Testimony of

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The people of the United States have just won a great victory in the war to bring democracy and majority rule to Iraq. Now it is time to bring democracy and majority rule to the U.S. Senate's confirmation process for federal judges. A determined and willful minority of Senators has announced a policy of filibustering, indefinitely, highly capable judicial nominees such as Miguel Estrada and Priscilla Owen. By doing this, those Senators are wrongfully trying to change two centuries of American constitutional history by establishing a requirement that judicial nominees must receive a 3/5 vote of the Senate, instead of a simple majority, to win confirmation.

I have taught Constitutional Law in one form or another at Northwestern University for 13 years and have published more than 25 articles in all of the top law reviews including the Harvard Law Review, the Yale Law Journal, the Stanford Law Review, and the University of Chicago Law Review. I served as a law clerk to Justice Antonin Scalia and as a Special Assistant to the Attorney General of the United States. I am a Co-Founder and the Chairman of the Board of Directors of the Federalist Society, a national organization of conservative and libertarian lawyers. I offer this legal opinion in my individual capacity, and not on behalf of my academic institution, the Federalist Society or any client.

The U.S. Constitution was written to establish a general presumption of majority rule for congressional decision-making. The historical reasons for this are clear. A major defect with the Constitution's precursor, the Articles of Confederation, was that it required super-majorities for the making of many important decisions. The Framers of our Constitution deliberately set out to remedy this defect by empowering Congress to make most decisions by majority rule. The Constitution thus presumes that most decisions will be made by majority rule, except in seven express situations where a two-thirds vote is required. The seven exceptional situations where a super-majority is required include: overriding presidential vetoes, ratifying treaties, approving constitutional amendments, and expelling a member.

There is substantial reason to think that these seven express exceptions to the general principle of majority rule are the only exceptions that the document contemplates. Under the canon of construction expressio unius, exclusion alterius, the enumeration of things in a series is generally supposed to be exclusive. Under this ancient and venerable canon, no other super-majority requirements beyond the seven enumerated in the constitutional text may in fact be permitted. This canon has been relied on by the U.S. Supreme Court in construing that court's original jurisdiction in Marbury v. Madison, as well as in many other cases.

Each House of Congress does, however, have the power to establish by majority vote "the Rules of its Proceedings", and it is quite clear that as an original matter this empowered each House to adopt parliamentary rules to foster deliberation and debate and to set up Committees to conduct business, as the British Parliament had done. It is not at all clear that the Rules of Proceedings Clause was originally meant to authorize filibusters of the kind we have become accustomed to in the Senate. From 1789 to 1806, the Senate's Rules allowed for cutting off debate by moving the previous question - a motion which required only a simple majority to pass. Critically, then, the first several Senates to sit under the Constitution did not have a Rule that allowed for filibustering.

The filibuster of legislation dates back to 1841 when Senator John C. Calhoun, a notorious defender of slavery and an extreme proponent of minority rights, originated the filibuster as part of his effort to defend the hideous institution of slavery. Calhoun's creation of the filibuster was opposed by the great Senator Henry Clay and the very name filibuster itself was originally a synonym for pro-Slavery mercenary pirates who would attack Latin American governments to try to spread the Slave system. Since its inception in 1841, the filibuster of legislation has been used to block legislation protecting black voters in the South, in 1870 and 1890-91; to block anti-lynching legislation in 1922, 1935, and 1938; to block anti-poll tax legislation in 1942, 1944, and 1946; and to block anti-race discrimination statutes on 11 occasions between 1946 and 1975. The most famous filibuster of all time was the pro-segregation filibuster of the Civil Rights Act of 1964, which went on for 74 days. In recent years, the number of filibusters has escalated dramatically due to the emergence of the so-called stealth filibuster or two track system of considering legislation. We have gone from 16 filibusters in the 19th Century to 66 in the first half of the 20th Century to 195 filibusters between 1970 and 1994. Filibusters of legislation may be constitutionally dubious as an original and textual matter, but they have been permitted now in the Senate for a century and one-half and indeed seem to be mushrooming.

Now for the first time in 214 years of American history an angry minority of Senators is seeking to extend the tradition

of filibustering from legislation to judicial nominees who enjoy the support of a majority of the Senate. This unprecedented extension of the filibuster to judicial nominees threatens to raise the vote required for senatorial confirmation of judges from 51 to 60 votes. This is a direct violation of the Advice and Consent Clause, which clearly contemplates only a majority vote to confirm a judge. Raising the vote required to confirm a judge will weaken the power of the President in this area in direct violation of the Constitution while augmenting the power of a minority of the Senate. Giving a minority of Senators a veto over judicial nominees will also threaten the independence of the federal judiciary in direct violation of the separation of powers.

