Summary of Testimony of Lee Rawls
Senate Rules Committee, June 23, 2010

The filibuster is the source of both the United States Senate's uniqueness and genius. The filibuster, by providing "continuous resistance" within the American legislative process, results in the virtues of bipartisanship, moderation, continuity and consensus. Any change to the rules surrounding the filibuster will unalterably change the nature and genius of the .Senate. The value the filibuster provides to the legislative process is also found in the nominations process. Because of their lifetime appointments, the filibuster is an appropriate tool for the vetting process of the federal judiciary. With respect to executive branch nominations, the fundamental problem is that the Senate presently requires that too many nominees be scrutinized under its Constitutional power of "Advice and Consent."

Testimony of Lee Rawls
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Before the
Committee on Rules
U.S. Senate
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"These opposed and conflicting interests which you considered as so great a blemish in your old and present constitution interpose a salutary check to all precipitate resolutions. They render deliberation a matter not of choice, but of necessity; " Edmund Burke

"the disposition of people to impose their own opinions can only be restrained by an opposing power." John Stuart Mill

"Partisan competition has been at the center of our struggle to advance as a people and as a nation. It has been our most important engine for adaption and change – one that remains in full motion." John Hilley (Chief of Staff to Majority Leader Senator Mitchell, and Legislative Affairs Director for President Clinton)

Chairman Schumer, Ranking Member Bennett and members of the Committee. My name is Lee Rawls and I am currently a member of the faculty at the National War College. I appreciate the opportunity to testify today on the relationship of the filibuster to the nominations process. Before joining the War College faculty, I was Chief of Staff at the FBI, but I am here today because of my previous life as Chief of Staff to Senator Frist when he was Senate Majority Leader and also as an Assistant Attorney General for Legislative Affairs at the Department of Justice in the early 1990's. Among my responsibilities at the Department were nominations for the Federal Judiciary, along with nominees for all the senior positions at the Department itself, including that of Attorney General.

I have opened my prepared remarks with several quotes to telegraph my general view of the value of the filibuster, and to preclude me from having to inflict my full philosophical theories of the filibuster on the members. Moreover, my longer musings can be found in my 2009 book In Praise of Deadlock – whose title captures much of my thinking.

Instead, I will open with a quote from the famed journalist Eric Sevareid, who wisely noted that "the chief cause of problems is solutions". I have taken a look at the Committee's previous hearings on the filibuster which in the aggregate present a

thorough review of the filibuster and during which many former members, scholars and practitioners have offered a wide range of possible solutions. My advice to the Committee on these proposals comes down to one word: Don't.

At the War College, we train the senior military commanders who attend to ask one question at the start of any discussion on a problem: So What? What is it about a situation that demands a remedy, and what assurances are there that the proposed solution will not make the problem worse.

The filibuster is a perfect candidate for this line of questioning. The Committee has been told that both partisanship and the use of the filibuster are on the rise. You have been told that the American legislative system is "broken", that the nominations process, particularly for the federal judiciary is in disarray, and that strong medicine is necessary to cure the situation.

Let me make 5 points in response, and leave any nuances to questions the members of the Committee may have.

1. Any legislative system that in the face of a deep financial recession and two wars that can enact in the space of two years TARP legislation, $750 billion dollars in stimulus funding, a major overhaul of the world's largest health care system and is preparing to enact a far-reaching reform of its financial system is by definition not broken. Moreover, any nomination process that has not had a single nominee for the federal judiciary rejected as the result of an unsuccessful cloture vote is by definition not in disarray.

2. If rising partisanship is a concern, the sole source in the entire American legislative system of bipartisanship, moderation, continuity and consensus is found in the United States Senate because of the role of the filibuster. The leverage provided to the minority by the filibuster is a two-sided coin. On one side it is the source of bipartisanship throughout the entire legislative process. On the other, it slows down the legislative process that in turn leads to inaccurate cries of "gridlock" which are loudly echoed by the press. In Burke's words, quoted above, the filibuster renders deliberation a "matter of necessity, not choice". This moderating, consensus forming role of the filibuster has been going on for 170 years. As Sarah Binder told the committee, organized use of the filibuster by the political parties started in the 1840's, and as Senator Byrd noted in his remarks, "bitter partisan periods in our history are nothing new." In fact, scholars note that parts of the 19th century were clearly more partisan than today.

3. The United States Senate is the most intricate legislative body in the known universe, unique for its permissive rules. At the core of its genius is its ability to moderate a large number of vital political forces all of which have their dark side For example, the filibuster is an essential element in moderating the extremes of our competitive party system. It also moderates the hubris and moral aggression noted by the Mill quote above in those who actually make the rules. Of particular importance it lessens the risks of united government when one party "hijacks" the Constitution's separation of power

system and in the name of all Americans exercises power in all branches of government at the same time.

The First amendment explicitly provides for special interests to engage in the political process. These groups range from economic interests to single-interest advocates, all of whom have a narrow focus, and who usually are not interested in compromise. The filibuster, by providing resistance within the legislative system, often smoothes out the worst abuses of this special interest participation. .Thus, although the First Amendment guarantees special interest participation, it is often the filibuster that protects the public interest in the legislative process. Professor Smith in his remarks to the Committee lamented the "obstruct and restrict syndrome" that he believes the filibuster has caused. From my vantage point as a practitioner within the system, I believe that the "continuous resistance" that the filibuster provides on a daily basis to these vital, but occasionally dangerous forces, is the essential component in the genius of the United States Senate.

