TESTIMONY OF U.S. SENATOR JOHN CORNYN

BEFORE THE UNITED STATES SENATE
COMMITTEE ON RULES AND ADMINISTRATION

"Hearing on Senate Rule XXII and proposals to amend this rule"

Thursday, June 5, 2003, 2:00 p.m.
Russell Senate Office Building Room 301

Mr. Chairman:

I thank you and the Committee for the opportunity to testify today in strong support of filibuster reform. And I am pleased to join Majority Leader Frist, as well as Chairman Lott, Senator Miller, and several other distinguished Senators and members of this committee, in co-sponsoring Senate Resolution 138.

Although I am new to this body, I have long been a passionate believer in the fundamental importance of an independent judiciary as the foundation of government. Indeed, the current struggle to build a free Iraq reminds us that no society can be just or prosperous without the rule of law. That requires an independent judiciary.

And so, when I had the honor of serving first as a state district judge, and then as a member of the Texas Supreme Court, Justice Priscilla Owen and I joined with other judges to advocate reform of our judicial selection process in the state of Texas. It has long been our view that elections are not the right way to go for selecting judges, because it excessively politicizes the selection process.

But I must say that, whatever the problems the various states may have in their judicial selection systems, nothing – absolutely nothing – compares to how badly broken the system of judicial confirmation is here in Washington, D.C.

In Texas, we have debate and discussion, and that is always followed by a vote. Whatever else you might say about the process, we always finish it. We always hold a vote.

Of course, voting is precisely what we in the U.S. Senate were elected to do. Vote up or down, but, as the *Washington Post* admonished in a February editorial, "Just Vote."

The problems we are facing in the U.S. Senate with respect to the confirmation of judges are even worse than I had imagined before coming here. And I am not the only freshman Senator to feel that way. As you know, Mr. Chairman, all ten freshman Senators wrote in a bipartisan letter to Senate leadership on April 30 that "we are united in our concern that the judicial confirmation process is broken and needs to be fixed."

I therefore welcome the committee's discussion today of whether the current filibusters of judicial nominations pose a threat to our independent judiciary.

The American people need the courts to be fully staffed. Our judicial selection process should focus simply on identifying and confirming well-qualified jurists committed to enforcing the law, not their will or agenda.

For far too long, this process has been caught in a downward spiral of politics and delay. As President Bush recognized in a speech in the Rose Garden on May 9, 2003, "during the administration of former Presidents Bush and Clinton, . . . too many appeals court nominees never received votes."

So the problem we face today is not new. It has faced Presidents of both parties. And it has existed in the Senate under the control of both parties.

Yet the problem has not been fixed. Quite the opposite: the problem is even worse today. And the problem threatens to destroy the integrity of our constitutional system of advice and consent and of an independent judiciary.

For months, a bipartisan Senate majority has tried to stop the politics of delay and tried to hold up-or-down votes on a number of judicial nominees. However, a partisan minority of Senators is blocking the Senate from holding those votes. As one leader of the current filibusters has said, "there is not a number [of hours] in the universe that would be sufficient" for debate on certain nominees.

The current use of filibusters, not to ensure adequate debate, but to block a Senate majority from confirming judges, is unprecedented and wrong.

This indefinite, needless, and wasteful delay distracts the Senate from other important business. And it hurts Americans. It leaves not only would-be judges in limbo, but also thousands of litigants.

President Bush has rightly called the situation "a disgrace."

Over 175 newspaper editorials representing 35 states condemn the current filibusters of judicial nominees. Last month, legal scholars of both parties told the Senate Constitution Subcommittee that filibusters of judicial nominations are uniquely offensive to our nation's constitutional design. Law professor and former Clinton adviser Michael Gerhardt has condemned supermajority requirements for confirming nominees, saying they "would be more likely to frustrate rather than facilitate the making of meritorious appointments."

Until now, members of this distinguished body have long and consistently obeyed an <u>unwritten rule</u> not to block the confirmation of judicial nominees by filibuster.

