Testimony of

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I am greatly honored to be allowed the privilege to participate in the Constitution Subcommittee's special hearing, "Judicial Nominations, Filibusters, and the Constitution: When a Majority is Denied its Right to Consent." Today's topic is especially important; the constitutionality of the filibuster has long intrigued constitutional scholars, and I am aware that the deployment of the filibuster against two circuit nominations has frustrated a majority of senators who have appeared ready to confirm the filibustered nominees. I know that for many senators, including the ten newest members of the Senate, these filibusters show just how badly broken the federal judicial system has become.

The constitutionality of the filibuster - the critical question in today's hearing - depends on whether it lacks constitutional authorization or violates some constitutional directive. Though I understand that this issue is divisive, it is not hard to answer. There is clear constitutional authority for the filibuster. The clear authorization for the filibuster derives from the Senate's express constitutional power under Article I, section 5, to create rules for its proceedings and the Senate's longstanding, consistent practice to allow the filibuster, or its functional equivalent, to block final action of the Senate on legislation and pending nominations. I further find no credible support for a constitutional prerogative that a majority within the Senate must be free of procedures that would impede its final vote on judicial nominations, even one approved by the Senate Judiciary Committee. Constitutional text, structure, and history all cut against any such prerogative. Constitutional sources also point overwhelmingly to the legitimacy of many longstanding, counter-majoritarian features of the Senate, including but not limited to Senate rules allowing committees to determine the content of legislation and to decide whether legislation or a nomination reaches the floor of the Senate. The filibuster has the same claim to legitimacy as do each of these other features of the Senate. While a filibuster undoubtedly allows a minority to frustrate the will of the majority, it may counteract the counter-majoritarian aspects of the committee system (and perhaps the discretion of the Majority Leader to schedule floor business) by enabling individual senators to block legislation or nominations favored by a committee or to force different nominations or changes in legislation rejected by a committee. The filibuster has the additional salutary effect of applying pressure on the President and the Senate to find common ground to resolve their differences. Hence, I believe the filibuster is not only constitutional but can facilitate compromise in an era in which many complain about its absence.

I.

Constitutional interpretation should not be any harder than it has to be. When the Constitution is clear, we should acknowledge its clarity; and there are two clear sources of constitutional authorization for the filibuster - the text of the Constitution and historical practices. First, Article I, Section 5 expressly provides, "Each House may determine the Rules of its Proceedings." Article I, section 5 is crystal clear. It plainly authorizes the Senate to make procedural rules, including but not limited to the length of debate in the Senate. The same constitutional authority empowers the Senate to make numerous delegations to smaller units (and even individual members) within the Senate. Many of these delegations allow committees and their Chairs to have final say over the fates of legislation and nominations. Similarly, Senate practices have included the blue-slip process that has traditionally allowed individual senators with the means by which to nullify any nominations to judgeships within their respective states. Along the same lines, the modified rules adopted by the Senate at the outset of the last Congress empowered the Senate Majority Leader with the discretion to forward nominations to the Senate floor regardless of whether it had been approved in committee. Obviously, such discretion entails choosing not to forward a nomination to the Senate floor and thus effectively sealing its fate. Previously, Senate rules had denied such discretion to the Majority Leader and left the Committee with final say over whether a nomination should be forwarded to the Senate floor. All such rules are plainly constitutional, because they can trace to their legitimacy back to the same source - Article I, Section 5, which empowers the Senate to implement procedural rules generally, including Rule XXII. The textual authority for the filibuster are precisely the same as those for all of these other measures. If these measures are constitutional (and no one, at present, seriously questions their constitutionality), then so too is the filibuster.

