JOHN CORNYN
TEXAS

United States Senate

WASHINGTON, DC 20510–4305

June 17, 2003

The Honorable George W. Bush
The White House
1600 Pennsylvania Avenue, N.W.
Washington, D.C. 20500

Dear Mr. President:

On May 6, 2003, I convened a hearing of the Senate Subcommittee on the Constitution, Civil Rights and Property Rights, because I believe that the judicial confirmation process in the Senate is broken and needs to be fixed. Unfortunately, recent developments threaten to further politicize, rather than to solve, the current judicial confirmation crisis. Speculating that one or more justices of the U.S. Supreme Court may soon announce their intention to retire, Senators Patrick Leahy and Charles Schumer are now demanding a role not only in the *confirmation* process, but also in the *selection* process for appointing Supreme Court justices. As President of the United States, you of course are free to consider suggestions made by any member of the Senate, or indeed by any American. To the extent, however, that Senators Leahy and Schumer intimate that either the Constitution or Senate tradition establish a special role for individual Senators in the process of selecting Supreme Court justices, they are mistaken.

In his June 11 letter, Senator Leahy suggests that Presidents traditionally engage in "consultation with the Senate in advance of nomination" of a Supreme Court justice. He adds that such consultation might even be necessary to "reassure the Senate and the American people that the process of selecting a Supreme Court justice has not become politicized." Senator Schumer goes even further, claiming in his June 10 letter that the Constitution "*mandate[s]* that the Senate advise the President on judicial nominations" (emphasis added). Moreover, to carry out his "constitutional obligation" to "advise the President on whom to nominate," Senator Schumer boldly recommends five individuals for you to nominate to the Supreme Court.

These letters greatly concern me. I have long been a champion of an independent judiciary as a vital institution and as the very foundation of our system of government. Few things concern me more than the threat of politics interfering with our courts and our system of justice, including our system for selecting judges to serve on the federal bench. Few things would politicize our judiciary more than to hand over control of the process for selecting Supreme Court justices to individual members of the United States Senate. Although you are certainly free to entertain suggestions made by Senators Leahy, Schumer, or any other member of the Senate, neither the Constitution nor Senate tradition establishes the wisdom of such a course. Neither the Constitution nor tradition confers any responsibility or authority upon individual Senators to recommend nominees to the Supreme Court, or imposes any obligation upon the President to seek advice from Senators prior to announcing such a nomination.

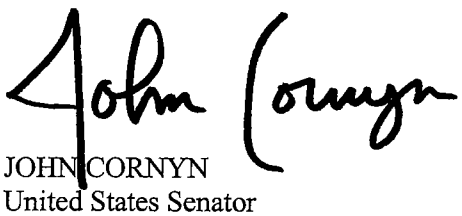
The Constitution nowhere "dictates that federal judges be nominated by the President with the advice and consent of the Senate," as Senator Schumer contends. Instead, the Constitution says that only the President shall nominate. It has long been recognized and understood that the Senate's "Advice and Consent" role is limited to the *appointment*, and not the *nomination*, of judges: the Constitution explicitly states that "[t]he President . . . shall nominate, and by and with the Advice and Consent of the Senate, shall appoint . . . Judges." Much is made of the word "Advice," but the Advice and Consent Clause establishes only that the Senate's approval is necessary, but not sufficient, for the President to appoint an individual – just as the Senate's approval is necessary, but not sufficient, for the President to ratify a treaty. The Senate must give advice on a nomination or a treaty submitted by the President, but it is the President who must, both initially and ultimately, decide.

The text of the Constitution therefore contemplates no formal role for the Senate as an institution – let alone individual Senators – to advise on selecting justices of the Supreme Court. As renowned constitutional scholar and historian David Currie has pointed out, President George Washington consulted with the Senate on the negotiation of future treaties, yet "no comparable practice emerged with regard to appointments; from the outset the President simply submitted the names and the Senate voted yes or no. . . . Madison, Jefferson, and Jay all advised Washington not to consult the Senate before making nominations." Alexander Hamilton wrote in *Federalist* No. 76 that "one man of discernment is better fitted to analyze and estimate the peculiar qualities adopted to particular offices than a body of men . . . . In the act of nomination, [the President's] judgment alone would be exercised." Law professors frequently consulted by Senate Democrats have expressed similar views. Professor Cass Sunstein, for example, has agreed that "the Constitution contemplates no formal prenomination advisory role for the Senate but reserves the act of nomination exclusively to the President." Professor Michael Gerhardt has similarly explained that "the Constitution does not mandate any formal prenomination role for the Senate to consult with the president; nor does it impose any obligation on the president to consult with the Senate prior to nominating people to confirmable posts."

