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JUDICIAL NOMINATIONS, FILIBUSTERS, AND THE CONSTITUTION: WHEN A MAJORITY IS DENIED ITS RIGHT TO CONSENT

HEARING

BEFORE THE

SUBCOMMITTEE ON THE CONSTITUTION, CIVIL RIGHTS AND PROPERTY RIGHTS

OF THE

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UNITED STATES SENATE

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CONTENTS

STATEMENTS OF COMMITTEE MEMBERS

	Page
Cornyn, Hon. John, a U.S. Senator from the State of Texas	1
prepared statement and attachments	189
Durbin, Hon. Richard J., a U.S. Senator from the State of Illinois	46
Feingold, Hon. Russell D., a U.S. Senator from the State of Wisconsin	5
prepared statement	263
Hatch, Hon. Orrin G., a U.S. Senator from the State of Utah, prepared statement	295
Kennedy, Hon. Edward M., a U.S. Senator from the State of Massachusetts	7
prepared statement	305
Kohl, Hon. Herbert, a U.S. Senator from the State of Wisconsin, prepared statement	311
Leahy, Hon. Patrick J., a U.S. Senator from the State of Vermont, prepared statement	314

WITNESSES

Calabresi, Steven, Professor of Law, Northwestern University Law School, Chicago, Illinois	32
Eastman, John, Professor of Law, Chapman University School of Law, and Director, Claremont Institute Center for Constitutional Jurisprudence, Orange, California	22
Fein, Bruce, Esq., Fein & Fein, Washington, D.C.	24
Gerhardt, Michael, Hanson Professor of Law, William and Mary Law School, Williamsburg, Virginia	26
Greenberger, Marcia, Co-President, National Women's Law Center, Washington, D.C.	28
Kmiec, Douglas, Dean, Columbus School of Law, Catholic University of America, Washington, D.C.	31
Schumer, Hon. Charles E., a U.S. Senator from the State of New York	10
prepared statement and attachment	353
Specter, Hon. Arlen, a U.S. Senator from the State of Pennsylvania	16

QUESTIONS AND ANSWERS

Wrtten questions submitted to all Panel II witnesses by Senator Cornyn	63
Written questions submitted to Michael Gerhardt by Senator Leahy	66
Written question submitted to John Eastman by Senator Cornyn	67
Responses of Steven Calabresi to questions submitted by Senator Cornyn	68
Responses of John Eastman to questions submitted by Senator Cornyn	70
Responses of Bruce Fein to questions submitted by Senator Cornyn	82
Responses of Michael Gerhardt to questions submitted by Senator Cornyn	87
Responses of Marcia Greenberger to questions submitted by Senator Cornyn	96
Responses of Douglas Kmiec to questions submitted by Senator Cornyn	99

SUBMISSIONS FOR THE RECORD

American Center for Law and Justice, Inc., Virginia Beach, Virginia, statement	108
Calabresi, Steven, Professor of Law, Northwestern University Law School, Chicago, Illinois, prepared statement	146
Carle, David, Press Secretary, Hon. Patrick J. Leahy, letter	152
Committee for Justice, Lawyers' Committee on Supreme Court Nominations, Washington, D.C., September 29, 1968, statement (Cutler letter)	196

Page

Concerned Women for America, Thomas L. Jipping, Washington, D.C., statement 154
Congressional Research Service, Richard S. Beth and Christopher M. Davis, Government and Finance Division, Washington, D.C., memorandum 185
Eads, Linda S., Associate Professor of Law, Southern Methodist University, Dallas, Texas, letter 226
Eastman, John, Professor of Law, Chapman University School of Law, and Director, Claremont Institute Center for Constitutional Jurisprudence, Orange, California, prepared statement and attachments 227
Fein, Bruce, Esq., Fein & Fein, Washington, D.C., prepared statement 260
Gerhardt, Michael, Hanson Professor of Law, William and Mary Law School, Williamsburg, Virginia, prepared statement and attachment 265
Greenberger, Marcia, Co-President, National Women's Law Center, Washington, D.C., prepared statement 285
Griffin, Robert P., Traverse City, Michigan, letter and attachment 220
Hyman, Andrew T., Attorney at Law, Ware, Fressola, Van Der Sluys & Adolphson LLP, Monroe, Connecticut, letter 299
Kmiec, Douglas, Dean, Columbus School of Law, Catholic University of America, Washington, D.C., prepared statement 307
McGinnis, John C., Professor of Law, Northwestern Law School and Michael B. Rappaport, Professor of Law, University of San Diego School of Law, joint letter 321
Mikva, Abner J., Visiting Professor, Law School, University of Chicago, Chicago, Illinois, letter 325
Miller, Hon. Zell, a U.S. Senator from the State of Georgia:
  statement 327
  Wall Street Journal, March 10, 2003, commentary 330
Paulsen, Michael Stokes, Briggs & Morgan Professor of Law, University of Minnesota Law School, Minneaplois, Minnesota, letter 332
People for the American Way, Elliot M. Mincberg, Vice-President and Legal Director, Washington, D.C., letter and memorandum 334
Presser, Stephen B., Raoul Berger Professor of Legal History, Northwestern University School of Law, Chicago, Illinois, statement 341
Rotunda, Ronald D., George Mason University Foundation Professor of Law, George Mason University, Arlington, Virginia, letter 349
Solum, Lawrence B., Professor of Law, University of San Diego, San Diego, California, letter 358
Specter, Hon. Arlen, Legal Times, July 8, 2002, article 362
Washington Times:
  Bruce Fein, March 23, 2003, article 366
  James L. Swanson, May 6, 2003, article 368
  Bruce Fein, May 13, 2003, article 370
The White House:
  Alberto R. Gonzales, Counsel to the President, May 6, 2003, letter 372
  Office of the Press Secretary, news releases 380

JUDICIAL NOMINATIONS, FILIBUSTERS, AND THE CONSTITUTION: WHEN A MAJORITY IS DENIED ITS RIGHT TO CONSENT

TUESDAY, MAY 6, 2003

UNITED STATES SENATE,
SUBCOMMITTEE ON THE CONSTITUTION, CIVIL RIGHTS AND PROPERTY RIGHTS,
COMMITTEE ON THE JUDICIARY,
Washington, DC.

The Subcommittee met, pursuant to notice, at 2:45 p.m., in Room SD–226, Dirksen Senate Office Building, Hon. John Cornyn, Chairman of the Subcommittee, presiding.

Present: Senators Cornyn, Craig, Hatch, Specter, Kyl, Feingold, Kennedy, Schumer and Durbin.

OPENING STATEMENT OF HON. JOHN CORNYN, A U.S. SENATOR FROM THE STATE OF TEXAS

Chairman CORNYN. This hearing of the Senate Subcommittee on the Constitution, Civil Rights and Property Rights shall come to order. Before I begin an opening statement and turn over the floor to Senator Feingold as the Ranking Member of this Subcommittee for his opening statement, I would like to begin with a few brief introductory remarks as the newest member of a distinguished line of Senators who have chaired this Subcommittee, including most recently my distinguished colleague Senator Russell Feingold.

Senator Feingold is an honorable and public-minded person, and I am glad we have already developed what I believe to be a good, cooperative bipartisan relationship. I think we agree, and he can certainly speak for himself, and no doubt will, but we agree that the current judicial confirmation process is broken and something needs to be done, and the purpose of this hearing is to talk about ideas about what can be done, and we have a distinguished panel of Senators to kick us off. I look forward to working with Senator Feingold and Senator Kennedy and all the members of this Subcommittee to try to fix the problem. I believe we need a fresh start in the U.S. Senate, and I hope that fresh start will begin today.

Second, I would like to say that when I was informed that I would have the honor of chairing this Subcommittee I was looking forward to directing the attention of this distinguished Subcommittee to many important issues that face our country. For example, the ongoing war against terror raises important issues to our legal and constitutional system of Government. In particular I am concerned about the need to ensure continuity in Government

should a catastrophic event, God forbid, befall the Washington, D.C. community, including the Congress, the Executive Branch or the Supreme Court, issues that raise important constitutional questions which may even require a constitutional amendment to address.

For another example, Senators Kyl and Feinstein have worked long and cooperatively to introduce a constitutional amendment to protect the rights of crime victims in the country. I am pleased to be a cosponsor of that particular amendment and I look forward to chairing the Subcommittee markup on it.

So there are many other topics besides judicial confirmation that I would like the Subcommittee to focus on and I am sure that Senator Feingold agrees with me that there are many that need to be addressed. But unfortunately the Senate now faces a problem of governance, and I think a problem of constitutionality within the Senate itself. That problem demands our attention and demands the attention of this Subcommittee. Although there are many other important issues that I would very much like for the Subcommittee to focus on, the current judicial confirmation crisis raises important issues impacting Senate governance and our constitutional democracy. The implications of this crisis for our fundamental Democratic principle of majority rule are before us right here, right now in this body, and they demand the Subcommittee's attention.

I open this hearing today to focus on judicial nominations, filibusters and the Constitution when a majority is denied its right to consent.

This week the Senate will mark a rather dismal political anniversary. Two full years have passed since President Bush announced his first class of nominees to the Federal Court of Appeals. In my opinion it is an exceptional group of legal minds. Some of them however still await confirmation. What is more, two of them are currently facing unprecedented filibusters, and more filibusters of other nominees may be threatened.

Never before has the judicial confirmation process been so broken and the constitutional principles of judicial independence and majority rules so undermined.

I would like to take just a few moments to discuss those principles here.

I also discussed those in an op-ed published just this morning on the Wall Street Journal's opinionjournal.com website, and without objection I would like that to be made part of the record.

The fundamental essence of our democratically-based system of government is both majestic and simple: majorities must be permitted to govern. As our Nation's founding fathers explained in Federalist No. 22, "the fundamental maxim of republican government...requires that the sense of the majority should prevail." Any exceptions to the doctrine of majority rule, such as any rule of a supermajority vote being required on nominations, must, in my view, be expressly stated in the Constitution. For example, the Constitution expressly provides for a supermajority, two-thirds voting rule, for Senate approval of treaties and other matters, and that is not the case, however, with regard to judicial nominees.

At the same time we of course have an important tool here in the United States Senate called the filibuster. Let me be clear in

stating that the filibuster, properly used, can be a valuable tool in ensuring that we have a full and adequate debate. Certainly not all uses of the filibuster are abusive or unconstitutional. As we Senators are often fond of pointing out, particularly when we are in a mood to talk, the House of Representatives is designed to respond to the passions of the moment. The Senate is also a democratic institution governed by majority rule, but it serves as the saucer to cool those passions and to bring deliberation and reason to the matter. The result is a delicate balance of democratically representative and accountable Government, and yet also, deliberative and responsible Government.

But the filibuster, like any tool, can be abused. I have concerns about its abuse here. Today a minority of senators appears to be using the filibuster, not simply to ensure adequate debate but to actually block some of our Nation's judicial nominees and to prevent those seats from being filled by people of the President's choosing by forcing upon the confirmation process a supermajority requirement of 60 votes.

The public's historic aversion to such filibusters is well grounded. These tactics not only violate democracy and majority rule, but arguably offend the Constitution as well. Indeed, prominent lawyers like Lloyd Cutler and Senators like Tom Daschle, Joe Lieberman and Tom Harkin have condemned filibuster misuse as unconstitutional.

Time does not permit me to read the previous statements of these individuals condemning filibusters as unconstitutional, but without objection, I would like to have them submitted and made part of the record.

Moreover, abusive filibusters against judicial nominations uniquely threaten both presidential power and judicial independence, and are thus far more legally dubious than filibusters of legislation, an area of preeminent Congressional control.

To justify the current filibusters some have pointed to Abe Fortas. President Lyndon Johnson nominated Fortas to be Chief Justice in 1968, but what is critical to understand about the Fortas episode is that majority rule was not under attack in that case. Dogged by allegations of ethical improprieties and bipartisan opposition, Fortas was unable to obtain the votes of at least 51 Senators to prematurely end debate. That was a serious problem for Fortas, because if there were not even 51 Senators that wanted to close the debate, it was far from clear whether a simple majority of Senators present and voting would vote to confirm. And of course, history tells us that rather than allow further debate, President Johnson withdrew the nomination all together just 3 days later.

Nor do the Sam Brown or Henry Foster episodes serve as precedent. There debate had not even begun when their supporters sought to end the debate prematurely, so the filibuster there was simply an effort to ensure debate and not to alter the constitutional standard.

It is also worth noting back in 1968 future Carter and Clinton White House counsel, Lloyd Cutler, along with numerous other leading members of the bar and the legal academy, signed a letter urging all Senators that nothing would more poorly serve our constitutional system than for the nominations to have earned the ap-

proval of the Senate majority, but to be thwarted because the majority is denied a chance to vote. Without objection, the Cutler letter will, also be entered in the record.

But of course, as I mentioned, Fortas was not even able to command 51 votes to close debate, and President Johnson withdrew the nomination as a result, so that letter was really a moot point.

The Fortas episode though is a far cry from the present situation, and the Cutler letter condemning filibusters of judicial nominations, when used to deny the majority its right to consent, most certainly would apply today. After extensive debate, Miguel Estrada, Priscilla Owen and other nominees can be said to enjoy bipartisan majority support, yet they face an uncertain future of indefinite debate.

By insisting that "there is not a number of hours in the universe that would be sufficient" for debate on certain nominees, some Senators concede that they are using the filibuster, not to "ensure adequate debate", but to change constitutional requirement by imposing a supermajority requirement for judicial confirmations.

Whether unconstitutional or merely destructive of our political system, the current confirmation crisis cries out for reform. As all 10 freshmen Senators, including myself, stated last week in a letter to Senate leadership, "we are united in our concern that the judicial confirmation process is broken and needs to be fixed." Veteran Senators from both parties expressed similar sentiments, and some of them are here in our first panel today.

Accordingly, today's hearing will explore various reform proposals. Our first panel is composed exclusively of Senators, actually two Democrats and one Republican Senator. All of them members of this body, have each experienced the current crisis firsthand. All of them have offered proposals for reform. These proposals will be debated, and they should be, but what is important is that these Senators acknowledge the current confirmation crisis and have urged reform, and I certainly want to congratulate them for doing so.

Our second panel is comprised of the Nation's leading constitutional experts who have studied and written about the confirmation process. Many of them have been called upon to testify in the past by members of both political parties, and I am pleased to have all six of them here today. They are a distinguished group, and I look forward to formally introducing them to the Subcommittee in just a few minutes.

I want to close by saying that the judicial confirmation process has reached the bottom of a decades-long downward spiral. Our current state of affairs is neither fair nor representative of the bipartisan majority of this body. For democracy to work and for the constitutional principle of majority rule to prevail, obstructionism must end, and we must bring matters to a vote. As former Senator Henry Cabot Lodge famously said of filibusters: "To vote without debating is perilous, but to debate and never vote is imbecile." Two years is too long, and I believe the Senate needs a fresh start.

And with that, I will turn the floor over to the ranking minority member of the Subcommittee, Senator Feingold, and I know Senator Kennedy has indicated that he has a pressing engagement,

and Senator Feingold and I are going to try to work to accommodate him, but at this point let me now recognize Senator Feingold.

[The prepared statement of Chairman Cornyn appears as a submission for the record.]

STATEMENT OF HON. RUSSELL D. FEINGOLD, A U.S. SENATOR FROM THE STATE OF WISCONSIN

Senator FEINGOLD. Thank you, Mr. Chairman. I will be brief so that Senator Kennedy has an opportunity to speak before he has to go.

I want to thank you, Mr. Chairman, for your very kind remarks about me, for the extremely courteous way in which you have started your job as Chairman, coming to my office and meeting with me about the Subcommittee and the way that you have approached me on all of these issues, I appreciate it, and I look forward to this opportunity to work together.

I also was interested in your brief sketch of some of the issues you were interested in for the Subcommittee that you just shared, including of course the fact that we want to play whatever role we can in trying to resolve this very difficult problem with regard to judges. This is not the normal province of our Subcommittee. It is that of one of the other Subcommittees but this hearing is apparently about the constitutional issues that may or may not exist in this regard. Nonetheless, I want to say that I agree with we have got to somehow deal with this logjam, and I want to be a positive force to make that happen.

Let me also say, since this is a Constitution Subcommittee, that I hope that the work of this Subcommittee will continue to address that very document and protecting that very document that is the foundation for today's hearing. That means to me that this Subcommittee has to continue to fight to protect the civil liberties of all Americans against some of the excesses that I believe have occurred in the context of the post 9/11 world, understandably, but that we have to deal with those.

I am going to tell you, Mr. Chairman, and you know this already, I hope to get through another Congress without amending the Bill of Rights. I think it is a great thing that Congress has never chosen to amend the Bill of Rights, and there are various proposals that you and I are going to disagree about where I will fight against this, but we will fight in a courteous manner, and it will be I am sure a very interesting experience.

Finally, I appreciate the collegial way in which you and your staff have handled the preparations for this hearing. This is an issue in which Senators and others involved in the process have strong and passionately held views, tempers are short and relations are frayed in our Committee in large part because of this issue of judicial nominations. I hope that with some reasoned discussion and negotiation we can get past this very rough spot in the Committee's history and return to more constructive work together. If this hearing is the beginning of an effort to reduce the level of confrontation on judicial nominations, that would be a very good thing.

Unfortunately, I have to say, Mr. Chairman, the title of the hearing suggests that this could be intended to turn up the heat rather than cool things down. The title of the hearing I believe is: "Judi-

cial nominations, Filibusters and the Constitution: When a Majority is Denied its Right to Consent." So take it for what it will. I am not sure that is the most neutral title we could have had.

The argument recently advanced on the floor by a number of Senators that filibusters of judicial nominees are unconstitutional seems to be part of a campaign by some of political intimidation launched by supporters of the President's nominees. If this hearing is a prelude to a floor effort to rewrite the Senate rules or circumvent them through parliamentary tactics, I have to say I doubt very much they will succeed, and I am sure that they will be met with stiff resistance.

The end result could be to take the tensions we feel in this Committee and spread them to the floor of the Senate, and that would be a real shame in my view, and I honestly believe the Chairman does not want that to happen.

It is also a shame that those who support the President's nominees are trying to inflate what is essentially a political fight into a constitutional crisis. For those of us who take the Constitution seriously it is actually odd to hear colleagues essentially arguing that one is violating one's oath of office by voting not to end debate on a nomination. As some in the audience may know, I spent 7 years in this body fighting to pass a campaign finance reform bill. For years that effort was stymied by filibusters. We had a majority of Senators after 2 years, McCain and I did. We did not say that it was unconstitutional that our bill was not passed. We said this is the way the Senate works and the way it has worked certainly in my lifetime. Senators who have supported reform had many spirited and sometimes even bitter debates with Senators who opposed our bill. Never did we contend that they were violating their oaths of office by using every tool available to oppose a bill with which they strongly disagreed.

Since the hearing title raises the question of the constitutionality of the filibuster, let me very briefly give my view up front. The Constitution does not prohibit opponents of a judicial nominee, or any nominee for that matter, from using a filibuster to block a final vote on the nominee. The majority does not have a constitutional right to confirm a nominee as the title of the hearing implies. I am sure we will hear more on this from our witnesses today, but I must say I am eager to hear the argument that would overturn the practices of the Senate dating back more than a century.

If the arguments that are advanced today are correct, then Republicans acted unconstitutionally in 1995 when they defeated the nomination of Henry Foster to be Surgeon General by using a filibuster. If this is all to be simply about majorities and is somehow mandated by the Constitution, they violated the Constitution when they required cloture votes before ultimately confirming Stephen Breyer, Rosemary Burkett, H. Lee Sarokin, Richard Paez and Marsha Berzon to circuit court judgeships, David Sacher to the Surgeon General's office, and Ricki Tigert to the FDIC, Walter Dellinger to the DOJ's Office of Legal Counsel, and the current Governor of Arizona, Janet Napolitano, to be U.S. Attorney. They violated their oaths of office when they forced the nomination of Sam Brown to be withdrawn because they refused to end the debate on his nomination.

These are just the cases where a cloture vote was required to get a nomination through. I will not even start on the list of nominees who never even got a hearing or vote in the Judiciary Committee, but there were dozens of them. Was not the majority denied its right to consent just as much in those cases? Is there any meaningful constitutional difference between a filibuster on the one hand and on the other hand a hold on the Senate floor, or a wink and a nod between a Committee Chairman and a member who just does not like a nominee? I assume our witnesses will enlighten us if there is.

Mr. Chairman, in the end, the seemingly insurmountable differences we have on judicial nominees can be resolved only the way that seemingly insurmountable differences are resolved in almost all other hotly contested issues in the Senate, and as you said, that is through negotiation and compromise. Of course for there to be a compromise, both sides have to be willing to engage in that effort. So far I have to say the White House seems intent on forging ahead with its efforts to push through as many nominees with the most extreme views as possible in the shortest possible time.

The majority on this Committee have participated in that strategy by pursuing a "take no prisoners" approach, disregarding decades of practice and precedent regarding the scheduling of hearings and votes on nominees. That is why we find ourselves constantly fighting instead of trying to work out a solution. I do think it is possible, Mr. Chairman, for reason to prevail, reducing the need for displays of raw political power. As I have told you before, Mr. Chairman, both publicly and privately, I am sincerely interested in working with you to try to resolve this problem. I remain hopeful that we can do that despite the title and the thrust of this hearing today.

Thank you, Mr. Chairman.

[The prepared statement of Senator Feingold appears as a submission for the record.]

Chairman CORNYN. Thank you, Senator Feingold.

Senator Kennedy.

STATEMENT OF HON. EDWARD M. KENNEDY, A U.S. SENATOR FROM THE STATE OF MASSACHUSETTS

Senator KENNEDY. Thank you, Mr. Chairman. I want to join Senator Feingold in expressing our appreciation for all the courtesies that you have shown us, and the seriousness with which you have undertaken the leadership on this Committee, and I am grateful for the opportunity to say a word about this issue which is of such enormous importance and consequence for our country, and for our country really to understand what both the historic role has been and what our founding fathers really intended.

It is always interesting in a hearing such as this, as we are trying to find out where authority and responsibilities lie, to look back at the Constitutional Convention itself. In the Constitutional Convention, when it met in Philadelphia from late May until mid September in 1787, on May 29th the Convention began its work on the Constitution with the Virginia Plan introduced by Governor Randolph, which provided that a national judiciary be established or be chosen by the national legislature, and under this plan the Presi-

dent had no role at all, in the selection of judges. When this provision came before the Convention on June 5th, several members were concerned that having the whole legislature select judges was to unwieldy and James Wilson suggested an alternative proposal that the President be given the sole power to appoint judges. That idea had no support. Rutledge of South Carolina said that he was by no means disposed to grant so great a power to any single person. James Madison agreed that the legislature was too large a body, and stated that he was rather inclined to give the appointment power to the Senatorial Branch of the legislative group, "sufficiently stable and independent to provide deliberate judgments," were the words he used. A week later Madison offered a formal motion to give the Senate the sole power to appoint judges, and this motion was adopted without any objection whatsoever at the Constitutional Convention.

On June 19th the Convention formally adopted the working draft of the Constitution, and it gave the Senate the exclusive power to appoint the judges. July 18th the Convention reaffirmed its decision to grant the Senate its exclusive power. James Wilson again proposed judges be appointed by the Executive, and again his motion was defeated overwhelmingly. The issue was considered again on July 21st, and the Convention again agreed to the exclusive Senate appointment of judges. In a debate concerning the provision, George Mason called the idea of Executive appointment of Federal judges a dangerous precedent. Not until the final days of the Convention was the President given power to nominate the judges. So on September 4th, two weeks before the Convention's work was completed, the last important decision made by the founding fathers, the Committee proposed that the President should have a role in selecting judges. It stated the President shall "nominate, and by and with the advice and consent of the Senate, shall appoint the judges of the Supreme Court." The debates make clear that while the President had the power to nominate, the Senate still had a central role. Governor Morris of Pennsylvania described the provision as giving the Senate the power to appoint the judges nominated to them by the President. And the Convention, having repeatedly rejected the proposals that would lodge exclusive power to select judges to the Executive Branch, could not possibly have intended to reduce the Senate to a rubber stamp role.

It is important that Americans understand what our founding fathers deliberated, what they believed, what they thought they were achieving with the power of the United States Senate not to be a rubber stamp for the presidency, and they also expected advice and consent.

The letter to the Senate leaders by freshman Senators emphasizes their concerns about the state of the judicial nominations and confirmation process. It is clear that all of us in the Senate have concerns, but the letter, goes on to say that the judicial confirmation process is broken and needs to be fixed. Many Democratic Senators, however, feel that the part of the process that is broken is the nomination process: The Constitution gives the Senate the power of "advice and consent". The Senate's role of advice and consent was fashioned to ensure that we can meet the responsibilities as a Nation. Our earliest predecessors in the first decade of the

Senate's history rejected a rule providing for motions to close debate, any motions to close debate. For the rest of the history, our rules have provided that debate, which is the lifeblood of our power, cannot be easily cut short. For 111 years unanimous consent was required to end debate interested United States Senate. You had to get unanimous consent. All Senators had to consent. That was unanimous for 111 years. For the next 58 years it was two-thirds, and now it is 60 that are required.

We have had an amazing life experience for this country and when you review what the founding fathers had intended and expected and what the rules had shown, it is clear that it was the function of advice and consent. It was the involvement of the United States Senate in the consideration and voting of various nominees on it in this process, that has contributed to this experience. We should all take the time to review that, because it has been the experience in the United States when this process has worked. That is not the way it is working at the present time.

Unfortunately President Bush has clearly demonstrated his intention to nominate judges who share the Administration's partisan, right-wing ideology. In his campaign for the presidency, he often said he would nominate judges in the mold of Justice Scalia and Justice Thomas, and that is exactly what he is doing. The 2000 election was very close, and the Senate is very narrowly divided as well, and it is no surprise that we are divided over the appointment of judges. President Bush has no popular mandate from the American people to stack the courts with judges who share his ideological agenda, and the Senate has no obligation to acquiesce in that agenda. We would be failing our responsibilities if we were just to be a rubber stamp. We certainly have no obligation to ignore or suspend our long-standing rules and become a rubber stamp.

I am hopeful that today's hearing will clear up any doubts about this issue. I am eager to work with our Chair and our other members to go back to the times that our founding fathers anticipated, where there would be the full kind of consideration in working with the Senate, as the founding fathers intended, and that we would move through a process where we would have the ample examination of the qualifications of the nominees and then the debate, and we would reach a conclusion and a decision.

I appreciate the Chairman having these hearings, and hopefully, the American people will better understand all of our responsibilities as well as the process that has been used in the past, what our founding fathers intended and what is really important in terms of ensuring that we have an independent judiciary that is worthy of our founding fathers.

I thank the Chair.

[The prepared statement of Senator Kennedy appears as a submission for the record.]

Chairman CORNYN. Thanks, Senator Kennedy.

Senator Hatch, Chairman of the Judiciary Committee as a whole cannot be here today, but he would like to have his statement entered into the record regarding the history of judicial nominees during the first Bush and Clinton administrations from his perspective, and without objection, that will become part of the record.

I know Senator Specter had a pressing engagement. As the senior Senator I was going to recognize him first, no disrespect to Senator Schumer. I see Senator Hatch here, if I may withhold a second.

Senator Hatch said he would withhold any further statement than his written statement as part of the record.

[The prepared statement of Chairman Hatch appears as a submission for the record.]

Chairman CORNYN. I would now like to introduce our first panel, and I know Senator Specter intends to return, but it is made up exclusively of Senators, and as I said, it is a bipartisan group, as it turns out, two Democrats and one Republican. I was going to apologize to Senator Specter about that, but in the interest of bipartisan approach to reform I think it is quite appropriate.

I am pleased to have this distinguished group here today. They recognize, and I think by virtue of their recommendations for reform, that the current judicial confirmation process is broken, in need of repair. They each have proposals and very provocative and very interesting proposals, and that of course is exactly the point of what I hoped we would get to today, is different ideas about how we can find ourselves out of this wilderness and into the path or more productive, and still, as Senator Kennedy reminds us, a constitutional process of advice and consent, but one that does not result in obstruction, but does allow full debate of all the President's nominees in an up or down vote, and may the majority have its will.

At this point I would like to ask Senator Schumer, who I know has written to the President and made a specific proposal to make any opening statement he would like. Senator Schumer, we are glad to have you here today.

STATEMENT OF HON. CHARLES E. SCHUMER, A U.S. SENATOR FROM THE STATE OF NEW YORK

Senator SCHUMER. Thank you, Mr. Chairman. I very much appreciate the opportunity to sit on this side of the panel, am proud to be a member of the panel and will join you on the other side, time permitting, and also want to join my colleagues in saying that this is an important hearing, it is a timely hearing, and we all appreciate the courtesy which you have extended to all of us.

I am always interested in words. You said this is a panel of Senators. I guess it is a panel of Senator right now. It is the first time I have been referred to as a group. But in any case, few other words are little more disconcerting. It is almost there is a dictionary here, a 1984 dictionary. I was listening to the words "crisis," there is a crisis on the bench because of the vacancies. We have fewer vacancies now than we have had in 13 years. Where was all the crisis over the last decade when the President was of another party and judges were routinely held up? Again, there is such a double standard. I worry about it. If it was a crisis now with a 5.6 percent vacancy, then why was it not a crisis then?

How about obstruction? Well, there is a brand new definition of "obstruction" of 123 judges that have been brought to the floor. 121 have been approved. In other words, the definition that some of my colleagues in the White House has of obstruction is you have to ap-

prove every one of our judges or you are an obstructionist. When I say to my constituents, they say, "What is going on with the judges?" And I say, "I voted for approximately I think it is, 113 out of 120," they say, "Oh, never mind. You are doing fine. That seems to be a pretty good average to me." So this idea of obstruction is again taking language and twisting it. You have to believe that every single judge has to be approved by a President, and I will get into this later, who has made ideology far more of a standard in choosing judges than any President in history. I think words are being twisted.

And finally, filibuster. First time there is a filibuster? Not so. It is the first time there has been a successful filibuster, but members on the other side of the aisle were tempted to filibuster Paez and Berzon when I was here. Senator Feingold mentioned a list of other filibusters. All of a sudden, now that the shoe is on the other foot, we are saying these are no good and we have to examine them. I am willing to examine them. I think that the title of this hearing, "Judicial Nomination, Filibuster and the Constitution: When a Majority is Denied its Right to Consent" is a bit loaded, but it is a good thing to debate. I think it is fine, and I am happy to debate it.

So I would like to go back to the Constitution. Senator Kennedy's peroration there on the Constitutional Convention I think is a wise and good one, but let us go to the Constitution itself. Now, it is one thing to have a discussion regarding the constitutionality of filibusters, and I will discuss that in a minute. I think it is way off base. I have never heard before people suggesting that filibusters are unconstitutional, and again, the worst way to legislate is doing it on something so traditional as this, and something that has existed in the Senate for so long and separates the Senate as the "cooling saucer" from the House, words of, I believe it was, Madison or Monroe, whoever called us the "cooling saucer" when explaining it to Jefferson who thought the Senate was a bit too regal for American tastes when he came back from Paris, after seeing the Constitution written. But it is a whole other matter to suggest that the majority has a right to consent.

I have poured over this little book when I saw the title of the hearing, this Constitution. I do not see anything in here about the right to consent for anyone, but certainly not the majority. As my colleagues well know, the framers wrote the Constitution in many ways to limit the majority's power. They were worried about regal power, King George. They wanted to make sure the President was not regal, was not king-like, was not monarch-like. They were also worried about, Alexander Hamilton described it, my own fellow New Yorker, as "mobocracy." And they wanted checks. And in fact, the first thing they did after the Government, this great Government, it was called by the founding fathers, "God's noble experiment." I truly believe that still exists today. We are God's noble experiment. It is an amazing thing this democracy. The founding fathers were the greatest group of geniuses put together. They truly were a group. But this idea of majority power? Well, maybe we should hold hearings on the election of the President in the year 2000 or make that the second chapter in this. That was a majority vote. The electoral college, is that unconstitutional even thought it

is in the Constitution, because it will deny a majority, as it did in 2002, the right to choose their President? Again, the selective nature of choosing words, the selective nature of talking about majority, when it fits your case, but ignoring it when it does not, nope, I do not think so.

When you go back and read the debates of the Constitutional Convention you see the framers struggle to find the right balance of power. If anything, they leaned to the primacy of the Legislative Branch, not the President, in the selection of judges.

I am going to skip all the detail here because I think Senator Kennedy went over it very, very well. So let us get into how we got to where we are and then I will talk about my proposal. Probably the most important thing I have written as Senator was an op-ed piece that said when judges are nominated, we ought to take ideology into effect, that we ought to look at their judicial philosophy, that that was not only our right but our obligation. Let me just say I have always had three criteria in the role I play in selecting judges in New York State. They are: excellence, legal excellence, moderation. I do not like judges too far right or too far left because they tend to want to make law rather than interpret law, and it was the founding fathers who said, none other than they, that judges should be interpreting the law, and those who have strong ideological disposition, tend to want to impose their views. The third is diversity. I believe the bench should mirror America, not the white males.

Well, on one in three President Bush has done a good job. I think his nominees are by and large legally excellent. They are smart. They are scholarly. They are well rehearsed in the law. And he has done a good job on diversity. But it is on ideology, moderation, that I choose to differ with him. I believe that this President, far more than any other, even more than Ronald Reagan, chooses judges through an ideological prism, and then when he gets some small amount of resistance in the grand scheme of things from the Senate, instead of coming and meeting with us and advising and consenting, tries to change the rules, and that is not fair.

Now, if you think ideology should not play a purpose, let us continue the constitutional history for a minute. In 1795 Chief Justice John Jay was stepping down, and President Washington nominated John Rutledge as his successor. Before the Senate voted on Rutledge's confirmation, Rutledge gave a speech attacking the Jay Treaty as excessively pro–British, which at the time would have been sort of like a nominee today going out and giving a speech defending the French. The Senate had just recently ratified the Jay Treaty, and in their voting, it was the Jay Treaty that caused them to vote down the Rutledge nomination 14 to 10. The Senate at that time was composed of a majority of founding fathers. And therefore, it is obvious that they thought these type of issues were relevant. These are the people who wrote the Constitution, and so all this hue and cry that ideology should not be part of the consideration, that we should not try to look for judges, my case moderate judges, but you can look for any kind you want, that was not a majority, by the way. It was six, by the way. The majority was in 1790 when the Constitution first started, there were six members of the Senate who were members of the Convention. Three voted for Rut-

ledge, three voted against. But here you had many of the founding fathers. Not a word was said that voting for the Jay Treaty was out of line.

So in one fell swoop the Senators of that first Congress made clear that the political views, let alone judicial philosophy, are legitimately considered in this process. That is how it was for the first hundred and some odd years.

What happened was—let us bring it up to more recent history—ideology began to recede in the selection of judges, and during the Truman and Eisenhower years there was not too much debate about them because there seemed to be a consensus. But for some reason, and it was probably not intended, the Court became very liberal, led by people who were not nominated as great liberals. Earl Warren, Republican Governor of California, Hugo Black, who had had a different past. He was from Alabama. I think he was a member or it was reputed he was a member of the Ku Klux Klan. And so a conservative movement started and said judges should not make law, that they were sort of coming up with their own ideas as opposed to interpreting the law. That was a conservative movement, and they called it "let's go back to strict constructionist."

By the way, just parenthetically, I was in college at the time and I remember debating this issue, and even then I said, even though I agreed with a lot of what the judges were doing, that it was a bad idea to have judges make law, that it is the legislature that should make law.

Ronald Reagan came in and he started nominating some very conservative judges. He started nominating conservative judges. But no one made much of a cry because the bench then was quite liberal, and if you go by a test of moderation, of balance, not within each individual but within the bench, it probably was good, it probably was good.

But then as that began to continue, ideology began to be discussed under the table, and so Democratic Senators would vote against the Republican Senator, the stated reason not being they disagreed with the ideology, Democratic Senators voting against the Republican nominee, but rather because they looked back and found that he smoked marijuana in college. And then Republicans might vote against a Democratic nominee because he went to the movie shop and took out the wrong movie at the video shop, and the process became demeaning, and we really were not looking for the moral purity of these nominees. It was an excuse. It was a Kabuki game, but under the table it was all ideology, and people got upset with it. I would not say the Bork nomination fell into this category, but perhaps Clarence Thomas's did. He should have been debated strictly on ideology, on how his views were, whether he was moderate enough for the Court.

In 1999 I sort of began talking to my colleagues and said we ought to bring this above the table. It is demeaning for the process to say, well, someone did some minor transgression in college, out with him. If that was really the issue, then we would have found Democrats and Republicans voting about evenly against the marijuana smoker or the video shop trespasser. They did not.

So I think that that argument has now gained sway, and, yes, we are sort of at a deadlock, but this was not started by Democrats in the Senate. This was brought on because President Bush, as he said it in his campaign, he said he chooses to nominate people in the mold of Scalia and Thomas, who I think by most objective standards would not be moderate or mainstream, but they are at the far right end of the judicial nominees. Clinton did not do that much of that. He had a few liberal nominees, but by and large, his nominees were not ACLU attorneys or legal aid lawyers. They were prosecutors. They were law firm partners. Bush's nominees have had a hugely ideological cast, and we have no choice but to bring out what they had to say. Then when Miguel Estrada came up, he would not even say what his views were because I think he felt—I do not know this, but my view is that he felt, and his handlers felt, that if he said what he thought, he would not be nominated. So he either had to dissemble or had to avoid stating anything, which he did.

That is when our caucus really got together and said enough of this, enough of this. It is demeaning to the process, to the advise and consent process, to have a nominee who will avoid every question. He said he could not answer certain questions generally on his views because it would violate Canon 5. Well, if I asked him how he felt about ruling on Enron versus the United States, he might violate Canon 5. But I asked his views on the Commerce Clause and how much an active role the Federal Government should have in regulating corporations. That is not a violation of Canon 5, and if it is, almost every nominee we have approved should not be on the bench because they violated Canon 5, because they have answered those kind of questions.

So when Miguel Estrada refused to even answer questions and really eviscerate the advise and consent process, we said enough. And I will continue to oppose nominees that I think are way out of the ideological mainstream, as long as President Bush tends to nominate nominees who are not in balance in terms of the thinking of this country. That does not mean each nominee Homeland Security to be a right down the middle moderate, but if you are going to nominate some from the hard right, nominate a few who are a little more liberal to balance them. That is not happening.

So we are deadlocked, we are deadlocked. And the deadlock will remain unless we can break through, and what I have tried to do in my proposal is to have a true compromise. I would prefer the President take ideology out of the process all together, but I do not think that is going to happen, and he made a campaign promise that he would not, so that is not going to happen.

I proposed a compromise which I think is a down the middle and fair compromise to break through this deadlock. Senator Specter's proposal, I respect it, but it basically means that we will have to wave the white flag. It says the President's nominees, as I understand his proposal, will come to the floor after a period of time. And that would mean the President would not win 121 out of 123, but would win 123 out of 123. It is not good for the process. There should be advise and consent, and in fact, even when one party controls the presidency and both houses, the other party should be

involved in the process. I think that is what the founding fathers intended when you read the Federalist Papers and commentary.

So I have proposed a true compromise I think. The proposals that my friends have offered, sort of unilateral disarmament, we are not going to accept it, and we will be back where we have been to begin with.

Let me go over what ours is. It is based on nominating commissions. They have worked in many States, and we would create nominating commissions in every State and every circuit. We would give the President and the opposition party leader in the Senate the power to name equal numbers of the members of each commission. We would instruct each commission to propose one name for each vacancy. The commission composed of half from one party, half from the other, would have to come together with one nominee. If they came together with two nominees, it would not work because the Republicans would propose one, the Democrats would propose another, and the President would just nominate the Republican one. Let them come together and propose one nominee. Not every nominee would be just a down the middle moderate. The commission might decide, we will nominate someone more conservative for this position, this vacancy, and then we will move and nominate someone a little more liberal for the next nomination, for the next vacancy.

Barring the discovery of anything that disqualifies the person for service, both the President and the Senate would agree to nominate and confirm him or her. This would be a gentleman's agreement. There would be nothing written into law and the process could break down and the commission would not work any more and we would go back to the old constitutional safeguards. But this commission would indeed provide the necessary framework for compromise and avoiding the kind of animus that we have seen where each side feels that they are right and they are not giving in. It is a 50–50 proposition, and some people may not want that. It preserves balance while removing politics, partisanship and patronage from the process.

Again, I want to thank you, Mr. Chairman, for holding this hearing. I think discussions like this are great. They are good for the health of the republic, whether we agree or disagree, and I look forward to continuing on this when we go to our second panel. Thank you.

[The prepared statement of Senator Schumer appears as a submission for the record.]

Chairman CORNYN. Thank you, Senator Schumer, and I too want to thank you for your enthusiastic articulation of your views of where you think the process has broken down. Needless to say there are those who disagree, but I agree that it is good to have that debate. In a moment I know Senator Specter is going to be joining us. he had a conflict so I want to make sure we accommodate him, and I know all of the Senators have a lot of conflicting time commitments.

In the interest of completeness though, let me go ahead, and without objection, I will have made part of the record the response which I understand the White House has made today, May the 6th, 2003. I will just read sort of what I think the conclusion is here.

Senator SCHUMER. I have not seen it yet, so I look forward to hearing it.

Chairman CORNYN. We will make sure you get a copy. I just had one handed to me a moment ago.

It says, "The solution of the broken judicial confirmation process is for the Senate to exercise its constitutional responsibility to vote up or down on judicial nominees within a reasonable time after nomination, no matter who is President or which party controls the Senate."

Senator Specter, thank you for rejoining us, and I know you had a conflict in your calendar, and I am glad you are back, and without further ado, I would like to recognize you, please, for purposes of your opening statement.

STATEMENT OF HON. ARLEN SPECTER, A U.S. SENATOR FROM THE STATE OF PENNSYLVANIA

Senator SPECTER. Thank you very much, Mr. Chairman. I had a commitment at 3 o'clock to meet with members of the Pennsylvania Rural Electrification Society, and it was a very, very important meeting. They were endorsing my candidacy for reelection.

[Laughter.]

Senator SPECTER. You will pardon me if I sit down for a few moments.

At the outset I compliment the 10 freshmen Senators on a bipartisan basis for digging into this very important and very contentious issue, and I believe that coming to the Senate fresh, you observe as new Senators, only a short time after being citizens without being a Senator, still a citizen after being a Senator, but very close to the non–Senator ranks, what this appears to the American people, to see the bickering which has been going on. At the outset I attribute that bickering to both parties. When the Republicans were in control of the White House in the last 2 years of President Reagan's Administration, and all during President George Herbert Walker Bush's Administration, the Democrats had the Senate, there was a problem. When President Clinton was in office, a Democrat, Republicans controlled the Senate from 1995 through 2000, there was a very, very similar problem. And the problem has been exacerbated.

When this hearing was organized, it is interesting to note that there was not any disagreement between the Chairman, a Republican, and the ranking member, a Democrat, all the way until you got to the title of the hearing. It took that far into the process, point one, to have the disagreement. And this is a subject that I have studied for many, many years. It is a little different being on this side of the table than it is on the Committee, and I have been on the Committee during my entire tenure in the Senate. This is the first time I can recollect being at the witness table since I testified before Senator John McClellan. That even predates Senator Hatch. Not much predates Senator Hatch, would not have predated Senator Thurman.

[Laughter.]

Senator SPECTER. But I was here in 1966 testifying about the impact of Miranda on the Philadelphia District Attorney's Office, so this is a new experience for me to be on this side of the table.

The problems have existed when the Republicans control the White House and the Democrats the Senate, and conversely when the Democrats control the White House and the Republicans control the Senate, and it has become exacerbated in recent years. During the period from 1995, when Republicans controlled the Senate, till 2000, there were many worthy judicial nominees who were not confirmed with long, long delays, and finally we did get some confirmations, and Senator Hatch and I voted for Judge Paez and Judge Berzon. We never could come to agreement on Bill Landley, who was Assistant Attorney General in the Civil Rights Division, but that was a very contentious time. And when the Democrats took back over on the Senate after Senator Jeffords left the Republican Party, it was payback time, and the payback occurred, and it was exacerbated. When Republicans regained the Senate after the 2002 elections, the table stakes were raised very, very considerably when we have had the introduction of the filibuster. This is unprecedented for the so-called inferior court, lesser than the Supreme Court of the United States, to have a filibuster. The only occasion where there had been a filibuster was, as we all know, with Justice Abe Fortas, and that was a bipartisan filibuster, and that was a filibuster which involved the issue of integrity. So this was very, very different.

It is my hope that we can use the old Latin phrase to restore the status quo, antebellum, to restore what had been prior to the time the war started, and the war has been going on for a very long time, and it is time to go back to what the status quo was before the war started.

Sometime ago I circulated what I called "the protocol." This was in the days before the exacerbation with the filibuster, and the protocol articulated a proposal that so many days after the candidate was nominated, there would be a hearing in the Judiciary Committee, and so many days later there would be Committee action, and so many days later there would be floor action, all subject to delay for cause on a determination by the Chairman or the majority leader, subject to notification of the Ranking Member of the minority leader on the floor of the United States Senate. It was my proposal that if there was a strict party line vote, that that individual would go to the floor even though there was not a motion by a majority to send the nominee to the floor.

There were precedents for that. When Judge Bork was defeated in Committee 9 to 5, he was sent to the floor. When Justice Thomas was tied in Committee and not enough votes, because it take a majority vote to go to the floor, Justice Thomas went to the floor. And there have been long complaints about matters being bottled up in the Judiciary Committee, going back significantly to civil rights issues, so that it seemed to me that if it was strict party line, that the matter ought to go to the floor.

Now we have the unprecedented situation with the filibuster. There is just no basis for that in the more than 200-year history of our republic, and I would suggest to my colleagues and everybody on the Judiciary Committee who is steeped in the lore of the law and steeped in the activities of judicial nomination and selection, that when we deviate from existing principles, we do so at our peril. If it was good enough for the confirmation of judges for more

than 200 years, what has occurred to warrant the change? There is no doubt that partisanship in the United States Senate today is at a very, very high pitch, and the bitterness is at a very, very high pitch. And that does not enable us to do our jobs in the interest of the public, and the bickering is applicable on pretty much an even division in my opinion between Democrats and Republicans. I put my votes where my mouth is, as voting for many, many of the Democratic nominees when Republicans controlled the Senate, and fighting to get Berzon and Paez and Bill Landley and others confirmed.

The confirmation process of Justice Clarence Thomas was the toughest one, most divisive one which I have seen in my tenure in the Senate. There may have been others. When Louis Brandeis was confirmed, it was very contentious, but I think that the confirmation process of Justice Thomas was as contentious if not more so than any nomination, judicial and otherwise in the history of the country, but there was no filibuster, no filibuster when Justice Thomas was up in 1991, just 12 years ago, and there were all sorts of maneuvers. There was a delay in the vote. There was an unwillingness of Professor Hill to come forward, as disclosed in the hearings. She had been assured that if she made a complaint against Justice Thomas, then Judge Thomas, that she would not have to testify. She ultimately did testify and those were very, very difficult hearings, very, very contentious floor debate, but there was no filibuster. And I think had there even been an occasion where a filibuster would have been expected that would have been it.

So it is a little hard to see why suddenly we have come to a filibuster on Miguel Estrada, superbly qualified, Phi Beta Kappa, magna cum laude at Columbia, magna cum laude at Harvard Law Review, 15 cases in the Supreme Court, comes from a foreign country, barely knows English, from Honduras as a teenager, great American dream.

The situation with Justice Priscilla Owen of the Texas State Supreme court, good credentials, a record you can quarrel with on issues of judiciary bypass, but in a different era there would never have been a serious challenge to her nomination.

For more than 200 years the latitude has been accorded to Presidents on advice and consent, but suddenly the Constitution has been turned into advice and dissent. There are in the wings some nuclear proposals which may be reaching the floor, and I am not going to discuss them. They will await another day. But one line of exacerbation inspires another.

As you said, Mr. Chairman, and again I compliment on your initiation of these hearings, it is time we made a new start, try to turn back the clock, status quo antebellum, going back to 1987, and trying to find a way, and it is my hope that perhaps the time will be ripe in the fall of 2004, when we are on the brink of a presidential election, at that time there may be some uncertainty as to who the next President will be, whose ox will be gored or the shoe will be on the other foot, so that we will have a system which will handle these matters with an established protocol, so many days regardless of what party controls the White House where the opposite party controls the Senate.

Thank you for conducting these hearings, and thank you for giving me an opportunity to testify.

Chairman CORNYN. Thank you Senator Specter for your contribution and your presence today and trying to help the Senate find a way out of this quagmire.

I know that Senator Zell Miller, who was going to originally be a member of the panel, wanted to be here to personally address the Subcommittee, although he informed me earlier today that with great regret, he cannot be here in person, but for personal reasons, must remain in his home State of Georgia, but he has graciously provided the Subcommittee with a written version of the remarks he wanted to give today, and I would like to have his full statement become part of the record, and without objection, it will be.

[The prepared statement of Senator Miller appears as a submission for the record.]

Chairman CORNYN. I would like to just give a simple overview of what his proposal is and what I believe he would say, in general terms, if he were able to be with us here today in person.

Senator Miller's proposal, it seems to me, strikes a balance and reconciles the tension between two principles at stake in today's discussion.

First, the Senate's tradition of ensuring adequate debate and, second, the Constitution's Doctrine of Majority Rule for confirming judges. Senator Miller's Senate Resolution 85 would do this, first, by providing that the first cloture vote would remain at 60 votes, and then by providing that each subsequent cloture vote would require incrementally fewer votes in a series steps until we reached a rule for ending debate by 51 votes; in other words, from 60 votes to 57 votes, to 54 votes, and then 51 votes for cloture.

I mentioned Senator Miller's proposal, along with Senator Specter's and Senator Schumer's proposal, in an article that I published this morning in opinionjournal.com, which has already been made part of the record.

Senator Miller, himself, published an article describing his proposal in the Wall Street Journal just 2 months ago, and without objection that editorial will also become a part of the record.

We certainly cherish debate in the United States Senate because we want to ensure that every Senator has a chance to speak and that every argument that can be made in good faith will be made and is tested in the Senate and before the American people. But after a while, after the debate has run its full course, after everything has been said and everyone has said it, we must then respect the basic fundamental constitutional democratic principle of majority rule.

Senator Miller, by the way, is the first to state that his proposal did not originate with him. His proposal is actually the same one introduced by Senators Tom Harkin and Joe Lieberman. Senators Harkin and Lieberman introduced the same proposal just as the Democrats were returning to minority status following the November 1994 elections.

As Senator Harkin explained his proposal on the Senate floor back in 1995, "the minority would have the opportunity to debate, focus public attention on a bill and communicate their case to the

public. In the end, though, the majority could bring the measure to a final vote, as it generally should in a democracy."

As I previously pointed out, Senators Harkin and Lieberman have both stated their opinion that filibusters, when abused to distort the constitutional majority of the Doctrine of Majority Rule are unconstitutional. And so I will let the rest of Senator Miller's written statement, as well as his article, speak for itself and will not go any further on that point.

I regret that he is not able to be here today in person, but at least his views, I know, will be made part of the record.

Senator FEINGOLD. Mr. Chairman?

Chairman CORNYN. Senator Feingold?

Senator FEINGOLD. Mr. Chairman, I would like to ask to be put in the record a memo prepared at my request by the Congressional Research Service on the subject of filibusters conducted on treaties and other matters that require a two-thirds vote in the Senate.

This memo shows that the filibuster has been used on numerous occasions to require extended debate on treaties, which the Constitution specifically provides must be approved by a two-thirds vote. Prior to 1917, of course, as Senator Kennedy pointed out, the Senate had no cloture rule. Thus, a single Senator could theoretically block a treaty through a filibuster. According to the theory advanced here today by a number of witnesses, that action would have been unconstitutional. After all, the Constitution is explicit that only a two-thirds vote is required to approve. Yet by extending debate, a single Senator essentially converted that requirement into a requirement of unanimity. Many of these treaties, of course, were ultimately approved. It seems to me the argument applies equally to any delay in approval caused by a filibuster.

Of course, I disagree with the arguments made here today on the constitutionality of the filibuster, and I think the history documented in the CRS report shows that the Senate, over a very long period of its history, disagreed as well.

Chairman CORNYN. Without objection, that document will be made part of the record.

Now, let us move on to the second panel. I would like to invite the members of the second panel, a panel of constitutional and legal experts, to come to the table. While we are waiting for them to take their seat, I would like to take a moment to observe that several other individuals have asked to testify before the Subcommittee on this important subject. Not surprisingly, the current crisis in the judicial confirmation process has attracted significant public attention, and I would have liked to have given everyone a chance to testify in person here today, but of course time does not permit that.

But many individuals and organizations have asked to have their written statements admitted as part of the record, and without objection, the following documents will be admitted as part of the record or be included as part of the record:

First, a letter from Professor Linda Eades at the Southern Methodist University, Dedman School of Law, in Dallas, Texas;

Second, a report of the American Center for Law and Justice, authored chiefly by that group's chief counsel, Jay Sekulow;

Third, a legal analysis by the Concerned Women by America and other groups.

And of course, without objection, we will leave the record open until 5 p.m. next Tuesday, May the 13th, in case others would like to submit their statements for the record. This is an important issue and an important debate, and I do not want to exclude anyone from the opportunity to participate in these discussions.

We are pleased to have before the Committee six distinguished panelists to speak on these issues.

First, Dr. John Eastman, who is professor of law at the Chapman University School of Law, specializing in constitutional law and legal history. He is also the director of the Center for Constitutional Jurisprudence, a public interest law firm affiliated with the Claremont Institute for the Study of Statesmanship and Political Philosophy. And I am pleased to say he has been called to testify before Congress a number of times by members on both sides of the aisle.

Mr. Bruce Fein is a senior partner in Fein & Fein, a Washington, D.C., law firm, specializing in appellate and constitutional law. He is a nationally acclaimed expert on constitutional law, who previously served as associate deputy attorney general and general counsel of the FCC. Like Professor Eastman, Mr. Fein has been called to testify before Congress on numerous occasions and by members on both sides of the aisle, including, I believe, the ranking minority member of this Subcommittee.

Professor Michael Gerhardt is the Hanson Professor of Law at William & Mary Marshall–Wythe School of Law, in Williamsburg, Virginia. In 2000, he authored a book of direct relevance to today's hearing, entitled "The Federal Appointments Process." He previously served as special consultant to the White House Counsel's Office for the Confirmation of Justice Stephen Breyer. Professor Gerhardt has the distinction of being the only joint witness called to testify by members on both sides of the aisle before the House Judiciary Committee in its special hearing on the impeachment process in 1998.

Ms. Marcia Greenberger is founder and co-president of the National Women's Law Center here in Washington, D.C. She is a nationally recognized expert on sex discrimination law and is no stranger to the politics of the judicial confirmation process.

A graduate of the university of Pennsylvania, Ms. Greenberger has been recognized by "Washingtonian Magazine" as one of the most powerful women in Washington.

Ms. Greenberger, we are delighted to have you hear as well.

Professor Steven Calabresi is professor of law at Northwestern University School of Law. He served as a Supreme Court law clerk and as an attorney and speechwriter in the White House and Justice Department during the Reagan and Bush administrations. He has written extensively on the numerous constitutional legal subjects dealing with the presidency and with separation of powers and has been published in the "Yale Law Journal," the "Stanford Law Review," and many other prestigious law journals.

Finally, Dean Doug Kmiec is dean of the Catholic University Law School. I first met Dean Kmiec when he was at Pepperdine School of Law, and it is good to see you again.

He is the co-author of one of the Nation's leading constitutional law case books and numerous articles on constitutional issues and the Federal courts. He has previously served as assistant attorney general for the Office of Legal Counsel at the Department of Justice, the office charged with providing constitutional legal advice to the President, the Attorney General, and the Executive Branch.

I want to welcome the entire panel here today, and I know it is almost a criminally short period of time, but so we can cover each of your statements to start with, and then provide an adequate opportunity for the Subcommittee to ask questions.

We will begin with opening statements of a mere 5 minutes before moving on to question-and-answer rounds.

Professor Eastman, we can start with you, please.

STATEMENT OF JOHN EASTMAN, PROFESSOR OF LAW, CHAPMAN UNIVERSITY SCHOOL OF LAW, DIRECTOR, CENTER FOR CONSTITUTIONAL JURISPRUDENCE, ORANGE, CALIFORNIA

Mr. EASTMAN. Thank you, Chairman Cornyn, and other members of the Subcommittee.

We are here today, as we all know, to address a procedural tactic—the filibuster—that dates back at least to Senator John C. Calhoun's efforts to protect slavery in the old South and that, until now, was used most extensively by Southern Democrats to block civil rights legislation in the 1960's.

In its modern embodiment, the tactic has been termed the "stealth filibuster." Unlike the famous scene from "Mr. Smith Goes to Washington," where Jimmy Stewart passionately defends his position until collapsing on the floor, the modern practitioners of this brigand art of the filibuster have been able to ply their craft largely outside the public eye, and hence without the political accountability that is the hallmark of representative Government.

I am thus very pleased to be here today to help you and this Committee in your efforts to "ping" this stealth filibuster and make it not only less stealthy, but perhaps restore to it some nobility of its original purpose.

Let me first note that I am not opposed to the filibuster per se, either as a matter of policy or constitutional law. I think the Senate, within certain structural limits, is authorized to enact procedural mechanisms such as the filibuster, pursuant to its power to adopt rules for its own proceedings.

I think that by encouraging extensive debate, the filibuster has, in no small measure, contributed to this body's reputation as history's greatest deliberative body. But I think it extremely important to distinguish between the use of the filibuster to enhance debate and the abuse of the filibuster to thwart the will of the people, as expressed through the majority of their elected representatives.

The use of the filibuster for dilatory purposes is particularly troubling in the context of the judicial confirmation process, for is thwarts not just the majority in the Senate and the people that elected that majority, as any filibuster of ordinary legislation does, but it intrudes upon the President's power to nominate judges and ultimately threatens the independence of the judiciary itself.

Before I elaborate on each of these points, let me offer a bit by way of a family apology of sorts. One of the more notorious of the

Senate's famed practitioners of the filibuster was my great uncle—it is actually my great-great uncle—Robert LaFollette, a candidate for President in 1924 and a long-time leader of the progressive movement whose members took great pride in thinking that they could provide greater expertise in the art of Government than anything that could be produced by mere majority rule. Because this ideology of the Progressive Party was so contrary to the principle of consent of the governed articulated in the Declaration of Independence, I have always considered Senator LaFollette somewhat of a black sheep in our family. But I can at least take some family pride in the fact that one of his filibusters—

Senator FEINGOLD. Mr. Chairman, this direct attempt to incite the Senator from Wisconsin will not be tolerated. I invite you to come to Wisconsin and make those remarks about Robert M. LaFollette, perhaps outside of a Packer game.

Chairman CORNYN. Senator Feingold, we appreciate your self-restraint.

[Laughter.]

Mr. EASTMAN. I can at least take some family pride in the fact that one of his filibusters, the temporarily successful effort to block Woodrow Wilson's widely popular proposal to arm merchant ships against German U-boats in World War I led the Senate to restrict the filibuster power by first providing for cloture.

Unfortunately, I believe that those efforts did not go far enough. More needs to be done to ensure that the debate-enhancing aspect of the filibuster cannot be misused to give to a minority of this body an effective veto over the majority.

With that end in mind, I want to quickly make four points.

First, it is important to realize that the use of the filibuster in the judicial confirmation context raises structural constitutional concerns not present in the filibuster of ordinary legislation.

Second, these constitutional concerns are so significant that this body should consider modifying Senate Rule XXII so as to preclude the use of the filibuster against judicial nominees or at least ensure that ultimately the filibuster cannot give to the minority of this body a veto over the majority.

Third, any attempt to filibuster a proposal to change the rules itself would be unconstitutional, in my view.

And, finally, I believe that if this body does not act to fix this problem to abolish what has essentially become a supermajority requirement for confirming judicial nominees, it could be forced to do so as a result of litigation initiated by a pending nominee or even by a member of this body whose constitutional vote has been diluted by the new use of the filibuster.

As we all know, the President nominates, and by and with the advice and consent of the Senate, appoints judges of the Supreme Court and of the inferior courts. Contrary to the testimony of Senator Schumer earlier and the comments by Senator Kennedy, this was not designed to provide a co-equal role in the confirmation process to this body. The primary role, as Joseph Story himself acknowledged in his Constitutional Treatise, was given to the President, with a limited check in this body to make sure that the President did not abuse that power.

Ultimately, it becomes clear that one of the few ways that we have to control the unelected judiciary, which was designed specifically to be countermajoritarian is, over time, through the ability of the President, elected by the citizenry of this country, to appoint judges who agree with the political views of the country.

There are two principal checks on the judiciary. One is the power of impeachment for judges that fail to act in good behavior. That has not been an effective check since Samuel Chase was impeached in the presidency of Thomas Jefferson. But the other check, the only viable check, is that, over time, the electorate, by choosing Presidents, can have an impact on the outlook of the judiciary. To assign to this body a role that would guarantee that that cannot happen, even after the President has been elected and a majority in this body has expressed their willingness to confirm his nominees, is in a sense to thwart, not just the majority of this body, but the majority of the people in the Nation as a whole.

Let me turn to a couple of options that we might have very quickly.

Chairman CORNYN. I am sorry to interrupt you, but, unfortunately, we need to hold the opening statements to 5 minutes, and hopefully we can address some of those on questions, and certainly your complete statement will be made part of the record.

I apologize for the short amount of time allotted.

[The prepared statement of Mr. Eastman appears as a submission for the record.]

Chairman CORNYN. Mr. Fein?

STATEMENT OF BRUCE FEIN, ESQ., FEIN & FEIN, WASHINGTON, D.C.

Mr. FEIN. Thank you, Mr. Chairman, and members of the subcommittee. I think the comments that you have made and those of the previous witnesses were very enlightening and focused attention on what the critical problem is and perhaps differing conceptions of what the role of the Senate is in confirming Federal judges.

I do not think we ought to delude ourselves that what we are witnessing today is not a dress rehearsal for the first nominations by President Bush for vacancies of the Supreme Court that are likely to unfold in June or July, and our focus and concern ought then to be equally then raised because this is not simply a dispute over Circuit Court confirmations.

I think that the issue of whether or not there have been filibusters about judges in the past that are equivalent to what is happening with regard to Miguel Estrada and Priscilla Owen are somewhat beside the point. It is clear that simply longevity of a practice is not sufficient to save it from unconstitutionality, and I will refer to five prominent cases which I believe demonstrate that in spades.

You may recall the U.S. Supreme Court in *INS* v. *Chadha* held unconstitutional the legislative veto that had flourished in Congress over many, many decades, over 60 years. The United States Supreme Court in *United States* v. *Meyers* eliminated the power of the Senate to require its consent for the President to remove an executive officer. That was the practice that emerged in the Tenure of Office Act in 1868, when the radical reconstruction Congress was

opposed to then–President Andrew Johnson; again, a practice of well over 80 years that was held unconstitutional.

Erie Railroad v. *Tompkins*, a case that we all study in law school, where Justice Brandeis overturned some 80 years of Federal common law as being an unconstitutional usurpation of power.

The Congress of the United States, for over a century, thought itself empowered to exclude persons properly elected beyond disqualifying from age, residency and citizenship. In *Powell* v. *McCormack*, the United States Supreme Court held that unconstitutional.

A political patronage that was inherited from the outset of our Constitution was held unconstitutional in *Elrod* v. *Burns*. So simply because something might have been done in the past, certainly does not require that it be continued in the future on the theory that if it was unconstitutional then, it in a sense gets grandfathered past Supreme Court review and acquires constitutionality through age.

I would also like to address one of the issues that was raised, I believe, by one of the previous witnesses about moderation being so critical here. And also the idea that a critical element of the reason for Senate review of presidential nominations in the judiciary was to ensure moderation in the bench.

Well, moderation is in the eye of the beholder, and I think it might be useful to examine those who opposed Justice Louis Brandeis when he was nominated in 1916. He was thought to be radical. That included the then-president of the American Bar Association, Elihu Root; former President William Howard Taft; former Attorney General George Wickersham; former NAACP head, Moorfield Story; the head of Harvard University, Lawrence Lowell; the Wall Street Journal, the Nation, and the New York Times all said Louis Brandeis was a radical.

Now, as we all know, Brandeis has authored jurisprudence that still thrives today. Perhaps a third of major First Amendment law, right of privacy law, and Fourth Amendment law is from the pen of Louis Brandeis, and he was thought, I think under the standard of moderation that was expounded earlier, to be too radical and kept off the bench.

I think that it is also unwise to search for intellectual tidiness on filibustering rules. I think its application to judges is different than its application to legislation or to treaties. We have to think about each case and ask the purpose of the Senate role or the Senate requirement of majority or supermajority and ask whether it would be undermined if you had a filibuster rule. It may be different with judges, as opposed to legislation.

I think if you look at the Federalist Papers and the Constitutional Convention of the Founding Fathers' reason for entrusting a confirmation role to the Senate, the filibuster for purposes of screening for ideology is improper.

Hamilton explained it was to screen for competence, cronyism and corruption. That was the reason. And, in fact, he goes on in Federalist 76 to explain precisely why, as Senator Kennedy pointed out, the Constitutional Convention shifted the appointment power from the Senate to the President. Collectivities have a tendency to search for the lowest common denominator because, in some sense,

there is an irresponsibility that goes with anonymity and voting in a collective.

The President was given power to appoint because he was accountable; he had an incentive to search for the best and the brightest and strongest. The Senate could deny confirmation if there was some kind of taint in the process. But otherwise it was thought, in the long run, to produce the most enlightened and strong judiciary, entrusted with checking the legislature and the executive abuses, that the President's nominee should prevail.

I also think that in this case, with regard to Miguel Estrada and Priscilla Owen, it is exceptionally worrisome that we have an effort by a minority of the Senate to block confirmation. I know that one of the Senators who had testified previously held a hearing all day on how he thought it was outrageous that the Supreme Court and other judges were saying Congress was exceeding its power under the Commerce Clause in Section 5 of the Fourteenth Amendment, and he thought Congress should be totally unchecked on those bases, and there should not be any judicial review.

So I think, in this case, the purpose of the filibuster is, in fact, to undermine a central component of separation of powers, the jewel in the crown, by having a judiciary to check an excess of Congress.

Thank you, Mr. Senator.

Chairman CORNYN. Thank you, Mr. Fein.

Professor Gerhardt?

STATEMENT OF MICHAEL GERHARDT, HANSON PROFESSOR OF LAW, WILLIAM & MARY LAW SCHOOL, WILLIAMSBURG, VIRGINIA

Mr. GERHARDT. Thank you, Chairman Cornyn, and thank you, other members of the Subcommittee. It is a great honor to be here. There is nothing I consider more important for me to be than to be of service to this institution and to follow my fellow panelist, John Eastman's, suggestion. I want to just note, personally, that I was born in Wisconsin, my mother lives in Texas, and I have visited Utah several times.

[Laughter.]

Mr. GERHARDT. I had the privilege of meeting Senator Hatch for the first time at the Utah Bar Convention. So I have covered my bases.

Chairman CORNYN. Professor Gerhardt, will you check your button there to make sure it is turned on.

Mr. GERHARDT. And that is pretty much all I had to say, Senator.

[Laughter.]

Mr. GERHARDT. With all due respect, I would not want to review here, in my brief appearance right now, the ample support for the constitutionality of the filibuster. I have covered that in my statement and would be happy to answer questions on it later.

I want to focus my remarks, briefly, on the major arguments against the constitutionality of the filibuster. One of the most common I think we will hear today, and that is the argument that the filibuster violates majority rule in the Senate. This argument is predicated on reading several provisions of the Constitution as establishing majority rule as a fixed principle to govern Senate vot-

ing, with the obvious exceptions of the specific instances in which the Constitution imposes supermajority voting requirements.

Yet, a sensible reading of these provisions does not establish majority rule within the Senate as a fixed principle in all but a few instances. At most, these provisions establish majority rule as the default rule in the absence of any other procedure.

The filibuster leaves this default rule intact. Rule XXII does not require 60 votes to adopt a law, it requires 60 votes to end debate. Passing a bill or confirming a nomination still requires a simple majority. Moreover, the clause that a majority is a quorum creates the basic rule for when each chamber may do its business. That same clause, by the way, shows how the framers could well provide for a majority or impose a majority, a legislative majority, when they wanted to, but they failed to do it for the internal procedures of the Senate.

Some opponents of the filibuster insist, nevertheless, the majority rule applies with respect to not only legislation, but also nominations. The argument in part is that the Appointments Clause entitles the Senate to give its advice and consent to presidential nominations and that the filibuster bars a majority of the Senate from exercising this prerogative.

The argument is that a majority of the Senate is constitutionally protected in exercising its discretion whether to hold a final vote or not. If it is disposed to hold one, no minority can stand in its way. I think there are problems with this argument.

The first difficulty is that it is predicated on a flawed reading of the Appointments Clause. The Appointments Clause sets forth the necessary conditions for someone to be appointed as an Article III judge. One of these conditions is nomination by the President, another is confirmation by the Senate. Confirmation is achieved by a majority vote of the Senate. Thus, the clause sets forth the prerequisites for a lawful presidential appointment. It says nothing about the specific procedures applicable in confirmation proceedings or about how someone may be denied confirmation.

Second, the suggested construction of the Appointments Clause would lead to absurd results. For one thing, I think, it would eliminate the committee, particularly the Senate Judiciary Committee, as a gatekeeper for nominations. Moreover, the majority leader presumably would be required to forward to the Senate floor each nomination that the President makes, regardless of what happened in the Committee.

In addition, this reading of the Appointments Clause would render unconstitutional temporary holds which have been used routinely to delay final consideration of legislation and nominations. Temporary holds near the end of legislation can often be fatal; delay a nomination just long enough near the end of a legislative session, time runs out for the Senate to act and the nomination lapses. Such lays would be intolerable on this reading of the Appointments Clause.

Reading the Appointments Clause as entitling, or empowering, a majority of the Senate to render final votes on presidential nominations would mean there were constitutional violations every time nominees failed to receive final votes on their nominations.

Let me note that there is only one Appointments Clause, and therefore what we are talking about is majority rule would apply with respect to every nomination, not just every judicial nomination, but every nomination, and I do not hear that argument being urged today.

The constitutional violation presumably arises when a majority is willing, but unable, for some reason, to confirm a nominee, but it is unclear what procedures the Constitution requires to determine a majority's willingness to vote prior to the final vote.

It would be absurd to think that the Appointments Clause requires the majority to vote twice. Moreover, a reading of the Appointments Clause as entitling a majority vote on a nomination when it is so disposed, leaves unclear whether Senators could change their minds once they have initially signalled their willingness to confirm someone. There have certainly been instances in the past when Senators have indicated their inclination to vote one way, but voted differently in the final vote.

I would just point out the numerous times in which this rule would have been violated not just during the Clinton administration, but before that. I could not begin to count how many instances in which it might have been violated, and so it is a good time for me to say my time has run out.

[The prepared statement of Mr. Gerhardt appears as a submission for the record.]

Chairman CORNYN. Thank you very much, Professor Gerhardt.

Ms. Greenberger, we would be pleased to hear from you now.

STATEMENT OF MARCIA GREENBERGER, CO–PRESIDENT, NATIONAL WOMEN'S LAW CENTER, WASHINGTON, D.C.

Ms. GREENBERGER. Thank you, Senator Cornyn.

I am Marcia Greenberger, co-president of the National Women's Law Center, which for 30 years has been working on the core legal rights that affect women and their families in this country. With me is Center Vice President Judith Appelbaum. We appreciate very much your invitation to appear here today, and like the other panelists today, recognize the extraordinary importance of the hearing on the topic before us.

The Federal courts play an extraordinarily important, indeed, a critical role in giving life and meaning to the rights and principles enshrined in the Constitution and the laws enacted by Congress, and because of the profound impact on the lives of all Americans, it is very important to look at the kinds of problems that are being alleged exist with respect to the judicial confirmation and appointments process and the solutions.

Senator Cornyn, you have described the judicial appointments process as broken and needing to be fixed. With all due respect, while I agree there is a problem, I differ on what it is and what should be done about it.

The problem is not that the Senate is giving careful scrutiny to judicial nominations and that Senators are willing to engage in a filibuster pursuant to the Senate rules to stop nominations to which they have especially strong objections, including objections based on the nominee's substantive views on important legal issues; these Senators are exercising the advise and consent re-

sponsibility the Constitution gives to the Senate and is what the Senate has done since the beginning of the Republic, including with respect to the first nominee to the Supreme Court in the very beginning days of the Republic in looking at judicial philosophy.

We have heard from some of my panelists a denigration of the role of the Senate in this advise and consent function. With the limited time now, I will not go into that, but suffice it to say that it was not that the shift of the appointment power went to the President, as I think one of my panelists just said, it was the shift of the nomination power to the President, the advise and consent role was retained by the Senate and of course every Senator is elected by constituencies, just as the President is, and that was reflected in the constitutional balance of authority and power in this important nomination process.

The problem as we see it rather is that the administration is sending to the Senate nominees who provoke controversy and delay. Instead of consulting with Senators and coming up with consensus candidates, respecting the advise function of the Senate's advise and consent constitutional responsibility, what we have seen is individuals with extreme views who are affecting critical legal principles, and in the Estrada case, depriving the Senate of sufficient information about the nominee's views on these issues.

This approach inevitably produces vehement opposition, polarization, and, yes, in these two cases, out of the 121 nominees who have been confirmed to date, filibusters. Hardly a crisis within this context, it is fair to say, as has been pointed out with the current vacancy rate just now at 47, the lowest in 13 years. We do not like much of what is happening with this process, but it is hard to say that there has been a crisis. In fact, there has been, thanks to what has happened under Senator Leahy's watch and now Senator Hatch, a movement of many nominees through the confirmation process.

I do, because the names of Priscilla Owen and Miguel Estrada have come up, want to say, briefly, in the case of Priscilla Owen, nominated to the Fifth Circuit, her judicial record has shown that, as a Supreme Court judge on the Texas Supreme Court—a court, Senator Cornyn, I know you are very familiar with—-her then fellow judge, Alberto Gonzales, wrote that her position in one case constituted an unconscionable act of judicial activism because it construed a State law in a way that would create hurdles for the right to choose that were not in the words of the statute. Strong language, and from the man who is now White House counsel.

In the case of Miguel Estrada, there have been concerns about the rules of the Judiciary Committee not being followed by key answers to questions not being given, by key pieces of information that are necessary for the Senate to discharge its advise and consent responsibility not being provided.

There are other very controversial and troublesome nominees coming up before this Judiciary Committee. I do not have time now to go through some of the deep concerns with Carolyn Kuhl, who during her tenure in the Government urged the Supreme Court to overturn *Roe* v. *Wade* and to allow Bob Jones University to retain tax-exempt status despite its policy of racial discrimination.

I will say, also, with Charles Pickering, nominated to the Fifth Circuit, he called for a constitutional amendment banning abortion and as a Federal judge tried to pressure the Justice Department to drop a charge against a convicted cross-burner, to avoid having the defendant serve the mandatory minimum sentence.

These are highlights of records that have many more details that are troublesome.

J. Leon Holmes, just reported out of the Judiciary Committee in a highly unusual procedural manner, nominated to a district court seat, compared the pro-choice movement to Nazi Germany, argued that wives must subordinate themselves to husbands, said that there need not be a right of rape victims to secure an abortion because basically they do not get pregnant.

These are extremely problematic nominees, and it is exactly the role of the Senate to give not only its advice, but when they are actually nominated to withhold its consent when they have extreme records that are so problematic.

I also want to say that there are a nominees who have ultimately been confirmed and not been filibustered, even though the "no" votes went over that 41-vote threshold. Jeffrey Sutton was confirmed with 41 "nay" votes; Judge Tymkovich, now in the Tenth Circuit, 41 "nay" votes; Judge Shedd, Fourth Circuit, 44 "nay" votes; D. Brooke Smith, Third Circuit, had 35 "nay" votes.

I bring that to this Subcommittee's attention because these kinds of nominees are divisive, they are problematic, they raise real issues and dangers with respect to real people's constitutional rights, but they raise an even bigger problem and challenge, and that is whether or not the American public, when it goes before a judge, will be able to have the confidence that that judge is going to be open-minded, and that is what we are really talking about when we are talking about respecting the advise role, as well as the consent role, of the Senate.

We should not be fostering and thinking about solutions that ram nominees through with artificial deadlines that do not allow for serious study and review of their records, that change filibuster rules that have been in place for decades—

Chairman CORNYN. Ms. Greenberger, if you would please wrap up your comments. We will make any statements you have a complete part of the record, but we have gone over the allotted time.

Ms. GREENBERGER. I appreciate that. Thank you.

And so I would, in wrapping up, say that rather than continue along the line of radical changes, of rules that have been in place for decades and even centuries, rather than changing the rules of the game as they have worked to protect the public over time, what is really the most important change would be to look for comity, to look for the kinds of nominees that can get the kind of strong backing that will give the public the confidence that there is a judiciary that is open-minded and ready to give fair justice to whoever walks in the door. Thank you.

[The prepared statement of Ms. Greenberger appears as a submission for the record.]

Chairman CORNYN. Thank you.

Dean Kmiec?

STATEMENT OF DOUGLAS KMIEC, DEAN OF THE COLUMBUS SCHOOL OF LAW, THE CATHOLIC UNIVERSITY OF AMERICA, WASHINGTON, D.C.

Mr. KMIEC. Senator, thank you for allowing me to appear before this body. This is an important hearing. I liked the way you described it at the beginning, a "fresh start." I like the fact that it originated as well with a group of bipartisan freshmen Senators who come to this body and recognize that for a good long time we have been paralyzed over this subject.

To try and facilitate a fresh start, let me suggest that it is useful, as we consider this discussion, to separate out four things. All four have been present here in the discussion already this afternoon.

First, is the issue of whether or not it is appropriate to consider ideology in the appointment of an individual to the Federal bench. This has been raised by Senator Schumer. It has been raised most recently by my co-panelist here, Marcia Greenberger. I do not believe that is an issue that is going to be particularly helpful this afternoon in getting us to the fresh start.

I think, as a constitutional matter, the President has complete authority to consider ideology if he wishes. As a constitutional matter, I believe the Senate has no textual restraint to preclude it from doing so. Whether it is prudent to do so after someone has been proven to be a person of integrity and competence I think is another question, but I think that issue is good to be put aside.

The second issue that I think will not help get us to the fresh start is whether or not we debate the particular qualities this afternoon of particular nominees. There are some excellent nominees, some of which have been, in my judgment, obstructed both in the Committee and now on the floor of the Senate. But other hearings have been held on that topic, and they need not be held this afternoon.

A third issue, and one that is interwoven with this topic, is the issue of the filibuster and whether that is constitutionally appropriate and specifically whether it is constitutionally appropriate to apply it to judicial nominations.

Professor Gerhardt, in his testimony, addressed this question. He also addressed it in his scholarly work in his book on appointments that was published several years ago, and I would borrow from what he said in his book, more than what he said in his testimony this afternoon. Specifically, when you have a constitutional text that in seven specific places envisions a supermajority, to construct a supermajority outside the constitutional text in other places is, I think, a problematic practice and perhaps one that is fraught with constitutional questions that are worthy of this body.

But it is really the fourth question that I think poses the most serious constitutional difficulty, and that is the constitutional entrenchment of supermajority rules, and the reason this is so serious is because it goes directly to the heart of whether or not you, Senator, who have been elected newly to this body, and your fellow freshmen Senators, who have the confidence of your constituencies, will, in fact, be given the opportunity to fully represent the people from the State of Texas and the other States where the new Senators are from.

We currently have in play a process where carryover rules, rules that have not been adopted by the present Senate, are requiring a supermajority to, in effect, approve and confirm a judicial nominee. As you know, to close debate, it requires 60 votes; in order to amend the rules, it requires 67.

These are carryover provisions that have not been adopted by this body and by virtue of that, they pose the most serious of constitutional questions because, as I quote, Senator, the Supreme Court has long held the following:

"Every legislature possess the same jurisdiction and power as its predecessors. The latter must have the same power of repeal and modification which the former had of enactment, neither more nor less."

I recommend that we focus our attention here this afternoon on how a fresh start can emerge, largely by having the Senate Rules Committee put in front of the full Senate for a majority of Senators to decide up or down, whether or not they want a Supermajority requirement for judicial nominees. I suspect they do not want that, and if that is the case, that will move us to a place where I think we can find agreement.

Thank you, sir.

[The prepared statement of Mr. Kmiec appears as a submission for the record.]

Chairman CORNYN. Thank you, Dean.

Professor Calabresi?

STATEMENT OF STEVEN CALABRESI, PROFESSOR OF LAW, NORTHWESTERN UNIVERSITY LAW SCHOOL, CHICAGO, ILLINOIS

Mr. CALABRESI. Thank you, Senator Cornyn. I very much appreciate the opportunity to appear before the Committee today.

The people of the United States have just won a great victory in the war to bring democracy and majority rule to Iraq. Now, it is time to bring democracy and majority rule to the Senate's confirmation process. A determined minority of Senators has announced a policy of filibustering indefinitely highly capable judicial nominees such as Miguel Estrada and Priscilla Owen. By doing this, the Senators are wrongly trying to change two centuries of American constitutional history by establishing a requirement that judicial nominees must receive a three-fifths vote of the Senate instead of a simple majority to win confirmation.

The U.S. Constitution was written to establish majority rule. The historical reasons for this are clear. A major defect with the Constitution's precursor, the Articles of Confederation, was that it required supermajorities for making many important decisions. The Framers deliberately set out to remedy this defect by empowering Congress to make most decisions by a simple majority. The only exceptions to this principle are in seven expressed situations where a two-thirds vote is required.

Each House of Congress does have the power by majority vote to establish the rules of its proceedings, but there is no evidence this clause was originally meant to authorize filibusters. From 1789 to 1806, the Senate's rules allowed for cutting off debate by moving

the previous question, a motion which required only a simple majority to pass.

The filibuster of legislation did not originate until 1841, when it was employed by Senator John C. Calhoun to defend slavery in an extreme vision of minority rights. Calhoun was called a filibusterer—from a Dutch word for pirate or as we would say today, "terrorist," because he was subverting majority rule.

From 1841 to the present, the principal use of a filibuster has been to defend Jim Crow laws oppressing African Americans.

Now, for the first time in 214 years, a minority of Senators are seeking to extend filibustering from legislation to the whole new area of judicial nominees, nominees who they know enjoy the support of a majority of the Senate. This is a bad idea for three reasons:

First, such filibusters weaken the power of the President, who is one of only two officers of Government who is elected to represent all of the American people;

Second, filibusters of judges undermine judicial independence, by giving a minority of Senators, led by special interest groups, a veto over who can become a judge. It is already hard enough for talented and capable individuals to be appointed judges without a minority of Senators imposing a litmus test;

Third, the filibuster of legislation can at least be defended on the ground that Federal legislation ought to be considered with extraordinary care. In contrast, the confirmation of 1 out of 175 appellate judges is a much less momentous matter. This is especially so since a Judge Estrada or a Judge Owen would be only one judge on a panel of three, sitting on a court with 12 to 15 judges.

The Senate can always change its rules by majority vote. To the extent that Senate Rule XXII purports to require a two-thirds majority for rules changes, Rule XXII is unconstitutional. It is an ancient principle of Anglo–American constitutional law that one legislature cannot bind a succeeding legislature. This principle goes back to the great William Blackstone, who said in his commentary, "Acts of Parliament derogatory from the power of subsequent Parliaments bind not."

Three Vice Presidents of the United States, presiding over the Senate—Richard Nixon, Hubert Humphrey, and Nelson Rockefeller—have all ruled that the Senate rules can be changed by a simple majority of the Senate.

Lloyd Cutler, White House counsel to Presidents Jim Carter and Bill Clinton, has written in the Washington Post that Senate Rule XX is plainly unconstitutional.

The Senate can, and should, now amend Rule XX by simple majority vote to ban filibusters of judicial nominations.

[The prepared statement of Mr. Calabresi appears as a submission for the record.]

Chairman CORNYN. Thank you, Professor.

We will now move to rounds of questions, with 10 minutes each, and I will go ahead and start.

I guess, in listening to the fascinating remarks that each of the panel members have delivered so far on this particular panel, I just want to make sure I understand, in particular, Ms. Greenberger and Professor Gerhardt, would it be fair to characterize your testi-

mony as "if it ain't broke, don't fix it"? And, if not, tell me how you disagree.

Ms. GREENBERGER. No, I do not say there are not problems that need to be addressed. I think there are things that need to be fixed. My solutions for fixing them, however, are not to change the rules with respect to the filibuster, are not, as I think it was Senator Specter had said, to interject nuclear suggestions that would lead to a further breakdown in comity; rather, my suggestions for the kinds of things that would enhance the judicial selection and appointments process would be those that would foster comity, those that would foster consensus candidates, those that would foster a give-and-take with respect to the administration and the Senate to respect both the role of the President, in nominating, and the constitutional role of the Senate, in giving advice and consent, so that there would be, at the end of the day, more confidence and better justice provided for the American public.

So I do think there are changes that could be very useful and important to make, but not the sorts of changes that would undermine the filibuster that would change the Senate rules as they have been operating, that they have been operating to this day in many different forms, in many different contexts, and not to look for those kinds of extreme, as they were saying, not my words, but these nuclear suggestions that, to me, would exacerbate the problem.

Chairman CORNYN. I will give you a chance to answer the question, Professor Gerhardt, in just a moment, but let me just ask a follow up to Ms. Greenberger.

So are you saying we just need to do a better job of getting along with each other?

Ms. GREENBERGER. No, I am saying that there are very concrete things that might be useful to foster the getting along with each other.

Again, I want to go back to the Constitution, which talks about the Senate giving advice, as well as consent. If the President respected the advice function that the Constitution places with the Senate and seeks specific consultation with respect to potential nominees before they are made, that would be a very dramatic change, as I understand it, from the way things are operating right now and could foster the kind of comity that I mentioned.

There was a newspaper article in the middle 1990's that was interviewing a Clinton administration official who was responsible for picking judges, and this particular official was quoted as saying that the administration was not going to be sending up any nominees that could not get 60 votes. And I am sorry that Senator Hatch had to step out because he was quoted in that article as well as talking about the fact that he would be personally a force that the administration was going to have to contend with in sending any nominee.

So there was a very close consultation process. The nominees that were sent up, were sent up with an expectation that there would be enough consensus around them to get 60 votes.

Chairman CORNYN. Would that be more than a majority of the Senate?

Ms. GREENBERGER. Sixty votes, yes.

Chairman CORNYN. In other words, assuming—

Ms. GREENBERGER. Yes, it would be also a—

Chairman CORNYN. If you will wait for my question.

Ms. GREENBERGER. Sorry.

Chairman CORNYN. Assuming that, as you say, the Constitution requires the President to seek advice from the Senate before he nominates judges or judicial nominees of his choosing, would that advice come from a simple majority or does it require a supermajority?

Ms. GREENBERGER. Well, I want to say that since the Senate rules require that if there are Senators who choose to invoke filibuster, there can be a 60-vote requirement. Then that kind of advice needs to be taken into account. There are obviously a number of nominees, as I mentioned in my statement, who did not get that supermajority, but were confirmed, nonetheless, in the last week or more by the Senate. But that is not a healthy situation for nominee, after nominee, even if they squeak by and get confirmed, to be so controversial and to cause so much concern in the country among so many organizations.

Organizations can be disparaged as special interests, and we do not have to care about them. These are not organizations that are out trying to find a way to make money. They are trying to protect the most basic and fundamental rights of organizations. I do not view representing women and families as a special interest to be disparaged.

When people are concerned and scared about the future of their fundamental rights, whether or not we are talking about a supermajority, there ought to be that advise function that respects the kinds of consensus candidates that gives the American public confidence in the judiciary, and we have not seen that advise function, and so I would say, and there a number of specific suggestions I could make, if, for example, the specific nominees were—before they were actually made were run by the Senators in their home States, were run by the Senators in the Senate Judiciary Committee, that would be a very dramatic change in what is going on right now, and I think it would make an enormous difference.

Chairman CORNYN. Would you give them a veto, the home Senator a veto on the entire Senate—

Ms. GREENBERGER. No, then we are getting into the "blue slip" situation, of course, that is another process that has not been discussed very much in this context, in this hearing, but the Senate, in many ways, which has been pointed out, operates in a deliberative fashion that gives much credence to particular Senator's objections with respect to holds, with respect to blue slips, with respect to objections they would have.

The best process is to try to see where that comity can come. Also—

Chairman CORNYN. And you think that is a good thing that judicial nominees are killed in the confirmation process because a single Senator or any small group of Senators may object to the nominee?

Ms. GREENBERGER. Well, that certainly was the history that I must say I was very concerned about during the Clinton administration.

Chairman CORNYN. I am just asking if you think it is good or bad.

Ms. GREENBERGER. I think that what we saw during the Clinton administration was an abuse of that process, and we saw nominee after nominee never getting a hearing, to begin with, and why that nominee never even got a hearing year after year, after year, is hard to say whether it was one Senator or what the problem was. That is often not open to the public scrutiny to know. I do not think that kind of secrecy was a good thing when I was abused, as it was, with so many nominees in the Clinton years who could not get a hearing or, if they did get a hearing, then never were sent to the floor. Senator Lott said he had many better things to do than confirm judges.

Chairman CORNYN. What I am trying to understand, though, is if you are saying that it is a good thing or a bad thing, regardless of who is in White House, for a single Senator or perhaps the Judiciary Committee, as a whole, to be able to have the power to thwart perhaps a bipartisan majority who would otherwise confirm that Senator? I am asking without regard to partisanship, without regard to who is in the White House, do you think that is a good thing or a bad thing?

Ms. GREENBERGER. And that is the spirit that I am trying to answer your question with. I think because it is facts-and-circumstances kind of answer, and what we saw with respect to—

Chairman CORNYN. Sometimes it is good and sometimes it is bad.

Ms. GREENBERGER. I think when it is abused, I think when it ends up putting in peril many nominations without articulated reasons, that is not a good thing. I think that is very different than the filibuster which is the subject of this hearing and the focus of this hearing, which is out in the public, where we are talking about at least 41 Senators who have to express their deep concerns, and that is very different than what we saw during the Clinton administration, where things were behind closed doors and not subject to public scrutiny, and there really were abuses. There is no doubt about it.

And if you would—

Chairman CORNYN. If I could—and I have not Professor Gerhardt, I apologize, I asked an initial question, and my time is running out for this initial round, but it looks like Senator Feingold and I are going to have a chance to do a number of rounds, since are the only two here now. Hopefully, we will be joined by other Senators, but I asked Professor Gerhardt if it was fair to characterize your testimony as "if it ain't broke, don't fix it," and I wanted to certainly give you a chance to respond.

Mr. GERHARDT. I appreciate that very much, Senator.

I am not sure I do think the process is broken, and I think a lot depends on what the "it" is to which we are referring; in other words, a lot depends on what you think might be broken. I do not think the filibuster is constitutionally defective, I do not think the rules of the Senate are themselves problematic, and so I would not recommend fixing those things. I do not think the system is broken.

At the same time I have the impression that, by and large, most nominations go through this process rather smoothly, and the fric-

tion is focused on a relatively few number of nominations. That might be inevitable, and it might not be a bad thing for there to be a great deal of debate.

As for one other aspect of that process, Senator, you asked about whether it is a good or a bad thing for an individual Senator to nullify a nomination. It seems to me to be a good thing that an individual Senator has the prerogative, but like any prerogative, it can be used for good or it can be used for bad. So I would make a distinction between the discretion that a Senator has and how he or she may use it, but that is something for which they stand politically accountable. And I think that is how our system operates.

If I may, Senator, and maybe if I can do this as a personal privilege, I just want to correct one thing that Dean Kmiec said. He quoted from my book, but I do not think it was accurately quoted. My critique of the supermajority requirement was actually a critique directed at a constitutional amendment proposed by Bruce Ackerman. I was critiquing a constitutional amendment, and the suggestion is I was doing so on the ground that it violated majority rule in the Senate. In fact, I was weighing the merits of a majority voting margin in the Senate against a constitutional amendment to displace it.

Chairman CORNYN. Just one last question, and then I will turn it over to Senator Feingold.

I am glad you brought up the question of the book that you have written, and I guess that is either a blessing or a bane when you write a book and have to then live with what you have written. And I just want to hear whether you still agree with what you have written, or maybe you can just put it in context and explain.

The book you published in the year 2000, "The Federal Appointments Process: A Constitutional and Historical Analysis," criticizes the proposal that I guess was by Mr. Ackerman for conforming judges, and in that book, you state: "The final problem with the supermajority requirement is that it is hard to reconcile with the Founders' reasons requiring such a vote for removals and treaty ratifications but not for confirmations. The Framers required a simple majority for confirmations to balance the demands of relatively efficient staffing of the Government."

I just want to be clear. Do you still adhere to that statement?

Mr. GERHARDT. Oh, very much so, Senator, because again, what I am doing there is responding to a proposed constitutional amendment, and I might point out that Professor Ackerman's constitutional amendment proposal was to amend the final vote necessary for choosing Supreme Court Justices, not just judges generally.

So my discussion about supermajority voting was done in that context. I was basically saying I thought a majority vote made more sense than a supermajority vote in the final action on Supreme Court nominations.

Chairman CORNYN. You would agree, finally, that the Senate cannot adopt a rule that conflicts with the Constitution; correct?

Mr. GERHARDT. That is correct. But I also think that the rules generally may be amended only in accordance with the rules.

Chairman CORNYN. Thank you.

Senator Feingold, let me turn it over to you.

Senator FEINGOLD. Thank you, Mr. Chairman.

First let me ask unanimous consent to put the statement our Ranking Member of the full committee, Senator Leahy, in the record.

Chairman CORNYN. Certainly; without objection.

Senator FEINGOLD. Thank you, Mr. Chairman.

Let me thank all the witnesses for your patience, and I hope you do not regard the long statements by Senators as in any way a constitutional or unconstitutional filibuster.

Mr. Fein, let me start with you. It is a pleasure to see you again. I enjoyed having you testify before this Subcommittee 5 years ago, when Attorney General Ashcroft was Chairman of this Subcommittee, about the importance of maintaining an independent Federal judiciary. I appreciated your testimony and your responses to my questions at that time.

Now, unlike some of our other witnesses here today, you have sharply criticized both Republicans and Democrats for holding up judicial nominees—I give you credit for that—and in a 1997 New York Times op-ed, you criticized your chairman, Chairman Hatch at that time, for holding up Clinton nominees. You wrote: "Mr. Hatch has vowed to prevent confirmation of Clinton nominees he deems likely to be judicial activists. He insists that a philosophical litmus test will not infect the confirmation process with politics, but it was Mr. Hatch and other Republican Senators who complained about just that after Robert Bork was rejected for a seat on the Supreme Court because of his judicial philosophy."

You went on to say that "Republicans seem to have forgotten what Alexander Hamilton instructed in Federalist 76, that the Senate is confined to screening judicial nominees for corruption, cronyism, or incompetence. Judicial philosophy is not on Hamilton's list."

Now, I assume that in that article, you were criticizing the Chairman for delaying or simply not granting hearings for your opinion between holding up nominees by not granting them hearings and filibustering of judicial nominees.

Are both of these tactics equally subject to constitutional attack?

Mr. FEIN. I believe so. If the purpose is to prevent a majority in the Senate from voting, I believe it is subject to constitutional attack.

But I want to amplify on an element here that perhaps has been obscured. It seems to me that if the Senate majority wishes by acquiescence, inaction, by carrying over rules or affirmative vote, confirming power on Committee chairmen or committees to kill nominations, wishes at any time to give a minority a veto over a nomination coming to the floor, that is their entitlement. The majority can give away, but then it can also take back.

So it is my view that at any time, a Senate majority could perhaps by resolution or otherwise vote to instruct that there should be a disregard either by a presiding officer if there is a filibuster, or if a nomination is being held up in Committee, to instruct that it would be unconstitutional to deny a vote in the full Senate on a judicial nominee, and I think that Senate vote would prevail under the Constitution over the obstruction tactics that you have identified and that I thoroughly deplore.

But if the Senate decides not to do anything, it seems to me the majority is ill-equipped to complain, then, that they are sitting and not challenging what they think is a hijacking of a majority process by a minority.

So I am not, I do not think, censoring at all the Democrats in this particular instance from asserting their rights under the rule if the Republicans want to acquiesce in that. I still insist, however, that if the Republican majority wanted to go forward, they could.

Senator FEINGOLD. I appreciate your candor on this, because I have been on this Committee throughout that period that you criticized, and I am confident that if what is being proposed today is somehow unconstitutional, then what was being done then was also unconstitutional.

Mr. FEIN. Absolutely it was.

Senator FEINGOLD. Professor Eastman, let me first return briefly to your reference to Robert M. LaFollette, as I am compelled to do. I think he is the greatest leader ever to come out of Wisconsin. I am sorry that you see your blood line with him as a black sheep situation.

I just want to remind you that Senator John F. Kennedy was asked to chair a commission in the 1950's and to pick five Senators in the history of the Nation to be honored in the reception room. Well, three of them were so easy they could not even discuss it—Clay, Calhoun, and Webster. They thought, well, we had better have two from the 20th century. Let us get one on the conservative side and one on the progressive side. They picked Robert Taft on the conservative side, and who was the fifth? Robert M. LaFollette of Wisconsin. And it is his face that you see as you enter the Senate Chamber.

There is no way that I could leave the record anything other than rebuking your remarks about the great Robert M. LaFollette.

Professor?

Mr. EASTMAN. Senator, thank you for reviving my family's name in that regard.

Senator FEINGOLD. Very good.

Professor Eastman, you wrote an article published in June 2002 in the publication "Nexus" entitled, "The Senate is Supposed to Advise and Consent—Not Obstruct and Delay." Let me quote from that article.

"The very existence of the judiciary is premised on the fact that the majority is not always right, allowing the Senate elected by the majority too great a hand in regulating the Federal bench, risks eroding the judiciary's power to perform this most crucial task."

You wrote this, of course, when Democrats were in control of the Senate, and you were harshly critical of their treatment of judicial nominees.

Less than a year later, with Republicans in control of the Senate, you come before the Committee and testify as follows: "The use of a filibuster for dilatory purposes is particularly troubling in the context of the judicial confirmation process, for it thwarts not just the majority in the Senate and the people who elected that majority, as any filibuster of ordinary legislation does, but it intrudes upon the President's power to nominate judges and threatens the very independence of the judiciary itself."

Professor Eastman, we see changes of position because the political situation changes all the time in the Congress. But you are appearing here as an unbiased constitutional scholar. It seems to me that the only way to reconcile your two positions, one before and one after the 2002 elections, is to conclude that you think Senate Democrats, whether in the majority or the minority, should have no role in the nominations process, and President Bush should be able to appoint and have confirmed whomever he wants to the Federal bench.

Can you give us another explanation for your two conflicting statements?

Mr. EASTMAN. Senator, I do not see anything conflicting in those statements at all, and let me be very clear. In both my testimony today and my testimony in the House of Representatives last fall and in that article, I have said that the Senate does not have the primary role in the appointment process, that the President does. And I said that both when this President was in office and when President Clinton was in office, that the primary role for the appointment process itself was given to the President because the Framers were concerned that by giving a primary role or a central role to a collective body would induce cabal and that to avoid that, that the Senator's role was much more limited to providing a check on the President.

And what you are talking about now when I produced that article was that the Senate Democrats were not just using it as a check on the President for untoward appointments, for appointments made out of bribery or for nepotism purposes, but because they disagreed with the judicial philosophy about which the President had waged his campaign, in part. And I thought that the use of ideology for that purpose was illegitimate.

I left open the possibility to use ideology when a nominee comes before this body and says something that makes it impossible for him to honor his oath of office, that if a nominee were to come before this body and be asked, for example, as I point out in that article, the question, If the law and the Constitution was clear, and it disagreed with your personal conscience on a subject, which way would you rule as a judge—to uphold the law or to further your conscience—and that nominee that I referred to in that article said "To my conscience."

I think that that is a demonstration of a disqualifying ideology and is one of the limited instances when the Senate does have the obligation to take ideology into account. But beyond that, to thwart the role of the President merely because Senators disagree with the outcome of an election I think is improper, and I think that is perfectly consistent with what I said today.

Senator FEINGOLD. Well, I recognize your response, except I do not think it resolves the problem that you had one view about majority rule under one Democratic President and another view about majority rule under a Republican President.

Now, you wrote in the same 2002 article when the Senate was controlled by Democrats, and you were outraged by delays in confirming President Bush's judges, that "The refusal to hold hearings at all is not advice or consent. It is political blackmail, which perpetuates the critical number of vacancies on the Federal bench."

