Testimony of

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Mr. Chairman, thank you for this opportunity to appear before you to discuss the relationship between the Constitution, the procedural rules that affect the Senate's evaluation of judicial nominees. As you know, I was privileged to serve as constitutional legal counsel to President Reagan and the first President Bush, and I have taught constitutional law for a quarter century at several universities, including Notre Dame, Pepperdine, and Catholic Universities.

It is fair to say that the constitutionally-envisioned process for judicial nomination and confirmation is broken, and that it has been for some time. The executive and legislative branches have been at loggerheads for twenty years or more, and while the Democratic and Republican voices occasionally exchange roles, the arguments are the same. Presidents complain that nominees of high intellect, integrity and temperate demeanor are being rejected on partisan or ideological grounds. The political opposition to the President in the Senate for its part makes like complaint but in reverse, claiming the President is using a partisan litmus test to stack the judicial deck.

In one sense, these arguments are as old as the Republic. Adams sought to populate the federal bench with federalists and the anti-federalists in league with Jefferson sought to deny him this ability. What is different about the modern context is the procedurally problematic, and arguably, constitutionally questionable, manner in which both Democratic and Republican partisans have operated. On both sides of the aisle during different eras, the Senate judiciary committee has ignored presidential nominees and deprived them of hearings. Both Democrats and Republicans have used hearings as a device to short-circuit full Senate consideration, by putatively rejecting nominees on committee, rather than full Senate, votes. And presently, the warfare has escalated to the point where the Senate, otherwise highly respectful of committee deliberation, is ignoring, itself, - that is nominees reported out of committee are being blocked from floor consideration by means of constitutionally dubious filibuster.

All of this delay results in what nonpartisan judicial administrators find to be "judicial emergencies" in a significant number of jurisdictions. Since these emergencies are concentrated on the litigants seeking to have civil and economic liberties vindicated through judicial process, they go unreported by popular media. There are few good visuals that the evening news can employ of citizens being harmed by judicial delay - but the harms are real, in the federal laws that go unenforced, the businesses harmed, and the injuries that are not redressed.

The harm of executive-legislative paralysis over judicial appointment also has insidious effect on the quality of women and men drawn to this service. It is well known that judicial salaries are a fraction of what an accomplished lawyer could earn for his or her family in private practice. Nevertheless, it is reasonable to speculate that modest salary has less of a dampening effect than delay and the coarse partisan caricature that is now used to oppose judicial nominees. The mounting of political campaigns for and against judicial nominees now begins on rumor of one's nomination, and as a result, many who might accept reduced income for public service are not willing to subject themselves and their families to scurrilous attack over an extended period that the broken confirmation process inspires.

What is to be done?

My advice is simple: follow the law of the Constitution. The original understanding gives unfettered nomination authority to the President. So too, the text allows the full Senate to reject any nominee for any reason, though commentary at the founding supposed that the reasons would have far more to do with intellectual quality or capability than partisan disagreement with the nominee's judicial perspective. Beyond that, President Bush has put the matter simply and directly: "the Senate has a constitutional responsibility to exercise its advice and consent function and hold up-or-down votes on all judicial nominees within a reasonable time after nomination."

Now if the response to this is that the Senate, by constitutional text, has sweeping authority to determine its own rules under Article I, section 5, that is, with respect, an incomplete and evasive response. As the Supreme Court unanimously held in United States v. Ballin (1892), "[t]he constitution empowers each house to determine its rules of proceedings. It may not by its rules ignore constitutional restraints or violate fundamental rights, and there should be a reasonable relation between the mode or method of proceeding established by the rule and the result which is sought to be attained." In a constitutional system, power, like freedom, is not without limit, and the exercise of one provision to thwart the reasonable nominating discretion of the executive and undermine the functioning of the judiciary is subversive of the separation of powers and the constitutional system.

This is especially so when adopted senate rules disregard the principal of majority governance by imposing textually unauthorized super-majority requirements, and where those supermajority requirements are the product of rules never adopted by the current Senate.

The Constitution provides for majority rule, as an implied aspect of the consent of the governed, wherever the document by conscious choice has not specified an alternative process requiring a greater vote. In seven sections of the Constitution, a greater vote than majority is specified - for example, in Article I, section 7 providing for the override of a presidential veto by two-thirds of both Houses or the provisions in Article II providing for Senate ratification of treaty by two-thirds.

