Verbatim Transcript
May 06, 2003

Senate
Judiciary Committee
Committee Hearing

Committee Chair Holds Hearing on Judicial Nominations and Filibusters

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U.S. SENATE JUDICIARY COMMITTEE, SUBCOMITTEE ON THE CONSTITUTION, CIVIL RIGHTS AND PROPERTY RIGHTS, HOLDS A HEARING ON JUDICIAL NOMINATIONS AND FILIBUSTERS

MAY 6, 2003

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U.S. SENATOR LINDSEY O. GRAHAM (R-SC)
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U.S. SENATOR SAXBY CHAMBLISS (R-GA)

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RANKING DEMOCRAT
U.S. SENATOR EDWARD M. KENNEDY (D-MA)
U.S. SENATOR CHARLES E. SCHUMER (D-NY)
U.S. SENATOR RICHARD J. DURBIN (D-IL)

WITNESSES:
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U.S. SENATOR CHARLES SCHUMER (D-NY)

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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 ranking member of this subcommittee for his opening statement, I'd like to begin with a few brief introductory remarks as the newest member of a distinguished line of Senators who chaired this subcommittee, including most recently my distinguished colleague Senator Russell Feingold.

Senator Feingold is an honorable and public minded person and I'm glad we've already developed what I believe to be a good, cooperative bi partisan 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. But 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 United States Senate and I hope that fresh start will begin today. Second I'd 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'm 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 that may even require a constitutional amendment to address. OR another example, Senator Kyl and Feinstein have worked long and cooperatively to introduce a constitutional amendment to protect the rights of crime victims in the country. I'm pleased to be a co-sponsor of that particular amendment and I look forward to chairing the subcommittee mark up on it.

So there are many other topics besides judicial confirmation that I'd like the subcommittee to focus on and I'm 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'd 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 this subcommittee's attention.

And so 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's 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 may be threatened.

Never before has a judicial confirmation process been so broken and the constitutional principles of judicial independence and majority rules so undermined. I'd like to take just a few moments to discuss those principles here. I also discuss those in an op ed published just this morning on the Wall Street Journal's opinion journal dot com website and without objection I'd 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 father's explained in Federalist number 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 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. That's 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 the mood to talk, the House of Representatives is designed to respond to the passions of the moment. The Senate, 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. And have concerns about its abuse here. Today, a minority of Senators appear to be using the filibuster not simply to ensure adequate debate, but to actually to block some of our nation's judicial nominees and to prevent those seats from being filled by the 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 can not only violate democracy and majority rule, but arguably offend the Constitution as well. Indeed, prominent lawyers like Lloyd Cutler and Senators 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'd 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 tell us that rather than allow further debate, President Johnson withdrew the nomination altogether just three 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's 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 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 even able to command 51 votes to close debate, and President Johnson withdrew the nomination as a result, so that letter was 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 are 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 the 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 ten freshman 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 express 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 first hand. All of them have offered proposals for reform.

These proposals will be debated and they should be. But what's important 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 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, 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'll 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 know recognize Senator Feingold.

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've started your job as Chairman, coming to my office and meeting with me about the subcommittee and the way that you've approached me on all 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 isn't the normal province of our subcommittee, it is out of one of the other subcommittee's but this hearing is apparently about the constitutional issue that may or may not exist in this regard.

Nonetheless I want to say I agree with you, that we have got to somehow deal with this log jam (ph) 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 American's against some of the excesses that I believe have occurred in the context of the post nine eleven world understandably, but that we have to deal with those.

I'm also going to tell you Mr. Chairman you know this already, I hope to get through another Congress without amending the Bill of Rights. I think it's a great thing that Congress has never chosen to amend the Bill of Rights and they're 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'm 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 on 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 Judicial Nominations, Filibusters and the Constitution when a majority is denied its right to consent. So take it for what it will, I'm not sure that's the most neutral title we could've 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's 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 have to 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 seven 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 two years, McCain (ph) and I did. We didn't say that you know it was unconstitutional that our bill wasn't passed. We said this is the way the Senate works and the way it's worked certainly in my lifetime. Senators who've 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 won't 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. Wasn't the majority denied its right to consent just as much in those cases? Is there any meaningful constitutional difference - 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 differences are resolved on 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 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 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 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.

CORNYN: Thank you Senator Feingold.

Senator Kennedy.

KENNEDY: Thank you Mr. Chairman and I want to join Senator Feingold in expressing our appreciation for all the courtesies that you've shown us and the seriousness which you've undertaken the leadership on this committee and I'm 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 the, both the historic role has been and what our founding fathers really intended.

It's 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. And in the constitutional Convention when it met in Philadelphia from late May until mid September in 1787, on May 29, the convention began its work on the Constitution with the Virginia plan (ph) introduced by Governor Randolph (ph) which provided that a national judiciary be established to be chosen by the national legislature and under this plan the President had no role at all, no role at all in the selection of judges.

And when this provision came before the convention on June 5, several members were concerned that having the whole legislature select judges was too unwieldy (ph) and James Wilson suggested an alternative proposal that the President be given the sole power to appoint judges. That idea had no support. Rutledge (ph) 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. And 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 19 the convention formally adopted the working draft of the Constitution and it gave the Senate the exclusive power to appoint the judges. July 18 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 21 and the convention again agreed tothe 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 (ph). Not until the final days of the convention was the President given power to nominate the judges. So on September 4, 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 [****] 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 [****] could not possibly have intended to reduce the Senate to a rubber stamp role.

So the advice and consent authority and power, it's 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 and what, as we, I want to just say as your letter pointed out talking about the concerns about the state of the judicial nominations and confirmation process and praise that way it's clear that all of us in the Senate have concerns but the letter goes on to say that the judicial confirmation process is broken, needs to be fixed. It's the advice and consent.

These are the rules of the Senate we're talking about. Our rules were 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 [****] part of our power cannot be easily cut short.

For 111 years unanimous consent was required to end debate in the United States Senate. You have to get unanimous consent, all Senators had to... That's [****] for 111 years. For the next 58 years it's two thirds and now it's 60 that are required. We've 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 and still the Supreme Court has such enormous regard and respect it is clear that the function was advice and consent. It was the involvement of the United States Senate in the consideration of various nominees and then the voting on it in this process. And that has been the experience.

Now (ph) take the time to review that, but that has been the experience in the United States, when this process has worked. That isn't the way it is working at the present time. We are in a situation where the President has clearly demonstrated his intention to nominate judges who share the administration's partisan right wing ideology in his campaign for the President. 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, the Senate is very closely divided as well and it's no surprise that we are divided over the appointment of judges. President Bush has no 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 longstanding rules and become a rubber stamp.

And I am hopeful that today's hearing will clear up any doubts about this issue. I'm 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 and 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 understand better 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's worthy of our founding fathers. I thank the Chair.

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 Administration's from his perspective and without objection that will become part of the record.

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

(INAUDIBLE)

Senator Hatch has said he'd withhold any further statement and his written statement is part of the record.

But I'd now like to introduce our first panel and I know Senator Specter intends to return. But it's made up exclusively of Senators and as I said it's a bi partisan 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 bi partisan approach to reform I think it's quite appropriate.

I'm 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 and need of repair. Now they each have proposals and very provocative and very interesting proposals and of course that is exactly the point of what

I hope we would get to today is different ideas about how we can find ourselves out of this wilderness and into the path of 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'd 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're glad to have you here today.

SCHUMER: Thank you Mr. Chairman. I very much appreciate the opportunity to sit on this side of the panel. I'm 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's a timely hearing and we all appreciate the courtesy which you've extended to all of us.

I'm always interested in words. You said this is a panel of Senators. I guess it's a panel of Senator right now. It's the first time I've been referred to as a group. But in any case, a few other words are a little less, little more disconcerting. It's almost there's a dictionary here, a 1984 dictionary. I was listening to the words crisis, there's a crisis on the bench because of the vacancies. We have fewer vacancies now than we've 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's such a double standard. I worry about it. If it was a crisis now with a 5.6 percent vacancy, then why wasn't it a crisis then?

How about obstruction? Well there's 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 approve every one of our judges or you're an obstructionist. When I say to my constituents, they say what's 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're 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'll have to believe that any single judge, every single judge has to be approved by a President and I'll 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's a filibuster, not so. It's the first time there's been a successful filibuster. But members on the other side of the aisle attempted to filibuster Paez (ph) and Burzon (ph) 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're saying these are no good and we have to examine them. Now I'm willing to examine them. I think that the title of this hearing "Judicial Nomination, Filibusters and the Constitution when a majority is denied its right to consent" is a bit loaded. But it's a good thing to debate. And I think it's fine and I'm happy to debate it. And so I'd like to go back to the Constitution. Senator Kennedy's Para ration (ph) there on the constitutional Convention I think is a wise and a good one, but let's go to the Constitution itself. Now it's one thing to have a discussion regarding the constitutionality of filibusters and I'll discuss that in a minute. I think it's way off base, I've 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's 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's a whole other matter to suggest the majority has a right to consent. Well I poured over this little book when I saw the title of the hearing, this Constitution. I don't see anything in here about the right to consent for anyone but certainly not the majority. And 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 wasn't regal, wasn't king-like, wasn't monarch like.

They were also worried about, Alexander Hamilton described it, my own fellow New Yorker, as mobacracy (ph), 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's an amazing thing this democracy. The founding fathers were the greatest geniuses, 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 though it's 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 you want to, when it fits your case but ignoring it when it doesn't, nope, I don't think so. And when you go back and read the debates of the Constitutional Convention you see the Framer's struggle to find the right balance of power and if anything they lean to the primacy of the Legislative Branch, not the President in the selection of judges.

