Testimony of

Dr. John Eastman

May 6, 2003

Good afternoon, Chairman Cornyn and other members of the Senate Judiciary Subcommittee on the Constitution, Civil Rights and Property Rights. We are here today to address a Senate procedural tactic--the filibuster--that dates back at least to Senator John C. Calhoun's efforts to protect slavery in the old South and that, until now, was used most extensively by southern Democrats to block civil rights legislation in the 1960s. In its modern embodiment, the tactic has been termed the "stealth filibuster." Unlike the famous "Mr. Smith Goes to Washington" movie image of Jimmy Stewart passionately defending his position until, collapsing, he persuades (or shames) his opponents to change their position, the modern practitioners of the brigand art of the filibuster have been able to ply their craft largely outside the public eye (and hence without the political accountability that is the hallmark of representative government). I am thus truly pleased to be here today, to help you and this committee in your efforts to "ping" the filibuster and make it not only less stealthy but perhaps restore to it some nobility of purpose.

Let me first note that I am not opposed to the filibuster per se, either as a matter of policy or of constitutional law. I think the Senate is, within certain structural limits, authorized to enact procedural mechanisms such as the filibuster, pursuant to its power under Article I, Section 5 of the Constitution to "determine the Rules of its Proceedings." And I think that, by encouraging extensive debate, the filibuster has in no small measure contributed to this body's reputation as history's greatest deliberative body. But I think it extremely important to distinguish between the use of the filibuster to enhance debate and the abuse of the filibuster to thwart the will of the people, as expressed through a majority of their elected representatives. The use of the filibuster for dilatory purposes is particularly troubling in the context of the judicial confirmation process, for it thwarts not just the majority in the Senate and the people who elected that majority--as any filibuster of ordinary legislation does--but it intrudes upon the President's power to nominate judges, and threatens the very independence of the Judiciary itself.

Before I elaborate on each of these points, let me offer a bit of a family apology. One of the more notorious of the Senate's famed practitioners of the filibuster was my great uncle, Robert M. LaFollette, a candidate for President in 1924 and a long-time leader of the Progressive movement, whose members took great pride in thinking they could provide greater expertise in the art of government than anything that could be produced by mere majority rule. Because this ideology of the Progressive Party was so contrary to the principle of consent of the governed articulated in the Declaration of Independence, I have always considered Senator LaFollette as somewhat of a black sheep in my family. But I can at least take some family pride in the fact that one of his filibusters--the temporarily successful effort to block President Woodrow Wilson's wildly popular proposal to arm merchant ships against German U-boat attacks in during World War I--led the Senate to restrict the filibuster power by providing for cloture. Unfortunately, I believe that those efforts did not go far enough. More needs to be done to insure that the debate-enhancing filibuster cannot be misused to give to a minority of this body an effective veto over the majority.

With that end in mind, I want to make four points. First, it is important to realize that the use of the filibuster in the judicial confirmation context raises structural constitutional concerns not present in the filibuster of ordinary legislation. Second, these constitutional concerns are so significant that this body should consider modifying Senate Rule XXII so as to preclude the use of the filibuster against judicial nominees. Third, any attempt to filibuster a proposal to change the rules would itself be unconstitutional. And finally, I believe that if this body does not act to abolish the supermajority requirement for ending debate on judicial nominees, it could be forced to do so as the result of litigation initiated by a pending nominee, by a member of this body, or even by the President himself.

I. The Constitutional Structure of the Appointment Process Envisions a More Limited Role for the Senate than is Currently Claimed, and None for a Minority Faction of the Senate.

As is well known to this body, Article II of the Constitution provides that the President "shall nominate, and by and with the Advice and Consent of the Senate, shall appoint, ... Judges of the Supreme Court" and of such inferior courts as Congress has ordained and established. This is one of the fundamental components of the separation of powers mechanism devised by our nation's founders to protect against governmental tyranny. By it, the Senate provides an important check on the power of the President, but it is only a check; recent claims that the advice and consent clause gives to the Senate a co-equal role in the appointment of federal judges simply are not grounded either in the Constitution's text or in the history and theory of the appointments process. Necessarily, the claim that such power exists in less than a majority of the Senate is even more problematic.