As renowned former Senate parliamentarian Floyd Riddick once said, Senators are expected to "restrain themselves" and "not abuse the privilege" of debate. And out of respect for the independent judiciary, Senators have historically and consistently exercised such restraint.

But this Senate tradition, this unwritten rule, has now been broken. The current judicial confirmation crisis demands a response. Senate Resolution 138 is that response. It guarantees full debate on nominees, while ensuring the ability of a Senate majority to hold up-or-down votes.

It is a bipartisan proposal. It originates with the filibuster reform proposal introduced by Senators Harkin and Lieberman in 1995, and reintroduced by Senator Miller earlier this year.

That proposal was endorsed by 19 Senate Democrats as well as the *New York Times*, which editorialized in 1995 that "now is the perfect moment . . . to get rid of an archaic rule that frustrates democracy and serves no useful purpose."

Last month, Senator Miller testified before the Senate Constitution Subcommittee that, "at the very least, . . . I would hope we would consider applying my proposal to judicial nominations." I could not agree more, and I am so pleased that, following that hearing, we have been able to introduce S. Res. 138 as a bipartisan effort.

Proposals quite similar to S. Res. 138 have been endorsed by Congressional experts from think tanks as diverse as the American Enterprise Institute, the Brookings Institution, and the Cato Institute.

The resolution is a reasonable, common-sense proposal, with a lot of precedent to support it.

The Senate has previously considered at least thirty proposals to eliminate filibusters altogether. And there are literally dozens of laws on the books today which prevent a minority of Senators from filibustering certain kinds of measures – from the Budget Act of 1974 to the War Powers Resolution.

According to the Congressional Research Service, the following twenty-six laws limit debate or otherwise eliminate the minority's power to filibuster in the Senate on certain specified matters:

Federal Budget

- Congressional Budget and Impoundment Control Act of 1974 (2 U.S.C. §§ 636, 641, 688)
- Balanced Budget and Emergency Deficit Control Act of 1985 (2 U.S.C. §§ 907a-d)

War, National Emergency, and National Security

- War Powers Resolution (50 U.S.C. §§ 1544-46)
- National Emergencies Act (50 U.S.C. § 1601)
- International Emergency Economic Powers Act (50 U.S.C. § 1701)
- Defense Base Closure and Realignment Act of 1990 (10 U.S.C. § 2687 note)

- Cuban Liberty and Democratic Solidarity Act of 1996 (22 U.S.C. § 6064)

Arms Control and Foreign Assistance

- International Security Assistance and Arms Export Control Act of 1976 (Pub. L. No. 94-329)
- Arms Export Control Act (22 U.S.C. § 2753 et seq.)
- Atomic Energy Act of 1978 (42 U.S.C. §§ 2153-59h)

International Trade

- Trade Act of 1974 (19 U.S.C. § 2191 et seq.)
- Uruguay Round Agreements Act (19 U.S.C. § 3535)
- Bipartisan Trade Promotion Authority Act of 2002 (19 U.S.C. § 3803 et seq.)

Energy and Environment

- Department of Energy Act of 1978 (22 U.S.C. § 3224a)
- Energy Policy and Conservation Act (42 U.S.C. § 6421)
- Power Plant and Industrial Fuel Use Act of 1978 (42 U.S.C. § 8374)
- Nuclear Waste Policy Act of 1982 (42 U.S.C. §§ 10131 et seq.)
- Public Utility Regulatory Policies Act of 1958 (43 U.S.C. § 2008)
- Outer Continental Shelf Lands Act (43 U.S.C. § 1337)
- Alaska Natural Gas Transportation Act of 1976 (15 U.S.C. § 719f)
- Alaska Nat'l Interest Lands Conservation Act (16 U.S.C. §§ 3232-33)

Employment Retirement Security

- Employee Retirement Income Security Act of 1974 (29 U.S.C. § 1322a)
- Pension Reform Act of 1976 (29 U.S.C. § 1306)

General Government

- Congressional Review Act (5 U.S.C. § 802)
- Executive Reorganization Act (5 U.S.C. § 912)
- District of Columbia Home Rule Act (Section 604)

The judicial confirmation process should surely be added to this list. To protect the independence of our judiciary and to restore the unwritten rules long respected by the Senate until now, we should immunize the Senate's process of confirming judges from filibuster abuse and approve S. Res. 138.