As you are aware from your own previous writings during the Clinton Presidency, the Republican-controlled Senate Judiciary Committee refused to hold hearings on numerous Clinton judicial nominees. When various judicial nominees of President Clinton were denied a hearing and never allowed a vote and in some cases were even filibustered on the Senate floor, did you ever, Professor, write or speak out against any of the very tactics you publicly criticized in 2002? Why not, if you did not? And do you agree that these practices were as wrong then as you say they are now?

Mr. EASTMAN. I think I agree with Bruce Fein's statement on that, that if the majority is willing to acquiesce, there is not a problem.

I do think it presents a problem for the minority or for a majority from a prior Senate to try to entrench a rule that prevents the majority from ultimately having its way.

I think we need to distinguish between two uses of the filibuster and two uses of a hold or two uses of a Committee hearing. There are some nominees who simply do not have any majority support in the full body, and it would not be worth the effort to go through the process. But what we were talking about in the instances that I referred to in my article is where there had already been a majority of Senators expressing their views to support a nominee who was being bottled up in Committee. That process, then—the Committee holds and the refusal to hold hearings were in fact thwarting the will of the majority even of the body under Democratic majority control.

So I think it is perfectly consistent that in both instances, I have said we need to get to a process that ultimately, after extensive and reasonable debate, lets the majority have its say, because to do otherwise, to impose a supermajority requirement contrary to the Constitution, intrude on the President's power and threaten the independence of the judiciary.

Senator FEINGOLD. Mr. Chairman, I think that at least one good thing has come out of this hearing. We have a witness on both sides here, both publicly stating that what was done when the Republicans controlled the Senate was wrong and perhaps unconstitutional under this theory—or, actually, it was Mr. Fein—excuse me—two witness on this side suggesting that. And that is very important because the American public is being misled that somehow this is something that began after President Bush became President. That simply is not the truth, and I stand here as a person who enraged a number of my supporters by voting for the confirmation of John Ashcroft as Attorney General, because that had never been politicized, because that kind of game has never been played in Cabinet appointments.

But I will stand here as the same Senator and tell you that what was done to President Clinton's right as the President of the United States for his second term was in my view unconstitutionally wrong.

Therefore, Mr. Chairman, any attempt to resolve this problem, which I know you sincerely want to do, has got to be something other than that George Bush gets all his nominees, and gee, hopefully things will be better when the Democrats have a President. It does not justify payback—you and I have talked about this—but

it requires a recognition of what was done in the past, a public admission that what was done with regard to the Democrats was simply wrong and distorted—distorted—the Federal judiciary, because the Federal judiciary should have represented the results of the 1996 election, and it did not.

Thank you, Mr. Chairman.

Chairman CORNYN. I see that Senator Durbin has joined us, and Senator, if you do not mind, let me ask a few questions and then I will turn it over to you, in the spirit of going back and forth across the aisle in the course of our questioning.

Dean Kmiec, I was interested in both your and Professor Calabresi's comments regarding Blackstone's dictum about no parliament can bind the hands of a future parliament and how you view Senator Rule XXII, which provides for the cloture requirement of 60 votes before debate can be ended.

I would be interested in how you reconcile, if you can, or any comments you have on Senate Rule XXII in that context.

Mr. KMIEC. Thank you, Senator.

I think there is an agreement emerging perhaps on the panel and among the Senators as well on this constitutional proposition, that a majority of the Senate must have within its constitutional authority the power to amend its own rules.

If that is the case, then a carryover rule, Rule XXII, that denies you as a new Member of the Senate the opportunity to pass upon the question of whether or not cloture for a judicial nomination ought to be a simple majority rather than 60, or actually, to amend rules—as you know, Rule XXII requires 67 votes—then that is an unconstitutional entrenchment of prior rules.

Now, Senator Feingold said just a minute ago that there have been abuses on both sides, and I have tried to say in my statement that I concur. One thing I know about being a dean is that if you are going to get beyond disagreements on a faculty, you have to put aside the past hurts and infringements and encroachments and look at the vision in front of you. And I think that that is what this hearing is about.

The vision in front of us is whether or not we can operate in a constitutionally appropriate manner with regard to the rules that apply to judicial nominations. Rule XXII as it is presently being applied to judicial nominations, which is something that has emerged only with regard to the past two nominations, is in fact an unconstitutional entrenchment in my judgment, and I have not heard a dissenting voice from that on the panel even as Professor Gerhardt has raised the issue that filibusters in general are not per se unconstitutional.

No one has argued that—at least I am not arguing that—but Rule XXII, which entrenches a 60-vote requirement, has those constitutional problems.

Chairman CORNYN. Yes, Professor Calabresi?

Mr. CALABRESI. Thank you.

I also would agree that Rule XXII is problematic to the extent that it purports to entrench the views of the prior Senate. I think the principle that prior legislatures cannot bind their successors is a fundamental principle of English and American constitutional law. It is so for a very good reason. If this Congress were able to

pass a bill and provide that it could only be repealed by a two-thirds or a three-quarters majority in the future, that would improperly rob future Congresses of the role that the Constitution gives them.

It seems to me that that is what Rule XXII does to the extent that it purports to say that a majority of the Senate cannot change the rule.

I do agree with Bruce Fein and John Eastman that a majority of the Senate can adopt rules that structure their deliberations by, for example, setting up, of course, committees and processes for blue slips and holds whereby things may not be brought up for a vote, but if a majority of the Senate wants something brought up for a vote, and if the majority of the Senate wants to change Rule XXII to provide for that, that seems to me to be totally warranted.

I guess I would also say that while I think that there were—Senator Feingold mentioned that there were a number of Clinton nominees who may not have received as good treatment as they perhaps deserved. Elena Kagan, who has now become the dean of the Harvard Law School, is one of those nominees, somebody whom I know and think highly of, and I wish that her nomination had been acted on.

But it seems to me that allowing a delay through filibustering of 2 years and taking up a nomination like Miguel Estrada's or Priscilla Owen's is a whole new order of magnitude of delay.

Mr. GERHARDT. Senator, may I correct the record? I am real sorry to interrupt; excuse me.

Chairman CORNYN. I noticed that when the dean was saying he thought a consensus was emerging, you were shaking your head, so please go ahead.

Mr. GERHARDT. I am sorry, Senator. Excuse me.

Chairman CORNYN. Go ahead, please.

Mr. GERHARDT. I appreciate it. I just want to point out quite briefly that I guess we do not have the consensus, I regret to say. The last few pages of my statement spell out, and I will not repeat here, reasons why I think not only is the filibuster constitutional, but also the requirement for a supermajority vote to change the rule of filibuster.

Entrenchment, I think—and this is the technical word—entrenchment is omnipresent within the legislative process, and I would only just point out a terrific article in the Yale Law Journal by Eric Posner and Adrian Vermeil, who argue against anti-entrenchment and defend supermajority voting requirements. A common example that they might give and that would challenge the Committee is that Congress uses sunset clauses in its laws all the time; those entrench policies. In fact, every time Congress passes a law, it has the potential for entrenching policies.

So I think entrenchment and the possibility of a current legislature binding the hands of a future one is always there.

Ms. GREENBERGER. Could I also say—

Chairman CORNYN. You would agree, wouldn't you, Professor Gerhardt, that if a subsequent legislature decided to change or amend that law, it is certainly at liberty to do so?

Mr. GERHARDT. By the appropriate voting procedures, yes, sir.

Chairman CORNYN. Okay.

Ms. GREENBERGER. Senator, could I just—

Chairman CORNYN. I want to just clarify with Professor Eastman and Mr. Fein some of your earlier statements.

Do you say that the prior use of blue slips or Committee rejections are always unconstitutional, or just unconstitutional if the majority disagrees but is prevented by filibuster from doing anything about it?

Mr. FEIN. Well, I am just saying that the Senate has a right at all times by majority to overrule a deference—or a blue slip or otherwise. If it wishes to acquiesce in a blue slip at any particular point, that is up to the majority. But what becomes unconstitutional is an attempt to handcuff the majority from deciding they want to depart from their customary deference to minority at this time and vote.

Chairman CORNYN. Professor Eastman?

Mr. EASTMAN. I agree with that. And for a Republican majority in the 1990's to have deferred to its committees does not raise the same kinds of constitutional issues, or for a Democrat majority to have deferred to its committees does not raise the same kinds of constitutional issues, as when we are talking about a minority of either party being able to thwart the will of the majority.

Now, they are not yet thwarting the will of the majority. The Senate rules have carried over. It is incumbent upon this body if they think there is a problem with the supermajority requirement, as I think there is, to enact a modification to that requirement. And I do not think there is any disagreement on that point.

Where there is disagreement is on whether this Senate can be bound by the two-thirds requirement carried over from a prior body, and I think most of us up here say that that would be unconstitutional, that it would give a supermajority requirement carried over from a prior body—and imagine a Senate that got 70 Democrats or 70 Republicans in a particular election, and they put in a bunch of rules that favor them in perpetuity, and then they say, "And we are going to lock this in with a supermajority requirement." That would clearly be unconstitutional, and I think the entrenching provisions of Rule XXII are equally unconstitutional.

Mr. FEIN. if I could just amplify on that response with regard to potential litigation, it does seem to me that if the Senate majority itself does not take any action, if a challenge were brought in court to the filibuster rule, the court would say, "You have a self-help remedy; why are you complaining to us?" And I think it would be most injudicious to try to contemplate litigation without the Senate majority taking the reins and taking political accountability for altering the filibuster rule, which can be very tough, and trying to hand it off to some court, saying, well, this is wrong because the filibuster rule imposed by the Senate itself is thwarting the majority.

Ms. GREENBERGER. Senator Cornyn, I am just feeling very nervous at not being able to disassociate myself also from Dean Kmiec's sense that there was a consensus emerging. I know that Professor Gerhardt has made clear for purposes of the record that he is not part of the consensus. I want to be sure that I for purposes of the record make clear that I am not as well. And I do think that I cannot help but see a connection between some of the concerns of some

of the nominees that have provoked such strong opposition to lead to a filibuster or, in cases where they were not filibusters but still very strong negative votes, the fear is of an activist judge who will disregard the rule of law.

To me, what is being discussed here is disregarding the Senate's rule of law in a similar activist and lawless and very distressing way. So I just want to be sure that that is understood.

Senator FEINGOLD. Mr. Chairman, I want to intervene here to also say that I—

Chairman CORNYN. That you are not part of that consensus, either?

Senator FEINGOLD. I am not, and I want it on the record that I do not view Rule XXII's requirement that a supermajority is required to cut of the debate on a change of a rule as being unconstitutional. Rules can be changed by majority vote, but the Senate still has the right to set its own rules of debate, and we are very short of a consensus here on this Committee.

Chairman CORNYN. Well, we are working on it.

Finally, let me just ask—and then I will recognize Senator Durbin—Ms. Greenberger and Mr. Gerhardt, you both cite a Law Review article by Catherine Fisk and Irwin Chemerinsky to support your conclusions. I take it, then, you agree with the constitutional analysis in that article?

First, Ms. Greenberger.

Ms. GREENBERGER. Yes, I agree with parts of it, but I do not agree with all of it. I think that part of what that article dealt with was this very issue that is being discussed about entrenchment, and I think that one of the things that is always important is to be sure that those authors have an opportunity to explore and explain their views, and that is not something that I have had the opportunity to hear from them about. But I do think their point with respect to the filibuster is something that I agree with.

I want to also—

Chairman CORNYN. I am sorry. Let me ask you, rather than volunteer statements, let me just ask some questions. I find your response interesting because they rested their analysis on the assumption that it only takes a majority to change the rules and that Rule XXII cannot be used to impose a two-thirds voting requirement for debate on a rule change.

If you endorse the Fisk–Chemerinsky constitutional analysis, then I assume you believe that a majority of the Senate can get rid of the filibuster—or is it that you agree with part of it, and is that consistent with what you said earlier—you agree with part of what they said and not other parts?

Ms. GREENBERGER. I think that certainly if, following Rule XXII and the supermajority vote that is required, the two-thirds vote that is required, to either change the filibuster, as of course the Senate has done in the past—it has altered the nature of the filibuster rules on repeated occasions in the past, so I would certainly say that under Rule XXII, there is the set procedures for changing the filibuster rules and following Rule XXII's prescriptions—the Senate of course could change the filibuster rules if it so decided. But I do believe—

Chairman CORNYN. It would require 60 votes to close off debate in order to change that filibuster rule; is that what you are saying?

Ms. GREENBERGER. Well, certainly it would require the filibuster cloture vote, too, but then there is also the issue with respect to changing the rule itself and getting to the merits and to the underlying requirements of the two-thirds vote.

Chairman CORNYN. Let me correct myself. Actually, it is two-thirds. I think that point was made earlier.

Ms. GREENBERGER. Right.

Chairman CORNYN. I have gone way over in my time, and at this time I would be happy to recognize Senator Durbin for any questions he may have.

STATEMENT OF HON. RICHARD J. DURBIN, A U.S. SENATOR FROM THE STATE OF ILLINOIS

Senator DURBIN. Thank you very much, Senator Cornyn, and thanks to the panel.

I would just like to make a couple of observations. Before I came to Congress 20 years ago, I was the parliamentarian of the Illinois State Senate for 14 years. So I sat there with those rules and worked with them every day; that was part of my life. So I understood them. That was what I was paid to do, and I understood those rules.

Then I came to the U.S. House of Representatives, and it was a struggle with Jefferson's Manual and the new House of Representatives Rules.

And then I came to the Senate and faced a new set of rules—and again, I am a student—I do not profess to be an expert. But I did notice one essential difference as I moved from a State Senate to the U.S. House of Representatives to the United States Senate. Without fail, after every election in the Illinois State Senate, we adopted our rules. Without fail, after every election, the U.S. House of Representatives adopts its rules. Without fail, after every election, the Senate does not adopt its rules. Now, why is that? Because they are continuous. Those rules continue. Even though we are a subsequent Congress, we are a new group of Senators for our own purposes. From the viewpoint of the Senate and its tradition, we are a continuing body. Robert Caro makes that point I think very graphically in his book about LBJ, which most of us have read, and I think that is being overlooked today by so many people who say, "Well, this is a new Congress. You ought to be able to start out anew."

We never do. We start off with the old rules, and we do not even adopt them because no one has wiped them away. They are still there today as they were before the election, and that creates a different premise for this debate as far as I am concerned.

The second thing I would like to say is that early in the third quarter, for those who are keeping score, the score is 123 to 2—123 to 2. President Bush as of this afternoon has received 123 judges that he has asked for, and exactly 2 have been held up.

You would assume from this hearing that the numbers were exactly the opposite—that we had only approved 2, we have filibustered 123 judges—and it is just an outrage.

Well, I would like to put it in perspective. I understand why Senator Cornyn called this hearing. It must be curious to you as a new Senator to come in at this point and wonder why has the Senate tied itself in knots over a judicial nomination to the point where there is a real difference, and the filibuster is being used on two of the nominees.

And I would simply say to you that there were several games played before you arrived—in fact, at least 59 games played on Clinton nominees who were never given a hearing, never given a day in court, never given a chance to sit at that table—59 different individuals.

Now, there are those who are arguing that in and of itself, there is nothing wrong with that, but it is clearly wrong to use the filibuster on two nominees sent by the Bush White House. I do not think that that follows, and I think that is the point made by Senator Feingold. If the rules of the Senate could countenance the abusive treatment of 59 Clinton nominees and say, "It is the rules of the Senate; you have got to live with it, Democrats—sorry," to stand back now and say, "The rules of the Senate cannot be used to stop a Bush nominee. There is a constitutional principle at stake here," does not work. It was either unconstitutional then and is unconstitutional now, or vice versa. Take your pick.

But having said that, what is also, I think, unspoken here is that we understand the agenda during the Clinton years. The agenda was to leave as many vacancies as possible, particularly at the circuit court level, use the Senate rules, use whatever you can, in the hope that a Republican would be elected President who would fill those vacancies. That is what this is all about. We are playing ping pong above the table and rolling bowling balls at one another below the table. That is what this debate is all about.

I think the only way to resolve it is if something happens which would be truly miraculous, and that is a surrender of power by our President, and I do not think he is going to do it.

One or two of the suggestions that have been made to try to find some bipartisan way out of this are not likely to be embraced by this White House—maybe it would never have been embraced by a Democratic President. But until then, we are going to find ourselves in this tangle.

And I might also add parenthetically that when you are dealing with judges of the kind that are being held up and the kind that may be challenged in the future, this is going to happen again. We live in a closely-divided Nation politically, in a closely-divided Senate, and with closely-divided courts, and it is no wonder that one or two nominees become determinative.

I would just like to ask maybe Professor Calabresi, since you are from my home state—and let me just add that I am not part of your "angry minority"; I have a smile on my face, and I am doing my best. I am not angry over this, but I am anxious to find some justice in the situation.

Could you tell me how you could rationalize the treatment of Clinton nominees under Senate rules being denied even an opportunity for hearing as being constitutional, and the use of the filibuster rule as unconstitutional?

Mr. CALABRESI. Sure. Actually, let me comment on several of the things that you said. First, with respect to your comments about the Senate being a continuing body, the Senate of course is a continuing body, but then, each new Senate organizes itself differently, perhaps with a different majority and minority leader—

Senator DURBIN. Under the Senate rules.

Mr. CALABRESI. [continuing.] With different members on Committees. If the Senate were completely a continuing body, then presumably the previous allocation of Committee slots might maintain itself and be perpetuated.

Senator DURBIN. But under the Senate rules.

Mr. CALABRESI. Second, with respect to numbers of nominees, you mentioned that there are two individuals up to now who have been filibustered, who have been held up for a period of 2 years or so. Those two individuals are being nominated to be one of 175 Federal Court of Appeals judges in the country. I find it very hard to believe that the sky would fall if one of the 175 court of appeals judges in the country were an individual of the caliber of Miguel Estrada or Priscilla Owen.

With respect to the Clinton period, I think a Senate majority does have the right to figure out what hearings to schedule and what hearings to hold.

Senator DURBIN. Under the Senate rules.

Mr. CALABRESI. Yes, yes, under the Senate rules which can be changed by majority vote by each succeeding new Senate. And it seems to me that the majority of Senators has a right basically to alter the Senate rules if it wants to do so.

I do think that some individuals who were talented should have gotten action during the Clinton years. I specifically mentioned Elena Kagan who was nominated for the D.C. Circuit, who is now becoming dean of the Harvard Law School. As it happens, she and I clerked together on the Supreme Court with Miguel Estrada, and I had a very high opinion during those years of both Miguel Estrada and Elena Kagan, and I am sorry that there was not action taken on her nomination. I do not think that not acting on Miguel Estrada's nomination is going to make the situation any better.

Senator DURBIN. Mr. Gerhardt?

Mr. GERHARDT. Yes, sir. With all due respect, Senator, I might want to go back to the question that Senator Cornyn asked me initially.

Senator DURBIN. On his time—no, go ahead.

Mr. GERHARDT. Oh, I'm sorry. On the Chemerinsky article, Senator, I would say that I am quite good friends with both of the authors, and we agree on some things and disagree on a lot. I would say that I agree with some of the article; I disagree with some constitutional analysis in it as well, and I certainly disagree with their conclusions regarding the requisite vote for changing Senate rules.

I might add that in fact I disagree to some extent even with their methodology. And you will note that I reached the constitutionality of filibuster by a different route than they do. So I rely on them for factual matters but not otherwise.

I just want to echo Senator Durbin's eloquent remarks, because I do think the continuity of the Senate is a critical thing here, and

that explains, I think, the unique circumstances of the Senate. While we can quote Blackstone, what he said that might have been true for the British Parliament and the British system, but it has nothing to do with the American system and the unique constitutional structure that includes Article I, Section 5, that empowers each Chamber to adopt rules for its respective proceedings.

Senator DURBIN. Mr. Fein, did you want to comment?

Mr. FEIN. Yes. One, I think that your comments really expose the kernel of the problem here. I think there is a sense on both sides of the aisle that there has been partisanship played whenever it suited their purposes and each side exploited the rules to their advantage but then wished to change the rules of the game when they fell to the minority party.

There is no way to write a constitution with sufficient clarity in order to avoid the kind of logjam we are in now if a majority wants to take its power to an extreme, or a minority, exploiting the rules. There are what I call a series of unwritten elements to our Constitution. There are rules of self-restraint that, if not complied with, are going to have the whole system shipwrecked. A President could destroy a department he did not want simply by refusing to nominate anybody. If he does not like the Department of Education, he will not nominate a Secretary of Education or any assistant secretaries. Unless there is self-restraint and an agreement, tacit, that there will not be an exploitation in order to destroy what is commonly accepted in the public as popular will or the results of an election, I do not think there is any rule that you could adopt that is going to overcome the problem.

Let me make one observation, however, with regard to the idea of a continuing Senate. I think your observation is quite accurate and forceful, but I do not think a continuing Senate can override Article II of the Constitution, which says in the Appointments Clause, so to speak, if you get a majority, and the majority forces a vote, then you have a confirmed judge. And in my judgment, even though the continuing Senate means that each Senate rule enjoys the same dignity as the any other even if it is a was a carryover from a previous Congress, still, if a majority of the Senate wants to exercise its muscle, so to speak, and force a vote on the floor, I think that the majority decision overrides the Senate rule by dint of Article II.

Senator DURBIN. I think I am out of time, unfortunately. I wanted to let Ms. Greenberger make a comment.

Chairman CORNYN. Certainly we have time to do that, Senator Durbin. Go ahead.

Senator DURBIN. Thank you.

Ms. Greenberger?

Ms. GREENBERGER. Thank you. Thank you both Senators.

I just wanted to make a couple of quick points. First of all, what we are talking about here, as I think Mr. Fein said at the end, is changing what the rule says with respect to needing a supermajority in order to change the rule. So that is the crux of whether or not the Senate can ignore these continuing rules and make up a new rule under these circumstances.

There was no such changing of rules in the past, and while there may have been abuses of the rules—and that, Senator Cornyn, is

what I was referring to as being unhappy about—I do take issue with Mr. Fein saying that both sides were changing the rules. I do not think that there was a changing of the rules in the past in contrast to what is being articulated now, under the theory that the current rules are unconstitutional.

Second, I wanted to make a point with respect to the concept of a fresh start. Everybody wants to have a fresh start on the one hand; but a fresh start that ignores where we are today as a result of problems in the past is not a realistic way of having a fresh start that accommodates what I think people are looking for.

Senator Feingold pointed out that there is a current distortion in the system as a result of what happened in the past. It is not sufficient to say, "Oh, I wish things had been done differently. There were problems in the past. I am sorry about them. I pointed them out in the past, and now I am pointing them out in the current context." That takes us only so far.

We have consequences today because of those problems in the past, so any fresh start has to take into account the fact not that there are one or two judges out of 175, so what problems could they cause with respect to Judge Owen or Mr. Estrada, but because of those problems in the pastcontinue today, in 2003, we have a distorted judiciary. We do not have the kind of needed balance of views. We do not have the enrichment of the different perspective of judges that we would have had.

And therefore, in exercising the advise and consent responsibilities of this Senate and all of these Senators in coming to grips with each of the nominees, it is my view that the Senate and each Senator has a constitutional responsibility to take into account whether each of these nominees in the circumstances of today belongs on a court of appeals or a district court or ultimately the Supreme Court, but especially with respect to these lower courts, because of the distortions of the past and because we do not have the kind of balanced judiciary right now that we would have had absent those distortions.

Senator DURBIN. Thank you.

I just want to conclude if I might, in 10 seconds. This is a discussion over an extreme procedure in the Senate. I think we are dealing with an extreme situation. It is one that we have not had before, and it is one that we can only deal with honestly, as has been suggested by my colleague, Senator Schumer, and others, and by Ms. Greenberger, if we deal honestly with the politics of this situation and where we are today.

I will just close by reminding you that I have checked, and the score is still 123 to 2 in the third quarter, that is, the third year of the President's first term.

Thank you.

Chairman CORNYN. Thank you.

Senator Feingold?

Senator FEINGOLD. I would like to offer to the record a few articles that Professor Eastman has written.

Chairman CORNYN. Without objection.

Senator FEINGOLD. I would also like to offer into the record a helpful letter, I think, from Abner Mikva, former White House

counsel and Court of Appeals judge for the District of Columbia Circuit.

Chairman CORNYN. Without objection.

Senator FEINGOLD. Mr. Chairman, I want to also put in the record another clarification. I certainly do not think there was ever any majority acquiescence during the period described under the Clinton Administration. The Republican leader and the Republican Chairman never let so many of these Clinton nominees get a vote, and many did have majority support in the Senate; that is actually what happened.

I am struck by this comment about self-restraint that I think is an important one. Let us just for 2 seconds look at the record.

There was no self-restraint on the part of those who blocked the Clinton nominees, 59 people never getting through—there certainly was no self-restraint there. The Democrats' record here, as Senator Durbin reiterated, is 123 to 2. So that all these vacancies, as Ms. Greenberger pointed out, were filled by Bush judges.

The record is 123 to 2, and this hearing is premised on the notion that the Democrats have been extreme? It is absurd. Any fair person could not possibly look at the record of the last 8 years and conclude that it is the Democrat side that is extreme—and I am noted for not being particular partisan.

I am just telling you, Mr. Chairman, that this is a travesty, to misinform the American people that somehow the Democrats have systematically blocked this.

The fact is that there has to be some fairness, there has to be some recognition, as Ms. Greenberger just said very eloquently, of a systematic denial of what was the Clinton Administration's right to have these judges come through. And I think 123 to 2 is awfully good considering what happened previously.

Thank you, Mr. Chairman.

Chairman CORNYN. Senator Feingold, as we started out by saying, or as I started out by saying, I believe that it was not particularly fruitful for us to go back and examine the abuses of the past, whether they be real or whether they be just perceived. As a matter of fact, all three of us—Senator Schumer, you, and I—and the other members of the Judiciary Committee see that being played out every time the Judiciary Committee meets and talks about a judge who is subject to some division of opinion.

My hope was that we could somehow get a clean break with the past—and I hear what you are saying; some may feel like that in itself is not fair—but what is fair, I think, is that we cannot control the past, and the only thing we can do is try to have an impact on the future. And the rules, if there are rule change adopted here, certainly they would operate equally for the benefit of a Democrat who is present in the White House or a Republican. To me, this is largely a test of our hopes and aspirations for what this process could be, and not an approval of what it perhaps has been in the past.

Senator FEINGOLD. Mr. Chairman, if I could just briefly respond. I think it is rare that one can go forward into the future without redressing past wrongs. There are ways to redress past wrongs. The administration does have within its power to recognize what was done and to negotiate with us about what happened. Those in-

dividuals in many cases are still available to be Federal judges. We recognize that most of the people appointed by President Bush should become judges. That in fact is the record. You may not like it that we refer to the past, but the actual record is we have approved 123 and only denied 2.

So to say that in the context of this discussion, we should not refer to what happened in the past to me is not a suggestion that will actually help us move forward. We have to refer to it, because something has to explain why we would take such an extreme step, and we do admit it is an extreme step to filibuster judges. To not have a public discussion and regularly discuss how we got to this point is going to make it almost impossible to move forward.

Chairman CORNYN. And just to clarify—and I do not really think we disagree even though I know it sounds like maybe we are right now—what concerns me so much is to hear comments on the floor of the Senate about "What is sauce for the goose is sauce for the gander," or "Tit for tat"—the kinds of recriminations and, frankly, things that are just beneath the dignity of this institution and the constitutional process in which we are engaged.

I would wish that we could look forward and now have to relive the past—maybe that is not possible. The only problem is that for every Democratic Presidential nominee who was not confirmed, I am sure there are folks on my side who would say that when Democrats were in control, Republican nominees and the Republican President were not treated fairly. So I do not know where that takes us except continuing the downward spiral, and that is why I am hopeful, as a result of some of the proposals that have been made by Senator Schumer and others—I do not happen to particularly like his proposal, but I congratulate him and appreciate his willingness to make one.

Let me just say two other things, and then I will recognize Senator Schumer for anything he has. I think what distinguishes the two nominees who are currently the subject of filibuster is that unlike the past, we have a bipartisan majority of the Senate that stands ready to confirm them today, and that is not true of any previous judicial nominee to my knowledge.

The second thing is when I hear—

Senator SCHUMER. If the Senator would yield, Paez and Berzon both went through with far more bipartisan majorities—I think 20 or 25 Republicans voted for Paez and Berzon.

Chairman CORNYN. But they were confirmed, were they not?

Senator SCHUMER. You said that is the difference; that is not a difference.

Chairman CORNYN. I am saying that a bipartisan majority stands ready to confirm two nominees today where the Senate majority is not able to effectuate its will because of the filibuster.

Ms. GREENBERGER. If I might—

Chairman CORNYN. The only other thing—

Mr. FEINGOLD. That is exactly what happened with Paez and Berzon. There was a majority, a bipartisan majority, at all times prepared—

Chairman CORNYN. But they were confirmed, right?

Ms. GREENBERGER. Well, and in fact, Senator Cornyn—

Chairman CORNYN. Excuse me, excuse me. I am not through. I still have the floor.

The other thing is that Senator Durbin said 123 to 2 is not bad for President Bush. The thing is I find it very difficult to reconcile that sort of statistic, if indeed we are supposed to pay attention to that kind of scorecard, with some of the caricatures that I have heard of President Bush's nominees as being out of the mainstream or right-wing ideologues or otherwise unsuitable for confirmation.

Now, as we all recognize, Senators are completely within their rights to vote against a nominee, and I will forever fight to make sure that that right is preserved, but I think 123 to 2 is hardly indicative to my mind of some sort of right-wing or out-of-the-mainstream ideology espoused by President Bush's nominees. And I understand that we may differ—I know that we differ.

Senator Schumer?

Senator SCHUMER. Thank you, Mr. Chairman.

I cannot think of a single Democrat the President has nominated—maybe they have—to the court of appeals. If he were nominating people without regard to ideology, you would think there would be a few. I do not know any—and Ms. Greenberger is here from the pro-choice point of view—it is not a litmus test for me, but I cannot think of one nominee who is pro-choice whom he has nominated who has said so.

The person who has the ideological litmus test here is the President, and we all know it. the people who are here from the left know it, and the people who are here from the right know it.

Chairman CORNYN. Well, if the Senator will yield, what I just said is that we do not all know it. I understand that that is your position.

Senator SCHUMER. Yes. I think that everybody—any objective observer who looks—but I would ask the panel to name for me a Democrat the President has nominated to the court of appeals.

Mr. EASTMAN. I will take that. Roger Gregory from the Fourth Circuit. And I have to weigh in. I just—

Senator SCHUMER. Okay. Have you got another one?

Mr. EASTMAN. Yes. Senator Feingold has introduced—

Chairman CORNYN. Excuse me, Professor Eastman.

I do want my very first hearing not to break into a free-for-all—

Mr. EASTMAN. He asked.

[Laughter.]

Chairman CORNYN. —so I must—

Ms. GREENBERGER. Could the woman who raised her hand get any special privilege?

Chairman CORNYN. No; no hands raised. Let us do it on a Q and A, and certainly if Senator Schumer wants to recognize anybody, we will come back if we have time.

Senator Schumer?

Senator SCHUMER. Okay. And Gregory we know was first nominated by President Clinton and held up for what many would think were pretty awful reasons.

How about another one? I mean, if we are doing this non-ideologically, there ought to be some scattering, and I do not know this.

I want to ask the nominees, do you think Democratic nominees and Republican nominees to, say, the D.C. Circuit vote the same way because they are interpreting the law in a neutral way?

Mr. CALABRESI. May I comment, Senator?

Senator SCHUMER. Yes.

Mr. CALABRESI. It seems to me if one looks at the past that President Clinton, I believe, was able to successfully appoint about 370 individuals to the lower Federal courts.

Senator SCHUMER. Right.

Mr. CALABRESI. My recollection is that it was minusculely different from the number of people that President Ronald Reagan appointed in 8 years to the lower Federal courts.

I think the argument that President Clinton did not have the same opportunity that President Reagan had to make an impact on the Federal courts just fails before the facts.

Senator SCHUMER. Yes. But that is not the point I am making here. President Clinton's nominees were not—again, by general view; let us take ideology out of this and make it the middle of where the American people are, not what each of us calls "mainstream," because what some of us would call mainstream on the panel is different—and most of Clinton's nominees—there were a few who were very liberal, but most tended to be moderate to moderate-liberals.

Mr. FEIN. I am not sure that that is accurate.

Senator SCHUMER. The vast majority of President Bush's nominees have been hard, hard right. And again, that we know has happened.

But I want to ask the panel, the four more conservative, if—let us just assume that a President is making ideological choices and is nominating people without fail who are way over to one side—it could be far left or far right—should the Congress question them, should the Senate question them on their views? Should the Senate use ideology as a test, or should the President basically get his way as long as the nominees are regarded as good legal thinkers and have no moral opprobrium in any way attached to them?

Mr. FEIN. Mr. Senator, that was practiced under Franklin Delano Roosevelt. After his court-packing plan failed, he nominated all hard New Dealers, those who supported his court-packing plan. The Senate confirmed every, single one, and—

Senator SCHUMER. Well, I am asking you your view—is that right?

Mr. FEIN. And I believe that was correct.

Senator SCHUMER. You do.

Mr. FEIN. I believe the President won the election overwhelmingly over Alf Landon. That was the rules of the game. The people knew—

Senator SCHUMER. Sort of the way Bush won over Gore overwhelmingly?

Mr. FEIN. —no, no—and he campaigned as you well know in 1936 against Justices who said we are taking a buggy-horse approach to interpreting the Constitution. And the Constitution did not collapse. It thrived. And I do not know that anyone views the Roosevelt appointees as being the waystation for the destruction of our constitutional system.

Senator SCHUMER. Go ahead, Marcia—so you would think that that is fine, and if President Roosevelt—let us just assume it—did all New Dealers—and I would argue that the New Deal, it was more in the consensus of America post–1938 than Scalia and Thomas are within the consensus of America in 2002, and the President has said those are the types of judges he wants—

Mr. FEIN. Scalia was confirmed unanimously.

Senator SCHUMER. I understand. That is not the point.

Mr. FEIN. But he is an extremist, and he got a unanimous vote?

Senator SCHUMER. Well, he got a unanimous vote because then the Court probably needed some balance. I would have voted for a Scalia if there were eight Brennans on the Court. I would not vote—

Mr. FEIN. No, there were not eight Brennans at the time. The Chief Justice was Mr. Rehnquist.

Senator SCHUMER. I understand. I am just making the point—I am asking you the question—you are not answering; you are giving other facts like the unanimous approval—so let me just finish with Mr. Fein.

So you are saying that if a President nominates people to one extreme—let us assume your argument that Roosevelt did—that the Senate should not inquire about their judicial philosophy, their ideological views, and just appoint the President's nominees, or you are not saying that?

Mr. FEIN. No, I am not saying that. I think the Senate—

Senator SCHUMER. Okay. Let me just ask you some questions. Do you think it is legitimate to make such inquiry?

Mr. FEIN. I think it is legitimate to make an inquiry so that the people can hold the President accountable and know exactly what kind of Justices he is nominating; absolutely.

Senator SCHUMER. Okay.

Does everyone else agree with that?

Mr. CALABRESI. I think it is legitimate for Senators to take ideology into account, but I do not think it is legitimate to filibuster nominees who clearly enjoy the support of a majority of the Senate, and I do not think there is any precedent for that in 214 years of American history.

Ms. GREENBERGER. Well, I have to say that that is absolutely factually inaccurate.

Senator SCHUMER. Of course it is.

Ms. GREENBERGER. And with respect to Paez and Berzon, Senator Schumer, whom you raised, there was a filibuster. Let us step back for a minute and remember that President Clinton was not even sending up names that he did not think were going to get 60 votes to start with, so the whole universe was not as controversial a universe to begin with. With respect to now judges Paez and Berzon, when there was a filibuster—and to go back, Senator Cornyn, to your point—there was a filibuster, it was on ideology. There are statements of the leader of the filibuster, then—Senator Smith; it was all about ideology. Senator Frist voted against invoking cloture.

Chairman CORNYN. If they were confirmed, how can you say there was a successful filibuster?

Ms. GREENBERGER. I did not say it was a successful filibuster, but I did say—

Senator SCHUMER. How long did it take to confirm them?

Ms. GREENBERGER. With respect to Judge Paez, it was over 3 years from start to finish, and with respect to Judge Berzon, it was a slightly shorter period of time. But still—

Senator SCHUMER. So in other words, Ms. Greenberger, if we were using the precedent, then Senator Cornyn and our friends on the other side should be estopped from complaining until it is 3 years—they are complaining when it is 3 months.

Ms. GREENBERGER. I just said the current leader of the Senate, Senator Frist, voted against invoking cloture in that context with respect to Judge Paez, and therefore, his whole approach was not consonant, Senator Cornyn, with what you were suggesting, that if there were a majority willing to confirm, there should not be a filibuster. He continued to support a filibuster, and the ultimate vote showed a very overwhelmingly strong vote to confirm for both.

So the leadership of the Senate currently, just a very short period of time ago, clearly was taking a different ideological and philosophical view about the rules of filibuster, how they apply with respect to lifetime appointments, with respect to judicial appointments, with respect to circumstances where it was obvious from the beginning that those nominees had substantial majority support, far more substantial majority support than some of the judges who I must say I do not congratulate the Senate for confirming, such as Judge Shedd, Judge Sutton, and others who have very, very strong negative votes.

Senator SCHUMER. Okay. I have a question of Professor Gerhardt. I am sort of befuddled again. It seems to me this is: Here is the result we want, and therefore we are making an argument for it.

In other words, I think the panel sort of buttresses my argument that we do not have this neutral machine that makes law. This panel is great proof of it.

But I am totally befuddled by the idea that it is unconstitutional to filibuster a judge but not unconstitutional to filibuster legislation. I would also like to know if there is any difference between—couldn't committees be unconstitutional? If a majority on a Committee decided to vote against a judge, is that okay?

And I ask the second question to all the panel: If, then, the whole Senate wanted to be for the nominee and there were a majority vote there.

So, first, Professor Gerhardt. This is taking the results you want and twisting the legal argument to make it right. It is the most absurd thing I have ever seen, and I think it is almost a joke. Do you see any difference between the unconstitutionality? Why is majority vote more sacred in judicial appointment than in legislation?

Mr. GERHARDT. I do not think there is. I do not think the Constitution recognizes any such distinction. In fact, as I suggested earlier, there is only one Appointments Clause. Every nomination would have to be the beneficiary of this rule if it were to apply.

Senator SCHUMER. That is even a better argument, thank you. That is why you are the professor and I am the Senator.

Mr. GERHARDT. Thank you.

Senator SCHUMER. Appointment to the executive branch—by the way, I missed some of this—are the people who are for this arguing that a filibuster and appointment to the executive branch would be equally unconstitutional?

Mr. FEIN. Mr. Senator, I do not think that it makes any sense to try to apply necessarily the same rule to all appointments or all votes. I pointed out earlier that intellectual tidiness is not the earmark of the way our Constitution has been interpreted and applied. You have to ask what is the purpose of the voting rule and whether it is consistent with the spirit and design of the Constitutional architects.

With regard to legislation, everyone knows the Founding Fathers were worried about a hurricane of legislation. They were erecting barrier after barrier to prevent legislation from being enacted. So you can argue reasonably plausibly that a supermajority vote that tries to block legislation is consistent with that design.

There is nothing comparable with regard to concern over appointing and confirming judges too fast with majority votes or otherwise. So it is thoroughly consistent to say that a filibuster rule can be overridden by a simple Senate majority on judges, but not on legislation.

Senator SCHUMER. Didn't the Founding Fathers, in objection to Wilson's proposal that the President choose the judiciary, say that they were worried that the President would have too much power, and isn't that in the same spirit? They did not say 51 is enough to check the President's power in this, but 41 is not.

Mr. FEIN. No. I do not think the Founding Fathers—

Senator SCHUMER. You are not being a very strict constructionist here, Mr. Fein.

Mr. FEIN. Right. No, I am not trying. I do not think you will find answers—

Senator SCHUMER. I know you are not trying.

Mr. FEIN. —to the constitutional questions that are difficult by reading a dictionary and looking only at the text, because the Constitution has additional elements that have to be consulted if it is to have any vibrancy; otherwise the Constitution would be 30,000 pages long to get into all the detail that you have adverted to.

Senator SCHUMER. You are not being a very strict constructionist, though, are you?

Mr. FEIN. I will not be a strict constructionist when I think it serves the goals of the Constitution. I am not embarrassed about that. And we should not be fetish about particular slogans.

With regard to the constitutional role of the Senate—

Senator Schumer. We will quote you on that at some other hearing sooner or later.

[Laughter.]

Mr. FEIN. Any time you want.

I testified, by the way, in favor of your proposal to have sentence enhancements for hate crime statutes. Maybe you were more endearing to me at that time than now.

[Laughter.]

Senator SCHUMER. I do not know where I went wrong before.

Mr. FEIN. Well, that makes two of us.

[Laughter.]

Mr. FEIN. With regard to the entrustment to the Senate of a confirmation role, there was no suggestion in the Federalist papers that a majority was not sufficient to perform the task of weeding out for cronyism, incompetence, or corruption. I think that is where the explanation comes as to why the President was not given the sole power. Hamilton explains that in 76 of Federalist Papers.

Mr. EASTMAN. In fact, Senator, the debate went even further. James Madison had proposed at one point to actually require a two-thirds vote to disapprove a Presidential nomination. That did not succeed. But the vote was not to go the other direction but in fact whether to give exclusive power to the President or to have some other check.

The notion that a minority of the Senate would be sufficient to stop a Presidential nominee and that that could be locked into place forevermore through a Senate rule—and I will just quote Erwin Chemerinsky—

Senator SCHUMER. Well, it is not forevermore. The Senate can chance its rules in a minute.

Mr. EASTMAN. But that is what the fight is about. And the constitutionality of the supermajority two-thirds requirement in the Senate rule to stop the change of the filibuster rule—and I will quote Erwin Chemerinsky; I have been debating him every week for 3 years—

Senator SCHUMER. Who is that? I did not hear.

Mr. EASTMAN. —and we have agree on hardly anything, and on this we agree—entrenchment of the filibuster violates a fundamental constitutional principle. One legislature cannot bind subsequent legislatures. And if this body does not take that seriously—he goes further in that same article to suggest that disgruntled nominees or Members of the Senate themselves whose votes are diluted by that unconstitutional rule could file suit and—

Senator SCHUMER. How about committees? How about when a Committee blocks a judge from coming to the floor? Let us say the Judiciary Committee votes 15 to 4 against letting someone coming to the floor, and 51 Senators sign a letter saying bring that judge to the floor. Is that unconstitutional?

Mr. CALABRESI. There is no question that committees are constitutional. First of all, the British Parliament had committees. The Framers were aware of that when they passed the Rules of Proceedings Clause. They clearly authorized Congress to set up committees and to set up rules that would structure deliberation and debate.

The filibuster itself—

Senator SCHUMER. Why isn't Mr. Fein's argument, which is sort of results-oriented, that this is what the Founding Fathers were looking for, apply equally to committees despite what the British Parliament did?

Mr. KMIEC. A majority of the Senate—

Mr. CALABRESI. Because the Rules of Proceedings Clause—

Senator SCHUMER. Let Professor Calabresi finish, and then I will call on you, Dean Kmiec.

Mr. CALABRESI. The Rules of Proceedings Clause authorizes Congress to set up committees and to set up rules of that kind. The filibuster of legislation—

Senator SCHUMER. Well, no—wait a second, Professor. It authorizes committees, and it authorizes rules, okay? It does not say that the committees come from any different genesis than rules. But you are saying the rules are unconstitutional, but the committees are not, even though the formulation of each is majority should rule. It makes no sense.

Mr. CALABRESI. Rules which foster deliberation and debate are perfectly permissible.

Senator SCHUMER. Wait a second—

Mr. CALABRESI. A rule which actually changes the voting outcome, which raises the threshold from 51 to 60 votes to be confirmed to an office, is not constitutional and represents a major extension of the filibuster.

We have had the legislative—

Senator SCHUMER. Wait a second, Professor Calabresi. Then, what you should be saying is—just to be logical here instead of just being totally outcome-determinative—is, then, that committees should be allowed to debate but not block someone from coming to the floor, that it should be a recommendation, because you said rules of debate are okay but not rules that block. A 15 to 4 vote in this Committee will prevent a judicial candidate from getting a majority vote on the floor of the Senate. I do not see any difference. And here you are, coming up with a construct that seems to be almost, with all due respect, made out of thin air, because you want to defend one, and you do not want to defend the other.

My guess—and you will disagree—is that if the Committee blocked it, and good Senator Cornyn came in and said committees blocking nominees is unconstitutional, you would be making exactly the opposite argument.

Go ahead.

Mr. KMIEC. In all fairness, Senator, I do not think anyone is saying that the Committee structure is unconstitutional. I do not think anyone made an argument here this afternoon that the filibuster was unconstitutional.

I think the argument that has been made—and there may not be a consensus here, but there is in fact a good body of Supreme Court opinion and not just the commentaries of William Blackstone—that one previous Senate cannot impose rules on a subsequent Senate without giving that subsequent Senate and a majority of that subsequent Senate, including new Members such as the Chairman of our Subcommittee this afternoon, the opportunity to pass upon those rules.

There is a continuing constitutional injury. It is an injury not just to the Subcommittee chairman; it is an injury to the nominees who the President has put forward, and that is an injury to the separation of powers—and frankly, there is an injury to the people who elected the new members of the Senate who are part of this body, because part of the whole process of the democratic system is accountability.

Senator SCHUMER. So, Dean Kmiec, you are saying that each rule is illegitimate if it is passed on from one Senate to the next regardless.

Mr. KMIEC. That is correct.

Senator SCHUMER. Okay. So you are not particularly holding the filibuster rule to be any worse than the rule on committees or the rule on this or the rule on that. And yet if this Senate were just to ratify its existing rules every 2 years, which I think we did in the House—

Mr. KMIEC. In the House, you did; in the House, you did.

Senator SCHUMER. —then that would be okay?

Mr. KMIEC. Then you would in my judgment meet the constitutional standard.

Senator SCHUMER. Okay. Fair enough.

Mr. KMIEC. But that is where the injury is, and it is an injury now that is compounding our present problem.

And I would just like for a minute to say something in favor of consensus which I know is unpopular. Senator Specter was here earlier in the afternoon, and he put forward a proposal which he called a "protocol." It is a protocol that I think, if you explained it to the American people, they would readily understand. They would say what does the Constitution provide? The Constitution provides that the President shall nominate, and it provides that the Senate shall give its advice and consent. And the people would likely ask: how can that be done reasonably and fairly within a reasonable period of time?

What Senator Specter's protocol is about is putting that framework in place, getting beyond the blame game. We both can do numbers. We can do our separate table of end-run numbers as to who did the worst injury in terms of denying hearings or defeating candidates within the committee.

The real constitutional injury here is failing to act within a reasonable time whoever is in the Presidential office and the constitutional injury that we have just talked about, and that is the entrenchment of rules being imposed from one body onto the next.

Senator SCHUMER. Which could be changed by majority vote.

Mr. KMIEC. And should be changed by majority vote in order to—

Senator SCHUMER. Right. That is why—I do not know why you say "imposed," because then it has gone along with the doing-ness, and the 51 Senators of the majority could propose changes in the rules.

Mr. KMIEC. And right now, it is being manipulated—they could and they should, and Lloyd Cutler, the former White House counsel to President Carter, proposed just that. And I think one of the salutary things that could come out of this afternoon's hearing is if the transcript from this hearing would be given over to the Senate Rules Committee and indeed a change in Rule XXII would be proposed, because that would be the beginning of healing of a process for a system that is in fact broken.

Ms. GREENBERGER. Could I just make sure there is no idea of consensus on that?

Chairman CORNYN. Let me—no—excuse me, excuse me, excuse me. I have the floor.

Senator Schumer, I wanted to inquire about how much more you have. We have been doing 10-minute rounds, and I have given you 20 minutes—

Senator SCHUMER. I was going to let Ms. Greenberger—sorry. I apologize.

Chairman CORNYN. —and I want to give you plenty of time—

Senator SCHUMER. I will let Ms. Greenberger make the last comment from my round of questions.

Chairman CORNYN. That is fine. Thank you very much.

Ms. GREENBERGER. Very quickly, of course, the nub of the controversy here is that this particular Senate rule requires a two-thirds vote to change it, not a majority vote to change it. So it would be changing the rules in a way that was inconsistent with the rules after the game, and that is the missing piece, I think, of the suggestion that makes it such a controversial suggestion and one that neither Professor Gerhardt nor I could support when we discussed it before.

Mr. KMIEC. It was not controversial for Lloyd Cutler, and it is not controversial for me.

Ms. GREENBERGER. Well, that may be. I cannot speak—

Senator SCHUMER. It is to me, because it basically says the President gets whatever he wants; it is not a compromise. You just wait a few months, and he gets it.

Chairman CORNYN. Very well. That was the last question and comment, and with that, I would like to thank all of the distinguished lawyers and scholars who comprise this panel as well as the preceding panel of my colleagues, our colleagues, in the Senate.

I think we have all found this fruitful, and certainly important constitutional questions and issues have been raised and debated, and I was not laboring under the hope, or actually, the expectation—maybe the hope, but not the expectation—that we would finally settle that today.

I want to make sure that I express my gratitude first to Senator Hatch for his leadership on the Senate Judiciary Committee. I do not think, regardless of who leads as Chairman of the Judiciary Committee, it is ever an easy job. I think I remember Senator Biden saying he is sure glad that he is no longer Chairman of the Judiciary Committee. But I believe we owe Chairman Hatch a debt of gratitude for his leadership and for leading us through difficult times for the committee.

I would like to express my gratitude to the staff who have helped us get ready for this hearing, including the staff of Senator Feingold, and all those who have worked so hard to try to allow us to tee-up the important questions that we have addressed here today.

I know that we will have more hearings, and we will continue to have debate about this and other important questions facing our Nation, particularly as they regard the Constitution, as Senator Feingold alluded to earlier and as I alluded to earlier.

And I look forward to future successful hearings and bipartisan cooperation. This is one of the few hearings that I think we have ended where everybody sort of had a smile on their faces.

Senator SCHUMER. Oh, yes. And I want to thank the witnesses. They have been here for a long time.

Chairman CORNYN. Absolutely.

Senator SCHUMER. I consider this fun; I hope you do.

Chairman CORNYN. And with that, this hearing of the Senate Subcommittee on the Constitution, Civil Rights, and Property Rights is hereby adjourned.

[Whereupon, at 6:01 p.m., the Subcommittee was adjourned.]

[Questions and answers and submissions for the record follow.]
[Additional material is being retained in the Committee files.]

QUESTIONS AND ANSWERS

WRITTEN QUESTIONS TO ALL PANEL II WITNESSES

U.S. SENATOR JOHN CORNYN, CHAIRMAN

U.S. SENATE SUBCOMMITTEE ON THE CONSTITUTION, CIVIL RIGHTS AND PROPERTY RIGHTS

"JUDICIAL NOMINATIONS, FILIBUSTERS, AND THE CONSTITUTION: WHEN A MAJORITY IS DENIED ITS RIGHT TO CONSENT"

Tuesday, May 6, 2003, 2 p.m.
Dirksen Senate Office Building Room 226

1. During the hearing, one Senator said that "I have never heard before people suggesting that filibusters are unconstitutional." Are you aware of any individuals (in addition to the numerous individuals who either testified before or sent written testimony to the subcommittee) who have stated that filibusters are unconstitutional, when used not to ensure adequate debate but to change the constitutional standard for taking action?

2. It was made clear at the hearing by several witnesses that there is an important constitutional difference between abusive filibusters of judicial nominees, on the one hand, and the use of committee procedures or holds on judicial nominees, on the other hand. There seems to be continuing confusion on this issue for some, however. Accordingly, I would ask that you state your view in writing here, and do so by addressing the following series of questions:

Prominent Democrats, including Lloyd Cutler and Senators Tom Daschle, Joe Lieberman, and Tom Harkin have condemned abusive filibusters as unconstitutional on the ground that they trample upon the constitutional rights of a majority of the Senate to take action. Does the position of these leading Democrats *require* them also to condemn the existence of committees or committee procedures as unconstitutional? Do committee procedures or holds on nominations raise the same constitutional objections, and pose the same threat to the constitutional doctrine of majority rule, as abusive filibusters? Is there any constitutional distinction between the two? Why or why not?

3. During the hearing, it was contended by at least one Senator that President Bush has nominated no Democrats to be federal judges. Is that statement correct? Can you name any nominees nominated by President Bush who are Democrat?

4. Can a previous Congressional majority bind a future Congressional majority, by enacting laws that cannot be amended or repealed by subsequent Congressional majorities? For example, do you believe that Congress has the constitutional authority to enact a law which cannot be amended or repealed except by a supermajority voting requirement of, say, 3/4ths of both Houses of Congress? Finally, can a previous Senate majority bind a future Senate majority, by enacting rules that cannot be amended or repealed by subsequent Senate majorities?

5. It has been stated that the Senate is a continuing body. That is true in some senses, and not true in other senses. On the one hand, at the beginning of each Congress, the Senate newly organizes itself, it constitutes new committee memberships, and it elects new officers. And of course, a third of the Senate is newly elected with every Congress. On the other hand, the standing rules of the Senate continue to be in effect from Congress to Congress, and need not be ratified anew at the beginning of each Congress. But that is, of course, no different than most acts of Congress, which continue from Congress to Congress without further action from either the House or the Senate.

Thus, even assuming that the Senate is in fact a continuing body, does that affect in any way the constitutional power of a future majority of the Senate to change Senate Rules, any more than it affects the constitutional power of a future majority of Congress to change acts of Congress?

6. As we discussed at the hearing, Professors Catherine Fisk and Erwin Chemerinsky (like several other law professors and lawyers) have written law review articles concluding that a majority of the Senate has the constitutional power to change the rules and, specifically, to abolish supermajority requirements for approving nominations, and that using Senate Rule XXII to obstruct a majority from changing the rules (as opposed to merely ensuring adequate debate) would be unconstitutional.

During the hearing, I noted that Professor Gerhardt and Ms. Greenberger specifically cited the Fisk/Chemerinsky article to support their own conclusion that filibusters are always constitutional no matter how badly they are abused. Nowhere in their written statements, however, did either Professor Gerhardt or Ms. Greenberger mention that, under the constitutional theory of Fisk and Chemerinsky, a majority of the Senate can change the rules at any time, and that Rule XXII is unconstitutional if it is abused to block such a majority from changing the rules.

To the contrary, Professor Gerhardt explained at the hearing that "I rely on them [Fisk and Chemerinsky] for factual matters but not otherwise." Page 5 of Professor Gerhardt's written testimony, however, includes a quote which states (incorrectly, in my view) that "the continuous use of filibusters since the early Republic provides compelling support for their constitutionality." To support that statement, he specifically cited the Fisk and Chemerinsky article, among other things.

I would ask Professor Gerhardt, in light of his citation of Fisk and Chemerinsky on page 5 of his written statement, whether he stands by his contention during the hearing that he relied on the Fisk and Chemerinsky article "for factual matters but not otherwise."

I would invite any other member of the panel to comment.

7. It has been claimed (by Professor Gerhardt and others) that 59 judicial nominees of President Clinton were never acted upon by the Senate.

I would ask Professor Gerhardt to provide a list of those 59 nominees, and I would ask all the panelists to explain whether or not there is any constitutional or other kind of difference between their circumstances, on the one hand, and those of the nominees currently being subjected to a months-long filibuster on the floor of the United States Senate, on the other hand.

8. In his book, *The Federal Appointments Process*, published in the year 2000, Professor Gerhardt criticized a proposal to impose a supermajority requirement for confirming Supreme Court justices. He said that "the dynamic brought about by the proposal would be more likely to frustrate rather than facilitate the making of meritorious appointments." Do you agree or disagree with that statement?

9. In that same book, Professor Gerhardt wrote that "[t]he final problem with the supermajority requirement is that it is hard to reconcile with the Founders' reasons for requiring such a vote for removals and treaty ratifications but not for confirmations. . . . The Framers required a simple majority for confirmations to balance the demands of relatively efficient staffing of the government." He also said that "[t]he Constitution . . . establishes a presumption of confirmation that works to the advantage of the president and his nominees. First, by requiring only a bare majority of the Senate for approval, the Constitution sets a relatively low threshold for the president's nominees." Do you agree or disagree with these statements?

10. In that same book, Professor Gerhardt writes that "[t]he Senate routinely delegates fact-finding authority to committees (and empowers individual senators to exercise holds or attempt filibusters, under certain conditions) to assist in rendering judgments on various matters over which the body has exclusive control." Please comment on this statement, and how you think the Senate's routine delegation of certain functions, as a general matter, bears upon any constitutional issues which may arise when the Senate's rules are *abused* to block a majority from taking action on specific judicial nominees.

11. Senator Leahy has propounded a series of questions to Professor Gerhardt, which I attach here. I would like to provide every other member of the panel with the opportunity and option to answer those questions as well.

Written Questions from Senator Patrick Leahy to Professor Michael J. Gerhardt:

1. The Subcommittee on the Constitution received testimony from several witnesses regarding the ability of one legislature to enact rules that carry over to the next session. Setting aside references by some witnesses to state and local legislatures, please share with us your views on the following:

   a. the structural differences between these bodies that may inform disparate traditions in self-governance;

   b. the historical differences between the United States Senate and the United States House of Representatives in promulgating and changing their rules;

   c. the constitutionality of Rule 5 of the Senate Rules;

   d. the proper timing that any rule changes should be proposed and considered; and

   e. Professor Eastman's written testimony that "any attempt to filibuster a proposal to change the rules would itself be unconstitutional."

2. Please comment on the argument promoted by certain hearing witnesses, including Bruce Fein, that there is an important constitutional difference between the power of Senators to filibuster judicial nominees and their power to filibuster legislation.

WRITTEN QUESTION TO PROFESSOR JOHN C. EASTMAN

U.S. SENATOR JOHN CORNYN, CHAIRMAN

U.S. SENATE SUBCOMMITTEE ON THE CONSTITUTION, CIVIL RIGHTS AND PROPERTY RIGHTS

"JUDICIAL NOMINATIONS, FILIBUSTERS, AND THE CONSTITUTION: WHEN A MAJORITY IS DENIED ITS RIGHT TO CONSENT"

Tuesday, May 6, 2003, 2 p.m.
Dirksen Senate Office Building Room 226

1. During the hearing, Senator Feingold asserted that your testimony before the subcommittee was inconsistent with certain claims you had made in previous writings. I would like to provide you with an opportunity to respond in writing.

Ho, James (Judiciary)

From: Calabresi Steve [s-calabresi@law.northwestern.edu]
Sent: Monday, June 16, 2003 4:44 PM
To: Stahl, Katie (Judiciary); Ho, James (Judiciary)
Cc: s-calabresi@northwestern.edu
Subject: Answers to Questions From the Committee

Dear Ms. Stahl:

Please find below my answers to the questions from the Committee:

1. The principal person who to my knowledge has argued that filibuster are unconstitutional when used not to ensure adequate debate but to change the constitutional standard for taking action is Lloyd Cutler, former White House Counsel to Presidents Jimmy Carter and Bill Clinton. Mr. Cutler state in an op-ed in the Washington Post that the Senate's filibuster rule is plainly unconstitutional.

2. It is perfectly consistent to belive that abusive filibusters are unconstitutional but that committee procedures or holds are permissible. Committee procedures and holds are authorized by a majority of the Senate. Senate majorities can authorize holds, committees, and rules governing debate pursuant to the rules of proceeding clause of the Constitution. Senate majorities cannot, however, change the threshold for a vote from whatever the Constitution prescribes. I believe the Constitution contemplates that Senate confirmations were to be by majority vote. Indefinite filibusters raise the threshold vote required from a majority to 60 Senators. This raises a serious constitutional issue. Now, practice has established that indefinite filibusters of legislation are OK, even though as an original matter, they might have been of doubtful constitutionality. The practice on judicial confirmations, however, is that there has never been an indefinite filibuster of a judicial nomination until this very year with Miguel Estrada. The constitutional issue raised here therefore is: should the constitutionality of indefinite filibusters of nominations be assessed with reference to the text of the Constitution or with reference to the tradition of allowing indefinite filibusters of legislation. I believe the text of the Constitution should be our guide and that, accordingly, indefinite filibusters of judicial nominations are unconstitutional, even though practice has established that indefinite filibusters of legislation are OK.

3. President Bush has named two Democrats to critical Court of Appeals posts: Barrington Parker to the Second Circuit and Roger Gregory to the Fourth Circuit. This is astonishing, since usually Court of Appeals nominees are always members of the same political party as the President. To name two Democrats to such prominent posts is an extraordinary show of bipartisanship. By way, of comparison, I am not aware of ANY Republicans appointed to Court of Appeals posts by former President Bill Clinton during his 8 years in office.

4. No, I do not believe previous Senate majorities can bind future Senate majorities by enacting laws that cannot be repealed by say a 3/4 majority. It is an ancient principle of English and American law that one session of a legislature cannot bind a future session of a legislature.

Some argue that the Senate is different because it is a continuing body since only 1/3 of the Senate's membership turns over every 2 years. They claim that when the Senate adopts rules binding future Senates, the Senate is binding itself. I disagree with this and do not believe the Senate is a continuing body. It has been the tradition in the Senate to pick new majority and minority leaders and to make new allocations of committee seats to the political parties once every two years. I believe this practice reflects an acknowledgment that the Senate turns over every two years, even though 2/3 of the Senators' terms continue on. For this reason, I do not think the Senate is a continuing body, and I do not think the Senate is only binding itself when it purports to limit what a future majority can do.

5. As I said above, I do not believe that the Senate is a contnuing body in any important sense, and so I do not believe one session of the Senate can bind another. But, even if the Senate were in some sense a continuing

body I believe the rules of its proceeding clause of the Constitution contemplates that a majority of the Senate can always change the Senate's rules at any time. A rule that purports to require a 2/3 majority for cloture on rules changes is itself unconstitutional.

6. I think the Fisk and Chemerinsky article is very scholarly and is totally persuasive when it argues that a majority of the Senate can always change the Senate's rules notwithstanding Rule XXII.

7. The difference between the 59 Clinton nominees not acted upon by the Republican Senate in the late 1990's and the situation today is that today there is a majority of Senators that want to confirm nominees such as Miguel Estrada whereas several years ago there was not a Senate majority that wanted to confirm additional Clinton nominees. Thus, if one believes in Democracy and in majority rule, as I do, one must think that Estrada and Owen should be confirmed, whereas additional Clinton nominees ought not to have been confirmed. The fact of the matter is that President Clinton got to appoint as many judges during his 8 years as President as President Reagan got to appoint during his 8 years. The Democrats have not been mistreated. What they want is for Clinton to have gotten to appoint 59 more judges in 8 years than Reagan got to appoint. That would be totally unfair!

8. I agree with Professor Gerhardt's statement in his book that supermajority requirements for appointing judges would result in less meritorious appointments being made.

9. I agree with Professor Gerhardt's statements in his book and disagree with his testimony before the Committee.

10. I agree with Professor Gerhardt's statements in his book condoning the use of holds, committees, and oridnary rules governing debate, but I don not see how those permissible practices condone indefinite filibusters of judicial nominees which raise the threshold for confirmation from a majority to 60 votes.

WRITTEN QUESTIONS TO ALL PANEL II WITNESSES

U.S. SENATOR JOHN CORNYN, CHAIRMAN

U.S. SENATE SUBCOMMITTEE ON THE CONSTITUTION, CIVIL RIGHTS AND PROPERTY RIGHTS

"JUDICIAL NOMINATIONS, FILIBUSTERS, AND THE CONSTITUTION: WHEN A MAJORITY IS DENIED ITS RIGHT TO CONSENT"

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Response of John C. Eastman

Question 1. During the hearing, one Senator said that "I have never heard before people suggesting that filibusters are unconstitutional." Are you aware of any individuals (in addition to the numerous individuals who either testified before or sent written testimony to the subcommittee) who have stated that filibusters are unconstitutional, when used not to ensure adequate debate but to change the constitutional standard for taking action?

Answer: As I noted in my prepared testimony, several sitting Senators have contended on the floor of the Senate that filibusters are unconstitutional. On January 4, 1995, for example, Senator Lieberman stated that "there is no constitutional basis for [the filibuster]... [I]t is, in its way, inconsistent with the Constitution, one might almost say an amendment of the Constitution by rule of the U.S. Senate."[1] Senator Daschle noted on January 30, 1995, that "the Constitution is straightforward about the few instances in which more than a majority of the Congress must vote: A veto override, a treaty, and a finding of guilt in an impeachment proceeding. Every other action by the Congress is taken by majority vote. The Founders debated the idea of requiring more than a majority . . . . They concluded that putting such immense power into the hands of a minority ran squarely against the democratic principle. Democracy means majority rule, not minority gridlock."[2] And on March 1, 1994, Senator Harkin said: "I really believe that the filibuster rules are unconstitutional. I believe the Constitution sets out five times when you need majority or supermajority votes in the Senate for treaties, impeachment."[3]

Lloyd Cutler, former White House Counsel to both Presidents Clinton and Carter, has repeatedly argued that the Senate's 60-vote requirement to end a filibuster is unconstitutional, and that the 2/3 requirement to change the rules is likewise

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[1] 141 Cong. Rec. S37 (Jan. 4, 1995).

[2] 141 Cong. Rec. S1749 (Jan. 30, 1995).

[3] 140 Cong. Rec. S2160 (Mar. 1, 1994). See also Harkin, Lieberman to Fight Use of Senate Filibuster, Gannett News Service, Nov. 22, 1994, available in LEXIS, News Library, GNS File.

unconstitutional. Back in 1968, for example, when the filibuster of President's Johnson's nomination of Abe Fortas to be Chief Justice was underway, Cutler argued that the filibuster was unconstitutional. In 1993, he again argued that both the 60-vote requirement to end a filibuster and the 2/3 requirement to change the cloture rules were unconstitutional.[4] He reiterated the point in testimony before the Joint Committee on the Organization of Congress.[5]

Legal scholars, too, have suggested that filibusters are unconstitutional. Although ultimately defending its constitutionality, U.S.C. Law Professor Erwin Chemerinsky and Loyola Law School Professor Catherine Fisk acknowledged in a 1997 Stanford Law Review article that "there are strong textual arguments that the filibuster is unconstitutional."[6] "The Constitution's procedures for adopting laws assume," they noted, "that a majority vote in each house would be sufficient to enact a law, and the Constitution expressly outlines those situations where supermajority votes are required."[7] They also noted that "it can be argued that the filibuster is inconsistent with the general constitutional commitment to majoritarianism."[8] And, in the analogous context of the 1995 decision by the House of Representatives to impose a 60% supermajority requirement for tax increases, a group of 17 distinguished law professors, led by Yale Law Professor Bruce Ackerman,[9] wrote to then-Speaker of the House Newt Gingrich that such a requirement was unconstitutional – a violation of the implicit requirement for majority rule in all instances except where the Constitution specifically provides otherwise. Although this position was persuasively refuted by other constitutional scholars John McGinnis and Michael Rappaport, the fact that some of the leading constitutional law scholars in the land adhered to it in a published, open letter to the Speaker of the House of Representatives demonstrates just how non-frivolous the argument against the constitutionality of the filibuster is. Indeed, when Judge Harry Edwards, then-Chief Judge of the U.S. Court of Appeals for the D.C. Circuit, contended in dissent in *Skaggs v. Carle* that the House supermajority requirement was unconstitutional, he specifically noted that the arguments in favor of the supermajority requirement "would allow the Senate to adopt an internal rule of procedure that requires the votes of three-fifths, rather than one-half, of its Members to confirm a presidential

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[4] Lloyd Cutler, The Way to Kill Senate Rule XXII, Wash. Post, Apr. 19, 1993, at A23.

[5] See Hearings Before the Joint Comm. On the Org. Of Cong., 104th Cong. (1995) (statement of Lloyd Cutler, White House Counsel). [cited in Chemerinsky, 49 Stan. L. Rev. at 183 n.13??].

[6] C. Fisk and E. Chemerinsky, "The Filibuster," 49 Stan. L. Rev. 181, 224 (Jan. 1997).

[7] Id.

[8] Id.

[9] Other signatories were: Akhil Amar, Jack Balkin, Paul Kahn, and Jeb Rubenfeld (Yale Law School); Susan Low Bloch (Georgetown University Law Center); Philip Bobbitt, Douglas Laycock, Sanford Levinson (University of Texas Law School); Richard Fallon and Frank Michelman (Harvard Law School); Philip Kurland, David Strauss, and Cass Sunstein (University of Chicago Law School); Michael Perry (Northwestern University School of Law); Robert Post (University of California School of Law, Boalt Hall); and Harry Wellington (Dean, New York Law School). Id. at 1544.

appointee." "The Senate," he continued, "acting unilaterally, could thereby increase its own power at the expense of the President."[10]

Question 2. It was made clear at the hearing by several witnesses that there is an important constitutional difference between abusive filibusters of judicial nominees, on the one hand, and the use of committee procedures or holds on judicial nominees, on the other hand. There seems to be continuing confusion on this issue for some, however. Accordingly, I would ask that you state your view in writing here, and do so by addressing the following series of questions:

Prominent Democrats, including Lloyd Cutler and Senators Tom Daschle, Joe Lieberman, and Tom Harkin have condemned abusive filibusters as unconstitutional on the ground that they trample upon the constitutional rights of a majority of the Senate to take action. Does the position of these leading Democrats *require* them also to condemn the existence of committees or committee procedures as unconstitutional? Do committee procedures or holds on nominations raise the same constitutional objections, and pose the same threat to the constitutional doctrine of majority rule, as abusive filibusters? Is there any constitutional distinction between the two? Why or why not?

Answer: There is a critically important distinction between the filibuster, on the one hand, and various committee procedures that prevent or delay a vote on a nominee, on the other. While both are equally problematic in denying to the President the "advice and consent" that the Senate is obliged to provide under Article II, committee procedures that delay a vote on a nominee exist with the acquiescence of a majority of the Senate; a majority is always free, on motion, to discharge a committee from further consideration of a nomination,[11] as happened recently with the nomination of Ted Olson to be Solicitor General.[12] The filibuster, on the other hand, can be used to thwart the will of a majority of the Senate, and, under extant rules, cannot be changed without a 2/3 vote.[13] As Georgetown Law Professor Mark Tushnet has recently noted in an e-mail exchange on the subject (which I reproduce with his permission):

> [T]here's a difference between the use of the filibuster to derail a nomination and the use of other Senate rules -- on scheduling, on not having a floor vote without prior committee action, etc. -- to do so. All those other rules (I think) can be overridden by a majority vote of the Senate (to suspend the rule in question, or whatever the appropriate

[10] 110 F.3rd 831, 838 (D.C. Cir. 1997).

[11] See Senate Rule XVII(4)(a).

[12] See Bill LaForge, "The 'Tenth Justice' and Counterrorism: Theodore B. Olson, Solicitor General of the United States," 49 Fed. Lawyer 18, 20 (March/April 2002). It was just this possibility for defeating the House's supermajority vote requirement for tax increases by a mere majority vote to change the rules that led the D.C. Circuit to deny standing to members of Congress in *Skaggs v. Carle*, 110 F.3d at 835.

[13] Senate Rule XXII(2).

> parliamentary formulation would be), whereas the filibuster rule can't be overridden in that way. A majority of the Senate could ride herd on a rogue Judiciary Committee chair who refused to hold a hearing on some nominee; it can't do so with respect to a filibuster.

Of course, the discharge motion could itself be the subject of a filibuster, preventing a majority from discharging the judiciary committee from further consideration of a judicial nomination, but in that case the thwarting of majority rule would again be due to the filibuster and not the committee's procedures.

Question 3. During the hearing, it was contended by at least one Senator that President Bush has nominated no Democrats to be federal judges. Is that statement correct? Can you name any nominees nominated by President Bush who are Democrat?

Answer: Senator Schumer made this contention during the hearing. As I pointed out at the time, President Bush nominated Democrat Roger Gregory to the U.S. Court of Appeals for the Fourth Circuit. Gregory had initially been appointed to the Court by President Clinton on a temporary recess appointment on December 27, 2000, just three weeks before the end of President Clinton's term of office. President Bush also nominated Barrington Parker, Jr. to the U.S. Court of Appeals for the Second Circuit, who had previously been appointed by President Clinton to the District Court for the Southern District of New York; Robert Junell, 7-term Democrat representative in the Texas legislature, and Texas state court judge Phil Martinez, to the District Court for the Western District of Texas; Legrome Davis to the District Court for the Eastern District of Pennsylvania, originally nominated by President Clinton to the same position; Broward County Circuit Judge and former trial lawyer James Cohn to the District Court for the Southern District of Florida; former Clinton Administration official (FBI deputy general counsel and U.S. Attorney for Connecticut) Stephen Robinson to the District Court for the Southern District of New York; Democrat Party ward leader Tim Savage to the District Court for the Eastern District of Pennsylvania; and Lance Afric to the District Court for the Eastern District of Louisiana. It is my understanding that all of these individuals are Democrats, with the exception of Mr. Afric, who had been a Democrat until he re-registered as a Republican following the 2000 election.

Question 4. Can a previous Congressional majority bind a future Congressional majority, by enacting laws that cannot be amended or repealed by subsequent Congressional majorities? For example, do you believe that Congress has the constitutional authority to enact a law which cannot be amended or repealed except by a supermajority voting requirement of, say, 3/4ths of both Houses of Congress? Finally, can a previous Senate majority bind a future Senate majority, by enacting rules that cannot be amended or repealed by subsequent Senate majorities?

Answer: I believe this is one of the most critical issues addressed at the hearing, and the one on which there is the most agreement among constitutional scholars. When refuting the claim made by Professor Bruce Ackerman and others that the supermajority requirement for tax increases adopted by the House of Representatives in 1995 was unconstitutional, Professors McGinnis and Rappaport argued that the supermajority

requirement was a constitutional exercise of the House's power to make its own rules "*so long as the rules are themselves subject to repeal or emendation by majority vote.*"[14] To hold otherwise would be to allow on house of Congress to bind its successors, contrary to one of the most fundamental maxims of legislative power, described long ago by William Blackstone (who in turn attributed it to Cicero): "Acts of parliament derogatory from the power of subsequent parliaments bind not."[15] It would also allow one house of Congress essentially to amend the Constitution without resort to the exclusive amendment mechanism spelled out in Article V.[16]

Professors Chemerinsky and Fisk took the same position in their Stanford Law Review article, "The Filibuster." Although they believed that the filibuster rule was a constitutionally permissible exercise of the Senate's power to enact its own rules, they correctly concluded that the attempt to lock in the filibuster rule by permitting amendment of it only by a supermajority vote—what they called "entrenchment" of the filibuster rule—was itself *unconstitutional*. And they pointed to a long line of Supreme Court decisions reaching the same conclusion. In *Ohio Life Insurance and Trust Co. v. Debolt*, for example, the Court held that "no one Legislature can, by its own act, disarm their successors of any of the powers or rights of sovereignty confided by the people to the legislative body."[17] In *Newton v. Commissioners*, the Court held that "[e]very succeeding Legislature possesses the same jurisdiction and power ... as its predecessors. The latter must have the same power of repeal and modification which the former had of enactment, neither more nor less. All occupy, in this respect, a footing of perfect equality."[18] Most significantly, Professors Chemerinsky and Fisk persuasively argued that to allow one legislature to bind a subsequent legislature to rules that could only be changed by a supermajority vote requirement would be the kind of restriction on the political processes that the Supreme Court suggested in footnote four of *United States v. Carolene Products Co.* should be subject to "more exacting judicial scrutiny."[19] "Congressional rules which allow simple majorities of one session of Congress to bind majorities of future sessions can be viewed," they concluded, "as precisely the sort of 'systematic malfunctioning' of which the Court should be concerned."[20]

Question 5. It has been stated that the Senate is a continuing body. That is true in some senses, and not true in other senses. On the one hand, at the beginning of each Congress, the Senate newly organizes itself, it constitutes new committee memberships, and it elects new officers. And of course, a third of the Senate is newly elected with every Congress. On the other hand, the standing rules of the Senate continue to be in

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[14] 105 Yale L. J. at 484 (emphasis added).

[15] 1 William Blackstone, Commentaries *90 (quoted in McGinnis & Rappaport, 105 Yale L. J. at 505).

[16] See McGinnis & Rappaport, 105 Yale L. J. at 505-06.

[1717] 57 U.S. (16 How.) 416, 431 (1853).

[18] 100 U.S. 548, 559 (1879).

[19] 304 U.S. 144, 152 n.4 (1938)

[20] Chemerinsky & Fisk, ?? at 248.

effect from Congress to Congress, and need not be ratified anew at the beginning of each Congress. But that is, of course, no different than most acts of Congress, which continue from Congress to Congress without further action from either the House or the Senate.

Thus, even assuming that the Senate is in fact a continuing body, does that affect in any way the constitutional power of a future majority of the Senate to change Senate Rules, any more than it affects the constitutional power of a future majority of Congress to change acts of Congress?

Answer: No. The fact that the Senate considers itself to be a continuing body actually exacerbates the problem addressed in my response to Question 4 above. Because Senate Rule V provides that the Senate's rules continue from one Congress to the next unless changed (rather than being adopted anew each Congress, as occurs in the House of Representatives), the ability of the Senate at one point in time to bind a future Senate comprised of entirely different individuals by the imposition of supermajority vote requirements to change the rules is greatly enhanced—the Senate does not re-adopt its rules at the beginning of every new Congress, so new Senators are bound by rules that they not only did not make but never even had a chance to ratify. Moreover, as Professors McGinnis and Rappaport have noted, Blackstone's argument about one legislature not being able to bind another is valid not just with a subsequent legislative body but with the same legislative body at a different point in time: "Blackstone's argument that each legislature is equal does not mean merely that the 103d Congress is the equal of the 104th Congress, but also that the 103d Congress on one day is the equal to the 103d Congress on a subsequent day."[21] "Thus, under the traditional view of the Senate [as a continuing body], if one legislature could bind itself, that would permit the Senate to bind itself permanently, which would effectively enable the Senate to amend the Constitution by passing unrepealable rules."[22]

Question 6. As we discussed at the hearing, Professors Catherine Fisk and Erwin Chemerinsky (like several other law professors and lawyers) have written law review articles concluding that a majority of the Senate has the constitutional power to change the rules and, specifically, to abolish supermajority requirements for approving nominations, and that using Senate Rule XXII to obstruct a majority from changing the rules (as opposed to merely ensuring adequate debate) would be unconstitutional.

During the hearing, I noted that Professor Gerhardt and Ms. Greenberger specifically cited the Fisk/Chemerinsky article to support their own conclusion that filibusters are always constitutional no matter how badly they are abused. Nowhere in their written statements, however, did either Professor Gerhardt or Ms. Greenberger mention that, under the constitutional theory of Fisk and Chemerinsky, a majority of the Senate can change the rules at any time, and that Rule XXII is unconstitutional if it is abused to block such a majority from changing the rules.

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[21] 105 Yale L. J. at 506 n.109.

[22] Id.

To the contrary, Professor Gerhardt explained at the hearing that "I rely on them [Fisk and Chemerinsky] for factual matters but not otherwise." Page 5 of Professor Gerhardt's written testimony, however, includes a quote which states (incorrectly, in my view) that "the continuous use of filibusters since the early Republic provides compelling support for their constitutionality." To support that statement, he specifically cited the Fisk and Chemerinsky article, among other things.

I would ask Professor Gerhardt, in light of his citation of Fisk and Chemerinsky on page 5 of his written statement, whether he stands by his contention during the hearing that he relied on the Fisk and Chemerinsky article "for factual matters but not otherwise."

I would invite any other member of the panel to comment.

Answer: I have several comments. First, although long use of a particular practice is strong evidence of its constitutionality, it is not dispositive. As the Supreme Court recognized in *Walz v. Tax Comm'n of New York City*, "[N]o one acquires a vested or protected right in violation of the Constitution by long use, even when that span of time covers our entire national existence and indeed predates it."[23] Second, it is clear that, in their article, Professors Chemerinsky and Fisk argued in favor of the constitutionality of the filibuster in part because the rule supporting the filibuster was subject to change by a mere majority vote. Third, Professor Gerhardt's focus on the constitutionality of the filibuster itself, rather than the "entrenchment" of the filibuster rule, begs the question about the constitutionality of the latter.

Question 7. It has been claimed (by Professor Gerhardt and others) that 59 judicial nominees of President Clinton were never acted upon by the Senate.

I would ask Professor Gerhardt to provide a list of those 59 nominees, and I would ask all the panelists to explain whether or not there is any constitutional or other kind of difference between their circumstances, on the one hand, and those of the nominees currently being subjected to a months-long filibuster on the floor of the United States Senate, on the other hand.

Answer: I have not yet seen a list of the 59 nominees to whom Professor Gerhardt was referring, but I have tried to derive such a list on my own and have come to the following conclusions:

First, several of President Clinton's nominees were held over from one session to another because they were nominated late in the session. As they were eventually confirmed, they cannot be compared to individuals who are being denied a vote altogether through the unprecedented use of the filibuster.

Second, several others were nominated very late in President Clinton's second term. Over the past quarter of a century, the period in which inaction prior to the election is

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[23] 397 U.S. 664, 678 (1970).

presumed has grown steadily, so that now nominees sent to the Senate in the last year of a President's administration are unlikely to receive a hearing. The nominees currently the subject of a filibuster (or other procedural tactics designed to prevent a vote) were nominated during the President's first year in office, not his last.

Many of the nominees were the subject of blue slip holds by home state Senators. Neither Miguel Estrada nor Priscilla Owen is the subject of a blue slip hold.

Finally, both with respect to any of the 59 nominees that were the subject of a blue slip hold, and others who were simply not moved through the Senate Judiciary Committee for hearings, the Senate majority always retained the right to file a discharge petition and force a vote on the floor of the Senate. The current Senate majority has been unable to force a vote on the Senate floor for Estrada and Owen because of the filibuster rules.

Question 8. In his book, *The Federal Appointments Process*, published in the year 2000, Professor Gerhardt criticized a proposal to impose a supermajority requirement for confirming Supreme Court justices. He said that "the dynamic brought about by the proposal would be more likely to frustrate rather than facilitate the making of meritorious appointments." Do you agree or disagree with that statement?

Answer: I agree with this statement. As I noted in my prepared testimony, the framers of the Constitution deliberately placed primary responsibility for appointments in the President because, in their view, a single individual would be more accountable for the caliber of his appointments than a legislative body. Concerned about the possibility of abuse, the framers provided a check on this power by requiring the Senate's advice and consent, but it was a limited check only; the Senate was never intended to have a co-equal role in the appointment process. By effectively establishing a supermajority requirement for confirmation, the use of the filibuster to block judicial nominees who command majority support transfers power from the President to the Senate, with the likely loss of accountability as the result.

Queston 9. In that same book, Professor Gerhardt wrote that "[t]he final problem with the supermajority requirement is that it is hard to reconcile with the Founders' reasons for requiring such a vote for removals and treaty ratifications but not for confirmations. . . . The Framers required a simple majority for confirmations to balance the demands of relatively efficient staffing of the government." He also said that "[t]he Constitution . . . establishes a presumption of confirmation that works to the advantage of the president and his nominees. First, by requiring only a bare majority of the Senate for approval, the Constitution sets a relatively low threshold for the president's nominees." Do you agree or disagree with these statements?

Answer: There is no question that the Constitution does not *require* a supermajority vote for confirmation, and there is also no dispute about the proposition that the default rule for confirmations is simple majority rule. What is a closer question is whether the default "majority vote" rule is itself constitutionally compelled, as Professor Bruce Ackerman, *et al.*, contended when challenging the similar supermajority vote requirement for tax

increases that the House of Representatives imposed upon itself in 1995. As I noted in my prepared testimony, I think this absolutist position does not given enough credence to the Article I power of each House to determine the Rules of its Proceedings. Although, with respect to nominations, there are separation of powers concerns not present in the context of supermajority vote requirements for ordinary legislation, I think that Professors McGinnis and Rappaport probably had it right in their published response: a rule imposing a supermajority vote requirement is permissible, *as long as the rule can itself be changed by the majority*. But the adoption of a rule imposing a supermajority vote requirement that cannot be changed by a majority of the Senate is unconstitutional.

Question 10. In that same book, Professor Gerhardt writes that "[t]he Senate routinely delegates fact-finding authority to committees (and empowers individual senators to exercise holds or attempt filibusters, under certain conditions) to assist in rendering judgments on various matters over which the body has exclusive control." Please comment on this statement, and how you think the Senate's routine delegation of certain functions, as a general matter, bears upon any constitutional issues which may arise when the Senate's rules are *abused* to block a majority from taking action on specific judicial nominees.

Answer: As I note in my response to Question 2 above, I think there is a fundamental difference between various committee procedures that might, and often do, prevent the full Senate from voting on any particular nomination, and the use of the filibuster to block a vote on the nomination. The committee procedures can be trumped by a majority voting on a discharge motion; the filibuster cannot.

11. Senator Leahy has propounded a series of questions to Professor Gerhardt, which I attach here. I would like to provide every other member of the panel with the opportunity and option to answer those questions as well.

Written Questions from Senator Patrick Leahy to Professor Michael J. Gerhardt:

Question 1. The Subcommittee on the Constitution received testimony from several witnesses regarding the ability of one legislature to enact rules that carry over to the next session. Setting aside references by some witnesses to state and local legislatures, please share with us your views on the following:

a. the structural differences between these bodies that may inform disparate traditions in self-governance;

Answer: There is no question that only 1/3 of the Senate faces election every two years, but that fact does not alter the fundamental principle that one legislative body cannot impose its will on a subsequent legislative body. Were it otherwise, Republicans could have filibustered the re-organization of the Senate after Senator Jeffords party switch changed majority control of the Senate to the Democrats (and Democrats similarly could have

filibustered the re-organization that occurred in January of this year, when Republicans regained majority control).

b. the historical differences between the United States Senate and the United States House of Representatives in promulgating and changing their rules;

Answer: Historically, the House re-adopts its rules at the beginning of each session, but the Senate's rules continue in effect without formal re-adoption. As I note above in my response to Question 5, however, that actually exacerbates the problem of a prior Senate imposing its will on the existing Senate, as the newly-elected Senators have never had a chance even to ratify the existing rules.

c. the constitutionality of Rule 5 of the Senate Rules;

Answer: To the extent Rule 5 merely keeps existing rules in place until the Senate decides to adopt new rules, it is perfectly constitutional. But to the extent it mandates a supermajority requirement to change the rules, it is unconstitutional, in my view, effectively allowing the Senate that adopted the rules to impose its will on the current Senate, therefore rendering the current Senate subservient to, rather than the equal of, the Senate that adopted the rules. The House of Representatives has a similar requirement of a 2/3 vote to suspend its rules, yet a majority of the House has, in the past, voted to modify that rule so that "a motion to suspend the rules should be agreed to by a majority instead of by a two-thirds vote."[24]

d. the proper timing that any rule changes should be proposed and considered; and

Answer: Article I, Section 5 of the Constitution gives to each House the power to adopt rules for its own proceedings. Nothing in the text of the Constitution limits the exercise of that power to any particular moment in the legislative session.

e. Professor Eastman's written testimony that "any attempt to filibuster a proposal to change the rules would itself be unconstitutional."

Answer: I stand by my testimony. The use of the filibuster to prevent a majority from changing the rules would deprive the majority of the Senate of its ability to make rules for its proceedings, in violation of Article I, section 5.

Question 2. Please comment on the argument promoted by certain hearing witnesses, including Bruce Fein, that there is an important constitutional difference between

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[24] VIII Cannon's Precedents of the House of Representatives 841; *see also Skaggs v. Carle*, 110 F.3d 831, 835 (D.C. Cir. 1997).

the power of Senators to filibuster judicial nominees and their power to filibuster legislation.

Anwer: As Lloyd Cutler noted in opposition to the filibuster of Abe Fortas' nomination to be Chief Justice of the United States, "Nothing would more poorly serve our constitutional system than for the nominations to have earned the approval of the Senate majority, but to be thwarted because the majority is denied a chance to vote. ...Whatever the merits of the filibuster as a device to defeat disliked legislation, its use to frustrate a judicial appointment creates a dangerous precedent with important implications for the very structure of our Government."[25] The use of the filibuster in order legislative matters amounts to the Senate imposing a restriction upon itself, but the use of the filibuster in confirmations allows a minority of the Senate to impose a restriction on the President, who has primary responsibility for appointments under Article II.

[25] September 29, 1968 Letter criticizing the use of the filibuster against the nomination of Abe Fortas to be Chief Justice. The current filibuster is even more problematic than the one successfully waged against Fortas, because Fortas never received majority support on a cloture vote as Miguel Estrada has done now on several occasions.

WRITTEN QUESTION TO PROFESSOR JOHN C. EASTMAN

U.S. SENATOR JOHN CORNYN, CHAIRMAN

U.S. SENATE SUBCOMMITTEE ON THE CONSTITUTION, CIVIL RIGHTS AND PROPERTY RIGHTS

"JUDICIAL NOMINATIONS, FILIBUSTERS, AND THE CONSTITUTION: WHEN A MAJORITY IS DENIED ITS RIGHT TO CONSENT"

Tuesday, May 6, 2003, 2 p.m.
Dirksen Senate Office Building Room 226

1. During the hearing, Senator Feingold asserted that your testimony before the subcommittee was inconsistent with certain claims you had made in previous writings. I would like to provide you with an opportunity to respond in writing.

Answer: I believe that Senator Feingold simply misunderstood the import of the passages he quoted from my prior articles. What I argued in the NeXus law review article from which he quoted was that even a Senate majority should not impose an ideological litmus test on a president's judicial nominees, at least when the nominee's ideology was not one that was inconsistent with the nominee's oath of office. Such would be an expansion of the "advice and consent" role envisioned by the Constitution's framers that would intrude both on the President's primary responsibility for appointments and on the independence of the judiciary itself. It is even more problematic for a *minority* of the Senate to attempt, through the use of procedural rules such as the filibuster, to impose ideological litmus tests on presidential nominees. My testimony opposing the use of the filibuster against judicial nominees is therefore fully consistent with my early writings describing the Constitution's assignment to the President of the principal role in judicial appointments.

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June 16, 2003

Senator Orrin Hatch
Chairman
United States Senate
Committee on the Judiciary
~~Washington, D.C. 20510-6275~~

Dear Mr. Chairman:

I have enclosed for inclusion in the committee record answers to questions and articles I have authored relating to the constitutionality of applying a Senate filibuster rule to the confirmation of judicial nominees. I applaud the committee's efforts to discover an enlightened escape from the tumult that now afflicts the nominations of Miguel Estrada and Priscilla Owen, with omens for a future Supreme Court nominee.

Very truly yours,

Bruce Fein

Bruce Fein

Responses of Bruce Fein to Subcommittee Questions

1. Long before the current dispute, prominent Democrats, such as former White House Counsel to President Jimmy Carter, Lloyd Cutler, insisted that the filibuster was unconstitutional. Senate Republicans thus have not contrived a novel constitutional theory to attack the Democrat filibusters of two of President George W. Bush's judicial nominees.

2. The decisive constitutional question is whether the Appointments Clause requires that a majority retain the power to force a floor vote where a simple majority will prevail. It is my understanding that Senate rules would enable a Senate majority if so inclined to force judicial nominees out of recalcitrant committees or to override permanent holds on nominations. But any rule that prevents a Senate majority from prevailing in the confirmation of a judicial nominee is unconstitutional and unenforceable if a Senate majority objects.

3. The public record speaks for itself, and shows that President Bush has appointed approximately a half-dozen Democrats. This observation, however, seems irrelevant to the constitutionality of the filibuster as applied to judicial nominees.

4. The Constitution empowers each Congress to pass laws with simple majorities in the House and Senate. A law may amend or repeal a pre-existing law. If that were not true, the laws might resemble a petrified forest. One Congress could enact a law declaring that no future law could disturb the status quo unless unanimously approved in both the House and Senate in 20 consecutive Congresses. But as Chief Justice John Marshall lectured in McCullough v. Maryland, 17 U.S. 316 (1819), the Constitution was drafted to live for the ages, not to become a museum piece. Senate rules fare no differently than statutes in attempting to bind future Senate majorities for the same reasons. Each popular consensus represented in the most recent biennial elections is entitled to prevail under the same constitutional standards as its predecessors. All enjoy the same democratic respect and legitimacy.
5. No. The analysis elaborated in the question is impeccable.
6. Longevity of use did not save the constitutionality of the legislative veto, INS v. Chada, 462 U.S. 919 (1983), restrictions on the power of the President to remove executive officers, Myers v. United States,

272 U.S. 52 (1926), federal common law, Erie Railroad Co. v. Tompkins, 304 U.S. 64 (1938) or political patronage, Elrod v. Burns 427 U.S. 347 (1976). An early Congress enacted the Alien and Sedition Act of 1798, but the Supreme Court held sedition laws unconstitutional in New York Times Co. v. Sullivan 376 U.S. 254 (1964).

7. A Senate majority never sought to exert its will to force a vote on the 59 nominees. The constitution does not require that a majority do so, but acknowledges its discretion to acquiesce in minority blocking tactics. With regard to the current filibusters of two judicial nominees, a Senate majority is clearly intending to have its voice prevail under the simple majority standard of the Appointments Clause.

8. I agree with the statement, as corroborated by the appointment of controversial but brilliant Louis D. Brandeis in 1916. The greater the ability of a minority to block nominees, the greater the necessity to resort to the lowest common denominator of mediocrity to obtain confirmation.

9. I agree. Professor Gerhardt is a great witness against himself.

10. None of the procedures recited by Professor Gerhardt thwart an aroused and aggressive Senate majority from insisting on a floor vote where its views would prevail. See response 7, supra.

11. In response to question 2 propounded by Senator Patrick Leahy to Professor Gerhardt, a filibuster to thwart legislation furthers the constitutional architecture antagonistic to new laws. In contrast, the Appointments Clause celebrates simple majorities for confirmation to encourage the appointments of Justices with bold minds that question conventional legal wisdom, like Brandeis. A filibuster to frustrate judicial nominees blemishes that architecture by preferring pedestrian, lowest common denominator candidates. Accordingly, filibustering legislation is much less constitutionally problematic than filibustering judicial nominees.

12. I have enclosed a copy of two columns that I authored for The Washington Times for inclusion in the hearing record.

June 16, 2003

The Honorable John Cornyn, R-Texas
Chair, Subcommittee on the Constitution, Civil Rights, and Property Rights
United States Senate Committee on the Judiciary
224 Dirksen Senate Office Building
Washington, D.C. 20510

Dear Senator Cornyn:

I greatly appreciate the opportunity to answer the questions you have asked the panelists, who participated in the May 6, 2003 hearing of the Constitution Subcommittee. Before giving you my specific responses to your questions, I thought a few general points may be in order.

First, I understand at least some of your questions as presuming the notion that a majority within the Senate has a constitutionally protected right to address and indeed to prevail on all issues that come before the Senate. This presumption is at odds with the usual presumption that the Senate's rules, like statutes, are constitutional. As my statement and responses make clear, I respectfully cannot accept the premise of some questions.

Second, my recollection of the May 6 hearings is that at least two witnesses argued that the failures to hold committee hearings and final votes on many of President Clinton's judicial nominations might have violated the Constitution of the United States. This is a radical position that I have never shared. In my book (published three years before the hearings) and my statements before the Subcommittee, I have strongly supported the constitutionality of *all* the inaction, or failures to hold final votes, on some of President Clinton's judicial nominations. I have thus taken this point consistently and well before the May 6 hearings of the Constitution Subcommittee.

Third, I am grateful to address mis-readings and mis-quotes from my book. In the hearing, I made arguments, clearly set forth in my book (and other writings), that support the constitutionality of various procedures, practices, and traditions employed within the Senate that allow a minority to frustrate majority will. The ultimate question before your Subcommittee and the Senate is whether the filibuster traces its legitimacy back to the same authority supporting other, counter-majoritarian measures in the Senate. I personally have had trouble distinguishing the filibuster from these other counter-majoritarian traditions for constitutional purposes. Below, I have organized my responses to follow the order of the questions you have asked.

Question 1: I am aware that there are people, besides those who testified at our hearings, who believe that the filibuster is unconstitutional. I do not know, however, whether these people believe that all filibusters are unconstitutional or believe that filibusters are only unconstitutional

"when used not to ensure adequate debate but to change the constitutional standard for taking action."

Question 2: I am hesitant to attribute beliefs, arguments, or positions to other people, particularly when I am not familiar with everything they have said and written on the subject under discussion. Consequently, I would respectfully prefer not to characterize what Lloyd Cutler's and Senators Daschle's, Lieberman's, and Harkin's statements about particular filibusters or proposals has required them to accept with respect to "the existence of committees or committee procedures as unconstitutional." I assume that each of these distinguished individuals would prefer to speak for themselves.

For myself, I have found it difficult, if not impossible, to distinguish for constitutional purposes among all the procedures employed within the Senate that allow a minority to frustrate majority will. I understand that, for some people, the filibuster is one such measure. Yet, I believe that there are other measures, such as holds, unanimous consent requirements, and committee procedures (including the authority of a committee chair to schedule, or not to schedule, committee hearings and votes) that similarly frustrate a majority's ability to render a final vote on matters on which it might wish to exercise its will. I believe each of these counter-majoritarian measures is constitutional. In the May 6th hearing, at least two witnesses suggested that the failure to hold hearings or schedule committee votes on dozens of President Clinton's judicial nominees might have violated the Constitution. While I do not share this position, I understand it to derive at least in part from a belief that all Senate practices that allow a minority to frustrate a majority's pose similar constitutional difficulties.

I hasten to add that some witnesses also suggested at the May 6 hearing that the constitutionality of committee practices might be salvaged through "majoritarian acquiescence." I have two problems with this position. The first is that majority approval is not necessary for committee rulings to take effect or to become final. A majority of the Senate takes no formal action to legitimize committee practices or rulings that preclude a matter from reaching the Senate floor. It is hardly inconceivable that a committee might preclude a nomination or a piece of legislation from reaching the Senate floor that a majority of the Senate might approve. My second problem is with Dr. Eastman's suggestion that committee or committee chairs' actions precluding matters from reaching the Senate floor may not be constitutionally problematic because a discharge petition may be filed. The problem is that the Senate rules do not empower a simple majority of the Senate to force a matter out of the Committee and onto the Senate floor. The Senate rules require unanimous consent, not a simple majority, for discharge petitions. Unanimous consent is, as you know, the ultimate super-majority voting requirement.

Question 3: My recollection is that at the May 6 hearing Senator Charles Schumer had asked whether President George W. Bush had nominated any Democrats to lifetime judgeships. I know that President Bush re-nominated Roger Gregory to the Fourth Circuit and Legrome Davis to a U.S. District Court judgeship in Pennsylvania, at the request of Republican senators. President Bush also nominated Judge Barrington Parker to the U.S. Court of Appeals for the

Second Circuit; Judge Parker had been nominated to his District Court judgeship by President Clinton. I do not know whether President Bush has nominated any other Democrats, or former Democratic nominees, to lifetime judgeships.

I note for the record that President Clinton agreed to nominate several people to lifetime judgeships suggested by Republican senators. Just in the period of 1999-2000, these people included (but were not limited to) Judge Richard Tallman to the U.S. Court of Appeals for the Ninth Circuit, Judge James Tielborg to the U.S. District Court in Arizona, Judge Ted Stewart to the U.S. District Court in Utah, Judge Barclay Surrick to a U.S. District Court in Pennsylvania, Judge Allen Pepper to a U.S. District Court in Mississippi, and Judge John Darrah to a U.S. District Court in Illinois.

Question 4: This question touches upon the important distinction between law-making and procedural rule-making. I am inclined to think that the Congress may not have "the constitutional authority to enact a law which cannot be amended or repealed except by a supermajority voting requirement . . ." My reason for this conclusion is not because the Constitution restricts entrenchment. Nor do I believe such a law is unconstitutional because it frustrates the will of a majority of the Senate. I think the law about which you ask would be unconstitutional because it allows the President as well as the House to dictate to the Senate what internal, procedural rules it may adopt. In order to be enacted, a law must comply with both the bicameral and presentment clauses. Obviously, a Senate rule does not and should not have to comply with these clauses. Instead, it derives its authority from Article I, Section 5; and neither . the President nor the House has any authority whatsoever to direct how the Senate may exercise its authority under Article I, Section 5.