A. The Framers of the Constitution Assigned to the President the Pre Eminent Role in Appointing Judges.

1. The President Alone Has the Power to Nominate

Article II of the Constitution provides that the President "shall nominate, and by and with the Advice and Consent of the Senate, shall appoint...Judges of the supreme Court [and such inferior courts as the Congress may from time to time ordain and establish]." As the text of the provision makes explicitly clear, the power to choose nominees--to "nominate"--is vested solely in the President, and the President also has the primary role to "appoint," albeit with the advice and consent of the entire Senate. The text of the clause itself thus demonstrates that the role envisioned for the Senate was a much more limited one that is currently being claimed by some, and it was, in any event, a role assigned to the entire Senate, not to a minority faction.

The lengthy debates over the clause in the Constitutional Convention support this reading. According to Madison's notes, an initial proposal on July 18, 1787, to place the appointment power in the Senate was opposed because, as Massachusetts delegate Nathaniel Ghorum noted, "even that branch [was] too numerous, and too little personally responsible, to ensure a good choice." Ghorum suggested instead that Judges be appointed by the President with the advice and consent of the Senate, as had long been the method successfully followed in his home state. James Wilson and Governeur Morris of Pennsylvania, two of the Convention's leading figures, agreed with Ghorum and moved that judges be appointed by the President.

In contrast, Luther Martin of Maryland and Roger Sherman of Connecticut argued in favor of the initial proposal, contending that the Senate should have the power because, "[b]eing taken fro[m] all the States it [would] be best informed of the characters & most capable of making a fit choice." And Virginia's George Mason argued that the President should not have the power to appoint judges because (among other reasons) the President "would insensibly form local & personal attachments...that would deprive equal merit elsewhere, of an equal chance of promotion."

Ghorum replied to Mason's objection by noting that the Senators were at least equally likely to "form their attachments." Giving the power to the President would at least mean that he "will be responsible in point of character at least" for his choices, and would therefore "be careful to look through all the States for proper characters." For him, the problem with placing the appointment power in the Senate was that "Public bodies feel no personal responsibility, and give full play to intrigue & cabal," while if the appointment power were given to the President alone, "the Executive would certainly be more answerable for a good appointment, as the whole blame of a bad one would fall on him alone."

Seeking a compromise, James Madison suggested that the power of appointment be given to the President with the Senate able to veto that choice by a 2/3 vote. Another compromise was suggested by Edmund Randolph, who "thought the advantage of personal responsibility might be gained in the Senate by requiring the respective votes of the members to be entered on the Journal." These compromises were defeated, however, and the vote on Ghorum's motion--that the President nominate and with the advice and consent of the Senate, should appoint--resulted in a 4-4 tie. The discussion was then postponed.

When the appointment power was taken up again on July 21, the delegates returned to their previous arguments. One side argued that the President should be solely responsible for the appointments, because he would be less likely to be swayed by "partisanship"--what Madison's generation called "faction" --than the Senate. The other side opposed vesting the appointment power in the President for a similar reason: he would not know as many qualified candidates as the Senate would, and might still be swayed by personal considerations or nepotism.

The convention delegates were primarily concerned about improper influence in the appointments process, and most of the debate centered on whether assigning the appointment power to the President or to the Senate would serve as a better check on that influence. Those who, like Madison, argued that the President should have the sole power of appointment believed that this procedure would best prevent such political bargaining. As Edmund Randolph noted, "[a]ppointments by the Legislatures have generally resulted from cabal, from personal regard, or some other consideration than a title derived from the proper qualifications."

In the end, the Convention agreed that the President would make the nominations, and the Senate--the entire Senate--would have a limited power to withhold confirmation as a check against political patronage or nepotism. Governeur Morris put the decision succinctly: "as the President was to nominate, there would be responsibility, and as the Senate was to concur, there would be security." As the Supreme Court subsequently recognized, "the Framers anticipated that the President would be less vulnerable to interest-group pressure and personal favoritism than would a collective body."