Historical practices support the constitutionality of the filibuster even more strongly than does the text of the Constitution. For more than two centuries, the Supreme Court has emphasized the relevance of historical practices for determining the legitimacy of some contested action. The filibuster, in one form or another, understood as the prerogative of an individual senator or a small set of senators, to engage in protracted if not endless debate to defeat some legislative action, has been employed in the Senate since 1790. As the leading legal scholars on the filibuster have noted, "the strategic use of delay in debate is as old as the Senate itself. The first recorded episode of dilatory debate occurred in 1790, when senators from Virginia and South Carolina filibustered to prevent the location of the first Congress in Philadelphia." While the First Congress did allow a motion for the previous question which could not be debated, "the previous question motion was seldom used before the Senate abolished it in 1806"; and there is evidence suggesting prior to its abolition the Senate nevertheless allowed protracted, effectively endless debate to delay or fully impede legislative action. In his Pulitzer-Prize winning biography of Lyndon Johnson's years as Senate Majority Leader, Robert Caro explains that, "[f]or many years after 1806 - for 111 years, to be precise - the only way a senator could be made to stop talking so that a vote could be taken on a proposed measure was if there were unanimous consent that he do so, an obvious impossibility. And there took place therefore so many 'extended discussions' of measures to keep them from coming to a vote that the device got a name, 'filibuster,' from the Dutch vrijbuiter, which means 'freebooter' or 'pirate,' and which passed into the Spanish as filibustero, because the sleek, swift ship used by the Caribbean pirates was called a filibote, and into legislative parlance because the de vice was, after all, a pirating, or highjacking, of the very heart of the legislative process." For the first time, the Senate approved a curb on the practice in 1917, after eleven senators had successfully filibustered President Wilson's proposal to arm American merchantmen against German submarine attacks. The Senate passed, at President Wilson's urging, Rule 22, which allows debate upon a "pending" matter to be terminated when, after a petition for such "cloture" was presented by sixteen senators and approved by two-thirds of the senators present and voting. In subsequent years, senators from both parties have used the filibuster to block a remarkably wide range of legislative actions with which they have disagreed. Indeed, during the period from 1927 through 1962, the Senate did not vote cloture once. In this period, conservative senators repeatedly used the filibuster to block civil rights legislation, provoking liberal senators to denounce the filibuster as illegitimate and conservative senators to defend it. None of the efforts to dismantle or reform the filibuster succeeded in this era, so that by the late 1960s and early 1970s the filibuster was available to liberal senators who then used it to block centerpieces of President Nixon's social and economic agenda while many conservative senators then began to question its legitimacy. After Bill Clinton became president, a series of Republican filibusters blocked key aspects of his legislative agenda. Nevertheless, the filibuster has persisted with the most significant alteration being that the Senate has agreed to three-fifths, rather than two-thirds, as the requisite supermajority for cloture.

Moreover, the filibuster has hardly been confined to legislation. It has frequently been used to thwart presidential nominations. Indeed, a Congressional Research Service study indicates that from 1949 through 2002, senators have employed the filibuster against 35 presidential nominations, on 21 of which senators had sought and invoked cloture. 17 of the 35 nominations filibustered were to Article III courts. All 21 nominations on which cloture was invoked were eventually confirmed. Of the 14 nominations on which cloture was sought but not invoked, 11 were eventually confirmed. For instance, Republican senators initially filibustered against President Clinton's nominations of Walter Dellinger to head the Office of Legal Counsel in the Justice Department and Janet Napolitano to be U.S. Attorney for Arizona, but eventually confirmed both nominees - Dellinger after Republican senators relinquished their opposition to his nomination and Napolitano after the Senate voted 72-26 on a cloture motion to end the filibuster against her nomination. Three of the 35 nominations failed altogether - Justice Abe Fortas to be Chief Justice in 1968, Sam Brown to be Ambassador in 1994, and Dr. Henry Foster to be Surgeon General in 1995. Similarly, the threat of a filibuster nullified President Clinton's intention to nominate then-Assistant Attorney General Walter Dellinger as Solicitor General. Another dramatic use of the filibuster occurred when Republican senators filibustered five of President Clinton's nominations to the State Department in order to gain leverage in a dispute over whether the State Department adequately investigated allegations that a former Clinton campaign worker who later served in the department had improperly searched the records of 160 former political appointees and publicly disclosed the contents of two of the files. In short, as found by two well-respected constitutional scholars who served in the Office of Legal Counsel in the late 1980s, John McGinnis and Michael Rappaport, "the continuous use of filibusters since the early Republic provides compelling support for their constitutionality."

II.

In spite of the clear textual and historical support for the filibuster, its legitimacy has been questioned on three possible grounds - the Framers did not include it among the supermajority voting requirements they had expressly listed in the Constitution, it violates majority rule in the Senate, and a supermajority voting requirement to change the filibuster is an impermissible entrenchment that allows one Congress to bind the hands of future ones. Each challenge is strained and is undercut by the weight of constitutional authority.