Article I, Section 5, gives to the Senate, and not the House or the President, plenary authority to devise *its* own procedural rules to govern *its* internal affairs. This clause contains no express limit on the discretion the Senate may employ in promulgating or formulating its procedural rules. Moreover, the Senate is a unique political institution, in which only a third of its members are subject to re-election in any given election cycle. Hence, the Senate has no institutional need, like the House, to reconstitute itself at the outset of each new legislative session. At the same time, the Senate may implement procedural rules requiring either a super-majority vote to amend its rules or a super-majority vote to end a filibuster against a motion to amend its rules. I believe these rules are unconstitutional only if they violate a fundamental right or are irrational. There is no fundamental right implicated by the super-majority voting requirements I just described, and those requirements are supported by the plausible justification that they are sometimes needed both to foster institutional stability and to protect against a simple majority from making rules changes for expedient reasons rather than the long-term interests of the Senate.

Interestingly, a super-majority voting requirement has the further, arguable advantage in not being as hard to achieve as unanimous consent, which has been a staple within the Senate since the beginning of the Republic. From 1806 until 1917, only unanimous consent could end a

filibuster. The super-majority now required by the rules to invoke cloture is easier to attain than unanimous consent was during that period.

Question #5: As you observe in the question, the Senate has standing rules, which "need not be ratified anew at the beginning of each new Congress." I do not wish to presume what you meant in making this acknowledgment, but the acknowledgment, on its face, seems to concede that standing rules are legitimate and may bind the Senate not just in, but across, legislative sessions. These rules need not be re-authorized at the outset of each new session because they remain, according to the institution's own rules, already in effect. In 1959, the Senate adopted Rule V to reflect its longstanding practice before then, which was to allow its rules to be in effect from one legislative session through the next.

Question #6: I appreciate the chance to follow up on my response to the Chair's question whether I relied on Chemerinsky and Fisk for only factual matters. First, I acknowledge that in my written statement I did not cite Chemerinsky's and Fisk's position on the constitutionality of a supermajority voting requirement to alter Senate rules. I cited their article twice in my statement, and at the time did not think it was necessary to explain all my differences with their argumentation. I apologize for not being aware that the Chair preferred that in citing references we clarify the portions of an article or book with which we disagree. With all due respect, I am not sure other witnesses have complied with this expectation. For instance, other witnesses (and perhaps others who have relied on their testimony) have cited my book to support their arguments, but they have acknowledged the arguments within the book that are contrary to their positions or with which they disagree. I hasten to add that I have not felt others have had an obligation to cite or explain the full extent of their agreement or disagreement with the arguments in the book; I just had not known until now the Chair's preferences with respect to the extent to which we should discuss arguments in our references with which we do not agree.

Second, in the May 6 hearing I did express my position on the constitutionality of Rule XXII requiring a super-majority vote to end a filibuster of a motion to amend Rule XXII. This position is contrary to that of Professors Chemerinsky and Fisk. At the hearing, I told the Chair that I disagreed with other portions of the Chemerinsky and Fisk article and often reached my conclusions (even on the issues with which we agreed) by a different path than the ones they had used. I regret our discussion was brief and occurred just as the time for the Chair's questions was expiring.

Third, in my written statement I did, as I just indicated, cite to the Chemerinsky and Fisk article twice. I had not thought this was extensive reliance, given that there are more than 20 footnotes in the written statement. The first cite was a direct quote from the Chemerinsky and Fisk article about the filibuster having been continuously used throughout our history. The second cite was at the end of a string citation of authorities for the proposition that the filibuster's continuous use throughout our history provided compelling support for its constitutionality. The main cite I referenced for this proposition was an article by two, notable conservative law professors, John McGinnis and Michael Rappaport. Then, I cited several other publications in

accord with their viewpoint, including the Chemerinsky and Fisk article. I included the article in this list because of its recognition of the continued use of the filibuster throughout our history. I regard the continuity of the filibuster as a factual matter. I apologize if, however, the inclusion of this cite in the written statement was confusing in any way. While Chemerinsky and Fisk agree that the filibuster has been used continuously in our history, they conclude that its constitutionality is a close call and decide that it is constitutional based on their balancing of various arguments and considerations. As I told the Chair at the May 6 hearing, I have disagreed with many portions of their article and the path by which they have reached certain constitutional conclusions. The reasons for the constitutionality of the filibuster are a case in point, for the three of us reach the same conclusion but by different paths – Professors Chemerinsky and Fisk weigh different arguments and sources, and I adopt what I regard as a more rigid analysis that seeks to determine whether the filibuster crosses the line set forth in the Constitution for permissible, internal procedures of the Senate.

Question #7: In my written statement, I wrote, "During Bill Clinton's eight years in office, the Senate did not act on 38% of his circuit court nominations; and from 1995 until the end of Bill Clinton's presidency, the Senate did not act on at least 20 of President Clinton's circuit court nominees." I regret not giving you the source for this statement, which is based on data in Sheldon Goldman's Judicature articles on President Clinton's judicial nominations during his last four years in office and Elizabeth Palmer's article, *For Bush's Nominees, A Tough Tribunal*, Congressional Quarterly Weekly, April 28, 2001, at 902.

Generally, the information I have had on the numbers of judicial nominations on which the Senate did not act derives from Senate sources, including end-of-the-year calendars. While these sources are sometimes incomplete, I would defer to the Senate's records if there is any discrepancy between my figures and what those records show. I recall several numbers mentioned at the hearing, and believe that some calculate the number as high as 65, not 59, judicial nominations on which the full Senate never acted. I should also note that there were many judicial nominations on which the full Senate did not act in 1992, 1993, and 1994. I consider this inaction, too, to be indistinguishable from other counter-majoritarian measures, such as the filibuster, for constitutional purposes.

I defer as well to the data set forth in the CRS Report for Congress, "Judicial Nominations by President Clinton During the 103rd-106th Congresses" (March 12, 2002) (Report #98-510). This Report indicates that there 69 judicial nominations made by President Clinton that the Senate did not confirm. According to this Report, the Senate confirmed only 65 of President Clinton's 106 nominations to federal circuit courts of appeal, and the Senate confirmed 303 of his 382 nominations to U.S. District Courts. According to the Report, from 1995 through 2000, the number of circuit court nominations on which the full Senate did not act were 9 in the 104th Congress, 10 in the 105th Congress, and 19 in the 106th Congress. When one removes from the count those circuit court nominees who had been nominated more than once but were ultimately confirmed, the CRS Report shows that the Senate did not act on 24 of President Clinton's circuit court nominations. The Report also shows that the Senate confirmed

only 15 of President Clinton's 34 nominations made to the federal circuit courts of appeal in 1999-2000. Similarly, the Senate confirmed only 30.3% of his circuit court nominations in 1997-98 and 45% in 1995-96. All of the above-referenced data, which deals with judicial nominations on which the full Senate never acted, is derived from the CRS Report mentioned above. Rather than replicate this data in my written statement, I respectfully ask the Chair to accept this Report in lieu of a list of specific nominations on which the full Senate did not act. These nominations are listed in the CRS Report.

Question #8: The statement to which you refer in this question was made on page 297 of my book. As your question acknowledges, I made this statement in reference to Professor Bruce Ackerman's proposed constitutional amendment to require a super-majority vote in the final Senate vote on a Supreme Court nomination. The paragraph from which you quote follows two other paragraphs in which I discuss how the Ackerman proposal would effect the dynamics in final votes on Supreme Court nominees. You do not, however, quote the whole paragraph from which this quote comes. The entire paragraph, which might be useful to reprint here in order to avoid any confusion, is as follows:

> Indeed, it is conceivable that the dynamic brought about by the proposal would be more likely to frustrate rather than facilitate the making of meritorious appointments (though, as we have seen, there has historically been considerable disagreement over what constitutes merit). The more accomplished a Supreme Court nominee, the more likely the nominee has done or said something in his or her professional life to stir the opposition of some faction. And the two-thirds requirement empowers a small faction – at least one-third of the Senate – to wield a veto power over Supreme Court nominations. Rather than fulfill Ackerman's (and others') desire to ensure that confirmation of Supreme Court nominations will occur with overwhelming public support, this proposal would make it easier for a nominee's opponents to block a nomination because they would have to persuade fewer people than they do at present.

I regret the other witnesses will not see this quote in its entirety. It refers to the possibility of a problem with Professor Ackerman's proposal rather than express the certitude that there would be such a problem, and the possible problem mentioned is relevant because it is inconsistent with Professor Ackerman's own stated preferences in proposing the amendment. Moreover, *it should be clear that in the paragraph (and, for that matter, the entire discussion about the Ackerman proposal) I am discussing the dynamic on the floor in the final vote of the Senate on a Supreme Court nomination. The entire discussion of this proposal is focused on the relative merits of having a majority or super-majority vote in the final vote on a nomination.* The discussion about the Ackerman proposal does not address the legitimacy of the Senate's procedural rules, which I explore elsewhere in the book. It should go without saying that sometimes senators may vote against cloture but in favor of the measure or motion being filibustered or vice versa. A cloture vote does not necessarily represent how a final vote may come out.

Question #9: The quotes referenced in this question are, of course, about the relative merits of a system in which the final vote on a presidential nomination must be by a majority of the Senate. The first is from near the end of my book, and the second is from page 41. If one were to delve deeper into the text of the book, one would find the arguments linking the two quotes together. To begin with, I recognize on page 42 (only a page after your second quote from the book) that the presumption of confirmation forces the Senate to pick and choose its battles with the President. The question that follows from this recognition is how does the Senate pick and choose its battles over nominations. In the next chapter on historical practices and patterns, I begin to set forth my answer to the question with the observation on page 67 that, "developments" in the Senate's internal operations and procedures "are crucial for explaining or evaluating the Senate's efforts to maintain a roughly equal footing with the [P]resident regarding appointments while at the same time trying to increase its efficiency and to handle increased media coverage of its operations." On the next page, I observe that "[t]he aggrandizement of Senate committees has made it easier for small(er) blocs of senators, their powerful chairs, or individual senators to thwart nominations. Moreover, numerous procedural mechanisms and Senate rules allow committees and their chairs (or other powerful or crafty senators) to impede nominations." (I omitted a footnote in the latter sentence.) I proceed to discuss these developments further in an entire chapter dedicated to showing how the Senate has tried to counter-act the advantages that a President has by virtue of the presumption of constitutionality. This chapter is entitled, "The Advice and Consent of the Senate."

I should add that when referring to the presumption of constitutionality I am not talking about the inexorability of majority rule within the Senate. Instead, I am referring to the odds that most presidential nominations, not just for judgeships but for all confirmable offices, will ultimately be approved. (Indeed, I use the term in the same manner as Yale Law School Professor Stephen Carter, who has written extensively on the federal appointments process.) For example, at a June 5 hearing of the Rules Committee, it was noted that the Senate had confirmed all but two of President Bush's judicial nominations that had reached the Senate floor. I believe it was argued there that this amounted to the confirmation of over 98% of the President's judicial nominations. Thus, one could say that these statistics confirm what one would have expected at the outset of President Bush's administration, i.e., the Senate would have approved most of his judicial nominees.

Question #10: You quote accurately from my book the statement about the Senate's "routine" delegations "to committees (and empowers individual senators to exercise holds or attempt filibusters, under certain conditions) to assist in rendering judgments on various matters over which the body has exclusive control." I appreciate the quote, because the more one quotes from the book the more one should find how consistently throughout the book I refer to and acknowledge the constitutionality of such delegations. For example, the sentence you have quoted is on page 299 of the book. Immediately after that sentence I suggest, "Nor has it been unusual outside of the realm of judicial selection for committees, through inaction, protracted deliberation, and delays in scheduling or voting (or individual senators through holds or filibusters), to preclude the Senate from taking final action on matters committed to the whole for

consideration." At this point in the book, I proceed to consider analogizing how the Senate treats treaty ratifications with how it has treated judicial nominations. I suggest that "it is not uncommon for treaties signed by the president to languish in the Senate and even if they get a hearing in the Foreign Relations Committee, never to be subjected to the Senate for a final vote. If the Senate has not been compelled constitutionally to take final actions on treaty ratifications, it should not be compelled to do so with respect to every judicial nomination." The analogy between judicial nominations and treaty ratifications is significant, because the constitutional text sets forth the requirements for ratification and confirmation by the Senate but says nothing about the procedures that the Senate may follow in considering treaty ratifications or judicial nominations.

The relevance of the Senate's "routine" delegations to "constitutional issues which may arise when the Senate's rules are abused to block a majority from taking action on specific judicial nominees" should be crystal clear in a section of the book dedicated to that inquiry. (I should note, however, I respectfully disagree with the use of the word "abused" in the question, because I do not consider any action to be taken in accordance with the rules to be an abuse of the rules. Indeed, such action is authorized by the rules.) This section is entitled, "The Senate's Institutional Obligation to Take Final Action on Every Judicial Nomination,"and covers pages 298-301 of the book. Indeed, this section begins on the page following my discussion of the analogy between treaty ratifications and judicial nominations. Rather than quote that section at length, I would respectfully suggest that it is perfectly consistent with my statements both before and after my appearance before the Subcommittee. These statements reflect my belief, asserted long before the May 6 hearings, that the Senate rules constitutionally allow a minority, sometimes individual senators, to take what is sometimes final action on judicial and other nominations. If a rule is properly adopted, then I do not think it has been "abused to block a majority from taking action on specific judicial nominees." It is a legitimate rule, on the existence of which every senator is on notice from the day he or she arrives in the Senate. With all due respect, I think the notion that a majority has the power to take action on judicial nominations whenever it is so disposed is contradicted by the Senate's longstanding procedures for handling judicial nominations, which can trace their legitimacy back to the Senate's rules which in turn trace their legitimacy to Article I, Section 5, which empowers the Senate to enact such rules. The bulk of what I have read and studied on this subject demonstrates the Senate's longstanding practices to allow minorities sometimes to frustrate majority will. The recognition of this fact in the book is hardly novel, and I am by no means the only scholar who has ever recognized this history. Many if not most people who have written about the Senate's Advice and Consent power have described or acknowledged this history, including the classic work in the field by Joseph Harris in 1953.

In closing, I would respectfully hope that the Subcommittee pays close attention to each of the texts on which each witness relies but none more so than the text of the Constitution. The Constitution nowhere expressly recognize that a majority must prevail on every matter within the Senate. I would note the Supreme Court's unanimous pronouncement, consistent with this silence, that "Certainly any departure from strict majority rule gives disproportionate power to

the minority. But there is nothing in the language of the Constitution, our history, or our cases that requires that a majority always prevail on every issue."[1]) The fact that the Constitution sets forth several super-majority voting requirements does not establish those as the only permissible super-majority requirements either the House or the Senate may use. To the contrary, the existence of these requirements merely means that they constitute only the mandatory minimum set of such requirements either chamber of the Congress may use. Both the House and the Senate employ many such requirements, including but not limited to the House's requirement that at least three-fifths of its members must approve tax increases. Moreover, the Quorum Clause is the only clause that specifically mentions the requirement of a majority for some congressional action. The Clause shows the Framers knew how to require, or empower, a majority for certain action when they wanted to do so. The Framers tellingly did not include any other clause in the Constitution requiring a majority for some action within the House or the Senate. Instead, in Article I, Section 5, they expressly authorized the Senate to adopt its rules to govern its respective proceedings; and so it is to those rules that one should turn for guidance on how Senate business may be done.

I am honored once again to be of service to the Chair, and hope you will not hesitate to let me know if you have other questions.

Very truly yours,

Michael J. Gerhardt
Arthur B. Hanson Professor of Law

[1]Gordon v. Lance, 403 U.S. 1, 6 (1971). The case involved a state law requiring a super-majority of eligible votes to approve tax increases.

June 16, 2003

Senator John Cornyn
Chairman, Subcommittee on the Constitution
Committee on the Judiciary
327 Hart Senate Office Building
Washington, D.C. 20510

Dear Senator Cornyn:

I appreciated the opportunity to testify at the Subcommittee hearing on May 6, 2003, and am pleased to respond to the questions your office transmitted to me following the hearing.

1. The premise of this question, that there is a distinction between filibusters "to ensure adequate debate" and filibusters "to change the constitutional standard for taking action" is not one that I believe has validity. It is my understanding that opposition to cloture on the Estrada or Owen nomination (or any other pending nomination) has not been based on any attempt to "change the constitutional standard for taking action."

2. I do not know what is meant by this question's reference to "abusive filibusters" of judicial nominations, but to the extent that the question makes a blanket assumption that filibusters of judicial nominees are abusive, I disagree. Further, in my view, neither filibusters nor other means of preventing a final vote on a nomination, such as the failure of the Judiciary Committee to take action on a nomination or the placement of a "hold" on a nomination that prevents floor action, is unconstitutional. The Constitution (Art. I, Sec. 5) gives the Senate the power to determine its own Rules of Proceedings, which includes the cloture requirement in Senate Rule XXII as well as committee and floor practices. I defer to Senators Daschle, Lieberman and Harkin, as well as Mr. Cutler, with respect to their views on the constitutionality of filibusters, the existence of committees or committee procedures.

3. My organization does not inquire into the party affiliation of nominees and I do not know the answer to this question.

4. With respect to these questions, I must draw a distinction between the enactment of laws and the adoption of "Rules of Proceedings." The Constitution establishes the manner for the enactment of laws, and the Constitution separately confers upon each House of Congress the power to adopt Rules of Proceedings. The question of whether the enactment of a law is constitutional differs from the of question whether a particular

"Rule[] of Proceedings" is constitutional. Your first two questions here are addressed to the enactment of laws, which is not at issue in the debate over judicial nominations. The last question relates to Rules of Proceeding, which are at issue here. It is not currently the situation, however, that a previous Senate has enacted a rule "that cannot be amended or repealed by a subsequent Senate majority" (as the question states), because current Senate Rules can be repealed or amended by subsequent Senate majority vote, although a current Senate majority cannot *terminate debate* on a motion to amend the Rules without a supermajority vote.

5. As noted above, the question whether a Senate may enact a "Rule[] of Proceedings" that can be amended or repealed only by a supermajority vote differs from the question whether the Senate may enact a law that can be amended or repealed only by supermajority votes. The fact that the Senate is in many respects a continuing body and that its Rules continue until amended or repealed is relevant to the constitutional analysis of whether the Senate could adopt a "Rule[] of Proceeding" that could not be amended or repealed except upon supermajority vote. Again, that is not currently the situation, because current Senate Rules can be repealed or amended by subsequent Senate majority vote, although a current Senate majority cannot *terminate debate* on a motion to amend the Rules without a supermajority vote.

6. With all due respect, this question misstates my testimony. Neither my oral nor my written testimony said that "filibusters are always constitutional no matter how badly they are abused." My written testimony did not discuss the constitutional issues surrounding filibusters at all, and cited the Fisk/Chemerinsky article in the Stanford Law Review only as general background on the use of the filibuster over the course of the Senate's history. (At page two of my written statement, for example, I quoted this article as stating that "[I]t is now commonly said that sixty votes in the Senate, rather than a simple majority, are necessary to pass legislation and confirm nominations.") And at the hearing, when I was asked whether I agree with the constitutional analysis in this article, I said that I agree with parts of it but not all of it. See transcript at p. 116. As I said then, I do not agree with the argument in that article that the two-thirds requirement in Senate Rule XXII with respect to closing debate on a measure to change the Senate rules is unconstitutional. I will leave it to Professor Gerhardt to address the questions about his reference to the Fisk/Chemerinsky article.

7. I am confident that the Judiciary Committee has in its records a list of the Clinton Administration nominations that were never acted upon by the Senate. The figure my testimony cites – that the Senate returned 38 of the 106 Clinton Administration Court of Appeals nominations (nearly 36%) without action – is from Congressional Quarterly Weekly, April 28, 2001 at p. 902. This article notes, for comparison, that during the Reagan Administration, only 9 (9.4%) of the 96 Court of Appeals nominations were returned without action. See my written statement at note 44. With respect to the second part of this question, my response is that neither the Senate's failure to act on a nomination due to committee inaction, as in the case of most or all of the Clinton nominations that were returned, nor the failure to invoke cloture on a nomination, is unconstitutional (see answer to Question 2, above).

8, 9, and 10. I defer to Professor Gerhardt to address the questions about statements in his book. With respect to the last question in Question 10, moreover, I note that the question assumes that the Senate's rules have been "abused" without providing any basis for that assumption.

Sincerely,

Marcia D. Greenberger
Co-President
National Women's Law Center

WRITTEN QUESTIONS TO ALL PANEL II WITNESSES

U.S. SENATOR JOHN CORNYN, CHAIRMAN

U.S. SENATE SUBCOMMITTEE ON THE CONSTITUTION, CIVIL RIGHTS AND PROPERTY RIGHTS

"JUDICIAL NOMINATIONS, FILIBUSTERS, AND THE CONSTITUTION: WHEN A MAJORITY IS DENIED ITS RIGHT TO CONSENT"

Answers by

Dean Douglas Kmiec
Catholic University School of Law

Tuesday, May 6, 2003, 2 p.m.
Dirksen Senate Office Building Room 226

1. During the hearing, one Senator said that "I have never heard before people suggesting that filibusters are unconstitutional." Are you aware of any individuals (in addition to the numerous individuals who either testified before or sent written testimony to the subcommittee) who have stated that filibusters are unconstitutional, when used not to ensure adequate debate but to change the constitutional standard for taking action?

I do not believe the filibuster is unconstitutional. The Senate's power to make its own rules in Article I, Section 5 permits the adoption of super-majority rules that facilitate the filibuster. What is unconstitutional is the entrenchment of those rules – that is, denying a simple majority of each newly composed Senate at least one opportunity to ratify, amend, or repeal the rules. This point is elaborated in my Wall Street Journal essay of March 6, 2003 at A12, and this assessment, I believe, enjoys the affirmation of constitutional scholars across the philosophical spectrum, including the highly respected liberal scholar, Professor Erwin Chemerinsky. See, e.g., "The Filibuster," 49 Stan. L. Rev. 181 (1997).

2. It was made clear at the hearing by several witnesses that there is an important constitutional difference between abusive filibusters of judicial nominees, on the one hand, and the use of committee procedures or holds on judicial nominees, on the other hand. There seems to be continuing confusion on this issue for some, however. Accordingly, I would ask that you state your view in writing here, and do so by addressing the following series of questions:

Prominent Democrats, including Lloyd Cutler and Senators Tom Daschle, Joe Lieberman, and Tom Harkin have condemned abusive filibusters as unconstitutional on the ground that they trample upon the constitutional rights of a majority of the Senate to take action. Does the position of these leading Democrats *require* them also to condemn

the existence of committees or committee procedures as unconstitutional? Do committee procedures or holds on nominations raise the same constitutional objections, and pose the same threat to the constitutional doctrine of majority rule, as abusive filibusters? Is there any constitutional distinction between the two? Why or why not?

I have been invited by the Senate Rules Committee to address the problem of abusive filibusters – what is abusive, however, is not inherent to the filibuster, but to its application, not to legislation, but to nominations, particularly judicial nominations. This is abusive because it adversely affects both the President's appointment authority and the core functioning of the Judicial Branch. There is no long history of judicial filibusters. Indeed, what history there is dates only to the acrimony over judicial nominations that began in the 1980s. The legislative filibuster can enhance deliberation and avoid improvident legislation; the judicial filibuster largely invites only delay and obstruction.

3. During the hearing, it was contended by at least one Senator that President Bush has nominated no Democrats to be federal judges. Is that statement correct? Can you name any nominees nominated by President Bush who are Democrat?

I cannot say that I keep a scorecard of the party affiliations of nominees. It does not surprise me that presidents strongly favor nominees from their own party; this is expected by voters, and indeed, such nominations can be argued to be fulfillment of electoral accountability. That said, I know that President Bush has nominated several individuals who do not share his party affiliation, including Judge Roger Gregory of the 4th Circuit.

4. Can a previous Congressional majority bind a future Congressional majority, by enacting laws that cannot be amended or repealed by subsequent Congressional majorities? For example, do you believe that Congress has the constitutional authority to enact a law which cannot be amended or repealed except by a supermajority voting requirement of, say, 3/4ths of both Houses of Congress? Finally, can a previous Senate majority bind a future Senate majority, by enacting rules that cannot be amended or repealed by subsequent Senate majorities?

It is well established in treatise and case precedent that Congress cannot prevent the repeal of legislation by a subsequent Congress. Congress may prescribe the length of a law's enforcement by means of sunset provision, but even this may be shortened or lengthened as a subsequent Congress may see fit. I know of no direct precedent precluding Congress from limiting a statute's repeal except by super-majority, but given how precisely the Supreme Court has observed the bicameral and presentment requirements and that a supermajority is required under Constitutional text in seven explicit instances, there is a strong argument that it may not be required elsewhere. Certainly, that the constitutional text requires a two-thirds majority of both Houses to override a veto suggests that something less is required for initial passage. Moreover, as the Supreme Court stated in United States v. Ballin, "the act of a majority of the quorum is the act of the body." Other provisions of the text also give rise to an inference denying a super-majority repeal requirement – most notably, Article I, Section 3, Clause 4 authorizing the Vice-President to break ties where the body is evenly divided. As to Senate rules precluding a majority of the Senate from amending its own rules, this is addressed above. Professor Chemerinsky's article recites ample precedent indicating that each subsequent legislature must have equal power to legislate upon the same subject. Carryover rules which a majority of the present Senate has never approved violate this precept.

5.It has been stated that the Senate is a continuing body. That is true in some senses, and not true in other senses. On the one hand, at the beginning of each Congress, the Senate newly organizes itself, it constitutes new committee memberships, and it elects new officers. And of course, a third of the Senate is newly elected with every Congress. On the other hand, the standing rules of the Senate continue to be in effect from Congress to Congress, and need not be ratified anew at the beginning of each Congress. But that is, of course, no different than most acts of Congress, which continue from Congress to Congress without further action from either the House or the Senate.

That the Senate has a composition that largely continues does not make the full body the same, either factually or legally. This is a legal point that has long been debated by the Senate, itself, yet the fact that each Senate is newly numbered, newly restructured in committee assignment and responsive to new leadership strongly suggests that the word "continuing" cannot be used to ignore the intervening election and the need to acknowledge the representational capacity of newly elected members.

Thus, even assuming that the Senate is in fact a continuing body, does that affect in any way the constitutional power of a future majority of the Senate to change Senate Rules, any more than it affects the constitutional power of a future majority of Congress to change acts of Congress?

No, and the Senate, itself, along with various Vice-presidents of both parties have acknowledged this from time-to-time, though thus far, the pragmatic acquiescence in carryover rules has precluded the application of the principle that a majority of each Senate must have at least one opportunity to consider the continuation or modification of

previously adopted rules. The advent of the judicial filibuster and its severe impact on the co-equal branches now necessitates that principle govern the pragmatism, at least in matters of judicial nomination.

6. As we discussed at the hearing, Professors Catherine Fisk and Erwin Chemerinsky (like several other law professors and lawyers) have written law review articles concluding that a majority of the Senate has the constitutional power to change the rules and, specifically, to abolish supermajority requirements for approving nominations, and that using Senate Rule XXII to obstruct a majority from changing the rules (as opposed to merely ensuring adequate debate) would be unconstitutional.

During the hearing, I noted that Professor Gerhardt and Ms. Greenberger specifically cited the Fisk/Chemerinsky article to support their own conclusion that filibusters are always constitutional no matter how badly they are abused. Nowhere in their written statements, however, did either Professor Gerhardt or Ms. Greenberger mention that, under the constitutional theory of Fisk and Chemerinsky, a majority of the Senate can change the rules at any time, and that Rule XXII is unconstitutional if it is abused to block such a majority from changing the rules.

To the contrary, Professor Gerhardt explained at the hearing that "I rely on them [Fisk and Chemerinsky] for factual matters but not otherwise." Page 5 of Professor Gerhardt's written testimony, however, includes a quote which states (incorrectly, in my view) that "the continuous use of filibusters since the early Republic provides compelling support for their constitutionality." To support that statement, he specifically cited the Fisk and Chemerinsky article, among other things.

I would ask Professor Gerhardt, in light of his citation of Fisk and Chemerinsky on page 5 of his written statement, whether he stands by his contention during the hearing that he relied on the Fisk and Chemerinsky article "for factual matters but not otherwise."

I would invite any other member of the panel to comment.

Professor Gerhardt is a fine scholar. However, I do not see in his testimony any analytically consistent way in which the factual matters that Professors Chemerinsky and Fisk so carefully set out can be acknowledged and then the necessary conclusion – that a majority of each Senate must have at least one opportunity to set its own rules – be resisted.

7. It has been claimed (by Professor Gerhardt and others) that 59 judicial nominees of President Clinton were never acted upon by the Senate.

I would ask Professor Gerhardt to provide a list of those 59 nominees, and I would ask all the panelists to explain whether or not there is any constitutional or other kind of difference between their circumstances, on the one hand, and those of the nominees currently being subjected to a months-long filibuster on the floor of the United States Senate, on the other hand.

8. In his book, *The Federal Appointments Process*, published in the year 2000, Professor Gerhardt criticized a proposal to impose a supermajority requirement for confirming Supreme Court justices. He said that "the dynamic brought about by the proposal would be more likely to frustrate rather than facilitate the making of meritorious appointments." Do you agree or disagree with that statement?

Agree. As I mentioned at the hearing, Professor Gerhardt's rejection in his text of a super-majority requirement for Supreme Court nominations is, in my assessment, indistinguishable from the question we are addressing. Professor Gerhardt in a subsequent May 12, 2003 letter to Senators Cornyn and Feingold characterizes the issue as whether "there is an absolute right of a majority within the Senate to have a final say on a nomination whenever it likes." This is not the constitutional judgment or position articulated by myself or Professors Calebresi and Eastman at the hearing. Our position, then and now, is that a majority of the present Senate has an absolute right to one opportunity to ratify, repeal or amend the Senate's rules. If the present Senate takes that opportunity and continues the carry-over super-majority requirements for rule change or cloture, the constitution is satisfied, even as that would mean in application that a majority would not have an absolute right to pass upon every nomination.

9. In that same book, Professor Gerhardt wrote that "[t]he final problem with the supermajority requirement is that it is hard to reconcile with the Founders' reasons for requiring such a vote for removals and treaty ratifications but not for confirmations. . . . The Framers required a simple majority for confirmations to balance the demands of relatively efficient staffing of the government." He also said that "[t]he Constitution . . . establishes a presumption of confirmation that works to the advantage of the president and his nominees. First, by requiring only a bare majority of the Senate for approval, the Constitution sets a relatively low threshold for the president's nominees." Do you agree or disagree with these statements?

These are sound statements. One might quibble with the language of "presumption," but if that reflects the historical and textual understanding that the nomination and appointment power is executive in nature, a matter that the Senate acknowledges with its own executive calendar, it is also an unassailable observation.

10. In that same book, Professor Gerhardt writes that "[t]he Senate routinely delegates fact-finding authority to committees (and empowers individual senators to exercise holds or attempt filibusters, under certain conditions) to assist in rendering judgments on various matters over which the body has exclusive control." Please comment on this statement, and how you think the Senate's routine delegation of certain functions, as a general matter, bears upon any constitutional issues which may arise when the Senate's rules are *abused* to block a majority from taking action on specific judicial nominees.

Let me be clear: the Senate has ample authority to set its own rules in Article I, Section 5. Rule XXII permitting the filibuster, even as applied to judicial nominations is not unconstitutional, even as it permits a minority to prevail – so long as the Rule has been adopted by the present Senate. This aspect of democratic practice (the unique protection of minority voice) is implicit in everything from the composition of the Senate, itself to the delegation of responsibilities to committees to the practice of blue slips or judicial holds. One can argue, as I have elsewhere, that it was the understanding of the founding generation, most notably Alexander Hamilton, that nominees would have the benefit of the deliberation of the "whole body" of the Senate, and that, with respect to judicial nominations, procedures that allow committees (or individual members) to defeat a nominee in committee are ill-advised. That said, they are in all likelihood not unconstitutional.

What the Senate, in my judgment, cannot constitutionally do is deprive the whole body of the present Senate at least one opportunity to ratify, amend, or repeal carry-over rules from a previous Senate. Because this opportunity has not yet been afforded the Senate of the 108th Congress, the majority leader's recent proposal embodied in S. Res. 138 (providing for a gradual reduction in the cloture vote needed for nominations) is not an attempt to go outside Senate rules, but to responsibly present at least one aspect of those rules for reconsideration to the rules committee, and ultimately, the Senate as a whole.

11. Senator Leahy has propounded a series of questions to Professor Gerhardt, which I attach here. I would like to provide every other member of the panel with the opportunity and option to answer those questions as well.

Written Questions from Senator Patrick Leahy to Professor Michael J. Gerhardt:

1. The Subcommittee on the Constitution received testimony from several witnesses regarding the ability of one legislature to enact rules that carry over to the next session. Setting aside references by some witnesses to state and local legislatures, please share with us your views on the following:

   a. the structural differences between these bodies that may inform disparate traditions in self-governance;

   The ancient precept that one legislative possesses the same jurisdiction and power of its predecessors, with the same power of repeal and modification which the former had of enactment, neither more nor less does not vary based on whether the legislature is national or local.

   b. the historical differences between the United States Senate and the United States House of Representatives in promulgating and changing their rules;

As Senator Robert Byrd has eloquently addressed in his treatise on the Senate, there is a strong tradition of unlimited debate in the Senate that does not prevail in the House. However, as the Senator's treatise also reveals this tradition is neither pervasive nor longstanding with regard to the consideration of judicial nominations. Indeed, given the responsibility that the Senate has to reach a disposition, either up or down, in matters of nomination in comity with its coordinate branches, there is a qualitative difference between unlimited debate in the legislative and nomination contexts.

c. the constitutionality of Rule 5 of the Senate Rules;

To the extent that it precludes the opportunity of a majority of each Senate to have at least one opportunity to ratify or amend the rules of a previous Senate, the Rule is unconstitutional.

d. the proper timing that any rule changes should be proposed and considered; and

This has never been explicitly addressed by the Senate, itself. The many other Senators and presiding officers who have commented on the issue over time assumed (without discussion) that rule changes would likely be undertaken at the beginning of each session. This is not constitutionally required, however. There is nothing in Article I, Section 5 to preclude rule changes at any time during a Session, and it is highly questionable whether a failure to address the need for a rule change in the beginning weeks of a session could constitute some form of constitutional estoppel.

e. Professor Eastman's written testimony that "any attempt to filibuster a proposal to change the rules would itself be unconstitutional."

If by this Professor Eastman means that the filibuster of the rule change precludes a majority of the Senate from having at least one opportunity to ratify, repeal or amend its rules, I agree.

2. Please comment on the argument promoted by certain hearing witnesses, including Bruce Fein, that there is an important constitutional difference between the power of Senators to filibuster judicial nominees and their power to filibuster legislation.

Obstructionist delay in the consideration of either executive or judicial nominations harms the separation of powers. The harm is greatest as it relates to the judicial branch – given the direct reliance of citizens upon the courts for justice and the independence envisioned for Article III judges .

As an abstract matter, it is rightly claimed that the filibuster is part of the Senate's legacy of deliberation. After all, it was not until 1917 that Rule XXII put meaningful restraints on debate. Senator Byrd in his treatise on the Senate recounts the history of robust and unlimited debate in the Senate with meticulous detail, ultimately concluding, that it is what distinguishes the Senate from the House and what merits Gladstone's appellation that the Senate is "the most remarkable of all inventions of modern politics."

I cannot match Senator Byrd's historical completeness or his eloquence; nor is it for me, as a law dean who has never been privileged to serve in the Senate, to posit that the Senator is mistaken in his conclusion that today's Rule XXII "strikes a fair and proper balance between the need to protect the minority against hasty and arbitrary action by a majority and the need for the Senate to be able to act on matters vital to the public interest." Hon. Robert C. Byrd, The Senate 1789-1989 at 162.

Yet, Senator Byrd's conclusion masks two difficulties: (1) there is no longstanding history of applying filibusters to judicial nominations and (2) doing so cannot be meaningfully argued to be in pursuit of needful or justifiable deliberation, as it is when solely legislative matters are considered. With regard to the first difficulty, I find it highly significant that in Senator Byrd's comprehensive treatment of the filibuster, there is no specific mention of the use of the Senate's tradition of unlimited debate to stymie judicial nominees. At best, the Senator notes that, in rare circumstances, such as late nominations made by an outgoing president, the filibuster has been used to preserve the prerogatives of a newly elected president. (See Byrd, supra at 102, commenting on the successful use of the filibuster in the 46th Congress to prevent Rutherford B. Hayes from filling vacancies more properly filled by the newly elected James A. Garfield.)

The second difficulty with applying filibusters to judicial nominations relates to the differences between legislative and appointment deliberations. The Senate acts as a necessary brake upon improvident legislation. It's role is also a check upon the staffing of the judiciary, but here, its duty is functionally interrelated with the appointing authority of one co-equal branch and the day to day operations of another. In this context, the Senate's duty is not merely to debate and evaluate, but also to timely dispose – affirmatively or negatively – upon an exercise of the executive power of appointment that intimately affects the core, on-going responsibilities of the branch that is intended to be politically independent by constitutional design. Applying the filibuster to judicial nominations is thus qualitatively different than applying it to legislation. Whether it should apply at all is arguable, but at a minimum, a different and more accountable cloture standard is warranted.

Senator Daschle suggests that the system of Senate consideration of judicial nominations does not need to be "fixed" since many of President Bush's

nominees have been confirmed. This is a reasonable debating point, but it fails to address the systemic danger. With respect, the minority leader's answer is also neither in keeping with the Senate's constitutional responsibility nor respectful of the men and women who are willing to put their professional and personal lives on hold to be considered for judicial office. The Chief Justice and various bar associations have recently bemoaned the effect inadequate judicial salaries have on recruiting men and women of talent for the bench. Combine modest compensation with the uncertainty and public caricature invited by judicial filibusters and it is a recipe for long-term harm to the Third Branch.

Senator Daschle's proposition that the system of judicial confirmation is "not broken," is simply belied by the bipartisan acrimony that the present and past use of the judicial filibuster has yielded. Moreover, it fails to account for the fact that with the exception of one judicial filibuster aimed at a Supreme Court nomination in 1968 of a candidate in personal ethical difficulty made by, as Senator Byrd records, a lame duck president, the practice of judicial filibusters dates effectively only to the 1980s or later.[1] *And prior to now, only three nominees – one judicial and two executive – failed to be confirmed as a result of a Senate filibuster or failed cloture vote.*[2] *President Bush is rightly concerned that the nominations of men and women of high intellect and judicial capability, like Miguel Estrada, Priscilla Owen, and now Carolyn Kuhl, are not being deliberated, but deliberately delayed. President Clinton was surely of equal sentiment with respect to his nominees to the Ninth Circuit, Richard Paez and Marsha Berzon. While it is true that cloture was ultimately achieved in the case of the Clinton nominees, the die was cast for the present circumstance. Now, in an even more closely divided Senate, the world's greatest deliberative body is seemingly unable to achieve resolution, either up or down, on judicial nominations that have been favorably reported by the Senate Judiciary Committee to the floor.*

There is a constitutional duty to provide timely advice and consent on judicial nominees.

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[1] The Congressional Research Service reports that from 1949-2002 there were 17 judicial nominations subject to cloture votes, 14 of which occurred after 1980.

[2] The nomination of Justice Abe Fortas in 1968 was withdrawn, after it was clear that it lacked even majority support in the Senate. Cloture was sought on two highly controversial Clinton nominees for executive posts, Sam Brown to be Ambassador in 1994 and Henry Foster to be Surgeon General in 1995. Since cloture was sought in both of the latter cases on the same day as floor debate began, neither is truly an example of nominations that were filibustered.

SUBMISSIONS FOR THE RECORD

AN END TO NOMINATION FILIBUSTERS AND THE NEED FOR CLOTURE MOTIONS:

TERMINATING DEBATE ON CONFIRMATION OF JUDICIAL NOMINEES BY THE VOTE OF A SIMPLE MAJORITY

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EXECUTIVE SUMMARY

Judicial vacancy emergencies exist in more than two dozen federal trial and appellate courts around the Nation. These emergencies frustrate the promise of justice that is a key component of ordered liberty. By that standard alone – these objectively defined "emergencies" – it is long past time for the Senate to have acted on pending nominations. While some seek a resolution to the partisan bickering over the cause of confirmation stalemates, delaying confirmations will not solve the emergencies or any underlying partisan differences that may have contributed to the emergencies. Agreement can be had on the key principle: the crisis in the courts is that there are empty benches in those courts.

Accepting the indisputable fact of the emergencies, and confronting the present broken condition of the advice and consent process, all concerned persons ask, Is there anything effective to be done in the Senate, to end the stalemate over nominees and improve the pace of confirmations for the well-qualified nominees pending there? At present, the search for cause never strays far from the Standing Rules of the Senate, particularly Rule XXII, governing the termination of filibusters. Under Rule XXII, the Senate departs from the democratic principle of majority rule, and makes the Senate hostage to voting blocs of Senators who are, by their numbers, a minority.

Confronted by an intractable minority, the Senate has options to move beyond the roadblock to confirmation that filibusters present. Each option targets the problem of the supermajority required under Rule XXII to restore power to the majority and to allow that majority to move forward on the country's business. The approaches vary:

- *One obvious solution is to seek approval of the Senate for a change in the Senate's Rules, and to do so in accord with Rule XXII.*

Perhaps the single best reason for employing this approach is that it is the least likely to provoke controversy. The approach suffers from a serious defect, however, because the Cloture Rule actually imposes an even greater supermajority requirement to overcome a filibuster against a motion to amend the rules than is imposed for the termination of other filibusters, such as the present one targeting the nomination of

a judicial officer.

- *Another seeks judicial intervention through litigation, challenging the diminution in the value of the votes of Senators who are in the majority but whose majority will is held hostage to minority voting blocks under the rigid supermajority requirements of Rule XXII.*

Two scholarly articles and two lawsuits have suggested litigation challenging the filibuster as an unconstitutional parliamentary obstruction. While the articles have much to recommend in analysis, the lawsuits have demonstrated the profound inadequacy of litigation as a means by which the express constitutional power of the Senate to make its own Rules would be subjected to the jurisdiction of a federal court. Moreover, in two instances of litigation challenging the constitutionality of the filibuster, arguments presented in the articles have failed to convince the federal courts of the justiciability of the question of the constitutionality of the filibuster.

- *Finally, a simple majority of the Senate can change the Standing Rules, casting off the supermajority yoke and recognizing that the Senate, a deliberative body moderated by accepted rules of parliamentary governance, can proceed in accordance with that most American of principles: Majorities Rule and Majorities Make the Rules.*

The Senate is to be a deliberative body, but nothing in the Constitution, the Federalist Papers or other source documents indicates that obstructive and delaying tactics by legislative minorities were intended to be the source of the Senate's deliberative care. The tenor of the Constitution broadly supposes internal governance of the two chambers, and a general principle of majority governance of the bodies. Unlike constitutional challenges to the filibuster, which have roundly failed, challenges to the exercise of majority rule in the House, the Senate, and in other deliberative bodies, provide a firm foundation for action by a willing majority of Senators to make new Rules for the Senate, either eliminating the filibuster, or substantially curtailing the impact of a filibuster by eliminating the supermajority requirements entirely.

TABLE OF CONTENTS

Page

EXECUTIVE SUMMARY I

TABLE OF CONTENTS . . . . . a

I. BACKGROUND 1

A. Unfulfilled Responsibilities: A Senatorial Crisis in Advising and Consenting to the Appointment of Federal Judges 1

B. A Dangerous Development Emerges That Threatens To Leave Judicial Crisis Unchecked 3

II. PHOENIX RISING: THE SOLUTION TO THE "BROKEN" PROCESS OF SENATORIAL ADVICE AND CONSENT ON JUDICIAL NOMINATIONS LIES WITHIN THAT BODY 6

A. Synopsis of Proposal 6

B. The Standing Rules of the Senate Entrench the Procedural Preferences of Senators Long Gone from that Body, Even Long Dead 8

C. Finding the Way: Repairing the Broken Senatorial Process of Advice and Consent 13

1. Senate Resolution 85: Amending the Standing Rules 14

2. Litigating the Constitutionality of Senate Rule XXII 16

3. Majorities Rule – Majority Rules 26

a. Existing precedent of the Senate recognizes the power of a simple majority of Senators to close debate on proposed changes to the Standing Rules 26

TABLE OF CONTENTS–cont'd

Page

b. Because normal parliamentary rules govern the conduct of the Senate's business in the absence of extraordinary, constitutional constraints, a simple majority may assert control over those rules and over that body 27

c. Consistent with the Rule-making Clause and with the decision in Brown v. Hansen, a simple majority of a quorum of the Senate can make rules for the governance of the body and the conduct of its business 29

CONCLUSION . . . . . 32.

I. BACKGROUND

A. *Unfulfilled Responsibilities: A Senatorial Crisis in Advising and Consenting to the Appointment of Federal Judges*

According to publicly reported numbers, in March 2003, the federal district courts of the United States suffered from a vacancy rate of 6.4 %. The federal appeals courts suffered from over twice that rate, experiencing a 13.4 % vacancy rate.[1] The vacancy rates tell an important part of the story of the judicial crisis. Another part of that story is told by the number of judicial emergencies in existence around the Nation.

Judicial emergencies are defined in accordance with a numerical formula for case filings, authorized judgeships, and other factors. Because some kinds of cases are more complicated and require more time, the number of case filings is adjusted by assigning a weight or value to new cases according to their kind (e.g., student loan defaults are much simpler than patent litigation; new patent cases are assigned nearly four times the weight of student load default cases). At the present time, there are seventeen judicial emergencies in the federal appeals courts and nine in the federal district courts.[2]

Today's judicial vacancy crisis in the federal courts has unhappily coincided with the consequences of a fifty-year trend in abdication of control of the Senate by a majority of its members. The confluence of these factors virtually guarantees appointment gridlock. Key figures in the confirmation process may disagree as to causes. Regarding the existence of a vacancy crisis, however, there is no dispute among branches of the Government or between partisans:

- The President has described the current level of vacancies on the federal bench as a crisis:

  > "We face a vacancy crisis in the federal courts, made worse by senators who block votes on qualified nominees. These delays endanger American

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1. The Administrative Office of the Courts provides the statistical information from which these percentages were derived on its website at http://www.uscourts.gov.

2. See "Judicial Emergencies," at http://www.uscourts.gov/vacancies/emergencies2.htm.

justice. Vacant federal benches lead to crowded court dockets, overworked judges and longer waits for Americans who want their cases heard."[3]

- The Chief Justice of the United States has explained the impact of the problem:

  "to continue functioning effectively and efficiently, our federal courts must be appropriately staffed. This means that judicial vacancies must be filled in a timely manner with well-qualified candidates. We appreciate the fact that the Senate confirmed 100 judges during the 107th Congress. Yet when the Senate adjourned, there were still 60 vacancies and 31 nominations pending."[4]

- The Chairman of the Senate Judiciary Committee, Senator Orrin Hatch, has said:

  "Historically, a president can count on seeing all of his first 11 Circuit Court nominees confirmed. . . . In stark contrast, eight of President Bush's first 11 nominations are still pending without a hearing for a whole year. History also shows that Presidents can expect almost all of their first 100 nominees to be confirmed swiftly. . . . But the Senate has confirmed only 52 of President Bush's first 100 nominees."[5]

- The Ranking Member of the Senate Judiciary Committee, Senator Patrick Leahy, has said:

  "Vacancies cannot remain at such high levels indefinitely without eroding the quality of justice that traditionally has been associated with the federal judiciary."[6]

Judicial vacancies that should have been filled long ago continue to stand open,[7]

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3. Weekly Radio Address of the President, February 22, 2003. See http://www.whitehouse.gov/news/releases/2003/02/20030222-1.html.

4. The 2002 Year-End Report on the Federal Judiciary. See http://www.supremecourtus.gov/publicinfo/year-end/2002year-endreport.html.

5. Senator Orrin Hatch, "Judicial Nomination Crisis," May 9, 2002. See http://www.senate.gov/~hatch/index.cfm?FuseAction=Topics.Detail&PressRelease_id=182703&Month=5&Year=2002.

6. Senator Patrick Leahy, Statement on Judicial Vacancies, Jan. 28, 1998. See http://leahy.senate.gov/press/199801/980128.html.

7. As of March 1, 2003, in the cases of the judicial emergencies in the federal appeals and district courts, the range of days that the emergency conditions have been pending is from 151 days up to 3167 days. See "Judicial Emergencies," at http://www.uscourts.gov/vacancies/emergencies2.htm. The average number of days in existence for

and as a consequence, justice is being denied in an untold number of cases, both civil and criminal. When they made the remarks quoted above, Chief Justice Rehnquist and Senators Hatch and Leahy all had in mind the delays in confirmation that resulted from the pace of confirmation hearings scheduled by the Judiciary Committee. See nn. 4-6, supra. From the context and times of his remarks, President Bush was addressing a different bottleneck than the one created by the slow pace of committee hearings on nominations. Given that his focus was on the stalled consideration of the whole Senate on the confirmation of Miguel A. Estrada to the United States Court of Appeals for the District of Columbia Circuit, it seems certain that the President was also concerned about the devastating impact that filibustering tactics would have on the orderly process of judicial selections.

The delay in setting hearings on confirmation appears to be resolving under the direction of Chairman Hatch. Regrettably, while the Committee hearing process appears to be receding as a source of bottlenecking, the filibuster appears to be maturing into a serious source of delay that endangers timely confirmation of the President's well-qualified nominees.

B. *A Dangerous Development Emerges That Threatens To Leave Judicial Crisis Unchecked*

Upon taking office, President Bush proceeded with appropriate speed and care to identify well-qualified and worthy candidates for appointment to the federal courts. On May 9, 2001, President Bush announced his intention to appoint Miguel Angel Estrada to serve as a judge of the United States Court of Appeals for the District of Columbia Circuit. As the Nation subsequently learned, when President Bush put before it his case for confirmation of Estrada, his choice presented

> an exceptional nominee for the federal bench. [Estrada] has a remarkable personal story. He came to America from Honduras as a teenager, speaking little English. Within a few years, he had graduated with high honors from

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each of these emergencies is 1097, or just over three years.

> Columbia College and Harvard Law School. Miguel Estrada then served as a law clerk to Supreme Court Justice Anthony Kennedy, as a federal prosecutor in New York, and as assistant to the Solicitor General of the United States.[8]

Despite the personal merits and character of the man, and perhaps because of political payback,[9] his nomination – one that should have sailed through the Senate – has been foundering.

Following the shift in control of the Senate that resulted when Senator Jeffords resigned from the Republic Caucus, Estrada's nomination, like that of nearly a full dozen other of President Bush's first judicial nominees, languished before the Democrat-controlled Senate Judiciary Committee. Finally, in September, 2002, the Judiciary Committee held a hearing on Estrada's nomination. After that hearing, the Committee failed to put the question of his nomination to a vote. Ultimately, that interminable delay resulted in the adjournment sine die of the 107th Congress without action on Estrada's nomination. Consequently, on January 7, 2003, President Bush resubmitted his nomination of Estrada to the United States Senate.

Now that the Senate is controlled by the Republican members, Estrada's nomination has been approved by the Senate Judiciary Committee and placed upon the Executive Calendar for consideration by the full Senate. It was at that juncture that the present crisis came to the foreground.

The new obstruction to the confirmation of judicial nominations takes the form of filibusters on the Senate floor. A vocal minority of Senate Democrats is

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8. See http://www.whitehouse.gov/news/releases/2003/02/20030222-1.html (Weekly address of the President).

9. It is certain that groups opposing the Estrada nomination found his service as counsel in the Bush election battles as grounds automatically proving his unfitness to serve. Estrada is affiliated with the law firm of Gibson Dunn & Crutcher, a key firm representing the Bush/Cheney 2000 efforts. His role in Bush's election efforts has not been lost on those who oppose his nomination. See, e.g., http://www.feminist.org/news/newsbyte/uswirestory.asp?id=7498 ("Estrada was one of the five lead lawyers at Gibson, Dunn & Crutcher who worked on George Bush's legal strategy – hand in hand, of course, with five Supreme Court justices – to hijack the 2000 presidential election in Jim Crow's Florida"). In turn, as materials on their web sites prove, groups such as the Feminist Majority and People for the American Way heavily lobby for and demand obstructive action from Democrat Senators.

demonstrating their commitment to satisfying the ideological requisites set for them by left wing interest groups.[10] And, for now, at least, an intractable delay in the confirmation of one nominee, Miguel Estrada, is being played out on the Executive Calendar, as votes on cloture motions are scheduled, occur, but fail to break the minority's stranglehold on the process.

A determined minority of Senators is frustrating, perhaps temporarily, the wishes of the majority of Senators and of the President of the United States regarding the appointment of Miguel Estrada to the United States Court Appeals for the District of Columbia Circuit. Employing tactics of delay countenanced at least implicitly by Rule XXII of the Standing Rules of the Senate, that minority of Senators has prevented the nomination from proceeding to a vote, even though the Estrada nomination has precedence on the Executive Calendar.

In compliance with Rule XXII of the Senate, four successive efforts have been undertaken to break the deadlock on the Estrada nomination. Each time, the Senate failed to invoke cloture. By failing to invoke cloture and terminate debate, the Senate has condemned itself to continue to consider the nomination of Estrada but denied to itself the right to vote upon it. Such a circumstance frustrates all. And a process that was already substantially degraded by over a decade of partisan sniping and bickering approaches irreparable breakdown.

In the face of this crisis, Senator Hatch has said:

> If we continue to filibuster this man, the Senate will be broken, the system will be broken and I think we will have to do what we have to do to make sure that executive nominations get votes once they get on the calendar. . . .[11]

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10. As Senator Hatch has explained, "[i]n this new war over Circuit nominees, the extremists demand that the Democrats do whatever it takes to stop or slow the confirmations of the President's superb nominees. It is irrelevant to these groups that a nominee has the qualifications, the capacity, the integrity, and the temperament to serve on the federal bench. What they want are activists who support their political views regardless of the law." See http://www.senate.gov/~hatch/index.cfm?FuseAction=Speeches.Detail&PressRelease_id=191297&Month=3&Year=2003.

11. N.Y. Times, Mar. 12, 2003.

The purpose of this paper is to propose for the consideration of willing Senators that a ready solution to the filibuster crisis is at hand.[12]

II. PHOENIX RISING: THE SOLUTION TO THE "BROKEN" PROCESS OF SENATORIAL ADVICE AND CONSENT ON JUDICIAL NOMINATIONS LIES WITHIN THAT BODY

A. *Synopsis of Proposal*

The Constitution gives to the Senate the right to make its own rules of procedure. See U.S. Const. art. I, § 5. Beyond the bare terms of the Rulemaking Clause the Constitution provides no further illumination of the scope or limitations upon such Rules as the Senate may choose to adopt. Unsurprisingly, the seemingly broad grant of power, described in early cases in terms of vast and sweeping scope, has been, nevertheless, the subject of many judicial interpretations and decisions.

In one instance of such rule-making, the Senate assigned the responsibility for taking evidence on impeachment trials of lower federal officials to a committee, with its recommendation subject to a vote of the body. Nothing in the Constitution authorizes such an approach. The Rulemaking Clause grants the Senate the authority to make its own Rules. So, in a federal complaint challenging the practice as applied

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12. The scope of this paper is necessarily limited. We do not treat the source materials evidencing the well-developed intention of the Framers of our Nation that the Senate serve as a more deliberative body than the House of Representatives. Nor do we examine the particulars of the role envisioned by the Founders for the Senate in the exercise of its duty of advice and consent to nominations. Nor do we treat the rise of the filibuster, or the rise of the related motion to invoke cloture. All these topics have been addressed elsewhere. For an excellent short history of the nominations of Justices to the Supreme Court and the confirmation processes that decided which nominees would take a seat at the High Court, see HENRY J. ABRAHAM, JUSTICES, PRESIDENTS AND SENATORS: A HISTORY OF THE U.S. SUPREME COURT APPOINTMENTS FROM WASHINGTON TO CLINTON (Rowman & Littlefield Publ. 1999). For a general treatment of the deliberative process in the Senate, and the rise of the role of the Senate, see FRED R. HARRIS, DEADLOCK OR DECISION: THE U.S. SENATE AND THE RISE OF NATIONAL POLITICS (Oxford Univ. Press 1993). For the views of Framers on the unique role and durably deliberative character of the Senate, see The Federalist Nos. 62 and 63. For the views of the Framers on the Senate's participatory role in the confirmation process, see The Federalist No. 76 For an examination of the filibuster and its role in the Senate, see SARAH BINDER AND STEVEN S. SMITH, POLITICS OR PRINCIPLE: FILIBUSTERING IN THE UNITED STATES SENATE (Brookings Institution Press 1997). For a brief, informative treatment of the relation between the filibuster and the confirmation process in the Senate, see Catherine Fisk and Erwin Chemerinsky, "The Filibuster," 49 STAN. L. REV. 181 (Jan. 1997). For the government's perspective on the filibuster and the Senate confirmation process, see Stanley Bach, "Filibusters and Cloture in the Senate," (Congressional Research Service, Jan. 17, 2001).

to the impeachment and removal from the office of federal judge, the Supreme Court concluded that the complaint presented a nonjusticiable political question. See Nixon v. United States, 506 U.S. 224 (1993).

Most of the cases challenging the validity or application of the Rules of the Senate or the House of Representatives are litigated in the federal trial and appeals court in the District of Columbia. Judicial decisions of these courts generally affirm the breadth and scope of the Rulemaking power while concluding that the power to make its own rules does not authorize the Senate to disregard the Constitution. See n. 18, infra (citing cases). The role of the courts has been to consider narrowly the question of whether a particular challenged rule violates another constitutional provision or a fundamental right.

To illustrate the matters of concern, take as an example, a decision by the Senate to enact a Rule allowing ratification of treaties by a simple majority. In appropriate litigation, that is, brought by a person who can satisfy prerequisites such as standing, the courts will not decline to consider whether the Senate has violated the Constitution, in particular Article II, § 2, by reducing the number of Senators required for ratification.

In the same vein, assuming that standing prerequisites can be met, a court will consider whether the Senate adopted unlawfully discriminatory rules, for example discriminating among Senators based on race or religion. But, beyond the narrow category of circumstances in which Senate Rules directly violate the Constitution or impermissibly burden fundamental rights, as a general principle, only the Senate is the judge of its own need for rules and of the necessary contour of those rules.

The Senate has exercised that constitutional prerogative by enacting the Standing Rules. The Senate has exercised that power, as well, from time to time, by amending those Rules to meet the needs perceived by the Senate for such amendment or revision. Amongst the Rules it has adopted is Rule XXII, by which the Senate has bound itself to allow unlimited debate, unless sixty senators agree to a motion to invoke cloture, and to never change those Rules without approval thereof by two thirds

of the Senators present and voting, see Rule XXII ¶ 2.

Various possible solutions present themselves. One approach calls for an amendment of the Standing Rules, accomplished in accord with the requirements of the Rules. Another approach seeks the mediation of the federal judiciary in determining whether Rule XXII violates the United States Constitution. Finally, a third approach looks to a simple majority of the Senate to accomplish the necessary change in the Standing Rules by a bare majority of that body.

That last proposal has the most to recommend it. Reform advocates have established as a precedent of the Senate that a simple majority of the Senate can amend its own Rules. As discussed infra at 26-27, the precedents of the Senate recognize the power of the majority to do so, the Standing Rule to the contrary notwithstanding. A simple majority of the Senate can take just such action, calling upon itself, at the direction of a majority of its members, to decide three questions:

- First, whether a simple majority of the Senate may close debate on a resolution providing for new Standing Rules of the Senate,
- Second, whether, under such new rules, filibusters may be made "out of order" on questions related to the judicial nominations, and,
- Third, whether the nomination of Miguel Angel Estrada (or any other filibustered nominee) should be agreed to by a vote of the Senate.

These steps will no doubt provoke cries of "foul" by opponents of the nominee and by members of the minority in the Senate. Nonetheless, there is no constitutional objection against these steps, and there is substantial authority that undermines the likelihood of success of any challenge to them.

B. *The Standing Rules of the Senate Entrench the Procedural Preferences of Senators Long Gone from that Body, Even Long Dead*

George Washington, in answer to a question from Thomas Jefferson, who was in France during the Constitutional Convention, explained that the Senate would serve the valuable purpose of providing a "cooling off" feature to the legislative process. In keeping with a habit of the time, Jefferson had poured some coffee from his cup into

his saucer, there to cool a bit. Washington explained that House-initiated legislation would, in the same way, be poured into the Senate where the more deliberate body would insure that legislation was not unwisely adopted in the heat of a moment.[13]

Although the Senate was, in the view expressed by Washington and of the Framers, intended to serve this deliberative function, no mention is made of the filibuster in the Constitution, the Federalist Papers, or other writings of the Founders. In fact, the term "filibuster" is a transliteration from the French and Dutch terms for "pirates." The Dutch term from which "filibuster" derives was used to describe piracy by American citizens who fought naval expeditions in Central and South America. A filibuster was one who, against proper and lawful authority, seized control of a government.[14]

The rise of obstructionist tactics to prevent the enactment of legislation disapproved by some has been well described elsewhere.[15] The use of the term "filibuster" to describe obstructionist tactics – including extended debate and a panoply of procedural devices intended to prevent action – reflected the frank recognition that procedural gamuts that frustrated the will of the majority of the Senate were a legislative form of piracy. It suffices to note that the present rules governing procedures of the Senate, the Standing Rules of the Senate, provide a specific means for the termination of the panoply of obstructionist tactics described by the term filibuster. Rule XXII of the Standing Rules of the Senate, the "cloture rule," provides:

> at any time a motion signed by sixteen Senators, to bring to a close the debate upon any measure, motion, other matter pending before the Senate, or the unfinished business, is presented to the Senate, the Presiding Officer, or clerk at the direction of the Presiding Officer, shall at once state the motion to the Senate, and one hour after the Senate meets on the following calendar day but

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13. The metaphor is attributed to Washington, but not reported in either the papers of Washington or of Jefferson. See MONCURE. D. CONWAY, OMITTED CHAPTERS OF HISTORY DISCLOSED IN THE LIFE OF EDMUND RANDOLPH 91 (1888).

14. See, e.g., http://www.bartleby.com/61/89/F0118900.html.

15. See generally Binder and Smith, supra n. 12.

> one, he shall lay the motion before the Senate and direct that the clerk call the roll, and upon the ascertainment that a quorum is present, the Presiding Officer shall, without debate, submit to the Senate by a yea-and-nay vote the question:
>
> "Is the sense of the Senate that the debate shall be brought to a close?"
>
> And if the question shall be decided in the affirmative by three-fifths of the Senators duly chosen and sworn -- except on a measure or motion to amend the Senate rules, in which case the necessary affirmative vote shall be two-thirds of the Senators present and voting -- then said measure, motion, or other matter pending before the Senate, or the unfinished business, shall be the unfinished business to the exclusion of the all other business until disposed of. . . .

Standing Rules of the Senate Rule XXII ¶ 2.

* * *

Currently, efforts to bring the nomination of Miguel Estrada to a vote by the full Senate are being frustrated by a filibuster conducted by members of a partisan legislative minority. In turn, efforts by a bipartisan majority to terminate the filibuster are frustrated by operation of Rule XXII ¶ 2. That provision allows essentially unlimited debate, unless sixty Senators vote to "invoke cloture." That same rule, in another provision, allows filibusters against changes in the Standing Rules unless cloture is supported by the vote of two thirds of the Senators present and voting.

Thus, the ability of a majority of Senators to fulfill their constitutional duty to provide advice and consent to the President's appointment of judicial officers is in jeopardy. As the matter stands, Senate Rule XXII insures both the continued frustration of the appointment process and the expansion of the judicial vacancy crisis already being felt in many of the Nation's judicial districts and circuits. Indeed, the filibuster targeting the nomination of Miguel Estrada has survived a record-breaking fourth motion to invoke cloture. At present, no end to that filibuster is in sight.

Rule XXII requires that those who would invoke cloture must amass at least sixty votes in support of the cloture motion. Thus, on any given day, fifty-nine senators who would like to conduct an up or down vote on the question of whether to consent to

the nomination of Estrada can be held hostage by a single Estrada opponent who is exercising the right to speak. Worse still, should fifty-one of those Senators seek to change the Standing Rules to accommodate their proportional majority, they run straight into an even more onerous two thirds super-majority requirement for cloture on motions to amend the Standing Rules.

There is, in such a system, a manifest unfairness. It is not surprising that its unfairness has been recognized for many years.[16] When the many are prevented from governing themselves and subjected to the rules and decisions of the few, an oligarchy is in place, not a republic. Despite our national and constitutional commitment to a republican form of democracy, Senate Rule XXII is an anachronism demonstrating long-abandoned preferences for government other than by the will of the people. While reasonable minds agree that a majority must always resist inflicting unconstitutional deprivations upon minorities, President Lincoln quickly dispatched the argument that government by minority presented a workable proposition:

> A majority held in restraint by constitutional checks and limitations, and always changing easily with deliberate changes of popular opinions and sentiments, is the only true sovereign of a free people. Whoever rejects it does of necessity fly to anarchy or to despotism. Unanimity is impossible. The rule of a minority, as a permanent arrangement, is wholly inadmissible; so that, rejecting the majority principle, anarchy or despotism in some form is all that is left.[17]

In addition to its manifest unfairness, the requirement of a supermajority vote not only puts government decisions in the hands of a minority, it guarantees governmental inertia, even in times of crisis. For this very reason, Alexander Hamilton criticized the Articles of Confederation, which conditioned many acts of the Committee of the States on approval by supermajorities:

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16. For example, in the years following the successful uses of the filibuster by Democrats and other opponents of civil rights legislation in the 1950s, the question of needed reform to the Standing Rules came up for discussion. At the time, observers noted this manifest unfairness. See 107 Cong. Rec. 235 (1961) (brief in support of cloture reform); 121 Cong. Rec. 756 (1975) (statement of Sen. Pearson).

17. A. LINCOLN, FIRST INAUGURAL ADDRESS (Mar. 4, 1861) (emphasis added).

> To give a minority a negative upon the majority (which is always the case where more than a majority is requisite to a decision), is, in its tendency, to subject the sense of the greater number to that of the lesser. . . . The necessity of unanimity in public bodies, or of something approaching towards it, has been founded upon a supposition that it would contribute to security. But its real operation is to embarrass the administration, to destroy the energy of the government, and to substitute the pleasure, caprice, or artifices of an insignificant, turbulent, or corrupt junto, to the regular deliberations and decisions of a respectable majority. . . . If a pertinacious minority can control the opinion of a majority, respecting the best mode of conducting it, the majority, in order that something may be done, must conform to the views of the minority; and thus the sense of the smaller number will overrule that of the greater, and give a tone to the national proceedings. Hence, tedious delays; continual negotiation and intrigue; contemptible compromises of the public good. . . . It is often, by the impracticability of obtaining the concurrence of the necessary number of votes, kept in a state of inaction. Its situation must always savor of weakness, sometimes border upon anarchy.[18]

These problems, particularly "tedious delays . . . intrigue . . . [and] contemptible compromises of the public good," animated the Framers in seeking a "more perfect union," see U.S. Const. pmbl. Consequently, in framing the general government under the Constitution, the number of instances in which a vote of greater than a majority would be required were limited and precisely stated. The Constitution requires a supermajority vote of two thirds: to convict of impeachment;[19] to expel one of their members;[20] to override a presidential veto;[21] to ratify a treaty;[22] to propound an amendment to the Constitution;[23] to lift disability from service in Congress of those who have participated in insurrection against the United States,[24]; and, to determine

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18. The Federalist No. 22, at 133-34 (Modern Library ed. 2000) (emphasis added).

19. See U.S. Const. art. I, 3, cl. 6.

20. See U.S. Const., art. I, § 5, cl. 2.

21. See U.S. Const., art. I, § 7, cl. 2.

22. See U.S. Const. art. II, § 2, cl. 2.

23. See U.S. Const. art. V.

24. See U.S. Const. amend. XIV, § 3.

that the President is under a disability preventing service.[25]

The general principle of majority rule in the Senate is also reflected in the Constitution's grant to the Vice President of a vote in that body if, but only if, "they be equally divided." U.S. Const. art. I, § 3, cl. 4. Thus, although it is not explicit that all other matters in the Senate are to be governed by majority rule, the implication of granting a tie breaking vote to the Vice President speaks for itself.

With each new Congress, the House of Representatives considers and adopts new Rules. Unlike the House, the Senate deigns itself a body of a continuing nature from Congress to Congress. Because of that self-conception as a continuing body, the Senate has eschewed the biennial rulemaking customary in the House. Consequently, the present Standing Rules do not reflect a fresh determination by the present majority of the Senate as to the best means for conducting the business of the Senate. In this way, the views of Senators long retired, even long deceased,[26] restrain change in the Senate with a cold hand, simply by operation of the supermajority requirement of Rule XXII.

C. *Finding the Way: Repairing the Broken Senatorial Process of Advice and Consent*

Senator Hatch's momentous commitment – to do what must be done to move nominations forward, even in the face of a determined minority – offers hope that if a sound and workable proposal for correcting the manifest injustice of the present circumstance can be found, it will be adopted by those who share Senator Hatch's resolve. The question arises, then, whether, other than successfully invoking cloture

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25. See U.S. Const. amend. XXV, § 4.

26. Because Rule XXII makes amendment of the Rules improbably difficult, the Rules now in effect are those that have been selected for the day to day operation of this Senate by Senators who no longer serve in that body. This fact is reminescent of the story about the Chicago area Sheriff who refused to allow a deputy to get back in the cruiser until he had gotten an equal number of names from the tombstones on both sides of the road dividing the community cemetery in half. "Son," he told the rain-soaked deputy, "the folks on this side of the cemetery have just as much right to vote for me in the upcoming election as the ones over on that side." Regrettably, because of the requirements of Rule XXII, long dead Senators have a preferred right to determine the procedures of the Senate over those currently serving.

on the filibuster, anything may be done to move the question forward of Senate's confirmation of Estrada.

Among possible responses to the crisis, three particular approaches merit examination. These approaches, which we treat in turn, are: amendment of the Standing Rules of the Senate to alter the Cloture Rule; litigation challenging the constitutionality of the Cloture Rule; and, assertion of the Rule-making power of the Senate by a simple majority of that body. While there is value in each of the approaches, the last one, which we recommend, has the best chance of bringing an early resolution to the filibuster of the Estrada nomination, and to the vacancy crisis.

1. Senate Resolution 85: Amending the Standing Rules

The Standing Rules of the Senate govern the process by which those Rules may be altered or amended. In addition to the provision cited above, imposing a two thirds supermajority requirement to invoke cloture against a filibuster of such Rule amendments, Rule V of the Standing Rules also addresses amendment of the Rules, and it provides:

> No motion to suspend, modify, or amend any rule, or any part thereof, shall be in order, except on one day's notice in writing, specifying precisely the rule or part proposed to be suspended, modified, or amended, and the purpose thereof. Any rule may be suspended without notice by the unanimous consent of the Senate, except as otherwise provided by the rules.
>
> The rules of the Senate shall continue from one Congress to the next Congress unless they are changed as provided in these rules.

"Except as otherwise provided by the rules." In those seven words, the Standing Rules condemn the Senate to the burdensome process of filibuster-breaking, and then heap on top of that burdensome task the added requirement "as otherwise provided" by Rule XXII of a two thirds majority vote to invoke cloture against any filibuster of such reforms.

Nonetheless, it is notable that the Standing Rules do not purport to be inviolate, that they provide for their amendment. In fact, in apparent response to the present crisis, on March 13, 2003, Senator Zell Miller submitted a proposed resolution

addressing this problem.[27] Senate Resolution 85 proposes that the Senate amend Rule XXII to modify the cloture provisions.

If agreed to, S. Res. 85 would modify the Cloture Rule by adding to it a "ratcheting down" feature for the total number of votes needed to invoke cloture. Under the proposed Rule, sixty votes would still be required to invoke cloture on a first motion. Upon each subsequent vote directed to the same matter, the number of votes required to invoke cloture would be reduced in number by three. Thus, cloture could be invoked with fifty-seven votes on a second motion, to fifty-four votes on a third motion, and finally, to fifty-one votes on a fourth motion.[28] Senator Miller's proposal is indistinguishable from one offered by Senators Tom Harkin and Joseph Lieberman in 1995.[29]

Senator Miller's proposal has considerable merit. After all, such a rule virtually guarantees an eventual end to every filibuster, while maintaining, at the same time, a deliberative pace to proceedings related to the invocation of cloture. By ratcheting down the total number of votes required to invoke cloture over a series of votes, the Senate would maintain its customary and anticipated role as a "cooling saucer." Senate Resolution 85 would work a welcome change in the Standing Rules, and could, ultimately, effectuate floor votes on all judicial nominees who make their way onto the Senate's Executive Calendar.

Although commendable, the proposal faces the same obstacle as a judicial nominee: a filibuster, or the threat of one. Already four attempts to invoke cloture on the Estrada filibuster have failed to garner sixty votes. It strains the imagination to see a partisan, minority voting bloc on the Estrada question voluntarily surrender its present superior position by agreeing to the proposed rule change. Under Rule XXII,

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27. See 149 Cong Rec S 3730 (daily ed. Mar. 13, 2003).

28. See the text of proposed S. Res. 85 as introduced by Senator Miller on Mar. 13, 2003, at http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=108_cong_bills&docid=f:sr85is.txt.pdf.

29. See Binder and Smith, supra n.12, at 182-83.

two thirds of Senators present and voting are required to invoke cloture on filibusters of rule changes. Thus, to defeat the predictable filibuster of Senator Miller's proposed Senate Resolution 85 would require the willingness and action of Senators in numbers even greater than needed to invoke cloture on the Estrada filibuster.[30]

Because of the supermajority requirement, Senator Miller's proposal, without more, is likely to fall victim to the same obstructionist minority. It seems highly unlikely that Senators will vote in numbers sufficient to invoke cloture on this proposal where the result would be to take from many of those very Senators their most effective means of satisfying the demands of their Washington-based liberal interest group constituencies.

2. Litigating the Constitutionality of Senate Rule XXII

Two lawsuits, a law review article and a political science journal article have provided insight into the possibility of challenging Rule XXII through litigation. Although the articles argue vociferously for the prospects of such litigation, the only suits ever filed challenging the constitutionality of the filibuster and the supermajority requirements of the cloture rule have failed to produce a judicial order granting relief against the rule.

In the early 1990s, proceeding pro se, Douglas Page, a registered Democrat, sued Senator Dole and the Republican minority in the Senate over their successful use of the filibuster against a variety of legislative proposals supported by President Clinton and the Democrat majority. In an unreported decision (Page I), the district court dismissed Page's suit for lack of standing. See Page v. Shelby, 995 F. Supp. 23, 26 (D.D.C. 1998) (Page III) (explaining history of the litigation). On appeal from that dismissal, also in an unreported opinion, the Court of Appeals concluded that the change in control of the Senate following the 1994 election cycle mooted Page's complaint. Consequently, the

30. The actual number of Senators required to invoke cloture to close debate on changes in the Rules will vary, according to the number of Senators present and voting. If all Senators are present and voting, sixty-seven votes would be required to invoke cloture; of course, if only a smaller quorum of Senators were present at the time, the number required to invoke cloture would be fewer.

court vacated the decision of the district court and remanded the case with instructions to dismiss as moot. See Page v. Dole, 1996 U.S. App. LEXIS 15491 (D.C. Cir. 1996) (Page II).

Subsequently, Page redrafted his complaint in an effort to avoid the defects that convinced the court of appeals that the earlier litigation was moot. In Page III, the district court concluded that Page had failed to assert any particularized injury to himself distinguishable from the injury suffered by all other citizens as a result of Senate inaction on filibustered legislation. Because he failed to assert particularized injury to himself, Page lacked standing to challenge the constitutionality of the Rule.[31]

The district court explained the failings of Page's asserted standing:

> In this case, Mr. Page has not demonstrated that he has sustained or will imminently sustain direct harm as a result of Senate Rule XXII. This Court cannot find that a litigant has standing based solely on his speculation that, no matter which party's senatorial candidates he votes for, Senators of the other political party will invoke Rule XXII to prevent the passage of unspecified legislation favored by Mr. Page. Mr. Page asserts that Rule XXII 'drastically diminishes [his] voting power to obtain legislation he desires.' Yet he does not provide examples of the types of legislation he favors and does not indicate how he personally has been or will be injured if that legislation fails to become law.[32]

The court of appeals affirmed this second dismissal without published opinion, "for substantially the reasons" set out in the decision of the district court. See Page v. Shelby, 1998 U.S. App. LEXIS 20728 (D.C. Cir. 1998) (Page IV).

Page I is identified as the only judicial challenge to the constitutionality of the filibuster in the best-known law review article on the subject of filibusters.[33] In their article, Fisk and Chemerinsky argue that a constitutional challenge to the filibuster of a judicial nominee is necessary and feasible:

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31. See 995 F. Supp. at 27-28.

32. Id.

33. See Catherine Fisk and Erwin Chemerinsky, The Filibuster, 49 STAN. L. REV. 181, 233 (Jan. 1997) (hereinafter "The Filibuster"); see also Robert A. Heineman, Edward N. Kearny, "The Senate Filibuster: A Constitutional Critique," 26 PERSPECTIVES ON POLITICAL SCIENCE 5 (No. 1, 1997).

> The repeated failure of efforts to adopt majority cloture or to permit a majority to change Rule XXII suggests that it is unlikely that the Senate will decide on its own that the filibuster is unconstitutional. Therefore, judicial action will be needed for the filibuster to be ruled unconstitutional.[34]

The authors then take up the question of the difficulties that a successful challenge to the filibuster rule would face:

> The government, however, would likely move to dismiss any lawsuit challenging the constitutionality of the filibuster on three independent grounds: [1] that the constitutionality of the filibuster is a nonjusticiable political question; [2] that the plaintiffs lack standing to bring the suit; and [3] that the Speech and Debate Clause immunizes senators from being sued as to their votes.[35]

In laundry list fashion, the authors summarily list three very potent arguments against success in litigation. In fact, these three considerations – the political question doctrine, standing, and Speech and Debate Clause immunity – constitute the focus of substantive considerations in more than a dozen decisions of the United States Court of Appeals for the District of Columbia and the District Court for the District of

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34. See Fisk and Chemerinsky, supra n. 33, at 225.

35. See id.

Columbia.[36] Virtually every one of those cases resulted in no relief being granted.[37]

Nonetheless, Fisk and Chemerinsky propose that successful litigation could be devised in one highly improbable circumstance:

> Imagine the strongest case: The President nominates a woman to be Chief Justice of the Supreme Court and a group of senators filibuster, openly declaring that they believe that a woman should never hold the position. Imagine, too, that fifty-nine senators are on record supporting the nomination and have even voted for cloture.[38]

In that wildly improbable circumstance, Professors Fisk and Chemerinsky conclude that the obstacles of standing, the political question doctrine and the Speech and Debate Clause could be overcome.[39] Of course, here, the opposition to the confirmation

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36. See Kucinich v. Bush, 236 F. Supp. 2d 1 (D.D.C. 2002) (dismissing challenge to abrogation by President of ABM treaty on standing and political question grounds); Page v. Shelby, 995 F. Supp. 23 (D.D.C. 1998) (dismissing challenge to constitutionality of filibuster on standing grounds); Schreibman v. Holmes, 1997 U.S. Dist. Lexis 12584 (D.D.C. 1997) (dismissing challenge to the denial of Capitol press credentials on political question grounds); Skaggs v. Carle, 110 F.3d 831 (D.C. Cir. 1997) (dismissing challenge to House rules governing the consideration of tax increase legislation for lack of standing); United States v. Rostenkowski, 59 F.3d 1291 (D.C. Cir. 1995) (rejecting interlocutory challenge to prosecution on Speech or Debate Clause grounds); Michel v. Anderson, 14 F.3d 623 (D.C. Cir. 1994) (granting vote in Committee of the Whole to nonvoting Delegates does not violate the Constitution); CNN v. Anderson, 723 F. Supp. 835 (D.D.C. 1989) (declining to grant relief on grounds of equitable discretion); Barnes v. Kline, 759 F.2d 21 (D.C. Cir. 1984) (discussing doctrine of equitable discretion), vacated sub nom. Burke v. Barnes, 479 U.S. 361 (1987) (remanded with instructions to dismiss as moot); Moore v. U.S. House of Representatives, 733 F.2d 946, 957 (D.C. Cir. 1984) (Scalia, J., concurring in result) (criticizing D.C. Circuit's "equitable discretion" doctrine); Vander Jagt v. O'Neill, 699 F.2d 1166 (D.C. Cir. 1983) (affirmed the judgment of dismissal on the separate ground of the court's remedial discretion); Metzenbaum v. FERC, 675 F.2d 1282 (D.C. Cir. 1982) (challenge to legislation adopted in apparent violation of parliamentary rules presented nonjusticiable political question); Consumers Union of United States v. Periodical Correspondents' Association, 515 F.2d 1341 (D.C. Cir. 1975) (reversing judgment for complaining journalist on political question grounds).

37. In Barnes, 759 F.2d 21, the D.C. Circuit sided with the complainants and against President Reagan regarding his attempted exercise of a pocket veto on legislation. The appeals court, consequently, concluded that the complainants were entitled to an order directing that the legislation be duly enrolled as a statute of the United States. In Burke, 479 U.S. 361, the Supreme Court concluded that the case was moot and issued an order vacating the judgment below with remand instructions to dismiss the case as moot.

38. See Fisk and Chemerinsky, supra n.33, at 233.

39. See id.

of Estrada has not been made expressly upon invidiously discriminatory grounds.[40]

In the many cases that have come before the federal courts in Washington, DC,[41] after examining questions about standing, the political question doctrine, the Speech or Debate Clause, and equitable discretion, these courts have repeatedly left claimants standing with hats in hand but no relief in sight. Thus, while instituting and conducting litigation about the constitutionality of Rule XXII might create a sense of progress against the present stalemate, that progress would be only illusory because it is very likely that such litigation would produce no relief.

Of course, any proposal that assumes the propriety of the present construct, under which governance lies in the hands of the legislative minority, cannot be squared with representative democracy. As Hamilton explained, granting to a number fewer than a majority the powerful weapon of an absolute negative upon actions approved by a simple majority establishes, in effect if not name, government by that minority, as well as insuring paralysis of government, even at times of the most profound national crisis.[42] But, as President Lincoln explained, government by a minority as a fixed principle cannot be admitted.[43] The Senate's capacity to make whatever rules

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40. Activist groups and others who support the filibuster of the Estrada vote have not been quite so delicate about the question of Estrada's qualifications as a Hispanic American. See, e.g., Statement of Representative Reyes, at http://www.house.gov/reyes/CHC/miguelestrada.htm ("Miguel Estrada fails to meet the [Congressional Hispanic Caucus]'s criteria for endorsing a judicial nominee. In our opinion, his . . . failure to recognize or display an interest in the needs of the Hispanic community do not support an appointment to the federal judiciary"); Statement of Representative Menendez, at http://menendez.house.gov/speaks/viewspksubsections.cfm?id=38 ("Miguel Estrada, the D.C. Circuit Court nominee . . . whose record showed no understanding or commitment to the rights of individuals, or to the Hispanic community"); "Memorandum of the Mexican American Legal Defense and Educational Fund (MALDEF) and Southwest Voter Registration and Education Project (SVREP) Explaining Bases for Latino Opposition to the Nomination of Miguel Estrada to the DC Circuit Court of Appeals," at http://www.maldef.org/news/latest/est_memo.cfm ("he challenged whether the NAACP actually represented the black community's interests. If he does not even recognize the NAACP's ability to represent blacks, would he recognize Latino groups' standing in court to represent Latinos? His arguments in this case suggest he probably would not").

41. See n. 36, supra.

42. See text accompanying nn.16-18, supra (discussing problems of minority governance).

43. Id.

for its governance that it might make is constrained only by two considerations. As explained infra at 28-30 (discussing United States v. Ballin, 144 U.S. 1 (1891)), the Rule-making power is constrained only by a judicial construction of it that neither chamber may, by the rules they adopt, violate the Constitution or violate fundamental rights. Consequently, while the anti-majoritarian effect of the present Rule is indisputable, a judicial decision would not likely be forthcoming to upset the Senate's rule unless that decision found substantive constitutional fault with the decision of a simple majority to allow itself to be bound by supermajority voting requirements. Such a conclusion is improbable.

Having identified litigation as one possible approach, it must be noted that there are a substantial number of litigated cases disputing the very unreviewability of those Rules in a variety of circumstances, but still denying relief to the aggrieved claimants.[44] One observer has written:

> In Ballin, the Supreme Court aimed to establish a permanent framework within which the judiciary would have limited power to review legislative rules of procedure. In this it failed. Time after time, courts have expanded their power to hear these 'sensitive' cases. But no court has succeeded, or for that matter attempted, to break down the barrier constructed in Ballin entirely. All cases presuppose some limit on the judiciary's power to review legislative rules of procedure.[45]

It is assumed that the goal is ultimate success, not merely the instigation of litigation capable of surviving Rule 12(b)(6) dismissal. Unless meaningful relief can be forthcoming from the courts, repair to them may satisfy other interests, but litigation in this area will only add to the burden of overtaxed and understaffed courts. The cases demonstrate quite clearly that no meaningful relief is likely to be afforded

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44. See, e.g., Consumers Union of United States v. Periodical Correspondents' Association, 515 F.2d 1341 (D.C. Cir. 1975) (litigation challenging rules governing process for credentialing members of the press); Skaggs v. Carle, 110 F.3d 831 (D.C. Cir. 1997) (litigation challenging House Rules restricting the means by which legislation proposing an increase in the income tax could be proposed); Vander Jagt v. O'Neill, 699 F.2d 1166 (D.C. Cir.) (litigation challenging committee assignment system for purported disproportionality).

45. Michael B. Miller, Comment, The Justiciability of Legislative Rules and the "Political" Political Question Doctrine, 78 CALIF. L. REV. 1341, 1356 (Oct. 1990).

to a litigant challenging the Senate's Rules, in the absence of an articulable and principled claim that the challenged rule violates some provision of the Constitution.

In the area of intergovernmental relations and disagreements, the courts tread with great care. That care is summarized in a formulation known as the political question doctrine. When reference is made by a court to the political question doctrine, what is in contemplation are those alleged constitutional violations by either the Legislative or Executive Branch that a court will decline to adjudicate, despite the satisfaction of jurisdictional and other justiciability questions.

Perhaps the most familiar explanation by the Supreme Court of the nonjusticiable political question is the following:

> Prominent on the surface of any case held to involve a political question is found a textually demonstrable constitutional commitment of the issue to a coordinate political department; or a lack of judicially discoverable and manageable standards for resolving it; or the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or an unusual need for unquestioning adherence to a political decision already made; or the potentiality of embarrassment from multifarious pronouncements by various departments on one question.[46]

In Baker v. Carr and a variety of other cases, the Supreme Court has held that when the task of constitutional interpretation presents "political questions," those questions are left by the Constitution to the politically accountable branches of government: the Legislative and the Executive.[47]

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46. See Baker v. Carr, 369 U.S. 186, 217 (1962).

47. So, for example, the Court consistently has held that cases brought under the Republican Form of Government Clause, U.S. Const. art. IV, § 4, present nonjusticiable political questions. See, e.g., Pacific States Tel. Co. v. Oregon, 223 U.S. 118, 133 (1912); Taylor & Marshall v. Beckham, 178 U.S. 548, 578-79 (1900); Luther v. Borden, 48 U.S. (7 How.) 1, 42 (1849). Congress, not the courts, is to decide what is a "Republican Form of Government" and whether a State is governed by one. In like vein, the Court has turned away challenges to the conduct of foreign policy by the President, relying in the process on characterizations of the issues as presenting "nonjusticiable political question." See, e.g., Goldwater v. Carter, 444 U.S. 996, 1002 (1979) (plurality opinion); Chicago & S. Air Lines v. Waterman S.S. Corp., 333 U.S. 103, 111 (1948); Oetjen v. Central Leather Co., 246 U.S. 297, 302 (1918).

The federal trial and appeals courts in the District of Columbia have concluded that constitutional standing requirements have been met in a variety of vote dilution or diminution cases brought by Senators or Representatives. For example, in Michel v. Anderson, 14 F.3d 623 (D.C. Cir. 1994), the Court concluded that then-Minority Leader Michel had standing to complain of the diminution of his vote when the House adopted a rule allowing territorial delegates to vote when the House convened itself as a Committee of the Whole. The conclusion that standing requirements of injury have been met may be interpreted as a hopeful sign for a litigant concerned whether the courts will be open to hear a claim. But, as previously noted, the conclusion that one may maintain litigation because the minimum showing of standing has been met does not translate into success on the merits and does not guarantee a positive outcome at all. In Michel, the court of appeals concluded that the practice complained of by Michel did not violate the Constitution.

It seems certain that litigation will be one approach considered by those concerned with preserving or changing the nominations status quo. If litigation is inevitable, judgments must be made about the likelihood of producing a favorable, sustainable result. In making such evaluations, it can be beneficial to bear in mind the precise relief a litigant would seek from a court. Plainly, a judicial attempt to superimpose Rules upon the Senate, from without, would constitute a naked power grab by the Courts, perhaps at the behest of a Senate minority. In the previously discussed challenge to the constitutionality of the filibuster, the district court rejected the proposed resolution that it take responsibility for the crafting of the Senate's rules: "[I]t would be inappropriate for this Court to rewrite the Senate Rules as Mr. Page suggests. . . . The measures that Mr. Page suggests the Court should take – rewriting the Senate rules and withholding the Senators' pay – raise serious its [sic] separation of powers concerns."[48]

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48. Page v. Shelby, 995 F. Supp. 23, 29 (D.D.C. 1998). Cf. United States v. Rostenkowski, 59 F.3d 1291, 1306 (D.C. Cir. 1995) (noting that even mere "judicial interpretation of an ambiguous House Rule runs the risk of the court intruding into the sphere of influence reserved to the

Only one justiciable, nonpolitical question case that involved the rules of either the House or Senate has actually resulted in the grant of relief to a claimant. See Powell v. McCormick, 395 U.S. 486 (1969). The Supreme Court concluded that the House had wrongfully excluded Powell him from being seated in the House by finding him "disqualified," not on the constitutional grounds of age, residency, etc., but on his alleged violation of House ethics rules during a prior term of Congress. There, because the Congress to which he had been elected had expired, the only relief that could be fashioned for Congressman Powell was an order for back pay. It is worth noting that the back pay remedy did not affect the Rules of the House or interfere with the usual operation of the House under them.

Many cases have been brought in which Senators or Congressmen have complained that some action, of the House or Senate, or of the Executive Branch, has had the effect of diminishing or diluting the votes of elected representatives.[49] In all the cases, the ultimate question becomes the question at the heart of the political question doctrine: is the matter unreservedly committed by the Constitution to the Legislative Branch. In all the cases, questions regarding the rules of either House are recognized by the courts as having been unreservedly committed to the Legislative Branch. In all the cases, the courts acknowledge their inability to fashion a remedy in such circumstances.

Consequently, it appears ill-advised to institute litigation to challenge the constitutionality of Rule XXII, unless the purpose is something other than success. Because such suits too frequently result in spectacular failures, the best strategy related to litigation battles over legislative rules is to position one's opponents as the claimants in any litigation challenging the Rules of the Senate. Amending the Rules and leaving it to a legislative minority to complain is the sure way of success. In the end, those who would employ the filibuster, but for amended Senate Rules, should be

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legislative branch under the Constitution").

49. See, n. 36, supra (citing cases).

the ones relegated to the option of pursuing judicial relief.

* * *

A separate constitutional consideration about instituting litigation to resolve this question must be examined. The litigating approach falls back on the pattern of repair to the Courts for the resolution of every constitutional question, and every potential dispute between the Legislative and the Executive Branch. The wisdom of this pattern and the constitutionality of it have concerned two judges of the D.C. Circuit whose opinions in such matters are entitled to great weight of respect: Robert Bork and Antonin Scalia.

In a dissent from a decision in one of these interbranch disputes, Judge Bork excoriated the Court for its headlong rush into a field not assigned to it under the Constitution:

> [T]he complete novelty of the direct intermediation of the courts in disputes between the President and the Congress, ought to give us pause. When reflection discloses that what we are asked to endorse is a major shift in basic constitutional arrangements, we ought to do more than pause. We ought to renounce outright the whole notion of congressional standing.
>
> I write at some length because of the importance of the constitutional issue and because in this case, unlike those in which similar protests have been lodged, the error in analysis produces an error in result. To date these protests have been unavailing. With a constitutional insouciance impressive to behold, various panels of this court, without approval of the full court, have announced that we have jurisdiction to entertain lawsuits about governmental powers brought by congressmen against Congress or by congressmen against the President. That jurisdiction floats in midair. Any foundations it may once have been thought to possess have long since been swept away by the Supreme Court. More than that, the jurisdiction asserted is flatly inconsistent with the judicial function designed by the Framers of the Constitution.

Barnes v. Kline, 759 F.2d 21, 41-42 (D.C. Cir. 1984) (Bork, J., dissenting) (citations omitted). Similarly, concurring in the judgment in Moore v. U.S. House of Representatives, 733 F.2d 946 (D.C. Cir. 1984), then-Judge Scalia explained why such interbranch disputes were unsuitable for litigation:

> This is not a suit between two individuals regarding action taken by them in

> their private capacities; nor a suit between an individual and an officer of one or another Branch of government regarding the effect of a governmental act or decree upon the individual's private activities. It is a purely intragovernmental dispute between certain members of one house of the Legislative Branch and -- in decreasing order of proximity -- (1) their own colleagues, (2) the other house of the same Branch, and (3) the Executive Branch, concerning the proper workings of the Legislative Branch under the Constitution. Such a dispute has no place in the law courts.

733 F.2d at 957 (Scalia, J., concurring in result) (emphasis added).

3. Majorities Rule – Majority Rules

During his service as Senator from Kansas, James Blackwood Pearson was a staunch advocate for recognition of the right of a simple majority of the Senate to change the rules of the Senate, including the rule governing cloture. The simple majority principle advocated by Senator Pearson – that a simple majority of the Senate may determine the Rules by which it proceeds – presents the clearest and best resolution of the present conflict. Moreover, pursuit of that solution now – while the appointment in question is to a court other than the Supreme Court – would both resolve the present controversy and make possible a smoother process of confirmation when vacancies there require the Senate to pass upon the President's nominees to the Supreme Court.

Moreover, as discussed within, the "simple majority" solution suggested herein: has a high degree of likelihood of success; is subject to only the very lowest degree of likelihood of invalidation if subjected to judicial challenge; and comports entirely with the constitutional role assigned to the Senate in the process of judicial confirmations, namely that of advising and consenting.

a. Existing precedent of the Senate recognizes the power of a simple majority of Senators to close debate on proposed changes to the Standing Rules

The provision of the Standing Rules regarding closing debate on the question of amending the Rules does not negate the majority's power to change the Rules. For at least a quarter century, it has been the settled precedent of the Senate that the power to make the Rules belongs to the majority. The establishment of this precedent

occurred during the leadership of Mike Mansfield, and resulted from Senate majority votes on virtually indistinguishable questions.[50] Of particular import the precedent is established that "a simple majority may close debate on a resolution providing for new rules at the beginning of a Congress . . . ."[51]

b. Because normal parliamentary rules govern the conduct of the Senate's business in the absence of extraordinary, constitutional constraints, a simple majority may assert control over those rules and over that body.

With the exception of those specific provisions for which a supermajority vote is constitutionally mandated,[52] after the power of the Senate to act rises with the presence of a quorum of its members, it may be exercised at the direction of a simple majority of that quorum. See United States v. Ballin, 144 U.S. 1 (1891). In the elegant phrasing of Ballin:

> The Constitution provides that 'a majority of each [house] shall constitute a quorum to do business.' In other words, when a majority are present the house is in a position to do business. Its capacity to transact business is then established, created by the mere presence of a majority, and does not depend upon the disposition or assent or action of any single member or fraction of the majority present. All that the Constitution requires is the presence of a majority, and when that majority are present, the power of the house arises.

144 U.S. at 5-6 (emphasis added).

Rulemaking for their proceedings is one of the fit subjects to which the power of the House and the Senate, when their power to act arises, may be applied. The Constitution assigns to each House of Congress the power "to determine the Rule of its Proceedings. . . ." U.S. Const. art. I, §5, cl. 2. For more than a century, it has been a bedrock of constitutional construction by the Supreme Court that the power of the

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50. See Binder and Smith, supra note 12, at 181 ("For the first time, a Senate majority endorsed [Senator] Pearson's interpretation of the Constitution that the Senate's standing rules cannot prevent a simple majority from acting on new rules at the beginning of a Congress"); id. (discussing 1975 reform efforts, including the adoption by the Senate of a point of order recognizing power of bare majority to close debate on new rules).

51. Id.

52. See text accompanying nn.19-25, supra.

Legislature to make such Rules is all but unreviewable. In Ballin, an importer challenged the assessment of a duty on certain goods. He claimed that the classification of his goods in accord with a United States Statute was invalid, because the law was not approved by a majority of the House of Representatives. 144 U.S. at 1-2. The United States defended on the ground that the statute had been validly enacted, and that the House's determination of the presence of a quorum was accomplished in accord with the Rules of the House.

The Supreme Court turned away the challenge to the enactment of the statute, and deferred to the judgment of the House on whether the method for determining a quorum was satisfactory to it:

> The question, therefore, is as to the validity of this rule, and not what methods the Speaker may of his own motion resort to for determining the presence of a quorum, nor what matters the Speaker or clerk may of their own volition place upon the journal. Neither do the advantages or disadvantages, the wisdom or folly, of such a rule present any matters for judicial consideration. With the courts the question is only one of power. The Constitution empowers each house to determine its rules of proceedings. It may not by its rules ignore constitutional restraints or violate fundamental rights, and there should be a reasonable relation between the mode or method of proceeding established by the rule and the result which is sought to be attained. But within these limitations all matters of method are open to the determination of the house, and it is no impeachment of the rule to say that some other way would be better, more accurate or even more just. It is no objection to the validity of a rule that a different one has been prescribed and in force for a length of time. 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, and within the limitations suggested, absolute and beyond the challenge of any other body or tribunal.

144 U.S. at 324-325. The plain import of the Court's opinion is that a simple majority of a quorum of each House continues to possess, while it has risen in its constitutional power, the authority to make its rules. In other words, the rule making process is not fixed and static. Instead, it is subject to adjustment and refinement, or outright changes, at the discretion of a simple majority of a quorum.

c. Consistent with the Rule-making Clause and with the decision in Brown v. Hansen, a simple majority of a quorum of the Senate can make rules for the governance of the body and the conduct of its business

In Brown v. Hansen, 973 F.2d 1118 (3d Cir.), aff'g 1992 U.S. Dist. Lexis 3483 (D.V.I. 1992), the validity of certain acts and resolutions of the Virgin Islands Legislature were drawn into question because they were adopted in contradiction to the express terms of the Rules of the Legislature. A review of the facts reveals the striking conflict in that legislative body and the surprising circumstances in which the challenged enactments were approved:

> When the Nineteenth Legislature of the Virgin Islands convened on January 14, 1991, it adopted standing rules ("the 1991 Rules") and made committee and chair assignments. Among other things, the 1991 Rules provided they could be amended, suspended, or waived only upon a vote of two-thirds of the Senators. These rules were adopted by an 11-4 vote of the legislature.
>
> A year later, a majority of the Senators (defendants) had become disenchanted with the committee leadership and 1991 Rules, and petitioned Senate President Virdin C. Brown to convene a special session of the legislature to consider the [certain] bills and resolutions[, including ones changing some of the 1991 Rules.]
>
> [Senate] President Brown convened the legislature in public session on January 22, 1992 in Charlotte Amalie. After reading defendant Senators' petition, Brown stated that the proposed bills and resolutions were not submitted in accordance with the 1991 Rules and, over the objections of several Senators, declared the meeting adjourned. Brown and his six supporters then left the Senate chambers. After their departure, Senate Vice President Alicia Hansen assumed the president's chair and continued deliberations with the remaining Senators present. Defendant Senators then adopted the proposed bills and resolutions by a vote of 8-0. Six days later, Senator Hansen forwarded the bills and resolutions to the governor [for action.][53]

In other words, the majority of Senators that remained after the departure of the Senate President took the gavel, made it in order for the Senate to consider the relevant legislation and rules changes, and then adopted them by simple majority votes. Litigation ensued.

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53. 973 F.2d at 1120.