Madison, for instance, arguing in defense of his suggested compromise--that a 2/3 vote of the Senate could disqualify a judicial nomination, but otherwise giving the President a free hand--noted that

The Executive Magistrate wd be considered as a national officer, acting for and equally sympathizing with every part of the U. States. If the 2d branch alone should have this power, the Judges might be appointed by a minority of the

people, tho' by a majority, of the States, which could not be justified on any principle as their proceedings were to relate to the people, rather than to the States....

Note that in Madison's proposal, a supermajority would have been required to reject a President's nominee, demonstrating just how preeminent was the role Madison envisioned for the President. Although the convention ultimately settled on a majority vote requirement, by assigning the sole power to nominate (and the primary power to appoint) judges to the President, the Convention specifically rejected a more expansive Senate role; such would undermine the President's responsibility, and far from providing security against improper appointments, would actually lead to the very kind of cabal-like behavior that the Convention delegates feared. These concerns are significantly exacerbated when, through use of the filibuster, a minority faction can thwart confirmation of a presidential nominee who enjoys majority support.

This understanding of the appointment power was reaffirmed during the ratification debates. In Federalist 76, for example, Alexander Hamilton explained at length that "one man of discernment is better fitted to analyze and estimate the peculiar qualities adapted to particular offices, than a body of men of equal or perhaps even of superior discernment." Noting that a President would "have fewer personal attachments to gratify, than a body of men who may each be supposed to have an equal number," --or as we would say today, that the President will be swayed by fewer political pressure groups than the Senate--Hamilton concluded:

In the act of nomination, [the President's] judgment alone would be exercised; and as it would be his sole duty to point out the man who, with the approbation of the Senate should fill an office, his responsibility would be as complete as if he were to make the final appointment. There can, in this view, be no difference between nominating and appointing. The same motives which would influence a proper discharge of his duty in one case, would exist in the other. And as no man could be appointed but on his previous nomination, every man who might be appointed would be, in fact, his choice.

Note the very limited role that the Senate serves in Hamilton's view--which, of course, echoes the views expressed at the Constitutional Convention by both those who defended and those who opposed giving the appointment power to the President. In the founders' view, the Senate acts as a brake on the President's ability to fill offices with his own friends and family members rather than qualified nominees, but beyond that, the element of choice--the essence of the power to fill the office--belongs to the President alone. The Senate has the power to refuse nominees, but in the Constitutional scheme it has no proper authority in picking the nominees--either through direct choice or through logrolling and deal-making of the kind that the modern filibuster encourages.

Hamilton was not so ignorant as to deny that deal-making would be the process by which things got done in the Senate--as he writes, legislatures are very often prone to "bargain[s]" by which one party says to another, "'Give us the man we wish for this office, and you shall have the one you wish for that.'" But this legislative propensity was, for Hamilton, a primary reason for giving the appointment power to the President instead of the Senate. Placing the nomination power in the President alone would, he argued, cut down on the degree to which political bargains in the Senate influenced the choice of candidates, because under the Constitutional scheme, all would understand that the power of appointment belonged to the President alone. That understanding, as we shall see, has been eroded in recent years.

Commenting on the prevailing understanding, Joseph Story later described the President's power to nominate as almost absolute. "The president is to nominate," Story noted, "and thereby has the sole power to select for office." Story believed that the danger of vesting the appointment power in the Senate was greater than the danger of giving the power to the President alone, because "if he should...surrender the public patronage into the hands of profligate men, or low adventurers, it [would] be impossible for him long to retain public favour.... At all events, he would be less likely to disregard [public disapprobation] than a large body of men, who would share the responsibility and encourage each other in the division of the patronage of the government."

2. The Framers Envisioned A Narrow Role for The Senate in The Confirmation Process.

Of course, there is more to the appointment power than the power to nominate, and the Senate unquestionably has a role to play in the confirmation phase of the appointment process. But the role envisioned by the framers was as a check on improper appointments by the President, one that would not undermine the President's ultimate responsibility for the appointments he made. As James Iredell--later a Justice of the Supreme Court himself--noted during the North Carolina Ratification Convention, "[a]s to offices, the Senate has no other influence but a restraint on improper appointments.... This, in effect, is but a restriction on the President." Here, as elsewhere during the debates, the "restraint" on presidential appointments was to be exercised by the Senate as a body, acting pursuant to majority rule, not at the hands of a minority faction.

