Testimony of

Ms. Marcia Greenberger

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I. Introduction and Overview

My name is Marcia Greenberger, and I appreciate your invitation to testify today. I am Co-President of the National Women's Law Center, which since 1972 has been at the forefront of virtually every major effort to secure and defend women's legal rights. With me is Center Vice President Judith Appelbaum.* I am especially pleased to have the opportunity to address an issue of such fundamental importance to the American people. Indeed, because the federal courts play such a critical role in giving life and meaning to the rights and principles enshrined in the Constitution and the federal statutes enacted by Congress, the question before the Subcommittee today -- how the Senate should exercise its constitutional role in the judicial appointment process - is one with a profound impact on the lives of all Americans.

The Constitution confers on the U.S. Senate a role in determining the composition of the federal courts that is co-equal to the role of the President: the President nominates appointments to the federal bench, but his nominees may serve if and only if the Senate gives its "advice and consent." It is clear why the framers of the Constitution concluded that an independent Senate role is appropriate: the judiciary is independent from the executive and legislative branches (and indeed is sometimes called upon to resolve disputes between the two), and federal judges sit on the bench not just for the term of the President who names them, but for life. So while it may be appropriate for Senators generally to give deference to a President's choices of Cabinet officers or other high-level executive branch officials to join his Administration and implement his policies, similar deference is not appropriate when it comes to the President's selection of judicial nominations.

In exercising their Constitutional responsibility to give or withhold consent to the President's judicial nominations, Senators necessarily operate within the rules of the Senate. In accordance with these rules, most nominations are decided by a confirmation vote on the Senate floor and approved if a simple majority of Senators vote in favor. Many nominations, however, are resolved in other ways; in some cases, for example, Senate leaders decide not to schedule a floor vote on a nomination (e.g., due to a "hold" placed on the nomination by even just one Senator), or the Judiciary Committee rejects the nomination or fails to take any action on it. And some nominations are decided only after a cloture vote is taken pursuant to Senate Rule 22 - that is, after 60 Senators (three-fifths of the Senators in office) vote to invoke cloture and the nomination is allowed to go forward, or the cloture vote fails and it is not.

In fact, as shown below, cloture votes on judicial nominations have ample precedent in contemporary U.S. history, and there are a number of bases on which Senators may reasonably conclude that the use of this Senate procedure on judicial nominations is appropriate in some circumstances. Cloture votes are routine in the Senate today, and have occurred on judicial nominations in numerous instances in the past few decades -- on judicial nominations submitted to the Senate by Presidents of both parties, including nominations to the Supreme Court as well as lower federal courts. They have been based at least in part on concerns about the ideology or judicial philosophy of the nominee, or objections to the nomination process, or both. As further shown below, requiring cloture on some judicial nominations is particularly appropriate at this juncture in our history. At present, the stakes are particularly high: one party controls two branches of government; the remaining branch, the judiciary, is tilted to the right; the balance that normally occurs over time as Administrations change has not occurred because of the obstruction of the last Administration's nominations; and the President is explicitly seeking to move the judiciary further to the right and, without consultation with the Senate, is selecting nominees with extreme, out-of-the-mainstream views on critical legal issues.

II. Requiring Cloture Votes on Judicial Nominations:
The Precedents and the Rationale

A. The Cloture Vote, Now a Routine Senate Practice, Has Been Applied to Numerous Judicial Nominations

The cloture vote is the mechanism for ending debate on the Senate floor, which otherwise may continue without limit under the Senate's rules. Until recent decades, cloture was generally used to try to bring to a close old-fashioned filibusters, in which Senators opposing a legislative measure (or nomination) engaged in a non-stop debate, for days and nights on end, in an effort to talk the measure to death. In the contemporary Senate, however, cloture votes are not reserved for actual filibusters, which are rare; rather, they are often prompted simply when even a single Senator signals strong opposition to a measure - e.g., by placing a "hold" on the matter. As a result, according to the Congressional Research Service (CRS), cloture votes have become increasingly common. While there were only 23 cloture votes in the entire period of 1919 through 1960 (and in at least 24 of those years, there were no cloture votes at all), in just one recent Congress (1997-98), the Senate voted on 53 cloture motions and invoked cloture 18 times. Indeed, as summarized in one scholarly analysis, "[I]t is now commonly said that sixty votes in the Senate, rather than a simple majority, are necessary to pass legislation and confirm nominations."