And I'm going to skip all the detail here because I think Senator Kennedy went over it very, very well. So let's get into how we got to where we are and then I'll talk about my proposal. Probably the most important thing I've 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.

And let me just say I've always had three criteria in the role I play in selecting judges in New York State. They are excellence, legal excellence; moderation - - I don't 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 of strong ideological disposition tend to want to impose their views; and the third is diversity. I believe the bench should mirror America and not be white males.

While on one and 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's done a good job on diversity. But it's 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's not fair.

Now if you think ideology shouldn't play a purpose, let's continue the constitutional history for a minute. In 1795, Chief Justice John Jay (ph) was stepping down and President Washington nominated John Rutledge (ph) as his successor. Before the Senate voted on Rutledge's (ph) confirmation Rutledge gave a speech attacking the Jay (ph) Treaty as excessively pro British which at the time would have been a sort of like a nominee today going out and giving a speech defending the French. The Senate just recently ratified the Jay (ph) Treaty and in their debate it was the Jay (ph) Treaty that caused them to vote down, in their voting, it was the Jay Treaty that caused them to vote down the Rutledge (ph) 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 were the people who wrote the Constitution. And so all this you and cry (ph) that ideology shouldn't be part of the consideration, that we shouldn't try to look for judges - in my case moderate judges - but you can look for any kind you want, that is - it wasn't a majority by the way, it was six by then, the majority was in 1790 when the Constitution first started, there were six members of the Senate who were the members of the Convention, three voted for Rutledge, three voted against. But here you have many of the founding fathers. Not a word was said that the voting for the Jay (ph) 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. And that's how it was for the first hundred and some odd years. And what happened was, let's bring it up to more recent history. Ideology began to recede in the selection of judges and during the Truman and Eisenhower years there wasn't too much debate about them because there seemed to be a consensus.

But for some reason -- it was probably not intended -- the court became very liberal, led by people who were not nominated as great liberals. Earl Warren (ph), Republican Governor of California; Hugo Black (ph) who had had a different past, I think he was a member, he was from Alabama, I think he was a member, or it was reputed he was a member of the Klu Klux Klan. And so a conservative movement started and said judges shouldn't make law. That they were sort of coming up with their own ideas as opposed to interpreting the law.

And that was a conservative movement and they called it let's go back to strict constructionnism (ph). And -- by the way just parenthetically - - I was in college at the time and I remember debating this issue. And even then I said it's a bad, even though I agreed with a lot of what the judges were doing, it was a bad idea to have judges make law, that it's the legislature that should make law. Ronald Reagan came in and he started nominating some very conservative judges. The only judges knocked out in the, he started nominating conservative judges.

But no one made much of a cry cause 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 not because they, the stated reason not being they disagreed withthe ideology -- Democratic

Senators voting against a 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 weren't looking for the morale purity of these nominees, it was an excuse, it was a Kabuki (ph) game. But under the table it was all ideology. And people got upset with it. I wouldn't say the Bork nomination fell into this category but perhaps Clarence Thomas's did. He should've been debated strictly on ideology, on how his views were, whether he was moderate enough for the court.

GERHARDT: And so in 1999, I sort of began talking to my colleagues and said we ought to bring this above the table, it's demeaning for the process. And to say well someone did some minor transgression in college, out with them. And if that was really the issue then we would've found Democrats and Republicans voting about evenly against the marijuana smoker or the video shop.

And so, I think that argument has now gained sway.

SCHUMER: And yes, we're 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're at the far right end of the judicial nominees.

Clinton didn't do that much of that, he had a few liberal nominees. But by and larger, 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.

And then when Miguel Estrada came up, he wouldn't even say what his views were because, I think, he felt -- I don't know this -- but my view is that he felt, and his handlers felt, that if he said what he thought he wouldn't be nominated. So he either had to dissemble or had to avoid stating anything, which he did. And that's 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 couldn't 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 him his views on the commerce clause and how much an active role the federal government should have in regulating corporations -- that's not a violation of Canon 5, and if it is, almost every nominee we've approved should not be on the bench because they violated Canon 5, because they've answered those kind of questions.

And so what I've done here -- and 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 doesn't mean each nominee has to be a right-down-the-middle moderate. But if you're going to nominate some from the hard right, nominate a few who are a little more liberal to balance them. That's not happening.

So we're deadlocked. We're 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. You know what I'd prefer? I'd prefer the president take ideology out of the process altogether. But I don't think that's going to happen, and he made a campaign promise that he wouldn't. So that's not going to happen.

So I proposed a comprise, which I think is a down-the-middle and fair compromise to break through this deadlock.

Senator Spector's proposal, I respect it, but it basically means that we have to raise 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 that the president would not win 121 out of 123, but would win 123 out of 123. It's not good for the process. There should be advise and consent. In fact, even when one party controls the presidency and both houses, the other party should be involved in the process. I think that's what the founding fathers intended when you read federalist papers and commentary. So I propose true compromise, I think. And the proposals that my friends have offered, sort of unilateral disarmament. We're not going to accept it. And we'll be back where we have been to begin with.

Let me go over what ours is. It's based on nominating commissions. They have worked in many states. And we would create nominating commissions in every state and in every circuit. We'd give the president and the opposition party leader in the senate, the power to name equal numbers of the members of each commission. We'd 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 wouldn't work because the republicans would propose one, the democrats would propose another, and the president would just nominate the republican one. But let them come together and propose one nominee. Not every nominee would be just a down the middle moderate. The commission might decide we'll nominate someone more conservative for this vacancy. And then, we'll move to nominate someone a little more liberal for the next vacancy.

Barring the discovery of anything that disqualifies the person, 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 wouldn't work anymore 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 anomous (ph) we have seen where each side feels that they are right and they're not giving in. It's a 50-50 proposition. And so people may not want that. It preserves balance, while removing politics, partisanship, and patronage from the process.
And, again, I want to thank you, Mr. Chairman, for holding this hearing. I think discussions like this are great. They're good for the health of republic, whether we agree or disagree. And I look forward to continuing on this when we go to our second panel.

UNKNOWN: Thank you, Senator Schumer. And I, too, want to thank you for your enthusiastic articulation of your views of where you think the process is broken down. Needless to say, I think there are those who disagree, but I agree that it's good to have that debate.

And 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 the senators have a lot of conflicting time commitments. In the interest of completeness, though, let me go ahead, without objection, I'll have made part of the record, the response which I understand the White House has made today, May 6, 2003, I'll just read sort of what I think the conclusion is here...

UNKNOWN: I haven't seen it yet, so I look forward to [****].

UNKNOWN: I'll make sure you get a copy. I just had one handed to me a moment ago. It says the solution to the broken judicial confirmation process is for the senate to exercise it's constitutional responsibility to vote up or down on judicial nominees within a reasonable time after nomination, no matter who is present, or which party controls the senate.

Senator Specter, thank you for rejoining us. And I know you had a conflict in your calendar, but I'm glad you're back. I'd like to recognize you for purposes of your opening statement.

SPECTER: Thank you very much, Mr. Chairman. I had a commitment at 3:00 o'clock to meet with [****] members of the Pennsylvania Rural Electrification Society, and it was a very, important meeting. They were endorsing my candidacy for re-election.

(LAUGHTER)

You'll pardon me if I sit down for a few moments. At the outset, I compliment the attending (ph) 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 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, and at the outset I attribute that bickering to both parties. When the Republicans have controlled the White House, the last two 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. And 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's interesting to note that there wasn't 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. 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's 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 relate to being at the witness table since I testified before Senator John McClellan. That even predates Senator Hatch -- not much -- predates Senator Hatch. Wouldn't have predated Senator Thurmond.

(LAUGHTER)

But I was here in 1966 testifying about the impact of Miranda on the Philadelphia district attorney's office, so this is a newish experience for me to be on this side of the table.

The problems have existed when the Republicans controlled the White House and the Democrats the Senate; and conversely, when the Democrats controlled the White House and the Republicans controlled the Senate. And it has become exacerbated in recent years.

During the period from 1995, when Republicans controlled the Senate, to 2000, there were many worthy judicial nominees who were not confirmed, with long, long delays. And finally we did get some confirmations.

Senator Hatch and I voted for Judge Paez and Judge Berzon. We never could come to agreement on Bill Lann Lee, who was assistant attorney general in the Civil Rights Division, but that was a very, 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.

And 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. And 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, adn 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 quote, "antebellum," to restore what had been prior to the time the war started. And the war's been going on for a very long time, and it's time to go back to what the status quo was before the war started.

Some time ago I circulated what I called a 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'd be a hearing in the Judiciary Committee and so many days later there'd be committee action and so many days later there would be floor action, all subject to delay for cause on determination by the chairman or the majority leader, subject to notification of the ranking member or the minority leader on the floor of the United States Senate.

And 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 nominate to the floor, and there were precedents for that.

SPECTER: When Judge Bork was defeated in committee, 9-5, he was sent to the floor; when Justice Thomas was tied in committee and not enough votes because it takes 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. 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 steeped in the lore (ph) of the law and steeped in the activities of judicial nomination 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 a change?

There is no doubt that partisanship in the United States Senate today is at a very, very high pitch. 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, and 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 Burzon (ph) and Payez (ph) and Bill Landley (ph) and others confirmed.

The confirmation process of Justice Clarence Thomas was the toughest one, the most divisive one which I have seen in my tenure in the Senate, and there may have been others. When Louis Brandise (ph) 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 or 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 (ph) to come forward as disclosed in the hearings. She'd be assured that if she made a complaint against Justice Thomas, then Judge Thomas, that she would not have to testify and she ultimately did testify and those were very, very difficult hearings -- a very, very contentious floor debate, but there was no filibuster. And I think had there ever been an occasion where a filibuster would have been expected that would have been it.