The degree to which the founders viewed the power of appointment as being vested solely in the President can be gauged by the fact that John Adams objected even to the Senate's limited confirmation role, contending that it "lessens the responsibility of the president." To Adams, the President should be solely responsible for his choices, and should alone pay the price for choosing unfit nominees. Under the current system, Adams complained, "Who can censure [the President] without censuring the senate...?" The appointment power is, Adams wrote, an "executive matter[]," which should be left entirely to "the management of the executive." James Wilson echoed this view: "The person who nominates or makes appointments to offices, should be known. His own office, his own character, his own fortune, should be responsible. He should be alike unfettered and unsheltered by counsellors."

In discussing the analogous situation of executive appointments--such as ambassadors or cabinet members--James Madison asked, "Why...was the senate joined with the president in appointing to office...? I answer, merely for the sake of advising, being supposed, from their nature, better acquainted with the characters of the candidates than an individual; yet even here, the president is held to the responsibility he nominates, and with their consent appoints; no person can be forced upon him as an assistant by any other branch of government."

The Senate's confirmation power therefore acts only as a relatively minor check on the President's authority--it exists only to prevent the President from selecting a nominee who "does not possess due qualifications for office." Essentially, it exists to prevent the President from being swayed by nepotism or mere political opportunism. Assessing a candidate's "qualifications for office" arguably did not give the entire Senate grounds for imposing an ideological litmus on the President's nominees, at least where the questioned ideology did not prevent a judge from fulfilling his oath of office. It necessarily did not give such a power to a small faction of the Senate, as has become the practice through the use of ideologically-grounded holds or filibusters.

B. The Advice and Consent Role is Assigned to the Senate as a Body, not to Individual Senators or Factional Groups of Senators.

The advice and consent role envisioned by the Constitution's text is one conferred on the Senate as a body, acting pursuant to the ordinary principal of majority rule. As my fellow panelist, Michael Gerhardt, has previously argued, "the Framers required a simple majority for confirmations to balance the demands of relatively efficient staffing of the government with the need to check abusive exercised of the president's discretion." Yale Law School Professor Bruce Ackerman apparently agrees, as his 1998 recommendation to adopt a supermajority vote for confirmation of Supreme Court justices was made by way of a proposed constitutional amendment rather than Senate rules. As Professor Gerhardt has rightly pointed out, "it is hard to reconcile [a supermajority requirement] with the Founders' reasons for requiring such a vote for removals and treaty ratifications but not for confirmations." Instead, the Constitution embodies a presumption of judicial confirmation, because it requires [only] a majority for approval" and not the two thirds vote required for treaty ratification or removals.

Professor Ackerman's proposal for a constitutional amendment requiring a supermajority vote for judicial confirmations has not garnered much support, of course, but the unprecedented use of the filibuster to block circuit court nominees who enjoy majority support is having the same effect even absent the constitutional amendment. Whether the filibuster is an unconstitutional restriction on a majority of the Senate in ordinary legislation has been much debated, but its use in the judicial confirmation process is particularly troubling. Again referring to my fellow panelist's work:

[J]udicial nominations trigger separation-of-powers concerns not present in many of the other areas in which the Senate does not take final action on matters committed to its discretion. The fate of the third branch is conceivably at risk, because individual senators and committees might be able to impede filling enough judicial vacancies to reach the tipping point at which the quality of justice administered by the federal courts has been seriously compromised or sacrificed.

When President Clinton and Chief Justice Rehnquist make similar appeals to this body, as they did in 1997 and 1998, to curtail the use of "holds" by individual Senators because of the increasing number of vacancies on courts in "judicial emergency" status, I think it fair to conclude that the tipping point is at hand, quite apart from any ideological considerations. And the vacancy crisis has only grown worse since those warnings were made.