I want to just briefly mention the issue of Abe Fortas. Some have said that he was the first – and only – judicial nominee ever to be filibustered. Others, like myself, have argued that he was not defeated due to a filibuster; rather, he was defeated because he was not supported by 51 Senators. Former U.S. Senator Robert P. Griffin has expressed precisely the same view, both then and in a recent letter, which I also enclose here.

After just a few days of debate, supporters of Fortas's nomination to be Chief Justice filed for cloture to end debate prematurely. When the cloture vote was taken up two days later, they

failed to obtain the support of 51 Senators to invoke cloture, due to allegations of ethical improprieties and bipartisan opposition (24 Republicans and 19 Democrats). Moreover, had there been an actual confirmation vote, Fortas might have been defeated by a vote of 46-49, based on various indications in the *Congressional Record*. President Johnson thus withdrew the nomination, rather than subject Fortas to further debate. (Fortas later resigned under threat of impeachment.)

In other words, Fortas was denied confirmation not due to a filibuster, but because he lacked the support of 51 Senators.

Indeed, several Senators who opposed Fortas specifically and repeatedly noted that they were not filibustering, or otherwise trying to prevent a majority from confirming him. They were simply seeking time to debate and expose the serious problems with the nomination:

- "[A]n adequate and full discussion on this great and important issue *should not be termed a filibuster.*" 114 Cong. Rec. 28,115 (Sep. 25, 1968) (statement of Sen. Griffin).

- "I am certain that, in due time, we will come along, in the extended debate process, to a vote of some kind of some point. The main thing is that this great deliberative body . . . *ought to discuss this question.*" 114 Cong. Rec. 28,155 (Sep. 25, 1968) (statement of Sen. Hollings).

- "[I]t takes some time to develop these facts. . . . [T]he proponents are just waiting in the aisle, almost, to file a cloture petition at some early time . . . . *[G]ive us just a little time*, Mr. Leader." 114 Cong. Rec. 28,251-52 (Sep. 26, 1968) (statement of Sen. Stennis).

- "[I]t is right and proper that the U.S. Senate carefully deliberate this nomination . . . . *Debate is not a dilatory tactic.* . . . I am not willing now to say those of us who oppose Justice Fortas are a minority." 114 Cong. Rec. 28,253 (Sep. 26, 1968) (statement of Sen. Baker).

- "[T]here are a good many more than one—there may be half of the Senate; *there may be more than half of the Senate—that share our concern*." 114 Cong. Rec. 28,253 (Sep. 26, 1968) (statement of Sen. Holland).

- "[W]e in the Senate of the Untied States stand ready here and now, today, to discharge fully and completely, not with the *undue haste* that seems to be counseled by some, but rather with the *deliberation that the significance of the occasion requires*." 114 Cong. Rec. 28,254 (Sep. 26, 1968) (statement of Sen. Hansen).

- "*I do not rise to defend a filibuster*, because I firmly believe that as long as Senators are seeking the floor to speak on the issue before the Senate—and are addressing themselves to that issue without resort to dilatory tactics, then we do not have a

filibuster. . . . [W]e do not have to defend a filibuster *for we do not have a filibuster*." 114 Cong. Rec. 28,585 (Sep. 27, 1968) (statement of Sen. Griffin).

- "[T]his debate has given some the idea that someone is doing a wrong thing here by debating it a little, even before the motion to take up has prevailed. This is one place where it can be discussed, and for that I make no apologies, if it takes us *a little time*." 114 Cong. Rec. 28,748 (Sep. 30, 1968) (statement of Sen. Stennis).