The Third Circuit affirmed the judgment of the lower court that the legislation was validly enacted despite the steps taken in contradiction to the requirements of the 1991 Rules. The Court began by considering whether the acts of the majority violated "any constitutional or statutory provision," because, in the view of the Third Circuit, "the question whether the legislature violated its own internal rules is nonjusticiable."[54] In the Court's view, "[a]bsent a clear command from some external source of law, we cannot interfere with the internal workings of the Virgin Islands Legislature 'without expressing lack of the respect due coordinate branches of government.'"[55]

In 1982, Senator Metzenbaum and others sued to challenge the validity of certain consumer legislation that was, according to the complainants, not enacted in accordance with a set of statutorily imposed parliamentary procedures. Metzenbaum v. FERC, 675 F.2d 1282 (D.C. Cir. 1982). The Court of Appeals concluded that the task of interpreting the internal procedural rules of the House, and perhaps even putting itself in the position of deciding whether the House had correctly interpreted its own Rules, was an impermissible position for a federal court:

> Complainants first argue that Pub.L.No.97-93 is invalid because it was passed in violation of [parliamentary rules enacted by statute], which bar consideration by either house of Congress of a resolution approving proposed waivers within 60 days of considering any other resolution respecting the same Presidential [recommendation]. This provision was enacted by Congress
>
> > as an exercise of the rulemaking power of each House of Congress, respectively, and as such it is deemed a part of the rules of each House . . . with full recognition of the constitutional right of either House to change the rules (so far as those rules relate to the procedure of that House) at any time, in the same manner and to the same extent as in the case of any other rule of such House.
>
> 15 U.S.C. § 719f(d)(1). Thus, complainants ask us to decide whether or not the rules of the House of Representatives permitted consideration of the Senate

54. 973 F.2d at 1121.

55. Id. (citation omitted).

> resolution so quickly after passage of the House resolution. To resolve this issue would require us not only to construe the rules of the House of Representatives but additionally to impose upon the House our interpretation of its rules, i.e., whether the Senate resolution was in fact another resolution within the meaning of the [statutory parliamentary rules] and further whether the rule actually adopted by the House to allow consideration of the Senate resolution was effective under or took precedence over [those statutory parliamentary rules] so as to permit a change in the procedures it prescribes. There is no question here of whether Constitutional procedural requirements of a lawful enactment were observed, but only of whether the House observed the rules it had established for its own deliberations. We conclude that this issue, like most questions involving the processes by which statutes ... are adopted, is political in nature, and is therefore nonjusticiable.[56]

The court in Metzenbaum demonstrated an appropriate deference to the Rule-Making Clause authority of the House:

> Were not the express constitutional commitment of rulemaking authority to the houses of Congress sufficient in itself to identify the issues raised here as political questions, prudential considerations (would) counsel against judicial intervention. Among these is concern with the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government. To invalidate Pub.L.No.97-93 on the ground that it was enacted in violation of House rules would be to declare as erroneous the understanding of the House of Representatives of rules of its own making, binding upon it only by its own choice. We must assume that the House acted in the belief that its conduct was permitted by its rules, and deference rather than disrespect is due that judgment.

Id. (emphasis added).

In light of Brown v. Hansen and Metzenbaum v. FERC, and the precedents on which they are constructed, including Ballin and Baker v. Carr, together with the previously noted sense of the Senate regarding the power of a majority to make the Rules of the Senate,[57] it is within the power of a majority of the Senate to amend the Rules by the vote of a simple majority. Under Brown, a simple majority of Senators could act, and if they share Senator Hatch's commitment to do what must be done to

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56. 675 F.2d at 1286-88 (emphasis added; citations and internal quotation marks omitted).

57. See text accompanying nn. 50-51, supra.

repair the Senate's substantially broken confirmation processes, they will. Under Metzenbaum, the majority of a legislative body does not have to answer to a federal court as to the correct interpretation of its own rules.

Finally, in a decision arising from the State of Arizona, the Ninth Circuit rejected a similar invitation to weigh in on the internal rule-making and rule-interpretation activities of the Arizona House of Representatives. In Davids v. Akers, 549 F.2d 120 (9th Cir. 1977), the Democrat minority challenged the majority's allocation of committee seats and committee assignments.[58] The court commented,

> The principle that such procedures are for the House itself to decide is as old as the British Parliament. It is embodied in the Constitution of the United States: 'Each House may determine the Rules of its Proceedings. . . .' (Art. I, Sec. 5, cl. 2). It is embodied in the Constitution of Arizona: 'Each house to determine rules of its proceedings' (Art. IV, Sec. 8).[59]

In a footnote, the Ninth Circuit panel explained the historicity of the deference due to the legislature for determination of parliamentary questions: "From the earliest period in its history, the English Parliament has accepted the principle that the wishes of the majority are decisive."[60] Thus, again, the long-standing principle of representative bodies, the majority rule, is vindicated by the action of a simple majority deciding that it may make the rules of the Senate, deciding in the making of those rules that filibusters of nominations are out of order (or are subject to cloture by a simple majority vote), and deciding to give consent to the nomination of Miguel Estrada (or any other nominee) to be a federal judge.

CONCLUSION

Given the prerogative of the majority, and the respect for that prerogative expressed in Brown, Metzenbaum, and Davis, a willing majority in the Senate could make it in order for the Senate immediately to take up the questions proposed above,

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58. Id.

59. 549 F.2d at 123 (footnote omitted).

60. Id. n.2.

regarding the making of the Senate's rules, the prohibiting of filibusters on judicial nominations (or the phasing out of them), and the confirmation of Miguel Estrada (or other nominees). And while sixty votes may not be found to invoke cloture, Brown, Metzenbaum, Davis, and their predecessors in law and Senate practice confirm that all that would be required to make the necessary rule changes is a majority of a quorum of the Senate – a sufficient number of Senators to insure that the power of the body to act has arisen.

Testimony of Steven G. Calabresi

Professor of Law, Northwestern University

The people of the United States have just won a great victory in the war to bring democracy and majority rule to Iraq. Now it is time to bring democracy and majority rule to the U.S. Senate's confirmation process for federal judges. A determined and willful minority of Senators has announced a policy of filibustering, indefinitely, highly capable judicial nominees such as Miguel Estrada and Priscilla Owen. By doing this, those Senators are wrongfully trying to change two centuries of American constitutional history by establishing a requirement that judicial nominees must receive a 3/5 vote of the Senate, instead of a simple majority, to win confirmation.

I have taught Constitutional Law in one form or another at Northwestern University for 13 years and have published more than 25 articles in all of the top law reviews including the Harvard Law Review, the Yale Law Journal, the Stanford Law Review, and the University of Chicago Law Review. I served as a law clerk to Justice Antonin Scalia and as a Special Assistant to the Attorney General of the United States. I am a Co-Founder and the Chairman of the Board of Directors of the Federalist Society, a national organization of conservative and libertarian lawyers. I offer this legal opinion in my individual capacity, and not on behalf of my academic institution, the Federalist Society or any client.

The U.S. Constitution was written to establish a general presumption of majority rule for congressional decision-making. The historical reasons for this are clear. A major defect with the Constitution's precursor, the Articles of Confederation, was that it required super-majorities for the making of many important decisions. The Framers of our Constitution deliberately set out to

remedy this defect by empowering Congress to make most decisions by majority rule. The Constitution thus presumes that most decisions will be made by majority rule, except in seven express situations where a two-thirds vote is required. The seven exceptional situations where a super-majority is required include: overriding presidential vetoes, ratifying treaties, approving constitutional amendments, and expelling a member.

There is substantial reason to think that these seven express exceptions to the general principle of majority rule are the only exceptions that the document contemplates. Under the canon of construction *expressio unius, exclusion alterius*, the enumeration of things in a series is generally supposed to be exclusive. Under this ancient and venerable canon, no other super-majority requirements beyond the seven enumerated in the constitutional text may in fact be permitted. This canon has been relied on by the U.S. Supreme Court in construing that court's original jurisdiction in *Marbury v. Madison*, as well as in many other cases.

Each House of Congress does, however, have the power to establish by majority vote "the Rules of its Proceedings", and it is quite clear that as an original matter this empowered each House to adopt parliamentary rules to foster deliberation and debate and to set up Committees to conduct business, as the British Parliament had done. It is not at all clear that the Rules of Proceedings Clause was originally meant to authorize filibusters of the kind we have become accustomed to in the Senate. From 1789 to 1806, the Senate's Rules allowed for cutting off debate by moving the previous question – a motion which required only a simple majority to pass. Critically, then, the first several Senates to sit under the Constitution did **not** have a Rule that allowed for filibustering.

The filibuster of legislation dates back to 1841 when Senator John C. Calhoun, a

notorious defender of slavery and an extreme proponent of minority rights, originated the filibuster as part of his effort to defend the hideous institution of slavery. Calhoun's creation of the filibuster was opposed by the great Senator Henry Clay and the very name filibuster itself was originally a synonym for pro-Slavery mercenary pirates who would attack Latin American governments to try to spread the Slave system. Since its inception in 1841, the filibuster of legislation has been used to block legislation protecting black voters in the South, in 1870 and 1890-91; to block anti-lynching legislation in 1922, 1935, and 1938; to block anti-poll tax legislation in 1942, 1944, and 1946; and to block anti-race discrimination statutes on 11 occasions between 1946 and 1975. The most famous filibuster of all time was the pro-segregation filibuster of the Civil Rights Act of 1964, which went on for 74 days. In recent years, the number of filibusters has escalated dramatically due to the emergence of the so-called stealth filibuster or two track system of considering legislation. We have gone from 16 filibusters in the 19th Century to 66 in the first half of the 20th Century to 195 filibusters between 1970 and 1994. Filibusters of legislation may be constitutionally dubious as an original and textual matter, but they have been permitted now in the Senate for a century and one-half and indeed seem to be mushrooming.

Now for the first time in 214 years of American history an angry minority of Senators is seeking to extend the tradition of filibustering from legislation to judicial nominees who enjoy the support of a majority of the Senate. This unprecedented extension of the filibuster to judicial nominees threatens to raise the vote required for senatorial confirmation of judges from 51 to 60 votes. This is a direct violation of the Advice and Consent Clause, which clearly contemplates only a majority vote to confirm a judge. Raising the vote required to confirm a judge will

weaken the power of the President in this area in direct violation of the Constitution while augmenting the power of a minority of the Senate. Giving a minority of Senators a veto over judicial nominees will also threaten the independence of the federal judiciary in direct violation of the separation of powers.

The Appointments Clause imposes a mandatory duty on the President to nominate and appoint judges. The Clause directs that the President "shall" i.e. "must" nominate individuals to judicial vacancies and it implicitly suggests that the full Senate must give its advice and/or consent with respect to each nominee. By giving the Senate a role in judicial confirmations, the Constitution allows the Senate to share in the inherently executive power of appointment. This senatorial exercise of executive power is to be narrowly construed, as it is an exceptional involvement of the Senate in an inherently executive task. Myers v. United States.

The question that faces this body is: should the non-textual, non-originalist tradition of allowing filibusters of legislation be allowed to spread to the new area of senatorial confirmation of federal judges? There are several reasons why allowing filibusters of judicial nominations is a bad idea. First, such filibusters weaken the power of the President who is one of only two officers of government who is elected to represent all of the American people. The President was supposed to play a leading role in the selection of judges and that role is defeated by giving a minority of senators a veto over presidential nominees.

Second, giving a minority of Senators a veto over judicial nominees will violate the separation of powers by giving a Senate minority the power to impose a crude litmus test on judicial nominees, thus undermining judicial independence. It is already hard enough for talented and capable individuals to be appointed to the federal bench. Making this process even

more difficult is bad for the federal judiciary and bad for the country. We are likely to get only bland and weak individuals being willing to serve as federal judges if we continue to make the process of becoming a federal judge ever more onerous. This would weaken the federal courts and the exercise of judicial review immeasurably.

Third, the filibuster of legislation can at least be defended on the ground that federal legislation ought to be rare because of the sweeping and national effects it has on the rights of all citizens. In contrast, the confirmation of a judge who is sworn only to apply the law made by others ought to have no such sweeping and national effects. If a mistake is made with a judicial confirmation and somehow a judicial activist is allowed to slip through, impeachment is always available to rectify the error. There is no similarly easy remedy if Congress passes a bad law.

Finally, the tradition of Senate filibusters of legislation is, as I have shown of questionable pedigree. Text and original understanding do not clearly support the filibuster of legislation and the filibuster has had a dismal history as a tool primarily used in the defense of slavery and then of segregation. While it may be too late in the day to stamp out the filibuster of legislation, surely we can keep this invention of John C. Calhoun from spreading to a new area for the first time in 214 years of American history! This is the time and place to nip the spread of the filibuster in the bud.

The Senate can always change its rules by majority vote. To the extent that Senate Rule XXII purports to require a two-thirds majority to invoke cloture on a rule change, Rule XXII is unconstitutional. It is an ancient principle of Anglo-American constitutional law that one legislature cannot bind a succeeding legislature. The great William Blackstone himself said in his Commentaries that "Acts of parliament derogatory from the power of subsequent parliaments

bind not...". Thus, to the extent that the last Senate to alter Rule XXII sought to bind this session of the Senate its action was unconstitutional. A simple majority of the Senate can and should now amend Rule XXII by majority vote to ban filibusters of judicial nominations.

Leading scholars in this area of law such as John O. McGinnis of Northwestern University, Michael Rappaport of San Diego University, and Erwin Chemerinsky of the University of Southern California all have written that the Senate Rules can be changed at any time by a simple majority of the Senate. More importantly, Vice Presidents Richard M. Nixon, Hubert H. Humphrey, and Nelson A. Rockefeller have all so ruled while presiding over the United States Senate. Some commentators have gone even further in challenging filibusters of legislation as unconstitutional, as did Lloyd Cutler, White House Counsel to Presidents Carter and Clinton. Indeed, eight years ago, 17 very distinguished law professors, led by Yale Law Professor Bruce Ackerman, opined that a new Rule in the House of Representatives purporting to create a 3/5 requirement for enacting new tax increases was unconstitutional. The Ackerman letter wisely called for limiting the proliferation of new extra-constitutional, super-majority rules – counsel that the Senate should heed here.

What will happen if the filibuster is allowed to spread to the new area of judicial confirmations? It will next spread to the resolution every new Senate must pass to organize itself, set up Committees, and apportion staff and other resources. The filibusters next expansion will be one wherein a minority of 41 Senators will claim they are entitled to equal slots and Committee resources as are enjoyed by a majority of 59 Senators. This is the logical extension of the filibusters protection of minority rule under the inexorable Calhounian logic now being played out.

PATRICK LEAHY
VERMONT

COMMITTEES:
AGRICULTURE, NUTRITION, AND FORESTRY
APPROPRIATIONS
JUDICIARY

United States Senate
WASHINGTON, DC 20510-4502

A Reality Check
On GOP Whining About Judicial Nominations

From: David Carle, spokesman for
Sen. Patrick Leahy (D-Vt.), ranking Democratic member,
Senate Judiciary Committee

RE: Republican Whining

Under the Democratic-led Senate of the 107th Congress and continuing this year in the Republican-led 108th Congress, the judicial confirmation process is working far faster than it did when Republicans routinely blocked nearly 60 of President Clinton's nominees with anonymous holds, filibusters and other roadblocks. As of Monday night, the Senate now has confirmed 121 Bush judicial nominees. By the close of business Tuesday we expect to be at the lowest vacancy rate in 13 years, with two additional confirmations. One hundred of those Bush judicial nominees were confirmed by the previous Democratic-led Senate. Only two of President Bush's nominees have faced cloture votes -- and these cloture votes are open roll calls, not the secret holds that Republicans used anonymously to block scores of President Clinton's nominees.

The judicial vacancy rate in percentage terms – 5.7 percent – is even smaller than the nation's overall jobless rate, which reached 6 percent last Friday.

NUMBERS. With the confirmation Monday night of Deborah Cook, judicial vacancies are down to 49 – the lowest in seven years. With Senate confirmation of Cecilia Altonoga and Patricia Minaldi expected today (Tuesday), the vacancy rate will be the lowest in 13 years (47). The Democratic-led Senate of 2001 and 2002 confirmed 100 Bush judicial nominees, and this year's Republican-led Senate has confirmed 21, for a total so far of 121 (these numbers will change with the likely confirmations cited above).

At the time Democrats took over leadership of the Judiciary Committee in the summer of 2001, Democrats inherited 110 vacancies, and 40 additional vacancies

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occurred while Democrats were in charge. The Democratic Senate confirmed 100 Bush judicial nominees – 17 circuit and 83 district – in only 17 months. Presumably, nearly all 100 confirmed by the Democratic-led Senate were pro-life, conservative Republican nominees. The Democratic pace was faster and fairer than Republicans' pace since their slowdown began in 1996. Last year (2002) was the best single year (in terms of numbers of judicial nominees confirmed) since 1994.

THE SITUATION NOW. ***The judicial confirmation process is going far more smoothly today than Republicans allowed under President Clinton.*** Nearly 60 Clinton nominees were not given hearings and/or votes, and others were filibustered or waited years to get their hearings. President Bush acknowledges choosing nominees based on their ideology. President Clinton, as CQ and others concluded, was known instead for choosing mainstream candidates.

The many good-faith steps by Democrats in the 107th Congress to repair some of the damage of the previous six years of the Republican obstruction of President Clinton's nominations have not been reciprocated by the White House. In fact they are not even acknowledged. For most of this year, Chief Justice Rehnquist has been the only Republican gracious enough to even mention that Democrats had confirmed 100 Bush nominees. Democrats ended the era of anonymous and secret holds, made blue slips public for the first time, expedited the pace, made the process fairer, and even acted on vacancies in circuits where Republicans had purposefully blocked President Clinton's appointments. Unlike Republicans, Democrats held hearings and votes even on highly controversial nominees (the Pickering, Owen, Shedd and Estrada nominations are examples). This year, to make matters worse, Republicans have systematically changed, bent and even broken the committee's rules and practices now that there is a Republican in the White House (compared with their handling of Clinton nominees).

The process starts with the President, and any further meaningful improvements have to come from the White House. The President began his term by ending the pre-nomination peer review vetting by ABA, then also ended the normal practice of consultation with the opposition party and with home state senators that earlier presidents have followed (President Clinton even let Chairman Hatch pick a Utah judge, a Republican). More than any recent president including Reagan, President Bush is picking nominees based on their ideology – and brags that he is doing that. Yet he objects when the ***Senate*** examines the rigidity of their ideology.

# # # # #

Fixing a Broken Confirmation Process: Ending Permanent Judicial Nominee Filibusters

By
Thomas L. Jipping, J.D.

Submitted to the U.S. Senate Subcomm. on the Constitution, Civil Rights and Property Rights
Following the Hearing
"Judicial Nominations, Filibusters, and the Constitution:
When a Majority is Denied Its Right to Consent"

Submitted on Behalf of:

60 Plus Association
America 21
American Assoc. of Christian Schools
American Conservative Union
American Family Association
Center for Individual Freedom
Centre for New Black Leadership
Christian Coalition of America
Citizen Outreach
Citizens for Community Values
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May 13, 2003

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Fixing a Broken Confirmation Process: Ending Permanent Judicial Nominee Filibusters

Executive Summary

The current effort to impose minority rule through permanent filibusters of judicial nominees brings three important principles into tension, if not conflict: majority rule, the Senate's power to set its own rules, and the Constitution's primacy in setting standards for government.

Permanent Judicial Nominee Filibusters: Part of a Broad Obstruction Campaign

The obstruction campaign is based on a radical view of how much power judges should wield. Within days of President Bush's inauguration, Senate Minority Leader Tom Daschle (D-SD) vowed:

- Democrats would use "***whatever means necessary***" to block undesirable judges
- "***[I]f the time comes when it may be required, even on a nomination, that 41 of us stand together, we will be there.***"

During the 107th Congress, Democrats' obstruction campaign operated in both the Judiciary Committee and full Senate:

- Democrats refused to hold a hearing on nearly one-third of President Bush's appeals court nominees
- Democrats misused the "blue slip" system for the unprecedented purpose of pressuring the president to appoint more radical nominees.
- Democrats misused the Judiciary Committee to vote down nominees certain to be approved if given a Senate vote. ***Republicans never defeated a Clinton nominee in the Judiciary Committee.***

The Democrats' obstruction campaign yielded results during the 107th Congress:

- The confirmation rate for President Bush's appeals court nominees was 45 percent lower than previous presidents.
- Appeals court vacancies under President Bush averaged 50 percent higher than when Republicans controlled the Senate under President Clinton.
- The U.S. Court of Appeals accounts for 20 percent of the judiciary's full-time positions, but more than 45 percent of its vacancies.
- After ***730 days***, eight of President Bush's first batch of 11 appeals court nominees have been confirmed; by comparison, the previous three presidents' first 11 nominees were confirmed in an average of ***81 days.***

Permanent Judicial Nominee Filibusters: A Politicizing Strategy

The Senate's tradition of extended debate is not the problem. Even an ordinary "filibuster," resisting efforts to limit debate for legitimate purposes, is not the problem. The problem is use of a permanent filibuster to abolish majority rule. That unprecedented tactic has several politicizing effects:

- The Estrada and Owen filibusters clearly meet the definition of an improper filibuster.
- The Estrada and Owen filibusters are contrary to Senate practice, by which many nominees with support of more than 50, but less than 60, senators have been confirmed. Even the single example of the withdrawal of Abe Fortas' 1968 nomination to be Chief Justice after a failed cloture vote provides no precedent for permanent filibusters.
- Democrats appear to be taking their orders from leftist groups.
- Senate Democrat leaders have changed positions on nominee filibusters as the party controlling the White House has changed, while Republican leaders have not..
- Senate Democrats who once sought to change Senate rules to prevent permanent filibusters have changed positions as the party controlling the White House has changed.
- Individual Democrats who once argued strongly against nominee filibusters rank near the bottom in voting to limit debate on judicial nominations.
- Media outlets, such as the *New York Times*, that once condemned the filibuster, now support it.

Judicial Nominee Filibusters: Constitutional Concerns

The report carefully defines the filibusters that pose the most serious politicizing and potentially constitutional, problems. Its definition parallels the conclusion of the **Congressional Research Service**:

> Although a voting majority of Senators may be prepared to vote for a nominee, the nomination cannot be confirmed as long as other Senators, presumably, a voting minority, are able to prevent the vote from occurring. The use of dilatory tactics for such a purpose is a filibuster.

This kind of permanent filibuster designed to keep the Senate from ever voting on a nominee raises constitutional concerns. Among the most commonly cited concerns are: abolishing majority rule, adding to the Constitution's standards by imposing a super-majority in situations the Constitution does not, and undermining the president's appointment power.

The report includes four tables, with analysis based on cloture votes through May 8, 2003:

- **Table 1 lists every Senate cloture vote on a judicial nominee, with its outcome and the nature of the opposition to cloture.**
- **Table 2 documents every current senator's vote on every motion to invoke cloture on judicial nominees.**
- **Table 3 ranks all current senators based on their support for cloture on judicial nominees.**
- **Table 4 lists senators alphabetically and summarizes all the data regarding their record on judicial nominee cloture.**

Fixing a Broken Confirmation Process: Ending Permanent Judicial Nominee Filibusters

By
Thomas L. Jipping[1]

Submitted to the U.S. Senate Subcommittee on the Constitution, Civil Rights and Property Rights
For the Hearing
"Judicial Nominations, Filibusters, and the Constitution:
When a Majority is Denied Its Right to Consent"

"[T]he system for picking judges ... has broken down."

The New York Times
Editorial, April 17, 2003

The latest evidence for this conclusion is the unprecedented use of the filibuster by a minority of U.S. Senators to defeat judicial nominees the majority would otherwise approve. We applaud Sen. John Cornyn (R-Texas) for taking concrete steps to diagnose this problem and explore a solution.

I. Introduction

The current use of the filibuster against judicial nominees brings three important principles or traditions into tension, if not into conflict.

- **Majority Rule**. America's founders embraced, as Alexander Hamilton described it, "the fundamental maxim of republican government, which requires that *the sense of the majority should prevail.*"[2]

- **The Senate Sets Its Rules**. The Constitution gives the Senate, like the House, the power to "determine the Rules of its Proceedings."[3] Senate rules provide for essentially unlimited debate. Indeed, the right of U.S. Senators to unlimited debate has been called "the single most defining characteristic of the Senate as a legislative body."[4] These rules enhance the power of the minority.

- **The Constitution Sets the Standards**. Individual senators take an oath to support the Constitution. As an institution, the Senate's rules, as well as its legislation, must conform to the Constitution's standards.

Today, for the first time in American history, a minority of Senators is using the filibuster, not for the purposes the filibuster in the past has legitimately served, but to replace majority rule with minority rule. That is, a minority seeks to defeat judicial nominations the majority would otherwise approve. While this one tactic is unprecedented, it is part of a broader obstruction campaign against President Bush's judicial nominations. This report places the current use of judicial nominee filibusters in that context and examines the use of judicial nominee filibusters in two respects, its politicizing effects on the judicial selection process and its constitutional validity.

II. Permanent Judicial Nominee Filibusters: Part of a Broad Obstruction Campaign

The battle over judicial appointments is "an argument over ... the nature and extent of judicial power under a written Constitution."[5]

Making his first judicial nominations on May 9, 2001, President Bush took sides in this argument. He described "the standards by which I will choose all federal judges" this way: "Every judge I appoint will be a person who clearly understands ***the role of a judge is to interpret the law, not to legislate from the bench.*** ... My judicial nominees will know the difference."[6] Judges must take the law as they find it, in both form (its words) and substance (its meaning), and apply it faithfully toward whatever results the law requires.

Those obstructing President Bush's judicial nominees take the other side in this argument. The American people generally reject the far-left political and cultural agenda in the ordinary political process. The far-left typically switches from legislation to litigation, seeking to impose upon the American people through the courts an agenda they have not chosen for themselves at the polls. To the far-left, the political ends justify the judicial means. Their success in the courts, however, requires judges willing to go beyond merely interpreting the law, and willing to make law or to legislate from the bench.

On April 29, 2003, Sen. Richard Durbin (D-Illinois), an obstruction campaign leader, described the radical way the far-left views judges this way:

> **Most of us in the Senate will come and go, and [judges] will still be sitting on the bench with gavel in hand, in their black robes, meting out justice *according to their own values.*[7]**

Judges who decide cases according to their own values make law. Judges who decide cases according to law interpret it. These are two radically different views of what judges do and the power they wield.

A. "Whatever Means Necessary"

The far-left wants judges who will deliver results favorable to the leftist agenda and to leftist constituencies. Since the far-left believes judges rule "according to their own values" rather than according to law, the far-left seeks to eliminate judicial nominees with insufficiently leftist beliefs and values. Within days of President Bush's inauguration, Senate Minority Leader Tom Daschle (D-South Dakota) vowed Democrats would use "*whatever means necessary*" to do so.[8]

B. Obstruction from the Minority

In early 2001, while still in the minority, Senate Democrats sought to demonstrate that "they have the ability to defeat conservative candidates in the future, particularly candidates for any Supreme Court vacancy."[9] They did so in both the Judiciary Committee and the full Senate.

In the Judiciary Committee, Democrats blocked the first hearing scheduled for May 23, 2001, to consider the nominations of Jeffrey Sutton and Deborah Cook to the U.S. Court of Appeals for the Sixth Circuit and of John Roberts to the D.C. Circuit.[10] The next day, Sen. James Jeffords of Vermont left the Republican Party, giving Democrats effective majority control. None of these three nominees received a hearing for the rest of the 107th Congress.[11]

In the full Senate, minority Democrats sought to "send a message" to President Bush "through the strength of their opposition"[12] to various nominees. Democrats assembled against nominees to various positions more than the 40 votes needed to sustain a filibuster. Sen. Daschle said this "would be the strongest statement I think we could make"[13] and issued this warning:

> **"[I]f the time comes when it may be required,**
> ***even on a nomination,***
> **that 41 of us stand together, we will be there."[14]**

C. Obstruction from the Majority

In the majority for most of the 107th Congress, Democrats similarly waged their obstruction campaign in both the Judiciary Committee and the full Senate. They focused that campaign primarily on nominees to the U.S. Court of Appeals so that, by agreeing to confirm nominees to the U.S. District Court, they could still claim confirmation progress.

1. Judiciary Committee

In the Judiciary Committee, Democrats used three obstruction tactics. First, even though President Bush began making nominations months earlier than previous presidents,[15] Democrats refused a hearing to nearly one-third of his appeals court nominees. More Bush appeals court nominees have waited more than a year for a hearing than in the previous 50 years combined.

Second, Democrats are using the so-called "blue slip" system, by which senators support or oppose nominees who would serve in their state, for an unprecedented purpose. Since a negative blue slip typically prevents a Judiciary Committee hearing, senators in the past have used it to block nominees they directly oppose. Since 2001, however, Democrats have used this system to block nominees they do not oppose, intending to force nominations of their choosing to other positions.

Senators Carl Levin and Debbie Stabenow (D-Michigan), for example, are blocking consideration of six Michigan-based judicial nominees, four to the U.S. Court of Appeals for the Sixth Circuit and two to the U.S. District Court. They have stated no opposition to these nominees, but demand that President Bush appoint two unconfirmed Clinton nominees, one of whom is married to Sen. Levin's cousin.[16]

Third, Democrats distorted the Judiciary Committee's role by voting down two appeals court nominees, depriving the full Senate of the chance to vote at all.

The Judiciary Committee's proper role is to give nomination recommendations to the full Senate. The committee's proper role is evident in the way it votes, not on nominations themselves but on one of three recommendations: favorable, unfavorable, or none at all. If the process works properly, the Senate may not have an opportunity to vote on a nominee because the committee did not hold a hearing or a vote,[17] but not because the committee has formally voted to keep the Senate from acting.

Senate Democrats, however, did just that. The committee voted 9-10, along party lines, against sending the nominations of Charles Pickering[18] and Priscilla Owen[19] to the full Senate at all, even with a negative recommendation. In both cases, a majority of the full Senate indicated their desire both to consider, and to approve, the nominees. Instead, not unlike in the current filibusters, a minority of senators sought to deprive the majority of the opportunity to act.

The Judiciary Committee has defeated only six judicial nominees this way in the past 60 years, five of them when Democrats controlled the Senate.[20] ***Republicans never defeated a Clinton nominee in the Judiciary Committee.*** Significantly, the Clinton nominees who serve as Democrats' most prominent examples of supposed Republican obstruction – such as appeals court nominees Richard Paez and Marsha Berzon – were nonetheless sent to the Senate rather than voted down in the Judiciary Committee.

2. Senate

In the full Senate, Democrats used a series of tactics to achieve a series of obstructionist goals. During 2001, they simply refused to confirm many nominees. While President Bush made a record 44 nominations by the annual August recess, and 65 during 2001, Democrats confirmed just 28 nominees all year. By comparison, Democrats had confirmed that many Clinton nominees in one month alone, in October 1994 when they knew Republicans would likely capture Senate control.

Democrats soon focused their obstruction campaign on nominees to the U.S. Court of Appeals, allowing confirmation of district court nominees in order to claim overall progress. At the same time, the confirmation rate for President Bush's appeals court nominees was nearly 45 percent below the average for his three predecessors. Similarly, appeals court vacancies averaged 20 when Republicans ran the Senate under President Clinton; that average soared to 30 when Democrats ran the Senate under President Bush. Today, although the U.S. Court of Appeals accounts for 20 percent of the entire judiciary's full-time positions, it accounts for nearly 45 percent of its vacancies.

President Bush made his first 11 appeals court nominations on May 9, 2001. Democrats adjourned ***560 days*** later without confirming even half of them. During the entire 107th Congress, the Senate confirmed only five of those nominees, defeated one in the Judiciary Committee, held a hearing but no vote on one, and refused even a hearing to the other four. Even today, ***730 days*** later, the Senate has confirmed eight, not yet voted on two approved by the Judiciary Committee, and has yet to hold a hearing on one. The previous three presidents' first 11 appeals court nominees were confirmed in an average of ***81 days***, with none taking more than 202 days.

Senate Democrats did exactly what their leader instructed, assembling more than 40 votes against a series of nominees. This practice began early, with 42 votes against John Ashcroft to be Attorney General,[21] and 47 votes against Ted Olson to be Solicitor General.[22] It continued among judicial nominees, with 44 votes against appeals court nominee Dennis Shedd[23] and 41 votes against appeals court nominees Timothy Tymkovich[24] and Jeffrey Sutton.[25]

The latest tactic has made that filibuster threat filibuster reality.

II. Permanent Judicial Nominee Filibusters: A Politicizing Strategy

A. Defining the Problem

The Constitution gives the House and Senate the power to determine "the Rules of its Proceedings."[26] Under Senate Rule XIX, any senator receiving recognition may speak uninterrupted for as long as he wishes. Extended debate certainly serves the Senate's self-described function as the "world's greatest deliberative body,"[27] but even "extended" debate has never been without limits. Thomas Jefferson's *Manual of Parliamentary Practice*, for example, required: "No one is to speak impertinently or beside the question, superfluously or tediously."[28] And, of course, limiting debate is necessary for the Senate actually to vote on anything.

Two methods exist for limiting debate, one informal and one formal. The informal method is a "unanimous consent" agreement whereby all senators, by their failure to object, support limiting debate and scheduling a vote. The formal method is by voting on a "motion to invoke cloture" under Senate Rule XXII.

Promulgated in 1917, Rule XXII first applied only to legislation and required that "a super-majority of two-thirds could limit each Senator to one hour of debate."[29] Rule XXII was applied also to nominations in 1949[30] and, until 1975, invoking cloture required support of at least two-thirds of senators present and voting.[31] Since 1975, it has required "three-fifths of the Senators duly chosen and sworn," or currently 60 votes if there exist no vacancies.[32]

Extended debate is a Senate tradition.
A "filibuster" uses the *means* of extended debate for the *purpose* of obstruction.

Since extended, unlimited debate is the norm in the Senate, some additional element is necessary to identify an instance of extended debate as a "filibuster." The term "originally referred to mercenary warfare intended to destabilize a government."[33] Most contemporary definitions of "filibuster" include an element of purpose or motive:

- "the use of extreme dilatory tactics in an attempt to delay or prevent action especially in a legislative assembly."[34]
- "the parliamentary tactic used in the United States Senate by a minority of the senators—sometimes even a single senator—to delay or prevent parliamentary action"[35]
- "obstructionist tactics in legislative assemblies"[36]

Even these definitions, however, remain somewhat subjective. A more objective measure might be the cloture vote, the only formal method of limiting debate. Like the filibuster itself, however, a cloture vote can be used for entirely legitimate purposes. Taking a cloture vote can, for example, be as much a signal of legislative efficiency by preventing a filibuster as of legislative inefficiency by trying to stop a filibuster.

In November 1999, for example, then-Majority Leader Trent Lott (R-Mississippi) promised to bring up two controversial appeals court nominations for a vote by March 15, 2000.[37] When the time came, to ensure that a vote would take place, he filed a petition to invoke cloture, fewer than 15 senators voted against cloture, and the Senate confirmed both nominees the next day.[38]

Nor is a failed cloture vote *per se* evidence of an improper filibuster.

- **Rehnquist Nomination (1971)**. On December 10, 1971, the Senate voted 52-42 on a cloture motion regarding the nomination of William Rehnquist to be Associate Justice of the U.S. Supreme Court. Under existing Senate rules, 63 votes were necessary to limit debate. *Congressional Quarterly Almanac* notes that "the Senate took a final vote *the same day* and confirmed Rehnquist by a surprisingly easy 68-26 margin."[39]

- **Stewart Nomination (1999)**. In June 1999, President Clinton nominated B. Theadore Stewart to the U.S. District Court in Utah. On September 21, the Senate voted 55-44 on a cloture motion, *Democrats* supplying all the votes opposing cloture. Because the nominee was a close friend of Judiciary Committee Chairman Orrin Hatch (R-Utah), this was merely a tactic used to leverage confirmation of other nominees.[40] The Senate voted 93-5 on October 5, just two weeks after the failed cloture vote, to confirm Stewart.

The current use of judicial nominee filibusters is not simply a means of extending debate on a nomination. Nor is it for the purpose of encouraging, or even leveraging, negotiations on nominations. The current use of permanent judicial nominee filibusters is instead to establish minority rule, for a minority of senators to win what they would otherwise lose.[41] The Congressional Research Service used this definition:

Although a voting majority of Senators may be prepared to vote for a nominee, the nomination cannot be confirmed as long as other Senators, presumably, a voting minority, are able to prevent the vote from occurring. The use of dilatory tactics *for such a purpose* is a filibuster.[42]

An improper filibuster is one attempting to establish minority rule, a tactic by which a minority seeks to win a specific objective that they would lose if majority rule operated.

"[T]he filibuster has become the tool of the sore loser"

The New York Times
Editorial, January 1, 1995

B. The Current Use of Permanent Judicial Nominee Filibusters is Politicizing

1. The Estrada and Owen filibusters are improper

The current use of the filibuster against appeals court nominees Miguel Estrada and Priscilla Owen clearly meet this specific definition of an improper filibuster. Senate Majority Leader Bill Frist (R-Tennessee) first brought up the Estrada nomination for consideration on February 5, 2003. Over the next four weeks, the Senate spent nearly 100 hours debating the nomination. Sen. Frist made 17 different unanimous-consent proposals so there could be a full debate and a vote. These proposals offered as few as six hours and as much as nearly three weeks of debate. One offered a full hour for every U.S. Senator. Democrats objected to every single one.

Because the unanimous-consent approach failed, Sen. Frist has so far filed a record six motions to invoke cloture on the Estrada nomination; each has been defeated on a nearly party-line vote.[43] No previous judicial nominee had been subject to more than two cloture votes. The Senate is clearly ready to vote, and to confirm, the Estrada nomination. The Estrada filibuster is solely to replace majority rule with minority rule, ensuring that the "sense of the majority" does not prevail.

Similarly, the filibuster against Justice Owen's nomination fits the definition. The same process began on April 8, 2003, when Democrats objected to unanimous-consent requests to limit debate to six, and then to 10, hours.

Asked if "any number [of hours] would be sufficient" for considering the Owen nomination, Sen. Harry Reid (D-Nevada), the Assistant Minority Leader, responded that "*there is not a number in the universe that would be sufficient.*"[44]

Sen. Frist has so far filed two motions to invoke cloture. Both have been defeated.[45]

2. The Estrada and Owen filibusters are contrary to Senate practice

According to the Congressional Research Service, only one judicial nomination in history "on which cloture was sought but not invoked," the 1968 nomination of Abe Fortas to be Supreme Court Chief Justice, "ultimately failed of confirmation."[46] Significant differences exist, however, between even this single historical example and the current improper filibusters.

The single cloture vote on the Fortas nomination failed by a vote of 45-43. Unlike the current purely partisan filibusters, the 43 votes against cloture were an almost even partisan split, 23 Republicans and 19 Democrats.[47] Unlike the current filibusters, the 45 votes for cloture were not only insufficient for cloture, but insufficient for confirmation. Unlike the current filibusters, the Fortas nomination involved allegations of unethical conduct by the nominee and President Lyndon Johnson withdrew the Fortas nomination within days of this single failed cloture vote. So even this lone historical example provides no precedent for the current filibusters.

3. Democrats appear to take orders from leftist groups

Democrat senators' response to Sen. Daschle's call for Democrats to use "any means necessary" parallels demands by left-wing activists.

- **Kate Michelman**, president of the National Abortion and Reproductive Rights Action League said: "I fully expect pro-choice senators to filibuster any nominee who does not affirm a woman's constitutional right to choose."[48]
- **Eleanor Smeal**, president of the Feminist Majority Foundation, organized a "grass-roots campaign to push senators to use the tool of the filibuster ... against" judicial nominees.[49]
- **Abner Mikva**, former Democrat congressman and federal judge, and President Clinton's White House Counsel, wrote in a January 25, 2002, column that the Senate should simply refuse to consider any nominations until after the 2004 election.[50]
- **People for the American Way** praised defeat of the cloture motions on the Estrada nomination, saying such a move by Senate Democrats was "a rebuff to the Bush administration's efforts to pack the federal appeals courts with right-wing ideologues and frustrate the Senate's advise and consent role."[51]

4. Democrats change positions with changing presidents

Another indication of judicial nominee filibusters' politicizing impact comes from comparing, or contrasting, past and present positions on the practice by senators, media outlets, and others. Three groups of Democrat senators have changed their position as partisan control of the White House has changed: Senate leaders, in the full Senate and the Judiciary Committee, senators who have led reform efforts to decrease the majority required for cloture, and other individual senators.

Data on senators' past votes on invoking cloture on judicial nominations are assembled in the tables attached to this report. **Table 1** lists the result of all cloture votes on judicial nominations through May 8, 2003, with the partisan composition of the opposition to cloture. **Table 2** lists each current senator's cloture votes on judicial nominations. **Table 3** ranks current senators based on their support for cloture on judicial nominations. **Table 4** summarizes the data in Tables 2 and 3, with senators listed alphabetically.

a. Senate leaders

One test for whether a senator's position on judicial nominee filibusters is based on a partisan or ideological motive is whether that position changes as partisan control of the White House changes. That is, does a senator's support for nominee cloture apply only when a president of his own party is making nominations? The record appears to be quite clear.

Leader	President Clinton	President Bush
Sen. Trent Lott Republican Leader (1995-2002)	Oppose[52]	Oppose[53]
Sen. Orrin Hatch Judiciary Committee Chairman (1995-2000, 2003) Judiciary Committee Ranking Member (2001-02)	Oppose[54]	Oppose[55]
Sen. Tom Daschle Democratic Leader (1995-2003)	Oppose[56]	**Support**[57]
Sen. Patrick Leahy Judiciary Comm. Ranking Member (1995-2000, 2003) Judiciary Committee Chairman (2001-02)	Oppose[58]	**Support**[59]

b. Senators seeking to lower the cloture requirement

Democrat senators who have fought to decrease the majority required for cloture when President Clinton was in office today support the permanent filibusters against Bush judicial nominees. On January 4, 1995, for example, Sen. Tom Harkin (D-Iowa) introduced a proposal, applied to both legislation and nominations, to reduce the majority required for cloture on successive votes from 60 to 57, 54, and 51 votes. By the fourth vote, a simple majority could limit debate.[60]

Sen. Harkin condemned the "destructive impact" of filibusters,[61] warning that "it will harm the Senate and our Nation for this pattern to continue."[62] He made a series of arguments particularly poignant for the present debate:

- Sen. Harkin particularly condemned filibusters to kill legislation or nominations that "had a majority of support."[63]
- Even more relevant, Sen Harkin said: "We had nominations that were filibustered. This was almost unheard of in our past. We filibustered the nomination of a person that actually came through the committee process and was approved by the committee, and it was filibustered here on the Senate floor."[64]
- Sen. Harkin urged his colleagues to "embrace the vision of [the Senate] that our Founding Fathers had" as "a place to cool down, slow down, deliberate and discuss, *but not as a place where a handful … can totally stop legislation or nominations.*"[65]

Sen. Joseph Lieberman (D-Connecticut), another lead sponsor, described for his colleagues how the filibuster was being "misused and overused," calling it "a reasonable idea … put to very unreasonable use."[66] He argued that the filibuster "has unfortunately become a commonplace tactic *to thwart the will of the majority.*"[67]

On January 5, 1995, the Senate voted 76-19 to table the Harkin-Lieberman proposal. All 19 senators voting to keep this reform proposal alive were Democrats, and 10 remain in the Senate today. The following chart lists those supporting the proposal and, using the data from **Table 3**, shows that they nonetheless have rarely voted actually to invoke cloture on judicial nominations.

Senator Supporting the Harkin Amendment to Lower Cloture Requirement	Percentage of Votes Supporting Cloture on Judicial Nominations	Rank Supporting Cloture on Judicial Nominations
Jeff Bingaman (D-New Mexico)	35	83
Barbara Boxer (D-California)	38.46	71
Russ Feingold (D-Wisconsin)	33.33	87
Bob Graham (D-Florida)	50	58
Tom Harkin (D-Iowa)	29.41	92
Edward Kennedy (D-Massachusetts)	35	89
John Kerry (D-Massachusetts)	42.86	66
Frank Lautenberg (D-New Jersey)	26.32	97
Joseph Lieberman (D-Connecticut)	58.33	56
Paul Sarbanes (D-Maryland)	35	84
Average	**38.37**	**78**

c. Individual senators

While a cloture vote alone does not necessarily signal an improper filibuster, it is the only objective criterion available. Senators who establish a consistent pattern over many years and many votes indicate by their actions their overall posture toward judicial nominee cloture. Prominent Senate Democrats publicly denounced nominee filibusters when President Clinton was in office. They have, however, rarely voted for cloture on judicial nominations, and all support the current improper filibusters against Bush nominees. Their actions belie their words.

Senator	Past Stated Position on Nominee Filibusters	Current Rank re: Voting for Judicial Nominee Cloture
Tom Daschle (D-South Dakota)	"I find it simply baffling that a Senator would vote against even voting on a judicial nomination."[68]	**61** Senator Daschle has voted for cloture on judicial nominations only 7 of 16 times, or 43.75 percent.
Patrick Leahy (D-Vermont)	"I have stated over and over again … that I would object and fight against any filibuster on a judge, whether it is somebody I opposed or supported."[69] "I noted how improper it would be to filibuster a judicial nomination."[70]	**65** Senator Leahy has voted for cloture on judicial nominations only 9 of 21 times, or 42.86 percent.
Dianne Feinstein (D-California)	"A nominee is entitled to a vote."[71]	**67** Senator Feinstein has voted for cloture on judicial nominations just 6 of 15 times, or 40 percent.

Senator	Past Stated Position on Nominee Filibusters	Current Rank re: Voting for Judicial Nominee Cloture
Carl Levin (D-Michigan)	"If a bipartisan majority of the U.S. Senate is prepared to vote to confirm the President's appointment, that vote should occur.... The President is entitled to his nominee, if a majority of the Senate consent."[72]	**86** Senator Levin has voted for cloture on judicial nominations only 7 of 21 times, or 33.33 percent.
Edward Kennedy (D-Massachusetts)	"Senators who feel strongly about the issue of fairness should vote for cloture, even if they intend to vote against the nomination itself. It is wrong to filibuster this nomination, and Senators who believe in fairness will not let a minority of the Senate deny [the nominee] his vote by the entire Senate."[73]	**89** Senator Kennedy has voted for cloture on judicial nominations only 7 of 20 times, or 35 percent.
Tom Harkin (D-Iowa)	"Do not hide behind this procedure. Have the guts to come out and vote up or down .... And once and for all, put behind us this filibuster procedure on nominations."[74]	**92** Senator Harkin has voted for cloture on judicial nominations just 5 of 17 times, or 29.41 percent.
Frank Lautenberg (D-New Jersey)	"It is pitiful. Talking about the fairness of the system and how it is equitable for a minority to restrict the majority view, why can we not have a straight up-or-down vote on this without threats of a filibuster?"[75]	**97** Senator Lautenberg has voted for cloture on judicial nominations only 5 of 19 times, or 26.32 percent.

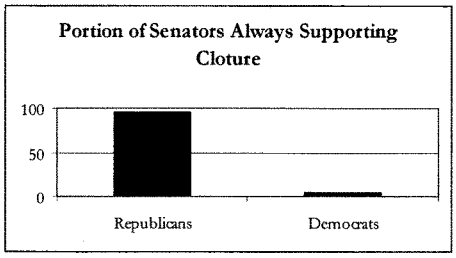
5. Media outlets change positions with changing presidents

Similarly, *The New York Times* strongly denounced the filibuster during the Clinton administration and endorsed Sen. Harkin's reform proposal. The *Times* has, however, endorsed the current improper filibusters against President Bush's appeals court nominees. Headlines from *Times* editorials during both periods speak for themselves.

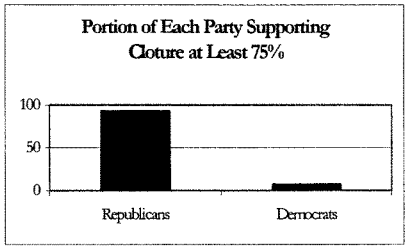
Under President Clinton	Under President Bush
"Time to Retire the Filibuster"[76]	**"Keep Talking About Miguel Estrada"**[77] **"Hold Firm on Estrada"**[78] **"Filibustering Priscilla Owen"**[79]

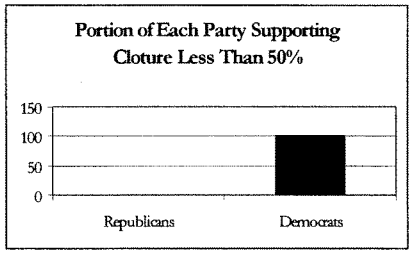
6. Partisan pattern on cloture votes

The data in **Table 3** also provide a comparison of voting patterns on judicial nomination cloture. That data show, for example, that 95 percent of the 40 senators who have always voted for cloture are Republicans.



A similarly clear pattern emerges by examining the portion of each party supporting cloture on judicial nominations at least 75 percent, or less than 50 percent, of the time.





III. Judicial Nominee Filibusters: Constitutional Concerns

The Constitution gives the Senate the power to determine the "rules of its proceedings."[80] Similarly, the Constitution gives "[a]ll legislative powers" to Congress.[81] In both cases, setting procedural rules or enacting legislation, the Senate must nonetheless comply with other constitutional requirements. The Supreme Court has unanimously recognized: "The constitution empowers each house to determine its rules of proceedings. It may not by its rules ignore constitutional restraints or violate fundamental rights."[82]

Legal scholars, commentators, and politicians themselves have for years raised both policy and constitutional concerns with using the filibuster ultimately to abolish majority rule.

- **The Lawyers' Committee on Supreme Court Nominations**, composed of prominent lawyers, seven past American Bar Association presidents, law professors, and 22 law school deans, wrote in 1968 that using the filibuster "to frustrate a judicial appointment creates a dangerous precedent with important implications for the very structure of our Government."[83]
- **Lloyd Cutler**, counsel to Presidents Carter and Clinton, wrote in 1993 that Rule XXII's super-majority cloture requirement is unconstitutional.[84]
- **Sen. Tom Daschle** said in 1995 that "the Constitution is straightforward about the few instances in which more than a majority of the Congress must vote.... Every other action by the Congress is taken by majority vote. The Founders debated the idea of requiring more than a majority .... They concluded that *putting such immense power into the hands of a minority ran squarely against the democratic principle. Democracy means majority rule, not minority gridlock.*"[85]
- **James Swanson**, senior fellow in constitutional studies at the Cato Institute, concluded in the context of the current filibusters that when a Senate minority "filibuster[s] judicial nominations, obstruct[s] an up or down vote, and den[ies] the majority the right to consent to the appointments, [it] subvert[s] the Constitution."[86]

A. Abolishing Majority Rule

This report notes three of the most commonly cited constitutional concerns about the current use of judicial nominee filibusters. First, when used to abolish majority rule, the filibuster violates the fundamental principle of majority rule embraced by the Constitution.

The Constitution provides that "a majority of each [house] shall constitute a quorum to do business."[87] And, as the Supreme Court unanimously described it, "the general rule of all parliamentary bodies is that, when a quorum is present, the act of a majority of the quorum is the act of the body."[88] America's founders embraced this principle as well, and expected that the full Senate would decide, by simple majority, whether to consent to nominations.

- In *The Federalist No.58*, James Madison argued of super-majority voting requirements: "It would be no longer the majority that would rule: the power would be transferred to the minority."[89]
- In *The Federalist No.65*, Alexander Hamilton cited "the fundamental maxim of republican government, which requires that the sense of the majority should prevail."[90]
- In *The Federalist No.76*, Hamilton wrote that the president would present his nominations to "an entire branch of the legislature."[91]
- In *The Federalist No.77*, Hamilton repeated that each nomination must be submitted to "an entire branch of the legislature."[92]
- Thomas Jefferson's *Manual of Parliamentary Practice*, used in the Senate in the early years of the Republic and still used in the House of Representatives today, states: "The voice of the majority decides."[93]

B. Adding to the Constitution's Standards

The Supreme Court has held that majority rule in parliamentary bodies "has been the rule for all time, except so far as in any given case the terms of the organic act under which the body is assembled have prescribed specific limitations." [94] The original U.S. Constitution has, in fact, done so in only five specific situations.

- **Article I, Section 3** requires "two thirds of the members present" for the Senate to convict a public official following impeachment by the House.
- **Article I, Section 5** requires a two-thirds vote for either the House or Senate to expel a member.
- **Article I, Section 7** requires a two-thirds vote of the House and Senate to enact a law over the president's objection.
- **Article II, Section 2** requires that "two thirds of the Senators present" to ratify treaties.
- **Article V** requires "two thirds of both Houses" or "two thirds of the several States" for congressional proposal of constitutional amendments.

C. Undermining the President's Appointment Power

Third, this constitutional concern is made worse by the fact that judicial confirmations, unlike the legislative process, directly implicate a primary power granted another branch of government. The Constitution gives the primary power of nomination and, subject to Senate consent, appointment of judges to the president. America's founders were again clear, Hamilton writing that "in the business of appointments the executive will be the principal agent."[95] When a minority of the Senate prevents the Senate from exercising its check on the president's appointment power, it effectively abolishes that power.

In the one court case challenging Rule XXII, U.S. Circuit Judge Harry Edwards argued, albeit in dissent, that creating by Senate rule a super-majority "beyond those already stated in the Constitution" has the "potential for mischief."[96] The Senate could, for example, apply the same three-fifths requirement it now imposes for cloture to the confirmation of judges itself. "The Senate, acting unilaterally, could thereby increase its own power at the expense of the President. I think it is clear that the Framers never intended for Congress to have such unchecked authority to impose supermajority requirements that fundamentally change the nature of our democratic processes."[97]

One reason this report takes such care in defining the problem at hand is that these constitutional concerns are indeed so grave. Anyone supporting the Constitution, and particularly sworn to support it, who believes that using a filibuster ultimately to abolish majority rule is indeed unconstitutional must not tolerate such a practice. As former White House Counsel Lloyd Cutler put it: "The issue is not whether a super-majority is desirable, but whether it is constitutional. That is the question that every conscientious senator needs to face."[98]

IV. Conclusion

As liberal columnist Nat Hentoff described it, the current use of judicial nominee filibusters are part of "a grand Democratic plan to so frustrate the president that he will henceforth send up only nominees that will appease the committee's lockstep Democrats, along with the law professors who have been advising them on how to rig the confirmation process."[99] The current use of judicial nominee filibusters to abolish majority rule has had a corrosive, politicizing effect on the entire judicial selection process and raises serious constitutional concerns.

TABLES

Table 1 U.S. Senate Cloture Votes on Judicial Nominations

Table 2 Current U.S. Senators' Cloture Votes on Judicial Nominations

Table 3 Current U.S. Senators Ranked by Support for Cloture on Judicial Nominations

Table 4 Summary of Cloture Vote Data for Current U.S. Senators

Table 1

U.S. Senate Cloture Votes on Judicial Nominations

Date	Nominee	Position	Result	NO votes
5/8/03	Priscilla Owen	U.S. Court of Appeals, Fifth Circuit	52-45 (Failed)	All Democrats
5/8/03	Miguel Estrada	U.S. Court of Appeals, D.C. Circuit	54-43 (Failed)	All Democrats
5/5/03	Miguel Estrada	U.S. Court of Appeals, D.C. Circuit	52-39 (Failed)	All Democrats
5/1/03	Priscilla Owen	U.S. Court of Appeals, Fifth Circuit	52-44 (Failed)	All Democrats
4/2/03	Miguel Estrada	U.S. Court of Appeals, D.C. Circuit	55-44 (Failed)	All Democrats
3/18/03	Miguel Estrada	U.S. Court. of Appeals, D.C. Circuit	55-45 (Failed)	All Democrats
3/13/03	Miguel Estrada	U.S. Court of Appeals, D.C. Circuit	55-42 (Failed)	All Democrats
3/6/03	Miguel Estrada	U.S. Court of Appeals, D.C. Circuit	55-44 (Failed)	All Democrats
7/26/02	Julia Smith Gibbons	U.S. Court of Appeals, Sixth Circuit	89-0 (Passed)	
7/18/02	Richard Clifton	U.S. Court of Appeals, Ninth Circuit	97-1 (Passed)	McCain (GOP)
7/15/02	Lavenski Smith	U.S. Court of Appeals, Eighth Circuit	94-3 (Passed)	Feingold, Dayton, Wellstone (Dems)
3/8/2000	Richard Paez	U.S. Court of Appeals, Ninth Circuit	85-14 (Passed)	All Republicans
3/8/2000	Marsha Berzon	U.S. Court of Appeals, Ninth Circuit	86-13 (Passed)	All Republicans
9/21/99	Brian T. Stewart	U.S. District Court, Utah	55-44 (Failed)	All Democrats
10/4/94	H. Lee Sarokin	U.S. Court of Appeals, Third Circuit	85-12 (Passed)	10 Republicans, 2 Democrats
9/9/92	Edward Carnes	U.S. Court of Appeals, 11th Circuit	66-30 (Passed)	29 Democrats, 1 GOP (Specter)
9/17/86	William Rehnquist	U.S. Supreme Court, Chief Justice	68-31 (Passed)	All Democrats
3/1/86	Sidney Fitzwater	U.S. District Court, Texas	64-33 (Passed)	All Democrats
8/9/84	J. Harvie Wilkinson	U.S. Court of Appeals, Fourth Circuit	65-32 (Passed)	31 Democrats, 1 GOP (Stevens)
7/31/84	J. Harvie Wilkinson	U.S. Court of Appeals, Fourth Circuit	57-39 (Failed)	35 Democrats, 4 Republicans
12/9/80	Stephen Breyer	U.S. Court of Appeals, First Circuit	68-28 (Passed)	24 Republicans, 4 Democrats
12/10/71	William Rehnquist	U.S. Supreme Court, Associate Justice	52-42 (Failed)	36 Democrats, 6 Republicans
10/1/68	Abe Fortas	U.S. Supreme Court, Chief Justice	45-43 (Failed)	24 Republicans, 19 Democrats

Table 2

Current U.S. Senators' Votes on Cloture for Judicial Nomiantions

1. Abe Fortas, USSC Chief Justice (10/1/68), failed 45-43
2. William Rehnquist, USSC Assoc. Justice (12/10/71), failed 52-42
3. Stephen Breyer, USCA (12/9/80), passed 68-28
4. J. Harvie Wilkinson, USCA (7/31/84), failed 57-39
5. J. Harvie Wilkinson, USCA (8/9/84), passed 65-32
6. Sidney Fitzwater, USDC (3/1/86), passed 64-33
7. William Rehnquist, USSC Chief Justice (9/17/86), passed 68-31
8. Edward Carnes, USCA (9/9/92), passed 66-30
9. H. Lee Sarokin, USCA (10/4/94), passed 85-12
10. Brian T. Stewart, USDC (9/21/99), failed 55-44
11. Marsha Berzon, USCA (3/8/00), passed 86-13
12. Richard Paez, USCA (3/8/00), passed 85-14
13. Lavenski Smith, USCA (7/15/02), passed 94-3
14. Richard Clifton, USCA (7/18/02), passed 97-1
15. Julia Smith Gibbons, USCA (7/26/02), passed 89-0
16. Miguel Estrada, USCA (3/6/03), failed 55-44
17. Miguel Estrada, USCA (3/13/03), failed 55-42
18. Miguel Estrada, USCA (3/18/03), failed 55-45
19. Miguel Estrada, USCA (4/2/03), failed 55-44
20. Priscilla Owen, USCA (5/1/03), failed 52-44
21. Miguel Estrada, USCA (5/5/03), failed 52-39
22. Miguel Estrada, USCA (5/8/03), failed 54-43
23. Priscilla Owen, USCA (5/8/03), failed 52-45

Senator **(GOP in bold)**	1	2	3	4	5	6	7	8	9	10	11	12	13	14	15	16	17	18	19	20	21	22	23
Akaka (HI)								Y	Y	N	Y	Y	Y	Y	Y	N	N	N	N	N	N	N	N
Alexander (TN)																Y	Y	Y	Y	Y	Y	Y	Y
Allard (CO)										Y	N	N	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y
Allen (VA)													Y	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y
Baucus (MT)			Y	N	Y	Y	N	Y	Y	N	Y	Y	Y	Y	Y	N	N	N	N	N	N	N	N
Bayh (IN)										N	Y	Y	Y	Y	Y	N	N	N	N	N	N	N	N
Bennett (UT)									Y	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y
Biden (DE)			Y	N	N	N	N	N	Y	N	Y	Y	Y	Y	N V	N	N V	N	N	N	N	N	N
Bingaman (NM)				N	N	N	Y	N	Y	N	Y	Y	Y	Y	Y	N	N	N	N	N	N	N	N
Bond (MO)								Y	N V	Y	Y	Y	Y	Y	N V	Y	Y	Y	Y	Y	Y	Y	Y
Boxer (CA)									Y	N	Y	Y	Y	Y	N V	N	N	N	Y	N	N	N	N
Breaux (LA)								N	Y	N	Y	Y	Y	Y	Y	Y	Y	Y	Y	N	Y	Y	N
Brownback (KS)										Y	N	N	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y
Bunning (KY)										Y	N	N	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y
Burns (MT)								Y	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y
Byrd (WV)	N	N	Y	N	N	N	N	Y	Y	N	Y	Y	Y	Y	Y	N	N	N	N	N	N	N	N
Campbell (CO)									Y	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y
Cantwell (WA)													Y	Y	Y	N	N	N	N	N	N V	N	N
Carper (DE)													Y	Y	Y	N	N	N	N	N	N	N	N
Chafee (RI)											Y	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y
Chambliss (GA)																Y	Y	Y	Y	Y	Y	Y	Y
Clinton (NY)													Y	Y	Y	N	N	N	N	N	N	N	N
Cochran (MS)			Y	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y
Coleman (MN)																Y	Y	Y	Y	Y	Y	Y	Y
Collins (ME)										Y	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y
Conrad (ND)								Y	Y	N	Y	Y	Y	Y	Y	N	N	N	N	N	N	N	N
Cornyn (TX)																Y	Y	Y	Y	Y	Y	Y	Y
Corzine (NJ)													Y	Y	Y	N	N	N	N	N	N	N	N

Senator (GOP in bold)	1	2	3	4	5	6	7	8	9	10	11	12	13	14	15	16	17	18	19	20	21	22	23
Craig (ID)								Y	Y	Y	N	N	NV	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y
Crapo (ID)								.		Y	Y	Y	NV	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y
Daschle (SD)								Y	Y	N	Y	Y	Y	Y	Y	N	N	N	N	N	N	N	N
Dayton (MN)													N	Y	Y	N	N	N	N	N	N	N	N
DeWine (OH)										Y	N	N	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y
Dodd (CT)				N	N	N	N	N	Y	N	Y	Y	Y	Y	Y	N	N	N	N	N	N	N	N
Dole (NC)																Y	Y	Y	Y	Y	Y	Y	Y
Domenici (NM)			Y	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y
Dorgan (ND)									Y	N	Y	Y	Y	Y	Y	N	N	N	N	N	N	N	N
Durbin (IL)										N	Y	Y	Y	Y	Y	N	N	N	N	N	N	N	N
Edwards (NC)										N	Y	Y	Y	Y	Y	N	NV	N	N	N	N	N	N
Ensign (NV)													Y	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y
Enzi (WY)										Y	N	N	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y
Feingold (WI)									Y	N	Y	Y	N	Y	Y	N	N	N	N	N	N	N	N
Feinstein (CA)									Y	N	Y	Y	Y	Y	Y	N	N	N	N	N	N	N	N
Fitzgerald (IL)										Y	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y
Frist (TN)										Y	Y	N	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y
B. Graham (FL)								Y	Y	N	Y	Y	Y	Y	Y	NV	N	N	N	NV	NV	N	N
L. Graham (SC)																Y	Y	Y	Y	Y	Y	Y	Y
Grassley (IA)				Y	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y
Gregg (NH)									Y	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y
Hagel (NE)										Y	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y
Harkin (IA)						N	N	N	Y	N	Y	Y	Y	NV	Y	N	N	N	N	N	N	N	N
Hatch (UT)			Y	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y
Hollings (SC)	N	Y	N	N	N	Y	Y	N	Y	N	Y	Y	Y	Y	Y	N	N	N	N	N	N	N	N
Hutchison (TX)									Y	Y	Y	Y	Y	Y	NV	Y	Y	Y	Y	Y	Y	Y	Y
Inhofe (OK)										Y	N	N	Y	Y	Y	Y	Y	Y	Y	NV	Y	Y	Y
Inouye (HI)	Y	N	N	N	N	NV	N	N	Y	N	Y	Y	Y	Y	NV	N	N	N	N	N	N	N	N
Jeffords (VT)								Y	Y	Y	Y	Y	Y	Y	Y	N	N	N	N	N	N	N	N
Johnson (SD)										N	Y	Y	Y	Y	Y	N	N	N	N	N	N	N	N
Kennedy (MA)	Y	N	Y	N	N	N	N	N	NV	N	Y	Y	Y	Y	Y	N	N	N	N	N	N	NV	NV
Kerry (MA)							N	N	Y	N	Y	Y	Y	Y	Y	N	NV	N	NV	N	NV	N	N
Kohl (WI)								Y	Y	N	Y	Y	Y	Y	Y	N	N	N	N	N	N	N	N
Kyl (AZ)										Y	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y
Landrieu (LA)								.		N	Y	Y	Y	Y	Y	N	N	N	N	N	N	N	N
Lautenberg (NJ)				N	N	N	N	N	Y	N	Y	Y		Y	Y	N	N	N	N	N	N	N	N
Leahy (VT)			Y	N	N	N	Y	Y	Y	N	Y	Y	Y	Y	Y	N	N	N	N	N	N	N	N
Levin (MI)			Y	N	N	N	N	N	Y	N	Y	Y	Y	Y	Y	N	N	N	N	N	N	N	N
Lieberman (CT)								Y	Y	N	Y	Y	Y	Y	Y	N	N	N	N	NV	NV	NV	NV
Lincoln (AR)										N	Y	Y	Y	Y	Y	N	N	N	N	N	N	N	N
Lott (MS)								Y	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y
Lugar (IN)			N	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y

Senator (GOP in bold)	1	2	3	4	5	6	7	8	9	10	11	12	13	14	15	16	17	18	19	20	21	22	23
McCain (AZ)								Y	N	NV	NV	NV	Y	N	Y	Y	Y	Y	Y	Y	Y	Y	Y
McConnell (KY)						Y	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y
Mikulski (MD)								N	Y	N	Y	Y	Y	Y	Y	N	N	N	N	N	NV	N	N
Miller (GA)													Y	Y	NV	Y	Y	Y	Y	Y	NV	Y	Y
Murkowski (AK)																Y	Y	Y	Y	Y	NV	NV	NV
Murray (WA)									Y	N	Y	Y	Y	Y	NV	N	N	N	N	N	NV	N	N
Nelson (FL)													Y	Y	Y	Y	Y	Y	Y	N	Y	Y	N
Nelson (NE)													Y	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y
Nickles (OK)				Y	Y	Y	Y	Y	N	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y
Pryor (AR)																N	N	N	N	N	N	N	N
Reed (RI)										N	Y	Y	Y	Y	Y	N	N	N	N	N	N	N	N
Reid (NV)								Y	Y	N	Y	Y	Y	Y	Y	N	N	N	N	N	N	N	N
Roberts (KS)										Y	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y
Rockefeller (WV)							N	N	Y	N	Y	Y	Y	Y	Y	N	N	N	N	N	N	N	N
Santorum (PA)										Y	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y
Sarbanes (MD)			Y	N	N	N	N	N	Y	N	Y	Y	Y	Y	Y	N	N	N	N	NV	N	N	N
Schumer (NY)										N	Y	Y	Y	Y	Y	N	N	N	N	N	N	N	N
Sessions (AL)										Y	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y
Shelby (AL)								Y	N	Y	N	N	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y
Smith (OR)										Y	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y
Snowe (ME)										Y	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y
Specter (PA)				N	Y	Y	Y	N	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y	NV	Y	Y
Stabenow (MI)													Y	Y	Y	N	N	N	N	N	N	N	N
Stevens (AK)		Y	Y	Y	Y	Y	Y	Y	NV	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y
Sununu (NH)																Y	Y	Y	Y	Y	Y	Y	Y
Talent (MO)																Y	Y	Y	Y	Y	Y	Y	Y
Thomas (WY)										Y	Y	Y	Y	Y	NV	Y	Y	Y	Y	Y	Y	Y	Y
Voinovich (OH)										Y	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y
Warner (VA)			Y	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y
Wyden (OR)										N	Y	Y	Y	Y	Y	N	N	N	N	N	N	N	N

Table 3

Senators Ranked by Support for Cloture on Judicial Nominations

Method for Ranking:

- Senators are ranked by the percentage of Yes votes among the cloture votes on judicial nominations in which they participated (through 5/8/03). Senators are further ranked as follows:
  - Senators with the same percentage across a greater number of votes are ranked higher.
  - Senators with the same percentage and number of votes, and no missed votes, are ranked higher.
- Senators with the same rank are listed alphabetically.
- The majority party senators are in **bold.**

Rank	Senator	% Yes	Total	Yes	Missed
1	**Cochran (MS)**	100	21	21	
	Domenici (NM)	100	21	21	
	Hatch (UT)	100	21	21	
	Warner (VA)	100	21	21	
5	**Stevens (AK)**	100	21	21	1
6	**Grassley (IA)**	100	20	20	
7	**McConnell (KY)**	100	18	18	
8	**Burns (MT)**	100	16	16	
	Lott (MS)	100	16	16	
10	**Bennett (UT)**	100	15	15	
	Campbell (CO)	100	15	15	
	Gregg (NH)	100	15	15	
13	**Collins (ME)**	100	14	14	
	Fitzgerald (IL)	100	14	14	
	Hagel (NE)	100	14	14	
	Kyl (AZ)	100	14	14	
	Roberts (KS)	100	14	14	
	Santorum (PA)	100	14	14	
	Sessions (AL)	100	14	14	
	Smith (OR)	100	14	14	
	Snowe (ME)	100	14	14	
	Voinovich (OH)	100	14	14	
23	**Hutchison (TX)**	100	14	14	1
24	**Bond (MO)**	100	14	14	2

Rank	Senator	% Yes	Total	Yes	Missed
25	**Chafee (RI)**	100	13	13	
26	**Crapo (ID)**	100	13	13	1
	Thomas (WY)	100	13	13	1
28	**Allen (VA)**	100	11	11	
	Ensign (NV)	100	11	11	
	Nelson (NE)	100	11	11	
31	Miller (GA)	100	9	9	2
32	**Alexander (TN)**	100	8	8	
	Chambliss (GA)	100	8	8	
	Coleman (MN)	100	8	8	
	Cornyn (TX)	100	8	8	
	Dole (NC)	100	8	8	
	L. Graham (SC)	100	8	8	
	Sununu (NH)	100	8	8	
	Talent (MO)	100	8	8	
40	**Murkowski (AK)**	100	5	5	3
41	**Lugar (IN)**	95.23	21	20	
42	**Nickles (OK)**	95	20	19	
43	**Frist (TN)**	92.86	14	13	
44	**Specter (PA)**	89.47	19	17	1
45	**Craig (ID)**	86.67	15	13	1
46	**Allard (CO)**	85.71	14	12	
	Brownback (KS)	85.71	14	12	
	Bunning (KY)	85.71	14	12	
	DeWine (OH)	85.71	14	12	
	Enzi (WY)	85.71	14	12	
51	**Inhofe (OK)**	84.62	13	11	1
52	**McCain (AZ)**	84.62	13	11	3
53	Nelson (FL)	81.82	11	9	
54	**Shelby (AL)**	81.25	16	13	
55	Breaux (LA)	75	16	12	
56	Lieberman (CT)	58.33	12	7	4
57	Jeffords (VT)	50	16	8	
58	B. Graham (FL)	50	14	7	3
59	Akaka (HI)	46.67	15	7	
60	Baucus (MT)	47.62	21	10	
61	Conrad (ND)	43.75	16	7	
	Daschle (SD)	43.75	16	7	

Rank	Senator	% Yes	Total	Yes	Missed
	Kohl (WI)	43.75	16	7	
	Reid (NV)	43.75	16	7	
65	Leahy (VT)	42.86	21	9	
66	Kerry (MA)	42.86	14	6	3
67	Dorgan (ND)	40	15	6	
	Feinstein (CA)	40	15	6	
69	Mikulski (MD)	**40**	**15**	**6**	**1**
70	Hollings (SC)	39.13	23	9	
71	Boxer (CA)	38.46	13	5	1
	Edwards (NC)	38.46	13	5	1
73	Murray (WA)	38.46	13	5	2
74	Bayh (IN)	35.71	14	5	
	Durbin (IL)	35.71	14	5	
	Johnson (SD)	35.71	14	5	
	Landrieu (LA)	35.71	14	5	
	Lincoln (AR)	35.71	14	5	
	Reed (RI)	35.71	14	5	
	Schumer (NY)	35.71	14	5	
	Wyden (OR)	35.71	14	5	
82	Rockefeller (WV)	35.29	17	6	
83	Bingaman (NM)	35	20	7	
84	Sarbanes (MD)	35	20	7	1
85	Byrd (WV)	34.78	23	8	
86	Levin (MI)	33.33	21	7	
87	Biden (DE)	33.33	18	6	2
88	Feingold (WI)	33.33	15	5	
89	Cantwell (WA)	33.33	10	3	1
90	Kennedy (MA)	35	20	7	3
91	Dodd (CT)	30	20	6	
92	Harkin (IA)	29.41	17	5	1
93	Carper (DE)	27.27	11	3	
	Clinton (NY)	27.27	11	3	
	Corzine (NJ)	27.27	11	3	
	Stabenow (MI)	27.27	11	3	
97	Lautenberg (NJ)	26.32	19	5	
98	Inouye (HI)	26.09	21	6	2
99	Dayton (MN)	18.18	11	2	
100	Pryor (AR)	0	8	0	

Table 4

Summary of Cloture Vote Data for Current U.S. Senators

Senator	Total Votes	Total Yes	% Yes	Missed Votes	Rank
Akaka (HI)	15	7	46.67		59
Alexander (TN)	8	8	100		32
Allard (CO)	14	12	85.71		46
Allen (VA)	11	11	100		28
Baucus (MT)	21	10	47.62		60
Bayh (IN)	14	5	35.71		74
Bennett (UT)	15	15	100		10
Biden (DE)	19	6	31.58	2	90
Bingaman (NM)	20	7	35		83
Bond (MO)	14	14	100	2	24
Boxer (CA)	13	5	38.46	1	71
Breaux (LA)	16	12	75		55
Brownback (KS)	14	12	85.71		46
Bunning (KY)	14	7	85.71		46
Burns (MT)	16	16	100		8
Byrd (WV)	23	8	34.78		85
Campbell (CO)	10	10	100		10
Cantwell (WA)	10	3	33.33	1	88
Carper (DE)	11	3	27.27		93
Chafee (RI)	13	13	100		25
Chambliss (GA)	8	8	100		32
Clinton (NY)	11	3	27.27		93
Cochran (MS)	21	21	100		1
Coleman (MN)	8	8	100		32
Collins (ME)	14	14	100		13
Conrad (ND)	16	7	43.75		61
Cornyn (TX)	8	8	100		32
Corzine (NJ)	11	3	27.27		93
Craig (ID)	15	13	86.67	1	45
Crapo (ID)	13	13	100	1	26
Daschle (SD)	16	7	43.75		61
Dayton (MN)	11	2	18.18		99
DeWine (OH)	14	12	85.71		46
Dodd (CT)	20	6	30		91
Dole (NC)	8	8	100		32
Domenici (NM)	21	21	100		1
Dorgan (ND)	15	6	40		67

Senator	Total Votes	Total Yes	% Yes	Missed Votes	Rank
Durbin (IL)	14	5	35.71		74
Edwards (NC)	13	5	38.46	1	71
Ensign (NV)	11	11	100		28
Enzi (WY)	14	12	85.71		46
Feingold (WI)	15	5	33.33		87
Feinstein (CA)	15	6	40		67
Fitzgerald (IL)	14	14	100		13
Frist (TN)	14	13	92.86		43
B. Graham (FL)	14	7	50	3	58
L. Graham (SC)	8	8	100		32
Grassley (IA)	20	20	100		6
Gregg (NH)	15	15	100		10
Hagel (NE)	14	14	100		13
Harkin (IA)	17	5	29.41	1	92
Hatch (UT)	21	21	100		1
Hollings (SC)	23	9	39.13		70
Hutchison (TX)	14	14	100	1	23
Inhofe (OK)	13	7	84.62	1	51
Inouye (HI)	21	6	26.09	2	98
Jeffords (VT)	16	8	50		57
Johnson (SD)	14	5	35.71		74
Kennedy (MA)	20	7	35	3	89
Kerry (MA)	14	6	42.86	3	66
Kohl (WI)	14	7	43.75		61
Kyl (AZ)	14	14	100		13
Landrieu (LA)	14	5	35.71		74
Lautenberg (NJ)	19	5	26.32		97
Leahy (VT)	21	9	42.86		65
Levin (MI)	21	7	33.33		86
Lieberman (CT)	12	7	58.33	4	56
Lincoln (AR)	14	5	35.71		74
Lott (MS)	16	16	100		8
Lugar (IN)	21	20	95.23		41
McCain (AZ)	13	11	84.62	3	52
McConnell (KY)	18	18	100		7
Mikulski (MD)	15	6	40	1	69
Miller (GA)	9	9	100	2	31
Murkowski (AK)	5	5	100	3	40
Murray (WA)	13	5	38.46	2	73
Nelson (FL)	11	9	81.82		53
Nelson (NE)	11	11	100		28
Nickles (OK)	20	19	95		42

Senator	Total Votes	Total Yes	% Yes	Missed Votes	Rank
Pryor (AR)	8	0	0		100
Reed (RI)	14	5	35.71		74
Reid (NV)	16	7	43.75		61
Roberts (KS)	14	14	100		13
Rockefeller (WV)	17	6	35.29		82
Santorum (PA)	14	14	100		13
Sarbanes (MD)	20	7	35	1	84
Schumer (NY)	14	5	35.71		74
Sessions (AL)	14	14	100		13
Shelby (AL)	16	13	81.25		54
Smith (OR)	14	14	100		13
Snowe (ME)	14	14	100		13
Specter (PA)	19	17	89.47	1	44
Stabenow (MI)	11	3	27.27		93
Stevens (AK)	21	21	100	1	5
Sununu (NH)	8	8	100		32
Talent (MO)	8	8	100		32
Thomas (WY)	13	13	100	1	26
Voinovich (OH)	14	14	100		13
Warner (VA)	21	21	100		1
Wyden (OR)	14	5	35.71		74

NOTES

[1] Senior Fellow in Legal Studies and Director, Judicial Appointments Project, Concerned Women for America. B.A. with honors, Calvin College (1983); J.D. *cum laude*, State University of New York (SUNY) at Buffalo (1987); M.A. in political science, SUNY-Buffalo (1989). Law clerk to Hon. William D. Hutchinson, U.S. Court of Appeals for the Third Circuit (1988-89).
[2] A. Hamilton, *The Federalist No.22*, available at http://memory.loc.gov/const/fed/fed_22.html.
[3] U.S. Constitution, Article I, Section 5.
[4] Bach, "Filibusters and Cloture in the Senate," *CRS Report for Congress* (January 17, 2001), at 1.
[5] McDowell, "Doubting Thomas," *The New Republic*, July 29, 1991, at 12.
[6] President Bush's speech (emphasis added) is available at http://www.whitehouse.gov/news/releases/2001/05/20010509-3.html.
[7] *Congressional Record*, April 29, 2003, at S5440 (emphasis added).
[8] Quoted in Fagan, "Democrats Vow That Ashcroft is a Sign of Things to Come," *Congressional Quarterly Daily Monitor*, Feb. 1, 2001 (emphasis added). See also Editorial, "Vilification of Nominees Unacceptable," *Atlanta Journal and Constitution*, Feb. 2, 2001, at 18A; Quaid, "Senate Readies to Confirm Ashcroft," *Associated Press Online*, February 1, 2001.
[9] Quaid, "Senate Majority Votes for Ashcroft, 40-Plus Democrats Vote No," *Associated Press State & Local Wire*, February 1, 2001. See also Mitchell, "Ashcroft Debate Shows Deep Rifts," *The New York Times*, February 1, 2001, at A1 (Democrats were determined "to send Mr. Bush a message that they would fight conservative Supreme Court nominees.").
[10] See Hudson, "Senate Panel Releases Papers to Back Olson," *The Washington Times*, May 23, 2001, at A6.
[11] After Republicans again became the majority in the 2002 election, the Judiciary Committee held a hearing for these three nominees on January 29, 2003. The Committee voted 11-8 to approve the Sutton nomination on February 13, 2003, and the full Senate voted 52-41 to approve the nomination on April 29, 2003. The Committee approved the Cook nomination by voice vote on February 27, 2003, and the full Senate voted 66-25 to approve the nomination on May 5, 2003. The Committee approved the Roberts nomination by voice vote on February 27, 2003, and the full Senate approved the nomination by voice vote on May 8, 2003.
[12] Knowlton, "Ashcroft Battle: A Signal to the President," *International Herald Tribune*, February 1, 2001, at 3.
[13] Quoted in Boyer, "Ashcroft Will Meet Critics After Vote," *The Washington Times*, February 1, 2001, at A4.
[14] Quoted in Mitchell, *supra* note 9.
[15] President Bush made his first nominations on May 9, 2001; President Clinton made his first nominations on August 6, 1993; the first President Bush made his first nominations on August 4, 1989; and President Reagan made his first nominations on July 9, 1981.
[16] President Bush was the first president to appoint someone previously nominated by a president of another political party. President Clinton nominated Roger Gregory to the U.S. Court of Appeals for the Fourth Circuit shortly before the 2000 election. The Senate rarely considers someone close to adjournment, but President Clinton took the rare step of temporarily appointing Mr. Gregory without Senate consent. President Bush nominated Judge Gregory on May 9, 2001, and the Senate confirmed him less than three months later. Three glaring differences exist between this and the Sixth Circuit blockade. First, Judge Gregory's home-state senators, Virginia Republicans John Warner and George Allen, supported his appointment. One of the failed Clinton nominees' home-state senators, Spencer Abraham (R-Michigan), opposed their appointment. Second, President Clinton had already appointed Judge Gregory, albeit temporarily. He perhaps intended this step as additional pressure on his successor, but there would have been greater disruption to the Fourth Circuit to remove someone already serving. Third, and most important, Judge Gregory met President Bush's substantive standard for appointing judges. The failed Clinton nominees did not.
[17] While voting down a nominee in the Judiciary Committee, especially when the full Senate is prepared to confirm him, has no purpose but obstruction, failing to hold a hearing or vote may have legitimate causes. A senator may, for example, have submitted a negative blue slip or the committee may receive a nomination with insufficient time to complete the confirmation process. Refusal to hold a hearing or vote may, however, be for no purpose but obstruction. The Judiciary Committee, for example, refused to hold a hearing on Sixth Circuit nominees Deborah Cook and Jeffrey Sutton of Ohio. Both home-state senators, Mike DeWine and George Voinovich, returned their blue slips on May 18, 2001. The nominations sat for 551 days without a hearing. Similarly, the committee refused to hold a hearing on Tenth Circuit nominee Timothy Tymvovich of Colorado. Both home-state senators, Wayne Allard and Ben Campbell, returned their blue slips in June 2001. The nominations sat for more than 500 days without a hearing. Neither nominee for the D.C. Circuit, John Roberts or Miguel Estrada, required home-state approval because the District of Columbia is not a state. Each was nominated on May 9, 2001. The committee refused to hold a hearing on Roberts at all and, after waiting 505 days to give Estrada a hearing, refused to take a vote on his nomination.

[18] President Bush nominated Pickering, currently on the U.S. District Court for the Southern District of Mississippi, on May 25, 2001. The Judiciary Committee held hearings on October 18, 2001, and February 7, 2002, and defeated the nomination on March 14, 2002.
[19] President Bush nominated Owen, currently on the Texas Supreme Court, on May 9, 2001. The Judiciary Committee held a hearing on July 23, 2002, and defeated the nomination on September 5, 2002. This was the first time the committee had defeated either a female nominee or a nominee receiving a unanimous "well qualified" rating from the American Bar Association.
[20] The others were appeals court nominee Kenneth Ryskamp, defeated on April 11, 1991; appeals court nominee Bernard Siegan, defeated on July 14, 1988; district court nominee Jefferson Sessions, defeated on June 5, 1986; and district court nominee Charles Winberry, defeated on March 4, 1980.
[21] The Senate voted 58-41 to confirm Ashcroft on February 1, 2001.
[22] The Senate voted 51-47 to confirm Olson on May 24, 2001.
[23] The Senate voted 55-44 to confirm Shedd on November 19, 2002.
[24] The Senate voted 58-41 to confirm Tymkovich on April 1, 2003.
[25] The Senate voted 52-41 to confirm Sutton on April 29, 2003.
[26] U.S. Constitution, Article I, Section 5.
[27] See Kaiser, "Low-Grade Drama," www.washingtonpost.com (March 20, 2003). Senators refer to themselves this way as well. See, e.g., *Congressional Record*, September 24, 1999, at S11426 (speech of Sen. Biden).
[28] Jefferson's manual informally governed the Senate in the early years of the Republic. It is available at http://www.constitution.org/tj/tj-mpp.htm.
[29] "Establishment of the Cloture Rule," available at www.house.gov/rules. .
[30] Beth, Cloture Attempts on Nomination," *CRS Report for Congress* (Dec. 11, 2002), at 2.
[31] "Recent Developments in the Senate," available at http://www.senate.gov/reference/reference_index_subjects/Cloture_vrd.htm.
[32] Bach, *supra* note 4, at 9.
[33] Fisk & Chemerinsky, "The Filibuster," 49 *Stanford Law Review* 181,187 n.26 (1996).
[34] *Merriam-Webster's Dictionary of Law* (1996), available at www.findlaw.com. See also www.m-w.com/cgi-bin/dictionary. A filibusterer is also known as a "freebooter" which means a "lawless military adventurer, especially one in quest of plunder." See *Webster's Revised Unabridged Dictionary* (1996), available at www.dictionary.reference.com.
[35] http://www.britannica.com/search?ref=B04201&query=filibuster&submit=Find.
[36] http://www.encyclopedia.com/html/f1/filibust.asp.
[37] *Congressional Record*, November 10, 1999, at S14503.
[38] The Senate voted 59-39 to confirm Paez and 64-34 to confirm Berzon.
[39] *Congressional Quarterly Almanac* (1971), at 14-15 (emphasis added).
[40] See Dealey, "Hatch Draws Fire from GOP, Dems on Judgeships," *The Hill*, August 29, 1999, at 1.
[41] When Sen. Tom Harkin (D-Iowa) introduced his proposal for decreasing majorities for successive cloture votes, he said the filibuster was being used "for one Senator to get his or her way on something that they could not rightfully win through the normal processes." *Congressional Record*, January 4, 1995, at S31.
[42] Beth, *supra* note 30, at 1 (emphasis added).
[43] The vote on March 6, 2003, was 55-44; the vote on March 13, 2003, was 55-42; the vote on March 18, 2003, was 55-45; the vote on April 2, 2003, was 55-44; and the vote on May 5, 2003, was 52-39.
[44] *Congressional Record*, April 8, 2003, at S4949.
[45] The vote on May 1, 2003, was 52-44; the vote on May 8, 2003, was 52-45.
[46] Beth, *supra* note 30, at 3.
[47] *Congressional Quarterly Almanac* (1968), at 41a (Chart IV).
[48] Quoted in Balz, "Democratic Candidates Vow to Protect Abortion Rights," *The Washington Post*, Jan. 22, 2003, at A8.
[49] Editorial, "Blocking Bad Judges," *Capital Times*, November 13, 2002, at 10A.
[50] Mikva, "Supreme Patience," *The Washington Post*, January 25, 2002, at A25.
[51] Press Release, "Filibuster Sustained!," available at http://www.pfaw.org/pfaw/general/default.aspx?oid=9142.
[52] Senator Lott voted for cloture on all five Clinton judicial nominees for whom cloture was sought. See Table 3. In addition, as Majority Leader, Senator Lott spoke publicly against filibustering Clinton judicial nominees. On November 10, 1999, for example, he said: "I do not believe that filibusters of judicial nominees are appropriate" *Congressional Record*, November 10, 1999, at S14503.
[53] Senator Lott has voted for cloture on all Bush judicial nominees on whom cloture has been sought. See Table 3.
[54] Senator Hatch voted for cloture on all 10 Clinton judicial nominee for whom cloture was sought. See Table 3. In addition, as Judiciary Committee Chairman, Sen. Hatch spoke out publicly against filibustering Clinton judicial nominees.
[55] Senator Hatch has voted for every Bush judicial nominee for whom cloture has been sought. See Table 3.

[56] Sen. Daschle voted for cloture on three of the four Clinton judicial nominations on which cloture was sought. See Table 2. On October 5, 1999, he said: "I find it simply baffling that a Senator would vote against even voting on a judicial nomination." *Congressional Record*, October 5, 1999, at S11919.
[57] As Minority Leader, Sen. Daschle has led the Estrada and Owen filibusters. He ranks 60th in his support for judicial nominee cloture. See Table 3.
[58] Sen. Leahy voted for cloture on three of the four Clinton judicial nominations on which cloture was sought. See Table 2. On June 18, 1998, he said: "I have stated over and over again ... that I would object and fight against any filibuster on a judge, whether it is somebody I opposed or supported." *Congressional Record*, June 18, 1998, at S6521.
[59] As Judiciary Committee Ranking Member, Sen. Leahy has helped lead the Estrada and Owen filibusters. He ranks 66th in his support for judicial nominee cloture. See Table 3.
[60] *Congressional Record*, January 4, 1995, at S30. On March 13, 2003, Sen. Zell Miller (D-Georgia) introduced S.Res. 85, which would reduce the majority required for successive cloture votes by the same gradations as Sen. Harkin's proposal. See *Congressional Record*, March 13, 2003, at S3749. On May 9, 2003, Senate Majority Leader Bill Frist (R-Tennessee) introduced S.Res. 138. Applied only to nominations, it would reduce the majority required on successive cloture motions in the same gradations, but add an opportunity, on a fifth cloture vote, for a simple majority of senators present and voting to limit debate. See *Congressional Record*, May 9, 2003, at S5982.
[61] *Congressional Record*, January 4, 1995, at S30.
[62] *Id.* at S31.
[63] *Id.*
[64] *Id.*
[65] *Id.* (emphasis added).
[66] *Id.* at S36.
[67] *Id.* (emphasis added).
[68] *Congressional Record*, October 5, 1999, at S11919.
[69] *Congressional Record*, June 18, 1998, at S6521.
[70] *Congressional Record*, October 14, 1998, at S12578.
[71] *Congressional Record*, September 16, 1999, at S11014.
[72] *Congressional Record*, June 21, 1995, at S8806.
[73] *Id.* at S8807.
[74] *Congressional Record*, June 22, 1995, at S8861.
[75] *Congressional Record*, June 21, 1995, at S8739.
[76] Editorial, "Time to Retire the Filibuster," *The New York Times*, January 1, 1995, at 8.
[77] Editorial, "Keep Talking About Miguel Estrada," *The New York Times*, February 13, 2003, at A40.
[78] Editorial, "Hold Firm on Estrada," *The New York Times*, March 13, 2003, at A26.
[79] Editorial, "Filibustering Priscilla Owen," *The New York Times*, April 17, 2003, at A24.
[80] U.S. Constitution, Article I, Section 5. On September 16, 1999, for example, Sen. Hatch said: "It is important to not filibuster judicial nominees on the floor of the Senate." *Congressional Record*, September 16, 1999, at S11015.
[81] U.S. Constitution, Article I, Section 1.
[82] *United States v. Ballin*, 144 U.S. 1,5 (1892).
[83] Reprinted in *Congressional Record*, October 1, 1968, at S28926.
[84] Cutler, "The Way to Kill Rule XXII," *The Washington Post*, April 19, 1993, at A23.
[85] *Congressional Record*, January 30, 1995, at S1748 (emphasis added).
[86] Swanson, "Filibustering the Constitution," *The Washington Times*, May 6, 2003, at A18.
[87] U.S. Constitution, Article I, Section 5.
[88] *Ballin*, 144 U.S. at 6.
[89] J. Madison, *The Federalist No.58*, available at http://memory.loc.gov/const/fed/fed_58.html.
[90] A. Hamilton, *The Federalist No.65*, available at http://memory.loc.gov/const/fed/fed_22.html.
[91] A. Hamilton, *The Federalist No.76*, available at http://memory.loc.gov/const/fed/fed_76.html.
[92] A. Hamilton, *The Federalist No.77*, available at http://memory.loc.gov/const/fed/fed_77.html.
[93] See *supra* note 28, at section 41.
[94] *Ballin*, 144 U.S. at 6.
[95] A. Hamilton, *The Federalist No.65*, available at http://memory.loc.gov/const/fed/fed_65.html.
[96] *Skaggs v. Carle*, 110 F.3d 831, 838 (D.C. Cir. 1997) (Edwards, C.J., dissenting).
[97] *Id.*
[98] Cutler, "On Killing Senate Rule XXII (Cont'd)," *The Washington Post*, May 3, 1993, at A19.
[99] Hentoff, "Estrada and the Future of the Judiciary," *The Washington Times*, March 10, 2003, at A19.

Memorandum

May 5, 2003

TO: Senate Judiciary Subcommittee on:
The Constitution, Civil Rights & Property Rights
Attn: Robert Schiff

DRAFT

FROM: Richard S. Beth
Christopher M. Davis
Government and Finance Division.

SUBJECT: Extended Debate on Senate Rule Revisions and Measures Requiring Super Majority for Passage

This memorandum is prepared in response to your request for information about instances where the Senate extensively debated measures that, under the Constitution, required a super-majority for passage. The Constitution requires a two-thirds majority for advice and consent to treaties (Article II, section 2), proposing constitutional amendments (Article V), enactment of legislation over the President's veto (Article I, section 7), conviction of an official on impeachment (Article I, section 3), expulsion of a Member (Article I, section 5), and the removal of "political disabilities" incurred through participation in rebellion (Amendment XIV, section 3).

Table 1 addresses chiefly treaties and constitutional amendments that may have been blocked, defeated, or subjected to extended debate. For each, it indicates the length of the debate, whether or not cloture was attempted, and the final outcome. The listing is not comprehensive; rather, the items listed are a selection based chiefly on our ability to identify them, and determine their suitability for your purposes, within the required time. In some cases, the information listed is incomplete because the source used was not specific. Most of the items (and the specific information provided, especially on the length of debate), are taken from the list of "Outstanding Senate Filibusters from 1841 to 1984" in: U.S. Senate, Committee on Rules and Administration, *Senate Cloture Rule*, 99th Cong., 1st sess., S.Prt. 99-95, (Washington: GPO, 1985). Some are also drawn from "Filibusters in the Senate, 1789-1993," CRS congressional distribution memorandum, February 18, 1994, by Richard S. Beth.

Some attempt was made to identify additional measures that may have been blocked or subjected to extended debate. This effort concentrated on the period prior to adoption of the cloture rule in 1917, on which the sources initially consulted are less comprehensive, but went back only as far as about 1870. A few treaties proposed between 1869 and the Treaty of Versailles (1919), which may exhibit the required characteristics, were identified by reference to Stull Holt, *Treaties Defeated by the Senate* (Baltimore: Johns Hopkins Press, 1933), and those that appeared to meet the requirements are included in Table 1. Some of these, as noted in the table, have been included even though they never received a Senate

vote, or never reached the point of floor consideration, because they evidently lacked sufficient support to be approved. The relevant excerpts from Professor Holt's book are enclosed.

Vetoes that the Senate attempted to override in the administrations of Presidents Ulysses S. Grant through Woodrow Wilson (were also identified, from U.S. Senate, Senate Library, *Presidential Vetoes, 1789-1988* (Washington: GPO, 1992), but we have been unable to identify which of them may have been subjected to extended debate or blocked. We also were unable to identify proposed constitutional amendments that may have been subjected to extended debate or blocked. Few attempts to expel Senators occurred during the time period on which attention was focused, and bills to remove political disabilities were deemed harder to locate and also relatively unlikely candidates for the purposes intended. Impeachment cases were not examined because the Senate tries impeachments under rules that generally preclude indefinitely extended debate.

Table 2 lists attempts to change the cloture rule that were subject to extended Senate debate.

Also enclosed with this memorandum are excerpts from *Congressional Quarterly* and the *Congressional Quarterly Almanac* describing proceedings incident to attempts to change the cloture rule at the beginning of a new Congress between 1953 and 1979. These proceedings are of interest because they raise the question of whether the absence of limitations on debate in Senate rules can properly be used to prevent the Senate from voting on amendments to its rules. The argument has been made that such an outcome operates in derogation of the constitutional power of each house of Congress (Article I, section 5) to make its own rules. Proceedings or remarks from the Chair especially important in the development of this question occurred in the following years:

- 1957, Vice President Nixon stated as an advisory opinion that a majority can close debate on a change in Rules on the first day of a new Congress;
- 1959, Majority Leader Johnson offered a resolution to amend the Rules that included a provision adding to the Rules a statement that the Rules carry over without readoption;
- 1963, Vice President Johnson ruled that the question of whether a majority can close debate on a rules change at the beginning of a Congress must be submitted to the Senate for decision, and is debatable;
- 1967, Vice President Humphrey submitted the question of closing debate on the first day of a Congress to the Senate;
- 1969, Vice President Humphrey ruled that cloture had been invoked by a majority on a rules change proposal, but the Senate reversed him on appeal; and
- 1975, Vice President Rockefeller stated that a majority would be sufficient to invoke cloture on a rules change at the opening of a Congress, but the Senate did not ultimately adopt this position.

DRAFT

We hope this information is helpful for your purposes. If you have questions or require additional information, please do not hesitate to contact us at x78667.

Table 1. Selected Measures Requiring Super Majority Votes Subjected to Extended Senate Debate

DRAFT

Year or dates of relevant action	Subject and measure number	Filibuster and Cloture action (a)	Outcome
12/20/1870; 1/11/1871	Dominican Republic	9 days of debate.	Rejected, 28-28
7/26/1882, 4/20/1886	Mexico	9 days of debate.	Rejected, 32-26
1/29/1885	Nicaragua, Isthmus of Panama	12 days of debate.	Rejected, 32-23
2/1/1889	Great Britain, reciprocity	7 days of debate.	Laid on table.
5/28/1888 - 8/1/1888	Canada, fisheries	15 days of debate.	Rejected, 27-30
5/11/1892 1.28/1893	France, extradition	4 days of debate.	Ratified, 40-16
2/21/1893	Hawaii, annexation	1 day of actual debate, but considered "hopeless" and postponed (p. 152)	No final action.
1/11/1897	Great Britain, arbitration	2 days of debate; supporters foresaw it would be "talked to death" (p. 155)	Rejected, 43-26.
n/a	Canada, boundary	Senate did not take up.	
6/16/1897	Hawaii, annexation	15 days of debate (p. 163)	No final action.
1903	Exec. K, Treaty with Colombia (Panama Canal)	9 days debate (in closed executive session)	Defeated (approved in subsequent session on February 23, 1904)
1919	Treaty of Versailles	55 days debate; cloture invoked 76-16	Defeated
1925	Isle of Pines Treaty	3 days debate; cloture moved but not voted	Ratified
1926	World Court Protocol (S.Doc. 309)	10 days debate; cloture invoked 68-26	Ratified

1970	S.J.Res. 1, Constitutional amendment to abolish electoral college	At least 19 days of debate. Sept. 17, cloture rejected 54-36; Sept. 29, cloture rejected 53-34	Laid aside
1972	S.Res. 241, Arms control treaty	9 days debate; Sept. 14, cloture invoked, 76-15.	Amendment on future negotiations adopted, 56-35; treaty ratified, 88-2
1974	Exec. O, 81-1, Genocide Treaty	4 days debate; cloture rejected twice: 55-36; 55-28.	Action not completed.
1978	Exec. N, 95-1, Panama Canal treaties	38 days debate; no cloture attempt	Ratified Mar. 16, 62-38; ratified Apr. 18, 62-38
1984	S.J.Res. 73, Constitutional Amendment on school prayer	11 days debate; no cloture attempt	Defeated
1988	100-11, Intermediate nuclear forces treaty	9 days debate; cloture moved but not voted	Ratified
1987-1988	S.J.Res. 282, Campaign spending limits constitutional amendment	4 days debate; cloture rejected twice: 52-42; 53-37	Withdrawn from floor consideration after cloture failed.
1992	102-20, 102-32, Strategic arms treaties	5 days debate; cloture invoked 87-6	Ratified

Note:

(a) Page citations given, where pertinent, are to W. Stull Holt, *Treaties Defeated by the Senate* (Baltimore: Johns Hopkins Press, 1933).