While used most often in the context of legislation, cloture votes on nominations are also increasingly frequent. CRS reports that from 1949 (when cloture on nominations was first permitted under the rules) through 2002, cloture was sought on 35 nominations. Of these, 17 were cloture votes on judicial nominations, including 14 Court of Appeals or District Court nominations since 1980. They include cloture votes on nominations submitted to the Senate by Democratic and Republican Presidents alike. The opposition to the nomination in every case was based at least in part on objections to the ideology or judicial philosophy of the nominee, or on procedural grounds such as concerns that the Judiciary Committee had inadequately examined the nominee's record, or both.

According to CRS, cloture motions were filed on the following judicial nominations:

? In 1968, President Lyndon Johnson nominated Associate Justice Abe Fortas to replace Earl Warren as Chief Justice of the Supreme Court when Warren announced his intention to retire. The Judiciary Committee approved the Fortas nomination by a vote of 11 to 6, but conservative Senators, led by Senator Strom Thurmond and others, mounted a filibuster on the floor on the motion to proceed to the nomination. Their objections to Fortas were based, among other things, on concerns that his opinions as a member of the Warren Court were too liberal in the areas of civil liberties and the rights of the accused as well as concerns about Justice Fortas' refusal to respond to some allegations leveled against him. Fortas' supporters failed to invoke cloture, forcing the president to withdraw the nomination.

? When William Rehnquist was nominated to serve on the Supreme Court by President Nixon in 1971, the nomination was opposed by civil rights groups based, among other things, on his past opposition to Arizona civil rights legislation and a school desegregation plan and allegations that he had been involved in the harassment of minority voters. Senate opponents of the nomination cited the need for extended debate, and two cloture motions were filed. Although supporters failed to invoke cloture, opponents subsequently permitted a vote to occur. Rehnquist was confirmed to the Court in December 1971.

? When Justice Rehnquist was nominated by President Reagan to serve as Chief Justice in 1986, he was again criticized for his civil rights record, which by then also included his lone dissent in the Bob Jones University case, in which the Court held that tax-exempt status may be denied to a university with racially discriminatory policies. In addition, some Senators sought an additional hearing to examine a discrepancy between Justice Rehnquist's testimony before the Committee and other evidence that had come to light. After Senator Kennedy refused to consent to a time agreement to limit debate, a cloture motion was filed. Cloture was invoked and Rehnquist was confirmed as Chief Justice.

? In December 1980, a floor vote on the nomination of Stephen Breyer (now a Supreme Court Justice) to the First Circuit was blocked by Senators protesting what they considered overly expedited treatment of the nomination during a lame duck session and trying to keep judicial seats open until incoming President Ronald Reagan could fill them. In addition, Senator Humphrey of New Hampshire (one of the states in the First Circuit) complained that he had not received the "usual" senatorial courtesies. A cloture motion was filed, cloture was invoked, and the nomination was confirmed.

? Democrats mounted vigorous opposition to several nominees of Presidents Reagan and George H.W. Bush to the Courts of Appeals - and one District Court nominee -- in the 1980's and early 1990's, forcing cloture votes on them.

o J. Harvie Wilkinson, nominated to the Fourth Circuit in 1984, was opposed based on questions about his commitment to civil rights and equal opportunity as well as his lack of experience. Senator Kennedy led a filibuster and the first cloture vote failed, but cloture was subsequently invoked and Wilkinson was confirmed following a third hearing on his nomination.

o Sidney Fitzwater, first nominated to the District Court for the Northern District of Texas in 1985, was opposed by a number of Democrats based on allegations that he had discouraged African-Americans from voting in an election, among other things. The Judiciary Committee approved the nomination by a vote of 10 to 5 but a filibuster was threatened and a cloture motion was needed to end debate; Fitzwater was then confirmed in March 1986.