4. The above points lead to the conclusion that if you change the filibuster rule, you unalterably change the nature of the Senate. Chairman Schumer has been quite fair-minded in his quest for answers to the filibuster riddle. In particular, because he has been both in the majority and minority, he has asked the right question as to whether one's views of the filibuster are completely dependent on one's political status of the moment, or whether there are more fundamental issues at stake. I believe such larger issues are at stake. These relate to what it means to have a full and productive Senate career. Such a career requires continuous involvement; namely a full body of legislative work that gives personal satisfaction and contributes to the public needs of the American people. Moreover, such a career requires the full engagement of one's skills whether one is in the majority or minority. A career where minority status means effective banishment falls short of these criteria. In fact, for those who have had acknowledged successful careers, such as the late Senator Kennedy or the recently retired Senator Domenici, the key to their success has often been the important role they played as leaders of the minority skillfully negotiating with the majority.

For the members of the minority, the value of filibuster in achieving a full career is obvious. I believe it is worth noting that the members of the Majority also run some risks if the filibuster were abolished. The first is that the power of the president would be substantially increased, particularly in united government. Given his visibility and power to influence grass roots forces, members of a Senate devoid of a filibuster would be under increased pressure to toe the line of a president of the same party.

Members of the Senate Majority may not appreciate how much they are in control of the entire legislative machine in the American system. The resistance provided by the Minority makes their political judgments the essential ingredient in establishing and implementing legislative strategy. Without such resistance, they will lose their strategic function and their role becomes one of either supporting or opposing the policies of an executive branch of the same party.

The other risk that a Majority party without a filibuster runs is being overwhelmed by the special interests. Every year thousands of bills that reflect strong special interest input are introduced but are not addressed by the Senate because of the filibuster. Absent such a constraint, it is difficult to conceive of the Majority party in the Senate resisting the whole range of special interest legislation that is introduced on an annual basis. For Majority Senators who do not conceive of themselves as handmaidens of special interests, this change would be an unwelcome shock.

5. With these first principles in mind, let me make 2 concluding remarks on the nominations process.

a. The virtues of the filibuster in fostering moderation and consensus are important in picking the federal judiciary. These are lifetime posts vested with immense importance in our system. Trust is perhaps the most important element in the Rule of Law which the federal judiciary overseas. Brilliance and other intellectual virtues are second order virtues, particularly if they come wrapped in strong ideological packaging. Anything that forces matters to the middle is a virtue, and the filibuster certainly does that. Every member here has had discussions as to whether a nominee will face opposition and what a minority armed with a filibuster is likely to do.

In addition, the leverage provided by the filibuster allows for a more thorough examination of candidates for the federal bench. Documents, extensive hearings, additional face-to-face meetings, all these flow form the leverage of a minority armed with the filibuster. As with any tool, or instrument, mistakes and abuses occur. But my view is that in the aggregate, given the importance of the federal judiciary, and their lifetime appointments, the leverage of the filibuster provides for a more thorough vetting process of the federal judiciary than a process without such leverage.

As an aside, I also wonder how much of an issue this is at present. During 2003-4 when I was Senator Frist's Chief of Staff, the Senate was split 51-49. We spent a lot of floor time on judicial nominees, winning some and losing some. Today's Majority of 59 votes has a perfect record on judicial cloture votes which leaves me wondering what part of the puzzle I am missing, if any.

b. Some of the same considerations hold for executive branch nominees. Here the problem is numbers. My experience is that the Senate is reasonably prompt in providing the President with his senior cabinet leadership. With exceptions, usually cases where the nominee has self-infllicted problems, the Senate does a good job on the Cabinet. Where matters get off the rails is the mid-level management of the executive branch on which the Senate insists on providing advice and consent. There are a variety of ways to address this issue, but overall the Senate insists on confirming too many nominees. The problem is not the filibuster; it is the Senate's inability to set priorities.

In my own case, I was held up for a period of time with two other nominees after our nominations to the Justice Department. The Senator who held us had a perfectly legitimate beef with the Department, and after some negotiations, the issue was resolved. Since the post of Assistant Attorney General for Legislative Affairs is really a fancy title

for flak-catcher, it seemed to me that the elaborate gyrations surrounding my nomination was wasted effort. In my view, if the nomination is important enough for a Senator to personally meet with the nominee and attend the confirmation hearing then the confirmation process is appropriate. If not, then drop the Senate confirmation requirement. In my case, no courtesy visits were asked for, and one poor junior member of the committee had to be dragooned into chairing the hearing. If following such an effort at establishing priorities to determine which positions actually need confirmation, there is still a substantial problem, then perhaps other measures could be considered.

Having taken more than my fair share of time, I am prepared to answer any questions that the committee may have.

Biography of Lee Rawls

Lee Rawls joined the faculty of the National War College after serving as Chief of Staff to the Director of the FBI. During his 40 years in Washington, he also served as Chief of Staff to Senate Majority Leader Bill Frist, Chief of Staff to Senator Pete V. Domenici and Assistant Attorney General for Legislative Affairs at the U.S. Department of Justice.

Previously, he has been a partner in the law firms of Vinson and Elkins and Baker, Donaldson, whose Washington office he opened in 1988. For 17 years he has taught as an adjunct professor at the Thomas Jefferson School of Public Policy at the College of William and Mary. His book In Praise of Deadlock was published in 2009 by the Woodrow Wilson Center for International Scholars and The Johns Hopkins University press.

He received his B.A. from Princeton University (1966), earned his J.D. from George Washington University (1979), and is a member of the D.C. Bar.