DRAFT

U.S. Senate Subcommittee on the Constitution, Civil Rights and Property Rights
U.S. Senator John Cornyn (R-TX), Chairman

Judicial Nominations, Filibusters, and the Constitution:
When a majority is denied its right to consent

Tuesday, May 6, 2003, 2:30 p.m., Dirksen Senate Office Building Room 226

OPENING STATEMENT

This hearing will focus the subcommittee on the following topic: "Judicial Nominations, Filibusters, and the Constitution: When a majority is denied its right to consent."

This week, the Senate will mark a rather dismal political anniversary. Two full years have passed since President Bush announced his first class of nominees to the federal courts of appeals. It is an exceptional group of legal minds. Some of them, however, still await confirmation. What's more, two of them are currently facing unprecedented filibusters. And more filibusters of other nominees are now being threatened.

Never before has the judicial confirmation process been so broken, and the constitutional principles of judicial independence and majority rule so undermined.

I'd like to take just a few moments to discuss those principles here.

I also discussed those principles in an op-ed published just this morning on the Wall Street Journal's opinionjournal.com website. Without objection, I would ask that that op-ed be submitted into the record.

The fundamental essence of our democratically-based system of government is both majestic and simple: majorities must be permitted to govern. As our nation's founding fathers explained in Federalist No. 22, "the fundamental maxim of republican government . . . requires that the sense of the majority should prevail." And as the Supreme Court unanimously held in the case of United States v. Ballin (1892), our Constitution is premised on the democratic doctrine of majority rule. Any exceptions to the doctrine of majority rule, such as any rule of supermajority voting, must be stated expressly in the Constitution. For example, the Constitution expressly provides for a supermajority, two-thirds voting rule for Senate approval of treaties and other matters. That is not the case, however, with respect to the Senate approval of judicial nominees.

At the same time, we of course have an important tool, here in the United States Senate, called the filibuster. Let me be clear in stating that the filibuster, properly used, can be valuable in ensuring that we have a full and adequate debate on matters. Certainly, not

all uses of the filibuster are abusive or unconstitutional. As we Senators are often fond of pointing out, particularly when we are in the mood to talk, the House of Representatives is designed to respond to the passions of the moment. The Senate is also a democratic institution, governed by majority rule, but it also serves as the saucer, to cool those passions, and to bring deliberation and reason to the matter. The result is a delicate balance of democratically representative and accountable government, and yet also, deliberative and responsible government.

But the filibuster, like any tool, can be abused. And I am concerned that it is being abused here. Today, a minority of Senators appear to be using the filibuster not simply to ensure adequate debate, but actually to block many of our nation's numerous judicial vacancies from being filled, by forcing upon the confirmation process a supermajority requirement of 60 votes.

The public's historic aversion to such abusive filibusters is well-grounded. These tactics not only violate democracy and majority rule, but arguably offend the Constitution as well. Indeed, prominent Democrats such as Lloyd Cutler and Senators Tom Daschle, Joe Lieberman, and Tom Harkin have condemned filibuster misuse as unconstitutional.

Time does not permit me to read each of their previous statements condemning filibusters as unconstitutional, but without objection, I would like to have them submitted for the record.

Moreover, abusive filibusters against judicial nominations uniquely threaten both presidential power and judicial independence – and are thus far more legally dubious than filibusters of legislation, an area of preeminent Congressional power.

For example, Harry Edwards, a respected Carter-appointed appeals judge on the U.S. Court of Appeals for the D.C. Circuit, has written that the Constitution forbids the Senate from imposing a supermajority rule for confirmations. Otherwise, he writes, "the Senate, acting unilaterally, could thereby increase its own power at the expense of the President" and "essentially take over the appointment process from the President." Thus, Judge Edwards has concluded, "the Framers never intended for Congress to have such unchecked authority to impose supermajority voting requirements that fundamentally change the nature of our democratic processes."

Significantly, I would point out that Judge Edwards expressed less concern with legislative filibusters than with filibusters of nominations.

In addition, I would point out that Judge Edwards was writing a dissenting opinion in this case, styled Skaggs v. Carle (D.C. Cir. 1997). But notably, the two judges in the majority did not disagree with Judge Edwards – indeed, they did not address the issue one way or the other, because the majority concluded that the court had no jurisdiction to hear the case in the first place. So Judge Edwards stands as the only judge in that case, or indeed in any case, who has discussed the precise constitutional issue before us today.]

History confirms Judge Edwards's constitutional interpretation that the Senate may not impose a supermajority requirement on confirmations. Indeed, a Senate majority has never been denied its constitutional right to confirm judicial nominees – until now. The current obstruction is thus as unprecedented as it is harmful.

To justify the current filibusters, some have cited the example of Abe Fortas. President Lyndon Johnson nominated Fortas to be Chief Justice in 1968. But what is critical to understand about the Fortas episode is that majority rule was not under attack in that case. Dogged by allegations of ethical improprieties and bipartisan opposition, Fortas was unable to obtain the votes of 51 Senators to prematurely end debate. That was a serious problem for Fortas – because, if there were not even 51 Senators to close debate, it was far from clear that there would be a simple majority of Senators present and voting to vote to confirm. Rather than allow further debate, Johnson withdrew the nomination altogether just three days later.

It's also worth noting that, back in 1968, future Carter and Clinton White House Counsel Lloyd Cutler, along with numerous other leading members of the bar and the legal academy, signed a letter urging all Senators that "nothing would more poorly serve our constitutional system than for the nominations to have earned the approval of the Senate majority, but to be thwarted because the majority is denied a chance to vote." Without objection, that letter will be entered into the record.

But of course, as I mentioned, Fortas wasn't able to get the support of even 51 votes to close debate, and Johnson withdrew the nomination as a result, so the Cutler letter was moot.

The Fortas episode is thus a far cry from the present situation. And the Cutler letter, condemning filibusters of judicial nominations when used to deny the majority its right to consent, most certainly would apply today. After extensive debate, Miguel Estrada, Priscilla Owen, and countless others enjoy enthusiastic, bipartisan majority support, yet they face an uncertain future of indefinite debate.

By insisting that "there is not a number [of hours] in the universe that would be sufficient" for debate on certain nominees, Democrat leaders concede they are using the filibuster not to ensure adequate debate, but to change the Constitution by imposing a supermajority requirement for judicial confirmations.

Whether unconstitutional or merely destructive to our political system, the current confirmation crisis cries out for reform. As all ten freshman Senators, myself included, stated last week in a letter to Senate leadership, "we are united in our concern that the judicial confirmation process is broken and needs to be fixed." Veteran Senators from both parties express similar sentiments.

Accordingly, today's hearing will explore various reform proposals. Our first panel is comprised exclusively of Senators – actually, two Democrat Senators, and one

Republican Senator. All of them, members of this body, have each experienced the current crisis first hand. All of them have offered proposals for reform.

These proposals will be debated, of course, and they should be. But what's important is that these Senators acknowledge the current confirmation crisis and have urged reform, and I congratulate them all for doing that.

Our second panel is comprised of the nation's leading constitutional experts who have studied and written about the confirmation process. Many of them have been called upon to testify by members of both parties. I am pleased to have all six here. They are a distinguished group, and I look forward to formally introducing them to the subcommittee later today.

I want to close just by saying that the judicial confirmation process has reached the bottom of a decades-long downward spiral. Our current state of affairs is neither fair nor representative of the bipartisan majority of this body. For democracy to work, and for the constitutional principle of majority rule to prevail, this obstructionism must end, and we must bring matters to a vote. As former Senator Henry Cabot Lodge famously said of filibusters: "To vote without debating is perilous, but to debate and never vote is imbecile." Two years is too long. The Senate needs a fresh start.

And with that, I would turn the floor over to the ranking minority member of the subcommittee, Senator Feingold.

OpinionJournal
from THE WALL STREET JOURNAL Editorial Page

BALANCE OF POWER

The Constitution and the Judiciary

Where's the check on Senate filibusters?

BY JOHN CORNYN
Tuesday, May 6, 2003

This week, the Senate marks a dismal political anniversary: Two years of partisan obstruction of President Bush's judicial nominees, culminating in two unprecedented filibusters. More are threatened. Never before has the judicial confirmation process been so broken, and the constitutional principles of judicial independence and majority rule so undermined.

It's time for a fresh start.

In that spirit, the Senate Subcommittee on the Constitution will hold a hearing today to consider proposals to restore both the confirmation process and our most cherished constitutional values.

The essence of our democratic system of government is beautiful in its simplicity: Majorities must be permitted to govern. As our nation's Founders explained in Federalist No. 22, "the fundamental maxim of republican government . . . requires that the sense of the majority should prevail." And as the Supreme Court has unanimously held, our Constitution is premised on the democratic doctrine of majority rule.

Today, a minority of obstructionist senators are forcing upon the confirmation process a supermajority requirement of 60 votes. They are using the filibuster not simply to ensure adequate debate, but actually to block many of our nation's numerous judicial vacancies from being filled.

The public's historic aversion to abusive filibusters is well grounded. These tactics not only violate democracy and majority rule, but arguably offend the Constitution as well. Indeed, prominent Democrats such as Lloyd Cutler and Sens. Tom Daschle, Joe Lieberman and Tom Harkin have condemned filibuster misuse as unconstitutional.

Moreover, abusive filibusters against judicial nominations uniquely threaten both presidential power and judicial independence--and are thus more dubious than filibusters of legislation, an area of pre-eminent congressional power.

Harry Edwards, a respected Carter-appointed appeals judge, wrote that the Constitution forbids the Senate from imposing a supermajority rule for confirmations. Otherwise, "the Senate, acting unilaterally, could thereby increase its own power at the expense of the President" and "essentially take over the appointment process from the President." He concluded: "the Framers never intended for Congress to have such unchecked authority to impose supermajority voting requirements that fundamentally change the nature of our democratic processes." (He expressed less concern with legislative filibusters.)

History confirms Judge Edwards's constitutional interpretation. A Senate majority has never been denied its constitutional right to confirm judicial nominees--until now. The obstruction is as unprecedented as it is harmful.

Some have cited, to justify the current filibusters, the example of Abe Fortas, whom President Lyndon Johnson nominated to be chief justice in 1968. But majority rule was not under attack in that case. Dogged by allegations of ethical improprieties and bipartisan opposition, Fortas was unable to obtain the votes of 51 senators to prematurely end debate. Three days later, Johnson withdrew the nomination altogether.

That is a far cry from the present situation. After extensive debate, Miguel Estrada, Priscilla Owen and countless others enjoy enthusiastic, bipartisan majority support, yet they face an uncertain future of indefinite debate. By brazenly insisting, as Nevada's Harry Reid--the Senate's second-ranking Democrat--has said, that "there is not a number [of hours] in the universe that would be sufficient" for debate on certain nominees, Democrat leaders admit they are using the filibuster not to ensure adequate debate, but to change the Constitution by imposing a supermajority requirement for judicial confirmations.

Whether unconstitutional or merely destructive to our political system, the current confirmation crisis cries out for reform. As all 10 freshman senators, myself included, stated last week in a letter to Senate leadership, "we are united in our concern that the judicial confirmation process is broken and needs to be fixed." Veteran senators from both parties express similar sentiments.

Accordingly, today's hearing will explore various reform proposals:

• Sen. Zell Miller suggests--as did Sens. Harkin, Lieberman and 17 other Democrats in 1995--that the 60-vote rule for ending debate be reduced incrementally with each succeeding vote, until the rule reaches 51 votes.

• President Bush and Sens. Arlen Specter and Patrick Leahy have urged the imposition of strict time deadlines for the Senate to hold hearings and vote on judicial nominees.

• Sen. Charles Schumer advocates an overhaul of the nomination process by eliminating the president's appointment power and instead giving President Bush and Sen. Daschle "equal roles in picking the judge-pickers."

These proposals will be debated. What's important is that these public officials acknowledge the crisis and urge reform.

The judicial confirmation process has reached the bottom of a decades-long downward spiral. Our current state of affairs is neither fair nor representative of the bipartisan majority of this body. For democracy to work, and for the constitutional principle of majority rule to prevail, this obstructionism must end, and we must bring matters to a vote. As Sen. Henry Cabot Lodge famously said of filibusters: "To vote without debating is perilous, but to debate and never vote is imbecile." Two years is too long. The Senate needs a fresh start.

Mr. Cornyn is a senator from Texas and chairman of the Senate Subcommittee on the Constitution. He served previously on the Supreme Court of Texas, and as the state's attorney general.

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#2

Prominent Democrats Who Call ALL Filibusters Unconstitutional

- **Senator Joe Lieberman** on January 4, 1995: "the filibuster rule . . . there is no constitutional basis for it. . . . it is, in its way, inconsistent with the Constitution, one might almost say an amendment of the Constitution by rule of the U.S. Senate." And on January 5: "The Constitution states only five specific cases in which there is a requirement for more than a majority to work the will of this body: Ratification of a treaty, override of a Presidential veto, impeachment, adoption of a constitutional amendment, and expulsion of a Member of Congress. In fact, the Framers of the Constitution considered other cases in which a supermajority might have been required and rejected them. And we by our rules have effectively amended the Constitution--which I believe, respectfully, is not right--and added the opportunity of any Member or a minority of Members to require 60 votes." *Congressional Record.*

- **Senator Tom Daschle** on January 30, 1995: "the Constitution is straightforward about the few instances in which more than a majority of the Congress must vote: A veto override, a treaty, and a finding of guilt in an impeachment proceeding. Every other action by the Congress is taken by majority vote. The Founders debated the idea of requiring more than a majority . . . . They concluded that putting such immense power into the hands of a minority ran squarely against the democratic principle. Democracy means majority rule, not minority gridlock." *Congressional Record.*

- **Senator Tom Harkin** on March 1, 1994: "I really believe that the filibuster rules are unconstitutional. I believe the Constitution sets out five times when you need majority or supermajority votes in the Senate for treaties, impeachment." *Congressional Record.*

- **Lloyd Cutler, Carter and Clinton White House Counsel,** on September 29, 1968: "Nothing would more poorly serve our constitutional system than for the nominations to have earned the approval of the Senate majority, but to be thwarted because the majority is denied a chance to vote. Senators have never before employed a filibuster against a Supreme Court nomination. Indeed, prior Supreme Court nominations have seldom been debated more than 8 days. Whatever the merits of the filibuster as a device to defeat disliked legislation, its use to frustrate a judicial appointment creates a dangerous precedent with important implications for the very structure of our Government." *Congressional Record.* And again on April 19, 1993: "requirements of 60 votes to cut off debate and a two-thirds vote to amend the rules are both unconstitutional." And again on May 3, 1993: "the Senate rule requiring a super-majority vote to cut off debate is unconstitutional." *Washington Post.*

Statement of Lawyers' Committee
On Supreme Court Nominations, September 29, 1968

The Lawyers' Committee on Supreme Court Nominations today issued the attached statement urging the Senate to act promptly on the merits of the Supreme Court nominations pending before it. The Committee was formed September 12, 1968, and its membership comprises 162 lawyers from 49 states and the District of Columbia. The committee opposes the use of the filibuster or other obstructive techniques to frustrate the appointive process. It also opposes the use of that procedure for indiscriminate attacks on the Supreme Court.

Included among this broadly representative group of lawyers are seven past presidents of the American Bar Association, many past and present officers of state bar associations and 22 law school deans. A list of the members is attached. The statement represents the personal views of the members of the Committee, and does not reflect the views of any institution with which they may be affiliated.

Inquiries may be directed to Jefferson B. Fordham, Dean of the University of Pennsylvania Law School.

Statement

The Lawyers' Committee on Supreme Court Nominations respectfully urges the Senators opposed to the pending nominees to put their views to the test of a vote on the merits.

Over three months ago, the President submitted to the Senate for its "advice and consent" a nomination for Chief Justice of the United States. The nominee was questioned extensively before the Senate Judiciary Committee. A detailed record was compiled. Last week, a majority of the Senate Judiciary Committee reported out the nomination favorably. The sole question now before the Senate should be the qualification and fitness of the nominee for the position of Chief Justice.

No one would deny the need for careful consideration by the Senate of the qualification of nominees to the highest court in the land. Nor is there any doubt that some period of debate and deliberation for that purpose is appropriate. But just as surely, the Senate has a duty not only to explore the issues but also to render a decision either granting or withholding its consent to the nominations.

If the pending nominations do not win the support of a majority of the Senate, they will fall. If they do win such support, they deserve the Senate's consent. Nothing would more poorly serve our constitutional system than for the nominations to have earned the approval of the Senate majority, but to be thwarted because the majority is denied a chance to vote.

Senators have never before employed a filibuster against a Supreme Court nomination. Indeed, prior Supreme Court appointments have seldom been debated more than 8 days. Whatever the merits of the filibuster as a device to defeat disliked legislation, its use to frustrate a judicial appointment creates a dangerous precedent with important implications for the very structure of our Government.

Senators concerned about whether the courts have correctly applied the Constitution ought not to ignore their own constitutional duties. We therefore urge that after a reasonable time for debate the nominations be voted up or down on their merits.

Members:

Brent M. Abel, San Francisco, CA
Stephen Ailes, Washington, DC
George E. Allen, Richmond VA
J. Garner Anthony, Honolulu, Hawaii
Charles E. Ares, Dean, University of Arizona, College of Law
Walter P. Armstrong, Jr., Memphis, TN
H. Thomas Austern, Washington, DC
William H. Avery, Chicago, IL
Joseph A. Ball, Long Beach, CA
Frederick A. Ballard, Washington, DC
E. Clinton Bamberger, Jr. Baltimore, MD
Edward L. Barrett, Jr., Dean, School of Law, University of California, Davis
Marvin Berger, New York, NY
Robert A. Bicks, New York, NY
Peter W. Billings, Salt Lake City, UT
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FOR IMMEDIATE RELEASE
June 5, 2003

CORNYN TO SENATE RULES COMMITTEE: UNWRITTEN RULE NOT TO FILIBUSTER JUDICIAL NOMINEES HAS BEEN BROKEN

"The current filibusters of judicial nominees are unprecedented and wrong."

WASHINGTON – The longstanding unwritten rule not to filibuster judicial nominees has been broken and the Senate must find a way to break the impasse over President Bush's nominees, U.S. Senator John Cornyn told a hearing of the Committee on Rules and Administration Thursday.

"The current filibusters of judicial nominees, done not to ensure adequate debate, but to block a Senate majority from confirming judges, are unprecedented and wrong," Sen. Cornyn, Chairman of the Judiciary Committee's Subcommittee on the Constitution, said at the hearing. "Until now, members of this distinguished body have long and consistently obeyed an unwritten rule not to block the confirmation of judicial nominees by filibuster. But, this Senate tradition, this unwritten rule has now been broken and it is crucial that we find a way to ensure the rule won't be broken in the future. "

Currently, in an unprecedented move, a minority of senators is blocking an up-or-down vote for Justice Priscilla Owen of Texas, nominated to the U.S. Court of Appeals for the Fifth Circuit, and Miguel Estrada, nominated to the U.S. Court of Appeals for the D.C. Circuit. "There has never been a filibuster of a judicial nominee, now there are two," Sen. Cornyn said. "Further nominees are threatened to be filibustered and we must do something soon."

Senate Resolution 138, the bipartisan proposal discussed at the hearing, would still guarantee full debate on nominees, while enabling a Senate majority to eventually hold up-or-down votes. "This resolution is a reasonable, common-sense proposal with a lot of precedent to support it," Sen. Cornyn said. "There are 26 laws that prohibit a minority of senators from filibustering certain kinds of measures. The judicial confirmation process should surely be added to this list." The resolution, introduced by Majority Leader Frist with Sen. Cornyn as an original co-sponsor, would gradually reduce the 60-vote requirement on successive cloture votes until a filibuster could eventually be ended by a simple majority, preventing endless delay of judicial nominees.

At the hearing, Cornyn noted that an independent judiciary is the foundation of government and that no society can be just or prosperous without the rule of law. "To protect the independence of our judiciary and to restore the unwritten rules long respected by the Senate until now, we should immunize the Senate's process of confirming judges from filibuster abuse and approve S. Res. 138."

Following the hearing, S. Res 138 could be marked-up by the Rules Committee and sent to the full Senate for a vote. A majority of the Senate is sufficient to approve a rules change. Under Senate Rule 22, debates on a rule change can be ended by a two-thirds vote.

-30-

A broken tradition

Time to reform Senate rules on filibusters

By John Cornyn

The current struggle to establish democracy in Iraq reminds us that no society can be either just or prosperous without the rule of law. New and old nations alike need independent and impartial courts as the foundation of government, and civilized nations must vigilantly maintain, not undermine, these institutions.

Today, the Senate Rules Committee will discuss whether the current filibusters of judicial nominations pose a threat to our own independent judiciary. I welcome today's discussion because I believe we need reform: Indeed, senators from both sides of the aisle agree that our process for confirming judges is broken and needs to be fixed.

The American people need the courts to be fully staffed. Our judicial selection process should focus simply on identifying and confirming well-qualified jurists committed to enforcing the law, not their will or agenda.

For too long, this process has been caught in a downward spiral of politics and delay. During the administrations of former Presidents Bush and Clinton, for example, too many appeals court nominees were never voted on at all.

The problem is even worse today. For months, a bipartisan Senate majority has tried to hold up-or-down votes on a number of judicial nominees. A partisan minority of senators, however, is blocking the Senate from holding those votes. As one leader of the current filibusters has said, "there is not a number [of hours] in the universe that would be sufficient" for debate on certain nominees.

The result: vacant judgeships and empty courtrooms, compelling the U.S. Judicial Conference to declare "judicial emergencies" across the country. People seeking redress for their injuries wait years for their cases to be tried and appealed, while judicial nominees languish in the Senate waiting for an up-or-down vote. The broken confirmation process translates into denial of access to justice in our nation's most important courts.

The use of filibusters — not to ensure adequate debate, but to block a Senate majority from confirming judges — is unprecedented and wrong. This indefinite, needless and wasteful delay distracts the Senate from other important business. And it leaves would-be judges in limbo, along with thousands of litigants. President Bush has rightly called the situation "a disgrace."

It doesn't have to be this way. As all 10 freshman senators detailed in a bipartisan letter to Senate leadership on April 30, it is time for a fresh start. The ill will of the past should not dictate the terms and direction of the future. And 12 senators have proposed a bipartisan reform to guarantee full debate on nominees, while ensuring the ability of a Senate majority to hold up-or-down votes. This proposal deserves wide support.

More than 175 newspaper editorials representing the home states of 70 senators condemn the current filibusters of judicial nominees. Law professor and former Clinton adviser Michael Gerhardt has condemned supermajority requirements for confirming nominees, saying they "would be more likely to frustrate rather than facilitate the making of meritorious appointments." And last month, legal scholars told the Senate Constitution Subcommittee that filibusters of judicial nominations are uniquely offensive to our nation's constitutional design.

Proposals like the one being debated today in the Rules Committee have been endorsed by congressional experts from think tanks as diverse as the American Enterprise Institute, Brookings and Cato. An even more aggressive reform proposal in 1995 was endorsed by 19 Senate Democrats, as well as the New York Times, which editorialized that, "now is the perfect moment . . . to get rid of an archaic rule that frustrates democracy and serves no useful purpose."

For nearly its first two decades, a Senate majority had the explicit power under the rules to call for votes. And since that time, senators have consistently obeyed an unwritten rule not to block the confirmation of judicial nominees by filibuster.

As renowned former Senate parliamentarian Floyd Riddick once said, senators are expected to "restrain themselves" and "not abuse the privilege" of debate. Out of respect for an independent judiciary, senators have historically and consistently exercised such restraint.

But this Senate tradition has now been broken. The Rules Committee and the Senate must respond. Reforming filibusters in the judicial nominations context would restore both majority rule and Senate tradition.

There is precedent for such action: The Senate has previously considered at least 30 proposals to eliminate filibusters altogether. In fact, there are dozens of laws on the books that prevent a minority of senators from delaying action in certain areas — from the Budget Act of 1974 to the War Powers Resolution, and covering such diverse subjects as international trade, arms control, environmental law, employee retirement protection and nuclear waste. Judicial confirmations should likewise be immunized from filibuster abuse.

For far too long, our judicial selection process has been tainted by coarse politics and hampered by wasteful delay. The Senate needs a fresh start.

Sen. John Cornyn is chairman of the Senate Subcommittee on the Constitution. He served previously on the Supreme Court of Texas and as the state's attorney general.

202

TESTIMONY OF U.S. SENATOR JOHN CORNYN

BEFORE THE UNITED STATES SENATE
COMMITTEE ON RULES AND ADMINISTRATION

"Hearing on Senate Rule XXII and proposals to amend this rule"

Thursday, June 5, 2003, 2:00 p.m.
Russell Senate Office Building Room 301

Mr. Chairman:

I thank you and the Committee for the opportunity to testify today in strong support of filibuster reform. And I am pleased to join Majority Leader Frist, as well as Chairman Lott, Senator Miller, and several other distinguished Senators and members of this committee, in co-sponsoring Senate Resolution 138.

Although I am new to this body, I have long been a passionate believer in the fundamental importance of an independent judiciary as the foundation of government. Indeed, the current struggle to build a free Iraq reminds us that no society can be just or prosperous without the rule of law. That requires an independent judiciary.

And so, when I had the honor of serving first as a state district judge, and then as a member of the Texas Supreme Court, Justice Priscilla Owen and I joined with other judges to advocate reform of our judicial selection process in the state of Texas. It has long been our view that elections are not the right way to go for selecting judges, because it excessively politicizes the selection process.

But I must say that, whatever the problems the various states may have in their judicial selection systems, nothing – absolutely nothing – compares to how badly broken the system of judicial confirmation is here in Washington, D.C.

In Texas, we have debate and discussion, and that is always followed by a vote. Whatever else you might say about the process, we always finish it. We always hold a vote.

Of course, voting is precisely what we in the U.S. Senate were elected to do. Vote up or down, but, as the *Washington Post* admonished in a February editorial, "Just Vote."

The problems we are facing in the U.S. Senate with respect to the confirmation of judges are even worse than I had imagined before coming here. And I am not the only freshman Senator to feel that way. As you know, Mr. Chairman, all ten freshman Senators wrote in a bipartisan letter to Senate leadership on April 30 that "we are united in our concern that the judicial confirmation process is broken and needs to be fixed."

I therefore welcome the committee's discussion today of whether the current filibusters of judicial nominations pose a threat to our independent judiciary.

The American people need the courts to be fully staffed. Our judicial selection process should focus simply on identifying and confirming well-qualified jurists committed to enforcing the law, not their will or agenda.

For far too long, this process has been caught in a downward spiral of politics and delay. As President Bush recognized in a speech in the Rose Garden on May 9, 2003, "during the administration of former Presidents Bush and Clinton, . . . too many appeals court nominees never received votes."

So the problem we face today is not new. It has faced Presidents of both parties. And it has existed in the Senate under the control of both parties.

Yet the problem has not been fixed. Quite the opposite: the problem is even worse today. And the problem threatens to destroy the integrity of our constitutional system of advice and consent and of an independent judiciary.

For months, a bipartisan Senate majority has tried to stop the politics of delay and tried to hold up-or-down votes on a number of judicial nominees. However, a partisan minority of Senators is blocking the Senate from holding those votes. As one leader of the current filibusters has said, "there is not a number [of hours] in the universe that would be sufficient" for debate on certain nominees.

The current use of filibusters, not to ensure adequate debate, but to block a Senate majority from confirming judges, is unprecedented and wrong.

This indefinite, needless, and wasteful delay distracts the Senate from other important business. And it hurts Americans. It leaves not only would-be judges in limbo, but also thousands of litigants.

President Bush has rightly called the situation "a disgrace."

Over 175 newspaper editorials representing 35 states condemn the current filibusters of judicial nominees. Last month, legal scholars of both parties told the Senate Constitution Subcommittee that filibusters of judicial nominations are uniquely offensive to our nation's constitutional design. Law professor and former Clinton adviser Michael Gerhardt has condemned supermajority requirements for confirming nominees, saying they "would be more likely to frustrate rather than facilitate the making of meritorious appointments."

Until now, members of this distinguished body have long and consistently obeyed an unwritten rule not to block the confirmation of judicial nominees by filibuster.

As renowned former Senate parliamentarian Floyd Riddick once said, Senators are expected to "restrain themselves" and "not abuse the privilege" of debate. And out of respect for the independent judiciary, Senators have historically and consistently exercised such restraint.

But this Senate tradition, this unwritten rule, has now been broken. The current judicial confirmation crisis demands a response. Senate Resolution 138 is that response. It guarantees full debate on nominees, while ensuring the ability of a Senate majority to hold up-or-down votes.

It is a bipartisan proposal. It originates with the filibuster reform proposal introduced by Senators Harkin and Lieberman in 1995, and reintroduced by Senator Miller earlier this year.

That proposal was endorsed by 19 Senate Democrats as well as the *New York Times*, which editorialized in 1995 that "now is the perfect moment . . . to get rid of an archaic rule that frustrates democracy and serves no useful purpose."

Last month, Senator Miller testified before the Senate Constitution Subcommittee that, "at the very least, . . . I would hope we would consider applying my proposal to judicial nominations." I could not agree more, and I am so pleased that, following that hearing, we have been able to introduce S. Res. 138 as a bipartisan effort.

Proposals quite similar to S. Res. 138 have been endorsed by Congressional experts from think tanks as diverse as the American Enterprise Institute, the Brookings Institution, and the Cato Institute.

The resolution is a reasonable, common-sense proposal, with a lot of precedent to support it.

The Senate has previously considered at least thirty proposals to eliminate filibusters altogether. And there are literally dozens of laws on the books today which prevent a minority of Senators from filibustering certain kinds of measures – from the Budget Act of 1974 to the War Powers Resolution.

According to the Congressional Research Service, the following twenty-six laws limit debate or otherwise eliminate the minority's power to filibuster in the Senate on certain specified matters:

Federal Budget

- Congressional Budget and Impoundment Control Act of 1974 (2 U.S.C. §§ 636, 641, 688)
- Balanced Budget and Emergency Deficit Control Act of 1985 (2 U.S.C. §§ 907a-d)

War, National Emergency, and National Security

- War Powers Resolution (50 U.S.C. §§ 1544-46)
- National Emergencies Act (50 U.S.C. § 1601)
- International Emergency Economic Powers Act (50 U.S.C. § 1701)
- Defense Base Closure and Realignment Act of 1990 (10 U.S.C. § 2687 note)

- Cuban Liberty and Democratic Solidarity Act of 1996 (22 U.S.C. § 6064)

Arms Control and Foreign Assistance

- International Security Assistance and Arms Export Control Act of 1976 (Pub. L. No. 94-329)
- Arms Export Control Act (22 U.S.C. § 2753 et seq.)
- Atomic Energy Act of 1978 (42 U.S.C. §§ 2153-59h)

International Trade

- Trade Act of 1974 (19 U.S.C. § 2191 et seq.)
- Uruguay Round Agreements Act (19 U.S.C. § 3535)
- Bipartisan Trade Promotion Authority Act of 2002 (19 U.S.C. § 3803 et seq.)

Energy and Environment

- Department of Energy Act of 1978 (22 U.S.C. § 3224a)
- Energy Policy and Conservation Act (42 U.S.C. § 6421)
- Power Plant and Industrial Fuel Use Act of 1978 (42 U.S.C. § 8374)
- Nuclear Waste Policy Act of 1982 (42 U.S.C. §§ 10131 et seq.)
- Public Utility Regulatory Policies Act of 1958 (43 U.S.C. § 2008)
- Outer Continental Shelf Lands Act (43 U.S.C. § 1337)
- Alaska Natural Gas Transportation Act of 1976 (15 U.S.C. § 719f)
- Alaska Nat'l Interest Lands Conservation Act (16 U.S.C. §§ 3232-33)

Employment Retirement Security

- Employee Retirement Income Security Act of 1974 (29 U.S.C. § 1322a)
- Pension Reform Act of 1976 (29 U.S.C. § 1306)

General Government

- Congressional Review Act (5 U.S.C. § 802)
- Executive Reorganization Act (5 U.S.C. § 912)
- District of Columbia Home Rule Act (Section 604)

The judicial confirmation process should surely be added to this list. To protect the independence of our judiciary and to restore the unwritten rules long respected by the Senate until now, we should immunize the Senate's process of confirming judges from filibuster abuse and approve S. Res. 138.

I want to just briefly mention the issue of Abe Fortas. Some have said that he was the first – and only – judicial nominee ever to be filibustered. Others, like myself, have argued that he was not defeated due to a filibuster; rather, he was defeated because he was not supported by 51 Senators. Former U.S. Senator Robert P. Griffin has expressed precisely the same view, both then and in a recent letter, which I also enclose here.

After just a few days of debate, supporters of Fortas's nomination to be Chief Justice filed for cloture to end debate prematurely. When the cloture vote was taken up two days later, they

failed to obtain the support of 51 Senators to invoke cloture, due to allegations of ethical improprieties and bipartisan opposition (24 Republicans and 19 Democrats). Moreover, had there been an actual confirmation vote, Fortas might have been defeated by a vote of 46-49, based on various indications in the *Congressional Record*. President Johnson thus withdrew the nomination, rather than subject Fortas to further debate. (Fortas later resigned under threat of impeachment.)

In other words, Fortas was denied confirmation not due to a filibuster, but because he lacked the support of 51 Senators.

Indeed, several Senators who opposed Fortas specifically and repeatedly noted that they were not filibustering, or otherwise trying to prevent a majority from confirming him. They were simply seeking time to debate and expose the serious problems with the nomination:

- "[A]n adequate and full discussion on this great and important issue *should not be termed a filibuster.*" 114 Cong. Rec. 28,115 (Sep. 25, 1968) (statement of Sen. Griffin).

- "I am certain that, in due time, we will come along, in the extended debate process, to a vote of some kind of some point. The main thing is that this great deliberative body . . . *ought to discuss this question.*" 114 Cong. Rec. 28,155 (Sep. 25, 1968) (statement of Sen. Hollings).

- "[I]t takes some time to develop these facts. . . . [T]he proponents are just waiting in the aisle, almost, to file a cloture petition at some early time . . . . *[G]ive us just a little time*, Mr. Leader." 114 Cong. Rec. 28,251-52 (Sep. 26, 1968) (statement of Sen. Stennis).

- "[I]t is right and proper that the U.S. Senate carefully deliberate this nomination . . . . *Debate is not a dilatory tactic.* . . . I am not willing now to say those of us who oppose Justice Fortas are a minority." 114 Cong. Rec. 28,253 (Sep. 26, 1968) (statement of Sen. Baker).

- "[T]here are a good many more than one—there may be half of the Senate; *there may be more than half of the Senate—that share our concern*." 114 Cong. Rec. 28,253 (Sep. 26, 1968) (statement of Sen. Holland).

- "[W]e in the Senate of the Untied States stand ready here and now, today, to discharge fully and completely, not with the *undue haste* that seems to be counseled by some, but rather with the *deliberation that the significance of the occasion requires*." 114 Cong. Rec. 28,254 (Sep. 26, 1968) (statement of Sen. Hansen).

- "*I do not rise to defend a filibuster*, because I firmly believe that as long as Senators are seeking the floor to speak on the issue before the Senate—and are addressing themselves to that issue without resort to dilatory tactics, then we do not have a

filibuster. . . . [W]e do not have to defend a filibuster *for we do not have a filibuster*." 114 Cong. Rec. 28,585 (Sep. 27, 1968) (statement of Sen. Griffin).

- "[T]his debate has given some the idea that someone is doing a wrong thing here by debating it a little, even before the motion to take up has prevailed. This is one place where it can be discussed, and for that I make no apologies, if it takes us *a little time*." 114 Cong. Rec. 28,748 (Sep. 30, 1968) (statement of Sen. Stennis).

- "[T]hus far, there have been only 4 days of Senate debate on this very important, historic issue. . . . *[A] filibuster, by any ordinary definition, is not now in progress*." 114 Cong. Rec. 28,930 (Oct. 1, 1968) (statement of Sen. Griffin).

- "I would not like to see the Senate gag itself . . . there are other things here that need exploration. *That requires time*." 114 Cong. Rec. 28,933 (Oct. 1, 1968) (statement of Sen. Dirksen).

- "An examination of the Congressional Record . . . clearly reveals that *the will of the majority was not frustrated*. . . . [I]f every Senator who made his position known in the Record had actually been present and had voted, there would have been 47 votes for cloture and 48 votes, or a majority, against cloture. . . . It should not be overlooked that the distinguished Senator from Kentucky [Mr. Cooper] announced during the debate that, although he would vote for cloture, he was against the confirmation of the nomination of Mr. Fortas as Chief Justice. *On the basis of the Record, then, it is ridiculous to say that the will of a majority in the Senate has been frustrated*." 114 Cong. Rec. 29,150 (Oct. 2, 1968) (statement of Sen. Griffin).

But however you choose to characterize the Fortas situation, it is certainly a far cry from what we are facing today.

Fortas was debated for just a few days. He was opposed on ethical grounds, and by a bipartisan group of Senators. And he did not have the support of 51 or more Senators.

The current filibusters of Miguel Estrada, Justice Owen, and perhaps others bear no resemblance to the situation Fortas faced. There can be no disputing that the current situation is simply unprecedented.

I would also like to point out that Richard Paez, whom some supporters of filibusters have cited, was not only confirmed; he was confirmed only because his Senate opponents restrained themselves and voted to end debate.

Indeed, on numerous occasions when a judicial nominee has enjoyed the support of a majority of Senators, but fewer than the 60 votes necessary under the Senate's cloture rule, the Senate has nevertheless acted to confirm the judicial nominee. This Senate tradition and practice has been applied at every level of the federal judiciary:

Judges confirmed with less than 60 votes (97th-108th Congresses)

Judge	Court	Vote	Date of Vote
J. Harvie Wilkinson III	4th Cir.	58-39	Aug. 9, 1984
Alex Kozinski	9th Cir.	54-43	Nov. 7, 1985
Sidney A. Fitzwater	N.D. Tex.	52-42	Mar. 18, 1986
Daniel A. Manion	7th Cir.	48-46	June 26, 1986
Clarence Thomas	S. Ct.	52-48	Oct. 15, 1991
Susan O. Mollway	D. Haw.	56-34	June 22, 1998
William A. Fletcher	9th Cir.	57-41	Oct. 8, 1998
Richard A. Paez	9th Cir.	59-39	Mar. 9, 2000
Dennis W. Shedd	4th Cir.	55-44	Nov. 19, 2002
Timothy M. Tymkovich	10th Cir.	58-42	April 1, 2003
Jeffrey Sutton	6th Cir.	52-41	April 29, 2003

I'd like to conclude by repeating the old saw, mentioned earlier by Majority Leader Frist, that in Washington, far too often, what matters most is not whether you win or lose, but where you place the blame.

That is certainly the problem with the judicial confirmation process. Instead of fixing the problem, we nurse old grudges, debate mind-numbing statistics, and argue about who hurt whom first, the most, and when.

It is time to end the blame game, fix the problem, and move on. Wasteful and unnecessary delay in the process of selecting judges hurts our justice system and harms all Americans. It is intolerable no matter who occupies the White House. And filibusters are by far the most virulent form of delay imaginable.

As all ten freshman Senators have stated: "None of us were parties to any of the reported past offenses, whether real or perceived. None of us believe that the ill will of the past should dictate the terms and direction of the future. Each of us firmly believes the United States Senate needs a fresh start."

Thank you for the opportunity to testify, Mr. Chairman.

MATERIALS IN SUPPORT OF
TESTIMONY OF U.S. SENATOR JOHN CORNYN

BEFORE THE UNITED STATES SENATE
COMMITTEE ON RULES AND ADMINISTRATION

"Hearing on Senate Rule XXII and proposals to amend this rule"

Thursday, June 5, 2003, 2:00 p.m.
Russell Senate Office Building Room 301

TABLE OF CONTENTS

The Senate's Unwritten Rule Against Filibusters
To Block Judicial Nominations 2

U.S. Senators Consistently Condemn Filibusters Of Judicial Nominees 3

False Precedents Of Filibusters Of Judicial Nominees 5

Fortas Did Not Face A Filibuster 6

Precedents For Filibuster Reform 9

Letter from former Senator Robert P. Griffin explaining that
Fortas was not denied confirmation due to filibuster (6/2/03) 11

Floor speech of former Senator Robert P. Griffin explaining that
Fortas did not have support of Senate majority (10/2/68) 14

Bipartisan letter from all ten freshman Senators to Senate leadership (4/30/03) 15

THE SENATE'S UNWRITTEN RULE AGAINST FILIBUSTERS TO BLOCK JUDICIAL NOMINATIONS

Throughout the more than two centuries since the nation's founding, the Senate has consistently obeyed an unwritten rule not to use filibusters to block the confirmation of judicial nominees.

The tradition and practice of the Senate thus requires confirmation so long as a majority of the Senate is prepared to exercise its constitutional power to consent to the President's judicial nominees.

On numerous occasions when a judicial nominee has enjoyed the support of a majority of Senators, but fewer than the 60 votes necessary under the Senate's cloture rule, the Senate has nevertheless acted to confirm the judicial nominee. This Senate tradition and practice has been applied at every level of the federal judiciary:

Judges confirmed with less than 60 votes (97th-108th Congresses)

Judge	Court	Vote	Date of Vote
J. Harvie Wilkinson III	4th Cir.	58-39	Aug. 9, 1984
Alex Kozinski	9th Cir.	54-43	Nov. 7, 1985
Sidney A. Fitzwater	N.D. Tex.	52-42	Mar. 18, 1986
Daniel A. Manion	7th Cir.	48-46	June 26, 1986
Clarence Thomas	S. Ct.	52-48	Oct. 15, 1991
Susan O. Mollway	D. Haw.	56-34	June 22, 1998
William A. Fletcher	9th Cir.	57-41	Oct. 8, 1998
Richard A. Paez	9th Cir.	59-39	Mar. 9, 2000
Dennis W. Shedd	4th Cir.	55-44	Nov. 19, 2002
Timothy M. Tymkovich	10th Cir.	58-42	April 1, 2003
Jeffrey Sutton	6th Cir.	52-41	April 29, 2003

U.S. SENATORS CONSISTENTLY CONDEMN FILIBUSTERS OF JUDICIAL NOMINEES

The Senate has consistently obeyed an unwritten rule not to use filibusters to block the confirmation of judicial nominees, as evidenced by numerous statements made by Senators of both parties on the Senate Floor. For example:

- **Senator Biden**: "[E]veryone who is nominated ought to have a shot, to have a hearing and to have . . . *a vote on the floor* . . . It is totally appropriate . . . to reject every single nominee if they want to . . . But it is not . . . appropriate not to have hearings on them, not to bring them to the floor and not to allow a vote." (March 19, 1997)

- **Senator Boxer**: "It is not the role of the Senate to obstruct the process and prevent numbers of highly qualified nominees from even being given the opportunity for *a vote on the Senate floor*." (May 14, 1997)

- **Senator Daschle**: "As Chief Justice Rehnquist has recognized: 'The Senate is surely under no obligation to confirm any particular nominee, but after the necessary time for inquiry it should vote him up or vote him down.' *An up-or-down vote . . . they deserve at least that much*. . . . I find it simply baffling that a Senator would vote against even voting on a judicial nomination." (October 5, 1999)

- **Senator Feinstein**: "A nominee is *entitled to a vote*. Vote them up; vote them down." (September 16, 1999)

- **Senator Hatch**: "I have always, and consistently, taken the position that *the Senate must address the qualifications of a judicial nominee by a majority vote*, and that the 41 votes necessary to defeat cloture are no substitute for the democratic and constitutional principles that

underlie this body's majoritarian premise for confirmation to our federal judiciary." (October 4, 1999)

- **Senator Hatch**: "Even when I have opposed a nominee . . . I have voted for cloture to stop a filibuster of that nominee. . . At bottom, *it is a travesty if we establish a routine of filibustering judges*." (March 6, 2000)

- **Senator Kennedy**: "We owe it to Americans across the country to give these nominees a vote. If our . . . colleagues don't like them, vote against them. But *give them a vote*." (February 3, 1998)

- **Senator Leahy**: "If we want to vote against somebody, vote against them. I respect that. State your reasons. I respect that. But don't hold up a qualified judicial nominee. . . . I have stated over and over again on this floor that . . . *I would object and fight against any filibuster on a judge, whether it is somebody I opposed or supported*; that I felt the Senate should do its duty." (June 18, 1998)

- **Senator Lott**: "*I do not believe that filibusters of judicial nominations are appropriate*." (November 10, 1999)

- **Senator Moseley-Braun**: "*[U]nder no circumstance is it appropriate or fair for us to filibuster* . . . to avoid having to take up the question of whether or not the President's nominee is qualified to serve." (June 21, 1995)

FALSE PRECEDENTS OF FILIBUSTERS OF JUDICIAL NOMINEES

There is no precedent for the current filibusters of Miguel Estrada, Justice Priscilla Owen, or other judicial nominees. Throughout its history, the Senate has consistently obeyed an unwritten rule not to use filibusters to block the confirmation of judicial nominees – until now.

- **Abe Fortas:** ***After just a few days of debate***, Fortas's nomination to be Chief Justice failed to obtain the support of 51 Senators to invoke cloture, due to allegations of ethical improprieties and bipartisan opposition (24 Republicans and 19 Democrats). President Johnson then withdrew the nomination, rather than subject Fortas to further debate. ***So, Fortas was denied confirmation not due to a filibuster, but because he lacked the support of 51 Senators.***

- **Every other judicial nomination that has been cited to support the current filibusters resulted in confirmation.** Those examples therefore provide no support for denying confirmation by filibuster.

  - Moreover, **Richard Paez** (9th Circuit) was not only confirmed, ***he was confirmed only because his Senate opponents upheld the unwritten rule against filibustering judicial nominees and voted to end debate.*** Although only 59 Senators supported Paez's confirmation (less than the 60 necessary to end a filibuster), 85 Senators voted to end debate and to permit a vote on his nomination. Senators also upheld the unwritten rule in the cases of **J. Harvie Wilkinson** (58-39 to confirm), **Sidney Fitzwater** (52-42 to confirm), and **Dennis Shedd** (55-44 to confirm).

- The tradition even extends to **Executive Branch nominees**. Supporters of **Sam Brown** and **Henry Foster** tried (and failed) to invoke cloture, because they wanted to stop debate before it had even begun. ***So, Brown and Foster were denied confirmation not due to a filibuster, but because his supporters did not want to debate their nominations.***

FORTAS DID NOT FACE A FILIBUSTER

After just a few days of debate, supporters of Fortas's nomination to be Chief Justice filed for cloture to end debate prematurely. When the cloture vote was taken up two days later, they failed to obtain the support of 51 Senators to invoke cloture, due to allegations of ethical improprieties and bipartisan opposition (24 Republicans and 19 Democrats). Moreover, had there been an actual confirmation vote, Fortas might have been defeated by a vote of 46-49, based on various indications in the *Congressional Record*. President Johnson thus withdrew the nomination, rather than subject Fortas to further debate. (Fortas later resigned under threat of impeachment.)

In other words, ***Fortas was denied confirmation not due to a filibuster, but because he lacked the support of 51 Senators.***

Indeed, several Senators who opposed Fortas specifically and repeatedly noted that they were not filibustering, or otherwise trying to prevent a majority from confirming him. They were simply seeking time to debate and expose the serious problems with the nomination:

- "[A]n adequate and full discussion on this great and important issue *should not be termed a filibuster*." 114 Cong. Rec. 28,115 (Sep. 25, 1968) (statement of Sen. Griffin).

- "I am certain that, in due time, we will come along, in the extended debate process, to a vote of some kind of some point. The main thing is that this great deliberative body . . . *ought to discuss this question*." 114 Cong. Rec. 28,155 (Sep. 25, 1968) (statement of Sen. Hollings).

- "[I]t takes some time to develop these facts. . . . [T]he proponents are just waiting in the aisle, almost, to file a cloture petition at some early time . . . . *[G]ive us just a little time*, Mr. Leader." 114 Cong. Rec. 28,251-52 (Sep. 26, 1968) (statement of Sen. Stennis).

- "[I]t is right and proper that the U.S. Senate carefully deliberate this nomination . . . . *Debate is not a dilatory tactic*. . . . I am not willing now to say those of us who oppose Justice Fortas are a minority." 114 Cong. Rec. 28,253 (Sep. 26, 1968) (statement of Sen. Baker).

- "[T]here are a good many more than one—there may be half of the Senate; *there may be more than half of the Senate—that share our concern*." 114 Cong. Rec. 28,253 (Sep. 26, 1968) (statement of Sen. Holland).

- "[W]e in the Senate of the Untied States stand ready here and now, today, to discharge fully and completely, not with the *undue haste* that seems to be counseled by some, but rather with the *deliberation that the significance of the occasion requires*." 114 Cong. Rec. 28,254 (Sep. 26, 1968) (statement of Sen. Hansen).

- "*I do not rise to defend a filibuster*, because I firmly believe that as long as Senators are seeking the floor to speak on the issue before the Senate—and are addressing themselves to that issue without resort to dilatory tactics, then we do not have a filibuster. . . . [W]e do not have to defend a filibuster for *we do not have a filibuster*." 114 Cong. Rec. 28,585 (Sep. 27, 1968) (statement of Sen. Griffin).

- "[T]his debate has given some the idea that someone is doing a wrong thing here by debating it a little, even before the motion to take up has prevailed. This is one place where it can be discussed, and for that I make no apologies, if it takes us *a little time*." 114 Cong. Rec. 28,748 (Sep. 30, 1968) (statement of Sen. Stennis).

- "[T]hus far, there have been only 4 days of Senate debate on this very important, historic issue. . . . *[A] filibuster, by any ordinary definition, is not now in progress*." 114 Cong. Rec. 28,930 (Oct. 1, 1968) (statement of Sen. Griffin).

- "I would not like to see the Senate gag itself . . . there are other things here that need exploration. *That requires time*." 114 Cong. Rec. 28,933 (Oct. 1, 1968) (statement of Sen. Dirksen).

- "An examination of the Congressional Record . . . clearly reveals that *the will of the majority was not frustrated*. . . . [I]f every Senator who made his position known in the Record had actually been present and had voted, there would have been 47 votes for cloture and 48 votes, or a majority, against cloture. . . . It should not be overlooked that the distinguished Senator from Kentucky [Mr. Cooper] announced during the debate that, although he would vote for cloture, he was against the confirmation of the nomination of Mr. Fortas as Chief Justice. *On the basis of the Record, then, it is ridiculous to say that the will of a majority in the Senate has been frustrated*." 114 Cong. Rec. 29,150 (Oct. 2, 1968) (statement of Sen. Griffin).

PRECEDENTS FOR FILIBUSTER REFORM

Filibusters are notorious in Senate history. They are not, however, an immutable part of the Senate rules. Quite the contrary:

1. **The Senate has previously considered *at least thirty proposals* to eliminate filibusters altogether.** Since the first recorded filibuster of 1841, there have been at least thirty proposals to restore a Senate majority's power to end debate: in 1841, 1850, 1869, 1873, 1883, 1890, 1893, 1918, 1925, 1947, 1951-58, 1960-68, 1995 and 2003.

2. **There are literally dozens of laws in effect today which prevent a Senate minority from delaying action in certain areas – from the Budget Act of 1974 to the War Powers Resolution, and covering such diverse subjects as international trade, arms control, environmental law, employee retirement law, and nuclear waste.**

The following ***twenty-six laws*** limit debate or otherwise eliminate the minority's power to filibuster in the Senate on certain specified matters:

Federal Budget

- Congressional Budget and Impoundment Control Act of 1974 (2 U.S.C. §§ 636, 641, 688)
- Balanced Budget and Emergency Deficit Control Act of 1985 (2 U.S.C. §§ 907a-d)

War, National Emergency, and National Security

- War Powers Resolution (50 U.S.C. §§ 1544-46)
- National Emergencies Act (50 U.S.C. § 1601)
- International Emergency Economic Powers Act (50 U.S.C. § 1701)
- Defense Base Closure and Realignment Act of 1990 (10 U.S.C. § 2687 note)
- Cuban Liberty and Democratic Solidarity Act of 1996 (22 U.S.C. § 6064)

Arms Control and Foreign Assistance

- International Security Assistance and Arms Export Control Act of 1976 (Pub. L. No. 94-329)
- Arms Export Control Act (22 U.S.C. § 2753 et seq.)
- Atomic Energy Act of 1978 (42 U.S.C. §§ 2153-59h)

International Trade

- Trade Act of 1974 (19 U.S.C. § 2191 et seq.)
- Uruguay Round Agreements Act (19 U.S.C. § 3535)
- Bipartisan Trade Promotion Authority Act of 2002 (19 U.S.C. § 3803 et seq.)

Energy and Environment

- Department of Energy Act of 1978 (22 U.S.C. § 3224a)
- Energy Policy and Conservation Act (42 U.S.C. § 6421)
- Power Plant and Industrial Fuel Use Act of 1978 (42 U.S.C. § 8374)
- Nuclear Waste Policy Act of 1982 (42 U.S.C. §§ 10131 et seq.)
- Public Utility Regulatory Policies Act of 1958 (43 U.S.C. § 2008)
- Outer Continental Shelf Lands Act (43 U.S.C. § 1337)
- Alaska Natural Gas Transportation Act of 1976 (15 U.S.C. § 719f)
- Alaska Nat'l Interest Lands Conservation Act (16 U.S.C. §§ 3232-33)

Employment Retirement Security

- Employee Retirement Income Security Act of 1974 (29 U.S.C. § 1322a)
- Pension Reform Act of 1976 (29 U.S.C. § 1306)

General Government

- Congressional Review Act (5 U.S.C. § 802)
- Executive Reorganization Act (5 U.S.C. § 912)
- District of Columbia Home Rule Act (Section 604)

ROBERT P. GRIFFIN
9235 N. Long Lake Road
Traverse City, Michigan 49684

June 2, 2003

The Honorable John Cornyn, Chairman
Subcommittee on the Constitution
Committee on the Judiciary
U.S. Senate

Dear Mr. Chairman:

An Associated Press piece which appeared yesterday in many of the Sunday newspapers (copy attached) speculated that Chief Justice Rehnquist and/or Justice O'Connor might retire this year or next, and concluded with this comment:

> "Presidents have not had much success in appointing Supreme Court justices in election years . . .The last person to try it was Lyndon Johnson in 1968, when he failed to elevate Justice Abe Fortas to replace Chief Justice Earl Warren. Republicans filibustered the nomination and Johnson backed off. (Emphasis added)

Whether intended or not, the inference read by many would be: Since the Republicans filibustered to block Justice Fortas from becoming Chief Justice, it must be all right for the Democrats to filibuster to keep President Bush's nominees off the appellate courts. Having been on the scene in 1968, and having participated in that debate, I see a number of very important differences between what happened then and the situation that confronts the Senate today.

First of all, four days of debate on a nomination for Chief Justice is hardly a filibuster. As I said in closing remarks,

> " When is a filibuster, Mr. President? . . There have been no dilatory quorum calls or other dilatory tactics employed. The speakers who have taken the floor have addressed themselves to the subject before the Senate, and a most interesting and useful discussion has been recorded in the Congressional Record.
>
> "Those who are considering invocation of cloture at this early stage on such a controversial, complex matter should keep in mind that Senate debate last year on the investment tax credit bill lasted 5 weeks; that the Senate debated the Congressional reorganization bill for 6 weeks; and that we spent 3 weeks earlier this year on the crime bill." 10-1-68 Cong. Record p.28930.

While a few Senators, individually, might have contemplated use of the filibuster, there was no Republican party position that it should be employed. Indeed, the Republican leader of the Senate, Everett Dirksen, publicly expressed his support for the Fortas nomination shortly after the President announced his choice. Opposition in 1968 to the Fortas nomination was not partisan. Some Republicans supported Fortas; and some Democrats opposed him.

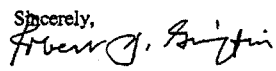
When, on October 1, 1968, a vote was taken on the first and only cloture motion, the count was: 45 in favor of the motion; and 43 against. Of course, those opposed to the nomination were jubilant, not only because the count fell far short of the 2/3 then required to impose cloture but, after reviewing the leanings of the absentees, we were more confident than ever that we had, or would achieve, majority support for our position. Of course, it also demonstrated that the White House could not produce the showing of a majority in favor of the nomination. Even if four days of debate were to be characterized as a filibuster, it could not be claimed that our debate was thwarting the will of a majority. Needless to say, that picture stands in stark contrast with the tactics employed these days by Senate Democrats.

Apparently, President Johnson and Justice Fortas at the White House could not come up with better numbers from their point of view. On the very next day, at the request of Justice Fortas, the President announced withdrawal of the Fortas nomination for Chief Justice.

Although Senate Democrats block confirmation of well qualified nominees simply because they are conservative, I wish to register my strong belief that Mr. Fortas would have been confirmed as Chief Justice if the only basis for opposition had been his liberal judicial philosophy. After all, he was known as a liberal in 1965, when he was easily confirmed as an Associate Justice. I believe the Fortas nomination for Chief Justice was rejected for two reasons: (1) the appearance of political manipulation in an exchange of letters between President Johnson and Chief Justice Warren to "create" a vacancy which did not exist until and unless Mr. Fortas was confirmed as Chief Justice, giving rise to the argument eloquently advanced by Senators Ervin and Baker that, really, there was no vacancy to be filled; and (2) the fact that, while sitting on the Supreme Court bench, and with little or no regard for the doctrine of separation of powers, Justice Fortas continued, on almost a daily basis, to serve as policy counsel and lawyer for President Johnson in the White House, a client whom he had served for many years reaching back to 1948 when Johnson first ran for the Senate and won by a margin of 87 votes. (For documentation of the extent of Justice Fortas' extrajudicial work in and for the White House, see: Fortas, the Rise and Ruin of a Supreme Court Justice, by Murphy.)

I hope this brief overview may provide the staff and the subcommittee with a bit of information and perspective that could be helpful. If you wish to contact me at any time, my phone number is 231 947-5002. My e-mail address is: rpgriffin@aol.com.

Sincerely,



TRAVERSE CITY RECORD-EAGLE PAGE 3A

NATION

Sunday, June 1, 2003 www.record-eagle.com

U.S. SUPREME COURT

Justices O'Connor, Rehnquist mull retirement

Political rancor means openings could go unfilled

WASHINGTON (AP) — Supreme Court Justice Sandra Day O'Connor can look out on the Capitol from her chambers. Chief Justice William H. Rehnquist's morning constitutional takes him past it every day.

The two justices have reason to keep a close eye on Congress' home. What they see could help determine whether either or both leave the bench this year.

There has been intense partisan acrimony in the Senate over some of President Bush's choices to fill federal judgeships. If a justice steps down this summer, there is a very real possibility of a political stalemate that would leave the job unfilled for months.

None of the nine current justices has announced plans to retire, but for reasons of age and politics Rehnquist, 78, and O'Connor, 73, are considered the most likely candidates.

Each has served decades

O'Connor Rehnquist

on the court and would prefer to leave while they have their health. Rehnquist was named to the court by President Nixon and O'Connor by President Reagan.

Both justices are part of the court's conservative wing and would prefer that a Republican president pick a successor.

As a practical matter, any justice thinking of leaving has a choice of going now and risking leaving the court short-handed as the Senate fights over Bush's chosen replacement. They also could hang on for another court session, but 2004 is an election year and that surely would raise the partisan rancor during the confirmation process.

Or they could wait until 2005, hopeful that Bush has swept to a second term and Republicans have built on their tenuous 51-48 advantage in the Senate.

"The window is closing," said David Yalof, a political science professor at the University of Connecticut who specializes in the judicial selection process.

"Presidents have not had much success in appointing Supreme Court justices in election years," Yalof said. The last president to try it was Lyndon Johnson in 1968, when he failed to elevate Justice Abe Fortas to replace the retiring Chief Justice Earl Warren. Republicans filibustered the nomination and Johnson backed off.

that Congressmen can develop a substantial national constituency and win local votes on the basis of enlightened foreign policy leadership. Even in the present disillusioned Congress, Representatives Morgan, Zablocki, Morse and Frazer are sustaining their political careers while devoting much of their attention to the U.S. relationships with the underdeveloped countries.

The problems of foreign aid are not hopeless. But if anything is certain in unpredictable 1968, it is that these problems, at least, will not solve themselves. Progress in technology and economics has been generally encouraging but in politics most of the progress has been in reverse. Experts cannot readjust these factors; only citizens and their representatives can.

MINORITY RULE?

Mr. GRIFFIN. Mr. President, after only 4 days of debate, the Senate refused yesterday by a vote of 45 to 43—far short of the necessary two-thirds majority—to invoke cloture on a motion to take up the nomination of Mr. Fortas as Chief Justice.

An editorial in this morning's Washington Post characterized the vote as a defeat for the majority by a "willful minority."

An examination of the CONGRESSIONAL RECORD of October 1, beginning at page S11688, clearly reveals that the will of the majority was not frustrated.

It will be noted that the votes of 12 Senators were not recorded. It appears in the CONGRESSIONAL RECORD that seven of that number sent word and indicated how they would have voted had they been present.

The Senator from Oregon [Mr. MORSE] and the Senator from Idaho [Mr. CHURCH] would have voted "yea," raising the total of those in favor of invoking cloture from 45 to 47.

The RECORD reflects that the Senator from Vermont [Mr. AIKEN], the Senator from Nevada [Mr. BIBLE], the Senator from Louisiana [Mr. ELLENDER], the Senator from Alaska [Mr. GRUENING], and the Senator from Maine [Mrs. SMITH] would have voted "nay," raising the total of those opposed to cloture from 43 to 48.

Accordingly, if every Senator who made his position known in the RECORD had actually been present and had voted, there would have been 47 votes for cloture and 48 votes, or a majority, against cloture.

There is no indication in the RECORD how the other five absent Senators would have voted.

It should not be overlooked that the distinguished Senator from Kentucky [Mr. COOPER] announced during the debate that, although he would vote for cloture, he was against the confirmation of the nomination of Mr. Fortas as Chief Justice.

On the basis of the RECORD, then, it is ridiculous to say that the will of a majority in the Senate has been frustrated.

THE CONFERENCE REPORT ON HIGHER EDUCATION AMENDMENTS OF 1968

Mr. WILLIAMS of New Jersey. Mr. President, late yesterday afternoon the Senate approved the conference report on the Higher Education Amendments of 1968.

The Higher Education Amendments of 1968 represent another step toward full educational opportunity for all Americans. The bill which we have sent to the President extends the educational opportunity grant and insured student loan programs; makes assistance available for 5 more years under the national defense student loan program; and extends the provisions of the developing institutions program and the education professions development program.

There are three other important provisions in the conference report which reflect a growing commitment on the part of Congress to make education a realistic goal—and not just a promise—for all Americans, regardless of race or social status.

First, the report provides that no student financial aid can be considered as family income for the purpose of computing welfare eligibility. Under present regulations, college financial aid officers are precluded from offering assistance which would boost family income over the allowable welfare limits. This negates the very purpose of student financial assistance, which is to guarantee that educational opportunities are available regardless of family finances.

Second, the report directs the U.S. Office of Education to collect data on college admissions policies, with the intention of discovering new and more flexible admissions practices. Many college admissions officers feel bound by existing procedures and requirements, and many potentially successful students are blocked from further study by these same requirements. This provision in the conference report would open the door to methods and materials for a more flexible, and more workable, college admissions policy.

College and university admissions procedures have been governed by an inflexible attention to past performance, rather than future potential. Admissions directors are the first to acknowledge that the devices like the college entrance examination board and scholastic aptitude tests are often arbitrary and inadequate measurements of an individual student's potential. Tests and other admissions materials are characteristically achievement oriented. As a result, students who do not measure up in these arbitrary tests, lose.

Although the conferees disagreed on the need to create a special program, with its own appropriation, to provide for demonstration grants to experiment and innovate with admissions procedures and policies, they did agree that research needed to accomplish this purpose can be conducted under title IV of the Cooperative Research Act. When the Commissioner of Education gathers all available data—including experiments now being conducted by individual institutions aimed at a more flexible admissions policy—we will be able to determine what direction the Federal Government should take to institute this long overdue objective of flexible admissions criteria.

However, if there is a need for further and more comprehensive research, based on the data accumulated by the Commissioner, research can and should be conducted under title IV of the Cooperative Research Act. Whatever steps are taken, it is hoped that the final package of information which will be developed will provide new materials, new techniques, and new attitudes directed toward drastically increasing the admissions rate of so-called high-risk students and others who, for sociological, geographical or other reasons, are arbitrarily disadvantaged by current admissions procedures.

Third, the report indicates that there is a role for students in locating and assisting other students who need advice on higher education—a role commonly assigned to a recruiter from the college administration. Colleges and universities, and local education agencies, will be able to use funds under the talent search program to carry out demonstration programs of student involvement in the recruiting processes.

I am hopeful that the Commissioner of Education will follow the intent of the Senate to use a portion of the money alloted for talent search to provide for several low-cost experimental demonstration grants, for involvement of students in recruiting of other students. These grants should be a part of, or in addition to, college and university requests for talent search programs, but should only be limited to the expenses of the students or student organizations that plan and implement these programs through the participating institutions. Young people need to be made working partners in the educational process. In many cases they have not been asked to take part, and in their frustration to participate, they have demonstrated. Students have much to contribute to the growth of higher education. In this vital area of admissions and recruitment, they can be an invaluable resource in selecting other students who will compliment the purposes of higher education. Through these low-cost demonstration programs, with the encouragement and assistance of Federal money, colleges can channel student energies and resources into a working partnership with the administration, and the participating college or university can thereby provide a mechanism for student involvement in its functions.

While these provisions offer no quick or easy answer to the problems that plague higher education, they do provide new ways for greater participation. The conference report on the Higher Education Amendments of 1968 is a major contribution to a better, stronger educational system in America.

RESEARCH AND DEVELOPMENT

Mr. SYMINGTON. Mr. President, in its report of September 19, 1968, on the Department of Defense appropriations bill, the Senate Appropriations Committee recommended that the funds requested by the Pentagon for research and development for the fiscal year 1968, some $8 billion, be reduced to $7,587,393,000.

I strongly support this reduction; and in that connection, believe it appropriate at this time to look at just what the vast

United States Senate

WASHINGTON, DC 20510

April 30, 2003

Dear Senators Frist and Daschle,

As the ten newest members of the United States Senate, we write to express our concerns about the state of the federal judicial nomination and confirmation process. The apparent breakdown in this process reflects poorly on the ability of the Senate and the Administration to work together in the best interests of our country. The breakdown also disserves the qualified nominees to the federal bench whose confirmations have been delayed or blocked, and the American people who rely on our federal courts for justice.

We, the ten freshmen of the United States Senate for the 108th Congress, are a diverse group. Among our ranks are former federal executive branch officials, members of the U.S. House of Representatives, and state attorneys general. We include state and local officials, and a former trial and appellate judge. We have different viewpoints on a variety of important issues currently facing our country. But we are united in our commitment to maintaining and preserving a fair and effective justice system for all Americans. And we are united in our concern that the judicial confirmation process is broken and needs to be fixed.

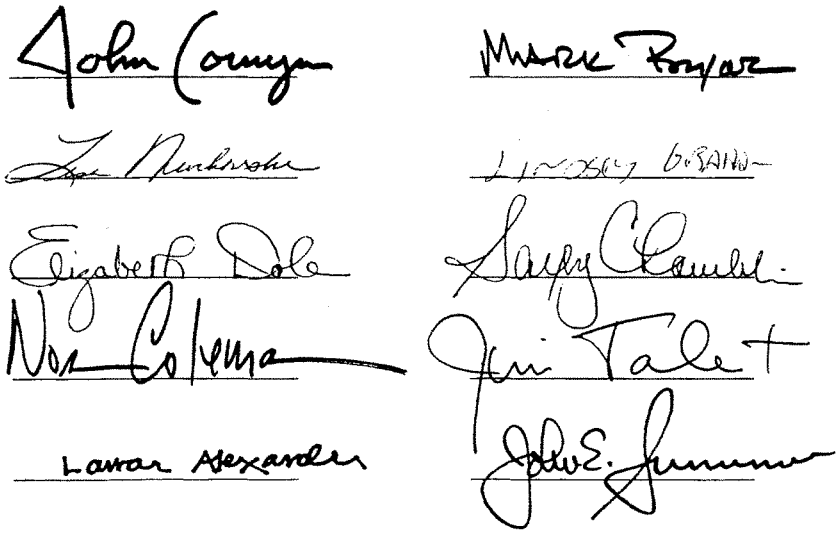
In some instances, when a well qualified nominee for the federal bench is denied a vote, the obstruction is justified on the ground of how prior nominees – typically, the nominees of a previous President – were treated. All of these recriminations, made by members on both sides of the aisle, relate to circumstances which occurred before any of us arrived in the United States Senate. None of us were parties to any of the reported past offenses, whether real or perceived. None of us believe that the ill will of the past should dictate the terms and direction of the future.

Each of us firmly believes that the United States Senate needs a fresh start. And each of us believes strongly that we were elected to this body in order to do a job for the citizens of our respective states – to enact legislation to stimulate our economy, protect national security, and promote the national welfare, and to provide advice and consent, and to vote on the President's nominations to important positions in the executive branch and on our nation's courts.

Accordingly, the ten freshmen of the United States Senate for the 108th Congress urge you to work toward improving the Senate's use of the current process or establishing a better process for the Senate's consideration of judicial nominations. We acknowledge that the White House should be included in repairing this process.

All of us were elected to do a job. Unfortunately, the current state of our judicial confirmation process prevents us from doing an important part of that job. We seek a bipartisan solution that will protect the integrity and independence of our nation's courts, ensure fairness for judicial nominees, and leave the bitterness of the past behind us.

Yours truly,



SOUTHERN
METHODIST
UNIVERSITY

#7

May 5, 2003

Senator John Cornyn
United States Senate
Washington, D.C.

RE: Judicial Nominations, Filibusters and the Constitution

Dear Senator Cornyn:

In addition to the concerns others have expressed about the constitutional implications of the Senate's filibuster procedure, I would suggest that the Senate Subcommittee on the Constitution, Civil Rights and Property Rights also review whether the basic concept of separation of powers is violated by the use of the filibuster procedure when the Senate is considering a presidential nominee. Under our system of checks and balances, it is vital that one branch of the federal government not usurp the authority of a co-equal branch. Maintaining the balance between the branches is at the heart of our liberty.

The filibuster process allows less than a majority of the Senate to stop the nomination and confirmation process. It allows less than a majority of the Senate to thwart the decision of the President on who should sit on the federal bench or serve in the Executive Branch. The Senate's role in this selection process is to voice the decision of the majority of the Senate as to whether it agrees with the President's choice. The Senate's role is to deny the President his choice only if a majority agree that it should be denied. If a minority of Senators can place themselves in the same position and deny the President his appointments by using the filibuster device, then the Senate has taken for itself more power than was intended by the Constitution.

As the Supreme Court said in *Morrison v. Olson*, 487 U.S. 654 (1988), one branch cannot take from another the power which is central to its place in our constitutional scheme. By allowing a minority of Senators to deny the President his choice of nominees, the filibuster process tilts the balance of power dramatically in favor of the Senate, and thus violates separation of powers principles.

Sincerely,

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Hijacking The Confirmation Process:
The Filibuster Returns to its Brigand Roots

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Before

The Senate Judiciary Subcommittee on the Constitution

Hearing on

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When a Majority is Denied Its Right to Consent"

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Hijacking The Confirmation Process:
The Filibuster Returns to its Brigand Roots

John C. Eastman*

Good afternoon, Chairman Cornyn and other members of the Senate Judiciary Subcommittee on the Constitution, Civil Rights and Property Rights. We are here today to address a Senate procedural tactic—the filibuster—that dates back at least to Senator John C. Calhoun's efforts to protect slavery in the old South and that, until now, was used most extensively by southern Democrats to block civil rights legislation in the 1960s. In its modern embodiment, the tactic has been termed the "stealth filibuster." Unlike the famous "Mr. Smith Goes to Washington" movie image of Jimmy Stewart passionately defending his position until, collapsing, he persuades (or shames) his opponents to change their position, the modern practitioners of the brigand art of the filibuster have been able to ply their craft largely outside the public eye (and hence without the political accountability that is the hallmark of representative government). I am thus truly pleased to be here today, to help you and this committee in your efforts to "ping" the filibuster and make it not only less stealthy but perhaps restore to it some nobility of purpose.

Let me first note that I am not opposed to the filibuster per se, either as a matter of policy or of constitutional law. I think the Senate is, within certain structural limits, authorized to enact procedural mechanisms such as the filibuster, pursuant to its power under Article I, Section 5 of the Constitution to "determine the Rules of its Proceedings." And I think that, by encouraging extensive debate, the filibuster has in no small measure

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contributed to this body's reputation as history's greatest deliberative body. But I think it extremely important to distinguish between the *use* of the filibuster to enhance debate and the *abuse* of the filibuster to thwart the will of the people, as expressed through a majority of their elected representatives. The use of the filibuster for dilatory purposes is particularly troubling in the context of the judicial confirmation process, for it thwarts not just the majority in the Senate and the people who elected that majority—as any filibuster of ordinary legislation does—but it intrudes upon the President's power to nominate judges, and threatens the very independence of the Judiciary itself.

Before I elaborate on each of these points, let me offer a bit of a family apology. One of the more notorious of the Senate's famed practitioners of the filibuster was my great uncle, Robert M. LaFollette, a candidate for President in 1924 and a long-time leader of the Progressive movement, whose members took great pride in thinking they could provide greater expertise in the art of government than anything that could be produced by mere majority rule. Because this ideology of the Progressive Party was so contrary to the principle of consent of the governed articulated in the Declaration of Independence, I have always considered Senator LaFollette as somewhat of a black sheep in my family. But I can at least take some family pride in the fact that one of his filibusters—the temporarily successful effort to block President Woodrow Wilson's wildly popular proposal to arm merchant ships against German U-boat attacks in during World War I—led the Senate to restrict the filibuster power by providing for cloture. Unfortunately, I believe that those efforts did not go far enough. More needs to be done to insure that the debate-enhancing filibuster cannot be misused to give to a minority of this body an effective veto over the majority.

With that end in mind, I want to make four points. First, it is important to realize that the use of the filibuster in the judicial confirmation context raises structural constitutional concerns not present in the filibuster of ordinary legislation. Second, these constitutional concerns are so significant that this body should consider modifying Senate Rule XXII so as to preclude the use of the filibuster against judicial nominees. Third, any attempt to filibuster a proposal to change the rules would itself be unconstitutional. And finally, I believe that if this body does not act to abolish the supermajority requirement for ending debate on judicial nominees, it could be forced to do so as the result of litigation initiated by a pending nominee, by a member of this body, or even by the President himself.

I. The Constitutional Structure of the Appointment Process Envisions a More Limited Role for the Senate than is Currently Claimed, and None for a Minority Faction of the Senate.

As is well known to this body, Article II of the Constitution provides that the President "shall nominate, and *by and with the Advice and Consent of the Senate*, shall appoint, ... Judges of the Supreme Court" and of such inferior courts as Congress has ordained and established. This is one of the fundamental components of the separation of powers mechanism devised by our nation's founders to protect against governmental tyranny. By it, the Senate provides an important check on the power of the President, but it is only a check; recent claims that the advice and consent clause gives to the Senate a co-equal role in the appointment of federal judges simply are not grounded either in the Constitution's text or in the history and theory of the appointment's process. Necessarily, the claim that such power exists in less than a majority of the Senate is even more problematic.

A. The Framers of the Constitution Assigned to the President the Pre-Eminent Role in Appointing Judges.

1. The President Alone Has the Power to *Nominate*

Article II of the Constitution provides that *the President "shall nominate*, and by and with the Advice and Consent of the Senate, *shall appoint*...Judges of the supreme Court [and such inferior courts as the Congress may from time to time ordain and establish]."[1] As the text of the provision makes explicitly clear, the power to choose nominees—to "nominate"—is vested solely in the President,[2] and the President also has the primary role to "appoint," albeit with the advice and consent of the entire Senate. The text of the clause itself thus demonstrates that the role envisioned for the Senate was a much more limited one that is currently being claimed by some, and it was, in any event, a role assigned to the entire Senate, not to a minority faction.

The lengthy debates over the clause in the Constitutional Convention support this reading. According to Madison's notes, an initial proposal on July 18, 1787, to place the appointment power in the Senate was opposed because, as Massachusetts delegate Nathaniel Ghorum noted, "even that branch [was] too numerous, and too little personally responsible, to ensure a good choice."[3] Ghorum suggested instead that Judges be appointed by the President with the advice and consent of the Senate, as had long been the method successfully followed in his home state. James Wilson and Governeur Morris of Pennsylvania, two of the Convention's leading figures, agreed with Ghorum and moved that judges be appointed by the President.

In contrast, Luther Martin of Maryland and Roger Sherman of Connecticut argued in favor of the initial proposal, contending that the Senate should have the power because, "[b]eing taken fro[m] all the States it [would] be best informed of the characters & most

capable of making a fit choice."[4] And Virginia's George Mason argued that the President should not have the power to appoint judges because (among other reasons) the President "would insensibly form local & personal attachments...that would deprive equal merit elsewhere, of an equal chance of promotion."[5]

Ghorum replied to Mason's objection by noting that the Senators were at least equally likely to "form their attachments."[6] Giving the power to the President would at least mean that he "will be responsible in point of character at least" for his choices, and would therefore "be careful to look through all the States for proper characters." For him, the problem with placing the appointment power in the Senate was that "Public bodies feel no personal responsibility, and give full play to intrigue & cabal,"[7] while if the appointment power were given to the President alone, "the Executive would certainly be more answerable for a good appointment, as the whole blame of a bad one would fall on him alone."[8]

Seeking a compromise, James Madison suggested that the power of appointment be given to the President with the Senate able to veto that choice by a 2/3 vote.[9] Another compromise was suggested by Edmund Randolph, who "thought the advantage of personal responsibility might be gained in the Senate by requiring the respective votes of the members to be entered on the Journal."[10] These compromises were defeated, however, and the vote on Ghorum's motion—that the President nominate and with the advice and consent of the Senate, should appoint—resulted in a 4-4 tie.[11] The discussion was then postponed.

When the appointment power was taken up again on July 21, the delegates returned to their previous arguments. One side argued that the President should be solely

responsible for the appointments, because he would be less likely to be swayed by "partisanship"—what Madison's generation called "faction"[12]—than the Senate. The other side opposed vesting the appointment power in the President for a similar reason: he would not know as many qualified candidates as the Senate would, and might still be swayed by personal considerations or nepotism.

The convention delegates were primarily concerned about improper influence in the appointments process, and most of the debate centered on whether assigning the appointment power to the President or to the Senate would serve as a better check on that influence. Those who, like Madison, argued that the President should have the sole power of appointment believed that this procedure would best prevent such political bargaining. As Edmund Randolph noted, "[a]ppointments by the Legislatures have generally resulted from cabal, from personal regard, or some other consideration than a title derived from the proper qualifications."[13]

In the end, the Convention agreed that the President would make the nominations, and the Senate—the entire Senate—would have a limited power to withhold confirmation as a check against political patronage or nepotism. Governeur Morris put the decision succinctly: "as the President was to nominate, there would be responsibility, and as the Senate was to concur, there would be security."[14] As the Supreme Court subsequently recognized, "the Framers anticipated that the President would be less vulnerable to interest-group pressure and personal favoritism than would a collective body."[15]

Madison, for instance, arguing in defense of his suggested compromise—that a 2/3 vote of the Senate could disqualify a judicial nomination, but otherwise giving the President a free hand—noted that

> The Executive Magistrate w^d be considered as a national officer, acting for and equally sympathizing with every part of the U. States. If the 2^d branch alone should have this power, the Judges might be appointed by a minority of the people, tho' by a majority, of the States, which could not be justified on any principle as their proceedings were to relate to the people, rather than to the States....[16]

Note that in Madison's proposal, a supermajority would have been required *to reject* a President's nominee, demonstrating just how preeminent was the role Madison envisioned for the President. Although the convention ultimately settled on a majority vote requirement, by assigning the sole power to nominate (and the primary power to appoint) judges to the President, the Convention specifically rejected a more expansive Senate role; such would undermine the President's responsibility, and far from providing security against improper appointments, would actually lead to the very kind of cabal-like behavior that the Convention delegates feared. These concerns are significantly exacerbated when, through use of the filibuster, a minority faction can thwart confirmation of a presidential nominee who enjoys majority support.

This understanding of the appointment power was reaffirmed during the ratification debates. In *Federalist* 76, for example, Alexander Hamilton explained at length that "one man of discernment is better fitted to analyze and estimate the peculiar qualities adapted to particular offices, than a body of men of equal or perhaps even of superior discernment."[17] Noting that a President would "have *fewer* personal attachments to gratify, than a body of men who may each be supposed to have an equal number,"[18]—or as we would say today, that the President will be swayed by fewer political pressure groups than the Senate—Hamilton concluded:

> In the act of nomination, [the President's] judgment alone would be exercised; and as it would be his sole duty to point out the man who, with the approbation of the Senate should fill an office, his responsibility would

> be as complete as if he were to make the final appointment. There can, in this view, be no difference between nominating and appointing. The same motives which would influence a proper discharge of his duty in one case, would exist in the other. And as no man could be appointed but on his previous nomination, every man who might be appointed would be, in fact, his choice.[19]

Note the very limited role that the Senate serves in Hamilton's view—which, of course, echoes the views expressed at the Constitutional Convention by both those who defended and those who opposed giving the appointment power to the President. In the founders' view, the Senate acts as a brake on the President's ability to fill offices with his own friends and family members rather than qualified nominations, but beyond that, the element of choice—the essence of the power to fill the office—belongs to the President alone. The Senate has the power to refuse nominees, but in the Constitutional scheme it has no proper authority in *picking* the nominees—either through direct choice or through logrolling and deal-making of the kind that the modern filibuster encourages.

Hamilton was not so ignorant as to deny that deal-making would be the process by which things got done in the Senate—as he writes, legislatures are very often prone to "bargain[s]" by which one party says to another, "'Give us the man we wish for this office, and you shall have the one you wish for that.'"[20] But this legislative propensity was, for Hamilton, a primary reason for giving the appointment power to the President instead of the Senate. Placing the nomination power in the President alone would, he argued, cut down on the degree to which political bargains in the Senate influenced the choice of candidates, because under the Constitutional scheme, all would understand that the power of appointment belonged in the President alone. That understanding, as we shall see, has been eroded in recent years.

Commenting on the prevailing understanding, Joseph Story later described the President's power to nominate as almost absolute. "The president is to nominate," Story noted, "and thereby has *the sole power* to select for office."[21] Story believed that the danger of vesting the appointment power in the Senate was greater than the danger of giving the power to the President alone, because "if he should...surrender the public patronage into the hands of profligate men, or low adventurers, it [would] be impossible for him long to retain public favour.... At all events, he would be less likely to disregard [public disapprobation] than a large body of men, who would share the responsibility and encourage each other in the division of the patronage of the government."[22]

2. The Framers Envisioned A Narrow Role for The Senate in The Confirmation Process.

Of course, there is more to the appointment power than the power to nominate, and the Senate unquestionably has a role to play in the *confirmation* phase of the appointment process. But the role envisioned by the framers was as a check on improper appointments by the President, one that would not undermine the President's ultimate responsibility for the appointments he made. As James Iredell—later a Justice of the Supreme Court himself—noted during the North Carolina Ratification Convention, "[a]s to offices, the Senate has no other influence but a restraint on improper appointments.... This, in effect, is but a restriction on the President."[23] Here, as elsewhere during the debates, the "restraint" on presidential appointments was to be exercised by the Senate as a body, acting pursuant to majority rule, not at the hands of a minority faction.

The degree to which the founders viewed the power of appointment as being vested solely in the President can be gauged by the fact that John Adams objected even to the Senate's limited confirmation role, contending that it "lessens the responsibility of the

president." To Adams, the President should be *solely* responsible for his choices, and should alone pay the price for choosing unfit nominees. Under the current system, Adams complained, "Who can censure [the President] without censuring the senate…?"[24] The appointment power is, Adams wrote, an "executive matter[]," which should be left entirely to "the management of the executive."[25] James Wilson echoed this view: "The person who nominates or makes appointments to offices, should be known. His own office, his own character, his own fortune, should be responsible. He should be alike unfettered and unsheltered by counsellors."[26]

In discussing the analogous situation of executive appointments—such as ambassadors or cabinet members—James Madison asked, "Why…was the senate joined with the president in appointing to office…? I answer, merely for the sake of advising, being supposed, from their nature, better acquainted with the characters of the candidates than an individual; yet even here, the president is held to the responsibility he nominates, and with their consent appoints; no person can be forced upon him as an assistant by any other branch of government."[27]

The Senate's confirmation power therefore acts only as a relatively minor check on the President's authority—it exists only to prevent the President from selecting a nominee who "does not possess due qualifications for office."[28] Essentially, it exists to prevent the President from being swayed by nepotism or mere political opportunism.[29] Assessing a candidate's "qualifications for office" arguably did not give the entire Senate grounds for imposing an ideological litmus on the President's nominees, at least where the questioned ideology did not prevent a judge from fulfilling his oath of office. It

necessarily did not give such a power to a small faction of the Senate, as has become the practice through the use of ideologically-grounded holds or filibusters.

B. The Advice and Consent Role is Assigned to the Senate as a Body, not to Individual Senators or Factional Groups of Senators.

The advice and consent role envisioned by the Constitution's text is one conferred on the Senate as a body, acting pursuant to the ordinary principal of majority rule. As my fellow panelist, Michael Gerhardt, has previously argued, "the Framers required a simple majority for confirmations to balance the demands of relatively efficient staffing of the government with the need to check abusive exercised of the president's discretion."[30] Yale Law School Professor Bruce Ackerman apparently agrees, as his 1998 recommendation to adopt a supermajority vote for confirmation of Supreme Court justices was made by way of a proposed constitutional amendment rather than Senate rules.[31] As Professor Gerhardt has rightly pointed out, "it is hard to reconcile [a supermajority requirement] with the Founders' reasons for requiring such a vote for removals and treaty ratifications but not for confirmations."[32] Instead, the Constitution embodies a presumption of judicial confirmation, because it requires [only] a majority for approval" and not the two thirds vote required for treaty ratification or removals.[33]

Professor Ackerman's proposal for a constitutional amendment requiring a supermajority vote for judicial confirmations has not garnered much support, of course, but the unprecedented use of the filibuster to block circuit court nominees who enjoy majority support is having the same effect even absent the constitutional amendment. Whether the filibuster is an unconstitutional restriction on a majority of the Senate in ordinary legislation has been much debated, but its use in the judicial confirmation process is particularly troubling. Again referring to my fellow panelist's work:

> [J]udicial nominations trigger separation-of-powers concerns not present in many of the other areas in which the Senate does not take final action on matters committed to its discretion. The fate of the third branch is conceivably at risk, because individual senators and committees might be able to impede filling enough judicial vacancies to reach the tipping point at which the quality of justice administered by the federal courts has been seriously compromised or sacrificed.[34]

When President Clinton and Chief Justice Rehnquist make similar appeals to this body, as they did in 1997 and 1998,[35] to curtail the use of "holds" by individual Senators because of the increasing number of vacancies on courts in "judicial emergency" status, I think it fair to conclude that the tipping point is at hand, quite apart from any ideological considerations. And the vacancy crisis has only grown worse since those warnings were made.

Some, such as Senator Dennis DeConcini and Law Professor Yvette Barksdale, have gone so far as to argue that the text of the advice and consent clause requires an up or down vote on every nominee—suggesting that individual holds and even the filibuster itself is an unconstitutional infringement on the President's appointment power. Others, including several sitting Senators now participating in the filibuster against Miguel Estrada, have contended that the use of the filibuster to block judicial nominees is an unconstitutional restriction on the power of the Senate majority. On January 4, 1995, for example, Senator Lieberman stated on the floor of the Senate that "there is no constitutional basis for [the filibuster]... [I]t is, in its way, inconsistent with the Constitution, one might almost say an amendment of the Constitution by rule of the U.S. Senate." Senator Daschle noted on the Senate Floor on January 30, 1995, that "the Constitution is straightforward about the few instances in which more than a majority of the Congress must vote: A veto override, a treaty, and a finding of guilt in an impeachment proceeding. Every other action by the Congress is taken by majority vote.

The Founders debated the idea of requiring more than a majority . . . . They concluded that putting such immense power into the hands of a minority ran squarely against the democratic principle. Democracy means majority rule, not minority gridlock." And on March 1, 1994, Senator Harkin said on the Senate Floor: "I really believe that the filibuster rules are unconstitutional. I believe the Constitution sets out five times when you need majority or supermajority votes in the Senate for treaties, impeachment."

Quite frankly, I think such absolutist positions fail to account for another constitutional provision, the power in Article I, Section 5 given to each house of Congress to determine the Rules of its Proceedings." But they do serve to highlight just how troubling it is for a minority of the Senate or even a single Senator to block a President's judicial nominee when the nominee enjoys majority support in the Senate. A filibuster rule designed to encourage necessary debate is certainly within the scope of this constitutional provision, but a filibuster designed not to encourage debate but to thwart the will of the majority long after the debate has run its course runs afoul of other constitutional norms, such as the requirement for majority rule in the absence of a specific constitutional provision to the contrary.

As I said, the anti-majoritarian nature of the filibuster is troubling even in ordinary legislation, but it is particularly troubling in the context of judicial confirmations. The judiciary is itself designed to be a counter-majoritarian institution, but that means the institutional checks on it must be given special heed. One check is the possibility of impeachment merely for lack of "good behavior" rather than "high crimes and misdemeanors" standard applicable to other officers of the government—a check that has been largely meaningless since the ill-fated impeachment of Justice Samual Chase

during the Presidency of Thomas Jefferson. The other principle check—the only one that is still viable—is the ability of the electorate, through the choice of a President (or succession of Presidents) to have an impact, over time, on the judiciary through the President's appointment power. Individual members of the Senate are simply not accountable to the entire nation in the way that the President is.

To be sure, the President is not without other countervailing powers, powers that can be used to counter an abusive use of the Senate's rules to thwart the majority will. Article II, Section 2 gives the President the power to make recess appointments, but in the context of the judiciary, these appointments are not without their own separation of powers issues. Recess appointments are temporary, lasting only until the end of the next session of Congress. Those appointed necessarily lack the independence that comes with life tenure, one of the key institutional protections afforded to the judiciary. While nothing in the text of the Recess Appointments Clause forbids such appointments—President Clinton used the recess appointment power to name Roger Gregory to a seat on the Fourth Circuit Court of Appeals, for example—such structural concerns counsel for its use only as a last resort, when a rump faction of the Senate has persisted in blocking judicial nominees who command majority support.

These concerns are not new, and they are not raised only by those who find the current President's nominees to be impeccably well-qualified. Lloyd Cutler, a prominent Washington attorney and former counsel to President Clinton, noted in a letter criticizing the filibuster of Abe Fortas's nomination to be Chief Justice of the United States, for example, that "Nothing would more poorly serve our constitutional system than for the nominations to have earned the approval of the Senate majority, but to be thwarted

because the majority is denied a chance to vote. ...Whatever the merits of the filibuster as a device to defeat disliked legislation, its use to frustrate a judicial appointment creates a dangerous precedent with important implications for the very structure of our Government."[36] More recently, Mr. Cutler has contended that "requirements of 60 votes to cut off debate and a two-thirds vote to amend the rules are both unconstitutional."[37]

Mr. Cutler echoed the view that prevailed throughout most of our nation's history. After Andrew Jackson defeated John Quincy Adams for President in 1828, Adams had several months as a lame duck President in which to nominate Judges to the federal bench. Because he no longer had the confidence of the people, several Senators wanted to postpone consideration of John J. Crittendon, whom President Adams had nominated as an Associate Justice of the Supreme Court. Although the Senate ultimately rejected the Crittendon nomination, the arguments made against the delay were profoundly important and ultimately carried the day throughout most of this nation's history. Senator Holmes argued, for example, that although the Senate had a right to deliberate and look into the character and qualifications of a candidate, it had "no constitutional power to resist its execution." Delays beyond what were necessary to deliberate about the nominee's qualifications were, he asserted, "an *abuse* of a discretion" given by the Constitution.[38] Senator Johnson echoed the sentiment, stating that "The duty of the Senate is confined to an inquiry into the character and qualifications of the person, and to a decisive action upon the nomination, in a reasonable time."[39] Johnson made the following dire prediction: "The moment you depart from the constitution, and begin an attack upon the other departments of the Government, you commence a conflict of authority where there is no arbiter, which will end in perpetual collision, or in the

destruction of the Government."[40] That, and the similar prediction by Senator Chambers—"Once let discretion be adopted as the rule of conduct for those in power, and no man can prescribe limits to the mischief which must ensue"[41]—should give us all pause at the actions, or rather inaction, currently being undertaken in the Senate as the result of the abusive use of the filibuster.

What this historical incident describes is a distinction between the proper use of the filibuster, to promote legitimate debate against any attempt by a majority to ram a vote through the Senate, and the improper—indeed, unconstitutional—use of the filibuster to prevent the majority from taking action even after the debate has fully run its course. With the President's constitutional power to nominate judges effectively under attack, and with it the independence of the judiciary itself, it is incumbent upon this body to consider revisions to Senate Rule XXII and other procedural mechanisms that have led to the current crisis.

II. The Senate Should Amend Senate Rule XXII Either To Bar the Use of the Filibuster in Judicial Confirmations or to Modify its Use So That, After Some Reasonable Period of Debate, A Simple Majority Can Invoke Cloture.

As described about, the constitutionally troubling use of the filibuster to thwart the will of a Senate majority is exacerbated when the Senate majority is attempting to exercise its constitutional role in the judicial confirmation process. Such use allows a minority faction in the Senate to impose what is essentially a barrier to the one constitutional mechanism that allows the political process to have some influence over the judiciary. Such interference with the political process have caught the heightened attention of the courts—a possibility I take up in Section IV below. It would be preferable, therefore, for this body to cure the constitutional offensive before resort to the

courts is sought by any of the growing number of parties who would have standing to bring such a challenge.

There are three principal ways to address the filibuster problem. First, and most drastically, the filibuster could be abolished altogether, not just in judicial confirmations but for ordinary legislation as well. Such a move would seem compelled by the absolutist position taken by Senators Lieberman, Daschle, and Harkin, described above, that would not permit anything but a majority vote to be dispositive except in the specific instances where the Constitution proscribes a supermajority requirement. Whatever the merits of such a proposal, it is beyond the scope of my presentation today.

A second alternative is to amend Senate Rule XXII so as to preclude the use of the filibuster in judicial confirmations. While this alternative is certainly within the Senate's prerogative, pursuant to the Article I, Section 5 power to establish its own rules, I think it fails to give sufficient play to the valuable role that a limited filibuster can play in fostering the deliberative process.

A third alternative would be to amend Senate Rule XXII to allow for a limited use of the filibuster to guarantee a reasonable time for debate without ultimately giving to a minority faction a veto power over a Senate majority. This alternative would distinguish between the *use* of the filibuster for deliberate ends, a use that I believe is constitutional, and the *abuse* of the filibuster for obstructionist, undemocratic ends, a use that I believe may well be unconstitutional. I am pleased to see, therefore, that the proposal made by Senator Miller would give effect to this important distinction. The "sliding scale cloture vote" mechanism would guarantee debate for a reasonable period of time, but would in the end not allow a minority faction in the Senate to exert its will over the majority.

Senator Miller's proposal is not without historical precedent. Among the efforts to prevent the kind of filibuster engaged in by my great Uncle more than 75 years ago was a proposal to allow for cloture on a mere majority vote. While that proposal was at the time rejected in favor of the 2/3 vote requirement ultimately enacted, this body has already once lowered the cloture vote threshold, to the 3/5 requirement that exists currently. Senator Miller's proposal simply completes the reform efforts begun back in 1925.

III. An Attempt to Filibuster A Change in the Rules Would Itself Be Unconstitutional.

On first blush, Senator Miller's proposal, and other proposals designed to amend rules that have contributed to a broken judicial confirmation process, might be regarded as dead on arrival. Why should we expect a minority faction, which currently has a chokehold on the confirmation process, to permit such a rules change, particularly when the Senate rules themselves require even a greater majority (2/3) to change the rules than is required (3/5) to invoke cloture itself. The simple answer is that the use of supermajority requirements to bar the change in rules inherited from a prior session of Congress would itself be unconstitutional.

Here, I must acknowledge the work of U.S.C. Law Professor Erwin Chemerinsky, who has been my weekly sparring partner on a nationally-syndicated radio show addressing all manner of constitutional issues. We have, in that time, hardly agreed on a single point of constitutional law, from the detention of Al Quada prisoners at Guantanamo Bar and the legality of the war in Iraq, to whether the parsonage exemption in the internal revenue code violates the Establishment Clause. But we agree on this. As Professor Chemerinsky noted in a 1997 Stanford Law Review article co-authored with

Loyola Law School Professor Catherine Fisk, such "entrenchment of the filibuster violates a fundamental constitutional principle: One legislature cannot bind subsequent legislatures."

This simple proposition, which dates at least to Sir William Blackstone, not only makes good constitutional sense, but it has been repeatedly accepted by the Supreme Court in a host of analogous contexts. It was used in *Stone v. Mississippi*, for example, to permit a legislature to repudiate an exclusive lottery franchise provided by a prior legislature. And it seems to be compelled by the Supreme Court's focus, in the famous footnote four of *United States v. Carolene Products Co.*, when the Court listed among the categories of legislative acts that should be subject to "more exacting judicial scrutiny" those which restrict the political process, as a entrenching supermajority requirement clearly does.

IV. Failure to Amend or Abolish Rule XXII Will Subject the Senate to Judicial Intervention.

Professor Chemerinsky's reliance on the concern for political process in *Carolene Products* brings me to the final point I wish to make today, namely, the possibility that resort to the courts might be had should the Senate not address the unconstitutional use of the filibuster on its own.

Normally, the courts will not interfere with the internal procedures of a co-equal branch, but there are exceptions, and the exceptions are perfectly apt in the current situation. Here again, I find myself in agreement with my frequent debate opponent, Erwin Chemerinsky. In his Stanford Law Review article on the filibuster, Professor Chemerinsky contends that a challenge to the continued use of a supermajority

requirement to change rules inherited from a prior Senate would not be barred by the political question doctrine.

Professor Chemerinsky also contends—rightly, in my view—that two classes of people would have standing to bring such a challenge because they would have the kind of particularized harm required under current standing doctrine. He makes the case as follows:

Imaging the strongest case: The President nominates a woman to be Chief Justice of the Supreme Court and a group of senators filibuster, openly declaring that they believe a woman never should hold the position. Imagine, too, that fifty-nine senators are on record supporting the nomination and have even voted for cloture. Under these facts, the nominee would meet the standing requirement.

These facts are almost identical to the facts surrounding the current use of the filibuster against Texas Supreme Court Justice Priscilla Owen.

Another class of persons with standing would be Senators who expect to be part of a majority in favor of confirmation but who fail to secure either the 3/5 necessary to invoke cloture or the 2/3 necessary to change the filibuster rule. Such Senators have a classic case of vote dilution, and would as a result also have standing.

Finally, the President himself, who's own constitutional role in the appointments process is severely curtailed by a minority faction in the Senate that refuses to permit either a vote on the President's nominees or a vote on the rules by which those nominees are considered, might also have standing to challenge the Senate's unconstitutional rules.

V. Conclusion.

In sum, there is good reason that the filibuster has only rarely been used in the context of judicial confirmations, and never before against a circuit court judge. The use of the

filibuster thwarts the will of the majority, and is therefore not only undemocratic but very likely unconstitutional. Moreover, should the Senate decide on its own initiative to repeal the offending use of the filibuster rule, any attempt to use the filibuster to entrench the filibuster would itself be unconstitutional, and would provide grounds for court intervention either by nominees, by individual Senators, or perhaps by the President himself, to insure that the constitutional norm of majority rule is given effect.

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[1] U.S. CONST. art. II § 2 cl. 2; art. III § 1.

[2] *See also* Weiss v. United States, 510 U.S. 163, 185 n. 1 (1994) (Souter, J., concurring) ("the President was...rightly given the sole power to nominate").

[3] 2 M. Farrand, Records of the Fedearl Convention 41 (1911).

[4] *Id.*

[5] *Id.* at 42. Mason's objections were actually more complicated. He argued that the President should not appoint judges because the judges might try impeachments of the President. This problem was later avoided by having the Senate try impeachments with the Chief Justice of the Supreme Court merely presiding. *See* U.S. CONST. art. I §3 cl. 6. Governeur Morris, in replying to Mason, argued that impeachments should not be "tried before the Judges." FARRAND, *supra* note 6 at 41-42. Mason also worried that "the Seat of Gov' must be in some state," and the President would form personal attachments to people in that state, which might exclude citizens of other states from the federal bench—an understandable objection from an antifederalist like Mason. This problem was at least partly obviated by placing the capital in a federal district which would not be subject to the jurisdiction of any state. *See* U.S. CONST. art. I § 8 cl. 17.