So it's a little hard to see why suddenly we've come to a filibuster on Miguel Estrada, superbly qualified, Phi Beta Kappa, Magna cum laude Columbia, Magna cum laude Harvard Law Revenue, 15 cases in the Supreme Court, comes for 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 judicial bypass, but in the 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. And there are in the wings some nuclear proposals which may be reaching the floor, and I'm not going to discuss them. They will await another day. But one line of exacerbation inspires another and as you said, Mr. Chairman -- and again, I compliment you on your initiation of these hearings. It's 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 right in the fall of 2004 when we're 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.

(UNKNOWN CHAIRMAN): Thank you, Senator Specter, for your contribution and for your presence today in 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's graciously provided the subcommittee with a written version of the remarks he wanted to give today. I'd like to have his full statement become part of the record and without objection, it will be. And I'd 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.

CHAIRMAN: 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 of 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 is has already been made part of the record. Senator Miller himself published an article describing his proposal in the Wall Street Journal just two 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 that 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 this same proposal just as the Democrats were returning to minority status following the November 1988 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. And 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?

FEINGOLD: Mr. Chairman, I'd like to ask to 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. But it seems to me, the argument applies equally to any delay in approval caused by a filibuster.

Of course, I disagree the arguments made here today on the constitutionality of the filibuster, 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: Without objection, that document will be made part of the record.

Now, let's move onto to the second panel. I'd like to invite the members of the second panel, a panel of constitutional and legal experts to come to the table.

While we're 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 at 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 Eads at 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 for America and other groups.

And of course, without objection, we'll leave the record open until 5:00 p.m. next Tuesday, May the 13th in case others would like to submit their statements for the record.

CORNYN: This is an important issue and an important debate and I don't want to exclude anyone from the opportunity to participate in these discussions.

We're pleased to have before the committee six distinguished panelists to speak on these issues.
First, Dr. John **Eastman,** Professor of Law at the Chapman University School Of Law, specializing in constitutional law and legal history. He's also the director of the Center for Constitutional Jurisprudence, a public interest law firm affiliated with the Claremont Institute for the Study of Statemanship and Political Philosophy. And I'm pleased to say he's been called to testify before Congress a number of times by members on both sides of the aisle.

Mr. Bruce Fein is the senior partner at Fein and Fein, a Washington, D.C. law firm specializing in appellate and constitutional law. He's a nationally acclaimed expert on constitutional law, who previously served as associate deputy attorney general and general counsel of the SEC. Like Professor **Eastman,** Mr. Fein's 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 Law of School 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 Steve Bryor (ph). 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's 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're delighted to have you here as well.

Professor Steven **Calabresi** is professor of law at Northwestern University School of Law. He served as a Supreme Court law clerk and was an attorney and speech writer in the White House and Justice Department during the Reagan and Bush administrations. He's 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. It's good to see you again. He's 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's 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's almost criminally short a 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'll begin with opening statements of a mere five minutes before moving on to question and answer rounds.

Professor **Eastman,** we can start with you, please.

EASTMAN: Thank you, Chairman Cornyn, and other members of the subcommittee.

We're 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 then until now was used most extensively by Senate Democrats to block civil rights legislation in the 1960s. In its modern embodiment, the tactic has been termed a 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 apply their craft largely outside the public eye, and hence without the political accountability that is the hallmark of representative government.

I'm 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 not less stealthy, but perhaps restore to it some nobility of its original purpose.

Let me first note that I'm 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. And 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 it 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's 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 principal of consent of the governed articulated in the Declaration of Independence.

I've 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...

(UNKNOWN): Mr. Chairman, this is a direct attempt to incite the senator from Wisconsin.

(LAUGHTER)

It 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.

(LAUGHTER)

(UNKNOWN): Senator Feingold, we appreciate your self-restraint.

(LAUGHTER)

(UNKNOWN): I can at least take some family pride in the fact that one of his filibusters that temporary successful effort to block Woodrow Wilson's widely popular proposal to arm merchant ships against German U-boats (ph) 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 in effect of 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 22 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 would, in my view, itself be unconstitutional.

And finally, I believe that if this body does not act to fix this problem, to abolish what has essentially become a super majority 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 combined with the advice and consent of the Senate, appoints judges of the Supreme Court and of the [****] courts.

Contrary to the testimony of Senator Schumer earlier and the comments like Senator Kennedy, this is not designed to [****] a co-equal role in the confirmation process to this body.

The primary role, as Joseph Storey (ph) himself acknowledged in his constitutional treaties (ph), 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 counter-majoritarian, is over time, through the use 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 hasn't been an effective check since Samuel Chase (ph) 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 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: Sorry to interrupt you, but unfortunately we need to hold the opening statements to five minutes, and hopefully we can address some of those on questions...

(CROSSTALK)

(UNKNOWN): ... pick it up.

CHAIRMAN: And certainly your complete statement will be made part of the record. I apologize for theshort amount of time allotted.

Mr. Fein?

FEIN: 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. Political patronage that was inherited from the outset of our Constitution was held unconstitutional in Elrod v. Burns.

So simply because something may 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 sort of gets grandfathered past Supreme Court review and acquires constitutionality through age.

I'd 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 a critical element of the reason for Senate review of presidential nominations in the judiciary was to ensure moderation in the beech.

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 [****], former President William Howard Taft, former Attorney General George Wickersham, former NAACP head [****] Story (ph), the head of Harvard University, Lawrence Lowell, the Wall Street Journal, the Nation, and the New York Times 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, Fourth Amendment 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 it's application to judges is different than its application to legislation or to treaties. We have to think 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 from 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. Collectives have a tendency to search for the lowest common denominator, because in some sense there's an irresponsibility that goes with anonymity and voting in a collective.

And therefore the president was given power because he was accountable, he had an incentive to search for the best and the brightest and strongest, and the Senate then could confirm if there was some kind of taint in the process, but otherwise that was thought in the long run to produce the most enlightened and strong judiciary that was entrusted with checking the legislature and the executive unconstitutional action.

I also think that in this case, with regard to Miguel Estrada and Priscilla Owen, it's 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 (ph) 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: Thank you, Mr. Fein.

Professor Gerhardt?

GERHARDT: With all due respect, I want to - not - want to review here in my brief appearance right now, the ample support for the constitutionality of the filibuster. I've covered that in my statement and we'd 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'll hear today. And that is the argument that the filibuster violates majority rule through the Senate. This argument is predicated, and we read several provisions

of the Constitution, as established in majority rule, as the fixed principle to govern the Senate voting.

That the obvious exceptions of the specific incidences in which the Constitution poses super majority 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 incidences.

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 22 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 to claim a majority as a quorum creates the basic rule that 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 procedures - some who have problems with the filibuster insist, nevertheless, the majority rule applies with respect to not only legislation, but also nominations. The argument is that the appointments clause entitles the Senate to give its advice and consent to presidential nominations, and that the filibuster bars the majority of the Senate from exercising this prerogative.

Their argument is the 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 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 the 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 on the Constitution temporary holds, which have been used routinely to delay final consideration of legislation and nominations. Temporary holds at the end of a legislation can often be fatal, delaying nomination just long enough near the end of a legislative session timed so that the Senate to act so the nomination lapses. Such delays would be intolerable on this reading of the appointments clause.

Reading the appointments clause has been (INAUDIBLE) of the majority of the Senate to (INAUDIBLE) and 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're talking about is majority rule would apply with respect to every nomination, not just every judicial nomination, but every nomination.

And I don't hear that argument being urged today. The constitutional violation presumably arises when majority is willing to finagle for some reason to confirm a nominee, but it's 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 the appointments clause requires the majority to vote twice.

Moreover, a reading of the appointments clause is entirely a majority vote, a nomination would be so disposed; it is unclear whether senators could change their minds once they've initially signaled their willingness to confirm someone.

There have certainly been incidences in the past where 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 couldn't begin to count how many incidences in which it might have been violated and in fact it's a good time for me to say my time is up.

CORNYN: Thank you very much, Professor Gerhardt. Ms. Greenberger, we'd be pleased to hear from you now.

GREENBERGER: Thank you Senator Cornyn. I'm 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.

And with me is 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 and 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 in trying the Constitution and the laws enacted by Congress and because of the profound impact on the lives of all Americans, it's 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've 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 nominees on important legal issues. These senators are exercising the advise and consent responsibility 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 of the days of the Republic in looking at judicial philosophy.

We've heard from some of my panelists a denigration of the role

of the Senate in this advise and consent function with a limited time now I won't 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 individual's 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's 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's hard to say that there has been a crisis. In fact, there's 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 5th Circuit. Her judicial record has shown that as a Supreme Court judge on the Texas Supreme Court - a court Senator Cornyn I know you're very familiar with - her then fellow Judge Alberto Gonzalez (?) wrote that her position on 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 wordsof the statute.

Strong language, and from the man who is now White House counsel. In the case of the Miguel Estrada (?), there've 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 it's advise and consent responsibility not being provided.

There are other very controversial and troublesome nominees coming up before this judiciary committee. I don't have time now to go through some of the deep concerns with Carolyn Shule (?) who during her tenure in the government urged the Supreme Court to overturn Roe v. Wade and the government to overturn - asked 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 5th Circuit he called for a constitutional amendment banning abortion and as a federal judge tried to pressure the Justice Department to drop the 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.

Jay 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 don't get pregnant. These are extremely problematic nominees and that is exactly the role of the Senate to give not only its advise but when they're actually nominated to withhold its consent when they have extreme records that are so problematic.