Some have gone so far as to argue that the text of the advice and consent clause requires an up or down vote on every nominee--suggesting that individual holds and even the filibuster itself is an unconstitutional infringement on the President's appointment power. Others, including several sitting Senators now participating in the filibuster against Miguel Estrada, have contended that the use of the filibuster to block judicial nominees is an unconstitutional restriction on the power of the Senate majority. On January 4, 1995, for example, Senator Lieberman stated on the floor of the Senate that "there is no constitutional basis for [the filibuster]... [I]t is, in its way, inconsistent with the Constitution, one might almost say an amendment of the Constitution by rule of the U.S. Senate." Senator Daschle noted on the Senate Floor on January 30, 1995, that "the Constitution is straightforward about the few instances in which more than a majority of the Congress must vote: A veto override, a treaty, and a finding of guilt in an

impeachment proceeding. Every other action by the Congress is taken by majority vote. The Founders debated the idea of requiring more than a majority . . . . They concluded that putting such immense power into the hands of a minority ran squarely against the democratic principle. Democracy means majority rule, not minority gridlock." And on March 1, 1994, Senator Harkin said on the Senate Floor: "I really believe that the filibuster rules are unconstitutional. I believe the Constitution sets out five times when you need majority or supermajority votes in the Senate for treaties, impeachment."

Quite frankly, I think such absolutist positions fail to account for another constitutional provision, the power in Article I, Section 5 given to each house of Congress to determine the Rules of its Proceedings." But they do serve to highlight just how troubling it is for a minority of the Senate or even a single Senator to block a President's judicial nominee when the nominee enjoys majority support in the Senate. A filibuster rule designed to encourage necessary debate is certainly within the scope of this constitutional provision, but a filibuster designed not to encourage debate but to thwart the will of the majority long after the debate has run its course runs afoul of other constitutional norms, such as the requirement for majority rule in the absence of a specific constitutional provision to the contrary.

As I said, the anti-majoritarian nature of the filibuster is troubling even in ordinary legislation, but it is particularly troubling in the context of judicial confirmations. The judiciary is itself designed to be a counter-majoritarian institution, but that means the institutional checks on it must be given special heed. One check is the possibility of impeachment merely for lack of "good behavior" rather than "high crimes and misdemeanors" standard applicable to other officers of the government --a check that has been largely meaningless since the ill-fated impeachment of Justice Samual Chase during the Presidency of Thomas Jefferson. The other principle check--the only one that is still viable--is the ability of the electorate, through the choice of a President (or succession of Presidents) to have an impact, over time, on the judiciary through the President's appointment power. Individual members of the Senate are simply not accountable to the entire nation in the way that the President is.

To be sure, the President is not without other countervailing powers, powers that can be used to counter an abusive use of the Senate's rules to thwart the majority will. Article II, Section 2 gives the President the power to make recess appointments, but in the context of the judiciary, these appointments are not without their own separation of powers issues. Recess appointments are temporary, lasting only until the end of the next session of Congress. Those appointed necessarily lack the independence that comes with life tenure, one of the key institutional protections afforded to the judiciary. While nothing in the text of the Recess Appointments Clause forbids such appointments--President Clinton used the recess appointment power to name Roger Gregory to a seat on the Fourth Circuit Court of Appeals, for example--such structural concerns counsel for its use only as a last resort, when a rump faction of the Senate has persisted in blocking judicial nominees who command majority support.

These concerns are not new, and they are not raised only by those who find the current President's nominees to be impeccably well-qualified. Lloyd Cutler, a prominent Washington attorney and former counsel to President Clinton, noted in a letter criticizing the filibuster of Abe Fortas's nomination to be Chief Justice of the United States, for example, that "Nothing would more poorly serve our constitutional system than for the nominations to have earned the approval of the Senate majority, but to be thwarted because the majority is denied a chance to vote. ...Whatever the merits of the filibuster as a device to defeat disliked legislation, its use to frustrate a judicial appointment creates a dangerous precedent with important implications for the very structure of our Government." More recently, Mr. Cutler has contended that "requirements of 60 votes to cut off debate and a two-thirds vote to amend the rules are both unconstitutional."