[6] FARRAND, *supra* note 6 at 42.

[7] Id.

[8] *Id.* at 43.

[9] *Id.* at 42.

[10] *Id.* at 43.

[11] The Convention voted by state. Georgia abstained from this vote, and Rhode Island never sent a delegate. Other states' delegates were sometimes absent for various reasons—for instance, although the Convention had been under way for more than a month, New Hampshire's delegates had still not arrived. In addition, this debate came during one of the lowest points of the Convention, when the differences between the delegates was at its severest. New York delegates, Robert Yates and John Lansing, had left the Convention on July 10, opposed to all its proceedings. New York's third delegate, Alexander Hamilton, had left ten days earlier. *See* CATHERINE DRINKER BOWEN, MIRACLE AT PHILADELPHIA 140 (Book of the Month Club, 1986) (1966). The day Lansing and Yates left the Convention, Washington wrote to Hamilton that he "almost despaired" of the Convention's success. *See id.* at 185-186. (Hamilton returned to the Convention in September and was New York's only signer). Thus the vote on July 18 was Massachusetts,

Pennsylvania, Maryland and Virginia in favor of Ghorum's motion, and Connecticut, Deleware, North Carolina and South Carolina against.

[12] *See* THE FEDERALIST NO. 10 & 51 (C. Rossiter ed. 1961).

[13] FARRAND, *supra* note 6 at 81.

[14] *Id.* at 539.

[15] Edmond v. United States, 520 U.S. 651, 659 (1997).

[16] FARRAND, *supra* note 6 at 81.

[17] THE FEDERALIST NO. 76 at 455 (C. Rossiter, ed. 1961).

[18] *Id.* at 456 (emphasis in original).

[19] *Id.* at 456-457.

[20] *Id.* at 456.

[21] Story, Commentaries on the Constitution of the United States §1525 (emphasis added) (1833).

[22] Story, *supra* note 25 at § 1523.

[23] James Iredell, *Debate in the North Carolina Ratification Convention*, July 28, 1788, *reprinted in* 4 THE FOUNDER'S CONSTITUTION 102 (P. Kurland & R. Lerner eds. 1987).

[24] Letter to Roger Sherman (July 20, 1789) *in id.* at 106-107. John Adams was a lifelong champion of judicial independence. *See* John Adams, *The Independence of The Judiciary: A Controversy between William Brattle And John Adams* (1773) *reprinted in* 2 THE WORKS OF JOHN ADAMS 511 (Easton Press, 1992). He was the author of the Massachusetts state constitution, which Ghorum cited as his precedent for giving the President the power to appoint, and the Senate to advise and consent on, judicial nominees. *See* 1 PAGE SMITH, JOHN ADAMS 440 (1962) ("even with minor changes and deletions and one major change in the article dealing with religious freedom, the constitution [of Massachusetts] was Adams' handiwork"); DAVID MCCOLLOUGH, JOHN ADAMS 220-222 ("it was the establishment of an independent judiciary, with judges of the Supreme Court appointed, not elected...that Adams made one of his greatest contributions not only to Massachusetts, but to the country, as time would tell." *Id.* at 222).

[25] *Id.* at 107. *See also* James Madison, *Speech in Congress on the Removal Power,* June 16, 1789, *reprinted in* RAKOVE, *supra* note 3 at 453, 456 ("if any power whatsoever is in its nature executive it is the power of appointing, overseeing, and controlling those who execute the laws.")

[26] James Wilson, *Lectures on Law* (1791), *reprinted in id.* at 110. *See also* Americanus (John Stevens Jr.), No. VII (Jan. 21, 1788) *reprinted in* 2 DEBATE ON THE CONSTITUTION 58, 59 (B. Bailyn ed. 1993) ("Instead of controling the President still farther with regard to appointments, I am for leaving the appointment of all the principal officers under the Federal Government *solely* to the President....").

[27] James Madison, *Speech in Congress on the Removal Power,* May 19, 1789, *reprinted in* RAKOVE, *supra* note 3 at 434, 436.

[28] Story, *supra* note 30

[29] It might seem ironic, then, that President Washington nominated his nephew, Bushrod Washington, to the Supreme Court in 1798. But Justice Washington was easily confirmed and served a long and successful term on the Supreme Court. His most famous opinion, Corfield v. Coryell, 6 F. Cas. 546 (C.C.E.D. Pa. 1823), was an important early case interpreting the Privileges and Immunities Clause in Article V.

[30] Michael J. Gerhardt, The Federal Appointments Process: A Constitutional and Historical Analysis 297 (Duke Univ. Press 2000).

[31] Bruce Ackerman, 2 We the People: Transformations ?? (?? 1998).

[32] Gerhardt, *supra*, note 30, at 297.

[33] Gerhardt, *supra*, note 30, at 299.

[34] Gerhardt, *supra*, note 30, at 299.

[35] William H. Rehnquist, *2001 Year-End Report on The Federal Judiciary* <www.supremecourtus.gov/publicinfo/year-end/2001year-endreport.html> (visited May 23, 2002)

[36] September 29, 1968 Letter criticizing the use of the filibuster against the nomination of Abe Fortas to be Chief Justice. The current filibuster is even more problematic than the one successfully waged against Fortas, because Fortas never received majority support on a cloture vote as Miguel Estrada has done now on several occasions.

[37] Washington Post, April 19, 1993, at ??; *see also* Washington Post, May 3, 1993.

[38] 5 Cong. Deb. 86, 88 (Feb. 2, 1829).

[39] *Id.* at 92.

[40] *Id.*

[41] *Id.* at 86.

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"In the President Alone"

A Legislative Proposal to End the Confirmation Stalemate

By John C. Eastman
Posted March 5, 2003

Last week, the House Judiciary Committee's Subcommittee on the Constitution held an important hearing (albeit one overlooked by the floor debate on the Iraq resolution), entitled "A Judiciary Diminished is Justice Denied: The Constitution, the Senate, and the Vacancy Crisis in the Federal Judiciary." Although there is nothing unusual in House subcommittee's holding hearings, this one was rather extraordinary — a committee of the House of Representatives inquiring into a matter textually committed solely to the other body, the Senate of the United States.

At first blush, one might be tempted just to treat the hearing as merely an attempt to shed some much-needed publicity on the stalemate, now approaching constitutional crisis magnitude, that has occurred in the Senate and, more particularly, in the Senate's Judiciary Committee. But the House of Representatives actually has a substantive role to play in judicial confirmation stalemate, both out of its customary role to oversee all aspects of the

government's operation, and more importantly, to offer a legislative solution to the current crisis.

One of the key statistics in what has become a battle of competing statistics is the vacancy rate on the federal Courts of Appeals, which now stands at the near-record level of 15.1%. It's as if Senator Leahy believes himself vested with a line item veto power, which he has used to redline 27 of the 179 circuit judgeships out of existence. One need only recall that the full complement of circuit judgeships have not only been authorized but mandated by law, duly enacted by both Houses of Congress and signed by the President, to appreciate the House's legitimate interest in seeing that that law not go un-enforced.

But the House has an even more profound role to play in resolving the current crisis, if it chooses to do so. Article II, Section 2 of the Constitution requires Senate confirmation for appointment of all *principal* officers, but "Congress may by Law vest the appointment of ... *inferior* officers" — including, as a matter of the Constitution's text, all lower court judges — "in the President alone, in the Courts of Law, or in the Heads of Departments." As the text specifies, this can be done "by law," which means the House of Representatives can initiate legislation that would vest in the President alone the sole power to appoint lower court judges whenever the Senate has failed either to confirm or reject the President's nominees in a reasonable period of time, say, six months. Given that in 1998 Senator Leahy himself proposed legislation that would have required the Senate to act on all nominations pending for more than 60 days before it took a ten-day or longer recess, he should not have

any trouble supporting such legislation.

Not that we should really expect consistency from the good Senator. The ideological stakes are simply too high for the intellectual left, whose last redoubts of power are in the courts and, apparently, in the Senate Judiciary Committee. President Bush's nominees must be opposed at all costs, in the left's view, not because they are unwilling to uphold the law from the bench — a truly disqualifying judicial temperament — but precisely because they would uphold the law as written rather than bending it to fit the left's latest jurisprudential fad. Legislation such as I have proposed would expose Senator Leahy's strategy to refuse committee votes or even hearings to President Bush's nominees for what it really is — opposition to extremely well-qualified candidates who enjoy majority support in the Senate and who are therefore perfectly within the mainstream of American jurisprudential thought, contrary to the frequent slanders leveled against them by Senator Leahy and some of his colleagues.

Moreover, it would force a return of the advice and consent role to the place where the Constitution assigns in — to the Senate as a body rather than to an individual Senator or committee. As the American Bar Association's House of Delegates noted in an extraordinary resolution adopted this past August, "The notion that the Committee, by the simple expedient of refusing to hold timely hearings may avoid confirmation proceedings in the full Senate, is simply unacceptable to our notion of an appropriate and *constitutional* nomination process." Indeed.

Assigning the appointment power to the President alone after six months of inaction by the Senate would not unduly interfere with internal procedures of the Senate. The committee system would still have its role to play, but that role could not be abused by abject refusals to even hold hearings or votes on nominees who enjoy majority support. There would even be a place for a "blue slip" policy, the deference to home state Senators originally conceived as a matter of Senatorial courtesy. But the courtesy would have to play out with a floor vote, and therefore would only be extended when the blue slip had been cast legitimately and in the light of day rather than, as now, for the basest of political motives in the darkness of a Senate cloakroom.

But whether or not the Senate's internal procedures might be affected, some check on the abuses of the advice and consent power that we are currently witnessing has to be adopted. Nothing less than the independence of the judiciary, and ultimately the Rule of Law itself, is at stake.

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Justice Delayed

By John C. Eastman
Posted May 1, 2003

The filibuster being waged by Senate Democrats against one of President Bush's exceptionally well-qualified nominees to the Circuit Courts of Appeal, Miguel Estrada, has now lasted longer than the war in Iraq. In light of this unprecedented action—the filibuster has never in our history been used against a circuit judge nominee—one must ask just what it is about Estrada that would lead some Senators to elevate their opposition to a place of higher priority than even our national defense, economy, or the administration of justice. And one must also ask whether this extraordinary dilatory tactic requires a remedial change in the Senate's rules.

Miguel Estrada is a Honduran native who barely spoke English when he immigrated to this country as a teenager. His life since then is a vintage Horatio Alger story: He went on to graduate with honors from Harvard Law School, has argued 15 cases before the United States Supreme Court, served in the Department of Justice for both the Clinton and Bush I administrations, and received a well-qualified rating from the American Bar Association, its highest. Estrada was first nominated by President Bush on May

9, 2001—nearly two years ago. The Senate Judiciary Committee, under the leadership of Senator Patrick Leahy (D-Vt.) refused even to give him a hearing for more than 16 months. Although, with the change of party control following last Fall's elections, his nomination was reported out of committee, it was done so on a strictly partisan vote, with not a single Democrat voting in accord with the ABA's "well-qualified" rating, a rating that Senator Leahy himself once called the "gold standard" in judicial confirmations.

On the floor of the Senate, Estrada's partisan detractors have fared only slightly less well, managing to block a vote despite Estrada's command of bipartisan support from a majority of the Senate. This obstruction is made possible by the Senate's rule permitting unlimited debate absent a super-majority, 60-Senator vote for cloture, and thus far Estrada has been able to manage only 55 votes for cloture, un-chartered territory for one so impeccably well qualified. Why the stand-off? It is alleged that Estrada is "too conservative," perhaps even (gasp!) opposed to abortion. Yet in sworn testimony before the Senate he acknowledged the binding force of *Roe v. Wade*, and while serving in the Clinton Administration he successfully argued before the Supreme Court that the federal racketeering statute could be used against anti-abortion groups such as Operation Rescue. Moreover, because the ABA has, since the mid-1970s, included within its rating system a consideration of judicial ideology, no one thought by that liberal-leaning organization to be "too conservative" could receive the "well-qualified" rating given to Estrada.

So what is the real source of the opposition to Estrada? Anyone honestly reviewing the record is left with the distasteful conclusion that raw partisan politics is at play. Estrada would be the first Hispanic appointed to the D.C. Circuit Court of Appeals, and once there would become, after a time, a leading contender for a future Supreme Court seat. Can it possibly be that Democrats simply cannot countenance such an accomplishment by a *Republican* President?

Our nation's founders worried that giving too great a role in the confirmation process to a partisan political body would lead to unseemly cabal and the loss of accountability. Instead, they gave the Senate a more limited role, merely as a check on Presidential abuse in the nomination process. Moreover, the role was given to the Senate as a whole, not to individual committees or to a minority of the Senate. To be sure, the Constitution also gives to the Senate the power to set its own rules, including the filibuster rule. But there is good reason that the filibuster has never been used against a circuit court judge, and was soundly criticized when on the rare occasion it has been used against a Supreme Court justice: such a rule intrudes upon the constitutionally-mandated separation of powers, allowing a minority of Senators—a cabal—to grab a share of the appointment power not constitutionally assigned to them.

Last month, President Bush proposed a remedy to this abuse of power. In a letter to Senate leaders Frist and Daschle, he asked the Senate to adopt a permanent Rule to ensure timely up or down votes on judicial nominations both now and in the future, no matter

who is president or which party controls the Senate. The importance attributed to this by the president and his administration was made manifest by the rare appearance by the vice president taking his constitutionally assigned seat as the President of the Senate.

The Senate could honor President Bush's request by abolishing the filibuster for judicial nominations. Democrats might attempt to filibuster the adoption of such a rule, of course, but even liberal USC law professor Erwin Chemerinsky, who supports the Estrada filibuster, has noted that use of the filibuster to prevent changes to the rules would be an unconstitutional attempt by a prior Senate, which adopted the rule, to impose a super-majority vote requirement on the current Senate.

Partisan politics aside, the President's proposal makes good constitutional sense. The growing politicization of the judicial confirmation process, with Senators now routinely demanding statements from nominees about how they view particular cases (and hence would rule on similar issues that might come before them) is threatening the independence of the judiciary, and the Rule of Law itself.

***

Editor's note: Dr. Eastman will testify at a hearing before the U.S. Senate Judiciary Subcommittee on the Constitution, on Tuesday, May 6.

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Jurisprudence.

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Testimony
United States Senate Committee on the Judiciary
Judicial Nominations, Filibusters, and the Constitution: When a Majority Is Denied Its Right to Consent.
May 6, 2003

Mr. Bruce Fein
, Fein & Fein

Mr. Chairman and Members of the Subcommittee:
I am grateful for the opportunity to share my views on the constitutional right of a Senate majority to confirm judicial nominees of the President irrespective of a supermajority Senate filibuster or cloture rule.
The Constitution establishes a simple majority as the Senate consensus sufficient to confirm nominees of the President who are officers of the United States under the Appointments Clause, including judges and members of the Cabinet. When the Constitution contemplates supermajorities, for example, to ratify treaties, to convict for impeachable offenses, or to override presidential vetoes, it employs express language to that effect. The absence of any supermajority language or hint of the same in the Appointments Clause confirms the obvious- that a simple majority was intended to confirm nominees. Indeed, no non-trivial argument has ever been fashioned that questioned the appointment of a federal judge or Cabinet officer who was approved by a Senate majority.
Appointments Clause policies are not advanced by a supermajority requirement for judicial nominees. As Alexander Hamilton explained in Federalist 76, the Senate's confirmation power was intended to safeguard against incompetence, cronyism or corruption, a task that can be discharged as well by a simple majority. In any event, the prevailing filibustering against two of President George W. Bush's nominees is fueled by ideological opposition, a ground beyond the purpose of confirmation scrutiny. Moreover, the power to appoint was entrusted to a unitary and accountable president instead of the Senate or a collectivity to promote excellence and integrity. As Hamilton amplified in Federalist 76: "The sole and undivided responsibility of one man will naturally beget a livelier sense of duty and a more exact regard to reputation. He will, on this account, feel himself under stronger obligations, and more interested to investigate with care the qualities requisite to the station to be filled, and to prefer with impartiality the persons who may have the faintest pretensions to them."
In contrast, the Founding Fathers understood that collective bodies invariably subordinate the public interest in glittering credentials to small-minded partisanship or uninspired horse trading in making appointments. Hamilton elaborated in Federalist 76: "There is nothing so apt to agitate the passions of mankind as personal considerations, whether they relate to ourselves or to others, who are able to be the objects of our choice or preference. Hence, in every exercise of the power of appointing to offices by an assembly of men we must expect to see a full display of all private and party likings and dislikes, partialities and antipathies, attachments and animosities, which are felt by those who compose the assembly. The choice which may happen to be made under such circumstances will of course be the result either of a victory gained by one party over the other, or of a compromise between the parties. In either case, the intrinsic merit of the candidate will be too often out of sight. In the first, the qualifications best adapted to uniting the suffrages of the party will be more considered than those which fit the person with the station. In the last, the coalition will commonly turn upon some interested equivalent: 'Give us the man we wish for this office, and you shall have the one you wish for that.' This will be the usual condition of the bargain. And it will rarely happen that the advancement of the public service will be the primary object of either party victories or of party negotiations."
Hamilton's lowest common denominator worry in appointments would be compounded, not mitigated, by a supermajority confirmation practice. It would place a perverse premium on nondescript and timid minds. And the same flaw would obtain for bipartisan commissioners in each state to present consensus nominees to the President. But constitutional law is too important to be left to mediocrities,

notwithstanding former Senator Roman Hruska's celebration of the pedestrian.
Lawyers and the law are generally backwardlooking. As Justice Oliver Wendell Holmes sermonized, many judges need education in the obvious, and continue to parrot legal doctrines inherited from the time of Henry IV in blind imitation of the past. Enlightened jurisprudence requires
Judges credentialed with bold, long-headed and razor-sharp intellects who have mastered history, human nature, and the moral precepts that inform our constitutional dispensation. Prudence is equally imperative, without which knowledge is useless, wit ridiculous, and genius contemptible, to borrow from Sam Johnson's fount of epigrams.
Such individuals ordinarily challenge conventional wisdom and spur controversy. Justice Louis D. Brandeis is emblematic, and his confirmation in 1916 would probably have been scuttled if opponents had attempted to prevent a floor vote. A supermajority requirement would tend to block desperately needed brilliance on the federal bench and give the law earmarks of a petrified forest.
It seems worth highlighting that there is no non-arbitrary supermajority stopping point once the constitutional standard of a simple majority is abandoned. Unanimity would be as undisturbing to the constitutional text and two centuries of practice as would be a 60 or 75 percent supermajority requirement. In other words, to accept the proposition that the constitution permits the Senate to require more than a simple majority for judicial confirmations is to endow the Senate with constitutional power to demand unanimity and lacerate the President's appointment authority.
An additional mischief of supermajorities is filling judicial vacancies. The more lead-footed the appointment process caused by the need for a supermajority consensus, the more understaffed the federal judiciary. Caseloads mount. Care in drafting opinions is slighted. More are unpublished than published. And litigants encounter frustration since justice delayed is justice denied.
The arguments in favor of a supermajority cloture rule for the purpose of thwarting confirmation by a simple Senate majority are unpersuasive. It is said that Article I empowers the Senate to make internal rules governing its proceedings. But Senate rules cannot ignore constitutional imperatives. The clearest example would be a rule that refused to count the votes of black or female Senators.
A supermajority cloture rule is less clearly constitutionally stained, but clear enough. The constitutional text does not directly clash with a supermajority Senate rule. It tacitly declares a simple majority is sufficient, without expressly prohibiting an upward adjustment by Senate rule. But the purpose of the Appointments Clause- giving the president the star role with Senators serving as supporting actors in the appointment of federal judges- would be largely defeated by discretion in the Senate to impose a supermajority confirmation hurdle with no stopping point short of unanimity. That power would give the Senate equal billing with the President in appointing judges, contrary to what the clause envisions. Further, a Senate power by rule to amend the constitutional standard of majority confirmation would be startling since two thirds majorities in both the House and Senate and three fourths of the States must approve a constitutional amendment.
It is also said that a non-constitutional supermajority rule is proper to block judicial nominees outside the legal mainstream. This contention is counterfactual. President George W. Bush and his opponent Al Gore featured judicial appointments in their platforms and debates. The topic was recurring throughout the campaign. President Bush prevailed. Even discounting for the unique elements of his victory, it cannot be credibly said that a view on judicial nominations that captured support from approximately half the American people is extreme. In addition, confirmation of the President's judicial nominees was raised in several Senate races in 2002. Detractors of the President's philosophy in appointing judges were unsuccessful in retaining Democrat control. It shifted to Senate Republicans who generally saluted President Bush's standards for judicial appointments. In sum, it smacks of the Orwellian to characterize a mainstream view of the American people in appointing federal judges as a fringe outside the mainstream, like mistaking the Mississippi River for a diminutive tributary.
It is alternatively said that a supermajority is appropriate to prevent a president from filling judgeships with persons of the same or comparable judicial philosophies. But that has never been the Senate

practice. President Franklin D. Roosevelt is illustrative. His ill-conceived court-packing plan was soundly rebuffed by Congress. The scheme sought to upset the traditional independence of the judiciary. But despite his resounding defeat on court-packing, FDR encountered no difficulty as vacancies arose in the ordinary course in packing the High Court with fervent New Dealers who generally supported the discredited court-packing legislation: Hugo Black, Stanley Reed, Felix Frankfurter, William O. Douglas, Frank Murphy, James Byrnes, Robert Jackson, and Wiley Rutledge. No effort was made in the Senate to defeat Roosevelt's nominees by filibustering or otherwise on the theory that a President is not entitled under the Appointments Clause to champion a particular judicial philosophy in all or most of his selections.

To reject on constitutional grounds a supermajority requirement for cloture regarding judicial nominees does not compel the same conclusion regarding legislation. The Founding Fathers worried about an excess of law making and erected barriers to that end, including a presidential veto. Filibustering to defeat legislation works towards that same constitutional end. In contrast, the Founding Fathers voiced no concern over the appointment of too many federal judges or judges echoing a uniform philosophy of judging. Filibustering judicial nominees with a supermajority cloture rule advances no constitutional objective or sentiment. Indeed, in the particular cases of two circuit court nominees now before the Senate, the filibustering wars with the constitutional goal of an independent judiciary to check legislative excesses. It is transparent that several pro-filibuster Senators aim to block confirmation of the nominees because fearful they might check congressional usurpations under either the Commerce Clause or section 5 of the Fourteenth Amendment. In other words, the filibusters are calculated to weaken judicial review of federal statutes.

Finally, it is every bit as important to the enlightened functioning of government that our unwritten constitution be as scrupulously honored as its written counterpart. Our unwritten constitution is a collection of self-restraining political customs necessary for the constitution itself to flourish. If partisanship and the power to disrupt were exploited to the extreme, then our sacred constitutional system and coveted separation of powers would collapse. The judiciary could be destroyed either by a President's refusal to nominate or the Senate's refusal to confirm, despite the absence of any express constitutional denunciation of either tactic. A President could mutilate a department created and funded by Congress by refusing to fill high level vacancies and making it acephalous. Or a president could de facto repeal criminal or civil laws through policies of non-prosecution. Congress might refuse to appropriate money to pay judicial salaries hoping to drive incumbents into resigning in order to denude the federal bench.

For more than two centuries, a vital unwritten constitutional custom underpinning the Appointments Clause has been the non-filibustering of judicial nominees. To break with that tradition of comity with the executive branch would set a worrisome precedent that could trigger wider constitutional convulsions. There can be no doubt that the ongoing filibustering of two circuit court nominees is simply a dress rehearsal for thwarting President Bush's anticipated Supreme Court nominees- perhaps as early as July- where the political and constitutional stakes will be momentous. Those who would pursue this reckless obstructionist course are more to be dissuaded and overcome than praised and garlanded both for the living and those yet to be born.

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Statement of U.S. Senator Russ Feingold
Ranking Member of the Constitution Subcommittee
Of the Senate Judiciary Committee

At a Hearing on Filibusters and Judicial Nominations

May 6, 2003

Thank you Mr. Chairman. I appreciate the collegial way in which you and your staff have handled preparations for this hearing. This is an issue on which Senators and others involved in the process have strong and passionately held views. Tempers are short and relations are frayed on our committee in large part because of judicial nominations. I hope that with some reasoned discussion and negotiation we can get past this rough spot in the committee's history and return to more constructive work together. If this hearing is the beginning of an effort to reduce the level of confrontation on judicial nominations, that would be a very good thing.

Unfortunately, the title of the hearing suggests that it may be intended to turn up the heat rather than cool things down. The argument recently advanced on the floor by a number of Senators that filibusters of judicial nominees are unconstitutional seems to be part of a campaign of political intimidation launched by supporters of the President's nominees. If this hearing is a prelude to a floor effort to rewrite the Senate's rules, or circumvent them through parliamentary tactics, I doubt very much they will succeed, and I am sure they will be met with stiff resistance. The end result could be to take the tensions we feel in this committee and spread them to the floor of the Senate. That would be a real shame in my view.

It is also a shame that those who support the President's nominees are trying to inflate what is essentially a political fight into a constitutional crisis. For those of us who take the Constitution seriously, it is odd to hear colleagues essentially arguing that one is violating one's oath of office by voting not to end debate on a nomination. As some in the audience may know, I spent seven years in this body fighting to pass a campaign finance reform bill. For years that effort was stymied by filibusters. Senators who supported reform had many spirited, sometimes even bitter, debates with Senators who opposed our bill. Never did we contend that they were violating their

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oaths of office by using every tool available to oppose a bill with which they strongly disagreed.

Since the hearing title raises the question of the constitutionality of the filibuster let me give my view up front. The Constitution does not prohibit opponents of a judicial nominee, or any nominee for that matter, from using a filibuster to block a final vote on the nominee. The majority does not have a constitutional right to confirm a nominee as the title of the hearing implies. I am sure we will hear more on this from our witnesses today, but I must say I am eager to hear the argument that would overturn the practices of the Senate dating back more than a century.

If the arguments advanced today are correct, then Republicans acted unconstitutionally in 1995 when they defeated the nomination of Henry Foster to be Surgeon General by using a filibuster. They violated the Constitution when they required cloture votes before ultimately confirming Stephen Preyer, Rosemary Burkett, H. Lee Sarokin, Richard Paez, and Marsha Berzon to circuit court judgeships, David Satcher to the Surgeon General's office, and Ricki Tigert to the FDIC, Walter Dellinger to the DOJ's Office of Legal Counsel, and the current Governor of Arizona, Janet Napolitano, to be U.S. Attorney. They violated their oaths of office when they forced the nomination of Sam Brown to be withdrawn because they refused to end debate on his nomination.

These are just the cases where a cloture vote was required to get a nomination through. I won't even start on the list of nominees who never got a hearing or vote in the Judiciary Committee. But there were dozens of them. Wasn't the majority denied its right to consent just as much in those cases? Is there any meaningful constitutional difference between a filibuster on the one hand and, on the other hand, a hold on the Senate floor, or a wink and a nod between a committee Chairman and a member who just doesn't like a nominee? I assume our witnesses will enlighten us if there is.

Mr. Chairman, in the end, the seemingly insurmountable differences we have on judicial nominees can be resolved only the way that seemingly insurmountable difference are resolved on almost all other hotly contested issues in the Senate—through negotiation and compromise. Of course, for there to be compromise, both sides have to be willing to engage in that effort. So far, the White House seems intent on forging ahead with its efforts to push through as many nominees with the most extreme views as possible, in the shortest possible time.

The majority on this Committee has participated in that strategy by pursuing a "take no prisoners" approach, disregarding decades of practice and precedent regarding the scheduling of hearings and votes on nominees. That is why we find ourselves constantly fighting instead of trying to work out a solution. I do think it is possible for reason to prevail, reducing the need for displays of raw political power. As I have told you before, Mr. Chairman, both publicly and privately, I am sincerely interested in working with you to make that happen. I remain hopeful that we can do that, despite the title and thrust of this hearing today.

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WRITTEN STATEMENT OF

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BEFORE THE
CONSTITUTION SUBCOMMITTEE OF THE SENATE JUDICIARY COMMITTEE
MAY 6, 2003

I am greatly honored to be allowed the privilege to participate in the Constitution Subcommittee's special hearing, "Judicial Nominations, Filibusters, and the Constitution: When a Majority is Denied its Right to Consent." Today's topic is especially important; the constitutionality of the filibuster has long intrigued constitutional scholars, and I am aware that the deployment of the filibuster against two circuit nominations has frustrated a majority of senators who have appeared ready to confirm the filibustered nominees. I know that for many senators, including the ten newest members of the Senate, these filibusters show just how badly broken the federal judicial system has become.

The constitutionality of the filibuster – the critical question in today's hearing – depends on whether it lacks constitutional authorization or violates some constitutional directive. Though I understand that this issue is divisive, it is not hard to answer. There is clear constitutional authority for the filibuster. The clear authorization for the filibuster derives from the Senate's express constitutional power under Article I, section 5, to create rules for its proceedings and the Senate's longstanding, consistent practice to allow the filibuster, or its functional equivalent, to block final action of the Senate on legislation and pending nominations. I further find no credible support for a constitutional prerogative that a majority within the Senate must be free of procedures that would impede its final vote on judicial nominations, even one approved by the Senate Judiciary Committee. Constitutional text, structure, and history all cut against any such prerogative. Constitutional sources also point overwhelmingly to the legitimacy of many longstanding, counter-majoritarian features of the Senate, including but not limited to Senate rules allowing committees to determine the content of legislation and to decide whether legislation or a nomination reaches the floor of the Senate. The filibuster has the same claim to legitimacy as do each of these other features of the Senate. While a filibuster undoubtedly allows a minority to frustrate the will of the majority, it may counteract the counter-majoritarian aspects of the committee system (and perhaps the discretion of the Majority Leader to schedule floor business) by enabling individual senators to block legislation or nominations favored by a committee or to force different nominations or changes in legislation rejected by a committee. The filibuster has the additional salutary effect of applying pressure on the President and the Senate to find common ground to resolve their differences. Hence, I believe the filibuster is not only constitutional but can facilitate compromise in an era in which many complain about its absence.

I.

Constitutional interpretation should not be any harder than it has to be. When the Constitution is clear, we should acknowledge its clarity; and there are two clear sources of constitutional authorization for the filibuster – the text of the Constitution and historical practices. First, Article I, Section 5 expressly provides, "Each House may determine the Rules of its Proceedings."[1] Article I, section 5 is crystal clear. It plainly authorizes the Senate to make procedural rules, including but not limited to the length of debate in the Senate. The same

[1]U.S. Const., art. I, section 5.

constitutional authority empowers the Senate to make numerous delegations to smaller units (and even individual members) within the Senate. Many of these delegations allow committees and their Chairs to have final say over the fates of legislation and nominations. Similarly, Senate practices have included the blue-slip process that has traditionally allowed individual senators with the means by which to nullify any nominations to judgeships within their respective states.[2] Along the same lines, the modified rules adopted by the Senate at the outset of the last Congress empowered the Senate Majority Leader with the discretion to forward nominations to the Senate floor regardless of whether it had been approved in committee.[3] Obviously, such discretion entails choosing not to forward a nomination to the Senate floor and thus effectively sealing its fate. Previously, Senate rules had denied such discretion to the Majority Leader and left the Committee with final say over whether a nomination should be forwarded to the Senate floor. All such rules are plainly constitutional, because they can trace to their legitimacy back to the same source – Article I, Section 5, which empowers the Senate to implement procedural rules generally, including Rule XXII. The textual authority for the filibuster are precisely the same as those for all of these other measures. If these measures are constitutional (and no one, at present, seriously questions their constitutionality), then so too is the filibuster.

Historical practices support the constitutionality of the filibuster even more strongly than does the text of the Constitution. For more than two centuries, the Supreme Court has emphasized the relevance of historical practices for determining the legitimacy of some contested action.[4] The filibuster, in one form or another, understood as the prerogative of an individual senator or a small set of senators, to engage in protracted if not endless debate to defeat some legislative action, has been employed in the Senate since 1790. As the leading legal scholars on the filibuster have noted, "the strategic use of delay in debate is as old as the Senate itself. The first recorded episode of dilatory debate occurred in 1790, when senators from Virginia and South Carolina filibustered to prevent the location of the first Congress in Philadelphia."[5] While the First Congress did allow a motion for the previous question which could not be debated, "the

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[2]*See generally* Brannon Denning, The "Blue-Slip:" Enforcing the Norms of the Judicial Confirmation Process, 10 Wm. & Mary Bill Rts. J. 75 (2001).

[3]*See* S. Res. 8, 107th Cong., 147 Cong. Rec. S48 (daily ed. January 5, 2001) (enacted).

[4]*See, e.g.*, The Pocket Veto Case, 279 U.S. 655, 689 (1929) (noting that "long settled and established practice is a consideration of great weight in a proper interpretation" of constitutional provisions); Marsh v. Chambers, 463 U.S. 783 (1983) (upholding practice of legislative prayers that began in First Congress and spanned two hundred years); Waltz v. Tax Comm'n, 397 U.S. 664, 678 (1970) (noting that "an unbroken practice . . . is not something to be lightly cast aside" by constitutional challenge).

[5]Catherine Fisk & Erwin Chemerinsky, *The Filibuster*, 49 Stan. L. Rev. 181, 187 (1997).

previous question motion was seldom used before the Senate abolished it in 1806";[6] and there is evidence suggesting prior to its abolition the Senate nevertheless allowed protracted, effectively endless debate to delay or fully impede legislative action.[7] In his Pulitzer-Prize winning biography of Lyndon Johnson's years as Senate Majority Leader, Robert Caro explains that, "[f]or many years after 1806 – for 111 years, to be precise – the only way a senator could be made to stop talking so that a vote could be taken on a proposed measure was if there were unanimous consent that he do so, an obvious impossibility. And there took place therefore so many 'extended discussions' of measures to keep them from coming to a vote that the device got a name, 'filibuster,' from the Dutch vrijbuiter, which means 'freebooter' or 'pirate,' and which passed into the Spanish as filibustero, because the sleek, swift ship used by the Caribbean pirates was called a filibote, and into legislative parlance because the de vice was, after all, a pirating, or highjacking, of the very heart of the legislative process."[8] For the first time, the Senate approved a curb on the practice in 1917, after eleven senators had successfully filibustered President Wilson's proposal to arm American merchantmen against German submarine attacks. The Senate passed, at President Wilson's urging, Rule 22, which allows debate upon a "pending" matter to be terminated when, after a petition for such "cloture" was presented by sixteen senators and approved by two-thirds of the senators present and voting. In subsequent years, senators from both parties have used the filibuster to block a remarkably wide range of legislative actions with which they have disagreed. Indeed, during the period from 1927 through 1962, the Senate did not vote cloture once.[9] In this period, conservative senators repeatedly used the filibuster to block civil rights legislation, provoking liberal senators to denounce the filibuster as illegitimate and conservative senators to defend it. None of the efforts to dismantle or reform the filibuster succeeded in this era, so that by the late 1960s and early 1970s the filibuster was available to liberal senators who then used it to block centerpieces of President Nixon's social and economic agenda while many conservative senators then began to question its legitimacy. After Bill Clinton became president, a series of Republican filibusters blocked key aspects of his legislative agenda. Nevertheless, the filibuster has persisted with the most significant alteration being that the Senate has agreed to three-fifths, rather than two-thirds, as the requisite supermajority for cloture.[10]

Moreover, the filibuster has hardly been confined to legislation. It has frequently been

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[6]*Id.*

[7]*Id.*

[8]**Robert A. Caro, The Years of Lyndon Johnson: Master of the Senate** 92 (2002).

[9]**Charles Tiefer, Congressional Practice and Procedure** 696 (1989).

[10]Senate Committee on Rules and Administration, 99th Cong., Senate Cloture Rule, Limitation of Debate in the Congress of the United States and Legislative History of Rule XXII of the Standing Rules of the United States Senate (Cloture Rule) 32 (Comm. Printing 1985).

used to thwart presidential nominations. Indeed, a Congressional Research Service study indicates that from 1949 through 2002, senators have employed the filibuster against 35 presidential nominations, on 21 of which senators had sought and invoked cloture.[11] 17 of the 35 nominations filibustered were to Article III courts. All 21 nominations on which cloture was invoked were eventually confirmed. Of the 14 nominations on which cloture was sought but not invoked, 11 were eventually confirmed. For instance, Republican senators initially filibustered against President Clinton's nominations of Walter Dellinger to head the Office of Legal Counsel in the Justice Department and Janet Napolitano to be U.S. Attorney for Arizona, but eventually confirmed both nominees – Dellinger after Republican senators relinquished their opposition to his nomination and Napolitano after the Senate voted 72-26 on a cloture motion to end the filibuster against her nomination. Three of the 35 nominations failed altogether – Justice Abe Fortas to be Chief Justice in 1968, Sam Brown to be Ambassador in 1994, and Dr. Henry Foster to be Surgeon General in 1995. Similarly, the threat of a filibuster nullified President Clinton's intention to nominate then-Assistant Attorney General Walter Dellinger as Solicitor General. Another dramatic use of the filibuster occurred when Republican senators filibustered five of President Clinton's nominations to the State Department in order to gain leverage in a dispute over whether the State Department adequately investigated allegations that a former Clinton campaign worker who later served in the department had improperly searched the records of 160 former political appointees and publicly disclosed the contents of two of the files. In short, as found by two well-respected constitutional scholars who served in the Office of Legal Counsel in the late 1980s, John McGinnis and Michael Rappaport, "the continuous use of filibusters since the early Republic provides compelling support for their constitutionality."[12]

II.

In spite of the clear textual and historical support for the filibuster, its legitimacy has been questioned on three possible grounds – the Framers did not include it among the supermajority voting requirements they had expressly listed in the Constitution, it violates majority rule in the Senate, and a supermajority voting requirement to change the filibuster is an impermissible entrenchment that allows one Congress to bind the hands of future ones. Each challenge is strained and is undercut by the weight of constitutional authority.

The first argument against filibusters is that they are not among the specific instances of supermajority voting requirements recognized in the Constitution. The Constitution specifically

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[11]Richard S. Beth, CRS Report for Congress, 1, 3 5-6 (December 11, 2002).

[12]John O. McGinnis & Michael B. Rappaport, *The Constitutionality of Legislative Supermajority Requirements: A Defense*, 105 Yale L.J. 483, 496 (1995). *Accord*, 1 Laurence H. Tribe, American Constitutional Law Section 2-3 n.1, 126 (2000); Jed Rubenfeld, *Rights of Passage: Majority Rule in Congress*, 46 Duke L.J. 73, 87-88 (1996) ; Chemerinsky & Fiske, *supra* note 5, at 239-45.

requires a supermajority vote in only seven situations.[13] This enumeration of the instances where a supermajority was required suggests to some that the Framers assumed that a simple majority vote in each chamber would suffice for all congressional action. Any time that there is a filibuster, adopting a law or confirming a nominee requires three-fifths of the Senate, or 60 percent, rather than a simple majority to pass legislation or confirm a nominee. It also shows that the Framers knew how to provide for supermajority voting requirements when they wanted to allow them, and their failure to allow for a measure such as Senate Rule XXII reflects their intention not to authorize it.

This first argument against the filibuster is, however, contradicted by the text of the Constitution. One could construe the Constitution's enumeration of the seven instances in which supermajority voting is required as meaning that these are the only instances in which supermajority voting is permissible. An equally, if not more, plausible reading of the text is that it requires supermajority voting in at least the seven specified instances but leaves Congress with the discretion to decide voting procedures in other situations. This reading is made even more compelling when combined with Article I, Section 5's empowerment of each chamber to make the rules for its respective proceedings. Clearly, the latter clause grants ample discretion to the Senate to devise its internal procedures as it sees fit unless they conflict with some constitutional prohibition. The Freedom of Speech Clause or the Equal Protection Clause might conceivably provide such prohibitions on the Senate's discretion in crafting its procedural rules, but the absence of a constitutional directive against the adoption of certain internal procedures does not.

The second, perhaps most common argument against the filibuster is that it violates majority rule in the Senate. This argument is predicated on reading several provisions of the Constitution as establishing majority rule as an unalterable principle to govern Senate voting (with the obvious exceptions of the specific instances in which the Constitution imposes supermajority voting requirements).[14] Yet, a sensible reading of these provisions does not

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[13]*See* U.S. Const. Art. I, Section 3, Cl. 6 (providing that the Senate may remove an impeached officer of the United States if at least two-thirds of the senators concur); *Id.*, Art. I, Section 5, Cl. 2 (allowing either chamber of Congress to expel a member if at least two-thirds of the members concur); *Id.*, Art. I, Section 7 (providing that overriding a presidential veto requires at least two-thirds of both the House and the Senate); *Id.*, Art. II, Section 2, Cl. 2 (requiring at least two-thirds of the senators to ratify treaties); *Id.*, Art. V (providing that for Congress to impose a constitutional amendment both the House and the Senate must prove it by a two-thirds vote); *Id.*, amend. XIV, Section 3 (providing that those who have engaged in insurrection or rebellion cannot be elected to Congress or hold any office, but that Congress by a two-thirds vote of both houses may remove such disability); *Id.*, amend. XXV, Section 4 (creates a procedure whereby the Congress, by a two-thirds vote of both Houses, may determine that a President is disabled).

[14]For the constitutional provisions on which this argument is premised, *see* U.S. Const., Art. I, Section 3, Cl. 4 (providing that the "Vice-President . . . shall be President of the Senate,

establish majority rule within the Senate as a fixed principle in all but a few instances demarcated by the Constitution. At most, these provisions establish majority rule as the default rule in the absence of any other procedure. The filibuster leaves this default rule in tact. Rule XXII does not require 60 votes to adopt a law; it requires 60 votes to end debate. Passing a bill, or confirming a nomination, still requires a simple majority. Moreover, the clause declaring that a majority is a quorum creates the basic rule for when each chamber may do its business. It says nothing about the voting margin necessary to end debates, pass legislation, or confirm nominees.

Some opponents of the filibuster insist nevertheless that majority rule applies with respect to not only legislation but also nominations. The argument is that the Appointments Clause[15] entitles the Senate to give its "Advise and Consent" to presidential nominations and that the filibuster bars a majority of the Senate from exercising this prerogative. The argument is that a majority of the Senate is constitutionally protected in exercising its discretion whether to hold a final vote or not; if it is disposed to hold one, no minority can stand in its way.

There are, however, many problems with this argument. The first difficulty is that it is predicated on a flawed reading of the Appointments Clause. The Appointments Clause sets forth the necessary conditions for someone to be appointed as an Article III judge. One of these conditions is nomination by the President, while another is confirmation by the Senate. Confirmation is achieved by a majority vote of the Senate. Thus, the clause sets forth the prerequisites for a lawful presidential appointment. It says nothing about the specific procedures applicable in confirmation proceedings or about how someone may be denied confirmation.

Second, the suggested construction of the Appointments Clause would lead to absurd results. The suggested reading of the Appointments Clause would render unconstitutional any action by a committee or individual senator (including the Senate Majority Leader) that had the effect of nullifying a judicial nomination. On this reading, committees lose all their traditional powers as gatekeepers for nominations or any other legislative business that a majority might be disposed to approve. The Majority Leader presumably would be required to forward to the Senate floor each nomination that the President makes, regardless of what happened in the Committee. In addition, this reading of the Appointments Clause would render unconstitutional temporary holds, which have been used routinely to delay final consideration of legislation and

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but shall have no Vote, unless they be equally divided)"; *Id.*, Art. I, Section 5 (providing that "a Majority of each [House] shall constitute a quorum to do business"); *Id.*, Art. I, Section 7 (providing that if the President vetoes a bill, the Congress can override the veto by a two-thirds vote of each House).

[15]*Id.*, Art. II, Section 2, Cl. 2 (providing in pertinent part that the President "shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law").

nominations. Temporary holds near the end of a legislative session can often be fatal – delay a nomination just long enough near the end of a session time runs out for the Senate to act and the nomination lapses. Such delays would be intolerable on a reading of the Appointments Clause as investing a majority of the Senate with the entitlement never to be stopped, for procedural reasons, from rendering a majority vote on every nomination a president makes.

Reading the Appointments Clause as entitling, or empowering, a majority of the Senate to render final votes on presidential nominations would mean that there were constitutional violations *every time nominees failed* to receive final votes on their nominations. (It is hard, at best, to maintain that this obligation or entitlement only applies with respect to judicial nominations. One might try to argue that the independence and proper functioning of the judiciary depends on the Senate's acting upon every judicial nomination, but there is only one Appointments Clause, whose text does not establish any priority or hierarchy among nominations much less any support for different procedures, voting requirements, entitlements, and obligations within the Senate regarding different nominations.) The constitutional violation presumably arises when a majority is willing but unable for some reason to confirm a nominee, but it is unclear what procedures the Constitution requires to determine a majority's willingness to vote prior to the final vote. It would be absurd to think that the Appointments Clause requires the majority to vote twice – once to signal its willingness to confirm, and another time to confirm the nominee in question. Even a vote for cloture is not necessarily reflective of how senators will vote on a disputed nomination, because some senators might like filibusters even less than they like the nomination(s) being filibustered. Moreover, a reading of the Appointments Clause as entitling a majority vote on a nomination when it is so disposed, leaves unclear whether senators could change their minds once they have initially signaled their willingness to confirm someone. There have been instances in the past when senators have indicated their inclination to vote one way but voted differently in the final vote.

Assuming *arguendo* there were a constitutional principle that a majority is entitled, when it prefers, to render a final vote on a nominee, it has been violated more times than anyone could count. During Bill Clinton's eight years in office, the Senate did not act on 38% of his circuit court nominations; and from 1995 until the end of Bill Clinton's presidency, the Senate did not vote on at least 20 of President Clinton's circuit court nominations.[16] In the final year of his presidency, the Senate failed to render final votes on 41 judicial nominees. I assume a majority of the Senate would have confirmed at least some if not all of these nominees, including the incoming Dean of the Harvard Law School Elena Kagan, if given the chance. (By all accounts,

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[16]President George W. Bush re-nominated one of the nominees, Roger Gregory, on whose nomination the Senate had not acted in the closing days of Bill Clinton's presidency. Had President Bush not re-nominated Judge Gregory, the Senate would not have had a second chance to act upon his nomination and to have confirmed him, and he would not be a federal judge today. His nomination by President Clinton was a clear instance in which a minority of senators had denied a majority the opportunity to render a final vote on a nominee whom it obviously was readily disposed to confirm.

the President believed all these nominees would have been confirmed if given the chance.) Thus, on the reading of the Appointments Clause urged upon the Subcommittee, one must assume that the Chair of the Senate Judiciary Committee either alone or in conjunction with a few other senators conspired to violate the Constitution throughout the Clinton presidency.[17] I for one cannot believe any such thing.

The reading of the Appointments Committee urged upon the Subcommittee suggests that not only is a majority entitled to a final vote on a nominee when it desires, but also it is constitutionally entitled not to vote. The reading suggests that a legitimate failure to vote must be the consequence of majoritarian preferences. If a failure to vote were not a consequence of the majority's actual preferences, then it violates majority rule in the confirmation process. The difficulty with this construction is that it lacks any support in the text of the Constitution or historical practices. It is undercut by a much more plausible reading of the Appointments Clause as merely making presidential nomination and Senate "Advice and Consent" preconditions for final appointment. The text says nothing about the circumstances that must exist within the Senate between the time a nomination is made and the time that the office to which a nomination has been made has finally been filled by someone confirmed by the Senate.

The third argument directed against the constitutionality of the filibuster is that Rule 5, which requires a supermajority vote to alter or abolish the filibuster, is unconstitutional. The argument is that Rule 5 impermissibly entrenches the filibuster, i.e., the supermajority vote required to alter or abolish the filibuster allows a current Senate to deprive a future majority within the Senate to choose the rules – including those governing the filibuster – under which they prefer to operate.

This argument, too, is seriously flawed. First, it has been flatly and repeatedly rejected in the Senate's precedents and practices. For instance, a Congressional Research Service study indicates that in 1995 Rule 5 was one of eight Senate rules requiring supermajority votes.[18] The Senate has consistently opposed efforts to allow amendment of its rules by majority vote;[19] and the only rule changes recognized by the Senate as legitimate have been effected by supermajority vote. For instance, near the end of President Clinton's impeachment trial a motion was made to

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[17]Interestingly, one can argue that the filibuster operates more fairly than does the discretion of a committee chair not to schedule a confirmation hearing or a final committee vote on a pending nomination. With a filibuster, a substantial minority of senators is obviously involved in opposing some legislative action, whereas with a committee chair's action only a single senator can claim responsibility for the final decision.

[18]Richard S. Beth, Congressional Research Service Memorandum, Supermajority Vote Requirements Currently in Effect in Congress, 3-4 (January 20, 1995).

[19]For instance, the Senate affirmatively approved entrenchment in votes in 1949, 1971, and 1975.

alter the Senate's rules requiring closed deliberations on the President's guilt; the Senate recognized its rules could be changed only by supermajority vote and failed to muster the requisite number for an amendment, even though this allowed a rule adopted by a much earlier Senate to remain in effect. The Presiding Officer and the Parliamentarian failed to recognize, much less to prevent, the supposed breach of the Constitution engendered by this procedure.

Second, there is no constitutional directive against entrenchment – the enactment of statutes or internal legislative rules that are binding against subsequent legislative actors in the same form. The leading commentary on entrenchment by Professors Eric Posner and Adrian Vermeule of the University of Chicago Law School comprehensively dissects the argument for implicitly reading an anti-entrenchment principle into Article I. As they argue, "Article I's elaborate crafting of the metes and bounds of legislative authority counsels against finding [an] additional, implicit restriction[against entrenchment] on statutes that (by assumption) fall within one of the enumerated grants of power."[20] They suggest further that entrenchment does not restrict the discretion vested in each chamber of the Congress by the Rules of Proceeding Clause, whose "reference to 'each House' is not a temporal limitation, but just a corollary of bicameralism. It establishes that each house separately, rather than the Congress as a whole, may make rules for its respective internal affairs."[21] Posner and Vermeule add that "rooting the rule against entrenchment in the equal authority of successive legislatures is hard to square with Congress' undisputed authority to enact laws containing sunset clauses – clauses that cause a statute to lapse, by operation of law, after a defined period."[22] Even statutes without sunset clauses entrench policies because they remain in effect indefinitely until a subsequent Congress chooses to displace them and thus require a subsequent Congress to expend resources and incur costs to revise or alter the policies already in effect. Yet, no one argues questions the constitutionality of such policy enactments on entrenchment grounds.

Similarly, Posner and Vermeule directly expose the fallacy of attacking Rule 5 on the ground that it constitutes impermissible entrenchment. "[T]he anti-entrenchment objection to the cloture rule is really a wholesale objection to constitutionalism as such. In a binding constitutional order, neither the future legislative majority nor the underlying electorate has any general 'right . . . to rule according to its will.' True, the constitutional restrictions come into force by a different procedure than do legislatively entrenched rules, but that is a different, narrower objection; and [it] is also a question-begging objection, because it unjustifiably assumes that restrictions on any given legislature may derive only from the procedure for constitutional entrenchment, rather than from the procedure for enacting entrenching statutes or rules. . . . The position is inconsistent, not merely with legislative entrenchment, but with the acceptance of

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[20]Eric A. Posner & Adrian Vermeule, *Legislative Entrenchment: A Reappraisal*, 111 Yale L.J. 1665, 1675 (2002).

[21]*Id.* at 1682 (citation omitted).

[22]*Id.* at 1675.

binding constitutions generally."[23]

The arguments against inferring a principle of majority rule within the Senate from the text of the Constitution apply as well to attempts to infer a principle of simple majoritariansim from tradition or the structure of the Constitution. The latter principle is inconsistent with American constitutional practices. Posner and Vermeule succinctly demonstrate that the problem with relying on simple majoritarianism as a basis for arguing against entrenchment: "If there are political or logistical costs to repealing legislation – and there surely are – then an earlier Congress 'binds' a later Congress by enacting legislation that cannot be costlessly repealed or changed, except in those instances in which it provides for the legislation to expire on its own. Indeed, . . . one Congress would hardly do a favor to a later Congress by making all legislation expire at the end of a [session], for this would impose on the subsequent Congress the burden of renegotiating and reenacting the expired legislation. Short of anticipating the needs and desires of future Congresses – which is impossible – a Congress will inevitably burden future Congresses, for the simple reason that the earlier Congress comes first and cannot avoid actions that will turn out to hinder the later Congress."[24]

The response that displacing a prior statute is easier than changing rules because of the different voting procedures misses the point. Either anti-entrenchment is a constitutional principle, or it is not. If it is a principle, than it requires foregoing or striking down *any* statute or rule that impedes a legislative majority from implement its statutory or procedural preferences. A new Congress cannot muster the will or the resources to enact an entirely new set of laws or rules. It will invariably leave in tact some policy or rule not preferred by a current majority and thus allow entrenchment to occur. In any event, Rule 5 implements the sound practice that the pre-existing Rules of the Senate remain in effect and can be changed only in accordance with the Rules themselves. (Otherwise, each new Senate would lack any rules for proceeding at the outset of a session, which would be a recipe for chaos.) Consequently, senators would be empowered to filibuster any attempt to amend the rules that was not done in accordance with their understanding of the governing rules.

III.

I understand that at the same time that the Constitution Subcommittee is considering the constitutionality of the filibuster it is considering some proposals to reform the federal judicial selection process. I regret I have not had the opportunity to review the proposals in detail and thus am hesitant to offer any opinion on them. Nevertheless, I believe the proposals, like today's hearing, constitute an important step in the right direction, because they have been developed with the spirit of compromise in mind. Cultivating this spirit is essential, in my opinion, to restoring good will within the federal judicial process.

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[23] *Id.* at 1695.

[24] Id. at 1686- 1687.

In the same spirit, I suggest that in considering these and other proposals for reform the Constitution Subcommittee ask a simple question. In considering any reform proposal, it makes sense to inquire about its institutional benefits and costs: What advantages and disadvantages does it have for each of the institutions involved with judicial selection? To what extent does it require, or call for, each institution to relinquish its prerogatives with respect to judicial selection? By prerogatives, I mean the formal powers of presidents and senators as well as their informal expectations or institutional norms, such as senatorial courtesy.

The usual impediment to reform is the hesitancy of each branch to abdicate its traditional prerogatives within the process. Because each branch is usually quite resistant to relinquish its powers, the status quo has steadfastly remained in tact. Yet, the status quo retains an important feature that serves as a safeguard against abuse. The safeguard is the political accountability of national political leaders. Presidents and senators remain politically accountable for their choices and actions within the appointments process. This safeguard applies as well to the filibuster. Political accountability is an important check on its use. Otherwise, one would imagine unfettered recourse to filibuster. At present, the transparency of cloture votes – i.e., the fact that they are made on the record – provides a basis for holding senators accountable for their positions on a filibuster. One can further imagine that the President stands ready to hold senators politically accountable for filibustering two of his judicial nominees, just as many senators expect to hold him and their colleagues accountable for advocating nominations they have deemed offensive.

Conclusion

The filibuster has been used for both good and ill. While its use against civil rights legislation should not make anyone proud, its constitutionality is beyond question. It is clearly authorized by the Senate's power to adopt rules for its proceedings and by its consistent use, in one form or another, throughout the Senate's history. The fact that the filibuster has been used, more than once, against judicial nominations does not detract from its legitimacy. For there is no constitutional entitlement of a majority of senators to exercise their will on every nomination with which they approve. If the majority's will is frustrated, the President and those who have supported his contested nominations can either exact revenge through the political process or seek common ground to resolve their differences with a substantial minority of their colleagues. Whichever path they follow is constitutional, just as constitutional as the filibuster itself.

May 12, 2003

Senators John Cornyn and Russell Feingold
Constitution Subcommittee of the Senate Judiciary Committee
United States Senate
Washington, D.C. 20510-4305

Dear Senators Cornyn and Feingold:

I would greatly appreciating your entering this letter into the record of the May 6th hearing of the Constitution Subcommittee, "Judicial Nominations, Filibusters, and the Constitution: When a Majority is Entitled to its Right to Consent." The letter supplements my written statement to the Subcommittee and responses during the hearing. In particular, the letter addresses five points raised in questions directed to me during the Subcommittee hearing.

My first point relates to perhaps the most important issue we discussed in the hearing – the constitutionality of the supermajority voting requirement to modify the filibuster. The most common complaint about such a requirement is that it violates the "ancient" rule that forbids a current legislature from tying the hands of a future one.

There are several reasons why this argument is unpersuasive. First, as Senator Durbin noted during the hearing, the Senate is a "continuous body." For good reason, the Senate has always viewed itself as a continuous body and has had a continuous practice not to reconstruct itself, like the House of Representatives, from scratch at the outset of every session. As Professor Cynthia Farina of the Cornell Law School has noted, the Senate is unique within our constitutional structure: "[S]taggered election [placing one-third of Senate seats at risk every two years] increases institutional stability by rendering the Senate an effectively continuous body in contrast to the House, which must fully reconstitute itself every two years. *See* The Federalist No. 63 (James Madison)."[1] Professor Vikram Amar of the University of California Hastings Law School agrees, as he has explained more than once, that "while the [Supreme] Court historically may appear the most continuous body, the Senate is the only institution that cannot – short of amendment – 'turn over' at one time. The President does, the House conceivably could,

[1]Cynthia R. Farina, *The Consent of the Governed: Against Simple Rules for a Complex World*, 72 Chi.-Kent L. Rev. 987, n.122 (1997).

and the Court effectively could as well, if the political branches 'packed it' . . ."[2] Thus, the unique structure of the Senate relieves it of any obligation, or necessity, to reconstitute itself anew in every congressional session. To the contrary, its continuity explains the Senate's consistent recognition at the outset of each session that its rules are already in effect. It is a longstanding practice of the Senate not to re-authorize its rules.

Second, I am not persuaded that original meaning fixes an anti-entrenchment principle within Article I. I respectfully caution the Constitution Subcommittee to be careful in not confusing an expectation that majority rule would be the default rule in voting in the Senate with treating majority rule as a principle mandated by the Constitution that requires a majority be allowed to change procedural rules or to vote on nominations whenever it pleases.

The text of the Constitution provides the clearest response to, and rejection of, the inferences drawn from the few scattered comments of the Framers against entrenchment. The specificity and breadth of Article I's careful delineation of the legislative powers vested in the Congress cut sharply against finding additional restrictions from outside the text, including an implicit restriction for one Congress not to bind another through statutes or internal procedural rules. Moreover, the Quorum Clause contradicts treating majority voting as required for the adoption of the rules at the outset of every congressional session, for it shows that the Framers knew how to provide for a legislative majority when they wanted to provide for one. Yet, the Framers made no such provision for internal rule-making of the House or Senate. They did just the opposite by empowering the House and the Senate to make their respective procedural rules.

Nor does the First Congress' failure to adopt supermajority voting requirements to govern internal affairs establish that its members thought there was an anti-entrenchment rule embedded within the Constitution. It would be ironic if not contradictory to appeal to the practices of the First Congress as settling the entitlement of a majority of senators to render final votes on nominations whenever they are so disposed, because it would effectively allow entrenchment of early congressional practices. The First Senate's decision to allow a motion to force the question as well as its failure to adopt supermajority voting requirements to alter Senate rules merely reflect a choice of that generation of senators to follow certain procedures in formulating and adopting internal rules. Article I, Section 5 clearly allows subsequent generations to adopt different procedures or alter the rules as long as they do so in accordance with the rules.

Third, the Senate's practices amply support the constitutionality of the supermajority voting requirement to alter the filibuster. Indeed, the Senate has consistently amended its rules only through supermajority votes. It was against this background in 1999 that the Senate decided that it could only alter its rules for impeachment trials by a supermajority vote. No one, then or since, protested that this supermajority voting requirement allowed a past Senate – indeed, one

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[2]Vikram David Amar, *Indirect Effects of Direct Election, A Structural Examination of the Seventeenth Amendment*, 49 Vand. L. Rev. 1347, 1400 (1996). *See also* Vik Amar, Note, *The Senate and the Constitution*, 97 Yale L.J. 1111, 1126 (1988).

from the previous century – to tie the hands of a present one. If the supermajority voting requirement to alter the filibuster may be changed by a majority vote, then the Presiding Officer – the Chief Justice of the United States – and the Parliamentarian erred in allowing a procedure that forced the motion to open final deliberations to the public to a supermajority vote. I am reluctant to find that they so erred.

Fourth, the Senate's precedents support the constitutionality of a supermajority requirement to alter the filibuster rule. As recently as 1975, the Senate decided that it could only amend the filibuster rule through a supermajority vote. Though some senators have previously argued that the supermajority voting requirement to alter the filibuster rule is unconstitutional, each time the Senate has revised its filibuster rule it has done so through supermajority voting. At no time in the history of the Senate has a majority amended the Senate's rules, or practice, pertaining to filibusters.

My second point is that I feel compelled to amplify my response to the references made in the May 6th hearing to my book, **The Federal Appointments Process: A Constitutional and Historical Analysis** (2000). I appreciate that people have read my book and consider its analysis worthy of attention. Some people seem, however, not to understand the significance of my rejection of Yale Law School Professor Bruce Ackerman's proposed constitutional amendment to require supermajority voting for Supreme Court nominations. For instance, Dr. John Eastman quotes my passage stating that "the Framers required a simple majority for confirmations to balance the demands of relatively efficient staffing of the government with the need to check abusive exercises of the president's discretion." He quotes further from my recognition that the Constitution "requires a majority for approval" and not a supermajority for confirmation.

I regret to say that the quotes from my book have been taken out of context, and used to support arguments that directly conflict with the argumentation throughout my book. The quotes come from my analysis of Professor Ackerman's proposed constitutional amendment to require supermajority voting for Supreme Court nominations. To analyze his proposal, I weigh the relative benefits and costs of changing the voting margins in a final Senate vote on a Supreme Court nomination. I thus compare a supermajority requirement, as Professor Ackerman proposes, against the current constitutional system in which a majority of the Senate is allowed to cast final votes on Supreme Court confirmations. In the quoted passages from my book, I analyze, among other things, the justifications the Framers had for permitting majority vote rather than a supermajority one for Supreme Court confirmations. There is nothing, absolutely nothing, in that discussion that suggests, or was meant to suggest, there is a right that a majority has to render a final vote on each and every judicial nomination. To the contrary, I am saying that when the time comes for a final vote, the majority may cast one, and the framers had good reasons for this arrangement.

I am troubled, however, because Senator Cornyn, Dean Douglas Kmiec, and Dr. Eastman, all of whom referenced my book, quoted from my critique of Professor Ackerman's proposal but failed to reference *the several pages* immediately thereafter in which I argue (as I did in my

written statement and appearance before the Subcommittee) that the majority has no right to vote on each and every judicial nomination.[3] I am not sure how these pages were overlooked, because they begin immediately after my discussion of Professor Ackerman's proposed constitutional amendment. They also are made in a section of the book entitled, "The Senate's Institutional Obligation to Take Final Action on Every Judicial Nomination." A fair reading of the book recognizes that my critique of the Ackerman proposal is perfectly consistent with my critique of the argument that a majority of the Senate is entitled not to have any procedure of the Senate preclude it from rendering a final vote on a judicial nomination.[4]

The arguments in the book are precisely the same as those I employed in my written statement and in my appearance before the Committee. In the book (as I did before the Committee), I defend the constitutionality of the Judiciary Committee's final say over judicial nominations as well as the constitutionality of individual senators' prerogatives to nullify judicial nominations through the blue-slip process or through a Committee chair's discretion not to schedule a hearing or a final Committee vote on a judicial nomination. My reference to majority rule was not as an absolute right, or entitlement, by a majority to have its say whenever it likes but rather *as the voting margin the Constitution presumes in final votes on Supreme Court nominations.*

On a personal note, I must take issue with the insinuation made by Dean Kmiec that I have changed positions on the question whether a majority has an absolute right to vote on a nomination whenever it pleases. I have the highest regard for Dean Kmiec, and consider him to be a great scholar and a person of the highest integrity. I do, however, consider his insinuation to be unwarranted. If he is willing as he suggested in the hearing to take what I said in my book over what I said in the hearing, then I could say he has apparently embraced my book's analysis suggesting there is *no* absolute right of a majority within the Senate to have a final say on a nomination whenever it likes. I hasten to add that I doubt he would agree with this analysis. I respect the disagreement we have on the constitutional issues before the Subcommittee, but feel there is no place for casting personal aspersions in a dialogue about the merits of these issues.

My third point is to applaud the discussion in the hearing on what can be done to achieve

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[3]Michael J. Gerhardt, The Federal Appointments Process: A Constitutional and Historical Analysis 298-301 (2000). Though I have recently revised this book, its arguments against an entitlement of a majority to vote whenever it pleases on a nomination remain fully in tact.

[4]My book on the federal appointments process has been reviewed by almost a dozen other scholars, including law professors, historians, and political scientists. Not a single reviewer (including two others for the Duke University Press) cited that a problem with the book was the inconsistency in the arguments made against Professor Ackerman's proposal and against the Senate's constitutional entitlement to render a final vote on judicial nominations whenever it likes. No reviewer cited this is as a problem with the book because the inconsistency is not there.

a fresh start in the Senate's handling of judicial nominations. The proposals suggested by Senators Specter and Schumer would allow for a fresh start, though I am not confident that either the President or senators will easily relinquish their respective prerogatives within the judicial selection process.

I seriously doubt whether there will be a fresh start if a majority claims, and then proceeds to act upon, the authority to amend the Senate's filibuster rule. Such an attempt would exacerbate, rather than heal, the sharp divisions within the Senate over the use of the filibuster – and other actions over the past decade – to impede final votes on judicial nominations. I fear a majority attempt to amend the cloture rule would sew the seeds for further discord within the Senate. It would not be a fresh start, but would be perceived by many senators as just the opposite – a raw exercise of power, made on unprecedented, seriously contested constitutional grounds,[5] that would produce short-term political victory and long-term ill will among senators. I am not sure whether such an effort will do credit to the Senate in the long run.

I appreciate the concerns expressed in the hearing about the tactics of a substantial minority of the Senate. I would think, however, that if a substantial minority of the Senate has a problem with something, their concerns are worthy of our attention. The filibuster allows their concerns to be heard. The filibuster reflects the Senate's longstanding respect for minority views and underscores the unique role of the Senate as a part of American democracy. It has the salutary effect of giving an incentive to all sides to seek compromise on issues where points of view are sharply divided. With regard to nominations to an independent branch of government such as the judiciary, the filibuster encourages the President to find common ground with the Senate by nominating individuals who can garner consensus. Through his nominating power, the President can make a choice that will exacerbate divisions within the Senate, or he can make a choice that can bring people together.

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[5]An obvious reason why it seems hard for a fresh start to begin with modifying the filibuster rule is that a substantial number of senators question the motives and consistency of some senators who are trying to amend the filibuster rule. For instance, Senator Frist joined the attempted filibuster against Richard Paez but has now introduced a resolution to amend the filibuster. Similarly, the Senate Judiciary Committee did not act upon, or forward to the Senate floor, 59 of President Clinton's judicial nominees, though a good case could be made that a majority might have confirmed most if not all of these nominees. In those days, Republican senators dismissed arguments made by President Clinton that a majority of the Senate was obliged, or entitled, to render a final vote on judicial nominees and should not be allowed to have its discretion thwarted by a small number of senators. It is hard to square this rejection and the persistent delays, including recourse to the filibuster, that nullified many of President Clinton's judicial nominees, with the current effort to change Senate rules on judicial nominations. A fresh start is doomed if it begins with riding roughshod over the concerns of many senators that the rules have been changed for result-oriented, rather than principled, reasons that cannot withstand the test of time.

My fourth point relates to Senator Schumer's question to the panelists about whether ideology does, or ought to, matter to the Senate in evaluating judicial nominations. The fact is that ideology has always been among the most important considerations in evaluating judicial nominations. (I discuss this at great length in my book on the federal appointments process.) A president is free to choose judicial nominees based on whatever criteria he prefers, but senators are empowered, by virtue of their Advice and Consent authority, to check his criteria (or their application in particular cases) as they see fit. To put this another way, the President's nominating authority allows him to set the terms of debate in the confirmation process and thus the Senate is entitled, as its practices consistently show, to assess the terms either generally or in particular cases.

Senator Schumer's question reminded me of a Republican proposal made at the outset of the current congressional session that because lower court judges are bound by precedent their ideologies should not matter and thus senators should readily defer to their nominations. I have never been sure how serious this proposal was. I wonder how many of my fellow panelists, or Republican senators, would be willing to defer to a Democratic president's lower court nominees because of the expectation that, if confirmed, they would be bound by precedent. The opposition to many of President Carter's and President Clinton's judicial nominations suggest many Republican senators would not be so disposed, just as most Democrats currently resist some of President Bush's nominations and thus are not prepared to accept that ideology is irrelevant to how lower court judges perform. Senators can disagree in a particular case that ideology has been unfairly characterized, but its relevance generally is beyond question.

Last but not least, I want to return to the question whether there is a constitutional principle that requires that a Senate majority be allowed to cast final votes on each and every judicial nomination. For reasons given in my original written statement and in my book (both in its original form and its newly revised one), I think there is no such rule. One reason – the unworkability of the rule – requires elaboration, given some comments made in the Subcommittee hearing.

Majority rule as a fixed entitlement within the Senate is unworkable within our constitutional structure. To begin with, as I suggested at the hearing more than once, there is only one Appointments Clause. This Clause makes no distinction among the officers requiring Senate confirmation. Thus, majority rule, if it were an inexorable entitlement, would require a majority vote on every piece of legislative business, including every presidential nomination, that a majority seems disposed to approve. This would mean that the Constitution was violated each and every time a committee did not, for whatever reason, forward to the floor a bill or a nomination to a non-judicial office that a majority was likely to approve.[6] I doubt anyone could

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[6]One argument made against procedures depriving a majority of a final vote on a nominee whom it is disposed to confirm is derived from the Supreme Court's 1892 decision in United States v. Ballin. The opinion suggests that Article I, Section 5, does not grant unlimited authority in "each house to determine its rules of proceedings. It may not by its rules ignore constitutional

calculate the precise numbers of such nominations constitutionally frustrated. (Indeed, the fact that all violations of this rule cannot be identified exposes a peculiarity of the rule.)

There is a major difficulty with determining when the majority's will has been vindicated. During the hearing, the argument was made that the committee structure within the Senate is permissible but the filibuster is not, because majoritarian acquiescence in the committee rulings legitizimes them. How do we know a majority has acquiesced in committee rulings? There was no formal vote taken by a majority to approve a committee's negative recommendations, so what was the proof of the acquiescence? The absence of an organized response by a majority to a committee's negative recommendation hardly confirms there was acquiescence. As we all know, the failure to act is explicable on all sorts of grounds. The failure to act could be easily construed as accepting that the majority's will is not relevant to Committee decisions. The reason committee actions are legitimate is not that a majority supports them but that committees are duly authorized pursuant to the Senate rules.

Recall that a president is unlikely to make a nomination he believes will fail. Presidents make nominations they think a majority of the Senate will accept. Surely, President Clinton thought this was the case for every single one of his nominations that were impeded in a committee – from Bill Lann Lee to James Hormel and others. There is no reason to think that a majority would have rejected these nominations if they had come to a final vote on the Senate floor. The same would have to be said for every other non-judicial nomination made by every other president in American history. The same would also have to be said for every bill that fails to pass through a committee, because there might be a majority in favor of it. Majoritarian acquiescence is not sufficient to establish the absence of a majority that might confirm a nominee, or approve a bill, that some committee has not forwarded to the floor of the Senate. Majoritarian acquiescence is nothing more than a legal fiction to rationalize the failure of the whole body to act. It is a dangerous fiction, because it requires no proof. It can be invoked at any time to support a committee chair's unilateral decisions on timing and pacing of nominations or a single senator's objections noted in the blue-slip process. If there were a genuine constitutional principle empowering a majority to vote when it was disposed to confirm

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restraints or violate fundamental rights, and there should be a reasonable relation between the mode of proceeding established by the rule and the result which is sought to be attained." In my written statement, I recognized, consistent with this language, that other constitutional principles, such as the Freedom of Speech Clause, establish limits on the procedures the Senate may adopt. This language does not, however, undercut the filibuster or the constitutionality of the supermajority requirement to alter the filibuster. I take the Court as recognizing that Senate rules must satisfy the rational basis test, for there must be a "reasonable relation[ship]" between a rule (the means) and its objective. Clearly, the filibuster and the supermajority voting requirement to alter the filibuster satisfy the rational basis test; the supermajority voting requirement to alter the cloture rule helps to foster the stability of the Senate as a continuing body, while the filibuster helps to further debate on contentious questions and to encourage the President and the Senate to find common ground in the contested area.

someone, then the principle requires that one of two things must happen. It must require either that the majority vote twice – once to approve a Committee's negative recommendation and again on the nominations that it approves, or every nomination must go to the floor of the Senate to ensure that the majority's will may be realized. If neither of these things were done, then a good case can be made that the majority rule has been breached. If neither of these things were done – and I do not expect either will ever be done – then majority rule as a constitutional principle remains nothing more than a fiction to be employed in select cases to justify some raw grab for power.

In closing, I do want to thank you both again for the privilege of participating in yesterday's hearing, and your extraordinary courtesy and generosity in allowing for open dialogue on the important questions of the constitutionality of the filibuster and the supermajority requirement to alter it. If you have any further questions or if I can be of any other help to you, please do not hesitate to let me know.

Very truly yours,

Michael J. Gerhardt
Arthur B. Hanson Professor of Law

TESTIMONY OF MARCIA D. GREENBERGER, CO-PRESIDENT
NATIONAL WOMEN'S LAW CENTER

BEFORE THE SUBCOMMITTEE ON THE CONSTITUTION, COMMITTEE ON THE JUDICIARY OF THE UNITED STATES SENATE

ON JUDICIAL NOMINATIONS, FILIBUSTERS AND THE CONSTITUTION

May 6, 2003

I. Introduction and Overview

My name is Marcia Greenberger, and I appreciate your invitation to testify today. I am Co-President of the National Women's Law Center, which since 1972 has been at the forefront of virtually every major effort to secure and defend women's legal rights. With me is Center Vice President Judith Appelbaum.* I am especially pleased to have the opportunity to address an issue of such fundamental importance to the American people. Indeed, because the federal courts play such a critical role in giving life and meaning to the rights and principles enshrined in the Constitution and the federal statutes enacted by Congress, the question before the Subcommittee today -- how the Senate should exercise its constitutional role in the judicial appointment process – is one with a profound impact on the lives of all Americans.

The Constitution confers on the U.S. Senate a role in determining the composition of the federal courts that is co-equal to the role of the President: the President nominates appointments to the federal bench, but his nominees may serve if and only if the Senate gives its "advice and consent."[1] It is clear why the framers of the Constitution concluded that an independent Senate role is appropriate: the judiciary is independent from the executive and legislative branches (and indeed is sometimes called upon to resolve disputes between the two), and federal judges sit on the bench not just for the term of the President who names them, but for life. So while it may be appropriate for Senators generally to give deference to a President's choices of Cabinet officers or other high-level executive branch officials to join his Administration and implement his policies, similar deference is not appropriate when it comes to the President's selection of judicial nominations.

In exercising their Constitutional responsibility to give or withhold consent to the President's judicial nominations, Senators necessarily operate within the rules of the Senate. In accordance with these rules, most nominations are decided by a confirmation vote on the

* I would also like to acknowledge the assistance of Center Counsel Amy K. Matsui and Center Legal Fellow Ikeita Cantú Hinojosa in the preparation of this testimony.

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Senate floor and approved if a simple majority of Senators vote in favor. Many nominations, however, are resolved in other ways; in some cases, for example, Senate leaders decide not to schedule a floor vote on a nomination (e.g., due to a "hold" placed on the nomination by even just one Senator), or the Judiciary Committee rejects the nomination or fails to take any action on it. And some nominations are decided only after a cloture vote is taken pursuant to Senate Rule 22 – that is, after 60 Senators (three-fifths of the Senators in office) vote to invoke cloture and the nomination is allowed to go forward, or the cloture vote fails and it is not.[2]

In fact, as shown below, cloture votes on judicial nominations have ample precedent in contemporary U.S. history, and there are a number of bases on which Senators may reasonably conclude that the use of this Senate procedure on judicial nominations is appropriate in some circumstances. Cloture votes are routine in the Senate today, and have occurred on judicial nominations in numerous instances in the past few decades -- on judicial nominations submitted to the Senate by Presidents of both parties, including nominations to the Supreme Court as well as lower federal courts. They have been based at least in part on concerns about the ideology or judicial philosophy of the nominee, or objections to the nomination process, or both. As further shown below, requiring cloture on some judicial nominations is particularly appropriate at this juncture in our history. At present, the stakes are particularly high: one party controls two branches of government; the remaining branch, the judiciary, is tilted to the right; the balance that normally occurs over time as Administrations change has not occurred because of the obstruction of the last Administration's nominations; and the President is explicitly seeking to move the judiciary further to the right and, without consultation with the Senate, is selecting nominees with extreme, out-of-the-mainstream views on critical legal issues.

II. Requiring Cloture Votes on Judicial Nominations: The Precedents and the Rationale

A. The Cloture Vote, Now a Routine Senate Practice, Has Been Applied to Numerous Judicial Nominations

The cloture vote is the mechanism for ending debate on the Senate floor, which otherwise may continue without limit under the Senate's rules. Until recent decades, cloture was generally used to try to bring to a close old-fashioned filibusters, in which Senators opposing a legislative measure (or nomination) engaged in a non-stop debate, for days and nights on end, in an effort to talk the measure to death.[3] In the contemporary Senate, however, cloture votes are not reserved for actual filibusters, which are rare; rather, they are often prompted simply when even a single Senator signals strong opposition to a measure – e.g., by placing a "hold" on the matter.[4] As a result, according to the Congressional Research Service (CRS), cloture votes have become increasingly common. While there were only 23 cloture votes in the entire period of 1919 through 1960 (and in at least 24 of those years, there were no cloture votes at all), in just one recent Congress (1997-98), the Senate voted on 53 cloture motions and invoked cloture 18 times.[5] Indeed, as summarized in one scholarly analysis, "[I]t is now commonly said that sixty votes in the Senate, rather than a simple majority, are necessary to pass legislation and confirm nominations."[6]

While used most often in the context of legislation, cloture votes on nominations are also increasingly frequent. CRS reports that from 1949 (when cloture on nominations was first permitted under the rules) through 2002, cloture was sought on 35 nominations.[7] Of these, 17 were cloture votes on judicial nominations, including 14 Court of Appeals or District Court nominations since 1980.[8] They include cloture votes on nominations submitted to the Senate by Democratic and Republican Presidents alike. The opposition to the nomination in every case was based at least in part on objections to the ideology or judicial philosophy of the nominee, or on procedural grounds such as concerns that the Judiciary Committee had inadequately examined the nominee's record, or both.

According to CRS, cloture motions were filed on the following judicial nominations:

- In 1968, President Lyndon Johnson nominated Associate Justice Abe Fortas to replace Earl Warren as Chief Justice of the Supreme Court when Warren announced his intention to retire. The Judiciary Committee approved the Fortas nomination by a vote of 11 to 6, but conservative Senators, led by Senator Strom Thurmond and others, mounted a filibuster on the floor on the motion to proceed to the nomination. Their objections to Fortas were based, among other things, on concerns that his opinions as a member of the Warren Court were too liberal in the areas of civil liberties and the rights of the accused[9] as well as concerns about Justice Fortas' refusal to respond to some allegations leveled against him.[10] Fortas' supporters failed to invoke cloture, forcing the president to withdraw the nomination.

- When William Rehnquist was nominated to serve on the Supreme Court by President Nixon in 1971, the nomination was opposed by civil rights groups based, among other things, on his past opposition to Arizona civil rights legislation and a school desegregation plan and allegations that he had been involved in the harassment of minority voters.[11] Senate opponents of the nomination cited the need for extended debate, and two cloture motions were filed. Although supporters failed to invoke cloture, opponents subsequently permitted a vote to occur. Rehnquist was confirmed to the Court in December 1971.

- When Justice Rehnquist was nominated by President Reagan to serve as Chief Justice in 1986, he was again criticized for his civil rights record, which by then also included his lone dissent in the *Bob Jones University* case,[12] in which the Court held that tax-exempt status may be denied to a university with racially discriminatory policies. In addition, some Senators sought an additional hearing to examine a discrepancy between Justice Rehnquist's testimony before the Committee and other evidence that had come to light.[13] After Senator Kennedy refused to consent to a time agreement to limit debate, a cloture motion was filed. Cloture was invoked and Rehnquist was confirmed as Chief Justice.

- In December 1980, a floor vote on the nomination of Stephen Breyer (now a Supreme Court Justice) to the First Circuit was blocked by Senators protesting what they considered overly expedited treatment of the nomination during a lame duck session[14]

and trying to keep judicial seats open until incoming President Ronald Reagan could fill them.[15] In addition, Senator Humphrey of New Hampshire (one of the states in the First Circuit) complained that he had not received the "usual" senatorial courtesies.[16] A cloture motion was filed, cloture was invoked, and the nomination was confirmed.

- Democrats mounted vigorous opposition to several nominees of Presidents Reagan and George H.W. Bush to the Courts of Appeals – and one District Court nominee -- in the 1980's and early 1990's, forcing cloture votes on them.

    - J. Harvie Wilkinson, nominated to the Fourth Circuit in 1984, was opposed based on questions about his commitment to civil rights and equal opportunity[17] as well as his lack of experience.[18] Senator Kennedy led a filibuster[19] and the first cloture vote failed, but cloture was subsequently invoked and Wilkinson was confirmed following a third hearing on his nomination.

    - Sidney Fitzwater, first nominated to the District Court for the Northern District of Texas in 1985, was opposed by a number of Democrats based on allegations that he had discouraged African-Americans from voting in an election, among other things.[20] The Judiciary Committee approved the nomination by a vote of 10 to 5 but a filibuster was threatened[21] and a cloture motion was needed to end debate; Fitzwater was then confirmed in March 1986.[22]

    - The nomination of Daniel Manion to the Seventh Circuit in 1986 prompted a confirmation battle.[23] He was opposed based in part on his support, while a state legislator, of legislation to permit display of the Ten Commandments in public schools immediately after the Supreme Court ruled a similar state statute unconstitutional.[24] After the Judiciary Committee sent his nomination to the floor without a recommendation, a cloture petition was filed to cut off debate. Ultimately, the cloture motion was vitiated and Manion was confirmed on a 48-46 vote.[25]

    - Edward Carnes, nominated by President George H.W. Bush to the Eleventh Circuit in 1992, was opposed due to concerns about his civil rights record in the Alabama attorney general's office, including his defense of the use of race-based peremptory challenges to obtain all-white juries in capital cases.[26] A Judiciary Committee vote was delayed after protests from civil and human rights groups[27] but the nomination was eventually approved by the Committee. Senator Thurmond and others then filed a cloture motion, cloture was invoked, and Carnes was confirmed.

- Strong Republican opposition to several of President Clinton's nominees for Courts of Appeals, and the use of extreme delaying tactics against them, prompted cloture votes during the 1990's.

- Rosemary Barkett, nominated to the Eleventh Circuit in 1993, was accused by Republicans of being "soft on crime."[28] After Republican opponents announced their intention to filibuster the nomination, a cloture motion was filed.[29] Lacking the votes to sustain a filibuster, Republican opponents accepted a time agreement, the cloture petition was withdrawn, and Barkett was confirmed.[30]

- H. Lee Sarokin, nominated to the Third Circuit in 1994, was vigorously opposed by Senators who characterized him as a liberal on criminal law, affirmative action, and other issues.[31] Republicans threatened a filibuster[32] and a cloture motion was filed. Cloture was then invoked, and Sarokin was confirmed.

- In 2000, cloture motions were necessary to obtain votes on the nominations of both Richard Paez and Marsha Berzon to the Ninth Circuit, after Republican opponents who considered them too liberal repeatedly delayed action on their nominations (over four years for Paez and over two years for Berzon).[33] Those opposing the nominations acknowledged that cloture was required "due to holds that we placed on them . . . as notice to the Senate that if the nominations were brought to the full Senate for debate they would be filibustered."[34] On the floor, Republican Senator Bob Smith, citing the Fortas, Rehnquist and other filibusters as precedents, said "I do not want to hear that I am going down some trail the Senate has never gone down before by talking about these judges and delaying. It is simply not true. I resent any argument to the contrary because it is simply not true."[35] He declared the next day that he had led a filibuster on the Berzon and Paez nominations, having built a coalition of Senators (including Senator Jeff Sessions) to block them because of the nominees' judicial philosophy.[36] Cloture was invoked on both nominations, whereupon Senator Sessions moved to indefinitely postpone the Paez confirmation vote,[37] but both nominees were confirmed.

- A cloture vote was also taken in 1999 on President Clinton's nomination of Brian Theadore Stewart to the District Court in Utah due to Democratic objections to the expedited treatment of the nomination. Not only did Stewart's nomination come to the floor in a mere two months even though 30 other nominations were then pending, but a number of those nominations -- including those of Paez and Berzon, as well as that of Missouri Supreme Court justice Ronnie White for a federal district court seat -- had been pending for more than a year and a half.[38]

In short, history supplies ample precedents for subjecting controversial judicial nominations to cloture votes.

B. Requiring Cloture on Some Judicial Nominations Is Appropriate At This Time

It is hardly surprising that opponents of controversial judicial nominations sometimes force cloture votes, given what is at stake. Federal judges comprise a powerful branch of the

U.S. government, and they sit with lifetime tenure. Once confirmed by the Senate, there is no means of holding them accountable for their actions, short of the extreme (and extremely rare) remedy of impeachment. Indeed, although cloture votes occur more often in connection with executive branch nominees than judicial nominees,[39] and far more often on legislation,[40] the stakes are *higher* for judicial confirmations: after all, legislation can always be amended or repealed, and executive branch appointments last only for finite terms or at the pleasure of the President, not for life. Moreover, the decisions that judges on federal courts render last through the ages and determine the scope and application of the most fundamental rights and liberties of American citizens. The Supreme Court, by interpreting the Constitution and federal statutes, establishes legal principles that reach every aspect of American life. And although the rulings of the Courts of Appeals are subject to Supreme Court review and the lower courts are required to abide by the high court's precedents, in reality the Courts of Appeals sit as the courts of last resort for the vast majority of litigants (since the Supreme Court decides fewer than 100 cases per year, while the Courts of Appeal decide over 28,000 per year)[41] and they have tremendous latitude to interpret and apply the broad principles laid down by the Supreme Court.

At this juncture in U.S. history, moreover, even more is at stake than is normally the case. One party holds power in two of the three branches of government -- the White House and both houses of the U.S. Congress -- and its leaders seek to impose their philosophy on the judicial branch as well.[42] At the same time, Justices who share the President's conservative philosophy already dominate the Supreme Court, and judges nominated by the President's party currently dominate the majority of the Courts of Appeals around the country.[43] The "tilt" to the right on the lower courts is partly due to the use of obstructionist tactics that blocked an inordinately large number of Clinton Administration nominees -- over one-third of President Clinton's nominations to the Courts of Appeals[44] -- which meant that the balancing process that normally takes place over time, as administrations change, did not occur. We are now on the brink of a wholesale transformation of the federal judiciary as this Administration seeks to tip the scales of justice even further toward the right. The filibuster, in some cases, is the last line of defense against this ideological shift.

Requiring 60 votes to invoke cloture has sometimes been criticized as "anti-majoritarian," usually by proponents of the measure being blocked. However, cloture is far from the only way in which matters are decided in the Senate without a vote of a simple majority of Senators, and without specific Constitutional language specifying a supermajority requirement (as there is, for example, with impeachment verdicts, veto overrides, treaty approval, and constitutional amendments). Legislative measures and nominations often die quiet deaths when committee chairs fail to schedule them for committee action, or the committee rejects them, or the leadership declines to call them up for a vote -- due to a hold placed by a Senator, sometimes anonymously,[45] or for some other reason. Indeed, from 1995 to 2001, many highly qualified judicial nominees received no hearing at all, including two Hispanic nominees to the Fifth Circuit (Jorge Rangel and Enrique Moreno) and others received a hearing but no Judiciary Committee action. In these situations, there is no Senate debate at all, much less votes on the floor for which all Senators can be held accountable. These practices, which could hardly be said to reflect the will of a majority of the Senate and

are not even visible to the public, could be considered far less democratic than filibusters and cloture votes.

It has been argued, moreover, that by forcing a supermajority cloture vote to cut off debate, the filibuster provides necessary protection for the rights of the minority and is an important feature of a democracy. Senator Hatch is one of those who has defended the filibuster. When other Senators were filibustering a Clinton Administration nomination to the Third Circuit in 1994, he called the filibuster "one of the few tools that the minority has to protect itself and those the minority represents."[46] Similarly, when he participated in a filibuster against labor legislation in 1978, he said, "The filibuster rule is the only way the majority of the people, who are represented by a minority in the Senate, can be heard."[47] [add cite in fn.] Former Senate Majority Leader Howard Baker (R-TN) also has defended the filibuster as a protection for the rights of the minority and the deliberative process of the Senate itself.[48] And conservative commentator George Will argued, when he opposed Clinton Administration legislation that was being filibustered in the Senate:

> [T]he Senate is not obligated to jettison one of its defining characteristics, permissiveness regarding extended debate, in order to pander to the perception that the presidency is the sun around which all else in American government – even American life – orbits. . . . Democracy is trivialized when reduced to simple majoritarianism – government by adding machine. A mature, nuanced democracy makes provision for respecting not mere numbers but also intensity of feeling."[49]

In light of all that is at stake in the confirmation of federal judges, especially at this time, those Senators with an "intensity of feeling" about the importance of a judiciary committed to civil rights and civil liberties should be expected to require cloture votes before troublesome nominations can move forward.

III. Conclusion

There is ample precedent supporting the decision to mount strong opposition to controversial judicial nominations, such that cloture is needed. And just as the failure to invoke cloture on legislation – or the mere threat of a cloture vote and the need for a 60-vote majority -- often forces proponents of a measure to agree to compromises in order to gain passage,[50] the failure to invoke cloture on judicial nominations – or the prospect of needing 60 votes for a nomination to move forward -- could lead the current Administration to consult with potential Senate opponents and agree to submit moderate, consensus nominees who are confirmable, as occurred during the Clinton administration.[51] If this occurs now, the nation's interests will be well served.

ENDNOTES

[1] U.S. CONST. art. II, § 2, cl. 2.
[2] Under Rule 22, sixteen Senators can bring a motion requiring the Senate to vote whether or not debate on a measure, motion, or any other matter should be brought to a close. If three-fifths of the Senate (or 60 Senators) vote yes on the motion, no more than thirty hours of debate may take place before an up-or-down vote occurs. No Senator may speak for more than an hour, and amendments that are not germane to the matter are not permitted. *See* SENATE RULE XXII.
[3] This "traditional" filibuster is often associated with the obstruction of civil rights legislation by southern Senators in the 1950's and 1960's, but it also has been used by others such as Progressive Senator Robert LaFollette, who led the 1917 debate that prompted the Senate to adopt the first cloture rule. *See* Catherine Fisk & Erwin Chemerinsky, *The Filibuster*, 49 STAN. L. REV. 181, 196-97 (1997).
[4] "In contrast to the dilatory tactics of the past, modern filibusters virtually never involve long speeches, all-night sessions, or the parliamentary maneuvering that used to draw public attention. A credible threat that forty-one senators will refuse to vote for cloture on a bill is enough to keep that bill off the floor. The Senate leadership simply delays consideration of the bill until it has the sixty votes necessary to cloture. In effect, the stealth filibuster eliminates the distinction between a filibuster and a threat to filibuster; any credible threat to filibuster is a filibuster because the majority leader must regard it as such." Fisk & Chemerinsky, *supra* note 3, at 203. *See also* CONGRESSIONAL RES. SERVICE, FILIBUSTERS AND CLOTURE IN THE SENATE 22 (updated Jan. 17, 2001) [hereinafter "FILIBUSTERS AND CLOTURE"] ("Some cloture votes are intended to preempt filibusters that are only anticipated. . . .").
[5] FILIBUSTERS AND CLOTURE, *supra*, at 20-21.
[6] Fisk & Chemerinsky, *supra* note 3, at 182; *see also* FILIBUSTERS AND CLOTURE, *supra* note 4, at 21 ("Both Senators and observers of the Senate have asserted that it now requires 60 votes (the majority required for cloture) for the Senate to pass almost any significant legislation.").
[7] CONGRESSIONAL RES. SERVICE, CLOTURE ATTEMPTS ON NOMINATIONS 2 (Updated Dec. 11, 2002) [hereinafter "CLOTURE ATTEMPTS ON NOMINATIONS"].
[8] *Id.*, at 5 tbl. 3.
[9] *See, e.g.*, 114 CONG. REC. 28273 (1968) (statement of Sen. Holland) ("[T]he appointment of Mr. Justice Fortas to be Chief Justice gives ground for jubilation to the ultraliberals who wish to see a continuation of the Warren court for the next fifteen years or more. . . ."); LAURENCE H. TRIBE, GOD SAVE THIS HONORABLE COURT: HOW THE CHOICE OF SUPREME COURT JUSTICES SHAPES OUR HISTORY 44 (1985); ROBERT A. KATZMANN, COURTS AND CONGRESS 24 (1997).
[10] *See, e.g.*, 114 CONG. REC. 28118 (1968) (statement of Sen. Griffin).
[11] Joel B. Grossman & Stephen L. Wasby, *The Senate and Supreme Court Nominations: Some Reflections*, *in* THE SUPREME COURT IN AMERICAN SOCIETY: EQUAL JUSTICE UNDER LAW 47 (Kermit L. Hall ed. 2000); 117 CONG. REC. S.43028 (1971) (statement of Sen. Bayh) (stating that Rehnquist never dissociated himself from statements made in a letter to the editor of the Arizona Republic opposing a voluntary school desegregation plan and asserting that "[Mr. Rehnquist] is outside the mainstream of American thought").
[12] *See* 132 CONG. REC. S.12378-04 (1986) (statement of Sen. Biden).
[13] *See* 132 CONG. REC. S.12663-01 (1986) (statement of Sen. Sarbanes).
[14] *See, e.g.*, 126 CONG. REC. S.31444 (1980) (reprinting written statement of Sen. Hatch).
[15] 1980 CONG. Q. ALMANAC 18-A; 126 CONG. REC. S.32998 (1980) (reprinting New York Times article reporting motivations behind Republican filibuster threats).
[16] Senator Humphrey complained that he had not been notified when Breyer was nominated, and that he was not informed when the Judiciary Committee hearing was to be held. 126 CONG. REC. S.3300 (reprinting remarks by Sen. Humphrey).
[17] SHELDON GOLDMAN, PICKING FEDERAL JUDGES: LOWER COURT SELECTION FROM ROOSEVELT THROUGH REAGAN 325 (1997); 130 CONG. REC. S.14845-50 (1984).
[18] A majority of the ABA Standing Committee on the Federal Judiciary rated Wilkinson qualified despite his inability to meet its minimum practice requirement, yet it rated women and minorities with more trial experience and fewer years of practice as unqualified. *See id.* at 325-26.
[19] *Id.* at 326.

[20] *Id.* at 314.
[21] *See* Mark Nelson, *Democrats Criticize Fitzwater: Senators May Filibuster Dallas Jurist's Nomination*, DALLAS MORNING NEWS, March 12, 1986, at 25A; Judy Wiessler, *Fitzwater Nomination Threatened*, HOUS. CHRON., March 12, 1986.
[22] GOLDMAN, *supra* note 17, at 314.
[23] *See id.* at 310-13.
[24] *See* 132 CONG. REC. S.9528-03 (1986) (reprinting Journal-Gazette editorial).
[25] GOLDMAN, *supra* note 17, at 309-12. The vote for confirmation initially tied, 47-47. Senator Byrd (who had voted against confirmation) switched sides, making the vote 48 to 46 and enabling him to move for reconsideration of the confirmation. The Senate subsequently rejected the motion to reconsider by a 50 to 49 vote. *See id.* at 312.
[26] *See, e.g.*, 138 CONG. REC. S.12962 (1992) (statement of Sen. Biden).
[27] Colman McCarthy, *Less Than Thorough Search for Justice*, WASH. POST, Apr. 28, 1992.
[28] *See, e.g.*, 140 CONG. REC. S.4295-96 (1994) (statement of Sen. Smith).
[29] Senator Mitchell explained: "[W]e have been advised by our Republican colleagues that they will filibuster [the nomination] and will not agree to a vote on it, and therefore it is necessary to file a motion to invoke cloture to end the filibuster and to permit a vote to occur." 140 CONG. REC. S.4184-02 (1994) (statement of Sen. Mitchell).
[30] *Senate Confirms Barkett for Circuit Court*, 52 CONG. Q. WEEKLY REPORT 898 (Apr. 16, 1994).
[31] *See, e.g.*, 140 CONG. REC. S.1369 (1994) (statement of Sen. Hatch).
[32] Helen Dewar, *Mitchell Vows to Extend Senate Session to End GOP Filibusters*, WASH. POST, Oct. 4, 1994 at A04 (stating that Republicans were blocking nominations with filibusters); *Nation: American Scene*, WASH. TIMES, Nov. 22, 1994 at A6 ("Judge Sarokin was confirmed last month by the Senate, 63-35, amid a threatened filibuster by conservative Senators who accused him of promoting a liberal agenda.").
[33] *See, e.g.*, MICHAEL J. GERHARDT, THE FEDERAL APPOINTMENTS PROCESS: A CONSTITUTIONAL AND HISTORICAL ANALYSIS 304-05 (2000).
[34] Senate Record Vote Analysis, Session Vote No. 36, March 8, 2000, at www.senate.gov/~rpc/rva/1062/106236.htm (summarizing contentions of Senators opposed to the nominations).
[35] 146 CONG. REC. S1336 (2000) (statement of Sen. Smith).
[36] Press Release, Sen. Bob Smith, Smith Leads Effort to Block Activist Judicial Nominees (Mar. 9, 2000), *available at* http://smith.senate.gov/Releases/Releases/030999a.HTM.
[37] Senator Sessions' motion was defeated by a 67-31 vote. 146 CONG. REC. S.1368 (2000).
[38] *See, e.g.*, 145 CONG. REC. S.11097 (1999) (statement of Sen. Leahy) ("Please understand that Democrats are prepared to vote on this nomination, as we are on all of the judicial nominations pending on the Senate Executive Calendar. This impasse is caused not by Democrats' refusals to vote on that nomination but by Republican refusals to allow a vote on the nominations of Judge Paez or Ms. Berzon.").
[39] *See* CLOTURE ATTEMPTS ON NOMINATIONS, *supra* note 7, at 5 tbl. 3.
[40] *See* note 5, *supra*.
[41] During its 2001-2002 term, the Supreme Court decided only 85 cases, while during fiscal year 2001 the federal Courts of Appeals decided over 28,000 cases and federal District Courts decided over 300,000. *Supreme Court of the United States: 2002 Year End Report on the Federal Judiciary* (Jan. 1, 2003), *available at* http://www.supremecourtus.gov/publicinfo/year-end/2002year-endreport.html; JUDICIAL BUSINESS OF THE UNITED STATES COURTS: 2001 ANNUAL REPORT OF THE DIRECTOR at tbls. S-1, C-1 & D-1, http://www.uscourts.gov/judbus2001/contents.html. The Court issued 76 opinions, but issued rulings in 85 cases. *Supreme Court of the United States: 2002 Year End Report on the Federal Judiciary. See also* Edward A. Purcell, Jr., *Reconsidering the Frankfurtian Paradigm: Reflections on Histories of Lower Federal Courts*, 24 L. & SOC. INQUIRY 679, 722 (1999) (citing statistics that suggest that over 95% of decisions by the courts of appeals are final).
[42] *See, e.g.*, *Bush, Gore Touted Different Justices*, TOPEKA CAPITAL-JOURNAL, Dec. 11, 2000, *available at* http://quest.cjonline.com/stories/121100/sup_1211007337.shtml (noting that as a presidential candidate, President Bush pointed to Justices Scalia and Thomas as models for his ideal judicial nominees).
[43] In eight of the thirteen federal circuit courts, the majority of judges were appointed by Republican administrations. *See* Alliance for Justice Judicial Selection Project Database, Federal Judiciary by Court and Appointing President Report, http://www.allianceforjustice.org/judicial/judicial_selection_resources/selection_database/byCourtAndAppPres.

sp. A majority of judges in three circuits were appointed by Democratic presidents, and the appointments are politically balanced in two circuits. *See id.*

[44] During the Clinton Administration, the Senate returned 38 of 106 Court of Appeals nominations (nearly 36%) without any final action. In contrast, of the 96 nominations to the Courts of Appeals submitted by President Reagan, just 9 (9.4%) were returned. Elizabeth A. Palmer, *For Bush's Nominees, A Tough Tribunal Awaits*, CONG. Q. WEEKLY, Apr. 28, 2001 at 902.