There is no comparable provision for judicial nominations, and yet, two recent nominees reported favorably by this committee to the full Senate cannot obtain an up or down vote without surpassing the 60 vote requirement needed to close debate.

Now as a matter of form, it can be argued that this 60 vote requirement relates not to the Senate's approbation of a nominee but simply to cloture. So too, it can be argued that a supermajority has been required to close debate for a century or more, and therefore, it is too late in the day to object.

These are arguments in constitutional evasion and noncooperation, they are not worthy of what is rightly referred to as the greatest deliberative body in the world. For that reason alone, the Senate - in the interest of maintaining the integrity of its own process - should have a desire to not apply supermajority cloture requirements where doing so threatens the separation of powers.

There may also be a constitutional duty on the Senate not to continue this practice. The Senate rules related to cloture are holdover rules from a previous Senate that have never been adopted. Senate Rule V provides that Senate rules are continuing, even as the Senate, by constitutional design, is not a continuing body. It cannot be. The framers carefully provided for staggered terms, whereby one-third of the Senate would stand for election every two years. This
ensures accountability and Senate responsiveness to the popular will, and failure to acknowledge this new composition by failing to give each newly constituted body an opportunity to affirm, amend, or repeal pre-existing Senate rules denies the meaning of these elections.

The likelihood of constitutional injury is all the more obvious in light of Senate Rule XXII which imposes a two-thirds requirement of those present and voting to secure cloture on any motion to change the rules. Senate Rule V which imposes these rules on the newly constituted Senate (which is denominated by its own number, selects its own officers, adjusts committee assignments, and otherwise reveals how the Senate is not a "continuing" body) violates fundamental law as old as Blackstone, who observed that "Acts of parliament derogatory from the power of subsequent parliaments bind not." Likewise, the Supreme Court has repeatedly held that "the legislature does not have the power to bind itself in the future."

Again, it is understandable why not. For the political process to remain representative and accountable, "every succeeding Legislature possesses the same jurisdiction and power . . . as its predecessors. The latter must have the same power of repeal and modification which the former had of enactment, neither more nor less." Ohio Life Ins. and Trust Co. v. Debolt (1853). The precept has never been doubted. Indeed, the Supreme Court would arguably apply the highest scrutiny to evaluating any legislation that "restricts those political processes which can ordinarily be expected to bring about repeal of undesirable legislation." U. S. v. Carolone Products Co. (1938).

Who will tell the Senate that it may be acting unconstitutionally? On one level, this is a question of justiciability. There is good reason for the judiciary to seek to avoid this issue to avoid embarrassment to a co-equal branch. And there is precedent, like Nixon v. United States, dealing with the Senate's exclusive power to try impeachments, which illustrate the level of the Court's appropriate deference. But appropriate deference is not default, and factors which stayed the judicial hand in Nixon are not present in this context. In Nixon, had judges inserted themselves to superintend Senate impeachment practices, they would be undermining their own parallel authority to hear criminal issues related to impeachment, and more, weakening one of the only checks upon the judiciary, itself. These considerations for deference are not present here. Rather, a disappointment nominee or a newly elected member of the Senate with no voice in the rules that limit his electoral service could persuasively argue that the failure of the Court to intervene is fully necessary to address the injury to the body politic.

It is interesting that two former Vice-Presidents of different parties (Nixon (1957) and Humphrey (1969), sitting as the presiding officer of the Senate, have ruled that the current membership of the Senate is not bound by Senate Rule V's imposition of the rules of a different, prior body. That the Humphrey ruling was rejected by the full Senate out of the politics of the day hardly settles the constitutional issue.

The Senate has a solemn responsibility in the consideration of judicial nominations. There has been a troubling failure on the part of both parties to meet this responsibility. The Senate need not defer to the judicial nominations of the President, but it should not ignore or defeat them by means not envisioned in the Constitution, itself. Let the debate be fair and open and concluded by all members of the Senate. That practice can easily be established in newly adopted Senate Rules that allow for debate to be closed on judicial nominations by simple majority.

As I have publicly written, denying Mr. Estrada or Justice Owen their confirmation vote by the full Senate is no more legitimate than if the outgoing Democratic majority of the previous Senate had attempted by rule to prevent repeal or modification of any Democratically-sponsored enactment except by super-majority.

It is not just the present nominees who are being injured; it is the right of Senate members not to have their representation diluted or nullified, and in that, it is the right of all of us who voted for those members that is being wrongly - if not unconstitutionally - filibustered.