o The nomination of Daniel Manion to the Seventh Circuit in 1986 prompted a confirmation battle. He was opposed based in part on his support, while a state legislator, of legislation to permit display of the Ten Commandments in public schools immediately after the Supreme Court ruled a similar state statute unconstitutional. After the Judiciary Committee sent his nomination to the floor without a recommendation, a cloture petition was filed to cut off debate. Ultimately, the cloture motion was vitiated and Manion was confirmed on a 48-46 vote.

o Edward Carnes, nominated by President George H.W. Bush to the Eleventh Circuit in 1992, was opposed due to concerns about his civil rights record in the Alabama attorney general's office, including his defense of the use of race-based peremptory challenges to obtain all-white juries in capital cases. A Judiciary Committee vote was delayed after protests from civil and human rights groups but the nomination was eventually approved by the Committee. Senator Thurmond and others then filed a cloture motion, cloture was invoked, and Carnes was confirmed.

? Strong Republican opposition to several of President Clinton's nominees for Courts of Appeals, and the use of extreme delaying tactics against them, prompted cloture votes during the 1990's.

o Rosemary Barkett, nominated to the Eleventh Circuit in 1993, was accused by Republicans of being "soft on crime." After Republican opponents announced their intention to filibuster the nomination, a cloture motion was filed. Lacking the votes to sustain a filibuster, Republican opponents accepted a time agreement, the cloture petition was withdrawn, and Barkett was confirmed.

o H. Lee Sarokin, nominated to the Third Circuit in 1994, was vigorously opposed by Senators who characterized him as a liberal on criminal law, affirmative action, and other issues. Republicans threatened a filibuster and a cloture motion was filed. Cloture was then invoked, and Sarokin was confirmed.

o In 2000, cloture motions were necessary to obtain votes on the nominations of both Richard Paez and Marsha Berzon to the Ninth Circuit, after Republican opponents who considered them too liberal repeatedly delayed action on their nominations (over four years for Paez and over two years for Berzon). Those opposing the nominations acknowledged that cloture was required "due to holds that we placed on them . . . as notice to the Senate that if the nominations were brought to the full Senate for debate they would be filibustered." On the floor, Republican Senator Bob Smith, citing the Fortas, Rehnquist and other filibusters as precedents, said "I do not want to hear that I am going down some trail the Senate has never gone down before by talking about these judges and delaying. It is simply not true. I resent any argument to the contrary because it is simply not true." He declared the next day that he had led a filibuster on the Berzon and Paez nominations, having built a coalition of Senators (including Senator Jeff Sessions) to block them because of the nominees' judicial philosophy. Cloture was invoked on both nominations, whereupon Senator Sessions moved to indefinitely postpone the Paez confirmation vote, but both nominees were confirmed.

? A cloture vote was also taken in 1999 on President Clinton's nomination of Brian Theadore Stewart to the District Court in Utah due to Democratic objections to the expedited treatment of the nomination. Not only did Stewart's nomination come to the floor in a mere two months even though 30 other nominations were then pending, but a number of those nominations -- including those of Paez and Berzon, as well as that of Missouri Supreme Court justice Ronnie White for a federal district court seat -- had been pending for more than a year and a half.

In short, history supplies ample precedents for subjecting controversial judicial nominations to cloture votes.

B. Requiring Cloture on Some Judicial Nominations Is Appropriate At This Time

It is hardly surprising that opponents of controversial judicial nominations sometimes force cloture votes, given what is at stake. Federal judges comprise a powerful branch of the U.S. government, and they sit with lifetime tenure. Once confirmed by the Senate, there is no means of holding them accountable for their actions, short of the extreme (and extremely rare) remedy of impeachment. Indeed, although cloture votes occur more often in connection with executive branch nominees than judicial nominees, and far more often on legislation, the stakes are higher for judicial confirmations: after all, legislation can always be amended or repealed, and executive branch appointments last only for finite terms or at the pleasure of the President, not for life. Moreover, the decisions that judges on federal courts render last through the ages and determine the scope and application of the most fundamental rights and liberties of American citizens. The Supreme Court, by interpreting the Constitution and federal statutes, establishes legal principles that reach every aspect of American life. And although the rulings of the Courts of Appeals are subject to Supreme Court review and the lower courts are required to abide by the high court's precedents, in reality the Courts of Appeals sit as the courts of last resort for the vast majority of litigants (since the Supreme Court decides fewer than 100 cases per year, while the Courts of Appeal decide over 28,000 per year) and they have tremendous latitude to interpret and apply the broad principles laid down by the Supreme Court.