I also want to say that there are a number of nominees who have ultimately been confirmed and not been filibustered even though the no votes went over that 41 vote threshold. Jeffrey Sutton (?) just confirmed with 41 nay votes. Judge Temptovich (?) now on the 10th Circuit, 41 nay votes. Judge Shagg (?), 4th Circuit, 44 nay votes. Dee Brooke Smith (?), 3rd Circuit had 35 nay votes.

I bring that to this sub-committee's attention because these kinds of nominees are divisive, they're 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's what we're really talking about when we're talking about respecting the advise role as well as the consent role of the Senate. We shouldn't be fostering and thinking about solutions that ram nominees through with artificial deadlines that don't allow for serious study and review of their records, that change filibuster rules that have been in place for...

CORNYN: Ms. Greenberger if you would please wrap up your comments, we'll make your - any statements you have - a complete part of the record but I - we've gone over the allotted time.

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's really the most important change would be to look for comedy, to look for the kinds of nominees that can get the kind of strong backing that will give the public the confidence that there's a judiciary that is open minded and ready to give fair justice to whoever walks in the door. Thank you.

CORNYN: Thank you. Dean Kmiec.

KMIEC: Senator, thank you for allowing me to appear before this body.

This is a important hearing. I like the way your described it at the beginning, a fresh start. I liked the fact that it originated, as well, with a group of bipartisan freshman senators who come to this body and recognize that for a good long time the - we have been paralyzed over this subject.

To try to facilitate that, 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-panelists here, Marcia Greenberger. I don't believe that's an issue that's 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.

A number of 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 in several years ago - and I would borrow from what he said in his book more than what he said in his testimony this afternoon - and specifically that where you have a constitutional text that in seven specific places envisions a super majority to construct a super majority in 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's really the fourth question that I think poses the most serious constitutional difficulty. And that is the constitutional entrenchment of super majority 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 carry over rules, rules that have not been adopted by the present Senate, are requiring a super majority 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 legislator 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 recommend that we focus our attention here this afternoon on how the 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 super majority requirement for judicial nominees. I suspect they don't want that, and if that's the case, that will move us to a place where I think we can find agreement. Thank you sir.

CORNYN: Thank you Dean. Professor **Calabresi.**

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's 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, these senators are wrongfully 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.

END

SCHUMER: 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 super majorities 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 express situations where a 2/3 vote is required.

Each house of Congress does have the power by majority vote to establish the rules of its proceedings but there's 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 and 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 principle use of the filibuster has been to defend Jim Crow laws oppressing African Americans. Now for the first time in 214 yearsa 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's already hard enough for talented and capable individuals to be appointed judges without a minority of senators opposing 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 1 judge on a panel of 3 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 22 purports to require a 2/3 majority for rules changes, rule 22 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 commentaries "Acts of Parliament derogatory from the power of subsequent parliaments by naught."

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 Jimmy Carter and Bill Clinton, has written in the "Washington Post" that Senate rule 22 is plainly unconstitutional.

The Senate can and should now amend rule 22 by simple majority vote to ban filibusters of judicial nominations.

CORNYN: Thank you, professor.

We'll 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 member have delivered so far on this particular panel, I just want to make -- make sure I understand, in particular, Ms. Greenberger and Professor Gerhardt, would it be fair to characterize your testimony as if it ain't broke, don't fix it? And if not, tell me how you disagree.

GREENBERGER: I, no, I don't say there aren't 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 comedy.

Rather my suggestions for the kinds of things that would enhance the judicial selection and appointments process would be those that would foster comedy, 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've been operating to this day in many different forms and many different contexts, and not to look for those kinds of extremes, as they were said, weren't my words, but these nuclear suggestions, that to me would exacerbate the problem.

CORNYN: And I'll give you a chance to answer the question, Professor Gerhardt, in just a moment, but let me just ask a follow-up of Ms. Greenberger. So, are you saying we just need to do a better job of getting along with each other?

GREENBERGER: No. I'm saying 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 advise 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 comedy that I mentioned.

There was a newspaper article in the middle 90'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 couldn't get 60 votes.

And I'm 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.

CORNYN: More than -- would that be more than a majority of the Senate?

GREENBERGER: 60 votes? Yes.

CORNYN: In other words, assuming...

GREENBERGER: Yes. It would be also assuming -- sorry.

CORNYN: If you'll wait for my question. Assuming that, as you say, the Constitution requires the president to seek advice for the Senate before he nominates judges or judicial nominees of his choosing, would that advice come from simple majority or would does it require a super majority?

GREENBERGER: Well, I want to say that since the Senate rules require that if there are senators that 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 didn't get that super majority, but were confirmed nonetheless in the last week or more by this Senate. But that's 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 interest and we don't have to care about them. These are not organizations that are out trying to find a way to make money. They're trying to protect the most basic and fundamental rights of organizations. I don't view representing women and families as a special interestto be disparaged.

When people are concerned and scared about the future of their fundamental rights, whether or not we're talking about a super majority, 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 haven't seen that advise function and so I would say -- and there are 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's going on right now and I think it would make an enormous difference.

CORNYN: Would you give them a veto? The senate -- home-state senator a veto on the entire Senate on the presidential nominees?

GREENBERGER: Well, then we're -- then we're getting into the blue slip situation, of course, that's another process that hasn't 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 senators 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 comedy can come. Also...

CORNYN: And you think that's a -- you think that's 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?

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

CORNYN: I'm just asking if you think it's good or bad.

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 it was -- why that nominee never even got a hearing after year after year after year is hard to say, whether it was one senator or what the problem was. That's often not open to the public scrutiny to know.

I don't think that kind of secrecy was a good thing, when it was abused as it was, with so many nominees in the Clinton years who couldn't get a hearing, or if they did get a hearing, they never were sent to the floor.

Senator Lott said he had many better things to do than confirm judges.

CORNYN: What I'm trying to understand, though, is if you are saying that it is a good thing or a bad thing, regardless of who is in the 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'm asking without regard to partisanship...

GREENBERGER: Right...

CORNYN: Without regard to who is in the Washington. Do you think that's a good thing or a bad thing?

GREENBERGER: Right. And that's the spirit that I'm trying to answer your question with. And I think because it's a facts and circumstances kind of answer.

And what we saw with respect to...

(UNKNOWN): Sometimes it's good and sometimes it's bad.

GREENBERGER: I think when it's 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're 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 they really were abusive, there's no doubt about it.

And if you would...

CORNYN: If I could get -- and I haven't forgotten 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 we're the only two here now. Hopefully we'll 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.

GERHARDT: I appreciate that very much, Senator.

I'm not sure I do think the process is broken, and I think a lot depends on what the "it" is. In other words, a lot depends on what you think might be broken.

I don't think the filibuster is constitutionally defective. I don't think the rules of the Senate are themselves problematic. So I would not recommend fixing those things. I don't think the are broken.

At the same time, I have the impression that by and large most nominations go through this process rather smoothly, and the friction is focused on a relatively few number of nominations and that might be inevitable. And that might not be a bad thing, because it certainly seems to foster a great deal of debate.

As for -- one other aspect of the process, Senator, you asked about whether it's a good or a bad thing for an individual senator to nullify a nomination. It seems to be 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.

And that's -- but that's something for which they stand politically accountable and I think that's how our system operates.

If I may, Senator, just in maybe -- if I can do this almost on a personal ground, I just want to correct one thing that Dean Kmiec said. He quoted from my book, but I don't think it was a correct quote, and that is, my critique of the super majority requirement was actually a critique directed at a constitutional amendment proposed by Bruce Ackerman (ph). I was critiquing a constitutional amendment, and doing so on the ground that it violated majority rule in the Senate. In fact, I was defending majority rule in the Senate against a constitutional amendment to displace it.

CORNYN: Well, I'm -- just one last question and then I'll turn it over to Senator Feingold. I'm glad you brought up the question of the book again, because -- that you've written. And I guess that's either a blessing or a bane, when you write a book and have to then sort of live with what you've written. And I just want to hear whether you still agree with what you've written, or maybe you can

just put it in context and explain your -- the book you published in the year 2000, "The Federal Appointments Process: A Constitutional and Historical Analysis," criticizes the proposal that, I guess, it was by Mr. Ackerman (ph), for conforming judges.

And in that book, you stated, quote, "The final problem with the super majority requirement is that it's hard to reconcile with the Founder's reasons requiring such a vote for removals and treaty ratifications but not for conformations. 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?

GERHARDT: OH, very much so, Senator, because again, what I'm doing there is responding to a proposed constitutional amendment, and I might point out that Professor Ackerman's (ph) constitutional amendment proposal was to amend the process for choosing Supreme Court justices, not just judges generally.

And so my discussion about supermajority voting was done in that context. I was basically saying I thought majority rule made more sense for Supreme Court confirmations than super majority vote, as the one he has been urging.

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

GERHARDT: That's correct.

CORNYN: Thank you.

Senator Feingold, let me turn it over to you.

FEINGOLD: Thank you, Mr. Chairman.

First, let me ask unanimous consent to put the statement of our ranking member of the full committee, Senator Leahy, on the record.

CORNYN: Certainly, without objection.

FEINGOLD: Thank you, Mr. Chairman.

Let me thank all the witnesses for your patience and I hope you don't 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 five years ago, when Attorney General Ashcroft was the 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. In a 1997 "New York Times" op ed, you criticized our chairman, Chairman Hatch at that time, for holding up Clinton nominees.

You wrote, quote, "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: "The Republicans seem to have forgotten that Alexander Hamilton instructed in Federal '76 that the Senate is confined to screening judicial nominees for corruption, cronyism or incompetence. Judicial philosophy is not on Hamilton's list," unquote.

Now, I assumed 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 a judicial nominee.

