Testimony of

The Honorable John Cornyn

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OPENING STATEMENT

This hearing will focus the subcommittee on the following topic: "Judicial Nominations, Filibusters, and the Constitution: When a majority is denied its right to consent."

This week, the Senate will mark a rather dismal political anniversary. Two full years have passed since President Bush announced his first class of nominees to the federal courts of appeals. It is an exceptional group of legal minds. Some of them, however, still await confirmation. What's more, two of them are currently facing unprecedented filibusters. And more filibusters of other nominees are now being threatened.

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

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

I also discussed those principles in an op-ed published just this morning on the Wall Street Journal's opinionjournal.com website. Without objection, I would ask that that op-ed be submitted into the record.

The fundamental essence of our democratically-based system of government is both majestic and simple: majorities must be permitted to govern. As our nation's founding fathers explained in Federalist No. 22, "the fundamental maxim of republican government . . . requires that the sense of the majority should prevail." And as the Supreme Court unanimously held in the case of United States v. Ballin (1892), our Constitution is premised on the democratic doctrine of majority rule. Any exceptions to the doctrine of majority rule, such as any rule of supermajority voting, must be stated expressly in the Constitution. For example, the Constitution expressly provides for a supermajority, two-thirds voting rule for Senate approval of treaties and other matters. That is not the case, however, with respect to the Senate approval of judicial nominees.

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

But the filibuster, like any tool, can be abused. And I am concerned that it is being abused here. Today, a minority of Senators appear to be using the filibuster not simply to ensure adequate debate, but actually to block many of our nation's numerous judicial vacancies from being filled, by forcing upon the confirmation process a supermajority requirement of 60 votes.

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

Time does not permit me to read each of their previous statements condemning filibusters as unconstitutional, but without objection, I would like to have them submitted for the record.

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

For example, Harry Edwards, a respected Carter-appointed appeals judge on the U.S. Court of Appeals for the D.C. Circuit, has written that the Constitution forbids the Senate from imposing a supermajority rule for confirmations. Otherwise, he writes, "the Senate, acting unilaterally, could thereby increase its own power at the expense of the President" and "essentially take over the appointment process from the President." Thus, Judge Edwards has concluded, "the Framers never intended for Congress to have such unchecked authority to impose supermajority voting requirements that fundamentally change the nature of our democratic processes."

Significantly, I would point out that Judge Edwards expressed less concern with legislative filibusters than with filibusters of nominations.

In addition, I would point out that Judge Edwards was writing a dissenting opinion in this case, styled Skaggs v. Carle (D.C. Cir. 1997). But notably, the two judges in the majority did not disagree with Judge Edwards - indeed, they did not address the issue one way or the other, because the majority concluded that the court had no jurisdiction to hear the case in the first place. So Judge Edwards stands as the only judge in that case, or indeed in any case, who has discussed the precise constitutional issue before us today.

History confirms Judge Edwards's constitutional interpretation that the Senate may not impose a supermajority requirement on confirmations. Indeed, a Senate majority has never been denied its constitutional right to confirm judicial nominees - until now. The current obstruction is thus as unprecedented as it is harmful.

To justify the current filibusters, some have cited the example of Abe Fortas. President Lyndon Johnson nominated Fortas to be Chief Justice in 1968. But what is critical to understand about the Fortas episode is that majority rule was not under attack in that case. Dogged by allegations of ethical improprieties and bipartisan opposition, Fortas was unable to obtain the votes of 51 Senators to prematurely end debate. That was a serious problem for Fortas - because, if there were not even 51 Senators to close debate, it was far from clear that there would be a simple majority of Senators present and voting to vote to confirm. Rather than allow further debate, Johnson withdrew the nomination altogether just three days later.

It's also worth noting that, back in 1968, future Carter and Clinton White House Counsel Lloyd Cutler, along with numerous other leading members of the bar and the legal academy, signed a letter urging all Senators that "nothing would more poorly serve our constitutional system than for the nominations to have earned the approval of the Senate majority, but to be thwarted because the majority is denied a chance to vote." Without objection, that letter will be entered into the record.

But of course, as I mentioned, Fortas wasn't able to get the support of even 51 votes to close debate, and Johnson withdrew the nomination as a result, so the Cutler letter was moot.

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

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

Whether unconstitutional or merely destructive to our political system, the current confirmation crisis cries out for reform. As all ten freshman Senators, myself included, stated last week in a letter to Senate leadership, "we are united in our concern that the judicial confirmation process is broken and needs to be fixed." Veteran Senators from both parties express similar sentiments.

Accordingly, today's hearing will explore various reform proposals. Our first panel is comprised exclusively of Senators - actually, two Democrat Senators, and one Republican Senator. All of them, members of this body, have each experienced the current crisis first hand. All of them have offered proposals for reform.

These proposals will be debated, of course, and they should be. But what's important is that these Senators acknowledge the current confirmation crisis and have urged reform, and I congratulate them all for doing that.

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

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

And with that, I would turn the floor over to the ranking minority member of the subcommittee, Senator Feingold.