The first argument against filibusters is that they are not among the specific instances of supermajority voting requirements recognized in the Constitution. The Constitution specifically requires a supermajority vote in only seven situations. This enumeration of the instances where a supermajority was required suggests to some that the Framers assumed that a simple majority vote in each chamber would suffice for all congressional action. Any time that there is a filibuster, adopting a law or confirming a nominee requires three-fifths of the Senate, or 60 percent, rather than a simple majority to pass legislation or confirm a nominee. It also shows that the Framers knew how to provide for supermajority voting requirements when they wanted to allow them, and their failure to allow for a measure such as Senate Rule XXII reflects their intention not to authorize it.

This first argument against the filibuster is, however, contradicted by the text of the Constitution. One could construe the Constitution's enumeration of the seven instances in which supermajority voting is required as meaning that these are the only instances in which supermajority voting is permissible. An equally, if not more, plausible reading of the text is that it requires supermajority voting in at least the seven specified instances but leaves Congress with the discretion to decide voting procedures in other situations. This reading is made even more compelling when combined with Article I, Section 5's empowerment of each chamber to make the rules for its respective proceedings. Clearly, the latter clause grants ample discretion to the Senate to devise its internal procedures as it sees fit unless they conflict with some constitutional prohibition. The Freedom of Speech Clause or the Equal Protection Clause might conceivably provide such prohibitions on the Senate's discretion in crafting its procedural rules, but the absence of a constitutional directive against the adoption of certain internal procedures does not.

The second, perhaps most common argument against the filibuster is that it violates majority rule in the Senate. This argument is predicated on reading several provisions of the Constitution as establishing majority rule as an unalterable principle to govern Senate voting (with the obvious exceptions of the specific instances in which the Constitution imposes supermajority 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 instances demarcated by the Constitution. At most, these provisions establish majority rule as the default rule in the absence of any other procedure. The filibuster leaves this default rule in tact. Rule XXII 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 declaring that a majority is a quorum creates the basic rule for when each chamber may do its business. It says nothing about the voting margin necessary to end debates, pass legislation, or confirm nominees.

Some opponents of the filibuster insist nevertheless that 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 "Advise and Consent" to presidential nominations and that the filibuster bars a majority of the Senate from exercising this prerogative. The argument is that a 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.

There are, however, many 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, while another is confirmation by the Senate. Confirmation is achieved by a 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 confirmation proceedings or about how someone may be denied confirmation.

Second, the suggested construction of the Appointments Clause would lead to absurd results. The suggested reading of the Appointments Clause would render unconstitutional any action by a committee or individual senator (including the Senate Majority Leader) that had the effect of nullifying a judicial nomination. On this reading, committees lose all their traditional powers as gatekeepers for nominations or any other legislative business that a majority might be disposed to approve. 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 unconstitutional temporary holds, which have been used routinely to delay final consideration of legislation and nominations. Temporary holds near the end of a legislative session can often be fatal - delay a nomination just long enough near the end of a session time runs out for the Senate to act and the nomination lapses. Such delays would be intolerable on a reading of the Appointments Clause as investing a majority of the Senate with the entitlement never to be stopped, for procedural reasons, from rendering a majority vote on every nomination a president makes.

Reading the Appointments Clause as entitling, or empowering, a majority of the Senate to render final votes on presidential nominations would mean that there were constitutional violations every time nominees failed to receive final votes on their nominations. (It is hard, at best, to maintain that this obligation or entitlement only applies with respect to judicial nominations. One might try to argue that the independence and proper functioning of the judiciary depends on the Senate's acting upon every judicial nomination, but there is only one Appointments Clause, whose text does not establish any priority or hierarchy among nominations much less any support for different procedures, voting requirements, entitlements, and obligations within the Senate regarding different nominations.) The constitutional violation presumably arises when a majority is willing but unable for some reason to confirm a nominee, but it is 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 that the Appointments Clause requires the majority to vote twice - once to signal its willingness to confirm, and another time to confirm the nominee in question. Even a vote for cloture is not necessarily reflective of how senators will vote on a disputed nomination, because some senators might like filibusters even less than they like the nomination(s) being filibustered. Moreover, a reading of the Appointments Clause as entitling a majority vote on a nomination when it is so disposed, leaves unclear whether senators could change their minds once they have initially signaled their willingness to confirm someone. There have been instances in the past when senators have indicated their inclination to vote one way but voted differently in the final vote.