Are both of these tactics equallysubject to constitutional attack?
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, I think, 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 conferring 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's 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 this -- if there's a filibuster or if they -- 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 that Senate vote, I think, would prevail under the Constitution over the obstruction tactics that you've 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're sitting and not challenging what they think is a hijacking of the majority process by a minority.

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

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's being proposed today is somehow unconstitutional, then what was being done then was also unconstitutional.

FEIN: Absolutely, it was.

FEINGOLD: Professor **Eastman**, let me first return briefly to your reference to Robert M. LaFollette, as I am compelled to do. I think he's the greatest leader to ever come out of Wisconsin. I'm sorry that you see your bloodline 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 couldn't even discuss it: Clay,

Calhoun and Webster. They thought, well, we'd better have two from the 20th century. Let's get one on the conservative side, 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's his face who you see as you enter the Senate chamber. There is no way I could leave the record anything other than rebuking your remarks about the great Robert M. LaFollette -- Professor.

EASTMAN: Senator, I thank you -- I think you for reviving my family's name in that regard.

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," unquote.

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 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."

Professor **Eastman,** we see changes of position because the political situation is changed all of the time in the Congress. You're 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 whoever he wants to the federal bench.

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

EASTMAN: Senator, I don't see anything conflicting in those statements at all. And let me be very clear. In both my testimony today and in 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 was -- 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 Senate's role was much more limited, to providing a check on the president.

And what you're 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 that the president had waged his campaign over 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 and be asked, for example, as I point out in that article, a 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 refer to in that article said "To my conscience." I think 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 they disagree with the outcome of an election, I think is improper, and I think that's perfectly consistent with what I said today.

FEINGOLD: Well, I recognize your response, except for I don't think it resolve the problem that you had one view about majority rule under one Democrat 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, quote, "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," unquote.

As you're 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, were never allowed a vote in some cases, or 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 didn't? And do you agree that these practices were as wrong then as you say they are now?

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

I do think it proves from a prior Senate to try and 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 whole. There are two uses of a committee hearing. There are some nominees that just simply don't 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 refer to in my article is, where there had already been a majority of senators expressed their views to support a nominee that was being bottled up in committee, that process, then, the committee holds and a 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's perfectly consistent that in both instances -- I've said we need to get to a process that ultimately, after extensive and reasonable debate, let's the majority have its say, because to do otherwise would [****] impose a super (ph) majority requirement contrary to the Constitution, intrude on the president's power and threaten the independence of the judiciary.

(UNKNOWN): Well, Mr. Chairman, I think 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. If a person were -- actually it was Mr. Fein -- excuse me, two witnesses on this side suggesting that. And that is very important because the American people is being misled that somehow this is something that began after President Bush became president. That simply isn't the truth.

And I stand here as a person that 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. ButI'll stand here as the same senator and tell you that what was done to President Clinton's right as the president of the Untied States for the 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 George Bush gets all his nominees and, gee (h), hopefully things will be better when the Democrats have a president. It does not justify payback. You and I've 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: I see Senator Durbin has joined us, and I might, Senator if you don't mind, let me as a few questions and I'll turn it over to you in the spirit of going back and forth across the aisle and in the course of our questioning.

Dean Kmiec, I was interested both in your's and Professor **Calabresi's** comments regarding Blackstones' dictum about no parliament can bind the hands of a future parliament and how you view Senate Rule 22, which provides for the cloture requirement of 60 votes before a debate can be ended. I'd be interested in how you reconcile, if you can, your comments you may have on that -- on Senate Rule 22 in that context.

KMIEC: Thank you, Senator.

I think there's an agreement emerging perhaps on the panel and among the senators, as well, on this constitutional proposition that a majority of the Senate always has it within its constitutional authority to amend its rules. If that is the case, then a carryover rule, Rule 22, 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 not to be simple majority rather than 60. Or

actually to amend rules, as you know, Rule 22 requires 67 votes, that that's an unconstitutional entrenchment of prior rules.

Now, Senator Feingold just said a minute ago that there has been abuses on both sides, and I have tried to say in my statement, as well, that I concur, and I, one of the things I know about being a dean is that if you're going to get 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's what this hearing is about. And 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 22, 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 application in my judgment, and I haven't heard a dissenting voice from that on the panel, even as Professor Gerhardt (ph) has raised the issue that perhaps if the filibusters are not necessarily, per se, unconstitutional.

No one has argued that, at least I'm not arguing that, but Rule 22, which entrenches a 60-vote requirement, has those constitutional problems.

(UNKNOWN): Yes, Mr. Calibrisi (ph).

CALIBRISI (ph): Thank you. I also would agree that Rule 22 is problematic to the extent that it purports to entrench the views of a prior Senate.

I think the principle that prior legislatures can't 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's what Rule 22 does to the extent that it purports to say that a majority of the Senate can't change the rule. I do agree with Bruce Fein (ph) and John **Eastman (**ph) 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 a majority of the Senate wants to change Rule 22 to provide for that, that seems to me to be totally warranted.

I guess I would also say that, well, I think that there were, Senator Feingold mentioned that there were a number of Clinton nominees who may not have received as a good treatment as they perhaps deserved.

Elena Kagan (ph), who's now become the dean of the Harvard Law School is one of those nominees, somebody who I know and think highly of, and I wish that her nomination had been acted on.

But I guess, it seems to me that allowing a delay through

filibustering of two years in taking up a nomination like Judge Estrada's, Miguel Estrada's or Priscilla Owens's is a whole new order of magnitude of delay.

GERHARDT (ph): Senator, may I correct the record? I'm real sorry to interrupt, excuse me.

CALIBRISI (ph): I noticed you when Dean was saying he though a consensus was emerging, you were shaking your head, so I, go ahead.
GERHARDT (ph): I'm sorry, Senator, excuse me.

CALIBRISI (ph): Go ahead, and please ...

GERHARDT (ph): I appreciate it. I just want to point our quite briefly that I guess we don't have the consensus, I regret. The last few pages of my statements sort of spell out, and I won't repeat it here, reasons why I think not only is the filibuster constitutional, but also the requirement for a super-majority vote to change the rule on filibuster.

Entrenchment, I think, is, and this is the technical word, entrenchment 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 Vermule (ph) who argue against, anti-entrenchment, defense of super-majority voting requirements, and a common example that they might give and that would challenge the committee is that Congress uses sunset clauses and laws all the time.

Those entrench policies. And, 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.

(UNKNOWN): Could I also say ...

CALIBRISI (ph): You would agree, Professor Gerhardt, wouldn't you that is a subsequent legislature decided to change or amend that law it's certainly at liberty to do so?

GERHARDT (ph): By the appropriate voting procedures, yes sir.

CALIBRISI (ph): I wanted to just clarify with Professor **Eastman** (ph) and Mr. Fein (ph) some of the, your statements. Do you say that the prior uses 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?

FEIN (ph): Well, I'm just saying that the Senate has a right at all times, by a majority, to overrule a deference or a blue slip or otherwise.

If it wishes to acquiesce in the blue slip at any particular point, that's 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.

CALIBRISI (ph): Professor **Eastman (**ph)?

EASTMAN (ph): I agree with that. And for a Republican majority in the 1990s to have deferred to its committees doesn't raise the same kind of constitutional issues, or for a Democrat majority to have deferred to its committees, doesn't raise the same kind of constitutional issues and when we're talking about a minority of

either party being to thwart the will of the majority. Now, they are not yet thwarting the will of the majority. The Senate rules that have carried over, it is incumbent upon this body if they think there's a problem with the super-majority requirement, as I think there is, to enact a modification to that requirement.

And I don't think there's any disagreement on that point. Where there is disagreement is whether they 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 super-majority 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 or rules that favor them in perpetuity and then they said, "And we're going to lock this in with a super-majority requirement."

That would clearly be unconstitutional, and I think the entrenching provisions of Rule 22 are equally unconstitutional.

FEIN (ph): If I could Just amplify on that response with regard to potential litigation. It does seem to me that if the Senate majority itself doesn't take any action, if a challenge was 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."

(UNKNOWN): Senator Cornyn, I just am feeling very nervous at not being able to disassociate myself also from Dean Kmeck's (ph) sense that there was a consensus emerging.

I know that Professor Gerhardt has made clear for purposes of the record that he isn't 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 can't 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 weren't filibusters but still very strong negative votes the fear is of an activist judge who will disregard the rule of law.

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

(UNKNOWN): Mr. Chairman, I want to intervene here to also say that I don't ...

(UNKNOWN): You're not part of that consensus, either?
(UNKNOWN): I am not. I want it on the record that I do not view Rule 22 as requirement that a super-majority is required to cut off a debate and 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're very short of a consensus here on this point.

(UNKNOWN): Well, we're working on it. Let me just ask finally, and then I'll turn it over to, I'll recognize Senator Durbin. Ms. Greenberger and Professor Gerhardt, you both cite a Law Review article by Katherine Fiske (ph) and Erwin Shimerinski (ph) to support your conclusions.

I take it, then, you agree with the analysis in the article, the constitutional analysis> First, Ms. Greenberger (ph).

GREENBERGER (ph): Yes, I agree with parts of it, but I don't agree with, I don't agree with al of it. I think that part of what that article dealt with was this very issue that's 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 isn't something that I've 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 wonder also ...

(UNKNOWN): Well, I'm sorry, let me ask you, since we're, rather than volunteer statements let me just ask some question. You will, 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 22 cannot be used to impose a two-thirds voting requirement for debate on a rule change.

If you endorse the Fiske, Shimerinski 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 were saying earlier. You agree with part of what they said and not with other parts?