At this juncture in U.S. history, moreover, even more is at stake than is normally the case. One party holds power in two of the three branches of government -- the White House and both houses of the U.S. Congress -- and its leaders seek to impose their philosophy on the judicial branch as well. At the same time, Justices who share the President's conservative philosophy already dominate the Supreme Court, and judges nominated by the President's party currently dominate the majority of the Courts of Appeals around the country. The "tilt" to the right on the lower courts is partly due to the use of obstructionist tactics that blocked an inordinately large number of Clinton Administration nominees -- over one-third of President Clinton's nominations to the Courts of Appeals -- which meant that the balancing process that normally takes place over time, as administrations change, did not occur. We are now on the brink of a wholesale transformation of the federal judiciary as this Administration seeks to tip the scales of justice even further toward the right. The filibuster, in some cases, is the last line of defense against this ideological shift.

Requiring 60 votes to invoke cloture has sometimes been criticized as "anti-majoritarian," usually by proponents of the measure being blocked. However, cloture is far from the only way in which matters are decided in the Senate without a vote of a simple majority of Senators, and without specific Constitutional language specifying a supermajority requirement (as there is, for example, with impeachment verdicts, veto overrides, treaty approval, and constitutional amendments). Legislative measures and nominations often die quiet deaths when committee chairs fail to schedule them for committee action, or the committee rejects them, or the leadership declines to call them up for a vote -- due to a hold placed by a Senator, sometimes anonymously, or for some other reason. Indeed, from 1995 to 2001, many highly qualified judicial nominees received no hearing at all, including two Hispanic nominees to the Fifth Circuit (Jorge Rangel and Enrique Moreno) and others received a hearing but no Judiciary Committee action. In these situations, there is no Senate debate at all, much less votes on the floor for which all Senators can be held accountable. These practices, which could hardly be said to reflect the will of a majority of the Senate and are not even visible to the public, could be considered far less democratic than filibusters and cloture votes.

It has been argued, moreover, that by forcing a supermajority cloture vote to cut off debate, the filibuster provides necessary protection for the rights of the minority and is an important feature of a democracy. Senator Hatch is one of those who has defended the filibuster. When other Senators were filibustering a Clinton Administration nomination to the Third Circuit in 1994, he called the filibuster "one of the few tools that the minority has to protect itself and those the minority represents." Similarly, when he participated in a filibuster against labor legislation in 1978, he said, "The filibuster rule is the only way the majority of the people, who are represented by a minority in the Senate, can be heard." [add cite in fn.] Former Senate Majority Leader Howard Baker (R-TN) also has defended the filibuster as a protection for the rights of the minority and the deliberative process of the Senate itself. And conservative commentator George Will argued, when he opposed Clinton Administration legislation that was being filibustered in the Senate:

[T]he Senate is not obligated to jettison one of its defining characteristics, permissiveness regarding extended debate, in order to pander to the perception that the presidency is the sun around which all else in American

government - even American life - orbits. . . . Democracy is trivialized when reduced to simple majoritarianism - government by adding machine. A mature, nuanced democracy makes provision for respecting not mere numbers but also intensity of feeling."

In light of all that is at stake in the confirmation of federal judges, especially at this time, those Senators with an "intensity of feeling" about the importance of a judiciary committed to civil rights and civil liberties should be expected to require cloture votes before troublesome nominations can move forward.

III. Conclusion

There is ample precedent supporting the decision to mount strong opposition to controversial judicial nominations, such that cloture is needed. And just as the failure to invoke cloture on legislation - or the mere threat of a cloture vote and the need for a 60-vote majority -- often forces proponents of a measure to agree to compromises in order to gain passage, the failure to invoke cloture on judicial nominations - or the prospect of needing 60 votes for a nomination to move forward -- could lead the current Administration to consult with potential Senate opponents and agree to submit moderate, consensus nominees who are confirmable, as occurred during the Clinton administration. If this occurs now, the nation's interests will be well served.