Of course, individual Senators, like all Americans, have the right to suggest possible nominees to the Supreme Court. But no one should be confused into believing that the President is in any way bound, as a constitutional, political, or traditional matter, to follow any of those recommendations. Indeed, it is impossible to comprehend how the President would obey the wishes of 100 individual Senators, each of whom might submit their own slate of nominees. Good faith cooperation between the branches, and between both political parties, is of course frequently desirable and helpful to the effective operation of government. But such cooperation must be a two-way street. You have done your part in the judicial selection process by establishing an exceptionally successful system for selecting the finest legal minds in the country to serve on the federal bench. You have insisted upon individuals who understand that the role of a judge is to interpret, and not to make, law. Yet a minority of Senators has poisoned the atmosphere, by conducting unprecedented and dangerous filibusters of judicial nominees, and by falsely accusing certain judicial nominees of falling outside the mainstream of American jurisprudence. It is difficult to imagine how, given the current environment, there could be good faith consultation with certain Senators on a matter as important as a Supreme Court vacancy.

As President, you of course have the discretion to consider suggestions made by any American, including any individual member of the Senate, in the course of selecting a Supreme Court nominee. But the only role expressly contemplated by the Constitution, and recommended by tradition, in the nomination of Supreme Court justices is the President's and the President's alone. The preferences of any individual Senator should not distract any President from his constitutional responsibility to select individuals who are committed to faithfully interpreting the law on behalf of the American people.

Sincerely,



JOHN CORNYN
United States Senator

History confirms Judge Edwards's constitutional interpretation. A Senate majority has never been denied its constitutional right to confirm judicial nominees--until now. The obstruction is as unprecedented as it is harmful.

Some have cited, to justify the current filibusters, the example of Abe Fortas, whom President Lyndon Johnson nominated to be chief justice in 1968. But majority rule was not under attack in that case. Dogged by allegations of ethical improprieties and bipartisan opposition, Fortas was unable to obtain the votes of 51 senators to prematurely end debate. Three days later, Johnson withdrew the nomination altogether.

That is a far cry from the present situation. After extensive debate, Miguel Estrada, Priscilla Owen and countless others enjoy enthusiastic, bipartisan majority support, yet they face an uncertain future of indefinite debate. By brazenly insisting, as Nevada's Harry Reid--the Senate's second-ranking Democrat--has said, that "there is not a number [of hours] in the universe that would be sufficient" for debate on certain nominees, Democrat leaders admit they are using the filibuster not to ensure adequate debate, but to change the Constitution by imposing a supermajority requirement for judicial confirmations.

Whether unconstitutional or merely destructive to our political system, the current confirmation crisis cries out for reform. As all 10 freshman senators, myself included, stated last week in a letter to Senate leadership, "we are united in our concern that the judicial confirmation process is broken and needs to be fixed." Veteran senators from both parties express similar sentiments.

Accordingly, today's hearing will explore various reform proposals:

• Sen. Zell Miller suggests--as did Sens. Harkin, Lieberman and 17 other Democrats in 1995--that the 60-vote rule for ending debate be reduced incrementally with each succeeding vote, until the rule reaches 51 votes.

• President Bush and Sens. Arlen Specter and Patrick Leahy have urged the imposition of strict time deadlines for the Senate to hold hearings and vote on judicial nominees.

• Sen. Charles Schumer advocates an overhaul of the nomination process by eliminating the president's appointment power and instead giving President Bush and Sen. Daschle "equal roles in picking the judge-pickers."

These proposals will be debated. What's important is that these public officials acknowledge the crisis and urge reform.

The judicial confirmation process has reached the bottom of a decades-long downward spiral. Our current state of affairs is neither fair nor representative of the bipartisan majority of this body. For democracy to work, and for the constitutional principle of majority rule to prevail, this obstructionism must end, and we must bring matters to a vote. As Sen. Henry Cabot Lodge famously said of filibusters: "To vote without debating is perilous, but to debate and never vote is imbecile." Two years is too long. The Senate needs a fresh start.

Mr. Cornyn is a senator from Texas and chairman of the Senate Subcommittee on the Constitution. He served previously on the Supreme Court of Texas, and as the state's attorney general.

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