GREENBERGER: I think that certainly if following Rule 22, and the super majority vote that's required, the two-thirds vote that's required to either change the filibuster as, of course, the senate has done in the past has altered the nature of the filibuster rules on repeated occasions in the past, so I would certainly say that under Rule 22, there is the set procedures for changing the filibuster rules and following Rule 22's prescriptions, the senate, of course, could change the filibuster rules if it so decided. But I do believe...

CORNYN: It would require 60 votes to close off debates in order to change that filibuster rule. Is that what you're saying?

GREENBERGER: Well, certainly, it would require the filibuster culture (ph) 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.

CORNYN: Let me correct myself, actually it's two-thirds. That point was made earlier.

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

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

I'd just like to make a couple of observations. Before I came to

congress, 28 years ago, I was a Parliamentarian of the Illinois State Senate, so I sat there with those rules and worked with them everyday. That was part of my life. And 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 manuals, the new House of Representative rule. And then I came to the senate and faced a new set of rules. And again, I'm a student. I don't profess to be an expert. But, I did notice one essential difference as I moved from a state's 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 Representative, adopts its rules. Without fail, after every election, the Senate doesn't adopt its rules. Now why is that? Because they're 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 Carroll (ph) makes that point -- I think very graphically -- in his book about LBJ, which I think most of us have read. And I think that's 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 don't even adopt them because no one has wiped them away. They're still there today, is they were before the election. And that creates a different premise for this debate, as far as I am concerned.

The second thing I'd like to say is that early in the third quarter, for those who are keeping score, the score is 123 to 2. President Bush, as of this afternoon, has received 123 judges that he's asked for, and exactly two have been held up. You would assume from this hearing that the number were exactly the opposite. That we only approved two. We're filibustering 123 judges and it's just an outrage. Well, I'd 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 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 of you who are arguing that, in and of itself, there's nothing wrong with that, but it's clearly wrong to use the filibuster of two nominees sent by the Bush White House. I don't think that follows, and I think that's the point made by Senator Feingold. If the rules of the senate could countenance (ph) the abusive treatment of 59 Clinton nominees, and say, it's the rules of the senate, you've got to live with it Democrats, sorry. To stand back now and say, the rules of the senate can't be used to stop a Bush nominee, there's a constitutional principle at stake here. It doesn't work. It was either unconstitutional then, and is unconstitutional, now, or vice versa. Take your pick.

But having said that, what i think is at stake 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's what this is all about. We're playing ping-pong above the table and rolling bowling balls at one another below the table. That's what this debate is all about. I think the only way it's resolved is if something happens which will be truly miraculous and that is the surrender of power by a president, and I don't think

he's going to do it. One or two other suggestions have been made to try to find some bipartisan way out of this. it's not likely going to be embraced by this White House.

Maybe it would never have been embraced by a Democratic president. But until then, we're going to find ourselves in this tangle. And I might also add paranthentically (ph) that when you're dealing with judges of the kind that are being held up and the kind that maybe 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's no wonder that one or two nominees become determinative.
And I'd just like to ask -- maybe Professor **Calabresi,** since you're from my home state, let me just add that I am not part of your quote, "angry minority." I got a smile on my face. And I'm doing my best. I'm not angry over this, but I am anxious to find some justice in this situation. And 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 is unconstitutional.

CALABRESI: Sure. Actually, let me comment on several other things that you said. I mean, 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...

(UNKNOWN): Under the same rules...

CALABRESI: With different members (ph) on committees. If the Senate were completely a continuing body then presumably the previous allocation of committee slots might maintain itself, and...

(CROSSTALK)

CALABRESI: Secondly with respect to numbers of nominees, you mentioned -- you know, there are two individuals up to now who have been filibustered who've been held up for a period of two years or so. Those two individuals are being nominated to be one of 175 federal court of appeal judges in the country where an individual with a 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...

(UNKNOWN): Under the Senate rules.

CALABRESI: Yes, under the Senate rules which can be changed by a majority vote by each succeeding newSenate. And it seems to me the majority of senators has a right basically to alter the Senate rules if it wants to do so. I do think some individuals who were talented should have gotten action during the Clinton years. I specifically mentioned Diana Kagen (ph) who was nominated for the D.C. circuit who's now becoming the dean of the Harvard Law School. As it happens, she and I clerked together in the Supreme Court with Miguel Estrada (ph). And I had a very high opinion during those years of both Miguel Estrada (ph) and Diana Kagen (ph) and I'm sorry that there wasn't action taken on her nomination. I don't think that not acting on Miguel Estrada's (ph) nomination is going to make the situation any better.

(UNKNOWN): [****]

(UNKNOWN): Yes sir. With all due respect, sir, I now want to go back to the questions Senator Mccorine (ph) asked me, initially.

(UNKNOWN): On his time. No -- go ahead.
(UNKNOWN): The [****] article. On that I would -- Senator, I would just say that I'm quite good friends with both the authors, and we agree on some things and disagree on a lot. I would say I agree with some of the articles, I disagree with some constitutional analysis in it as well. I certainly disagree with their conclusions regarding requisite vote for a change in Senate Rules. I might add that in fact I disagreed to some extent even with their methodology. And you'll note that I reached a constitutionally of filibuster by a different route than they do. So I rely on them for factual matters, but not otherwise.

And I just want to echo Senator [****] 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. And while we can quote [****] that might have been in truth with the British Parliament and the British system, 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.

HATCH: Mr. Fein, did you want to comment?

FEIN: Yes, one, I think that your comment really exposed the kernel of the problem here, and it's a sense, I think, on both sides of the aisle that there has been partisanship played whenever it suited their purpose and exploit the rules to their advantage and then change the rules of the game when they are in the minority. And there is no way to write a constitution with sufficient clarity in order to avoid the kind of log jam we're in now if a majority wants to take their power to an extreme or a minority exploiting the rules.

They are what I call a series of unwritten elements to our constitution. They 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 didn't want simply by refusing to nominate anybody. He doesn't like the Department of Education, he won't nominate a secretary of education or any assistant secretaries.

Unless there is self-restraint and an agreement [****] 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 don't think that there's any rule that you could adopt that's going to overcome the problem.

Well, 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 don't think a continuing Senate can override Article II of the Constitution, which says in the appointance clause [****] if you get a majority and the majority forces a vote, then you've got to confirm judge. And in my judgment, even though the continuing Senate doesn't mean that each Senate's rule is not as -- it doesn't enjoy the same dignity as the prior Senate's rule because it was a carryover, still if majority, in my judgment, under Article II wants to exercise its muscle, so to speak, and force a vote on the floor, I think it overrides the Senate rules.

(UNKNOWN): I think I'm out of time, unfortunately. I wanted to let Ms. Greenberger make a comment. But...

HATCH: Certainly we have time to do that, Senator.

(CROSSTALK)

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, I think, as Mr. Fein said, at the end is changing what the rule says with respect to needing a super majority in order to change the rules. So that would be -- that is the crocks 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, was what I was referring to as being unhappy about. I do take issue with Mr. Fein saying that there were -- both sides were changing the rules. I don't 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.

Secondly, I wanted to make a point with respect to fresh start. Everybody once can 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 insufficient to say, oh, I wish things had been done differently, there were problems in the past, I'm sorry about them, I pointed them out in the past and now I'm pointing them out in the current. That takes us only so far.

We have consequences today because of those problems in the past. And so, any fresh start has to take into account the fact not that there is one or two judges out of 175. And so, what problems could they cause with respect to Judge Owen or Mr. Estrada? But because of those problems in the past, today in 2003 we have a distorted judiciary. We don't have the kind of balance of views. We don't have the enrichment of the different perspectives of judges that we would have had and therefore inadvise 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 have a constitutional responsibility to take into account whether each of these nominees in the circumstances of today belong on a court of appeals or a district court or ultimately the Supreme Court, but especially with respect to these lower courts because of distortions with the past and because we don't have the kind of balanced judiciary right now we would have had absent those distortions.

(UNKNOWN): Thank you.

(UNKNOWN): Chairman?

(UNKNOWN): I just want to conclude, if I might, ten seconds. This is a discussion over an extreme procedure in the Senate. I think we are dealing with an extreme situation. It's one that we haven't had before and it's one that we can only deal with honestly. It 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. And I will just close by reminding you check and the score is still 123 to 2 in the in a third quarter, that is, the third year of the president's first term.

Thank you, Mr. Chairman.

HATCH: Senator Feingold?

FEINGOLD: I'd like to offer into the record a few of the articles that Professor **Eastman** has written.

HATCH: Without objection.

FEINGOLD: And I'd also like to offer into the record a helpful letter, I think, from Abner Nick (ph), a former White House council and Court of Appeals judge of the District of Columbia Circuit.

HATCH: Without objection.

FEINGOLD: Mr. Chairman, I just want to also put in the record another clarification. I certainly don't think there was ever any majority equity essence in the -- during the period described under the Clinton administration. A Republican leader and a Republican chairman never let so many of these Clinton nominees get a vote, and many did have majority support in the Senate. That's actually what happened.

And I'm struck by this comment about self-restraint that I think is an important one. I mean, look, let's just for two 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. Certainly there was no self-restraint there. Democrats record here, Senator Durbin reiterated 123 to two. So there was all of these vacancies, and Ms. Greenberger pointed out, were filled by Bush judges. And the record is 123 to two and this hearing is premised on the notion that the Democrats have been extreme. It's absurd. Any fair person could not possibly look at the record of the last eight years and conclude that it is the Democrat side that is extreme. And I am noted for not being particularly partisan.

I am just telling you, Mr. Chairman, 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.

FEINGOLD (?): I think 123 to two is awfully good considering what happened previously.

Thank you, Mr. Chairman.