Assuming arguendo there were a constitutional principle that a majority is entitled, when it prefers, to render a final vote on a nominee, it has been violated more times than anyone could count. During Bill Clinton's eight years in office, the Senate did not act on 38% of his circuit court nominations; and from 1995 until the end of Bill Clinton's presidency, the Senate did not vote on at least 20 of President Clinton's circuit court nominations. In the final year of his presidency, the Senate failed to render final votes on 41 judicial nominees. I assume a majority of the Senate would have confirmed at least some if not all of these nominees, including the incoming Dean of the Harvard Law School Elena Kagan, if given the chance. (By all accounts, the President believed all these nominees would have been confirmed if given the chance.) Thus, on the reading of the Appointments Clause urged upon the Subcommittee, one must assume that the Chair of the Senate Judiciary Committee either alone or in conjunction with a few other senators conspired to violate the Constitution throughout the Clinton presidency. I for one cannot believe any such thing.

The reading of the Appointments Committee urged upon the Subcommittee suggests that not only is a majority entitled to a final vote on a nominee when it desires, but also it is constitutionally entitled not to vote. The reading suggests that a legitimate failure to vote must be the consequence of majoritarian preferences. If a failure to vote were not a consequence of the majority's actual preferences, then it violates majority rule in the confirmation process. The difficulty with this construction is that it lacks any support in the text of the Constitution or historical practices. It is undercut by a much more plausible reading of the Appointments Clause as merely making presidential nomination and Senate "Advice and Consent" preconditions for final appointment. The text says nothing about the circumstances that must exist within the Senate between the time a nomination is made and the time that the office to which a nomination has been made has finally been filled by someone confirmed by the Senate.

The third argument directed against the constitutionality of the filibuster is that Rule 5, which requires a supermajority vote to alter or abolish the filibuster, is unconstitutional. The argument is that Rule 5 impermissibly entrenches the filibuster, i.e., the supermajority vote required to alter or abolish the filibuster allows a current Senate to deprive a future majority within the Senate to choose the rules - including those governing the filibuster - under which they prefer to operate.

This argument, too, is seriously flawed. First, it has been flatly and repeatedly rejected in the Senate's precedents and practices. For instance, a Congressional Research Service study indicates that in 1995 Rule 5 was one of eight Senate rules requiring supermajority votes. The Senate has consistently opposed efforts to allow amendment of its rules by majority vote; and the only rule changes recognized by the Senate as legitimate have been effected by

supermajority vote. For instance, near the end of President Clinton's impeachment trial a motion was made to alter the Senate's rules requiring closed deliberations on the President's guilt; the Senate recognized its rules could be changed only by supermajority vote and failed to muster the requisite number for an amendment, even though this allowed a rule adopted by a much earlier Senate to remain in effect. The Presiding Officer and the Parliamentarian failed to recognize, much less to prevent, the supposed breach of the Constitution engendered by this procedure.

Second, there is no constitutional directive against entrenchment - the enactment of statutes or internal legislative rules that are binding against subsequent legislative actors in the same form. The leading commentary on entrenchment by Professors Eric Posner and Adrian Vermeule of the University of Chicago Law School comprehensively dissects the argument for implicitly reading an anti-entrenchment principle into Article I. As they argue, "Article I's elaborate crafting of the metes and bounds of legislative authority counsels against finding [an] additional, implicit restriction[against entrenchment] on statutes that (by assumption) fall within one of the enumerated grants of power." They suggest further that entrenchment does not restrict the discretion vested in each chamber of the Congress by the Rules of Proceeding Clause, whose "reference to 'each House' is not a temporal limitation, but just a corollary of bicameralism. It establishes that each house separately, rather than the Congress as a whole, may make rules for its respective internal affairs." Posner and Vermeule add that "rooting the rule against entrenchment in the equal authority of successive legislatures is hard to square with Congress' undisputed authority to enact laws containing sunset clauses - clauses that cause a statute to lapse, by operation of law, after a defined period." Even statutes without sunset clauses entrench policies because they remain in effect indefinitely until a subsequent Congress chooses to displace them and thus require a subsequent Congress to expend resources and incur costs to revise or alter the policies already in effect. Yet, no one argues questions the constitutionality of such policy enactments on entrenchment grounds.

Similarly, Posner and Vermeule directly expose the fallacy of attacking Rule 5 on the ground that it constitutes impermissible entrenchment. "[T]he anti-entrenchment objection to the cloture rule is really a wholesale objection to constitutionalism as such. In a binding constitutional order, neither the future legislative majority nor the underlying electorate has any general 'right . . . to rule according to its will.' True, the constitutional restrictions come into force by a different procedure than do legislatively entrenched rules, but that is a different, narrower objection; and [it] is also a question-begging objection, because it unjustifiably assumes that restrictions on any given legislature may derive only from the procedure for constitutional entrenchment, rather than from the procedure for enacting entrenching statutes or rules. . . . The position is inconsistent, not merely with legislative entrenchment, but with the acceptance of binding constitutions generally."