Mr. Cutler echoed the view that prevailed throughout most of our nation's history. After Andrew Jackson defeated John Quincy Adams for President in 1828, Adams had several months as a lame duck President in which to nominate Judges to the federal bench. Because he no longer had the confidence of the people, several Senators wanted to postpone consideration of John J. Crittendon, whom President Adams had nominated as an Associate Justice of the Supreme Court. Although the Senate ultimately rejected the Crittendon nomination, the arguments made against the delay were profoundly important and ultimately carried the day throughout most of this nation's history. Senator Holmes argued, for example, that although the Senate had a right to deliberate and look into the character and qualifications of a candidate, it had "no constitutional power to resist its execution." Delays beyond what were necessary to deliberate about the nominee's qualifications were, he asserted, "an abuse of a discretion" given by the Constitution. Senator Johnson echoed the sentiment, stating that "The duty of the Senate is confined to an inquiry into the character and qualifications of the person, and to a decisive action upon the nomination, in a reasonable time." Johnson made the following dire prediction: "The moment you depart from the constitution, and begin an attack upon the other departments of the Government, you commence a conflict of authority where there is no arbiter, which will end in perpetual collision, or in the destruction of the Government." That, and the similar prediction by Senator Chambers--"Once let discretion be adopted as the rule of conduct for those in power, and no man can prescribe limits to the mischief which must ensue" --should give us all pause at the actions, or rather inaction, currently being undertaken in the Senate as the result of the abusive use of the filibuster.

What this historical incident describes is a distinction between the proper use of the filibuster, to promote legitimate debate against any attempt by a majority to ram a vote through the Senate, and the improper--indeed, unconstitutional--use of the filibuster to prevent the majority from taking action even after the debate has fully run its course. With the President's constitutional power to nominate judges effectively under attack, and with it the independence of the judiciary itself, it is incumbent upon this body to consider revisions to Senate Rule XXII and other procedural mechanisms that have led to the current crisis.

II. The Senate Should Amend Senate Rule XXII Either To Bar the Use of the Filibuster in Judicial Confirmations or to Modify its Use So That, After Some Reasonable Period of Debate, A Simple Majority Can Invoke Cloture.

As described about, the constitutionally troubling use of the filibuster to thwart the will of a Senate majority is exacerbated when the Senate majority is attempting to exercise its constitutional role in the judicial confirmation process. Such use allows a minority faction in the Senate to impose what is essentially a barrier to the one constitutional mechanism that allows the political process to have some influence over the judiciary. Such interferences with the political process have caught the heightened attention of the courts--a possibility I take up in Section IV below. It would be preferable, therefore, for this body to cure the constitutional offense before resort to the courts is sought by any of the growing number of parties who would have standing to bring such a challenge.

There are three principal ways to address the filibuster problem. First, and most drastically, the filibuster could be abolished altogether, not just in judicial confirmations but for ordinary legislation as well. Such a move would seem compelled by the absolutist position taken by Senators Lieberman, Daschle, and Harkin, described above, that would not permit anything but a majority vote to be dispositive except in the specific instances where the Constitution proscribes a supermajority requirement. Whatever the merits of such a proposal, it is beyond the scope of my presentation today.

A second alternative is to amend Senate Rule XXII so as to preclude the use of the filibuster in judicial confirmations. While this alternative is certainly within the Senate's prerogative, pursuant to the Article I, Section 5 power to establish its own rules, I think it fails to give sufficient play to the valuable role that a limited filibuster can play in fostering the deliberative process.

A third alternative would be to amend Senate Rule XXII to allow for a limited use of the filibuster to guarantee a reasonable time for debate without ultimately giving to a minority faction a veto power over a Senate majority. This alternative would distinguish between the use of the filibuster for deliberative ends, a use that I believe is constitutional, and the abuse of the filibuster for obstructionist, undemocratic ends, a use that I believe may well be unconstitutional. I am pleased to see, therefore, that the proposal made by Senator Miller would give effect to this important distinction. The "sliding scale cloture vote" mechanism would guarantee debate for a reasonable period of time, but would in the end not allow a minority faction in the Senate to exert its will over the majority.

Senator Miller's proposal is not without historical precedent. Among the efforts to prevent the kind of filibuster engaged in by my Great Uncle LaFollette more than 75 years ago was a proposal to allow for cloture on a mere majority vote. While that proposal was at the time rejected in favor of the 2/3 vote requirement ultimately enacted, this body has already once lowered the cloture vote threshold, to the 3/5 requirement that exists currently. Senator Miller's proposal simply completes the reform efforts begun back in 1925.