CORNYN: Well, let me -- Senator Feingold, as we started out by saying or as I started out by saying that I believe it wasn't particularly fruitful for us to go back and examine the abuses of the past, whether they be real or whether they be just perceived. And matter of fact, those of us -- all three of us, Senator Schumer, you and I and the other members of the Judiciary Committee -- we see that being played out every time the Judiciary Committee meets and talks about a judge that is subject to some division of opinion on. My hope was that we could somehow get a clean break with the past.

You know, I hear what you're saying. Some may feel like that in itself is not fair, but what is fair, I think, is to -- we can't control the past, and the only thing we can do is try to have an impact on the future. If there are rule changes adopted here, certainly they would operate equally for the benefit of a Democrat who's president in the White House or a Republican. And 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.

FEINGOLD (?): Mr. Chairman, if I could just briefly respond? I think it's rare that one could 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 individuals, in many cases, are still available to be federal judges. We recognize that most of the judges or 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 approved 123 and only denied two.

So to not say that in the context -- to say that in the context of this discussion, we shouldn't 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's an extreme step...

(CROSSTALK)

FEINGOLD (?): ... 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, Mr. Chairman.

CORNYN: And just to clarify, I don't really think we disagree, even though 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 sauce for the goose is sauce for the gander, tit for tat. The kind of recriminations and just, frankly, just things that are benefit the dignity of this institution and the constitutional process in which we're engaged.

And you know, I would wish that we could look forward and not have to re-live the past; maybe that's not possible. The only problem is that, for every Democratic presidential nominee that wasn't confirmed, I'm sure there are folks on my side that would say, "When Democrats were in control, Republican nominees of a Republican president weren't treated fairly." And so, I don't know where that takes us except continuing the downward spiral.

And that's why I'm hopeful as a result of some of the proposals that have been made by Senator Schumer and others. I don't 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 I'll recognize Senator Schumer for anything he has.

I think what distinguishes the two nominees who are currently subject to filibuster is that, unlike the past, we have a bipartisan majority of the Senate that stand 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...

SCHUMER: Will the Senator yield?

Piaz (ph) and Burson (ph) both went through with far more bipartisan majorities. I think 20 or 25 Republicans voted for Piaz

(ph) and Burson (ph).

CORNYN: But they were confirmed; were they not?

SCHUMER: You said that's the difference. The difference is not a difference.

CORNYN: Well, I'm saying that a bipartisan majority stands ready to confirm two nominees today that are currently not -- where the Senate majority is not able to effectuate its will because of the filibuster.

(CROSSTALK)

FEINGOLD (?): There was a bipartisan majority at all times prepared...

CORNYN: But they were confirmed, right?

(CROSSTALK)

CORNYN: The other thing is that, you know, Senator Durbin said 123 to two is not bad for President Bush. And the thing is, I find it very difficult to reconcile that sort of statistic if indeed we're supposed to pay attention to that kind of scorecard with some of the caricatures that I've heard of President Bush's nominees and as being out of the mainstream or a right wing ideologs 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 right is preserved. But I think 123 to two 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 we may differ; I know we differ.

Senator Schumer?

SCHUMER: Thank you, Mr. Chairman.

I can't think of a single Democrat the president has nominated. Now, maybe they have to the court of appeals.

If he were nominating people without regard to ideology, you think there would be a few? I don't know any -- Ms. Greenberger is here from pro-choice point of view; it's not a litmus test for me -- but I can't think of one nominee who is pro-choice who 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 from the left here know it and the people from the right here know it.

CORNYN: If the senator would yield?

What I just said is we don't all know it. I understand that's your position.

SCHUMER: I think that everybody, any objective observer looks. But I would ask the panel to name for me a Democrat the president has nominated to the court of appeals.

EASTMAN: I'll take that up. Roger Gregory from the 4th Circuit. And you know, I have to weigh in.

I mean, I just...

SCHUMER: OK. Got another one?

EASTMAN: Yes. Senator Feingold...

CORNYN: Excuse me, Professor **Eastman.** I'll come back with a question.

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

(LAUGHTER)

(CROSSTALK)
CRONYN: Let's do it on the Q&A and take that up.

(UNKNOWN): Roger Gregory from the 4th Circuit. And, you know, I have to weigh in. I mean, I just...

SCHUMER: OK. Got another one?

(UNKNOWN): Yes. Yes. Senator Feingold has introduced...

CORNYN: Excuse me, Professor **Eastman.** I will come back with a question. But I do want my very first hearing not to break into a free-for-all.

(LAUGHTER)

So I must...

(UNKNOWN): Does the woman who raised her hand get any special privilege?

CORNYN: And no hands raised. Let's do it in a Q&A. And certainly if Senator Schumer wants to recognize anybodywe'll come back, if we have time.

Senator Schumer?

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

So how about another one? I mean, if we're doing this nonideologically there ought to be some scattering, and I don't 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're interpreting the law in a neutral way?

(UNKNOWN): May I comment, Senator?

SCHUMER: Yes.

(UNKNOWN): I mean, it seems to me that if one looks at the past, that there are -- President Clinton was able to successfully appoint, I believe, about 370 individuals to the lower federal courts.

SCHUMER: Right.

(UNKNOWN): My recollection is that it was minuscully (ph) different from the number of people that President Ronald Reagan appointed in eight years to the lower federal courts. I think the argument that President Clinton didn't have the same opportunity that President Reagan had to make an impact on the federal courts just fails before the facts.

SCHUMER: Yes, well, but that's not the point I'm making here. President Clinton's nominees were not, by, again, general view, let's take ideology out of this and make 5 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 are different, and most of Clinton's nominees -- there were a few who were very liberal -- but most tended to be moderate to moderate liberals.

(UNKNOWN): I'm not sure that's accurate.

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

But I want to ask the panel, the four more conservative, if -- let's just assume that a president is making ideological choices and is nominating people without fail who are way over to one side, 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?

(UNKNOWN): Mr. Senator, that was practiced under Franklin Delano Roosevelt. He, 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.

SCHUMER: Well, I'm asking you your view. Was that right?

(UNKNOWN): And I believe that was correct.

SCHUMER: You do?

(UNKNOWN): I believe the president won the election overwhelmingly over Alf Landon. That was the rules of the game. The people knew...

SCHUMER: Sort of the way Bush won over Gore overwhelmingly?

(UNKNOWN): No. No. And he campaigned, as you well know, in 1936 against justices who said, "We're taking a buggy horse approach to interpreting the Constitution." And the Constitution did not collapse, it thrived. And I don't know that anyone views the Roosevelt appointees as being the way station for the destruction of our constitutional system.

SCHUMER: Go ahead, Marcia.

So you would think that's fine and the Senate should -- if President Roosevelt -- let's just assume it -- did all New Dealers...

(UNKNOWN): He did.

SCHUMER: ... and I would argue that New Deal, it was more in the consensus of America post-1938 than Scalia and Thomas are within the consensus of America 2002. And the president has said those are the types of judges he wants.

FEIN: You meant -- Scallia was confirmed unanimously.

SCHUMER: I understand, that is not the point.

FEIN: But he is an extremist and he got a unanimous vote?

SCHUMER: Well, he got a unanimous vote because then the court probably had some, needed some balance. I would have voted for a Scallia if there were eight Brennan's on the court. I wouldn't vote for them...

FEIN: There were not eight Brennan's at the time.

SCHUMER: I understand, I'm just making the point of balance.

FEIN: (INAUDIBLE)

SCHUMER: I'm asking you the question, you're not answering. You're giving other facts, like unanimous approval, so let me just finish with Mr. Fein.

So, you're saying that if a president nominates people to one extreme, let's 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're not saying that?

FEIN: I'm not saying that. I think...

SCHUMER: OK. You think -- let me just ask you some questions.

Do you think it's legitimate to make such inquiry?

FEIN: I think it's 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.

SCHUMER: OK. Does everyone else agree with that?

(UNKNOWN): I think it's legitimate for Senators to take ideology into account, but I don't think it's legitimate to filibuster nominees who clearly enjoy the support of a majority of the Senate. And I don't think there's any precedent for that in 214 years of American history.

GREENBERGER: Well, I think that that -- I have to say that that's absolutely factually inaccurate.

(UNKNOWN): Of course it is.

GREENBERGER: And with respect to Pias (ph) and Berzon, Senator Schumer, that you raised, there was a filibuster. Let's step back for a minute and remember that Senator Clinton was not even sending up names who he did not think was going to get...

SCHUMER: President.

GREENBERGER: I'm sorry. President Clinton, was not sending up names that he didn't think were going to get 60 votes to start with. So the whole universe wasn't as controversial of a universe to begin with...

(UNKNOWN): Right.

SCHUMER: ... with respect to now Judges Pias (ph) 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, the leader of the filibuster then, Senator Smith, it was all about ideology. Senator Frist voted against invoking (INAUDIBLE).

(UNKNOWN): Right. They were confirmed. How can you say there was a successful filibuster.

GREENBERGER: They were. I didn't say it was a successful filibuster, but I did say...

SCHUMER: How long did it take to confirm them?

GREENBERGER: And with respect to Judge Pias (ph), it was over three years, from start to finish, and with respect to Marsha Berzon, Judge Berzon, it was a slightly shorter period of time, but still...

SCHUMER: Right. So, in other words, Ms. Greenberger, if we were using the precedent, then Senator Cornyn and our fiends on the other side should be stopped from complaining until it's three years? They're complaining when it's three months.

GREENBERGER: The current leader of the Senate, Senator Frist, voted against invoking (INAUDIBLE) in that context with respect to Judge Pias (ph). And therefore, his whole approach was not continent, Senator Cornyn, with what you were suggesting, that if there was a majority willing to confirm, there shouldn't be a filibuster. He continued to support a filibuster, and the ultimate vote showed a very overwhelming 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 majority -- substantial majority support, far more substantial majority support than some of the judges who I must have to say, I don't congratulate the Senate for confirming, such as Judge Shedd, Judge Sutton, and others who had very, very strong negative votes.