The Appointments Clause imposes a mandatory duty on the President to nominate and appoint judges. The Clause directs that the President "shall" i.e. "must" nominate individuals to judicial vacancies and it implicitly suggests that the full Senate must give its advice and/or consent with respect to each nominee. By giving the Senate a role in judicial confirmations, the Constitution allows the Senate to share in the inherently executive power of appointment. This senatorial exercise of executive power is to be narrowly construed, as it is an exceptional involvement of the Senate in an inherently executive task. Myers v. United States.

The question that faces this body is: should the non-textual, non-originalist tradition of allowing filibusters of legislation be allowed to spread to the new area of senatorial confirmation of federal judges? There are several reasons why allowing filibusters of judicial nominations is a bad idea. First, such filibusters weaken the power of the President who is one of only two officers of government who is elected to represent all of the American people. The President was supposed to play a leading role in the selection of judges and that role is defeated by giving a minority of senators a veto over presidential nominees.

Second, giving a minority of Senators a veto over judicial nominees will violate the separation of powers by giving a Senate minority the power to impose a crude litmus test on judicial nominees, thus undermining judicial independence. It is already hard enough for talented and capable individuals to be appointed to the federal bench. Making this process even more difficult is bad for the federal judiciary and bad for the country. We are likely to get only bland and weak individuals being willing to serve as federal judges if we continue to make the process of becoming a federal judge ever more onerous. This would weaken the federal courts and the exercise of judicial review immeasurably.

Third, the filibuster of legislation can at least be defended on the ground that federal legislation ought to be rare because of the sweeping and national effects it has on the rights of all citizens. In contrast, the confirmation of a judge who is sworn only to apply the law made by others ought to have no such sweeping and national effects. If a mistake is made with a judicial confirmation and somehow a judicial activist is allowed to slip through, impeachment is always available to rectify the error. There is no similarly easy remedy if Congress passes a bad law.

Finally, the tradition of Senate filibusters of legislation is, as I have shown of questionable pedigree. Text and original understanding do not clearly support the filibuster of legislation and the filibuster has had a dismal history as a tool primarily used in the defense of slavery and then of segregation. While it may be too late in the day to stamp out the filibuster of legislation, surely we can keep this invention of John C. Calhoun from spreading to a new area for the first time in 214 years of American history! This is the time and place to nip the spread of the filibuster in the bud.

The Senate can always change its rules by majority vote. To the extent that Senate Rule XXII purports to require a two-thirds majority to invoke cloture on a rule change, Rule XXII is unconstitutional. It is an ancient principle of Anglo-American constitutional law that one legislature cannot bind a succeeding legislature. The great William Blackstone himself said in his Commentaries that "Acts of parliament derogatory from the power of subsequent parliaments bind not...". Thus, to the extent that the last Senate to alter Rule XXII sought to bind this session of the Senate its action was unconstitutional. A simple majority of the Senate can and should now amend Rule XXII by majority vote to ban filibusters of judicial nominations.

Leading scholars in this area of law such as John O. McGinnis of Northwestern University, Michael Rappaport of San Diego University, and Erwin Chemerinsky of the University of Southern California all have written that the Senate Rules can be changed at any time by a simple majority of the Senate. More importantly, Vice Presidents Richard M. Nixon, Hubert H. Humphrey, and Nelson A. Rockefeller have all so ruled while presiding over the United States Senate. Some commentators have gone even further in challenging filibusters of legislation as unconstitutional, as did Lloyd Cutler, White House Counsel to Presidents Carter and Clinton. Indeed, eight years ago, 17 very distinguished law professors, led by Yale Law Professor Bruce Ackerman, opined that a new Rule in the House of Representatives purporting to create a 3/5 requirement for enacting new tax increases was unconstitutional. The Ackerman letter wisely called for limiting the proliferation of new extra-constitutional, super-majority rules - counsel that the Senate should heed here.

What will happen if the filibuster is allowed to spread to the new area of judicial confirmations? It will next spread to the resolution every new Senate must pass to organize itself, set up Committees, and apportion staff and other resources. The filibusters next expansion will be one wherein a minority of 41 Senators will claim they are entitled to

equal slots and Committee resources as are enjoyed by a majority of 59 Senators. This is the logical extension of the filibusters protection of minority rule under the inexorable Calhounian logic now being played out.