[45] For example, then-Senator John Ashcroft placed a hold on the nomination of Margaret Morrow to a federal District Court in California during the Clinton administration. Tim Poor, *Judge Not: If John Ashcroft Can Help It, a Lot of President Clinton's Nominees to the Bench Aren't Going to Make It*, ST. LOUIS POST-DISPATCH, Nov. 2, 1997 at 1B. In addition, in January 2000, Senator Inhofe placed a non-anonymous "blanket" hold on over 30 judicial nominations. Sarah A. Binder, *Lessons Learned From Judicial Appointments*, *in* INNOCENT UNTIL NOMINATED: THE BREAKDOWN OF THE PRESIDENTIAL APPOINTMENTS PROCESS 181 (G. Calvin Mackenzie, ed. 2001).

[46] 140 CONG. REC. S.13973 (1994) (statement of Sen. Hatch).

[47] Alan Ehrenhalt, *The Right in Congress: Seeking a Strategy*, CONG. Q. WEEKLY, Aug. 5, 1978 at 2023.

[48] Howard H. Baker, Jr., *Rule XXII: Don't Kill It!*, WASH. POST, April 27, 1993, at A17.

[49] George F. Will, *The Framers' Intent*, WASH. POST, April 25, 1993, at C7.

[50] FILIBUSTERS AND CLOTURE, *supra* note 4, at 20 ("In the hopes of eliminating the threat of a filibuster, the proponents [of a bill] may try to accommodate the interests of all Senators, or at least to convince them that a good faith effort has been made to assuage their concerns.").

[51] In 1994, the Clinton administration admitted publicly that "it should be reluctant to name anybody to a judgeship unless it could count on 61 [sic] votes in the Senate." Neil A. Lewis, *At the Bar*, N.Y. TIMES, Dec. 9, 1994 at B7. Consequently, President Clinton consulted with the Republican leadership about certain nominations and was careful to "avoid making judicial or other nominations that would provoke serious opposition in the Senate." GERHARDT, *supra* note 33, at 114.

Statement of Senator Orrin G. Hatch
Chairman, Committee on the Judiciary
United States Senate

Before the Senate Committee on the Judiciary Subcommittee on the Constitution, Civil Rights and Property Rights

on

"Judicial Nominations, Filibusters, and the Constitution: When a Majority Is Denied Its Right to Consent"

Tuesday, May 6, 2003

Mr. Chairman, thank you for holding this important hearing today. This hearing marks the beginning of an important effort by this body to critically examine a judicial confirmation process that I and many of our colleagues, including Senator Schumer, agree is broken, and to propose solutions.

I want to emphasize why I believe that the judicial confirmation process is broken. It is all too easy to find recent examples of the rupture. In fact, one week ago, as I spoke in support of the nomination of Jeffrey Sutton to the Sixth Circuit, I learned that some Senate Democrats intend to proceed with an unprecedented simultaneous filibuster of yet another circuit nominee, Justice Priscilla Owen, who has been nominated for a seat on the Fifth Circuit. This, of course, is in addition to the initial and continuing filibuster against Miguel Estrada, the first Hispanic nominee for the prestigious D.C. Circuit, to which some of our Democratic colleagues have referred as the second most important court in the nation. Both nominations are about to reach their two year anniversary -- an anniversary that, quite

frankly, the Senate ought to be ashamed to have reached without having confirmed these highly qualified nominees to the appellate bench.

Pursuant to Rule 22 of the Standing Rules of the Senate, a modern day filibuster prevents an up-or-down vote on a nomination unless cloture is invoked. Under the present application of the rule, a vote of 60 Senators is required to end debate by invoking cloture. What makes the filibusters of Miguel Estrada and Priscilla Owen so outrageous is that the Senators perpetuating this obstructionist ploy aren't demanding the opportunity for extended debate. There is no dispute that there has been plenty of debate on these nominations. Everyone has had an opportunity to be heard, and all the issues have been repeatedly scrutinized.

Instead, pro-filibuster Democrats are subjugating the will of the majority, which wants an up-or-down vote on these nominees, to the whims of the minority by demanding a supermajority vote for confirmation. Such a requirement is contrary to the plain text of the Constitution, which is unambiguous as to the five extraordinary situations in which our forefathers required a supermajority: To expel a member, to convict impeached officials, to override Presidential vetoes, to ratify treaties, and to propose Constitutional amendments. The Constitution clearly does not require a supermajority vote to confirm a judicial nominee. Indeed, I would like to know if any of my colleagues believe that a supermajority vote is needed to confirm a nominee? That is an important question.

Moreover, consistent with the tenor of this hearing, filibustering judicial nominees is simply poor public policy. It turns every judicial

appointment into a partisan political war, and threatens to erode the respect in which we hold our third branch of government – the one branch of government intended to be above political influence.

This is not to say that the Senate should proceed to act on judicial nominations without careful scrutiny. Clearly there is an appropriate role for the Senate to engage in a learned and tempered, but genuine, deliberation. But the debates on the nominations of Miguel Estrada and Priscilla Owen have lasted for hours and hours, with no real progress. The accusations that the majority simply wishes to act as a rubber-stamp ring hollow, yet Senators are prevented from exercising their constitutional advice and consent responsibility by a determined minority that has thwarted an up or down vote on these nominations.

I am firmly convinced that this is not what the Framers envisioned when they drafted the Appointments Clause of Article II, Section 2 of our Constitution. The judicial confirmation process is in dire need of reform, and I look forward to hearing today about the proposals of the esteemed witnesses Senator Cornyn has assembled.

I would also like to take this opportunity to set the record straight on an allegation in the written testimony of one of the witnesses we will hear from today, Marcia Greenberger. Ms. Greenberger's testimony noted that I described the filibuster as "one of the few tools that the minority has to protect itself and those the minority represents." The citation for this quote is to the 1994 floor debate on the nomination of Lee Sarokin to the United States Court of Appeals for the Third Circuit. Her testimony erroneously

suggests both that there was a filibuster of Judge Sarokin's nomination, and that I supported it. Here is what I actually said, placed in its proper context:

> Mr. President, one of the games that is being played around here is that whenever the majority leader wants to move something along, he files cloture, whether or not anybody has decided to use extended debate. I have heard the majority leader—who is a person I have great regard and respect for—say how beset we are with filibusters in this body.
>
> Naturally, in the last week or so of a session, there is going to be the threat of some filibusters. It is one of the few tools that the minority has to protect itself and those the minority represents. But this is not a filibuster. I find it unseemly to have filed cloture on a judgeship nomination—where I have made it very clear that I would work to get a time agreement—and make it look like somebody is trying to filibuster a Federal court judgeship.
>
> I think it is wrong, and I think it is wrong to suggest in the media that this is a filibuster situation, because it is not.
>
> I personally do not want to filibuster Federal judges. The President won the election. He ought to have the right to appoint the judges he wants to.[1]

For the record, then, there was in fact no filibuster of Judge Sarokin's nomination, and I specifically did not support a filibuster of that or any other federal judge's nomination.

Again, Mr. Chairman, I thank you for convening this important and timely hearing.

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[1] 140 Cong. Rec. S. 13973 (Oct. 4, 1994).

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May 11, 2003

The Honorable John Cornyn, Chairman
U.S. Senate Subcommittee on the Constitution
517 Hart Senate Office Building
Washington D.C. 20510

Dear Senator Cornyn:

I write to the Subcommittee as a concerned citizen,[1] to express my views about the nomination process. ***I respectfully request that this letter please be included in the record of your May 6 hearing***. As I recall, you said during the hearing that the record will be open until May 13 at 5 PM.

A minority of Senators is now seeking to establish that judicial nominees can be defeated by filibusters that are opposed by a majority of the full Senate.[2] This new precedent could have profoundly negative implications, no matter who is president or which party controls congress.

I recommend an interesting way out of this situation. Senate Rule 22 is the rule that deals with filibusters.[3] It says that any sixteen Senators can request a cloture vote to end a filibuster, and that the

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[1] The views expressed here are my own. I have authored law review and journal articles regarding the Treaty Clause of the Constitution, and the Prior Restraint Doctrine among other topics. E.g. see *Denver Journal of International Law and Policy*, Volume 23, p. 313 (1995); *Findlaw's Writ*, June 13, 2002 (www.findlaw.com). I have a J.D. from Lewis and Clark Law School, am registered to practice before the U.S. Supreme Court, and have lectured for members of the New York and Pennsylvania Bars' continuing legal education (CLE) programs, as wel as lecturing for members of the Connecticut and New Jersey bars.

[2] A minority of the full Senate voted on October 1, 1968 in favor of ending the filibuster of Abe Fortas, the vote having been 45 to 43. See generally *Congress and the Nation, Vol. II, 1965-68, A Review of Government and Politics*, at 335-336 (Cong. Quarterly Serv. 1969).

[3] Standing Rules of The Senate, Rule XXII, *Precedence of Motions*. The Senate Rules are promulgated pursuant to Art. I, Sec. 5 of the Constitution: "Each House may determine the rules of its proceedings . . . ." However, "[t]he power of the senate to prescribe rules could not be deemed omnipotent. It must be construed with reference to, and in connexion with the power to preside . . . ." Joseph Story, *Commentaries on the Constitution of the United States*, Vol. 2, Sec. 737 (1833).

filibuster will then be terminated "if" three-fifths of the Senate votes for cloture.[4] Some scholars say that these parts --- or other parts --- of Rule 22 are unconstitutional because they violate the principle of majority rule. However, I respectfully submit that these experts are jumping the gun. Senate Rule 22 allows a number of Senators to absent themselves when their names are called during a cloture roll call vote, so that there will be a tie vote, and then the Vice President of the United States can decide the outcome.[5] In other words, the Rule 22 power of sixteen Senators can be combined with the constitutional power of the Vice President, in order to achieve cloture for a nomination, by a simple majority rather than by a supermajority.

A cardinal principle for dealing with situations like this is that one should try to interpret a rule or statute so as to avoid serious constitutional problems.[6] Your subcommittee would therefore be well-advised to seek the most innocuous interpretation of Rule 22 that impinges least upon majority rule.

No one should contend that it is unmistakably clear in the language of Rule 22 that a three-fifths vote is the exclusive way to achieve cloture for nominations, and that the word "if" in Rule 22

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[4] In pertinent part, Rule 22 says the following:

> "Notwithstanding the provisions of rule II or rule IV or any other rule of the Senate, at any time a motion signed by ***sixteen Senators***, to bring to a close the debate upon any measure, motion, other matter pending before the Senate, or the unfinished business, is presented to the Senate, the Presiding Officer, or clerk at the direction of the Presiding Officer, shall at once state the motion to the Senate, and one hour after the Senate meets on the following calendar day but one, he shall lay the motion before the Senate and direct that the clerk call the roll, and upon the ascertainment that a quorum is present, the Presiding Officer shall, without debate, submit to the Senate by a yea-and-nay vote the question: 'Is it the sense of the Senate that the debate shall be brought to a close?'
>
> "And ***if that question shall be decided in the affirmative by three-fifths*** of the Senators duly chosen and sworn -- except on a measure or motion to amend the Senate rules, in which case the ***necessary affirmative vote*** shall be two-thirds of the Senators present and voting -- then said measure, motion, or other matter pending before the Senate, or the unfinished business, shall be the unfinished business to the exclusion of all other business until disposed of." Id. (emphasis added).

[5] Article I, Section 3 of the Constitution says: "The Vice President of the United States shall be President of the Senate, but shall have no vote, unless they be equally divided." This authority of the Vice President is not limited to legislation, and Vice Presidents have inherent authority to vote with regard to cloture motions, such as the vote of Vice President Thomas Marshall on February 12 and February 15 of 1915. *See* G. Kroger, "Obstruction in the House and Senate: a Comparative Analysis of Institutional Choice," Dissertation for Ph.D. in Political Science, University of California at Los Angeles (2002), Table 7.1. Incidentally, note that Article I, Section 3 of the Constitution does not bother to say how many votes the vice president has, unlike the phrase "each Senator shall have one vote" in the same Article I, Sec. 3.

[6]
> "[W]here an otherwise acceptable construction of a statute would raise serious constitutional problems, the Court will construe the statute to avoid such problems unless such construction is plainly contrary to the intent of Congress. This cardinal principle has its roots in Chief Justice Marshall's opinion for the Court in Murray v. The Charming Betsy, and has for so long been applied by this Court that it is beyond debate" (citations omitted).

DeBartolo Corp. v. Fla. Gulf Coast Trades Council, 485 U.S. 568, 575 (1988).

unmistakably means "if and only if." This standard of "unmistakability" applies when fundamental interests are implicated by the Constitution.[7] The Framers of the Constitution explained why the executive branch has a fundamental interest in having its nominees confirmed by a majority:

> "[I]t could hardly happen, that the majority of the Senate would feel any other complacency towards the object of an appointment than such as the appearances of merit might inspire, and the proofs of the want of it destroy."[8]

If Rule 22 deviates from this majoritarian principle, it must do so unmistakably, and even then there might be constitutional problems. Rule 22 does not mention any role for the Vice President, but that would have been redundant given that it is already described by the Constitution. Certainly, the Vice President's role in confirmations is not unmistakably abrogated by Rule 22 which does not mention it.

Senate Rule 22 says that a filibuster on a nomination will be ended "if" three-fifths of Senators vote to end it, but Rule 22 pointedly does not require a "necessary affirmative vote" of three-fifths.[9] The word "if" is ambiguous, and courts have recognized two very different interpretations of this word: "if" can mean either "in the event that" or it can mean "on condition that."[10] Let us suppose that "if" means "in the event that," so that the three-fifths threshold of Rule 22 is not an exclusive threshold. The Constitution itself provides an alternative threshold of a simple majority, including the Vice President of

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[7] "Congress may abrogate the States' constitutionally secured immunity from suit in federal court only by making its intention unmistakably clear in the language of the statute. The fundamental nature of the interests implicated by the Eleventh Amendment dictates this conclusion."

Atascadero State Hospital v. Scanlon, 473 U.S. 234, 242 (1985)(emphasis added).

[8] The Federalist, No. 66, Alexander Hamilton (1788).

[9] See note 4 *supra*.

[10] E.g. see *International Brotherhood of Electrical Workers v. Illinois Commerce Comm'n*, 331 Ill. App. 3d 607, 772 N.E.2d 340, 265 Ill. Dec. 302 (Fifth District, 2002):

> "Although WPS and the Commission contend that the plain and ordinary use of the word 'if' renders the provision unambiguous, we disagree, for we believe that the statute is subject to a different, equally reasonable interpretation, when the word 'if' is given its other commonly understood meaning."

Also see note 14 *infra* for a dictionary definition of "if." It is significant that Rule IV of the Senate Judiciary Committee also uses this ambigiuous word in a very similar way:

> "[D]ebate shall be terminated ***if*** the motion to bring the matter to a vote without further debate passes with ten votes in the affirmative, one of which must be cast by the minority" (emphasis added).

The Chairman of the Judiciary Committee effectively ruled on February 27, 2003 that this word "if" means "in the event that" instead of "on condition that." See 149 Cong. Rec. S3021-S3022 (2003), 108th Congress.

the United States. The language of Senate Rule 22 does not clearly abrogate this important constitutional authority of the Vice President, with respect to nomination votes.[11]

The next time that sixteen Senators request a cloture vote for Mr. Estrada or Judge Owen, there will be an alphabetical roll call vote in the Senate.[12] No Senator is permitted to vote after the decision is announced by Vice President Cheney, and therefore Mr. Cheney can announce the decision upon the tying vote of a Republican Senator who will have stepped out when his name was called (I suggest that each and every Republican Senator step out of the chamber when his or her name is called). Then the Vice President can break the tie.

In summary, a cloture vote on a nomination will succeed in the Senate if a supermajority votes for it, or if there is a simple majority including the Vice President. This scenario is very similar to the procedure by which Congress passes a bill into law; the bill will succeed if a supermajority votes for it, or if there is a simple majority with the support of the President of the United States.

As a matter of constitutional theory, it could be argued that the Treaty Clause of the Constitution is relevant here. Indeed, the Appointments Clause is immediately adjacent to the Treaty Clause in the Constitution, and the Treaty Clause does involve the issue of supermajorities.[13] A few brief observations about the Treaty Clause would now seem appropriate.

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[11] See note 5 *supra*. I take no position about whether a three-fifths Senate vote is necessary to achieve cloture regarding legislative matters, as opposed to executive matters like nominations. It may well be that the rule of construction discussed in Atascadero, *supra* note 7, does not apply to filibusters of legislation, even though it most certainly should apply to filibusters of nominees. The executive branch has a fundamental interest in having its nominations decided by a Senate majority rather than a minority, in order to ensure that nominations are decided based on merit rather than other factors. See note 8 *supra*. The relative novelty of nomination filibusters suggests that a new reading of Rule 22 would be less appropriate for legislative filibusters.

[12] Standing Rules of The Senate, Rule XII, *Voting Procedure*. This Rule states the following, in pertinent part:

> "When the yeas and nays are ordered, the names of Senators shall be called ***alphabetically***; and each Senator shall, without debate, declare his assent or dissent to the question, unless excused by the Senate; and ***no Senator shall be permitted to vote after the decision shall have been announced by the Presiding Officer***, but may for sufficient reasons, with unanimous consent, change or withdraw his vote. No motion to suspend this rule shall be in order, nor shall the Presiding Officer entertain any request to suspend it by unanimous consent." Id. (emphasis added).

[13] Article II, Section 2 of the Constitution says the following:

> "He shall have power, by and with the advice and consent of the Senate, to make treaties, provided two thirds of the Senators present concur; and he shall nominate, and by and with the advice and consent of the Senate, shall appoint ambassadors, other public ministers and consuls, judges of the Supreme Court, and all other officers of the United States, whose appointments are not herein otherwise provided for, and which shall be established by law"

The language of the Treaty Clause is very different from that of Rule 22; the word "provided" in the Treaty Clause is far more indicative of exclusivity as compared to the word "if" in Rule 22.[14] To be sure, Roger Sherman stated unequivocally and publicly during the ratification debates as follows:

> "It is provided by the Constitution that no commercial treaty shall be made by the president without the consent of two-thirds of the senators present."[15]

International accords like the North American Free Trade Agreement (NAFTA) do not necessarily fall within the framers' definition of the word "treaty." NAFTA allows the United States to get out of the deal on six months' notice without any penalty,[16] and thus NAFTA does not obligate future presidents or future congresses. It may seem odd that this alternative mode of international deal-making was not specified in Article II, Section 2 of the Constitution, just as it may seem odd that Rule 22 did not say anything about tie votes. However, the alternative simple-majority method of international deal-making has always been well-recognized, and Thomas Jefferson highly recommended it to George Washington:

> "It is desirable, in many instances, to exchange mutual advantages by Legislative Acts rather than by Treaty: because the former, though understood to be in consideration of each other, and therefore greatly respected, yet when they become too inconvenient, can be dropped at the will of either party . . . ."[17]

The Treaty Clause is exclusive as to international accords that necessarily fall within the meaning of the word "treaty," but is not necessarily exclusive as to other international accords. Obviously, the Treaty Clause has great subtleties, and it therefore offers few clear implications for the Appointments Clause. However, one of those clear implications is this: a supermajority is constitutionally required under the Treaty Clause whereas it is not under the Appointments Clause, and so a Senate Rule should

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[14] The conjunction "provided" is defined as "on the condition or understanding that," and my dictionary gives no alternative definitions. Random House Webster's College Dictionary, c. 1999, page 1063. In contrast, the word "if" is defined as "on condition that" or as "granting or supposing that." Id. at 654.

[15] "Essays on the Constitution of the United States, Published During Its Discussion by the People, 1787-1788" Edited by Paul Leicester Ford (1892). Note that this quote does not say, one way or the other, if a simple majority vote of both houses might be necessary in addition to supermajority senate approval.

[16] Article 2205 of NAFTA. The Senate's final vote on NAFTA was 61 to 38, short of the two-thirds that would have been needed for a treaty. 139 Cong. Rec. 16712-13 (1993).

[17] Thomas Jefferson, Report of the Secretary of State to the President (Jan. 18, 1791). Of course, treaties can be unilaterally revoked under domestic U.S. law whenever the U.S. chooses, but that "does not relieve the United States of its international obligation or of the consequences of violation." Restatement (Third) of Foreign Relations Law of the United States § 115.1 (1987). Jefferson's understanding of a "treaty" is supported, for example, in Federalist 64, by John Jay. An interesting question would arise if a two-thirds supermajority of congress required the president to enter into an international accord, even over his veto. It appears that the best way to solve this riddle is to say that non-treaty agreements approved by congress also require the assent of the president, because they are justified by "the combined foreign affairs powers of the congress and the president." *Treaties and Other International Agreements: The Role of the United States Senate*, Congressional Research Service (1993), page 59. In a similar way, the power of the "sixteen Senators" of Rule 22 can be combined with the power of the Vice President to break tied confirmation votes.

not be construed as requiring a supermajority for appointments unless that construction is unmistakable in the language of the Rule; even then there could well be serious constitutional problems with a supermajority requirement for appointments. I urge the subcommittee to not construe Rule 22 in a way that raises constitutional problems, at least not unless the Senate Rules Committee insists on such a construction.

The supermajority requirement of the Treaty Clause was designed, in part, to address international commitments of considerable duration that cannot be revoked without violating those commitments. In contrast, the commission of a judge can be revoked at any time.[18] In other words, the supermajority requirement of the Treaty Clause preserves our government's flexibility and liberty, whereas the availability of impeachment[19] and the requirement of good behavior[20] already accomplish those goals for the judiciary.

If some Senators want to clarify and strengthen the three-fifths clause of Rule 22, then they are free to try amending Senate Rule 22 to replace the ambiguous word "if" with something like "if and only if" or "provided that" or "on condition that." Then we could consider if such a clause is constitutional. Until such an amendment of Rule 22, the ambiguous word "if" in that Rule is insufficient to disenfranchise the Vice President of the United States, to strip the Senate majority of its power to confirm nominees, to shrink the American presidency to a fraction of its historical stature, and to destroy the independence of the judiciary.

I hope that these comments will be helpful to the Subcommittee during its deliberations about the judicial appointments process. I emphasize that the Senate is perfectly entitled to conduct a simple majority cloture vote regarding a nomination, without amending Senate Rules and without deeming any Senate Rules to be unconstitutional, provided that the Vice President is available and willing to vote.

Very Sincerely,

Andrew T. Hyman

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[18] There are various other reasons for the supermajority requirement besides the fear of foreign entanglements. For example, if an international accord is approved by only one house of congress, then that house should be very sure of itself, regardless of whether the accord commits the United States for a considerable duration. Incidentally, James Madison wrote in Federalist No. 62 that six years is a "considerable" duration.

[19] Article II, Section 4, U.S. Constitution.

[20] Article III, Section 1, U.S. Constitution.

from the office of

Senator Edward M. Kennedy

of Massachusetts

FOR IMMEDIATE RELEASE
May 6, 2003

CONTACT: Stephanie Cutter
(202) 224-2633

STATEMENT OF SENATOR EDWARD M. KENNEDY ON THE CONSTITUTIONAL ROLE OF THE SENATE IN THE JUDICIAL NOMINATIONS PROCESS

The Constitution gives a strong role to the Senate in confirming federal judges. Both the text of the Appointments Clause of the Constitution and the debates over its adoption make clear that the Senate should play an active and independent role in selecting judges.

The Constitutional Convention met in Philadelphia from late May until mid-September of 1787. On May 29, 1787, the Convention began its work on the Constitution with the Virginia Plan introduced by Governor Randolph, which provided "that a National Judiciary be established, to be chosen by the National Legislature." Under this plan, the President had no role at all in the selection of judges.

When this provision came before the Convention on June 5th, several members were concerned that having the whole legislature select judges was too unwieldy. James Wilson suggested an alternative proposal that the President be given sole power to appoint judges. That idea had almost no support. Rutledge of South Carolina said that he "was by no means disposed to grant so great a power to any single person." James Madison agreed that the legislature was too large a body, and stated that he was "rather inclined to give [the appointment power] to the Senatorial branch" of the legislature, a group "sufficiently stable and independent" to provide "deliberate judgments."

A week later, Madison offered a formal motion to give the Senate the sole power to appoint judges and this motion was adopted without any objection. On June 19th, the Convention formally adopted a working draft of the Constitution, and it gave the Senate the exclusive power to appoint judges.

On July 18th, the Convention reaffirmed its decision to grant the Senate the exclusive power. James Wilson again proposed "that the Judges be appointed by the Executive" and again his motion was defeated. The issue was considered again on July 21st, and the Convention again agreed to the exclusive Senate appointment of judges. In a debate concerning the provision, George Mason called the idea of executive appointment of federal judges a "dangerous precedent."

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Not until the final days of the Convention was the President given power to nominate Judges. On September 4th, two weeks before the Convention's work was completed, the Committee proposed that the President should have a role in selecting judges. It stated: "The President shall nominate and by and with the advice and consent of the Senate shall appoint judges of the Supreme Court."

The debates, make clear, however, that while the President had the power to nominate judges, the Senate still had a central role. For instance, Governor Morris of Pennsylvania described the provision as giving the Senate the power "to appoint Judges nominated to them by the President."

The Convention having repeatedly rejected proposals that would lodge exclusive power to select judges with the Executive Branch, could not possibly have intended to reduce the Senate to a rubber stamp role.

The reasons given by delegates to the Convention for making the selection of judges a joint decision by the President and the Senate are as relevant today as they were in 1787. The framers refused to give the power of appointment to a "single individual." They understood that a more representative judiciary would be best served by giving members of the Senate a major role.

Any claim that the Senate does not have the right to an active role in the judicial nomination process lacks foundation.

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Statement of Douglas W. Kmiec
Dean & St. Thomas More Professor of Law
The Catholic University of America Law School
Before the Subcommittee on the Constitution, Civil and Property Rights
of the U.S. Senate Judiciary Committee
May 6, 2003

Mr. Chairman, thank you for this opportunity to appear before you to discuss the relationship between the Constitution, the procedural rules that affect the Senate's evaluation of judicial nominees. As you know, I was privileged to serve as constitutional legal counsel to President Reagan and the first President Bush, and I have taught constitutional law for a quarter century at several universities, including Notre Dame, Pepperdine, and Catholic Universities.

It is fair to say that the constitutionally-envisioned process for judicial nomination and confirmation is broken, and that it has been for some time. The executive and legislative branches have been at loggerheads for twenty years or more, and while the Democratic and Republican voices occasionally exchange roles, the arguments are the same. Presidents complain that nominees of high intellect, integrity and temperate demeanor are being rejected on partisan or ideological grounds. The political opposition to the President in the Senate for its part makes like complaint but in reverse, claiming the President is using a partisan litmus test to stack the judicial deck.

In one sense, these arguments are as old as the Republic. Adams sought to populate the federal bench with federalists and the anti-federalists in league with Jefferson sought to deny him this ability. What is different about the modern context is the procedurally problematic, and arguably, constitutionally questionable, manner in which both Democratic and Republican partisans have operated. On both sides of the aisle during different eras, the Senate judiciary committee has ignored presidential nominees and deprived them of hearings. Both Democrats and Republicans have used hearings as a device to short-circuit full Senate consideration, by putatively rejecting nominees on committee, rather than full Senate, votes. And presently, the warfare has escalated to the point where the Senate, otherwise highly respectful of committee deliberation, is ignoring, itself, – that is nominees reported out of committee are being blocked from floor consideration by means of constitutionally dubious filibuster.

All of this delay results in what nonpartisan judicial administrators find to be "judicial emergencies" in a significant number of jurisdictions. Since these emergencies are concentrated on the litigants seeking to have civil and economic liberties vindicated through judicial process, they go unreported by popular media. There are few good visuals that the evening news can employ of citizens being harmed by judicial delay – but the harms are real, in the federal laws that go unenforced, the businesses harmed, and the injuries that are not redressed.

The harm of executive-legislative paralysis over judicial appointment also has insidious

effect on the quality of women and men drawn to this service. It is well known that judicial salaries are a fraction of what an accomplished lawyer could earn for his or her family in private practice. Nevertheless, it is reasonable to speculate that modest salary has less of a dampening effect than delay and the coarse partisan caricature that is now used to oppose judicial nominees. The mounting of political campaigns for and against judicial nominees now begins on rumor of one's nomination, and as a result, many who might accept reduced income for public service are not willing to subject themselves and their families to scurrilous attack over an extended period that the broken confirmation process inspires.

What is to be done?

My advice is simple: follow the law of the Constitution. The original understanding gives unfettered nomination authority to the President. So too, the text allows the full Senate to reject any nominee for any reason, though commentary at the founding supposed that the reasons would have far more to do with intellectual quality or capability than partisan disagreement with the nominee's judicial perspective. Beyond that, President Bush has put the matter simply and directly: "the Senate has a constitutional responsibility to exercise its advice and consent function and hold up-or-down votes on all judicial nominees within a reasonable time after nomination."

Now if the response to this is that the Senate, by constitutional text, has sweeping authority to determine its own rules under Article I, section 5, that is, with respect, an incomplete and evasive response. As the Supreme Court unanimously held in *United States v. Ballin* (1892), "[t]he constitution empowers each house to determine its rules of proceedings. It may not by its rules ignore constitutional restraints or violate fundamental rights, and there should be a reasonable relation between the mode or method of proceeding established by the rule and the result which is sought to be attained." In a constitutional system, power, like freedom, is not without limit, and the exercise of one provision to thwart the reasonable nominating discretion of the executive and undermine the functioning of the judiciary is subversive of the separation of powers and the constitutional system.

This is especially so when adopted senate rules disregard the principal of majority governance by imposing textually unauthorized super-majority requirements, and where those supermajority requirements are the product of rules never adopted by the current Senate.

The Constitution provides for majority rule, as an implied aspect of the consent of the governed, wherever the document by conscious choice has not specified an alternative process requiring a greater vote. In seven sections of the Constitution, a greater vote than majority is specified – for example, in Article I, section 7 providing for the override of a presidential veto by two-thirds of both Houses or the provisions in Article II providing for Senate ratification of treaty by two-thirds.

There is no comparable provision for judicial nominations, and yet, two recent nominees reported favorably by this committee to the full Senate cannot obtain an up or down vote without

surpassing the 60 vote requirement needed to close debate.

Now as a matter of form, it can be argued that this 60 vote requirement relates not to the Senate's approbation of a nominee but simply to cloture. So too, it can be argued that a supermajority has been required to close debate for a century or more, and therefore, it is too late in the day to object.

These are arguments in constitutional evasion and noncooperation, they are not worthy of what is rightly referred to as the greatest deliberative body in the world. For that reason alone, the Senate – in the interest of maintaining the integrity of its own process – should have a desire to not apply supermajority cloture requirements where doing so threatens the separation of powers.

There may also be a constitutional duty on the Senate not to continue this practice. The Senate rules related to cloture are holdover rules from a previous Senate that have never been adopted. Senate Rule V provides that Senate rules are continuing, even as the Senate, by constitutional design, is not a continuing body. It cannot be. The framers carefully provided for staggered terms, whereby one-third of the Senate would stand for election every two years. This ensures accountability and Senate responsiveness to the popular will, and failure to acknowledge this new composition by failing to give each newly constituted body an opportunity to affirm, amend, or repeal pre-existing Senate rules denies the meaning of these elections.

The likelihood of constitutional injury is all the more obvious in light of Senate Rule XXII which imposes a two-thirds requirement of those present and voting to secure cloture on any motion to change the rules. Senate Rule V which imposes these rules on the newly constituted Senate (which is denominated by its own number, selects its own officers, adjusts committee assignments, and otherwise reveals how the Senate is not a "continuing" body) violates fundamental law as old as Blackstone, who observed that "Acts of parliament derogatory from the power of subsequent parliaments bind not." Likewise, the Supreme Court has repeatedly held that "the legislature does not have the power to bind itself in the future."

Again, it is understandable why not. For the political process to remain representative and accountable, "every succeeding Legislature possesses the same jurisdiction and power . . . as its predecessors. The latter must have the same power of repeal and modification which the former had of enactment, neither more nor less." *Ohio Life Ins. and Trust Co. v. Debolt* (1853). The precept has never been doubted. Indeed, the Supreme Court would arguably apply the highest scrutiny to evaluating any legislation that "restricts those political processes which can ordinarily be expected to bring about repeal of undesirable legislation." *U. S. v. Carolone Products Co.* (1938).

Who will tell the Senate that it may be acting unconstitutionally? On one level, this is a question of justiciability. There is good reason for the judiciary to seek to avoid this issue to avoid embarrassment to a co-equal branch. And there is precedent, like *Nixon v. United States*,

dealing with the Senate's exclusive power to try impeachments, which illustrate the level of the Court's appropriate deference. But appropriate deference is not default, and factors which stayed the judicial hand in *Nixon* are not present in this context. In *Nixon,* had judges inserted themselves to superintend Senate impeachment practices, they would be undermining their own parallel authority to hear criminal issues related to impeachment, and more, weakening one of the only checks upon the judiciary, itself. These considerations for deference are not present here. Rather, a disappointment nominee or a newly elected member of the Senate with no voice in the rules that limit his electoral service could persuasively argue that the failure of the Court to intervene is fully necessary to address the injury to the body politic.

It is interesting that two former Vice-Presidents of different parties (Nixon (1957) and Humphrey (1969), sitting as the presiding officer of the Senate, have ruled that the current membership of the Senate is not bound by Senate Rule V's imposition of the rules of a different, prior body. That the Humphrey ruling was rejected by the full Senate out of the politics of the day hardly settles the constitutional issue.

The Senate has a solemn responsibility in the consideration of judicial nominations. There has been a troubling failure on the part of both parties to meet this responsibility. The Senate need not defer to the judicial nominations of the President, but it should not ignore or defeat them by means not envisioned in the Constitution, itself. Let the debate be fair and open and concluded by all members of the Senate. That practice can easily be established in newly adopted Senate Rules that allow for debate to be closed on judicial nominations by simple majority.

As I have publicly written, denying Mr. Estrada or Justice Owen their confirmation vote by the full Senate is no more legitimate than if the outgoing Democratic majority of the previous Senate had attempted by rule to prevent repeal or modification of any Democratically-sponsored enactment except by super-majority.

It is not just the present nominees who are being injured; it is the right of Senate members not to have their representation diluted or nullified, and in that, it is the right of all of us who voted for those members that is being wrongly – if not unconstitutionally – filibustered.

Statement of Senator Herb Kohl
Constitution Subcommittee Hearing: Judicial Nomination Process
Tuesday, May 6, 2002 at 2:00 p.m. in SD-226

Herb Kohl

Mr. Chairman, we meet today to consider the federal judicial nomination process. My purpose today is not to assess blame for the divisiveness that many see as all too evident in today's judicial nomination process. Instead, I would like to discuss how well the judicial nominations process works in Wisconsin in the hope that others may take note.

All prospective federal judicial nominees in Wisconsin must first apply to the independent and bipartisan Wisconsin Federal Nominating Commission. The by-laws of the Commission make every effort to ensure the judicial nominations process is bipartisan and that its membership fairly reflects the spectrum of political views. The Commission has eleven members. In cases when, as today, the President is from a different political party from Wisconsin's two Senators, the senior elected official of the President's party chooses four members, each Senator chooses two members, the State Bar nominates two, and the Dean of either the University of Wisconsin Law School or Marquette University Law School (depending on the geographic location of the open judgeship) fills out the remaining seat on the Commission and serves as Chairman. The Commission considers the applications of the candidates, closely reviews their qualifications, and interviews them at length. After this process is complete, the Commission chooses from the vast pool of candidates and recommends between four and six individuals for nomination for each judicial vacancy.

A federal nominating commission to recommend choices for vacancies in the federal courts in Wisconsin dates back to 1979. Since that time, Wisconsin's judicial nominees have all been the result of a bipartisan, consensus driven system that strives to recommend individuals who are highly regarded throughout the state and unlikely to be ideological extremists of either party. The work of this independent, bipartisan commission has resulted in nominees of the highest caliber who we can recommend to the President with a great degree of confidence in their legal skills, judgment, fairness and temperament. The success of the nomination commission can be seen in its results – of the judicial nominations since 1979, none has resulted in any significant controversy and all have been confirmed very quickly. It has been our experience through Democratic and Republican administrations, and Democratic and Republican senators, that this process has worked, and worked well, for Wisconsin. It is my desire that the Commission will continue to serve Wisconsin as it chooses future District Court and Circuit Court judges long after my service here.

The contrast between the current judicial nomination controversy and the smooth functioning of the Wisconsin judicial nomination process could not be more pronounced. The Wisconsin model works to ensure the nomination of qualified candidates and avoids nominees who are simply out of the mainstream. Further, our judges are confirmed with a minimum of delay. Using our model would greatly reduce the partisan tensions that many believe are occurring with ever increasing frequency when we consider judicial nominations.

Mr. Chairman, the voters who sent us to Washington want qualified, talented and fair-minded men and women to fill these judgeships, people who assume these vital positions without rigid ideological leanings, and whose only prejudice is in favor of the Constitution and justice. I believe the Wisconsin model of independent, bipartisan state nomination commissions is one proven method to assure the nomination of such people, and to restoring a judicial confirmation process about which we can all be proud.

Statement of Senator Patrick Leahy
Hearing before the Constitution Subcommittee,
Senate Judiciary Committee
May 6, 2003

I look forward to a fair, balanced and bipartisan discussion of the judicial nomination and confirmation process. Since July 2001 a number of Senators have worked very hard to repair the damage done during the years 1995 through the early part of 2001. We made significant progress. Unfortunately our efforts have received little acknowledgment and the current Administration continues down the strident path of confrontation and court packing rather than working with Senators of both parties to identify and nominate consensus, mainstream nominees.

While the nation's unemployment rate rose last month to 6 percent. The vacancy rate on the federal judiciary has been lowered to 5.7 percent. While the number of private sector jobs lost since the beginning of the Bush Administration is 2.7 million, almost 9 million Americans are now out of work, and unemployment has risen by more than 45 percent, Democrats in the Senate have cooperated in moving forward to confirm 123 of this President's judicial nominees, reduce judicial vacancies to the lowest level in years, and reduce federal judicial vacancies by almost 60 percent. Yet the Republican-led Senate remains obsessed with seeking to force through the most divisive of this President's controversial, ideologically-chosen nominees.

In just the last two years 123 of the President's judicial nominees will have been confirmed. One hundred of those confirmations came during the 17 months of Democratic leadership of the Senate. No fair-minded observer could term that obstructionism. By contrast, during the six and one-half years during which Republicans controlled the Senate and President Clinton's nominations were being considered, they averaged only 38 confirmations a year. During the last two years of the Clinton administration, the Senate confirmed only 73 federal judges. Combining the 1996 and 1997 sessions, Republicans in the Senate allowed only 53 judges to be confirmed in two years, including only seven new judges to the circuit courts. One entire congressional session, the Republican-led Senate confirmed only 17 judges all year and none at all to the circuit courts. The Senate confirmed 72 judges nominated by President Bush last year alone under Democratic leadership.

The fact is that when Democrats became the Senate majority in the summer of 2001, we inherited 110 judicial vacancies. These are the facts. Over the next 17 months, despite constant criticism from the Administration, the Senate proceeded to confirm 100 of President Bush's nominees, including several who were divisive and controversial, several who had mixed peer review ratings from the ABA and at least one who had been rated not qualified. Despite the additional 40 vacancies that arose, we reduced judicial vacancies to 60, a level below that termed "full employment" on the federal judiciary by Senator Hatch.

Since the beginning of this year, in spite of the fixation of the Republican majority on the President's most controversial nominations, we have worked hard to reduce judicial vacancies even further. As of today, the number of judicial vacancies is at 47. That is the lowest it has been in several years. That is lower than it ever was allowed to go at any time during the entire eight years of the Clinton Administration. We have already reduced judicial vacancies from 110 to 47, in less than two years. We have reduced the vacancy rate from 12.8 percent to 5.6 percent, the lowest it has been since 1990. With some cooperation from the Administration think of the additional progress we could be making.

The President promised to be a uniter not a divider, but he has continued to send us judicial nominees that divide our nation and, in the case of Miguel Estrada, he has even managed to divide Hispanics across the country. The nomination and confirmation process begins with the President, and I urge him to work with us to find a way forward to unite, instead of divide, the nation on these issues.

Republican talking points will likely focus on the impasse on two of the most extreme of the President's nominations rather than the 123 confirmations and the lowest judicial vacancy rate in 13 years. They will ignore their own recent filibusters against President Clinton's executive and judicial nominees in so doing.

What is unprecedented about the Estrada matter is that the Administration and Republican leadership have shown no willingness to be reasonable and accommodate Democratic Senators' request for information traditionally shared with the Senate by past administrations. That we have endured numerous cloture votes is an indictment of Republican intransigence on this matter, nothing more. What is unprecedented is that there has been no effort on the Republican side to work this matter out, as these matters have always been worked out in the past. What is unprecedented is the Republican insistence to schedule cloture vote after cloture vote without first resolving the underlying problem caused by the Administration's inflexibility.

What is unprecedented about the Owen nomination is that it was made at all. Judge Owen had a fair hearing and was given fair consideration before the Judiciary Committee last year. We proceeded is spite of the fact that the Republican majority had refused to proceed with any of President Clinton's Fifth Circuit nominees during his last four-year term. Never before in our history has a President renominated for the same vacancy someone voted down by the Judiciary Committee.

I wish this hearing had been organized in a truly bipartisan manner with cooperation and equal numbers of witnesses. Unfortunately, the Ranking Democrat only learned about it when given the minimum one-week notice required by Senate Rules last week and the minority is allowed to invite only one-third of the witnesses. That is not a good start to what should be a fair, balanced and bipartisan discussion. Thus, this is not a hearing that all interested Senators have considered

and collaborated on over a period of time and in which they have worked jointly allowing equal time and equal witnesses, as is our better practice. I commend Senator Feingold for his work in preparing for this hearing and for being one of the most constructive and conscientious members of this Committee on these matters.

I fear that this hearing will serve as an ironic bookend to the hearings held in 1997 by former Senator Ashcroft. In Senator Ashcroft's hearings former Attorney General Meese, a future Deputy White House Counsel and other partisan Republicans sought to justify the Republican majority's stalling tactics for slowing down consideration of President Clinton's judicial nominees before the United States Senate. In the entire 1996 session the Republican majority would only confirm 17 district judges all year and refused to confirm any judges at all to the Courts of Appeals. Indeed, except for the 1998 session, which followed strong criticism from Chief Justice Rehnquist of the Republican stalling, starting with the 1996 session and continuing to the change in Senate majority in the summer of 2001, the Republican majority would never confirm as many as 40 judges any year and overall, from 1995 through the summer of 2001, averaged only 38 confirmations a year with only seven to the Courts of Appeals. That explains why federal judicial vacancies rose from 63 to 110 on the Republican watch and circuit vacancies more than doubled from 16 to 33.

Of course, during those years there were no Republican-led hearings calling for prompt action or fair consideration of President Clinton's moderate judicial nominees. To the contrary, Senator Ashcroft held hearings designed to justify the slowdown. Senator Ashcroft and others perfected the practice of using anonymous holds both in Committee and on the floor so that judicial nominees were stalled for months and years without consideration. Scores of nominees never received hearings, at least 10 who received hearings never received Committee consideration and those who were ultimately considered often were delayed months and years.

Beginning in July 2001, Democrats started bringing accountability and openness to the process. In the 17 months of the Democratic Senate majority we held more hearings on more judicial nominees, held more Committee votes and more Senate votes than before. We were able virtually to double the pace and productivity of the process. We did away with the secrecy of the "blue slip" and the anonymous hold. We considered President Bush's nominees fairly, responsibly and in those 17 months confirmed 100 of this President's nominees. We reversed the destructive trends with respect to the numbers of vacancies and length of time that nominees had to wait to be considered. While we could not consider all nominations simultaneously, we considered more, more quickly than in the preceding years. The Democratic majority inherited 110 judicial vacancies including a record 33 to the circuit courts. By December 2002, we were able through hard work to outpace the 40 additional vacancies that had arisen and reduce the remaining vacancies to 60, including 25 to the circuit courts. We have continued to cooperate and today the remaining vacancies number 47, including 20 on the circuit courts. This is the lowest vacancy number and lowest vacancy rate in 13 years.

Senator Hatch used to say, when President Clinton was nominating moderates to more than 100

vacancies, that there was no vacancies crisis. He used to say that he considered 67 vacancies to be "full employment" on the federal judiciary. Today we are well short of 100 vacancies and well beyond what he used to term "full employment" with 47 vacancies. Today I expect the Senate to consider and confirm both Judge Cecilia Altonaga, who will be the first Cuban-American woman to serve on the federal judiciary, and Patricia Minaldi, and thereby bring the remaining vacancies down to 47. The Committee continues to report nominations to fill additional vacancies, as well, with another hearing scheduled for tomorrow.

This is not to say that our work is done. Last week, with the help and hard work of the Senate Leadership we were able to make additional progress. Last Wednesday, Majority Leader Frist used that word "progress" to describe how we have been able to resolve complications caused by the manner in which these nominations were forced through the Judiciary Committee. Last Thursday, I thanked the Majority Leader and the Democratic Leader and others for their efforts in this regard and for working with us to bring the nomination of Judge Edward Prado to a vote without further, unnecessary delay.

Yesterday the Senate debated and voted on the nomination of Deborah Cook to the Sixth Circuit. She is the fourth nominee of President Bush to be confirmed to the Sixth Circuit in less than two years. During the entire second term of President Clinton, the Republican majority would not hold hearings or consider a single one of President Clinton's nominees to the Sixth Circuit – not Judge Helene White, not Kathleen McCree Lewis, not Professor Kent Markus. Nonetheless, while I was chair of the Judiciary Committee we proceeded to consider and confirm two conservative nominees of President Bush to the Sixth Circuit and this year the Senate has proceeded to confirm two more.

The work of the Senate would be more productive if this Administration were more interested in filling vacancies with qualified, consensus nominees rather than packing the federal courts with activist judges. The nominations and confirmation process begins with the President. Far from being someone who has sought consensus and to unite us on judicial nominees, this President has used judicial nominees as a partisan weapon and sought sharply to tilt the courts ideologically. That is unfortunate. Some of us have urged another course, a course of cooperation and conciliation, but that is not the path this Administration has chosen. Yet, in spite of the historically low level of cooperation from the White House, the Senate has already confirmed 123 of President Bush's judicial nominees, including some of the most divisive and controversial sent by any President.

Last week the Senate proceeded to a vote on the nomination of Jeffrey Sutton to the Sixth Circuit. He received the fewest number of favorable votes of any nominee in almost 20 years with 52. He is the third controversial judicial nominee of this President against whom more than 40 negative votes were cast, yet those three nominees were not stalled and not subjected to a filibuster.

Our Senate leadership, both Republican and Democratic, have worked to correct some of the

problems that arose from some of the earlier hearings and actions of this Committee. Last week we were able to hold a hearing on the nomination of John Roberts to the District of Columbia Circuit. We are all working hard to complete Committee consideration of that nomination at the earliest opportunity. Thus, a number of additional, controversial nominations are in the process of being considered and will be considered by the Senate in due course.

My point is to underscore that we have made and are making real progress from the thoroughgoing obstruction from 1996 until 2001. While "the glass is not full," it is more full than empty and more has been achieved than some want to acknowledge. One hundred and twenty-three lifetime confirmations in less than two years is better than any two-year period from 1995 through 2000. We have reduced judicial vacancies to 47, which is the lowest number and lowest vacancy percentage in 13 years. During the entire eight-year term of President Clinton it was never allowed by Republicans to get that low. We have made tremendous progress and I want to thank, in particular, the Democratic members of this Committee for their hard work in this regard. These achievements have not been easy.

The Administration has chosen confrontation with the Congress, with the Senate and with this Committee. We are now proceeding at three to four times the pace Republicans maintained in reviewing President Clinton's judicial nominees. We have reached the point where this Committee and the Senate are often moving too fast on some nominations and we risk becoming a racing conveyor belt that rubber stamps rather than examines these lifetime appointments. Democrats have worked hard to repair the damage to the confirmation process and achieved significant results. Republicans seem merely results oriented and interested in ideological domination of the federal courts.

Apparently, the topic for today's hearing is the propriety of the filibuster in connection with judicial nominations. I trust the Republican majority will not overlook the precedent on this question. Republicans not only joined in the filibuster of Abe Fortas to be Chief Justice of the United States Supreme Court, they joined in the filibuster of Stephen Breyer to the 1st Circuit, Judge Rosemary Barkett to the 11th Circuit, Judge H. Lee Sarokin to the 3rd Circuit, and Judge Richard Paez and Judge Marsha Berzon to the 9th Circuit. The truth is that filibusters on nominations and legislative matters and extended debate on judicial nominations, including circuit court nominations, have become more and more common on the initiative of Republicans working against Democratic nominees. Now that a Republican President, intent on packing the courts with ideologues, has seen two nominees delayed by filibusters, and even though the other 123 judges he nominated have been confirmed, partisans want to change the rules to make it easier for this President to get his way.

Of course, when they are in the majority Republicans have more successfully defeated nominees by refusing to proceed on them and have not publicly explained their actions, preferring to act in secret under the cloak of anonymity. From 1995 through 2001, when Republicans previously controlled the Senate majority, Republican efforts to defeat President Clinton's judicial nominees most often took place through inaction and anonymous holds for which no Republican Senator could be held accountable. Republicans held up almost 80 judicial nominees who were not acted

upon during the Congress in which President Clinton first nominated them and eventually defeated more than 50 judicial nominees without a recorded Senate vote of any kind, just by refusing to proceed with hearings and Committee votes. These are just the sorts of stealth tactics Democrats have rejected.

Beyond judicial nominees, Republicans also filibustered the nomination of Executive Branch nominees. They successfully filibustered the nomination of Dr. Henry Foster to become Surgeon General of the United States in spite of two cloture votes in 1995. Dr. David Satcher's subsequent nomination to be Surgeon General also required cloture but he was successfully confirmed.

Other Executive Branch nominees who were filibustered by Republicans included Walter Dellinger's nomination to be Assistant Attorney General. Two cloture petitions were required to be filed on that nomination and both were rejected by Republicans. We were able finally to obtain a confirmation vote for Professor Walter Dellinger after significant efforts and he was confirmed to be Assistant Attorney General with 34 votes against him. He was never confirmed to his position as Solicitor General because Republicans had made clear their opposition to him. In addition, in 1993, Republicans objected to a number of State Department nominations and even the nomination of Janet Napolitano to serve as the U.S. Attorney for Arizona, resulting in more cloture petitions. In 1994, Republicans successfully filibustered the nomination of Sam Brown to be an Ambassador. After three cloture petitions were filed, his nomination was returned to President Clinton without Senate action. Also in 1994, two cloture petitions were required to get a vote on the nomination of Derek Shearer to be an Ambassador. And it likewise took two cloture petitions to get a vote on the nomination of Ricki Tigert to chair the FDIC. So when Republican Senators now talk about the Senate Executive Calendar and presidential nominees, they must be reminded that they recently filibustered many, many qualified nominees.

Filibusters should be and are rare. That there are two this year is a direct result of the strategy of confrontation sought by the White House and Senate Republicans. The Administration holds the key to ending the Estrada impasse, as it has for the last year. It should cooperate with the Senate and provide access to his work papers, following the example set by all previous Republican and Democratic administrations. The renomination of Judge Owen was most ill-advised and unprecedented. Her nomination had already been rejected after fair hearings and thorough debate and a Committee vote last year. Some apparently want to rewrite the rules so that this President can have every nominee confirmed, no matter how divisive and controversial, by the Republican Senate majority.

Recently, I heard a respected Republican and senior advisor to the Majority Leader describe cloture as "the fulcrum on which you balance the rights of the individual and the rights of the institution." He explained how important the rights of the minority party are in the Senate and how Senate rules are deliberately constructed to reflect that and protect the minority. That Republicans are now intent on rewriting longstanding Senate rules shows just how partisan and ends-oriented they have become.

The President promised to be a uniter not a divider, but he has continued to send us judicial nominees that divide our nation. He has even managed to divide Hispanics across the country with the nomination of Mr. Estrada. He has managed to outrage disabled individuals by his nomination of Jeffrey Sutton. The nomination and confirmation process begins with the President. I, again, urge him to work with us to identify and nominate qualified, consensus, mainstream nominees who all Americans can be confident will be fair and impartial and to abandon his ideological court packing scheme.

# # # # #

May 12, 2003

The Honorable John Cornyn
Chairman of the Senate Subcommittee on the
Constitution, Civil Rights & Property Rights
Washington, DC

Dear Chairman Cornyn:

We write to express our opinion, based on several years of research, that the Constitution does not permit entrenchment of the filibuster rule against change by a majority of the Senate. Although the filibuster rule itself is a time-honored senatorial practice that is constitutional, an entrenchment of the filibuster rule, or of any other legislative rule or law, that would prevent its repeal by more than a majority of a legislative chamber, is unconstitutional. Therefore, an attempt to prevent a majority of the Senate from changing the filibuster rule, through a filibuster of that proposed change in the Senate rules, would be unconstitutional

The Constitution allows each legislative house broad discretion in selecting its legislative rules, including rules relating to the support needed to take a vote and to pass a measure. Under the Rules of Proceedings Clause of Article I, section 5, clause 2, the Senate has clear authority to enact the filibuster rule as well as other supermajority rules. The main limitation on the Senate's authority to enact a legislative rule is that the rule cannot violate another constitutional provision.

The Senate rule that would prevent a majority of the Senate from the opportunity to vote on whether to repeal or modify the filibuster rule would violate an important and traditional constitutional principle embedded in the vesting of legislative power to the Congress in Article I, section I: that no house may entrench a legislative rule or law against modification by a future majority of that house. Thus, while the Constitution allows the Senate to enact a filibuster rule, it forbids the Senate from entrenching that rule.

This understanding of the legislative power has strong support in both constitutional structure and history. As a matter of structure, the Constitution established an extremely strict constitutional amendment process that requires two-thirds of Congress to propose an amendment and then three-quarters of the states to ratify one. Legislative entrenchment, however, would allow the Senate to pass a rule that could not be repealed by a subsequent Senate and therefore would operate as a type of quasi-constitutional law. For example, instead of enacting a constitutional amendment to prohibit Congress from passing unbalanced budgets, the Senate could pass a rule that would prevent itself from taking this action and then entrench that rule against change by prohibiting its future modification or by requiring a 90 percent vote for such modification. It is extremely unlikely that the Framers would have allowed each house to pass a measure that so resembles a constitutional amendment through a lenient procedure such as majority passage through a single house, when they established such a strict procedure for

constitutional amendments.

History also provides powerful support for the notion that a house may not entrench its rules against amendment by a majority. When the Constitution was written, Anglo-American legislatures did not generally, if ever, entrench. As Blackstone stated in his Commentaries, each legislature "is always of equal . . . authority" and therefore "Acts of parliament derogatory from the power of subsequent parliaments bind not." Americans inherited this understanding that the legislative power did not include the authority to entrench when they established an independent nation. Thus, one of the most famous statutes in American history – the 1786 Virginia Statute for Religious Freedom, which was written by Thomas Jefferson and introduced by James Madison – states in the statute itself that even the justly celebrated principle of religious freedom, which was regarded as a natural right, could not be entrenched against future repeal. The statute provides: "And though we know this assembly elected by the people for ordinary purposes of legislation only, have no power to restrain the acts of succeeding assemblies, constituted with powers equal to our own, and that therefore to declare this act irrevocable would be of no effect in law; yet we are free to declare, and do declare, that the rights hereby asserted are of the natural rights of mankind, and that if any act shall be hereafter passed to repeal the present, or to narrow its operation, such act will be an infringement of natural right."

This understanding of the legislative power was also applied to the United States Constitution. James Madison, the father of the Constitution, told the House of Representatives in 1790 that the Congress did not have the authority to entrench legislation: "It is not in our power to guard against a repeal. Our acts are not like those of the Medes and Persians, unalterable. A repeal is a thing against which no provision can be made"

Under our Constitution, then, the Senate can enact and enforce a rule like the filibuster rule that requires a supermajority of the legislature to take votes or certain actions. Similarly other rules, such as the committee system, which may also deprive a majority of the Senate from taking action, are also constitutional. These rules can be a valuable part of our constitutional democracy, serving a variety of significant purposes. Yet, there is an important distinction between legislative supermajority rules and entrenched rules. Although supermajority rules prohibit a majority from taking action, they allow a majority to eliminate the rule. Entrenched rules, by contrast, prevent a future majority from repealing or amending the rule.

This analysis of the Senate's constitutional powers is also consistent with the distinctive role of the Senate in our constitutional system. One important distinction between the Senate and the House of Representatives is that the Senate is a continuing body with enduring rules, whereas the House of Representative's rules terminate at the end of every Congress and must be enacted anew every two years. The continuing nature of the Senate rules, however, does not justify nor require the entrenchment of these rules. So long as a majority of the Senate can amend the rules, there is no constitutional difficulty with the continuing nature of the rules. Put differently, the continuing nature of the rules does not require that these rules be entrenched against change.

Another distinction between the two houses is that the Senate has attempted to emphasize collegiality and deliberativeness. The filibuster rule is often thought to contribute to these norms by allowing a Senate minority to continue debating a matter, even though a majority would vote to end debate. But the Constitution does not forbid the operation of the filibuster. The Constitution only forbids a minority from blocking a change in the filibuster rule and therefore permits the Senate to continue its emphasis on deliberateness by continuing to enforce the filibuster in most instances.

It should be underscored that the filibuster rule is still likely to be effectual even though a majority can amend it. There is every reason to believe that the filibuster will continue to operate and to prevent a vote, even though a majority of the Senate would want to end debate and could, theoretically, vote to exempt that filibuster from the filibuster rule. Even if a majority of the Senate supports ending a particular filibuster, that does not mean that majority would be willing to amend the filibuster rule generally or to create an exception for that particular filibuster. Senators might be reluctant to amend the filibuster rule out of a desire to operate the Senate in accordance with traditional practices that have been thought to contribute to orderly decisionmaking in a variety (but not all) circumstances. Indeed, at present, Senate minorities often refrain from filibustering bills even though these minorities oppose the bills, because a filibuster is regarded as an extraordinary action – and that occurs under a regime where the filibuster is part of the rules. The Senate is likely to be even more reluctant to amend the rules.

In testimony, Professor Michael Gerhardt relies upon a recent essay by Professors Eric Posner and Adrian Vermeule arguing that the Constitution permits entrenchment, but that reliance is misplaced for at least two reasons. First, Posner and Vermeule's article acknowledges that the "Supreme Court sees [the prohibition on entrenchment] as a constitutional axiom" and that "the academic literature takes the rule as given, universally assuming that legislative entrenchment is constitutionally or normatively objectionable." Thus, whatever the scholarly merits of Posner and Vermeule's article, it cannot be understood as stating the law. Second, the two of us have just published an essay, including a critique of Posner and Vermeule's theory, which in our view refutes their constitutional claims. *See Symmetric Entrenchment: A Constitutional and Normative Theory*, 89 Va. L. Rev. 385 (2003).

Professor Gerhardt also quotes an earlier article, where we did not take a position on the constitutionality of the Senate rules allowing a filibustering of a change in the filibuster rule. *See* John O. McGinnis & Michael B. Rappaport, *The Constitutionality of Legislative Supermajority Requirements: A Defense*, 105 Yale L. J. 483 (1995). In that article, we were defending the constitutionality of the House three-fifths rule, which required a three-fifths supermajority in order to raise income tax rates. That article did not take a position on the entrenchment of the filibuster. Instead, we discussed two theories that were consistent with the constitutionality of the three-fifths rule, one which would hold the entrenchment of the filibuster unconstitutional, the other which regarded it as permissible. Since that time we have undertaken additional work, largely in response to Posner and Vermeule's argument, and have developed the analysis we present here.

Finally, that the proposed change in the filibuster rule relates to judicial appointments does not affect this analysis. While it is theoretically possible that entrenchment would be permissible in a specific area, such as the Senate's power to advise and consent, even though it was not allowed generally, one would require strong evidence based on text, history, structure, and purpose to reach that conclusion. We are not aware of any such evidence.

Sincerely,

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Abner Mikva
Visiting Professor

May 5, 2003

The Honorable Russell Feingold
United States Senate
Washington, DC 20510

Dear Senator Feingold,

I regret that my teaching schedule at the University of Chicago Law School prevents me from attending the hearing this next week on the process used for the confirmation of federal judges. I have had an opportunity to observe the process, both as a judicial nominee ultimately confirmed for the U.S. Court of Appeals for the D.C. Circuit, and as White House Counsel to President Clinton.

Candidly, my views changed over the 25 year period that elapsed from the time that I was first exposed to the awesome power of the Senate to exercise its "advise and consent" power to the nomination of federal judges. I was a member of the House of Representatives in 1979, when President Carter nominated me for the court. I assumed that as a member in good standing of the majority party that controlled both the Senate and the House, I would have an easy time of my confirmation. I did not reckon with the vigor of the opposition that some of my views as a Congressman had generated, particularly on gun control and on a woman's right to choose. The confirmation was not a cake-walk. It took more than six months, and a filibuster was only averted when both houses agreed to a rider in an appropriations bill which allowed some members of Congress to continue the fight in court. (That fight lasted more than two years.)

I was confirmed, and I was sitting as a federal judge; consequently, I did not express myself publicly about the confirmation process. But if I had been asked privately, I would not have been very high on the subject. But over the years I became more objective, even during my time as White House Counsel, when I was trying to shepherd President Clinton's judicial nominees through the Senate controlled by the other party, I came to believe that the process works pretty much as our founders intended.

A judicial appointment is normally for life–"good behavior" as it is referred to in the Constitution. It is appropriate that the popularly elected branches of government—the President as the nominator and the Senate as the confirmer—have the say in who are to occupy those positions of influence and power for terms well beyond the elected terms of the people who nominate and confirm. The tension that arises between the executive branch and the Senate as to those appointments is not unusual nor disrespectful. A President who wants to see his nominees

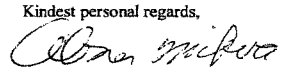
confirmed quickly, as I found out in my many trips to Republican Senators' offices during the Clinton Administration, looks for candidates who have avoided contentious and cutting edge positions on the law.

If the Senate is indeed to be the final decision-maker on who ascends to the bench, then it follows that Senators are free to exercise all of the powers that are in their doman. If Rule 22 is appropriate for any purposes, and the Senate has consistently found that it is, then it is hard to construct any reason why it is not available as to judicial appointments.

Nor can it be argued that it leads to an impasse that will prevent the filling of judicial vacancies on a timely basis. Under Senate rules, the Senate can end any extended debate whenever there are sufficient votes for cloture. More significantly, most district court nominees, where individual senators have more input in the nominating process, and many appellate court nominees have been and are regularly being confirmed without any need to invoke cloture.

The tension between the President's nomination power and the Senate's confirmation power has existed since President Washington's earliest judicial nominees. When a President wants to avoid protracted confirmation battles, he sends up nominees who are easier to confirm. We learned that in the Clinton Administration, not always before the fact. But it remains the appropriate balance-wheel for the selection of federal judges. It is neither unusual nor inappropriate for Senators to exercise all of the prerogatives that are available to carry out the function that the Constitution clearly gives them–and expects them to use.

Kindest personal regards,



Abner J. Mikva

Testimony of U.S. Senator Zell Miller (D-GA)
Senate Judiciary Subcommittee Hearing
"Judicial Nominations, Filibusters and the Constitution: When A Majority Is Denied Its Right to Consent"
May 6, 2003

The United States Senate is the only place on the planet where 59 votes out of 100 cannot pass anything because 41 votes out of 100 can defeat it.

Try explaining that at your local Rotary Club or someone in the Wal-Mart parking lot or, for that matter, to the college freshman in Poly Sci 101. You can't because this silly senate math stands democracy on its head.

Winston Churchill once said, "Democracy is based on reason and fair play." Well, there's nothing reasonable or fair about what's been happening in the Senate in recent years, especially in recent weeks. It's not just that it's an expensive waste of time and taxpayer money, but it's also a flagrant abuse of majority rule, the principle that Democracy operates on everywhere. Everywhere, that is, except in the U.S. Senate.

The word "filibuster" comes from a Spanish word for "pirate," and that is exactly what the filibuster does: it hijacks the democratic process. The way it is being used in the Senate gives the minority an absolute veto on everything.

James Madison, the Father of the Constitution, feared some future political leaders would pervert the legislative process in just this way. And he warned in Federalist Paper Number 58 that when it happened, "The Fundamental principle of free government would be reversed. It would be no longer the majority that would rule. The power would be transformed to the minority." So what's happening today, I'm sure, has the man who wrote the Constitution spinning in his grave.

And Alexander Hamilton as well, because he agreed with Madison on this. He pointed out in his Federalist Paper #68 that the vice president was given a tie-breaking vote "to securing at all times the possibility of a <u>definite resolution</u> of that body." A "definite resolution, how well put. That's what we need around here: "a definite resolution."

For many years, I taught political science and history at four different colleges and universities, I don't think

I ever taught a class without telling the old story about the origin of the Senate.

Thomas Jefferson was in France when the Constitutional Convention was being held and later, the story goes, he asked his friend George Washington, who presided over the convention, about the purpose of this upper chamber, the Senate.

Washington, according to the anecdote, then asked Jefferson "why do you pour coffee into your saucer?" "To cool it," Jefferson replied. And Washington responded, "Even so, we pour legislation into the senatorial saucer to cool it."

But there is nothing said in the Constitution at all about extended debate. Washington, I believe, thought the smaller size, longer and staggered terms, as well as chosen by state legislation, would provide more wisdom, hopefully.

Some constitutional lawyers have argued that any kind of super majority vote is unconstitutional, other than for those five areas specified in the Constitution itself: treaty ratification, impeachment, override of a presidential vote, constitutional amendments and expelling a member of Congress. Nowhere does it say it now should be a super majority on judicial nominations. But that is what we have going on today.

Perhaps it is time for someone to test its constitutionality. That's one possible remedy. Or, we could abolish Rule XXII that protects this travesty and let the U. S. Senate operate under rules like every other democratic legislative body in the world. I don't think that's very likely.

Or, we could modify what I call the Two-Track-Trick put in a few years ago where a "filibuster-lite" goes on without any heavy lifting while another piece of legislation is being considered at the same time.

With this devious device, you avoid the inconvenience and pain of a real filibuster, but it still can go on ad nauseam. It's just that the public doesn't notice it as much. And that's the point - public debate is turned down real low. I'd much rather have the old all night filibuster - a bunch of them - than this charade.

Over the years, many respected veterans of the Senate, not a newcomer like myself, have expressed dismay with this process. Henry Clay, selected as one of the greatest senators in the history of the body, condemned the first organized filibuster when it occurred in 1837. Even back

then he thought there needed to be some workable limitation for endless debate. If only that "Great Compromiser" could have foreseen what it would become late in the 20th Century. In the 19th Century, there were 23 filibusters. In the last 30 years of the 20th Century there were over 200.

Both parties have used it time and time again. One is just as guilty as the other.

In 1995 - eight years ago - Democratic Senators Tom Harkin and Joe Lieberman introduced a rule change that I believe is the best that's been proposed. My resolution is modeled after theirs.

Two years before he introduced his rule change, Senator Harkin let a committee have it with both barrels, "There comes a time when tradition has to meet the realities of the modern age. The minority's rights must be protected. The majority should not be able to run roughshod over them, but neither should a vexatious minority be able to thwart the will of the majority and not even permit legislation to come up for a meaningful vote."

The Harkin-Lieberman plan was a four-step process that still kept 60 votes on the initial cloture vote, but decreased it by three votes with each of the next three cloture attempts until it got down to a majority of 51. There would be two-day intervals between each cloture vote, so the whole process would last less than two weeks. (Compare that to the ten weeks we've been filibustering the Miguel Estrada nomination.)

Harkin and Lieberman argued, logically I believe, that this would preserve the Senate tradition while still giving the minority plenty of time to plead its case without blocking the majority forever.

That is what my proposal, Senate Resolution 85, would do. In 1995, the Harkin-Lieberman bill won only 19 votes. I'm enough of a realist to know things haven't changed that much in eight years and my proposal probably wouldn't fare much better today. But at the very least, Mr. Chairman, I would hope we would consider applying my proposal to judicial nominations.

Thank you, Mr. Chairman.

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Monday, March 10, 2003

Senate Math
--
41 Is Greater Than 59!

By Zell Miller

A portly British statesman once famously said that "Democracy is based on reason and fair play." But there's nothing reasonable or fair about what's been happening in the Senate recently. The filibuster against Bush-nominee Miguel Estrada is not just an expensive waste of time and taxpayer money, it's also an affront to majority rule, the principle that Democracy operates on everywhere.

Everywhere, that is, but the Senate.

The Senate is the only place I know where 59 votes out of 100 cannot pass anything because 41 votes out of 100 can defeat it. Last week, of course, 55 senators -- a clear majority -- voted to end a filibuster against Mr. Estrada and still lost the day. Try explaining that at your local Rotary Club or to a constituent in the Wal-Mart parking lot or, for that matter, to the college freshman in Poly Sci 101. You can't because it stands democracy on its head.

The word "filibuster" comes from a Spanish word for "pirate," and that is exactly what the filibuster does; it hijacks the democratic process. The way it is being used in the Senate gives the minority an absolute veto on everything.

James Madison, the Father of the Constitution, feared some future political leaders would pervert the legislative process in just this way. And he warned in Federalist Paper Number 58 that when it happened, "The fundamental principle of free government would be reversed. It would be no longer the majority that would rule. The power would be transformed to the minority." I'm sure Madison is today spinning in his grave.

Some constitutional lawyers have argued that any kind of super majority vote is unconstitutional, other than for those five areas specified in the Constitution itself: treaty ratification, impeachment, override of a presidential veto, constitutional amendments, and expelling a member of Congress.

Perhaps it is time for someone to test its constitutionality. That's one possible remedy. There are others. We could abolish Rule XXII that protects this travesty and let the Senate operate under rules like every other democratic legislative body in the world. That's about as likely as a day dawning in Washington without 10 fund-raisers.

Or we could modify what I call the Two-Track Trick, installed a few years ago, which allows a "filibuster-lite" to proceed without any heavy lifting while another piece of legislation is being considered at the same time. With this devious device the Senate avoids the inconvenience and pain of a real filibuster. Powder puff, 16-ounce gloves are used instead of bare knuckles, but it still can go on and on ad nauseam. It's just that the public doesn't notice it as much. And that's the point -- public debate is turned down real low.

Over the years, many respected veterans of the Senate, not a newcomer like myself, have expressed dismay with the process. Henry Clay did before the Civil War and the process then was nothing like it would become late in the 20th century. Barry Goldwater and even the loquacious Hubert Humphrey expressed misgivings from time to time.

In the mid-1990s, there was a bipartisan group of distinguished citizens called "Action, Not Gridlock" who came together with great ballyhoo, intent on reforming Senate rules. They had the shelf-life of a ripe banana. And in 1995, Democratic Sens. Tom Harkin and Joe Lieberman introduced a rule change that I believe is the best that's been proposed. It still kept 60 votes on the initial cloture vote, but decreased it by three votes with each of the next three cloture attempts until finally it got down to the majority of 51. They argued, logically I believe, that this would preserve the Senate tradition while still giving the minority plenty of time to plead its case without blocking the majority forever.

All of this came to naught, however, after the Republicans solidly opposed it and Sen. Robert Byrd enlightened his fellow Democratic senators with the story of how Cato II, in 60 B.C., got the floor in the Roman Senate at midday and spoke until sundown, the time of adjournment, in order to thwart one of Julius Caesar's proposals. And that was the end of the Harkin-Lieberman filibuster reform bill.

Never mind that Caesar was not thwarted and 14 years later, in 46 B.C., Cato committed suicide while Caesar was at the height of his power and still going strong. Perhaps it is worth noting that the First Filibusterer in history ended up taking his own life. He made his point -- as senators love to do -- but ended up killing himself. Now that, my filibustering friends, is a history lesson worth pondering.

Mr. Miller is a Democratic senator from Georgia.

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May 2, 2003

Senator John Cornyn
Chairman, Senate Subcommittee on the Constitution
United States Senate
Washington, DC 20510

Dear Senator Cornyn:

I understand that your Subcommittee is holding hearings on the question of what measures might be taken to address the problem of a minority of senators blocking votes on judicial nominees through use of "filibuster" procedures currently permitted by Senate rules. At present, some judicial nominees have the support of a majority of the Senate for confirmation but a minority is blocking a vote on confirmation.

I am the Briggs & Morgan Professor of Law at the University of Minnesota Law School, where I have taught for twelve years. I regularly teach and write in the areas of Constitutional Law, Separation of Powers, and Legislation. I have published more than thirty scholarly articles in these areas. I have provided oral or written testimony to committees of the United States Congress on several occasions on matters of constitutional power and constitutional structure and have served as part of a legal advisory group to the Chair of the Senate Judiciary Committee. Before becoming a law professor, I was an Attorney-Advisor in the Office of Legal Counsel of the U.S. Department of Justice. I offer this legal opinion in my individual capacity, and not on behalf of my academic institution or any client. My vita is attached.

My legal opinion is simple and straightforward: The U.S. Senate always possesses the constitutional power, acting by simple majority vote, to change its rules of proceedings, including the filibuster rule. The power of each house to make its own rules of proceedings is explicitly set forth in article I, section 5, clause 2 of the Constitution: "Each House may determine the Rules of its proceedings . . .". The rule-making power of each house is plenary, except where the Constitution specifies a certain procedure or requires a super-majority vote on a certain matter (as it does, for example, with respect to expulsion of a Member, U.S. Const. art. I, sec. 5, cl.2, overriding a presidential veto of legislation, U.S. Const. art I., sec. 7, cl. 2, Senate votes to

convict in cases of impeachment, U.S. Const. art. I, sec. 3, cl. 6, and Senate consent to treaty-formation, U.S. Const. art. II, sec. 2, cl.2). It is plain that the constitutional power of each house to adopt its rules of proceedings is a power that may be exercised by a simple majority of the members of that house, since the Constitution does not specify a contrary rule.

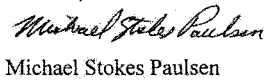
Because the Senate's power to make its own rules of proceedings is plenary and may be exercised by a simple majority except where the Constitution imposes a specific rule or requirement to the contrary, the Senate cannot constitutionally limit its own future constitutional rule-making power by imposing a super-majority requirement for adopting or changing a Senate rule. Otherwise, one Senate could simply annihilate a plenary constitutional power of the Senate as a body, acting through a simple majority. This would be inconsistent with the Constitution's grant of rules-making power to the body as a whole.

This does not mean that the Senate (or the House) is barred from adopting internal procedures with super-majority requirements. It simply means that no such super-majority requirement is *irreversible* by a simple majority of the Senate at a later time. The filibuster rule is one such procedural requirement. Though the rule has a long tradition, the Constitution requires that it be capable of being repealed or modified by the same simple majority of the Senate that has the constitutional power to adopt Senate procedures in the first place. So too with any Senate rule imposing a super-majority requirement for changing the Senate's rules: The Senate must always retain the constitutional power to adopt, repeal, or modify its rules of proceedings, acting by a simple majority.

It follows that, if a majority of the Senate is concerned that the filibuster procedure is being abused in a particular case or that it should not be available to block confirmation votes for nominees for judicial appointments as a general proposition, the Senate may adopt a rule restricting or eliminating the use of filibusters in such circumstances. Such a rule may be adopted by a simple majority of the Senate, notwithstanding any existing rule purporting to require a super-majority vote for changing Senate rules. The sole question is one of Senate policy, and may be determined by the Senate as it thinks most appropriate.

I understand that Professor Steven G. Calabresi, whose expertise and intellect I respect greatly, will be testifying before the Subcommittee and expressing much the same opinion. I have discussed this issue with him but have not seen his testimony. Please let me know if I can be of assistance to your Subcommittee on this matter in any way. I may be reached at (612) 625-0018 or "stoke001@umn.edu".

Sincerely,



Michael Stokes Paulsen
Briggs & Morgan Professor of Law
University of Minnesota Law School

VIA E-MAIL AND REGULAR MAIL

May 12, 2003

Senator John Cornyn
Chair, Subcommittee on the Constitution, Civil Rights, and
Property Rights
U.S. Senate Committee on the Judiciary
224 Dirksen Senate Office Building
Washington, D.C. 20510
Attn: James Ho

Dear Senator Cornyn:

Pursuant to your statement at last Tuesday's Subcommittee hearing and my conversation with James Ho of your staff, I am enclosing with this letter a copy of a memorandum from People For the American Way concerning judicial nominations and the use of the filibuster. The memorandum concludes that Senators of both parties have properly utilized the filibuster to demand 60 votes for or to defeat nominees, consistent with the Constitution and Senate practice, and that efforts to eliminate this important check and balance are improper. We would appreciate it if this letter and the enclosed memorandum are included in the record of the May 6 hearing. Thank you very much.

Sincerely,

Elliot M. Mincberg
Vice-President and Legal Director

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May 6, 2003

GOP Leaders Try to Create Constitutional Cover for Illegitimate Power Play

The Senate Judiciary Committee's Constitution, Civil Rights and Property Rights Subcommittee is holding a hearing today "to examine judicial nominations, filibusters, and the Constitution, focusing on when a majority is denied its right to consent." It appears that the hearing is an effort to create the illusion of legitimacy for an outrageous scheme to eliminate an important check and balance on the administration's court-packing efforts in advance of future vacancies on the Supreme Court.

Republican threats to "go nuclear" and put an end to long-established Senate practice, rules, and precedents are extraordinary in light of the success that President Bush has already had in making his mark on the federal judiciary. In the two years since President Bush named his first nominees to the federal bench, the U.S. Senate has confirmed more than 120 Bush judges, including 100 who were confirmed with the Senate and the Judiciary Committee under Democratic control. Since Republicans regained control of the Senate this year, Democrats have used the filibuster – a longstanding Senate procedure requiring a supermajority to cut off debate on important topics – to block only two controversial appeals court nominees, while a number of other nominees have been permitted a full floor vote in spite of intense opposition. Amidst the talk of crisis and a broken system, one important fact is being overlooked: there are currently only 49 vacancies in the federal judiciary, less than half of the 111 vacancies that existed when the Democrats took control of the Senate in July 2001.

In spite of the rapid approval rate for Bush's judicial nominees, Republican leaders' fury that even two nominees have been stopped by Democratic filibusters has led to a series of remarkable efforts to unilaterally change longstanding rules and to abrogate bipartisan agreements in order to undermine the ability of the minority party to provide any real check on the administration's efforts to create a federal judiciary dominated by committed right-wing ideologues. Perhaps the most potentially far-reaching is the effort to declare the use of the filibuster to be unconstitutional when applied to judicial nominees.

The astonishing claim that the use of the filibuster is unconstitutional – although it has been used by Republicans and Democrats alike for decades – is a short-sighted strategy for undermining the Senate's traditional role as the more deliberative House of Congress and for removing one of the only checks on the abuse of power by the majority Party, with respect to the issue of judicial nominations.

The Curious Champions of a Constitutional Right to a Senate Floor Vote

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It is a remarkable display of hypocrisy for Republican leaders, including senators like Orrin Hatch, to suggest that use of the filibuster to prevent final votes on judicial nominees is unconstitutional. The historical record is clear that the filibuster has been used by both Republicans and Democrats with respect to controversial judicial nominations. In defending a Republican-led filibuster on a judicial nomination in 1994, Hatch himself explained that the filibuster is "one of the few tools the minority has to protect itself and those the minority represents." Moreover, during the Clinton administration, Senate Republicans blocked dozens of Clinton nominees with much less open and accountable procedures like secret holds. Fully one-third of Clinton's appeals court nominees from 1995 through 2000 were kept off the bench – many without even a hearing or committee vote – while others were delayed for as long as four years.

How can it be constitutional for a committee chair to stop a nominee by refusing to hold a hearing, or for a secret hold by a single Republican senator to prevent a nominee from moving forward, but unconstitutional for 41 Democratic senators to prevent a final vote using a public Senate procedure specifically designed to protect the rights of the minority? It is clear that the answer has nothing to do with the Constitution and everything to do with the politics of power at all costs. It is simply amazing for Sen. Hatch and his colleagues to make this argument with a straight face.

Senate Majority Leader Bill Frist was among those voting against cloture on the nomination of Richard Paez in 2000. Yet now Frist says, "If filibusters are going to be made part of the judicial nominee process, I think you will see increasing discussion over whether the rules should be changed." Frist and others have even suggested taking the constitutional question to the Supreme Court, a separation of powers nightmare that seems implausible at best. Former Senate Majority Leader Trent Lott has told reporters that he has devised a strategy that could bypass the filibuster and force approval of nominees with only 51 votes, describing his idea as "nuclear."

Although Sen. Rick Santorum has suggested that the Democratic filibuster against Estrada "set a dangerous precedent" and that Democrats have "changed the rules," it is clear that it is Republicans who are seeking to change the rules and make a dramatic break with history and Senate tradition. Republican Sen. Richard Lugar explained in 1993 that it is "a function of our Constitution that minorities are protected in many, many ways," and that this is part of the rationale for the continued existence of the filibuster.

Some Republicans have wrongly asserted that there has been only one filibuster against a federal judicial nomination, the successful Republican filibuster of Supreme Court nominee Abe Fortas in 1968. In fact, cloture votes have been required to end debate on a number of judicial nominations. According to the Congressional Research Service, cloture motions have been filed and cloture votes held on 14 Court of Appeals nominations since 1980; as recently as 2000, cloture votes were necessary to obtain votes on the nominations of both Richard Paez and Marsha Berzon to the Ninth Circuit. Sen. Bob Smith openly declared he was leading a filibuster, and he described Sen. Sessions as a member of his filibuster coalition. Democrats have also demanded 60 votes for controversial nominees, such as Edward Carnes, who was nominated to

the Court of Appeals for the 11th Circuit in 1992. Over the years, there were many other attempted filibusters that did not result in a cloture vote.

The current situation – with one party dominating the White House and Congress in spite of a narrowly divided national electorate – demonstrates why our constitutional framework was designed as a system of checks and balances. The filibuster is now virtually the *only* tool that Senate Democrats have at their disposal to try to force the administration and the Republican Senate majority to engage in bipartisan consultation, compromise, and cooperation on judicial nominations. If a demand for 60 votes is legitimate with respect to legislation that future Congresses can revisit, it is even more appropriate when considering *lifetime* appointments to powerful positions on the federal judiciary.

Historical Revisionism and Bogus Constitutional Theory

The primary legal theory being put forward by right-wing legal scholars and activists to support their claims rests on bad logic, bad law, and bad history. Conservative legal pundit Bruce Fein, scheduled to appear at Tuesday's hearing, is among those arguing that requiring a supermajority to cut off debate on judicial nominations is impermissible. Such an interpretation defies the language of the Constitution and the history of the Senate.

In fact, Article I, Section 5 of the Constitution clearly states that each House of Congress would make its own rules. In some areas, the framers of the Constitution did take some matters out of the hands of Congress by requiring, for example, two-thirds of the Senate to approve international treaties. Requiring a majority vote to approve matters is in essence a parliamentary floor, not a ceiling. Nowhere in the Constitution is there a requirement for a simple majority for votes on nominations.

In fact, it wasn't until 1917 that there was any way other than unanimous consent to cut off debate on issues, including judicial nominations, and bring them to a vote. In that year the very first cloture rule was adopted -- two thirds of the Senate present and voting required to invoke cloture and force a vote on a measure. For the past 54 years, the Senate has required a super majority of the entire Senate (ranging from 3/5 to 2/3) to bring judicial nominations or legislation to a vote.

Never in our history as a nation have we authorized a simple majority to force a vote in the Senate on a judicial nomination or any other matter. There is certainly no justification for doing so now. The Senate was in fact designed to be the more deliberative body, where extended debate would be a check on potential abuses by the party in power. That characteristic of the Senate has often been lauded by conservatives in the past. Contrary to what George Will is suggesting now, in 1993 he wrote, "[T]he Senate is not obligated to jettison one of its defining characteristics, permissiveness regarding extended debate, in order to pander to the perception that the presidency is the sun around which all else in American government – even American life – orbits." Back then Will also wrote that "Democracy is trivialized when reduced to simple majoritarianism - government by adding machine. A mature, nuanced democracy makes provision for respecting not mere numbers, but also intensity of feeling." (*Washington Post*, April 25, 1993).

Although most observers consider it unlikely that the Supreme Court would accept a case about internal Senate rules, the Court did uphold the principle of supermajorities in a case involving local voting rules requiring a majority of 60 percent to pass a measure. The Court's ruling stated: "Certainly any departure from strict majority rule gives disproportionate power to the minority. But there is nothing in the language of the Constitution, our history, or our cases that requires that a majority always prevail on every issue." Gordon v. Lance, 403 U.S. 1 at 6 (1971)

As has been noted earlier, filibusters have been used by both Republicans and Democrats against judicial nominations and many types of legislation. During the Clinton administration, Republican senators filibustered a number of legislative initiatives, including an economic stimulus package, campaign finance reform, lobbying reform, health care reform, striker replacement legislation, and racial justice provisions in a crime bill. Would Republicans now argue that these efforts were unconstitutional because they are not explicitly permitted in the language of the Constitution?

The framers of the Constitution showed wisdom in specifying certain matters in which particular super majorities would be required and in all other areas allowing Congress to set its own rules. When Congress moved to create a rule that would create a mechanism to cut off debate – for the first time in 150 years – it did so in a manner that would maintain the Senate's deliberative role and make it difficult for a narrow majority to abuse its power.

Other Examples of GOP Rule Changes and Power Plays

Senate Judiciary Committee Chairman Orrin Hatch is increasingly abusing the power of his chairmanship to flagrantly violate or unilaterally change longstanding committee rules and bipartisan agreements that govern the Judiciary Committee's deliberative process. It is these actions by Sen. Hatch, not the Democrats' legitimate use of the Senate's filibuster procedure, that mark a dramatic break with precedent and an abandonment of a commitment to act fairly and according to mutually agreed-upon procedures. Several of Hatch's actions also stand in direct contradiction to his own stated principles about how the Judiciary Committee should function.

Committee Rule IV

One of the most egregious abuses of power occurred on Thursday, February 27, when Hatch violated clear and explicit Judiciary Committee rules that prevent the Committee from moving to a final vote on any matter before the committee without the support of at least one member of the minority party. Over the strenuous objections of several Democratic Senators, Hatch insisted that the rule did not apply to nominations – a specious claim that had never been made before – and that he would call for a final vote on appeals court nominees Deborah Cook and John Roberts, even though no Democrats supported the motion to bring them to a vote. (In a compromise since then, another hearing was held for Roberts; Cook received a vote on the Senate floor without an additional hearing to review her record.)

Since then, Hatch has changed his explanation, claiming that Committee Rule IV does not apply to the Committee Chairman. He now claims in essence that the Chairman's power to

call for a vote on a matter is absolute regardless of agreed upon rules of procedure, and that Rule IV is actually a rule that gives members the right to push for a vote that is being delayed by the Chair.

Hatch's claims are demonstrably false. As recently as 1997, in connection with the consideration of the nomination of Bill Lann Lee to be assistant attorney general, Hatch explicitly acknowledged that "[a]bsent the consent of a minority member of the Committee, a matter may not be brought to a vote." (Transcript of Judiciary Committee meeting of November 13, 1997 at 6) (emphasis added) As Senate Minority Leader Tom Daschle wrote to Hatch on March 4, Rule IV "clearly establishes a Committee filibuster right."

Blue Slip Policy

Hatch has also changed another fundamental Senate rule regarding judicial nominations. In the past, Hatch has been a fervent supporter of the Senate's "blue slip" policy, which has allowed home-state senators who object to a judicial nominee to delay action in the Judiciary Committee by not returning a nominee's "blue slip" to the committee. As *American Prospect* has noted, "it was Hatch, in 1995, who hardened the blue-slip policy to allow a single senator to block a nomination indefinitely." Indeed, Sen. Hatch made his blue slip policy explicit in 1998 by stating on the blue slips themselves that "[n]o further proceedings on this nominee will be scheduled until both blue slips have been returned by the nominee's home state senators."

Now, however, Hatch has apparently declared a new policy saying that even though a senator's decision not to return a blue slip would be given great weight, it would not be allowed to prevent Hatch from moving nominees he wants to move. "In other words," says Hatch, "we can go ahead with certain nominees where you might have a withheld blue slip." Sen. Barbara Boxer has objected to proceeding on controversial nominee Carolyn Kuhl, but Hatch has scheduled a committee vote on the nomination on Thursday, May 8.

Stacked Confirmation Hearings

Sen. Hatch held a single confirmation hearing featuring three controversial appeals court nominees simultaneously – Jeffrey Sutton, Deborah Cook, and John Roberts – on January 29. Scheduling multiple controversial appeals court nominees on a single day violated a longstanding bipartisan agreement. In the mid-1980s, Senators Strom Thurmond, Joseph Biden, Bob Dole, and Robert Byrd agreed in writing that there would be no more than one controversial nominee scheduled at any one time, an agreement that had been followed under both Republican and Democratic control until Hatch's packed January 29th hearing.

Hatch's move virtually assured that it would be impossible for senators to prepare thoroughly and for all three nominees to receive sufficient scrutiny. In fact, senators focused their questions on Sutton, meaning that nominees Roberts and Cook were asked very few questions. Hatch did provide another hearing for Roberts, but on May 5, Cook was confirmed by the full Senate, never having been subjected to serious public scrutiny, even though Democratic senators objected to the way she was railroaded through committee with the stacked hearing and Hatch's violation of Rule IV.

Conclusion

The effort to create a constitutional objection to the selective use of the filibuster against extremist judicial nominees has no grounding in history or constitutional law. It is a power play that would subvert the Senate's historical role, undermine its ability to conduct its advise and consent responsibilities, and open the door to further abuses of power by a narrow majority of the Senate.

The way to limit the time and energy expended in divisive confirmation battles is not a nakedly partisan power play that would alter the nature of the Senate in order to cement ideological domination of the judiciary for decades to come. The way forward is for the White House to engage in genuine consultation and cooperation on judicial nominations that would result in more mainstream nominees who could win bipartisan support.

United States Senate

Committee on the Judiciary

Subcommittee on the Constitution, Civil Rights & Property Rights

"Judicial Nominations, Filibusters, and the Constitution:

When a majority is denied its right to consent"

Tuesday, May 6, 2003

Written Testimony of Stephen B. Presser

My name is Stephen B. Presser, and I am the Raoul Berger Professor of Legal History at Northwestern University School of Law. I very much appreciate the opportunity to submit written testimony to this subcommittee, on an issue of crucial importance. I have been teaching and writing about Constitutional law and its history for twenty-eight years, and I have been privileged to be an invited witness before many committees and subcommittees of both the Senate and House to testify on Constitutional matters. With the possible exception of the time I was called before a subcommittee of the House Judiciary Committee to testify about the possible grounds for impeachment of a sitting President, I do not believe that any matter on which I have been asked for testimony is as important as that before this subcommittee.

It does not go too far to say that for the last few months a constitutional crisis has been brewing in the United States Senate, a constitutional crisis all but ignored by the public, but a constitutional crisis the resolution of which is likely to determine the nature of federal jurisprudence for the next few decades. At one level the struggle in the Senate is a struggle over one or two notable nominees to the lower federal courts, most particularly Miguel Estrada and Priscilla Owen, but at a deeper level the struggle is over what some Senators have called "judicial ideology," by which they mean a disposition to decide particular cases in a particular manner.

For what I believe to be the first time in our history, one political party, the Senate Democrats, have taken the position not only that judges should be picked based on their preference for designated outcomes in cases that might come before them, but that the Senate ought to be an equal partner in picking judges, and that nominees who come

before the Senate have a burden of persuading sixty Senators (the number necessary to cut off debate in the Senate), that they are worthy of ascension to the bench.[1]

For those of us who still believe that judging ought to be impartial, that there actually is content to the rule of law, and that it ought not to be the task of judges to make policy from the bench, there is cause for great alarm over what is now happening in the Senate. This is, in a sense, the culmination of several decades of practice in the courts and in the Senate, which have resulted in the belief on the part of many Senators, many lawyers, and many law professors, that judges ought to be free to mold the laws and constitution to fit the needs of the times. Putting this belief into practice has resulted in many judicial decisions that have departed from the original understanding of the Constitution and our laws, particularly in the areas of state-federal allocation of power, race, religion, and abortion.[2] The exercise of what essentially amounted to legislation from the bench has been criticized by some political leaders and by some scholars who have decried this "government by judiciary" as a betrayal of the principles on which our nation was founded.[3]

Those principles did include the belief of our framers, borrowed from the great French political thinker, Montesquieu, that there can be no liberty if there is not separation between the legislative, executive and judicial powers.[4] When courts make law, in other words, it usurps the function of the people's representatives in the legislature, and is an affront to popular sovereignty and republican government. Even before the current imbroglio in the Senate, the recognition that in many cases our courts, and particularly our federal courts, have strayed from their Constitutional task was what led Presidential Candidate George W. Bush to proclaim that he wanted to appoint judges who would interpret, not make law, and to point to Supreme Court Justices Antonin Scalia and Clarence Thomas as his models. Now that he has sought to do just that, those uncomfortable with the jurisprudence of Scalia and Thomas, those who would like to see Constitutional interpretation as something other than fidelity to the original understanding of that document, have sought to deny Bush nominees confirmation. There is reason to be upset then, not only over the Senate's current frustration of the Constitutional task of the President, but also over the theory of judging that lies behind some Senators' refusal to allow Senate votes on some of the Bush nominees.

In my opinion the current impasse over judicial nominees in the Senate has resulted from a mistaken understanding of the Senate's role under the Constitution, as

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[1] I have addressed these matters at greater length in Stephen B. Presser, "Should Ideology of Judicial Nominees Matter?: Is the Senate's Current Reconsideration of the Confirmation Process Justified?", 6 Texas Review of Law & Politics 245 (2001).

[2] This was the theme of my book, Recapturing the Constitution: Race, Religion, and Abortion Reconsidered (Regnery Publishing, 1994).

[3] On this point see generally Raoul Berger: Government by Judiciary: The Transformation of the Fourteenth Amendment (2nd ed., Liberty Fund, 1997).

[4] On this point, and on the framers' reliance on Montesquieu, see Madison's Federalist No. 67, entitled "The Meaning of the Maxim Which Requires a Separation of the Departments of Power, Examined and Ascertained," and which notes, *inter alia*, that Montesquieu wrote that "Were the power of judging joined with the legislative, the life and liberty of the subject would be exposed to arbitrary control . . ."

well as a mistaken understanding of what it is that judges should do. It is impossible to make clear the nature of what is going on without some reference to the facts surrounding the nominees who have been refused confirmation. One who reads The Federalist, the masterwork on interpretation of the Constitution by Hamilton, Madison, and Jay, comes away with a strong sense that the Senate's "advise and consent" role on judicial nominations is simply to insure that the President does not corruptly pick members of his family, his political cronies, or other persons who lack the character, integrity, and training to be good judges.[5] Those judges, as Hamilton makes clear in the most important of the Federalist Papers dealing with the judiciary, No. 78, are supposed to be those persons who will be able to interpret the Constitution and our laws in as objective a manner as possible, following the rules laid down by the people's representatives and their Constitution. Judges are supposed to assume the bench with a willingness to carry out their task free from political influence and without any kind of an agenda other than the objective enforcement of the law and Constitution. Accordingly, a nominee's character, integrity, and reputation for learning, judgment and honesty are his or her most important qualifications for judicial office, and it is only in the case of those lacking such qualifications that the Senate should be called upon to exercise its advise and consent function by denying confirmation.

When this is understood, it is impossible to view what has been done to Miguel Estrada, for example, as anything but a travesty of Constitutional principles. Mr. Estrada had hearings before the Senate Judiciary Committee, he served with distinction in the Solicitor General's office, in both private practice and in the government he was a respected member of the bar of the United States Supreme Court, he had a splendid law school record at Harvard Law School, and secured a prestigious clerkship with Supreme Court Justice Anthony Kennedy. He was unanimously rated "well-qualified" by the American Bar Association body charged with passing on nominees, formerly the "gold-standard" of qualifications for the bench in the view of the very Senate Democrats who now oppose his nomination. These opponents know that if the Estrada nomination is ever brought to a vote on the Senate floor he will be confirmed, but they have managed to avoid such a vote by filibustering and invoking Senate Rule XXII. Estrada's opponents have claimed that their opposition is based on his failure to produce documents from his tenure in the solicitor general's office, which documents, they assert, may reveal his beliefs about particular legal doctrines that he might be called upon to decide as a judge. The production of those documents (protected by the "lawyer-client privilege") has been

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[5] See, e.g. Hamilton's comments in Federalist 76, where he explains that the Senate's power of rejecting Presidential nominees is designed to "be an excellent check upon a spirit of favoritism in the President, and [that it] would tend greatly to prevent the appointment of unfit characters from State prejudice, from family connection, from personal attachment, or from a view to popularity." See also Hamilton, writing in Federalist 78, where he notes that "[T]here can be but few men in the society who will have sufficient skill in the laws to qualify them for the stations of judges. And making the proper deductions for the ordinary depravity of human nature, the number must be still smaller of those who unite the requisite integrity with the requisite knowledge. These considerations apprise us, that the government can have no great option between fit characters. . . ."

opposed by every living Solicitor General from both political parties, who are concerned about protecting the privilege, but more is at stake here than the protection of a privilege of government attorneys and the concern that they be free to render honest and objective advise to their clients in the same manner as private attorneys may do.

Estrada's opponents seek these documents in order to argue that Estrada would take a position on the law on the bench which would be similar to that he took as a government lawyer, but this misunderstands the role of a judge, and flies in the face of all of the evidence produced of Estrada's character, integrity, and intelligence that led to his "well-qualified" rating by the ABA. Indeed, so weak is the substantive case of Estrada's opponents that they have only been able to frustrate his nomination by recourse to Senate Rule XXII, in order to prevent his nomination from coming to the floor of the Senate for a majority vote that he would win. That rule, the "cloture" provision, states that the only way to cut off debate on a nomination or a pending bill is by a motion for which 60 of the 100 senators vote aye. Rule XXII and the other Senate Rules can be changed only by the vote of two-thirds of the senators present, so that as long as Estrada's opponents number more than 40 they can prevent a vote on his nomination. We have recently learned that the Estrada opponents will employ the same tactic to prevent a vote on the nomination of Priscilla Owen, a Texas Supreme Court Justice with credentials as impressive as those of Estrada, and who also received the ABA's "well-qualified" ranking. Other Bush nominees are likely to be treated in an identical matter.

In my view it is not only wrong as a matter of proper Constitutional principles for Senators to oppose a nominee on grounds other than his or her character, integrity, learning, and honesty, but by invoking Senate Rule XXII, Estrada's and Owen's opponents in the Senate have, in effect, altered the Constitutional procedures of confirmation. Rule XXII is now being used for the first time in connection with a nominee to the lower federal courts. By now employing Rule XXII, the Democrat minority in the Senate, has, in effect, raised the number of Senators necessary to confirm a nominee from the mere majority previously regarded as sufficient to confirm, to the super-majority requirement of 60. As John C. Armor, writing for UPI, recently observed, since other Constitutional provisions, notably the clauses regarding treaties, impeachments, expelling members, overriding Presidential vetoes and constitutional Amendments expressly require two-thirds supermajorities, the clear implication is that the clause regarding confirmation of judicial nominees, which merely speaks of "advise and consent," should not.[6] I believe that Mr. Armor is correct, and that Senate Rule XXII, at least when used to defeat a judicial nominee by denying him or her a vote on the Senate floor, unconstitutionally raises the number of votes required for confirmation, and thus ought not to be permitted to frustrate the President's appointment power.

It is significant that when Senate Rule XXII was being employed by Republicans (not in the appointive context) during the term of President Clinton, one of his most distinguished counsel, Lloyd Cutler, in whose law firm I once had the privilege to serve, made a strong argument that the use of Rule XXII to create supermajority requirements not in the Constitution, was impermissible. Thus, in an op-ed piece published in the

[6] John C. Armor, "Commentary: Stop Judicial Filibusters," March 13, 2003.

Washington Post on April 19, 1993,[7] Cutler indicated his belief that what he (in my view, correctly) understood to be a rule permitting unconstitutional conduct could be abolished.