SCHUMER: OK. And one question -- I have a question of Professor Gerhardt. Can you -- I'm sort of befuddled again. It seems to me this is -- here's the result we want, therefore we're making an argument for it. In other words, I think the panel sort of buttresses my argument that we don't have this neutral machine that makes law. This panel is great proof of it.

But I'm totally befuddled by the idea that it's unconstitutional to filibuster a judge, but not unconstitutional to filibuster legislation. I also would like to know, is there difference between -- why -- couldn't committees be unconstitutional? If a majority on a committee decided to vote against a judge, is that OK?

I ask the second question to all the panel -- if then the whole Senate wanted to be for the nominee and they were a majority vote there. So, first, Professor Gerhardt, I mean this is -- this is taking the results you want and then twisting the legal argument to make it right. It's the most absurd thing I've ever seen, and I think it's almost a joke.

But what -- do you see any difference between the unconstitutionality -- why is majority vote more sacred in judicial appointment than in legislation?

GERHARDT: I don't think there is. I don't think the constitution recognizes any such distinction. In fact, as I suggested earlier, there's only one appointments clause.

Every nomination would have to be the beneficiary of this rule if it were to apply.

SCHUMER: So an appointment -- that's even a better argument, thank you. That's why you're the professor and I'm the senator. Appointment to the executive branch, or by the way, I missed some of this. Are the people who are for this arguing that that -- a filibuster in appointment to the executive branch would be equally unconstitutional?

GERHARDT: Same grounds.

FEIN: Mr. Senator, I don't think that it makes any sense to try to apply necessarily the same rule to all appointments or all votes.

I pointed out earlier, intellectual tidiness is not the earmark of the way our Constitution has been interpreted and applied. You have to ask what's the purpose of the voting rule and whether it's 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, too much. They were erecting barrier after barrier to prevent legislation from being enacted.

So you can argue reasonably plausibly that a super majority vote that tries to block legislation is consistent with that design. There's nothing comparable with regard to concern over appointing and confirming judges too fast with majority votes or otherwise.

So it's thoroughly consistent to say that a filibuster rule can be overridden by a simple Senate majority on judges but not on legislation.

SCHUMER: Didn't the founding fathers in objection to Wilson's proposal that the presidency, 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 didn't say 51 is enough to check the president's power in this, but 41 isn't.

FEIN: No, I don't think the Founding Fathers...

SCHUMER: You're not being a very strict constructionist here, Mr. Fein.

FEIN: Right. I'm not trying -- I do not think you will find answers...

SCHUMER: I know you're not trying.

FEIN: ... to the constitutional questions that are difficult by reading the dictionary and looking only at the text, because the Constitution has additional elements that have to be consulted if it's too have any vibrancy. Otherwise, the Constitution would be 30,000 pages long, to get into all of the detail that you've adverted to.

SCHUMER: You're not being a very strict constructionist, though, are you?

FEIN: I'll be a not-strict constructionist when I think it serves the goals of the Constitution. I'm not embarrassed about that.

SCHUMER: Yes.

FEIN: We shouldn't be fetish about particular slogans.

With regard to the constitutional role of...

SCHUMER: We'll quote you on that at some other hearing sooner or later.

FEIN: With regard to the -- I testified, by the way, in favor of your proposal to have incentive enhancements for hate crime statues. Maybe you were more endearing to me at that time than now. But in any event...
SCHUMER: I don't know where I went wrong before.

FEIN: Well, that makes two of us.

With regard to -- with regard to the entrustment to the Senate of a confirmation role, there was no suggestion that 51, a majority, wasn't sufficient to perform the task of weeding out for cronyism, incompetence or corruption. And I think that's where the explanation comes as to why the president wasn't given the sole power.

Hamilton explains that in '76, the Federalist Papers.

(UNKNOWN): In fact, Senator, James Madison and the debate went even further. James Madison had proposed at one point to actually require a 2/3 vote to disapprove a presidential nomination. That did not succeed.

But the devote was not to go the other direction, but to in fact -- whether to give exclusive power to the president or to have somewhat of a 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'll just quote Irving Chimensky (ph)...

SCHUMER: Well, it's not forevermore. The Senate can change its rules in a minute.

(UNKNOWN): But that's what the fight is about, and the constitutionality of the super majority 2/3 requirement in the Senate rule to stop the change of the filibuster rule -- and I'll quote Irving Chimensky (ph). I've been debating him every week for three years and we...

SCHUMER: Who's that? I didn't hear.

(UNKNOWN): ... ad we have never agreed, hardly, on 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 doesn't take that seriously, he goes further in that same article to suggest that disgruntled nominees or members of this Senate themselves, whose votes are deluded by that unconstitutional rule, could file suit and get...

SCHUMER: How about committees? How about when a committee blocks a judge from coming to the floor, and we know that a majority -- let's say the Judiciary Committee votes, you know, 15 to 4 against letting someone come to the floor, and 51 Senators sign a letter saying bring that judge to the floor. Should -- is that unconstitutional?

(UNKNOWN): There's 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 setup committees and to setup rules that would structure deliberation and debate.

The filibuster itself...

SCHUMER: Why doesn't Mr. Fein's argument, which is sort of result-oriented -- this is what the Founding Fathers were looking for -- apply equally to committees?

(CROSSTALK)

SCHUMER: Let Professor **Calabresi** finish and then I'll call on you, Dean Kmiec.

CALABRESI: The rules of proceedings clause authorizes Congress to setup committees and to setup rules of that kind.

The filibuster of legislation...

SCHUMER: Well, no, wait a second, Professor. It authorizes committees and it authorizes rules. OK. It doesn't say that the committees come from any different genesis than rules. But you're saying the rules are unconstitutional but the committees are not, even though the formulation of each is majority should rule. It makes no sense.

CALABRESI: Rules which foster deliberation and debate are perfectly permissible. A rule which...

SCHUMER: Wait a second...

CALABRESI: ... 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 -- had the legislature...

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 committees should be allowed to debate, but not block someone from coming to the floor. That it should be a recommendation, being, as you said, rules of debate are OK, 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 don't 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 the one and you don't want to defend the other.

My guess, you'll disagree, that if the committee blocked it, and good Senator Cornyn came in and said committees blocking nominees,

unconstitutional, you'd be making the exact opposite argument.

KMIEC: In all fairness, Senator, I don't think anyone is saying that the committee structure is unconstitutional. I don't think anyone made an argument here this afternoon that the filibuster was unconstitutional. I think the argument that has been made, and there wasn't a consensus, but there is in fact a good body of Supreme Court opinion, and not just the commentaries of William Blackstone, is that one previous Senate cannot impose rules on a subsequent Senate without giving that subsequent Senate and a majority of that subsequent, 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's an injury not just to the subcommittee chairman. It's an injury to the nominees who the president has put forward, and that's an injury to the separation of powers and, frankly, there's 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. And you...

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

KMIEC: If it's invoked, that's correct.

SCHUMER: OK. So, you're 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 two years -- I think we did in the House. I'm not sure of this.

KMIEC: In the House, you did. In the House, you did.

SCHUMER: Then that would be OK.

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

SCHUMER: Fair enough.

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

And I would just like 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's a protocol that I think if you explained 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, 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 Enron 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 office. And the constitutional injury

that we just talked about, and that the is the entrenchment of rules being imposed from one body onto the next.

SCHUMER: Which could be changed by majority vote.

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

SCHUMER: Not being -- I don't know why you say imposed.

KMIEC: Well, it's imposed...

SCHUMER: The Senate has gone along with doing this, and the 51 senators of the majority could propose changes in the rules.

KMIEC: And right now it's 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 that would be proposed, because that would be the beginning of healing of a process that is in fact broken.

(CROSSTALK)

CORNYN: No, excuse me, I have the floor.

Senator Schumer, I wanted to inquire about how much more you had. We have...

SCHUMER: I was going to let Ms. Greenberger...

CORNYN: We've been doing 10 minute rounds and I've given you 20 minutes and we...

SCHUMER: I'm sorry. I apologize.

CORNYN: I want to give you plenty of time...

SCHUMER: I'll let Ms. Greenberger say the last comment from my round of questions.

CORNYN: That's fine. Thank you very much.

GREENBERGER: Very quickly, of course, the nub of the controversy here is this particular Senate rule requires a 2/3 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 -- that is the missing piece of, I think, this suggestion, that makes it such a controversial suggestion and one that neither Professor Gerhardt nor I had -- could support.

(UNKNOWN): It wasn't controversial for Lloyd Cutler, and it isn't controversial for me.

GREENBERGER: Well, that may be. I can't speak...

SCHUMER: It is to me, because it basically says the president gets whatever he wants. It's not a compromise. You just wait a few months and he gets it.

GREENBERGER: At the nub...

CORNYN: Very well. Well, that's -- that was the last question and comment, and with that I'd like to thank all of the distinguished

lawyers and scholars who comprised this panel as well as the preceding panel of my colleagues, our colleagues in the Senate.

I think we've all found this fruitful and certainly important. Constitutional questions and issues have been raised and debated and I wasn't laboring under the hope or actually the expectation -- maybe the hope, but not the expectation we would finally settle that today.

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

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

I know we'll have more hearings and we'll 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've ended where everybody was sort of had a smile on their face.

SCHUMER: OH, yes. And I want to thank the witnesses. They've been here a long time, and I consider this fun. I hope you do.

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

END

COMMITTEE CHAIR

Washington, D.C.

2003 WL 21029181 (F.D.C.H.)

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