The arguments against inferring a principle of majority rule within the Senate from the text of the Constitution apply as well to attempts to infer a principle of simple majoritariansim from tradition or the structure of the Constitution. The latter principle is inconsistent with American constitutional practices. Posner and Vermeule succinctly demonstrate that the problem with relying on simple majoritarianism as a basis for arguing against entrenchment: "If there are political or logistical costs to repealing legislation - and there surely are - then an earlier Congress 'binds' a later Congress by enacting legislation that cannot be costlessly repealed or changed, except in those instances in which it provides for the legislation to expire on its own. Indeed, . . . one Congress would hardly do a favor to a later Congress by making all legislation expire at the end of a [session], for this would impose on the subsequent Congress the burden of renegotiating and reenacting the expired legislation. Short of anticipating the needs and desires of future Congresses - which is impossible - a Congress will inevitably burden future Congresses, for the simple reason that the earlier Congress comes first and cannot avoid actions that will turn out to hinder the later Congress."

The response that displacing a prior statute is easier than changing rules because of the different voting procedures misses the point. Either anti-entrenchment is a constitutional principle, or it is not. If it is a principle, than it requires foregoing or striking down any statute or rule that impedes a legislative majority from implement its statutory or procedural preferences. A new Congress cannot muster the will or the resources to enact an entirely new set of laws or rules. It will invariably leave in tact some policy or rule not preferred by a current majority and thus allow entrenchment to occur. In any event, Rule 5 implements the sound practice that the pre-existing Rules of the Senate remain in effect and can be changed only in accordance with the Rules themselves. (Otherwise, each new Senate would lack any rules for proceeding at the outset of a session, which would be a recipe for chaos.) Consequently, senators would be empowered to filibuster any attempt to amend the rules that was not done in accordance with their understanding of the governing rules.

III.

I understand that at the same time that the Constitution Subcommittee is considering the constitutionality of the filibuster it is considering some proposals to reform the federal judicial selection process. I regret I have not had the opportunity to review the proposals in detail and thus am hesitant to offer any opinion on them. Nevertheless, I believe the proposals, like today's hearing, constitute an important step in the right direction, because they have been developed with the spirit of compromise in mind. Cultivating this spirit is essential, in my opinion, to restoring good will within the federal judicial process.

In the same spirit, I suggest that in considering these and other proposals for reform the Constitution Subcommittee ask a simple question. In considering any reform proposal, it makes sense to inquire about its institutional benefits and costs: What advantages and disadvantages does it have for each of the institutions involved with judicial selection? To what extent does it require, or call for, each institution to relinquish its prerogatives with respect to judicial selection? By prerogatives, I mean the formal powers of presidents and senators as well as their informal expectations or institutional norms, such as senatorial courtesy.

The usual impediment to reform is the hesitancy of each branch to abdicate its traditional prerogatives within the process. Because each branch is usually quite resistant to relinquish its powers, the status quo has steadfastly remained in tact. Yet, the status quo retains an important feature that serves as a safeguard against abuse. The safeguard is the political accountability of national political leaders. Presidents and senators remain politically accountable for their choices and actions within the appointments process. This safeguard applies as well to the filibuster. Political accountability is an important check on its use. Otherwise, one would imagine unfettered recourse to filibuster. At present, the transparency of cloture votes - i.e., the fact that they are made on the record - provides a basis for holding senators accountable for their positions on a filibuster. One can further imagine that the President stands ready to hold senators politically accountable for filibustering two of his judicial nominees, just as many senators expect to hold him and their colleagues accountable for advocating nominations they have deemed offensive.

Conclusion

The filibuster has been used for both good and ill. While its use against civil rights legislation should not make anyone proud, its constitutionality is beyond question. It is clearly authorized by the Senate's power to adopt rules for its proceedings and by its consistent use, in one form or another, throughout the Senate's history. The fact that the filibuster has been used, more than once, against judicial nominations does not detract from its legitimacy. For there is no constitutional entitlement of a majority of senators to exercise their will on every nomination with which they approve. If the majority's will is frustrated, the President and those who have supported his contested nominations can either exact revenge through the political process or seek common ground to resolve their differences with a substantial minority of their colleagues. Whichever path they follow is constitutional, just as constitutional as the filibuster itself.