This subcommittee should consider whether it might now be appropriate to take the advice Cutler then offered. Rule XXII could be repealed, according to Cutler's view, "If the Senate Rules Committee, would approve an amendment of Rule XXII permitting a majority to cut off debate after some reasonable period. When the amendment comes before the Senate, [those seeking to prevent the Rule's continued unconstitutional use] would need to muster only 51 favorable votes (or 50 plus the vice president's vote)." Cutler recommended that A senator "would raise a point of order that this number is sufficient either to pass the amendment or to cut off debate against it, because the super-majority requirements of Rule XXII are unconstitutional. The vice president would support this view, backed up by an opinion of the attorney general. Following Senate custom on constitutional points, the vice president would refer the question to a vote of the entire Senate, where the same 51 or more votes, or 50 plus the vice president's vote, would sustain it." At that point Rule XXII would be history and the problem of unconstitutionality would vanish, as the Senate would be able to cut off debate by a mere majority vote. I do believe that Senate Rule XXII should not be used to frustrate the President's appointive power, and thus I urge this subcommittee to consider recommending its abolition. Unfortunately, there is great reluctance to overturn longstanding Senate practice, such as Rule XXII, but if there ever were an occasion for it, it might well be the first time in history that Rule XXII has been used to defeat federal lower-court nominees.

Overturning Rule XXII at this time, or using some other means to stop the frustration of Estrada's, Owen's and other Bush appointments, as I have tried to make clear, would not only to preserve Presidential prerogatives, but would put a stop to what I can only describe as a bold attempt to make a serious revision in the original understanding of the appointment powers and the Senate's role in the process. In two hearings on the judicial appointments process while the Democrats still controlled the Senate, in an effort to challenge the nomination philosophy candidate Bush had expressed on the campaign trail, Senator Charles Schumer of New York made clear his belief (buttressed by some academics friendly to the Democrats' point of view) that it ought to be the task of the Senate to achieve a "balance" of judicial ideologies on the bench,[8] and

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[7] Lloyd Cutler, "The Way to Kill Senate Rule XXII," Washington Post, April 19, 1993, at A23.

[8] Senator Schumer's idea of "balance" on the bench, and, indeed the Senate Democrats' thinly veiled threat that if Bush is to succeed in getting any of his nominees through the Senate it will have to be at the price of coming up with "balancing" nominees favored by Democrats, sounds very much like a practice Alexander Hamilton warned against in Federalist 78:

> [I]n every exercise of the power of appointing to offices, by an assembly of men, we must expect to see a full display of all the private and party likings and dislikes, partialities and antipathies, attachments and animosities, which are felt by those who compose the assembly. The choice which may at any time happen to be made under such circumstances, will of course be the result either of a victory gained by one party over the other, or of a compromise between the parties. In either case, the intrinsic merit of the candidate will be too often out of sight. In the first, the qualifications best adapted to uniting the suffrages of the party, will be more considered than those which fit the person for the station. In the last, the coalition will commonly turn upon some interested

that each nominee had a burden of satisfying the Senators he or she was qualified for the position. By "judicial ideology," Senator Schumer made clear at those hearings (for the first one of which I testified as an invited witness),[9] he meant a belief that particular judicial decisions, including apparently many regarding race, religion, and abortion, were correctly decided and ought to be expansively applied and followed in the future. Senator Schumer (and some of his witnesses) strongly suggested that any Bush nominee with contrary views ought not to be permitted to be confirmed unless a nominee with a "judicial ideology" favored by Senator Schumer and those like him was also confirmed, in order to maintain "balance."

There is, of course, no constitutional requirement of "balance" on the bench, and, more important, Senator Schumer's concept of "judicial ideology," seems inconsistent with the Constitution's presumption with regard to judging. The proper "judicial philosophy" (and *not* "judicial ideology") Federalist 78, and the writing of the founders tells us, is to decide cases according to a neutral interpretation of the Constitution and laws, and not to arrive on the bench with a preconceived set of responses or determined to implement a particular "ideology." Senator Schumer, pursuant to ascendant ideas in the legal academy about judges as forces for social change, has a different conception of judging, and wants a bench that will implement the policies he and many of his fellow Democrats favor. President Bush has made clear that he does not share that view, and his remarks about preferring judges who will not legislate from the bench (the views also of Scalia and Thomas) put him squarely at odds with Senator Schumer. If the President is forced (by the unconstitutional application of Rule XXII, or by other means) to give up half of his nominations to satisfy some Senators' ideological preferences, his constitutional appointment powers will have been severely compromised. Senators who take seriously their oath to uphold the Constitution, and thus its scheme of separation of powers, ought to strive to prevent this.

The Constitutional scheme, and the rule of law itself would be compromised if Senator Schumer's expressed notion that nominees have a burden of proof they must meet to satisfy ideologically-driven Senators goes unchallenged. According to the Federalist, at least, and according also to the prevailing practice in more than two centuries of judicial appointments, a presumption of fitness has been generally accorded to Presidential judicial nominees, and the Senate has properly opposed nominees only when they have been lacking in character or professional legal accomplishments. As I have previously indicated, the authors of the Federalist made clear that the assignment of the "advise and consent" role to the Senate was to prevent the President from using the nomination process to reward unqualified or corrupt family members or cronies, and not to prevent him from actions taken in good faith to appoint qualified persons of high character. It is true that some nominees have been rejected or questioned on other grounds throughout our history (one thinks of the criticism leveled at Louis Brandeis, which did not prevent his confirmation, and that at Robert Bork, which did). It has been

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> equivalent: "Give us the man we wish for this office, and you shall have the one you wish for that." This will be the usual condition of the bargain. And it will rarely happen that the advancement of the public service will be the primary object either of party victories or of party negotiations.

[9] See generally footnote 1, supra.

almost unheard of, however, for this kind of ideological litmus test to be applied to deny a confirmation vote to lower court nominees.

If President Bush is made to give in to the tactics of the Senate Democrats on this point, he will not only have suffered an ignoble political defeat, but he will have failed in *his* oath to support the Constitution, because he will have compromised his powers and will have seriously undermined the rule of law on which the Constitution depends. So serious is this matter – and, again, I think it can fairly be described as a Constitutional crisis – that some have begun to urge the President, in effect, to ignore the Senate's role altogether.

One suggestion that has been made, for example by Victor Williams (and also by Boston University Law Professor Randy Barnett), is for the President to do an end run around the Senate Democrats, by making a series of recess appointments of his judicial nominees. As Mr. Williams recently pointed out in the National Journal, "Clause 3 of Article II, Section 2, states: 'The President shall have Power to fill up all Vacancies that may happen during the Recess of the Senate, by granting Commissions which shall expire at the End of their next Session.' The recess-appointments clause protects the government from Senate inaction and guarantees the ceaseless functioning of the judiciary. More than 300 jurists have risen to the bench via a recess appointment: Earl Warren, William Brennan, Potter Stewart, Griffin Bell and Augustus Hand, to name a few." Mr. Williams notes that John F. Kennedy "recess-appointed more than 20% of his judges, and each was subsequently confirmed for a tenured bench. . . . It was just such a Kennedy recess appointment that placed Thurgood Marshall, then a successful lawyer for the National Association for the Advancement of Colored People, on the 2d Circuit." President Clinton made similar use of the recess appointment power, and there is thus precedent for President Bush to go that route. Still, the Republicans criticized Clinton for his attempt to circumvent the confirmation process through recess appointments. Thus, recess appointments for President Bush's nominees, though they ought to be considered if there are not other alternatives, are still a dubious attempt to make two wrongs equal a right. The Senate, rather than the President, is the appropriate body to end the problem created by a few Senators' inappropriate use of Senate Rule XXII.

Catholic Law School's Dean Douglas Kmiec, wrote in the Wall St. Journal on March 6, 2003, that what was being done to Miguel Estrada was a "national disgrace." He favors stopping the Democrat Senators' tactics by a frontal attack on "Senate Rule V, [which] provides that the rules of the Senate shall continue from one Congress to the next unless amended by two-thirds of those present and voting." Dean Kmiec notes that "This violates fundamental law as old as Sir William Blackstone, who observed in the mid-18th century that 'Acts of Parliament derogatory from the power of subsequent parliaments bind not.'" Kmiec also observes that "the Supreme Court has repeatedly held that the legislature does not have the power to bind itself in the future. As the Court stated in Ohio Life Ins. and Trust Co. v. Debolt (1853), for the political process to remain representative and accountable, 'every succeeding Legislature possesses the same jurisdiction and power . . . as its predecessors. The latter must have the same power of repeal and modification which the former had of enactment, neither more nor less.'" I agree with Dean Kmiec's analysis, and this subcommittee should consider whether it should recommend that the Senate Rules Committee act accordingly.

In any event, whatever strategy or tactics are eventually adopted by Senators or the President, it ought to be the obligation of this subcommittee to declare that the current use of Senate Rule XXII is unconstitutional insofar as it alters the President's appointive power and the Senate's prerogatives. This Subcommittee, no less than the Courts, charged with the task of Constitutional interpretation and construction,[10] should also make a strong statement of the appropriate role of judges and reject some Senators' attempt to subvert the practice of judging by subjecting it to conceptions of "judicial ideology." Those Senators who are true friends of the rule of law, ought to take action to stop what Dean Kmiec quite correctly calls this "national disgrace," this effort at rewriting the Constitution and undermining its careful allocation of legislative and judicial responsibilities and powers.

[10] On the legislature's role in Constitutional "construction," see generally Keith E. Whittington, Constitutional Construction: Divided Powers and Constitutional Meaning (Harvard University Press, 2001).

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13 May 2003

James C. Ho, Esq.
Chief Counsel
Senate Subcommittee on the Constitution, Civil Rights & Property Rights
Chairman, Senator John Cornyn

RE: *Changing the Rules Governing Senate Filibuster of Nominations*

Dear Mr. Ho:

I would like to render my legal opinion regarding the ability of the Senate to change its rules regarding filibusters of nominations.

First, a little background. The filibuster has a long history, but its pedigree is not one that should make us proud. It prevented civil rights legislation from being adopted for nearly a century.[1]

The modern filibuster has evolved into an invisible filibuster that is much more powerful than its historical predecessor. The current filibuster is covert and nearly invisible to the observer, because the Senate rules do not require any senator to actually hold the floor to filibuster: instead, the senators simply tell the Senate leadership that they intend to filibuster. Other Senate business goes on, but a vote on a particular issue — a nomination or a vote on legislation — cannot be brought to a vote.

The present Senate rules that create the filibuster also purport not to allow the Senate to change the filibuster by simple majority. However, these rules should not bind the present Senate any more than a statute that says that it cannot be repealed until 60% or 67% of the Senate vote to repeal the statute. As I explain more fully below, I do not see how an earlier Senate can bind a present Senate on this issue.

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[1] This point is neither original nor hardly in dispute. *See, e.g.*, Catherine Fisk & Erwin Chemerinsky, *The Filibuster*, 49 STAN. L. REV. 181, 199 (1997): "Beginning during Reconstruction and continuing for nearly a century, anti-civil rights filibusters played a major role in blocking measures to prohibit lynching, poll taxes, and race discrimination in employment, housing, public accommodations, and voting." (footnotes omitted citing authorities).

I understand that my opinion is being given in the context of a dispute between the Republicans and Democrats regarding the appropriateness of using the filibuster to prevent the Senate from voting on nominations that the relevant committee has approved. Of course, if the full Senate is allowed to vote on the nomination then, under the Constitution, a simple majority will be sufficient to confirm. Thus, this legal question has political overtones, but the resolution of the present dispute is not based on political preference: instead, it is based on law and logic.

Hence, Democratic commentators agree that the Senate can vote (if a simple majority want to vote) notwithstanding a preexisting rule to the contrary. For example, Lloyd Cutler, the former White House Counsel to Presidents Carter and Clinton wrote in 1993 that the Senate Rule requiring a super-majority vote to cut off debate is "plainly unconstitutional."[2] Prominent Democratic academics agree that the modern day filibuster "raises serious constitutional questions." *See*, Catherine Fisk & Erwin Chemerinsky, *The Filibuster*, 49 STAN. L. REV. 181 (1997).[3] Moreover, these authors reach the same conclusion that I reach: "the Senate rule that prohibits a majority of a newly elected Senate from abolishing the filibuster is unconstitutional because it impermissibly entrenches the decisions of past Congresses."[4]

Granted, the Senate, unlike the House, is often called a continuing body because only one-

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[2] "Rule XXII's built-in requirement that it and other Senate rules cannot be amended by majority vote, but only when two-thirds of the senators present vote 'aye.' The Constitution specifies no exception to the vice president's constitutional right to cast a tie-breaking vote, which necessarily includes votes on motions to amend the Senate's own rules. Since Rule XXII denies this power to the vice president by requiring that any amendment requires an affirmative vote of two-thirds, it is *plainly unconstitutional*." Lloyd Cutler, *The Way to Kill Senate Rule XXII*, WASH. POST, Apr. 19, 1993, at A23. See also his testimony before the JOINT COMMITTEE ON THE ORGANIZATION OF CONGRESS, 104th Cong. (1995) (statement of Lloyd Cutler, White House Counsel).

[3] Indeed, in 1995, Professor Bruce Ackerman of Yale, along with 16 other law professors opined that a proposed House of Representatives rule that created a 60% majority requirement for enacting new tax increases was unconstitutional, even though the House could have repealed that rule by simile majority vote. *See* reference in, Congressional Testimony by Federal Document Clearing House Immigration and Naturalization Bills, Cong. Testimony, 2003 WL 11717788 (May 6, 2003).

[4] The introductory comments to the article offer a brief summary of the author's full analysis, which is over 70 pages in length. This summary and the parts in quotations are taken from these comments from the authors' article. This article explains that what the authors call a "stealth filibuster" is historically "unprecedented" and raises "serious" constitutional questions. The authors conclude, first: "The Constitution requires that the judiciary declare Rule XXII's requirement that there be a two-thirds vote for a change in the Senate's rules unconstitutional." 49 STAN. L. REV. at 253. And second, "Senate Rule XXII is unconstitutional in requiring a two-thirds vote in order to change the Senate's rules." *Id.*

third of its members are elected every two years. But that does not give the Senators of a prior time (some of whom were defeated in the prior election) the right to prevent the present Senate from choosing, by simple majority, the rules governing its procedure. In other words, the Senate may be a continuing body insofar as two-thirds of its members carry over from the prior elections, but — for purposes relevant to this letter — the Senate starts anew every two years.

It is easy to make this point by looking at simple logic and a few examples.

If the prior Senate can bind a later Senate, that would mean that the prior Senate could, by mere rule, impose what amounts to an important amendment to the Constitution regarding the number of votes needed to confirm a nominee. The Senate cannot change the number of votes needed to confirm a nominee any more than it can properly change the number of votes necessary for consenting to the ratification of a treaty from two-thirds to 75% or 25% or 51%. Nor could a majority of the Senators amend the rules to provide that a treaty may be ratified only if two-thirds of the Republican Senators present and voting give their consent.[5]

Recall that Senator James Jeffords changed parties and became an independent after the 2000 election. That shifted control of the Senate from Republicans to Democrats. The new Senate then reorganized itself, changed committee staff, and so on. However, if the prior Senate can really bind the present Senate, the Republicans could have filibustered the effort to reorganize the Senate. One might respond: but that would mean that the Senate could not vote on anything while there was a filibuster going on! Ah, but as I mentioned above, the Senate no longer require a senator to actually hold the floor to filibuster; senators "filibuster" simply by notifying the Senate leadership that they plan to filibuster. If the present Senate cannot change its filibuster rule until 67 senators vote against this modern-day "invisible" filibuster, then the Republicans could have prevented the turn-over of the Senate after the Republicans no longer controlled 50 or 51 votes. Yet, we all know that attempt would be invalid.

Or, think of it this way: what if the prior Senate (before the most recent election that shifted control to the Republicans) used its rule-making power to provide that judicial appointments require 75% or even unanimous consent, and that the Senate could not change that rule except by unanimous consent? Surely, no one would argue that the prior Senate can prevent the present Senate from changing that rule. Filibusters cannot be used to prevent changes in the rules that govern filibusters.

The present Senate rules are no more sacrosanct than a statute. If the House and Senate enact a law and the President signs it, it remains in effect until the House and Senate repeal it and the President signs the repealing legislation. The prior law cannot provide that it remains law unless 60% or 67% of the Senators approve the repeal. Similarly, a Senate rule remains in effect until the

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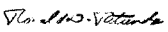
[5] *See also, e.g.*, Catherine Fisk & Erwin Chemerinsky, *The Filibuster*, 49 STAN. L. REV. 181, 253 (1997): "it is unconstitutional for Congress to bind future sessions of Congress. It is a clearly established principle of constitutional law, supported by fundamental democratic principles, that one Congress cannot tie the hands of future Congresses"

Senate changes that rule. The prior rule cannot provide that it remains law unless 60% or 67% of the Senators approve the repeal.

In short, the Senate can change its filibuster rule by simple majority vote. The rule regarding the filibuster cannot apply to votes to change the Senate rules, including the Senate rule regarding filibusters.

Sincerely,



Ronald D. Rotunda

New York's Senator

CHARLES E. SCHUMER

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FOR IMMEDIATE RELEASE:
May 6, 2003

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SCHUMER: ABANDONING FILIBUSTER UNDERMINES CHECKS AND BALANCE SYSTEM

Schumer says Founding Fathers never intended any automatic right to consent, majority or otherwise – there should be no rubber stamp for judicial nominees

US Senator Charles Schumer testified today at the Constitution, Civil Rights and Property Rights Subcommittee on "Judicial Nominations, Filibusters and the Constitution: When a Majority Is Denied Its Right to Consent." Schumer issued the following statement:

Mr. Chairman, I want to thank you for holding this hearing today and for inviting me to testify. It's an honor to sit here between my two esteemed colleagues, but it's a special honor to be here with Senator Specter who has been a leader on this Committee for so many years. He is one of the brightest, most thoughtful members of the Senate. He's sort of the E.F. Hutton of the Senate – when he speaks, people listen – and rightfully so.

Before I discuss the specific proposals for revamping the nomination and confirmation process, I just want to note that I was struck by the title of this hearing. The hearing is called: "Judicial Nomination, Filibusters, and the Constitution: When a Majority is Denied it Right to Consent."

It's one thing to have a discussion regarding the constitutionality of filibusters – as I will discuss in a minute, it's way off base to suggest filibusters are unconstitutional – but it's a whole other matter to suggest the majority has a "right" to consent.

I've pored over the Constitution and I don't see anything in here about any right to consent for anyone, but certainly not the majority. The Framers wrote the Constitution to limit the majority's power – a majority of Americans can't even necessarily elect a President – just ask Al Gore how he feels about the Electoral College after 2000.

When you go back and read the debates of the Constitutional Convention, you see that the Framers struggled to find the right balance of power when it came to selecting judges. History tells us that the Framers did not reach this delicate balance easily.

The Framers had four basic options to choose from when it came to selecting the judicial branch of government. They could give the power to select judges to: (1) the President alone, (2) Congress

alone, (3) the President with congressional advice and consent, or (4) Congress with Presidential advice and consent. As they began to piece together the foundation of our country, the Framers discussed and debated all of these options. Then, as now, there was a robust debate about the role of each branch of government should play.

The first proposal – the Virginia Plan – gave all of the power to appoint judges to the Congress. James Madison soon proposed that the Senate alone appoint judges. Throughout most of the Convention, the working draft of the Constitution contained Madison's plan, giving the Senate exclusive power to appoint judges. But some Framers disagreed. A few of the Framers, but not many, thought that the power to appoint should not be given exclusively to the President.

The dispute between the two camps centered on two equally important concerns: political corruption in the nomination process and the independence of the judicial branch. Both of these concerns were fundamental to our system of checks and balances. And those concerns are no less relevant today.

The pro-Presidential-power contingent was beaten back by those who argued it would be easier to corrupt and influence one person, i.e., the President, rather than the many, i.e., the Senators. The pro-Senate-power contingent was offset by those who feared it would give the second branch of government too much power over the third. So the Convention rejected vesting exclusive power with any one branch. But they still needed a compromise.

In the end, just a few days before a final version of the Constitution was written, the Framers decided to give the President the power to nominate judges balanced by the Senate's power to give advice about those nominations and the power to consent to the appointments.

The compromise was another example of one of the most unique and enduring traits of our constitutional framework, its system of checks and balances. For those of us who revere the Constitution and who believe in the rule of law, the balance they created is almost a work of art.

The Framers realized that shared powers were best for the country. And the system of checks and balances they formulated has sustained our democracy for more than 200 years. The suggestion that anyone – much less the majority -- has a right to consent is both anti-constitutional and goes against centuries of Senate practice. Don't take my word for it, just look at the history.

In 1795, Chief Justice John Jay was stepping down and President Washington nominated John Rutledge as his successor. Before the Senate voted on Rutledge's confirmation, Rutledge gave a speech attacking the Jay Treaty as being excessively pro-British -- which, at the time, would have been sort of like a nominee today going out and giving a speech defending the French. The Senate, having recently ratified the Jay Treaty, voted down the Rutledge nomination, 14-10. Six members of that Senate were also members of the Constitutional Convention. Three of them voted for Rutledge and three voted against.

(I'd note – as an aside – that one of the three opposing Rutledge was Rufus King, a Senator from New York, so I'm continuing in a pretty long and rich tradition here.)

In one fell swoop, the Senators of that first Congress made clear both that political views are legitimately considered in this process and that there is no right to consent.

If the Senate has the power to reject nominations, then one can hardly claim the majority has the right to consent. As a constitutional matter, whether a nomination is defeated by an up-or-down vote or by a filibuster is entirely meaningless.

For the first century-plus of Senate history, there was no mechanism to cut off debate. The cloture vote is a creature of 20th Century Senate procedure, not created until 1917. So to suggest that filibusters are unconstitutional goes against the entire history of the Senate.

The argument is somehow that it is all right to filibuster legislation, but no all right to filibuster nominations, despite the fact that the words filibuster and cloture don't appear in the Constitution. It's not only anti-constitutional, it's totally illogical.

When it comes to the current problems, I think it's hard to say that the system is broken. The vacancy rate on the federal courts is at 5.6% -- the national unemployment rate is at 6%. Sometimes it seems the only jobs the White House cares about are those that involve Senate confirmation. Regardless, there aren't many seats left to fill.

When we were in the majority, we confirmed 100 of the President's nominees. Most of them have been conservatives, but mainstream conservatives, and they've gone through the Senate like a knife through hot butter.

We're down to under 50 vacancies, and most of those are awaiting nominations or the scheduling of a confirmation hearing. The handful of nominees we Democrats are most vigorously opposing are those who fall way outside the mainstream, will use their judicial powers to make law, not interpret law, or have refused to answer questions and provide documents. So relative to the problems President Clinton's nominees faced, President Bush's nominees are breezing through.

That said, I'd prefer that we fill every vacancy and get rid of all the rancor regarding these nominations. As I see it, there are two ways to fix the problems. First, the President could take ideology out of the process. Or, second, we could have a true compromise. The proposals that my friends have offered require unilateral disarmament. That may be a good thing when we're negotiating with hostile foreign powers, but when you are talking about a co-equal branch of American government, it's a dangerous thing to do. Saying the Senate should blindly confirm every nominee undermines everything the Framers were attempting to do.

So if you want a true compromise that preserves balance between the branches, I offer my proposal:

- Create nominating commissions in every state and circuit.
- Give the President and the opposition party leader in the Senate the power to name equal numbers of members of each commission.
- Instruct each commission to propose one name for each vacancy.
- And, barring the discovery of anything that disqualifies the person for service, both the President and the Senate agree to nominate and confirm him or her.

This proposal preserves balance while removing politics, partisanship, and patronage from the process. I look forward to the rest of this hearing and thank the Chair for giving me the opportunity to testify.

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CHARLES E. SCHUMER
NEW YORK

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COMMITTEES:
BANKING
JUDICIARY
RULES

United States Senate
WASHINGTON, DC 20510

April 30, 2003

The Honorable George W. Bush
The White House
1600 Pennsylvania Avenue
Washington, DC 20500

Dear Mr. President:

Six months ago you described the judicial nomination and confirmation process as "broken" and declared "we have a duty to repair it." I could not agree with you more. To fulfill that duty, both the Administration and the Senate must be willing to make concessions for the sake of the Judiciary and the nation. I write to suggest a reform that requires such concessions, but, if adopted, will go a long way toward repairing the damage that has been done.

As matters currently stand, both sides are clearly considering ideology in evaluating candidates for the bench and nominees are being delayed and deferred because of it.

On the front end, while most of the candidates you have sent to the Senate have been mainstream conservatives (and have been swiftly confirmed), a growing number of nominees have records that raise both eyebrows and concerns about their commitment to balance, fairness, and moderation. They may be excellent lawyers, but they have spent their careers advancing agendas that harm – most particularly – women, consumers, workers, civil rights, and the environment.

On the back end, in the face of such extremist nominees, one simply cannot expect the Senate to disregard its constitutional obligation and rubberstamp these extremist nominees. When confronted with nominees' hostility to basic fairness, we must ask questions, demand answers, and do all we can to stop those who fail to demonstrate the capacity to be even-handed jurists. Thus far, you have declined to take ideology out of the process. That is your right and I respect it, but it means we must continue to stand up against nominees who will bring an activist agenda to the courts.

Thus, we find ourselves at an impasse when it comes to several nominees. In addition, because we have to spend so much time vetting other nominees for whom red flags are raised, the process moves more slowly than any of us would like.

I believe there is a solution to the problems we face.

Both the Administration and the Senate should agree to the creation of nominating commissions in every state, the District of Columbia, and each Circuit Court of Appeals. Every commission will consist of an equal number of Republicans and Democrats, chosen by the

President and the opposition party's Senate leader. Each commission will propose one candidate to fill each vacancy. Barring evidence that any candidate proposed by a Commission is unfit for judicial service, the President will nominate the individual and the Senate will confirm her or him.

To ensure each vacancy is filled rapidly but not hastily, the Commission will have a reasonable period of time within which to propose a nominee, the President will have a short time within which to make the nomination, and the Senate will have the same short period of time within which to confirm him or her.

This proposal is our best hope for filling the bench with judges who are appointed based on merit, not ideology or party affiliation. It is also our best hope for breaking the vicious cycle that the judicial nomination and confirmation process has been stuck in for years.

The solution I offer is similar to one proposed 25-years ago by President Carter, who relied on judicial nominating commissions to generate candidates for circuit court vacancies and it is similar to nominating commissions used by Senators in several states. The biggest differences are that this proposal ensures that all federal judges are appointed by the same process regardless of what party is in power and it guarantees that every single selection is bipartisan.

By giving the President and the Senate equal roles in picking the judge-pickers, both retain some control over the process, but neither gets a stranglehold.

By forcing every selection to be bipartisan, we maximize the prospect of achieving balance and moderation on the bench. Very few extremists on either side will get through and, in the rare instance where one does, he or she likely will be offset by an extremist on the other side.

By mutually agreeing to abide by the choices the commissions make, we take politics and patronage out of the process.

Once this system is in place, Presidents and Senates will be hard-pressed to abandon it. We have a real chance here to put these battles to rest for good.

I promise to work to secure support for this proposal from every Senator on both sides of the aisle. I will also ask every Democratic candidate for the White House to take a vow to support this reform. Your leadership on this matter is essential to achieving this momentous goal. I hope you will agree to work with me to fix our broken system.

I look forward to hearing from you soon.

Sincerely,

Charles E. Schumer
United States Senator

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San Diego, CA 92110-2492

May 13, 2003

The Honorable John Cornyn
United States Senate
Washington, DC 20510-4305
VIA ELECTRONIC MAIL

Dear Senator Cornyn:

I am writing in connection with issues raised at the Hearings on *Judicial Nominations, Filibusters, and the Constitution: When a majority is denied its right to consent*, held on Tuesday, May 6, 2003 at 2:30 p.m. I am a Professor of Law at the University of San Diego, and I have written extensively on issues of constitutional law and judicial selection. I am not writing to support the President's nominees on the merits, nor am I a member of the President's party. My concern is with the Constitution and the downward spiral of politicization that has characterized the confirmation process in recent years.

In this letter, I address the original understanding of the advice and consent clause in light of the text of Article II and the interaction between the first President and the first Congress. My conclusion is that the Senate has a constitutional duty to provide advice and consent in a timely fashion, and that this duty is breached when a Minority filibuster delays the vote on a Presidential nominee beyond the end of a session of Congress. This conclusion is supported by the following considerations.

First, when the Senate gives advice and consent it performs an executive function. This fact is directly supported by the language of the clause. What is the constitutional responsibility of the Senate with respect to advice and consent? The United States Constitution Article II, Section 2, Clause 2, provides that the President

> shall nominate, and by and with the advice and consent of the Senate, shall appoint ambassadors, other public ministers and consuls, judges of the Supreme Court, and all other officers of the United States, whose appointments are not herein otherwise provided for, and which shall be established by law: but the Congress may by law vest the appointment of such inferior officers, as they think proper, in the President alone, in the courts of law, or in the heads of departments.

The phrase "advice and consent" is borrowed from the laws of Great Britain where it was used to describe the consultative relationship between Crown and Privy Council—an executive department. Appointment itself is an executive function.

Second, because advice and consent is an executive function, it is distinguishable from the Senate's legislative function. When the Senate acts in its legislative capacity, it owes no constitutional duties to the President, but when the Senate acts as an executive body—the fundamental nature of its role is different. The Senate itself recognizes this distinction in a variety of ways; for example, the Senate goes into executive session to consider judicial nominations.

Third, the Senate has a constitutional duty to give advice and consent to the President. Perhaps this is obvious, but examination of the early historical practice is nonetheless instructive. How did the first President, George Washington, view the Senate's obligations with respect to advice and consent? He believed that when the Senate performed this executive role, its relationship to the President was analogous to the Privy Council. President Washington wrote:

> The Senate when these powers are exercised, is evidently a Council only to the President, however [necessary] its concurrence may be to his Acts. It seems incident to this relation between them, that not only the time but the place and manner of consultation should be with the President. It is probable that the place may vary. The indisposition or inclination of the President may require, that the Senate should be summoned to the President's House. Whenever the Government shall have buildings of its own, an executive Chamber will no doubt be provided, where the Senate will generally attend the President. It is not impossible that the place may be made to depend in some degree on the nature of the business. In the appointment to offices, the agency of the Senate is purely executive, and they may be summoned to the President.[1]

President Washington's understanding was that the Senate could be called by the President to give advice and consent on his timetable. This understanding accords with the role of the Privy Council in the England.

Fourth, early in the history of the Republic, the settled practice became that the Senate would remain in its own chamber, but would give the President advice and consent within a reasonable time. Although Washington's specific proposal was not adopted, his understanding of the fundamentally executive nature of the Senate's role in advice and consent provides an important insight into the meaning of the Article II, Section 2, Clause 2. From the text and early history, a general principle can be adduced. This general principle is that *advice and consent must be timely*. President Washington believed that this principle could be implemented by giving the President the authority to demand advice and consent when he deemed it necessary. The first Senate countered by

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[1] George Washington to Senate Committee on Treaties and Nominations, 10 Aug. 1789, Writings 30:377—79.

providing advice and consent that was timely, while reserving to itself the authority to schedule its own executive sessions.

Fifth, the duty to give timely advice and consent means, at a minimum, that the Senate should vote on nominations during the Session in which the nomination is made. The text of the advice and consent clause when read in light of the early historical practice provides compelling evidence that the Senate has a constitutional duty to give advice and consent to the President. From the existence of the duty, it follows that the duty must be completed in a timely fashion. If the Senate has a constitutional duty to give advice and consent, it cannot escape that duty through indefinite delay. The constitution does not provide a specific period of days, and hence it might be argued that the Senate may wait for months or even years before acting on a nomination. There is, however, strong evidence from another provision of the Constitution as to the outer limit of constitutionally permissible delay. The Recess Appointments Clause, Article II, Section 2, Clause 3, provides:

> The President shall have Power to fill up all Vacancies that may happen during the Recess of the Senate, by granting Commissions which shall expire at the End of their next Session.

This provision strongly suggests that the founders contemplated that the Senate would give and advice and either grant or deny consent within the session in which the nomination was made. Any delay of advice and consent beyond the session in which the nomination was made would be a breach of the Senate's constitutional duty.[2]

Sixth, allowing indefinite filibusters of Presidential nominees is inconsistent with the constitutional duty to provide advice and consent in a timely fashion. This is not to say that the Senate cannot provide individual Senators or the Minority with a procedural opportunity to trigger extended debate. But that opportunity cannot be so extensive as to allow its abuse by extending debate beyond the end of the current Session of Congress—excepting of course in the case of a nomination that is submitted at the end of the Session.

Seventh, the current extended filibusters of multiple nominees require the Senate to address the question whether its rules provide a sufficient guarantee that the Senate will fulfill its constitutional duty to give advice and consent within a reasonable time. It is true that this question should also have been raised in a variety of situations. It is possible that prior Senates have not fulfilled their constitutional responsibilities. But this is not excuse for ducking the question.

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[2] If a nomination were made at the very end of a Session, then the Senate's obligation would be to act during the next Session.

In sum, the text and history of the Constitution suggest that the Senate has a duty to give advice and consent in a timely fashion. Although the constitution does not provide a period of days, the relationship between the Advice and Consent Clause and the Recess Appointments Clause suggests that the Senate's constitutional duty should be fulfilled during the session in which the nomination is made. The current Senate Rules permit a determined minority to breach that Constitutional duty through a filibuster. The Senate can cure this constitutional defect by amending its rules in a variety of ways. The Senate might provide that debate can be closed by a simple majority vote after a reasonable period of time has elapsed, or the Senate might provide that nominations will come to the floor automatically within a specific number of days after submission.

There is, of course, another route by which the Senate could fulfill its constitutional duty to give advice and consent in a timely fashion. The Minority could end the filibuster voluntarily. In the long run, this course might be the wisest. Amending the rules over the objection of the minority will do little to restore the spirit of cooperation that is vital to the Senate's role as the "cooling plate" for the "hot tea" produced by the House.[3]

Thank you for the opportunity to submit this letter.

Sincerely yours,

Lawrence B. Solum
Professor of Law
[Electronic Signature]

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[3] "George Washington is said to have told Jefferson that the framers had created the Senate to "cool" House legislation just as a saucer was used to cool hot tea." United States Senate, 1787-1800, September 17, 1787 Senate Created, at http://www.senate.gov/artandhistory/history/minute/Senate_Created.htm (last visited May 13, 2003).

#4

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Points of View

LET'S AGREE ON A TIMELY BASIS

TO BREAK THE JUDICIAL NOMINATIONS GRIDLOCK, THE SENATE NEEDS TO VOTE ON SCHEDULE.

Arlen Specter

Our constitutional system for choosing federal judges has hit an impasse. Public confidence in the Senate confirmation process has declined, while the inordinate number of judicial vacancies has caused corresponding delays in federal court dockets. For the benefit of those seeking legal redress and for citizens generally, we in the Senate can and must act to remedy this unacceptable situation. The solution lies in something as straightforward--and nonpartisan--as a series of scheduled steps leading to a full Senate vote on each and every nominee.

It was another series of steps that led to the current gridlock in confirming federal judicial nominees: President George W. Bush failed to win the popular vote in the 2000 presidential election, with the contest essentially decided in the Supreme Court. The president nominated for the federal bench several prominent individuals with judicial philosophies similar to the president's views. Sen. James Jeffords of Vermont left the Republican Party, ceding control of the Senate to the Democratic Party.

Now the Democrats directing the Senate have refused to appropriately act on Bush judicial nominations--in several cases, for more than a year--in much the same way that Clinton judicial nominees were treated for six years by a Republican controlled Senate. This reciprocal partisan treatment has in turn created an even deeper division in a Senate already deeply divided in light of the disputed 2000 election and the Jeffords defection. Advocacy groups with vested interests in the makeup of the judiciary have continued to wage negative campaigns against nominees, prompting at various times the invocation--and sometimes abuse--of the time-honored tradition of senatorial courtesy to delay or defeat nominations.

Article II, Section 2, of the Constitution tells us that the president "shall nominate, and, by and with the advice and consent of the Senate, shall appoint...Judges of the Supreme Court, and all other officers of the United States." The Senate is thus a critical part of the process for naming federal judges. Unfortunately, the advice-and-consent power is

applied in an arcane and ad hoc practice that lacks any set time lines--and therefore is subject to abuse.

A Timetable at least

All too often of late, where a president of one political party has submitted a judicial nomination to a Senate controlled by the opposite party, that nomination has been subjected to partisan treatment not focused solely on the nominee's qualifications for the federal bench. This has been the case regardless of which party controlled the White House and which party controlled the Senate.

Individual senators and committee chairmen have taken advantage of the ad hoc process to cause excessive delays in considering nominees. Some nominees have not even received a hearing. At other times, the Committee on the Judiciary-- acting along party lines--has prevented the full Senate from exercising its constitutional duty to vote on all judicial nominations. While confirmation disputes have often been resolved by back-room arrangements among the Senate leadership, these deals themselves have tended to undermine the legitimacy of the confirmation process in the public's eyes.

I have suggested a simple Senate rule change--a nominations protocol-- that would establish a timetable for confirmations.

My nominations protocol provides that the chair of the Senate Judiciary Committee, in consultation with the ranking member, set a specific timetable for committee action on each nominee. A certain number of days after a nomination is submitted by the president, a hearing would be held, and within a certain number of additional days there would be a vote by the Judiciary Committee on whether to report the nominee to the full Senate for its consideration. Then, the majority leader of the Senate, in consultation with the minority leader, would agree upon a timetable for floor action so that, within another specified period of time, there would be a vote by the full Senate.

Additionally, my protocol requires that a nomination would proceed to the Senate floor if the nominee were rejected in committee on a party-line vote. The recent nomination to elevate U.S. District Judge Charles Pickering Sr. of Mississippi to the U.S. Court of Appeals for the 5th Circuit is an instance where a nomination, rejected by the Judiciary Committee on a 10-9 party- line vote, was not reported to the full Senate for consideration. It is likely that Judge Pickering would have been confirmed by the full Senate. Thus the Democrats' refusal to allow the full Senate to consider his nomination did not conform to the Constitution, which calls for the Senate--not simply a committee--to make the decision to accept or reject federal judicial nominees.

I believe that any president, notwithstanding his political persuasion, should be accorded a certain degree of deference in his judicial nominations. Neither the text of the Constitution nor any contemporaneous or subsequent history says anything about the ability of one senator or one committee to defeat a judicial nomination by the president. To the contrary, in Federalist 76, Alexander Hamilton made clear that this constitutional

function was to be exercised by the Senate as a whole, which would serve as a check upon unwise appointments. Each and every senator should participate in bringing the collective wisdom of the Senate to bear on judicial nominations. If one senator or one committee has the de facto power to block a nomination, then the advice-and-consent clause of the Constitution is rendered virtually meaningless.

Reporting a nomination to the full Senate even absent a majority vote in committee also has historical support under Senate practice. Since 1950, six lower court nominees have been sent to the full Senate even though they did not receive an affirmative vote in the Judiciary Committee.

Similarly, under my protocol, any Supreme Court nominee would be reported to the full Senate irrespective of the committee vote. This conforms with recent Senate practice: In 1991, the nomination of Judge Clarence Thomas to be an associate justice failed to receive a majority vote (7-7) in the Judiciary Committee, yet was reported to the full Senate, which confirmed him, 52-48. Another Supreme Court nominee, Judge Robert Bork, received a negative vote (9- 5) in the Judiciary Committee, but his nomination was still sent to the Senate floor--and was ultimately defeated, 58-42.

To ensure that ample discretion is retained at the committee level, the timetables under my protocol could always be extended for cause, such as the need for more investigation or additional hearings. While it is presumed that the White House will adequately consult with senators from the judicial nominee's home state, a failure to consult--in and of itself--should not be considered sufficient cause to indefinitely delay a judicial nomination.

Judges Delayed

Besides the constitutional concern, a vital pragmatic consideration underlies the need for my protocol. According to both sitting federal judges and their court executives, filling vacancies is the most pressing issue facing our lower courts--due to the correlation between judicial vacancies and delays in processing cases.

For example, look at the 6th Circuit. The court's 50 percent vacancy rate has left a death penalty appeal pending for more than eight years, while a plaintiff in a civil case died after having waited more than 15 months just to have oral arguments in a job discrimination suit.

Egregious delays can also be found in the 4th Circuit, where more than a quarter of the seats are unfilled despite four declared judicial emergencies and one seat being vacant for eight years. Meanwhile, simple appeals languish. A municipality in South Carolina has been waiting 39 months for clarification of the constitutionality of its ban on the docking of longline fishing vessels at the local marina. A routine Longshoreman's Act claim has been pending for 38 months. It is difficult to conceive of a fully occupied court that could not dispose of such mundane cases in more than three years.

These anecdotal examples are representative of a much broader and most disturbing pattern of easily avoidable judicial vacancies and emergencies. The situation is unacceptable, and the Senate has a constitutional responsibility to act. My proposed protocol would provide a nonpartisan way to fill judicial vacancies with due care but without undue political influence.

Arlen Specter is the senior U.S. senator from Pennsylvania, a Republican, and a member of the Senate Judiciary Committee.

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Confirmation treachery
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By Bruce Fein, SPECIAL TO THE WASHINGTON TIMES
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Judicial confirmation treachery is afoot among a fringe of Senate Democrats. It demands an equally bold Senate Republican answer: a Senate vote irrespective of the non-constitutional cloture rule of the Senate and judicial commissions for nominees who attract simple Senate majorities as prescribed by the Constitution. Turn the other cheek is canonical in the New Testament, but it would be foolhardy before the witch's brew of Democrats currently abusing the right of Senate debate.

A cynical filibuster has been launched against a vote on President George W. Bush's nomination of Miguel Estrada to the U.S. Court of Appeals for the District of Columbia Circuit. The nominee is a Stradivarius within the professional community: unexcelled academic credentials; celebrated service as a Supreme Court clerk and assistant solicitor general; impressive arguments before the high court in private practice; and, a deluxe rating from the American Bar Association's Committee on the Federal Judiciary, which Senate Democrats themselves have acclaimed as the gold standard for judicial qualifications.

Article II of the Constitution contemplates confirmation of the president's judicial nominees by simple Senate majorities. That threshold of consensus, the Founding Fathers believed, would thwart misuse of the president's appointment power to favor cronies or incompetents; and, check undue executive branch influence over the character of the third branch. The idea of Senate supermajorities for confirmations was rejected for reasons that are threefold: appointing a single federal judge was far less politically momentous than treaty ratifications for which a supermajority requirement was thought proper; the judiciary could become understaffed if a Senate minority were empowered to block nominees; and, a popular consensus over

The constitutional cloud over cloture rules darkens considerably when extended to judicial nominees. In contrast to legislation, our constitutional architects voiced no concern over either an excess of judgeships or too much judging. Indeed, they generally celebrated independent federal courts and the power of judges to pronounce on the constitutionality of government action the jewel in our Constitution's crown as acclaimed by both conservative Chief Justice William H. Rehnquist and liberal Associate Justice Ruth Bader Ginsburg.

Thus, filibustering judicial nominees who would be confirmed by a Senate majority works against the constitutional grain. No exception has been recognized for Senate minority opposition turning on judicial philosophy. President Franklin D. Roosevelt, for instance, packed both the lower federal courts and the Supreme Court with hard-core New Dealers without provoking filibusters.

In sum, neither in Senate traditions nor in constitutional law is there a crumb of justification for the fringe Senate Democrat filibustering of the impeccably qualified Mr. Estrada. Sen. Charles Schumer, New York Democrat, exemplifies their duplicity. In one sentence, he maligns Mr. Estrada as a stealth candidate who confounds the Senate duty to make an informed confirmation vote. In the next, he insists that overwhelming evidence proves the nominee is a far-right conservative outside the judicial mainstream who would create a dangerous imbalance on the court of appeals. And in the third, he accuses President Bush of conservative machinations by following the strong advice of former Democrat Solicitors General Archibald Cox and Walter Dellinger in declining to provide the Senate with confidential and legally privileged memoranda authored by then Assistant Solicitor Miguel Estrada. As F. Scott Fitzgerald bemoaned, the mark of a first-rate intelligence in modern times is the ability to keep two opposite ideas in the mind simultaneously yet retain the capability of functioning.

Senate Majority Leader Bill Frist, Tennessee Republican, should arrange for a Senate vote on Mr. Estrada irrespective of the cloture rule. His confirmation would be certain. The Constitution would be honored. And the federal judiciary would no longer be held hostage by a fringe Democrat minority.

Bruce Fein is a founding partner of Fein & Fein law firm.

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The Washington Times
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Filibustering the Constitution

James L. Swanson
Published May 6, 2003

This afternoon, Sen. John Cornyn, Texas Republican and chairman of the Senate Judiciary Committee's subcommittee on the Constitution, will convene a hearing on "Judicial Nominations, Filibusters, and the Constitution: When a Majority Is Denied Its Right to Consent." It's about time. For the past three months, Senate Democrats have filibustered the nomination of Miguel Estrada to the U.S. Circuit Court of Appeals for the District of Columbia. Last week, they made official their hitherto informal filibuster of the nomination of Texas Supreme Court Justice Priscilla Owen to the U.S. Fifth Circuit Court of Appeals. And it might not end there. In the future, other nominees, including to the U.S. Supreme Court, might become filibuster targets.

Today's hearing is a timely and much needed antidote to the rancorous politicization that has plagued the judicial confirmation process. Expert testimony will explore a number of arcane but important subjects, including the historical origins of filibusters, their purposes, the obscure Senate rules that allow them, the difference between the Senate's executive and legislative calendar, the meaning of advice and consent, and more.

However wide-ranging the testimony, by the end of today four things should be obvious: First, the Constitution requires only a simple majority of 51 senators to confirm a judicial nomination. Second, any Senate rule or procedure — filibuster included — that allows the minority of the body to prevent the majority from consenting to a judicial nomination is in conflict with the Constitution. Third, in such a conflict, the Constitution is supreme. Thus, finally, any Senate rule that contradicts the Constitution by denying the majority its right to consent to a judicial appointment cannot stand.

No one disputes that the Senate has a legitimate role in filling judicial vacancies. The Appointments Clause of Article II, Section 2 of the Constitution is clear: The president "shall nominate, and by and with the Advice and Consent of the Senate, shall appoint ... Judges of the supreme Court, and all other Officers of the United States." To express consent, senators do the obvious — they vote in favor of a nomination. And no one can dispute that the Appointments Clause requires a simple majority of 51 senators for confirmation. Elsewhere in the Constitution, when the Framers intended more than simple majorities, they said so, as they did by requiring a two-thirds majority to convict in an impeachment trial, expel a member, overcome a presidential veto, approve a treaty or propose a constitutional amendment.

The filibuster, which under Senate rules requires 60 votes to bring a nomination to a vote, rewrites the Appointments Clause by requiring a super majority for confirmation. On "Meet the Press," Sen. Tom Daschle, South Dakota Democrat, claimed "in controversial issues [including judicial nominations], the Founding Fathers have said that it ought to take a supermajority to pass." Constitutional text and more than two centuries of precedent prove Mr. Daschle wrong.

This is not to say that all filibusters raise constitutional questions. There is a long history

of their use in the legislative context, and they can serve a legitimate purpose by not foreclosing debate on legislation prematurely. But in the executive context, when presidential appointments are at issue, filibustering appellate nominees is an unprecedented, though still not necessarily unconstitutional, step. If employed merely to guarantee a reasonable and limited period of debate before proceeding to an up or down vote, a brief filibuster might pass constitutional muster. But in the cases of Mr. Estrada and Justice Owen, when the filibuster is being used not to debate, but to kill their nominations by denying the majority its right to consent to them, serious constitutional issues arise.

Yes, the Constitution permits the Senate to set its own rules. But that is hardly a blank check entitling the Senate to amend the Appointments Clause by raising the confirmation bar from simple majority to super majority, to aggrandize power by upsetting the balance between the congressional and the executive branches, and to threaten the independence of the third branch, the federal judiciary. The conclusion is inescapable. Whenever Senate Democrats, a minority of the body, filibuster judicial nominations, obstruct an up or down vote, and deny the majority its right to consent to the appointments, they subvert the Constitution.

But what is the remedy? Should the president order the Justice Department to sue Mr. Daschle and seek relief in the form of an up or down floor vote on the filibustered nominees? Or is Majority Leader Bill Frist, Tennessee Republican, the proper plaintiff, or the nominees themselves? While such a claim might prevail, federal courts frown on settling political disputes between the other branches, or among feuding members of the same branch. There is a simpler solution. Change the rules. That's right. The majority could simply change the Senate rules to allow a simple majority of 51 senators to end debate and bring a judicial nomination to the floor for an up or down vote. Although existing Senate rules require a super majority to change them (how convenient for obstructionists), these rules are not laws, or carved in stone like the Ten Commandments. They are merely internal procedures, and under any proper understanding of the history and theory of legislative bodies, no prior Senate can exercise perpetual, dead-hand control over the present one.

It can be done without litigation, within the Senate by its own members, and it can be done immediately. Like Dorothy in the "Wizard of Oz," who always had the power to return home but didn't know it, Senate Republicans have always had the power to end the filibuster subversion and bring the Senate home to the Constitution. Will they do it?

James L. Swanson, a senior fellow in constitutional studies at the Cato Institute, is editor in chief of the Cato Supreme Court Review.

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Return to the article

The Washington Times
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Strategy to break the bench logjam

Bruce Fein

Published May 13, 2003

"Paris is well worth a mass." Henry IV of Navarre thus explained his olive branch to Catholics in ending France's gruesome religious wars. President George W. Bush and Republican senators should consider a corresponding gesture towards Senate Democrats over the confirmation of judicial nominees before resorting to a so-called "nuclear" option — a pulverization of the filibuster when deployed to defeat nominees who enjoy the support of a Senate majority. In recognition that Senate Republicans thwarted scores of President William Jefferson Clinton's nominees by masterly inactivity tantamount to filibusters, Mr. Bush and the Senate Republican leadership should compensate for that politically and constitutionally misguided history. They should agree to fill 10-20 percent of the next 50 judicial vacancies with Clinton nominees who failed to obtain a Senate vote.

Republicans have nothing to fear from such magnanimity. The doctrines they celebrate generally dominate the constitutional landscape in the Supreme Court, for example, in the fields of racial or ethnic preferences, church-state relations, federalism, and powers of the police and prosecutors. President Ronald Reagan's meticulously devised and brilliantly executed plan to populate the federal bench with trenchant thinkers and writers scornful of Great Society enthusiasms proved a stupendous success. Foiled Clinton nominees who might be selected under a 10-20 percent compensation formula, in contrast, fell within the customary range of mediocrity unlikely to convince others or to disturb the status quo.

But if the Republicans have little to fear from appointing a modest number of Democrat judges, they also have little to gain in the short run. The Constitution and the votes are on their side. The Democrat-inspired filibusters of Bush nominees Miguel Estrada and Priscilla Owen are unprecedented. Both bear impeccable credentials according to the Committee on the Federal Judiciary of the liberal leaning American Bar Association. The filibusters are not to inform or enlighten senators, but to scuttle a vote because confirmation would be certain. To concede compensatory appointments of Democrat judges to obtain a bipartisan consensus to eliminate filibustering over judicial nominees would also smack of capitulation to blackmail. Moreover, Democrats, not Republicans, inaugurated unmerciful confirmation tactics with their outrageous and counterfactual laceration of Supreme Court nominee Robert H. Bork, the most intellectually garlanded and gifted candidate since Chief Justice Charles Evans Hughes.

But statesmanship that subordinates partisan advantage to the nation when a constitutional abyss approaches carries its own reward. Republicans need to think not only of the living but of the dead and those yet to be born in contemplating whether to risk partisan political vendettas reminiscent of the Montagues and Capulets. The Constitution will capsize in the long run without a modicum of procedural consensus and goodwill between the parties.

There seems little doubt that Senate Republicans could reduce Democrat obstructions to

Mr. Bush's judicial nominees to rubble. At present, Senate Rule XXII requires 60 votes to invoke cloture and compel a floor vote. The nuclear option would amend the rule with a simple majority cloture threshold for judicial nominations; and, it would muscle aside an anticipated Democrat filibuster to thwart the amendment irrespective of Rule XXII by insisting that the Constitution empowers a simple Senate majority to prevail in the confirmation of judges under the Appointments Clause enshrined in Article II, section 2, clause 2. All Senate rules are subordinate to constitutional commandments. A rule which voided the votes of female senators, for example, would be unenforceable. Similarly, any rule which blocks a simple Senate majority — the constitutional standard of the Appointments Clause — from asserting its will in judicial confirmations is likewise unconstitutional and void.

Longevity of Senate filibuster rules is no defense. The Supreme Court has held unconstitutional the legislative veto, restrictions on the president's power to remove executive officers, political patronage, and federal common law despite equally hoary histories. Neither is President Bush's insistence on appointing judges sporting uniform philosophical stripes an excuse for filibustering. He was elected to do just that. Judicial appointments were a centerpiece of his campaign against Al Gore, just as President Franklin D. Roosevelt made the Supreme Court a target of disparagements in defeating Alf Landon in 1936. The Senate and the nation bowed to FDR's appointments of eight fervid New Dealers to the Supreme Court, all sympathetic to his ill-starred court-packing fiasco. President Bush deserves the same political deference.

The filibuster also subverts the Founding Fathers' preference for controversial brilliance over the lowest common denominator in judicial appointments. Its use would have shipwrecked the 1916 appointment of Justice Louis D. Brandeis. His glittering contributions to constitutional thinking have been unexcelled, ranging from freedom of speech to privacy to federalism. Yet his bold challenges to orthodoxies occasioned opposition to his appointment by the President of the American Bar Association, Elihu Root, former President William Howard Taft, former Attorney General George Wickersham, former head of the NAACP, Moorfield Story, President of Harvard University, A. Lawrence Lowell, and the New York Times.

Republicans are destined to triumph in the battle of the federal judiciary. But wouldn't an Appomattox peace with the Democrats be better for the country than the Carthaginian variety?

Bruce Fein is general counsel for the Center for Law and Accountability, a public interest law group headquartered in Virginia.

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Return to the article

THE WHITE HOUSE

WASHINGTON

May 6, 2003

Dear Senator Schumer:

On behalf of President Bush, I write in response to your letter of April 30.

You propose that the President and Senate leader of the opposite party select in equal numbers members of citizen judicial nominating commissions in each State and circuit who would then select one nominee for each judicial vacancy. The President then would be required to nominate the individual selected by the commission and the Senate required to confirm that individual, at least absent "evidence" that the candidate is "unfit for judicial service." You propose this as a permanent change to the constitutional scheme for appointment of federal judges.

We appreciate and share your stated goal of repairing the "broken" judicial confirmation process and the "vicious cycle" of "delayed" Senate nominees. But we respectfully disagree with your proposal as inconsistent with the Constitution, with the history and traditions of the Nation's federal judicial appointments process, and with the soundest approach for appointment of highly qualified federal judges, as the Founders determined. Rather, as President Bush and many Senators of both parties have stated in the past, the solution to the broken judicial confirmation process is for the Senate to exercise its constitutional responsibility to vote up or down on judicial nominees within a reasonable time after nomination, no matter who is President or which party controls the Senate.

I. The Constitution, the Current Problem, and the Solution

Article II of the Constitution provides: The President "shall nominate, and by with the Advice and Consent of the Senate, shall appoint . . . Judges of the supreme Court, and all other Officers of the United States . . . ." During the first Congress and throughout most of this Nation's history, the Senate has both recognized and exercised its constitutional responsibility under Article II to hold majority, up-or-down votes on a President's nominees within a reasonable time after nomination. The Framers intended that the Senate vote on nominations would prevent Presidential appointment of "unfit characters from State prejudice, from family connection, from personal attachment, or from a view to popularity." *Federalist* 76.

Your proposal would effectively transfer the nomination power of the President and the confirmation power of the Senate to a group of unelected and unaccountable private citizens. As the Supreme Court has explained, however, the Appointments Clause is "more than a matter of etiquette or protocol; it is among the significant structural safeguards of the constitutional scheme. By vesting the President with the exclusive power to select the principal (noninferior) officers of the United States, the Appointments Claude prevents congressional encroachment upon the Executive and Judicial Branches. This disposition was also designed to assure a higher quality of appointments: the Framers anticipated that the President would be less vulnerable to

interest-group pressure and personal favoritism than would a collective body." *Edmond v. United States*, 520 U.S. 651, 659 (1997) (citations omitted). Importantly, as the Supreme Court has also explained, the Appointments Clause not only guards against encroachment "but also preserves another aspect of the Constitution's structural integrity by preventing the diffusion of the appointment power." *Freytag v. CIR*, 501 U.S. 868, 878 (1991). Therefore, "neither Congress nor the Executive can agree to waive this structural protection" afforded by the Appointments Clause. *Id.* at 880. These principles and precedents amply demonstrate the constitutional and structural problems with any proposal to transfer the constitutional responsibilities of the President and the Senate to a group of unelected and unaccountable private citizens.

That said, we very much appreciate your recognition that the Senate's judicial confirmation process is "broken." The precise problem, in our judgment, is that the Senate has too often failed in recent years to hold votes on judicial nominees within a reasonable time after nomination (often because a *minority* of Senators has used procedural tactics to prevent the Senate from voting and expressing its majority will). Many appeals court nominees have waited years for votes; many others have never received votes. Today, for example, although the Senate never before has denied a vote to an appeals court nominee on account of a filibuster, a minority of Senators are engaged in unprecedented simultaneous filibusters to prevent up or down votes on *two* superb nominees, Priscilla Owen and Miguel Estrada, who were nominated two years ago and who have the support of a majority of the Senate.

The problem of the Senate not holding votes on certain judicial nominees is a relatively recent development, albeit not new to this Presidency. In the Administrations of both President George H.W. Bush in the 102nd Congress and President Clinton in the 106th Congress, for example, too many appeals court nominees never received up-or-down votes. As President Bush has explained, however, the problem has persisted and significantly worsened in the 107th and 108th Congresses during this President's tenure.

President Bush's commitment to solving this problem also is not new. In June 2000, during the Presidential campaign, then-Governor Bush emphasized that the Senate should hold up-or-down votes on all nominees within a reasonable time after nomination (60 days). Last fall, after two additional years of Senate delays that were causing a judicial vacancy crisis (an "emergency situation," in the words of the American Bar Association), the President proposed a comprehensive three-Branch plan to solve the problem. President Bush stated that this three-Branch plan should apply now and in the future, no matter who is President or which party controls the Senate. In particular, he proposed that judges provide one-year advance notice of retirement where possible; in March 2003, the Judicial Conference adopted the President's recommendation. The President proposed that Presidents nominate judges within 180 days of learning of a vacancy; the President is complying with this part of the plan and already has submitted nominations, for example, for the 15 new judgeships created on November 2, 2002. The President also proposed that the Senate vote up or down on judicial nominees within 180 days of receiving a nomination, a generous period of time for all Senators to evaluate nominees and to have their voices heard and their votes counted.

In the past, you and Senators of both parties have publicly agreed with the need for timely Senate votes on judicial nominees. On March 7, 2000, for example, you stated: "The basic problem is it takes so long for us to debate those qualifications. It is an example of Government not fulfilling its constitutional mandate because the President nominates, and *we are charged with voting on the nominees*. . . . I also plead with my colleagues to move judges with alacrity – *vote them up or down*. But this delay makes a mockery of the Constitution, makes a mockery of the fact that we are here working, and makes a mockery of the lives of very sincere people who have put themselves forward to be judges and then they hang out there in limbo."

In the 2000 campaign, moreover, several Democrat Senators such as Senator Leahy and Senator Harkin publicly and expressly agreed with then-Governor Bush's proposal for timely votes on nominees. In addition, Senator Specter in 2002, Senator Leahy in 1998, and Senator Bob Graham in 1991 all introduced Senate proposals to ensure timely up-or-down votes on judicial nominees. The Chief Justice, speaking on behalf of the federal Judiciary, also has expressly asked the Senate to ensure prompt up-or-down votes on nominees. And the American Bar Association, for its part, adopted a resolution last summer asking the Senate to hold prompt votes on judicial nominations, stating: "Vote them up or down, but don't hang them out to dry."

In seeking to fix the broken Senate confirmation process, we respectfully ask that you and other Senators consider these past statements, a sample of which are listed below, advocating timely up-or-down Senate votes on judicial nominees and ensure such votes no matter who is President or which party controls the Senate:

- *Senator Leahy* on October 3, 2000, stated: "Governor Bush and I, while we disagree on some issues, have one very significant issue on which we agree. He gave a speech a while back and criticized what has happened in the Senate where confirmations are held up not because somebody votes down a nominee but because they cannot ever get a vote. Governor Bush said: You have the nominee. Hold the hearing. Then, within 60 days, vote them up or vote them down. Don't leave them in limbo. *Frankly, that is what we are paid to do in this body. We are paid to vote either yes or no – not vote maybe*. When we hold a nominee up by not allowing them a vote and not taking any action one way or the other, we are not only voting 'maybe,' but we are doing a terrible disservice to the man or woman to whom we do this."

  - *Senator Leahy* on June 18, 1998, stated: "I have stated over and over again on this floor that I would refuse to put an anonymous hold on any judge; that I would object and fight against any filibuster on a judge, whether it is somebody I opposed or supported; that I felt the Senate should do its duty. *If we don't like somebody the President nominates, vote him or her down.* But don't hold them in this anonymous unconscionable limbo, because in doing that, the minority of Senators really shame all Senators."

- *Senator Daschle* on October 5, 1999, stated: "As Chief Justice Rehnquist has recognized, 'The Senate is surely under no obligation to confirm any particular nominee, but after the necessary time for inquiry it should vote him up or vote

him down.' *An up or down vote, that is all we ask for Berzon and Paez.* And after years of waiting, they deserve at least that much. . . . *I find it simply baffling that a Senator would vote against even voting on a judicial nomination.*"

- *Senator Harkin* on September 14, 2000, stated: "I'll just close by saying that *Governor Bush had the right idea.* He said the candidate should get an up or down vote within 60 days of their nomination."

  - *Senator Harkin* on October 6, 2000, stated that then-Governor Bush's proposal for an up-or-down vote within 60 days of nomination was a "great idea."

- *Senator Biden* on March 19, 1997, stated: "I respectfully suggest that everyone who is nominated is entitled to have a shot, to have a hearing and to have a shot to be heard on the floor *and have a vote on the floor.*"

- *Senator Bob Graham* on April 24, 1991, introduced a bill that would require the Judiciary Committee to report a nomination within 90 days of nomination and *would require an up-or-down vote on the floor within 120 days of nomination.* Senator Graham stated: "I consider it a judicial emergency when a judgeship is vacant for one day more than necessary."

- *Senator Kennedy* on February 3, 1998, stated: "We owe it to Americans across the country to give these nominees a vote. If our Republican colleagues don't like them, vote against them. *But give them a vote.*"

  - On September 21, 1999, *Senator Kennedy* stated: "It is true that some Senators have voiced concerns about these nominations. But that should not prevent a roll call vote which gives every Senator the opportunity to vote 'yes' or 'no.' . . . *These delays can only be described as an abdication of the Senate's constitutional responsibility* to work with the President and ensure the integrity of our federal courts."

- *Senator Durbin* on September 28, 1998, stated: "I am not suggesting that we would give our consent to all of these nominees. I am basically saying that this process should come to a close. *The Senate should vote.*"

- *Senator Feinstein* on September 16, 1999, stated: "*A nominee is entitled to a vote. Vote them up; vote them down.*"

  - *Senator Feinstein* on October 4, 1999, stated: "Our institutional integrity requires an up-or-down vote."

- *Senator Harry Reid* on June 9, 2001, stated: "I think we should have up-or-down votes in the committee and on the floor."

- *Senator Feingold* on March 8, 2000, stated: "All Judge Paez has ever asked for was this opportunity: an up or down vote on his confirmation. Yet for years, the Senate has denied him that simple courtesy."

- *Senator Kohl* on September 21, 1999, stated: "These nominees, who have to put their lives on hold waiting for us to act, *deserve an up or down vote.*"

  - *Senator Kohl* on May 15, 1997, stated: "[L]et's breathe life back into the confirmation process. Let's vote on the nominees who already have been approved by the Judiciary Committee, and let's set a timetable for future hearings on pending judges. *Let's fulfill our constitutional responsibilities.*"

- *Senator Lincoln* on September 14, 2000, stated: "If we want people to respect their government again, then government must act respectably. It's my hope that we'll take the necessary steps to give these men and these women especially *the up or down vote that they deserve.*"

- *Senator Boxer* on January 28, 1998, stated: "I think, whether the delays are on the Republican side or the Democratic side, let these names come up, *let us have debate, let us vote.*"

  - *Senator Boxer* on May 14, 1997, stated: "According to the U.S. Constitution, the President nominates, and the Senate shall provide advice and consent. *It is not the role of the Senate to obstruct the process and prevent numbers of highly qualified nominees from even being given the opportunity for a vote on the Senate floor.*"

- *Senator Sarbanes* on December 15, 1997, stated: "This politicization . . . has been extended to include the practice of denying nominees an up or down vote on the Senate floor or even in the Judiciary Committee. *If the majority of the Senate opposes a judicial nominee enough to derail a nomination by an up or down vote, then at least the process has been served.*"

  - *Senator Sarbanes* on March 19, 1997, stated: "It is not whether you let the President have his nominees confirmed. *You will not even let them be considered by the Senate for an up-or-down vote. That is the problem today.*"

- *Senator Levin* on September 14, 2000, stated: "The truth of the matter is that the leadership of *the Senate has a responsibility to do what the Constitution says we should do, which is to advise and at least vote on whether or not to consent to the nomination of nominees for these courts.*"

- *Senator Levin* on May 24, 2000, stated: "These Michigan candidates . . . deserve to have *an up or down vote* on their nominations. . . . The Senate slowdown has a serious impact on the administration of justice."

II. Additional Points Regarding Your Proposal

I also want to make three other points regarding your proposal.

First, contrary to an implicit suggestion in your proposal, the members of these citizen committees themselves will bring their own views about the best qualities for judicial candidates, and their own preferences and visions and ideologies. But there is an important difference between these private citizens, on the one hand, and the President and 100 Senators, on the other. The American people did not elect these citizens to exercise this critical constitutional responsibility and cannot hold them accountable for their exercise of it.

Moreover, the Framers of the Constitution expressly considered and rejected a committee nomination process, concluding that such a process was unlikely to focus on the "intrinsic merit of the candidate." *Federalist* 76. As Hamilton explained, "in every exercise of the power of appointing to offices by an assembly of men we must expect to see a full display of all the private and party likings and dislikes, partialities and antipathies, attachments and animosities, which are felt by those who compose the assembly." *Id.* It will "rarely happen that the advancement of the public service will be the primary object either of party victories or of party negotiations." *Id.*

By contrast, "[t]he sole and undivided responsibility of one man" – the President – "will naturally beget a livelier sense of duty and a more exact regard to reputation. He will, on this account, feel himself under stronger obligations, and more interested to investigate with care the qualities requisite to the stations to be filled, and to prefer with impartiality the persons who may have the fairest pretensions to them." *Id.* The Framers wanted the President alone to exercise the power of nomination, moreover, because the "blame of a bad nomination would fall upon the President singly and absolutely." *Federalist* 77. In a committee nomination process, by contrast, "all idea of responsibility is lost." *Id.*

For these reasons, the Framers concluded that the President alone was to nominate and the Senate as a body was to vote up or down on the President's nominations.

Second, you explain that your proposal would ensure the merit of federal judges. In your letter to President Bush of March 16, 2001, however, you and Senator Leahy expressed the view that the American Bar Association ratings provide "unique, unbiased and essential information" about judicial candidates, and provide an "independent, apolitical" evaluation of their qualifications. You referred to the ABA rating as the "gold standard" for evaluating nominees. All 42 of the President's appeals court nominees rated so far have received "well-qualified" or "qualified" ABA ratings. By the standard outlined in your letter of March 16, 2001, all of these appeals court nominees warrant your support.

Third, you explain that your proposal would avoid "extremist" judges. The Framers intended that the President would nominate judges and the Senate as a body would vote up-or-down on the nominations to express the majority will of the Senate. The constitutional scheme of Presidential appointment and majority vote in the Senate ensures that the nominees are not unfit. And your proposal would not preclude judges you might label as "extremist" from emerging from the citizen committees. Indeed, even more troubling is the fact that your proposal would not prevent judges whom both the President *and* a majority of the Senate might view as "extremist" from emerging from the citizen committees, yet the President and Senate would be essentially powerless to prevent the appointment.

One final point warrants mention. We assume that you include Miguel Estrada and Priscilla Owen in your description of "extremists" given the extraordinary ongoing filibusters of their nominations. But Miguel Estrada and Priscilla Owen represent the mainstream of American law and American values, as indicated by the fact that the President nominated them and a majority of the Senate supports them. Moreover, Miguel Estrada is supported by prominent Democrat lawyers such as Seth Waxman and Ron Klain and by a bipartisan group of 14 former colleagues in the Solicitor General's office, among many others. He worked for four years in the Clinton Administration. He was unanimously rated "well-qualified" by the American Bar Association. Priscilla Owen is supported by three former Democrat Justices on the Texas Supreme Court with whom she served and 15 past Presidents of the State Bar of Texas. She also received a *unanimous* "well-qualified" rating from the American Bar Association.

These two nominees are the mainstream. It bears note, moreover, that you and other Democrat Senators have supported nominees such as Jay Bybee and Michael McConnell who (unlike Mr. Estrada and Justice Owen) have taken strong public positions contrary to yours on significant issues of concern to you. We believe that an unfair double standard is being applied to both Miguel Estrada and Priscilla Owen.

* * *

We appreciate your desire to fix the broken judicial confirmation process. The President believes that the fix is for the Senate to exercise its constitutional responsibility and ensure that every judicial nominee receives an up-or-down Senate vote within a reasonable time after nomination, no matter who is President or which party controls the Senate.

Sincerely,

Alberto R. Gonzales
Counsel to the President

The Honorable Charles Schumer
United States Senate
Washington, DC 20510

Copy: The Honorable Bill Frist
The Honorable Thomas Daschle
The Honorable Orrin Hatch
The Honorable Patrick Leahy
The Honorable John Cornyn
The Honorable Russ Feingold

http://www.whitehouse.gov/news/releases/2002/10/20021030-4.html

For Immediate Release
Office of the Press Secretary
October 30, 2002

President Announces Plan for Timely Consideration of Judicial Nominees

Today the President outlined his plan to ensure timely consideration of judicial nominees. The President calls on the Senate and the Judiciary to join him in adopting this plan and applying it both now and in the future, no matter who is President or which party controls the Senate. The objective is to fix, on a permanent and bipartisan basis, a judicial confirmation process that is clearly broken.

The Current Crisis

- There is a vacancy crisis in the federal Judiciary. As of this week, there are 79 vacancies out of the 849 authorized federal judgeships, a 9% vacancy rate. The 12 regional federal appeals courts face a particularly serious crisis, with 28 vacancies out of 167 judgeships, a 17% vacancy rate.

- Chief Justice Rehnquist's 2001 Year-End Report on the Federal Judiciary, issued when there were 94 vacancies, called the situation "alarming."

- The Secretary of the Judicial Conference of the United States, which is the federal Judiciary's governing body, stated in May 2002 that the overall shortage of federal judges is "staggering."

- The American Bar Association report in August 2002 described the status of the federal Judiciary as an "emergency situation."

- In 1998, when there were 50 judicial vacancies, Chairman Leahy stated that the number of vacancies represented a "judicial vacancy crisis." (AP, 10/22/98)

- Caseloads in the federal courts continue to grow dramatically. Filings in the federal appeals courts reached an all-time high last year.

- The Senate has not lived up to its responsibility to hold fair hearings and prompt votes on judicial nominees.

- The Senate has voted on only 80 of the President's 131 nominees overall and, even more problematic, has voted on only 14 of the President's 32 appeals court nominees. By contrast, in the first two years of the past three Administrations, 60 of the 65 appeals court nominees were confirmed.

- As of November, 15 of President Bush's appeals court nominees will have been forced to wait more than a year just for a hearing (many are still waiting). That number is more than the number of appeals court nominees who had to wait a year for a hearing in the last 50 years combined.

- The Chief Justice of the United States, speaking on behalf of the Judiciary in his 2001 Year-End Report, "ask[ed] the Senate to schedule up or down votes on judicial nominees within a reasonable time after receiving the nomination."

- The American Bar Association report in August 2002 stated that as a result of delays in the judicial confirmation process, "the federal courts . . . suffer, and so does the rule of law."

- The report stated that the Senate Judiciary Committee's refusal to allow "confirmation proceedings in the full Senate is simply unacceptable to our notion of an appropriate and constitutional nomination process" and added: "Vote them up or down, but don't hang them out to dry."

- The 2000 report of the bipartisan Citizens for Independent Courts stated that "the views of individual senators, while vital, should not be allowed to undermine collective decision-making in an open, deliberative process" and stated that "the Senate process should proceed expeditiously to a committee hearing, committee review and voting, and floor consideration and voting."

The President's Proposal

This President's plan requires specific commitments from everyone involved in the nomination and confirmation of federal judges:

- First, the President calls on federal court of appeals and district court judges to notify the President of their intended retirement dates at least a year in advance whenever possible. Because the nomination and confirmation of a federal judge can be a lengthy process even under the best of circumstances, advance notice is necessary to prevent extended unnecessary judicial vacancies. The President's call to the Judiciary builds on existing Judicial Conference recommendations and is intended to create a seamless process whereby a new federal judge is ready to take the bench at or near the time a sitting federal judge retires.

- Second, Presidents should submit a nomination to the Senate within 180 days of receiving notice of a federal court vacancy or intended retirement. This would help expedite the process by which home-State Senators, Representatives, bar leaders, and others provide their recommendations and evaluations of possible judicial candidates to the President, while leaving ample time for Presidents to vet and choose nominees of the highest quality.

- Third, the President calls on the Senate Judiciary Committee to hold a hearing within 90 days of receiving a nomination. The Committee has engaged in too many delays of too many nominees for too many years. A strict deadline, which will apply no matter who is President and which party controls the Senate, is the best way to ensure that judicial nominees are promptly and fairly considered. Ninety days is more than enough time for the Committee to conduct any necessary research before holding a hearing.

- Fourth, the President calls on the full Senate to hold an up-or-down floor vote within 180 days of receiving a judicial nomination. That is a generous period designed to give both the Committee and the full Senate ample time to evaluate nominees and answer any questions they may have. And all Senators will have an opportunity to have their voices heard and their votes counted.

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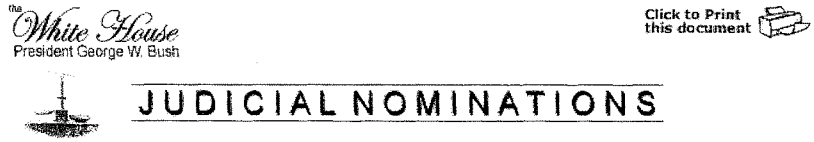

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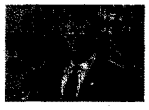
JUDICIAL NOMINATIONS

For Immediate Release
Office of the Press Secretary
October 30, 2002

Remarks by the President on Judicial Confirmations
The East Room

1:40 P.M. EST



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NOMINATIONS
JUDICIAL
- Who is Miguel Estrada?
- President's Radio Address 2/22/03

THE PRESIDENT: Thank you all very much. Thank you, Al. He's – everybody must have a good lawyer, and I got one in Al Gonzales. I want to welcome you all here to the White House. Thank you for coming.

The federal courts play a central role in American justice, protecting the innocent, punishing the guilty, resolving disputes and upholding the rule of law. Yet, today, our federal courts are in crisis. The judicial confirmation process does not work as it should. Nominees are too often mistreated, votes are delayed, hearings are denied, and dozens of federal judgeships sit empty, and this endangers the quality of justice in America.

Everyone knows these facts. Everyone knows the system isn't working. These concerns are not new. And we will not find a solution in an endless cycle of blame and bitterness.

Today, I'm proposing a clean start for the process of nominating and confirming federal judges. We must have an even-handed, predictable procedure from the day a vacancy is announced to the day a new judge is sworn in. This procedure should apply now and in the future, no matter who lives in this house or who controls the Senate. We must return fairness and dignity to the judicial confirmation process. I want to thank the Judge Al Gonzales for working on this initiative and I want to thank his team for working hard. I appreciate John Ashcroft's service to our country; he is a great Attorney General. (Applause.) And I'm not saying that just because his wife and her twin sister are here. (Laughter.)

I'm so pleased that Ted Olson, the Solicitor General, is with us. I thank Fred Fielding, the former counsel to President Ronald Reagan. Boyd Gray is with us, former counsel to Number 41. Dennis Archer is with us today, President-elect of the American Bar Association and, of course, the former mayor of Detroit. Mr. Mayor, thank you for coming. Thomas Hayward, Chair of the Committee of Federal Judicial Improvements for the American Bar Association. And all of you, thank you for your interest in this subject.

Nearly 18 months ago, at an event right here in the East Room, I introduced my first 11 nominees to the Court of Appeals. I urged Senators of both parties to provide a fair hearing and a prompt vote to each nominee. Thus far, only three of these 11 nominations have been brought to a vote in the United States Senate.

The eight who are stalled in the Judiciary Committee include people such as John Roberts. John Roberts has argued 38 cases before the Supreme Court. He has served as Deputy Solicitor General of the United States. He's widely regarded as one of the best Supreme Court lawyers in America.

And they include Miguel Estrada, who has argued 15 cases before the U.S. Supreme Court, and has served in the Justice Department under Presidents of both political parties as a federal prosecutor and as the Assistant to the Solicitor General.

The Judiciary Committee has prevented full Senate action on people such as Priscilla Owen, who has served brilliantly on the Texas Supreme Court since 1995, and was overwhelmingly reelected by the people of Texas in the year 2000. Mr. Roberts, Mr. Estrada and Justice Owen have the highest ratings from the American Bar Association, which some Democrat Senators have called, "the gold standard." They have broad support among lawyers in both political parties. Both Mr. Roberts and Mr.

Estrada have the support of former President Clinton's Solicitor General. Justice Owen is supported by three former Democrat justices of the Texas Supreme Court.

In all, I have sent to the Senate 32 nominees for the Court of Appeals. They are well qualified men and women with experience, intelligence, character and bipartisan home state support. They represent the mainstream of American law and American values. Yet the Senate has confirmed only 14 of these 32 nominees, which is far below the pace of past Senates at the start of an administration. It's a lousy record. Not one of my nine pending nominees to fill vacancies on the Sixth and D.C. Circuit Courts has received a Senate vote, not one. As of November, 15 of my Appeals Court nominees will have been forced to wait over a year for a hearing. That's more in this Presidency than under the previous nine Presidents combined.

There's no good reason why any nominee should endure a year, a year-and-a-half, or more, without the courtesy of an up or down floor vote; there is not one good reason why. Whatever the explanation, we clearly have a poisoned and polarized atmosphere in which well qualified nominees are neither voted up or down; they are just left in limbo. This is unfair to the nominees and their families. This process discourages good people from serving as judges. It's also unfair to the courts themselves, which are forced to handle a growing caseload without the judges they need.

Nine percent of all federal judgeships in America are now vacant, nine percent. Of the 12 regional Courts of Appeals, the courts right below the Supreme Court, there is a 17 percent vacancy rate. The Court of Appeals for the D.C. Court, which rules on many significant Constitutional and regulatory issues, now operates with one-third of its judgeships empty. And the Sixth Court of Appeals which covers Kentucky and Ohio, Michigan and Tennessee, is nearly half empty, with nine active judges doing the work of 16.

Meanwhile, the number of federal appeal court filings reached an all-time high this year. Benches are empty, the number of court filings has increased to an all-time high. We can expect them to increase even further as a result of the war on terror, corporate fraud prosecutions, and issues arising out of the September the 11th attacks.

The judicial vacancies go unfulfilled, we will see more crowded dockets and longer delays. The federal courts will be unable to act in a timely manner to protect constitutional rights, to resolve civil disputes, and enforce the criminal laws, the environmental laws, and the civil rights laws that affects the lives and liberties of every single American. Chief Justice Rehnquist has called this situation alarming. The American Bar Association's report has described the current status of the federal judiciary as an emergency situation.

The judicial crisis is the result of a broken system, and we have a duty to repair it. I want to work with the Senate to fashion a new approach to filling federal court vacancies. We should leave behind the arguments and grievances of the past. We need to fix this problem together. That's why we've come to Washington, to fix problems. And each branch of government can contribute and must contribute to a better system.

So today, I'm offering four specific proposals to break the logjam in Washington and bring the federal courts of appeals and district courts to full strength.

First, I call on federal judges on the courts of appeals and district courts to notify the President of their intention to retire at least a year in advance, whenever this is possible. Because the nomination and confirmation of a federal judge is a lengthy process under the best of circumstances, judges who retire without advance notice can unintentionally create a judicial vacancy that can last for many months. The request for one year advance notice builds on existing policy of the judiciary and will help us work toward a system in which a new federal judge is ready to take the bench on a day the sitting judge retires -- that's the goal.

Second, I propose that Presidents submit a nomination to the Senate within 180 days of receiving notice of a federal court vacancy or intended retirement. In other words, we have a responsibility as well to make sure the judiciary is sound and whole. This will speed up the sometimes time-consuming process of obtaining recommendations and evaluations from home-state senators and representatives and governors and bar leaders, while leaving ample time for Presidents to vet and choose nominees of the highest quality.

Third, I call on the Senate Judiciary -- Senate Judiciary Committee to commit to holding a hearing within 90 days of receiving a nomination. A strict deadline is the best way to ensure that judicial nominees are promptly and fairly considered. And 90 days is more than enough time for the committee to conduct necessary research before holding a hearing -- that's plenty of time.

Finally, I call on the full Senate to commit to an up or down floor vote on each nominee no later than 180 days after the nomination is submitted. This is a very generous period of time that will allow all the Senators to evaluate nominees and have their votes counted.

Our proposals would not favor Democrats or Republicans. The plan would be fair and would apply to -- regardless of who the President is. It doesn't matter who the President is. What matters is a system which works.

For the first time in years, the judicial confirmation process would work as it was intended to work. All Senators would have a chance to make their voices heard, and their views known, and that's important. All nominees would have the certainty of an up or down Senate floor vote within a reasonable period of time, and that is important. All Presidents would know that their judicial nominations would be addressed promptly. All Americans would see a more dignified process, and have their federal courts fully staffed to protect their rights and their liberties. And the vacancy crisis would be resolved once and for all.

I urge every member of the Senate, in particular those serving on the Judiciary Committee, to carefully consider this new beginning for the judicial nomination process, to weigh their responsibilities, to look at the vacancy problem we have, to act in a responsible fashion.

The failure of the judicial confirmation process is harming the administration of justice in America. That is a fact. The current state of affairs is not merely another round of political wrangling. It is a disturbing failure to meet our responsibilities under the Constitution. The Constitution has given us a shared duty and we must meet that duty together.

Thank you all for coming.

END 1:53 P.M. EST

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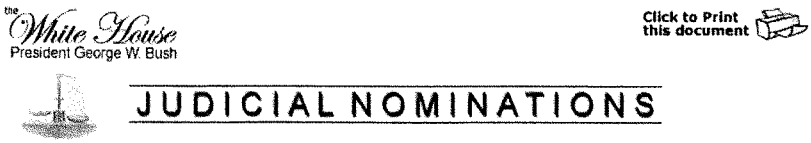


JUDICIAL NOMINATIONS

For Immediate Release
Office of the Press Secretary
May 9, 2003

President Calls for Judicial Reform

Remarks by the President on Judicial Independence and the Judicial Confirmation Process
The Rose Garden

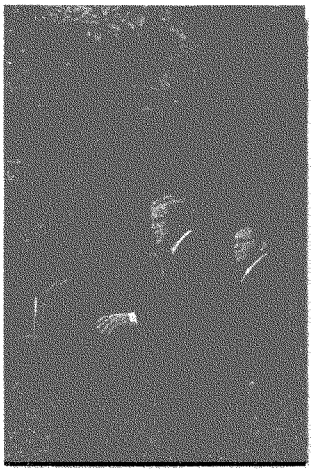
VIDEO Multimedia

President's Remarks
view
listen

In Focus: Judicial Nominations

10:30 A.M. EDT

THE PRESIDENT: Thank you all, very much. (Applause.) Please be seated. Thanks. (Applause.) Thanks a lot for coming, thanks for the warm welcome. Welcome to the White House and the Rose Garden. I'm pleased all of you could be here to stand for a truly independent federal judiciary. The framers of the Constitution knew that freedom and justice depend on fair and impartial judges. To ensure judges of the highest quality, integrity, they designed a system in which the President would nominate judges and the Senate would vote up or down on the nominees.



Today, we are facing a crisis in the Senate, and therefore, a crisis in our judiciary. Highly qualified judicial nominees are waiting years to get an up-or-down vote from the United States Senate. They wait for years while partisans search in vain for reasons to reject them. The obstructionist tactics of a small group of senators are setting a pattern that threatens judicial independence. Meanwhile, vacancies on the bench and overcrowded court dockets are causing delays for citizens seeking justice. The judicial confirmation is broken, and it must be fixed for the good of the country. (Applause.)

Every person nominated to the federal bench deserves a timely vote. I want to appreciate Al Gonzales' introduction. I appreciate his good sound legal advice. He's been my friend for a long time. I'm really pleased he left Austin, Texas to come up here and serve our country. I also want to thank the Attorney General for serving our country, as well. He is doing a fabulous job for our nation. (Applause.) And we wish him a happy 60th birthday today. (Applause.)

I'm so pleased the leaders of the United States Senate are here. Bill Frist is ably leading the United States Senate. Thank you for coming, Senator. (Applause.) I want to thank Senator Orrin Hatch for being here, as well. The Chairman is going to lead the efforts to reform our process. And, Mr. Chairman, I support your work to make sure we increase judicial pay across the United States. Thank you for your leadership. (Applause.)

I'm also grateful that Senators Cornyn, from Texas, Dole – and Graham, of South Carolina – Mitch McConnell, Zell Miller and Arlen Specter are with us. These folks represent the best of the United States Senate, and thank you for coming. (Applause.)

I appreciate the fact that members of John Aschcroft's staff from the Justice Department are here, in particular

Larry Thompson, Bobby McCallum, and Ted Olson. Thank you all, for your good work and service. (Applause.)

I know we've got a lot of distinguished lawyers who are here. A.P. Carlton is the President of the American Bar Association. A.P., I appreciate you coming and lending your efforts to make sure that the system works on behalf of the American people. Duard Bradshaw is the President of the Hispanic National Bar Association -- is here, as well. Welcome to you both. Thank you for your concern. (Applause.) And welcome to all.

Exactly two years ago, I announced my first 11 nominees to the federal appeals court. I chose men and women of talent and integrity, highly qualified nominees who represent the mainstream of American law and American values. Eight of them waited more than a year without an up-or-down vote in the United States Senate. As of today, three of that original group have waited two years. Their treatment by a group of senators is a disgrace.

Overall, I have sent to the Senate 42 superb nominees for federal courts of appeal. Eighteen of them are still waiting for a vote in the Senate; and eight of those 18 have been waiting more than a year. More appeals court nominees have had to wait over a year for a hearing in my presidency than in the last 50 years combined. This is not just business as usual; this is an abnication of constitutional responsibility, and it is hurting our country. (Applause.)

As President, I have the constitutional responsibility to nominate excellent judges. And I take that responsibility seriously. The men and women I have nominated are an historically diverse group, whose character and credentials are impeccable.

This group includes Miguel Estrada, my selection for the D.C. Circuit Court of Appeals. Miguel Estrada has served in the Justice Department under Presidents from both political parties. He has argued 15 cases before the U.S. Supreme Court. He has earned the American Bar Association's highest mark, a unanimous rating of well qualified. If confirmed, Miguel would be the first Hispanic American ever to serve on the court that is often considered the second highest in the land. Miguel Estrada's nomination has strong support from citizens and leaders in both political parties. And he has support from a majority in the United States Senate. Yet, after two years, he still cannot get an up-or-down vote on the floor of the Senate. A group of Democratic senators has insisted that Mr. Estrada answer questions that other nominees were not required to answer. These senators have sought confidential Justice Department memos not sought for other appeal court nominees -- a request opposed by all living former Solicitor Generals because of the damage it would do to our legal system. These senators have also filibustered for three months to prevent a vote on Miguel Estrada's nomination. Never before has there been a successful filibuster to prevent an up-or-down vote on an appeals court nominee. This is an unprecedented tactic that threatens judicial independence and adds to the vacancy crisis in our courts. And it is wrong. (Applause.)

Justice Priscilla Owen, whom I have nominated to the Fifth Circuit Court of Appeals, also has the support of the majority of United States senators. And she, too, has become the target of a filibuster. Justice Owen is an extraordinarily well qualified nominee, who has served with distinction on the Texas Supreme Court since 1995. Like Miguel Estrada, she has earned the American Bar Association's unanimous rating of well qualified. She has strong bipartisan support, including endorsements from three Democrats who served with her on the Texas Supreme Court; and endorsements from 15 past presidents of the Texas bar. Yet, Justice Owen has been waiting two years -- two years -- for an up-or-down vote on the Senate floor.

The list goes on. And the trend is clear: Of the 18 appeals court nominees awaiting a vote, all who have been rated by the American Bar Association have received well qualified or qualified ratings. Some Democratic senators have referred to those ratings as the gold standard. But those same senators have ignored those high marks, and instead of applying the gold standard, have applied a double standard to some of my nominees. The Senate has a constitutional responsibility to hold an up-or-down vote. (Applause.)

Throughout most of our history, the Senate has exercised this responsibility and voted promptly on judicial nominees. During the administration of former Presidents Bush and Clinton, however, too many appeals court nominees never received votes. And today the situation is worse than ever, making the need for reform greater than ever.

While senators stall and hold on to old grudges, American justice is suffering. Dockets are overcrowded, judges are overworked, and citizens are waiting too long for their cases to be heard. The regional appeals courts have a

12 percent vacancy rate. And filings in those courts have reached an all-time high, again last year. The Sixth Circuit, which covers Ohio and Michigan and Kentucky and Tennessee has four vacancies on a 16-judge court. The D.C. Circuit has three vacancies on a 12-judge court. Of the eighteen open seats that could be filled by the nominees waiting for Senate confirmation, 15 have been classified as judicial emergencies by the Judicial Conference of the United States. The American Bar Association has called this an emergency situation. And the Chief Justice recently said that these vacancies and rising caseloads threaten the proper functioning of federal courts and asked the Senate to give every nominee a prompt up-or-down vote.

The bitterness and partisanship that have taken over the judicial confirmations process, also threaten judicial independence. Some senators have tried to force nominees to take positions on controversial issues before they even take the bench. This is contrary to the constitutional design of a separate and independent judicial branch.

Six months ago, I proposed a plan to end the vacancy crisis and make the process work again. This plan would apply no matter who lives in the White House or no matter which party controls the United States Senate. Here's how it works: Judges on the federal appellate and district courts would notify the President of their intentions to retire at least a year in advance whenever that is possible. The President would then submit a nomination to the U.S. Senate within 180 days of receiving notice of a vacancy or intended retirement. The Senate Judiciary Committee would hold a hearing within 90 days of receiving a nomination. And the full Senate would vote on a nominee no longer than 180 days after the nomination is submitted. The goal is to have a new judge ready to take the bench on the same day the sitting judge retires.

Since I announced this plan, the Judicial Conference has done its part by strongly urging judges to give a one-year advance notice of retirement. I've done my part with an executive order issued today formalizing my commitment to submit nominations within 180 days after notification of a vacancy. And now we're waiting for the Senate to do its duty and ensure timely up-or-down votes for every single nominee. (Applause.)

Majority Leader Frist and Judiciary Chairman Hatch are pushing hard for progress on this issue. They are reformers. And I thank you for your hard work. (Applause.) U.S. Senator Arlen Specter and U.S. Senator Zell Miller have proposed reforms to fix the problem. And I thank you for your leadership. (Applause.) I'm very pleased that 10 freshmen senators of both parties have come together to demand the return of dignity and civility to the process. As newcomers, they see the futility of endless bickering that blocks good judges from the bench.

Under the leadership of John Cornyn and Democrat Mark Pryor, these senators sent a letter to the Senate leadership last week. And this is what it said: None of us were parties to any of the reported past offenses, whether real or perceived. None of us believe that the ill will of the past should dictate the terms and direction of the future. Each of us firmly believes the United States Senate needs a fresh start.

I completely agree, and so do the American people. (Applause.) I believe a fresh start is possible. And we will stand with these senators to bring needed reform on behalf of the American people. And I ask for your help -- I ask for your help to make sure our judiciary functions in a way that will make the people proud. I ask for your help in talking to senators as we convince them that obstructionist policies harm the American people. It hurts the justice system that makes us the envy of the world. I know we can move forward. I look forward to the day when a good nominee gets a vote -- up or down, in timely fashion -- on the floor of the United States Senate. Thank you all for coming. And God bless. (Applause.) Thank you all for coming. (Applause.)

END 10:51 A.M. EDT

Return to this article at:
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For Immediate Release
Office of the Press Secretary
May 9, 2003

Executive Order: Facilitating the Administration of Justice in the Federal Courts

By the authority vested in me as President by the Constitution and the laws of the United States of America, and in order to promote the prompt appointment of judges to the Federal courts, it is hereby ordered as follows:

Section 1. Policy. The Federal courts play a central role in the American justice system. For the Federal courts to function effectively, judicial vacancies in those courts must be filled in a timely manner with well-qualified candidates.

Sec. 2. Plan. The presidential plan announced on October 30, 2002, calls for timely consideration of judicial nominees, with the President submitting a nomination to fill a vacancy in United States courts of appeals and district courts within 180 days after the President receives notice of a vacancy or intended retirement, absent extraordinary circumstances.

Sec. 3. Responsibilities. The Counsel to the President shall take all appropriate steps to ensure that the President is in a position to make timely nominations for judicial vacancies consistent with this plan. All Federal departments and agencies shall assist, as requested and permitted by law, in the implementation of this order.

Sec. 4. Reservation of Authority. Nothing in this order shall be construed to affect the authority of the President to fill vacancies under clause 3 of section 2 of article II of the Constitution.

Sec. 5. Judicial Review. This order is intended only to improve the internal management of the Federal Government and is not intended to, and does not, create any right or benefit, substantive or procedural, enforceable at law or in equity by a party against the United States, its departments, agencies, instrumentalities or entities, its officers or employees, or any other person.

GEORGE W. BUSH
THE WHITE HOUSE,
May 9, 2003.

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West Wing connections

In Focus
- Iraq
- National Security
- Economic Security
- Homeland Security
- More Issues
- En Español

News
- Current News
- Video
- Press Briefings
- Proclamations
- Executive Orders
- Radio Addresses

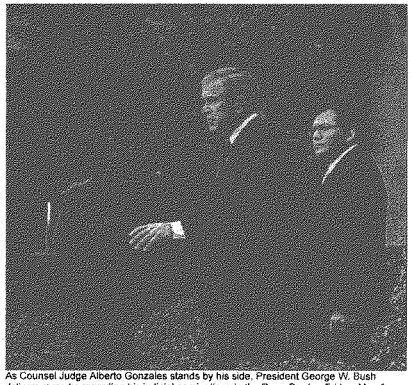
Appointments
- Nominations
- Application

Offices
- Global Communications
- USA Freedom Corps
- Faith-Based & Community
- OMB
- More Offices

Major Speeches
- Iraqi Freedom
- State of the Union
- Economy
- Education
- Homeland Security
- Iraqi Threat
- U.N. Remarks
- 9/11/02 Remarks

Photos

JUDICIAL NOMINATIONS



As Counsel Judge Alberto Gonzales stands by his side, President George W. Bush delivers remarks regarding his judicial nominations in the Rose Garden Friday, May 9, 2003. White House photo by Tina Hager.

The President's Call to Action on Judicial Nominees

Two years ago today, President Bush announced his first 11

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May 8, 2003
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President Calls for Action

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- Briefing Excerpts 04/30/03

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nominees to the federal appeals courts and asked the Senate to rise above the bitterness of the past and give every nominee fair treatment and a timely up-or-down vote. But 8 of those 11 nominees then waited more than a year without a Senate vote. And today, 3 of these highly qualified nominees still have not received a vote. They are Miguel Estrada, Priscilla Owen, and Terry Boyle. All of the May 9, 2001, nominees represent the mainstream of American law and values, possess extraordinary experience, intellect and integrity, and enjoy strong bipartisan support.

The Senate has a Constitutional responsibility to hold an up or down vote on judicial nominees and to do so within a reasonable time after nomination. As illustrated by the extraordinary delays on these first 11 nominees, the judicial confirmation process is broken. For the sake of the American people and our system of justice, the confirmation process must be fixed. The President reiterated the call he first made in June 2000 - when several Democrat Senators publicly agreed with him -- for a fair and timely Senate confirmation process for every nominee.

Today the President signed an executive order formalizing his commitment to submit nominations within 180 days after receiving notification of a vacancy. Now we are waiting on the Senate to do its duty - and ensure timely up-or-down votes for every nominee.

Some Senators are engaging in unprecedented obstructionist tactics and delaying the confirmation process.

- Since President Bush took office, more appeals court nominees have waited at least a year for a hearing than in the last 50 years combined.
- During President Bush's first two years in office, only 53% of appeals court nominees were confirmed compared to a rate of over 90% during the same period for the last 3 Presidencies.
- A minority of Senators are now engaging in unprecedented filibusters of two highly qualified appeals court nominees who have the support of a majority of Senators. And more filibusters are threatened.
- Yesterday, a minority of Senators for the 6th time blocked a vote on Miguel Estrada and for the 2nd time blocked a vote on Priscilla Owen.
- Some Senators are applying a double standard to Miguel

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- Briefing Excerpts 03/03/03
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Estrada and Priscilla Owen.

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Policies in Focus Go

JUDICIAL NOMINATIONS

The delays in the process are causing vacancy crises in many of our nation's federal appeals courts.

- When the federal courts are understaffed, they cannot act in a timely manner to resolve disputes that affect the lives and liberties of Americans.
- There is now a 12% vacancy rate in the U.S. Courts of Appeals.
- Fifteen of the appeals court seats for which the President currently has nominations pending have been declared "judicial emergencies" by the Judicial Conference of the United States.
- The President has submitted 42 superb nominees for the federal courts of appeals. Eighteen of them are still waiting for a vote in the Senate - and 8 of those 18 have been waiting more than a year.

The President's nominees are highly qualified and deserve a vote.

- The President's nominees are known for their character, experience and intellect.
- Each shares the President's philosophy that judges should follow the law, and not make the law.
- Each of the nominees has strong bipartisan support.
- The President's nominees represent the mainstream of American law and values.
- All of the President's appeals court nominees who have been rated have received a "qualified" or "well-qualified" rating from the American Bar Association.

It is time to fix the broken confirmation process.

- It's time to restore dignity and fairness to the judicial confirmation process and to address the vacancy crisis, particularly in the appeals courts, as Republican Senator Cornyn and Democrat Senator Pryor recently advocated on behalf of the 10 new United States Senators.
- The President has proposed a comprehensive three-Branch plan to fix the process and end the

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vacancy crisis. He has proposed that judges give one-year advance notice of retirement when possible, that Presidents submit nominations within 180 days of receiving notice of a vacancy or intended retirement, and that the Senate vote up or down on nominees within 180 days after nomination. The plan would apply now and in the future no matter who is President or which party controls the Senate.

- The Judicial Conference has done its part. In March they adopted the President's proposal for one-year advance notice by judges of an intended retirement.
- The President is submitting nominations within 180 days of receiving notice of a vacancy or intended retirement, and today he signed an executive order formalizing his commitment to prompt nomination.
- Now it is time for the Senate to act. Every nominee deserves a vote in a reasonable amount of time, a principle that Senators on both sides of the aisle have advocated:
- Senator Harkin on September 14, 2000 stated: "...I'll just close by saying that Governor Bush had the right idea. He said the candidate should get an up or down vote within 60 days of their nomination."
- Senator Leahy on October 3, 2000 stated: "Governor Bush and I, while we disagree on some issues, have one very significant issue on which we agree. . . . [T]hat is what we are paid to do in this body. We are paid to vote either yes or no - not vote maybe. When we hold a nominee up by not allowing them a vote and not taking any action one way or the other, we are not only voting maybe, but we are doing a terrible disservice to the man or woman to whom we do this."
- Senator Daschle on October 5, 1999 stated: "...I find it simply baffling that a Senator would vote against even voting on a judicial nomination."
- Senator Biden on March 19, 1997, stated: "I respectfully suggest that everyone who is nominated is entitled to have a shot, to have a hearing and to have a shot to be heard on the floor and have a vote on the floor."

Let each Senator vote as he or she thinks best - but give every nominee a vote.