- "[T]hus far, there have been only 4 days of Senate debate on this very important, historic issue. . . . *[A] filibuster, by any ordinary definition, is not now in progress*." 114 Cong. Rec. 28,930 (Oct. 1, 1968) (statement of Sen. Griffin).

- "I would not like to see the Senate gag itself . . . there are other things here that need exploration. *That requires time*." 114 Cong. Rec. 28,933 (Oct. 1, 1968) (statement of Sen. Dirksen).

- "An examination of the Congressional Record . . . clearly reveals that *the will of the majority was not frustrated*. . . . [I]f every Senator who made his position known in the Record had actually been present and had voted, there would have been 47 votes for cloture and 48 votes, or a majority, against cloture. . . . It should not be overlooked that the distinguished Senator from Kentucky [Mr. Cooper] announced during the debate that, although he would vote for cloture, he was against the confirmation of the nomination of Mr. Fortas as Chief Justice. *On the basis of the Record, then, it is ridiculous to say that the will of a majority in the Senate has been frustrated*." 114 Cong. Rec. 29,150 (Oct. 2, 1968) (statement of Sen. Griffin).

But however you choose to characterize the Fortas situation, it is certainly a far cry from what we are facing today.

Fortas was debated for just a few days. He was opposed on ethical grounds, and by a bipartisan group of Senators. And he did not have the support of 51 or more Senators.

The current filibusters of Miguel Estrada, Justice Owen, and perhaps others bear no resemblance to the situation Fortas faced. There can be no disputing that the current situation is simply unprecedented.

I would also like to point out that Richard Paez, whom some supporters of filibusters have cited, was not only confirmed; he was confirmed only because his Senate opponents restrained themselves and voted to end debate.

Indeed, on numerous occasions when a judicial nominee has enjoyed the support of a majority of Senators, but fewer than the 60 votes necessary under the Senate's cloture rule, the Senate has nevertheless acted to confirm the judicial nominee. This Senate tradition and practice has been applied at every level of the federal judiciary:

Judges confirmed with less than 60 votes (97th-108th Congresses)

Judge	Court	Vote	Date of Vote
J. Harvie Wilkinson III	4th Cir.	58-39	Aug. 9, 1984
Alex Kozinski	9th Cir.	54-43	Nov. 7, 1985
Sidney A. Fitzwater	N.D. Tex.	52-42	Mar. 18, 1986
Daniel A. Manion	7th Cir.	48-46	June 26, 1986
Clarence Thomas	S. Ct.	52-48	Oct. 15, 1991
Susan O. Mollway	D. Haw.	56-34	June 22, 1998
William A. Fletcher	9th Cir.	57-41	Oct. 8, 1998
Richard A. Paez	9th Cir.	59-39	Mar. 9, 2000
Dennis W. Shedd	4th Cir.	55-44	Nov. 19, 2002
Timothy M. Tymkovich	10th Cir.	58-42	April 1, 2003
Jeffrey Sutton	6th Cir.	52-41	April 29, 2003

I'd like to conclude by repeating the old saw, mentioned earlier by Majority Leader Frist, that in Washington, far too often, what matters most is not whether you win or lose, but where you place the blame.

That is certainly the problem with the judicial confirmation process. Instead of fixing the problem, we nurse old grudges, debate mind-numbing statistics, and argue about who hurt whom first, the most, and when.

It is time to end the blame game, fix the problem, and move on. Wasteful and unnecessary delay in the process of selecting judges hurts our justice system and harms all Americans. It is intolerable no matter who occupies the White House. And filibusters are by far the most virulent form of delay imaginable.

As all ten freshman Senators have stated: "None of us were parties to any of the reported past offenses, whether real or perceived. None of us believe that the ill will of the past should dictate the terms and direction of the future. Each of us firmly believes the United States Senate needs a fresh start."

Thank you for the opportunity to testify, Mr. Chairman.