III. An Attempt to Filibuster A Change in the Rules Would Itself Be Unconstitutional.

On first blush, Senator Miller's proposal, and other proposals designed to amend rules that have contributed to a broken judicial confirmation process, might be regarded as dead on arrival. Why should we expect a minority faction, which currently has a chokehold on the confirmation process, to permit such a rules change, particularly when the Senate rules themselves require even a greater majority (2/3) to change the rules than is required (3/5) to invoke cloture itself. The simple answer is that the use of supermajority requirements to bar the change in rules inherited from a prior session of Congress would itself be unconstitutional.

Here, I must acknowledge the work of U.S.C. Law Professor Erwin Chemerinsky, who has been my weekly sparring partner on a nationally-syndicated radio show addressing all manner of constitutional issues. We have, in that time, hardly agreed on a single point of constitutional law, from the detention of Al Quada prisoners at Guantanamo Bar and the legality of the war in Iraq, to whether the parsonage exemption in the internal revenue code violates the Establishment Clause. But we agree on this. As Professor Chemerinsky noted in a 1997 Stanford Law Review article co-authored with Loyola Law School Professor Catherine Fisk, such "entrenchment of the filibuster violates a fundamental constitutional principle: One legislature cannot bind subsequent legislatures."

This simple proposition, which dates at least to Sir William Blackstone, not only makes good constitutional sense, but it has been repeatedly accepted by the Supreme Court in a host of analogous contexts. It was used in Stone v. Mississippi, for example, to permit a legislature to repudiate an exclusive lottery franchise provided by a prior legislature. And it seems to be compelled by the Supreme Court's focus, in the famous footnote four of United States v. Carolene Products Co., when the Court listed among the categories of legislative acts that should be subject to "more exacting judicial scrutiny" those which restrict the political process, as an entrenching supermajority

requirement clearly does.

IV. Failure to Amend or Abolish Rule XXII Will Subject the Senate to Judicial Intervention.

Professor Chemerinsky's reliance on the concern for political process in Carolene Products brings me to the final point I wish to make today, namely, the possibility that resort to the courts might be had should the Senate not address the unconstitutional use of the filibuster on its own.

Normally, the courts will not interfere with the internal procedures of a co-equal branch, but there are exceptions, and the exceptions are perfectly apt in the current situation. Here again, I find myself in agreement with my frequent debate opponent, Erwin Chemerinsky. In their Stanford Law Review article on the filibuster, Professors Chemerinsky and Fisk contend that a challenge to the continued use of a supermajority requirement to change rules inherited from a prior Senate would not be barred by the political question doctrine.

Professors Chemerinsky and Fisk also contend--rightly, in my view--that two classes of people would have standing to bring such a challenge because they would have the kind of particularized harm required under current standing doctrine. They make the case as follows:

Imaging the strongest case: The President nominates a woman to be Chief Justice of the Supreme Court and a group of senators filibuster, openly declaring that they believe a woman never should hold the position. Imagine, too, that fifty-nine senators are on record supporting the nomination and have even voted for cloture. Under these facts, the nominee would meet the standing requirement.

These facts are almost identical to the facts surrounding the current use of the filibuster against Texas Supreme Court Justice Priscilla Owen.

Another class of persons with standing would be Senators who expect to be part of a majority in favor of confirmation but who fail to secure either the 3/5 necessary to invoke cloture or the 2/3 necessary to change the filibuster rule. Such Senators have a classic case of vote dilution, and would as a result also have standing.

Finally, the President himself, who's own constitutional role in the appointments process is severely curtailed by a minority faction in the Senate that refuses to permit either a vote on the President's nominees or a vote on the rules by which those nominees are considered, might also have standing to challenge the Senate's unconstitutional rules.

V. Conclusion.

In sum, there is good reason that the filibuster has only rarely been used in the context of judicial confirmations, and never before against a circuit court judge. The use of the filibuster thwarts the will of the majority, and is therefore not only undemocratic but very likely unconstitutional. Moreover, should the Senate decide on its own initiative to repeal the offending use of the filibuster rule, any attempt to use the filibuster to entrench the filibuster would itself be unconstitutional, and would provide grounds for court intervention either by nominees, by individual Senators, or perhaps by the President himself, to insure that the constitutional norm of majority rule is given effect.