

May 16, 2003

Senators Bill Frist and Tom Daschle
U.S. Capitol
Washington, DC 20510

Dear Senators Frist and Daschle:

As law professors, we write to express our opinion that the Senate's use of the filibuster with respect to both legislation and nominations is constitutional. Both the text of the Constitution and historical practices strongly support the constitutionality of the filibuster. Article I, Section 5 expressly provides, "Each House may determine the Rules of its Proceedings." Article I, Section 5 plainly authorizes the Senate to make procedural rules. It empowers the Senate as well to delegate what is sometimes final authority over the fate of legislation and nominations to committees and their chairs. The textual authority for the filibuster is precisely the same as those for these other measures. If these measures are constitutional, then so too is the filibuster.

The Supreme Court has repeatedly emphasized the relevance of historical practices for determining constitutionality. The filibuster, understood as protracted debate precluding final Senate consideration of a legislative matter, began early in the history of the Republic. It has been used frequently by senators from both parties with respect to nominations as well as legislation. In fact, it has been used effectively to defeat presidential nominations, including the nominations of Abe Fortas to be Chief Justice of the United States in 1968, Sam Brown to be Ambassador in 1994, and Henry Foster to be Surgeon General in 1995. This longstanding historical practice weighs heavily in support of the filibuster's constitutionality.

The filibuster reflects the Senate's longstanding respect for minority views and underscores the unique role of the Senate as a part of American democracy. It has the salutary effect of giving an incentive to all sides to seek compromise on issues where points of view are sharply divided. With regard to nominations to an independent branch of government such as the judiciary, the filibuster encourages the President to find common ground with the Senate by nominating individuals who can garner consensus.

For these and other reasons, we conclude the filibuster is constitutional.

Very truly yours,

Professor Vikram Amar
University of California
Hastings College of the Law

Anthony G. Amsterdam
University Professor and Professor of Law
New York University School of Law

Frank Anechiarico
Visiting Scholar, New York University
School of Law
Maynard-Knox Professor of Government
And Law, Hamilton College

Frank Askin
Professor and Robert Knowlton Scholar
Rutgers Law School - Newark

David Barron
Assistant Professor
Harvard University Law School

Vincent Blasi
D. Lurton Mabee, Jr. Professor and Hunton
& Williams Res. Prof.
University of Virginia School of Law
and Corliss Lamont Professor of Civil Liberties, Columbia Law School

Ira Mark Bloom
Justice David Josiah Brewer Distinguished
Professor of Law
Albany Law School

Vincent M. Bonventre
Professor of Law
Albany Law School

Sarah E. Burns
Professor of Law
New York University School of Law

Oscar G. Chase
Professor of Law
New York University School of Law

Erwin Chemerinsky
Sydney M. Irmas Professor of Public Interest
Law, Legal Ethics & Pol. Sci.
University of Southern California Law School

Stephen Clark
Associate Professor of Law (as of 5/30/2003)
Albany Law School

Michael Kent Curtis
Professor of Law
Wake Forest University School of Law

Christine Desan
Professor of Law
Harvard Law School

Laura Dickinson
Associate Professor
University of Connecticut Law School

Norman Dorsen
Stokes Professor of Law and Counselor to the
President
New York University School of Law

David R. Dow
Professor of Law
University of Houston Law Center

Mary L. Dudziak
Judge Edward J. and Ruey L. Guirado
Professor of Law and History
University of Southern California Law School

Garrett Epps
Associate Professor
University of Oregon Law School

Martin S. Flaherty
Professor of Law
Co-Director, Joseph R. Crowley Program in
International Human Rights
Fordham Law School

Michael J. Gerhardt
Arthur B. Hanson Professor
The College of William and Mary Law School

Charles G. Geyh
Professor of Law
Indiana University School of Law-Bloomington

Rachel Godsil
Associate Professor
Seton Hall Law School

Stephen E. Gottlieb
Professor of Law
Albany Law School

H. Kent Greenfield
Associate Professor
Boston College Law School

Joel Goldstein
Professor and Associate Dean,
Saint Louis University Law School

Martin Guggenheim
Clinical Professor & Director, Clinical &
Advocacy Program
New York University School of Law

Peter Halewood
Professor of Law
Albany Law School, Union University

Lynne N. Henderson
Professor of Law
Boyd School of Law – University of Nevada,
Las Vegas

Dawn E. Johnson
Associate Professor
Indiana University School of Law-Bloomington

Pamela S. Karlan
Kenneth & Harle Montgomery Professor of Public Interest Law
Stanford University School of Law

Joseph E. Kennedy
Assistant Professor
University of North Carolina School of Law

Larry D. Kramer
Samuel Tilden Professor
New York University Law School

Sylvia A. Law
Elizabeth K. Dollard Professor of Law
Medicine and Psychiatry
New York University Law School

Timothy D. Lytton
Professor of Law
Albany Law School

Hugh Macgill
Professor of Law
University of Connecticut School of Law

Michael T. Madison
Professor of Law
Fordham University School of Law

Deborah C. Malamud
Professor of Law
The University of Michigan Law School

William P. Marshall
Kenan Professor
University of North Carolina School of Law

Victoria F. Nourse
Visiting Professor, New York University
School of Law
Professor, University of Wisconsin

John B. Oakley
Professor of Law
University of California-Davis School of Law

Todd D. Peterson
Professor of Law
George Washington University Law School.

Richard A. Primus
Assistant Professor
The University of Michigan Law School

Martha Rayner
Associate Clinical Professor of Law
Fordham University School of Law

Judith Resnik
Arthur Liman Professor
Yale Law School

David A.J. Richards
Edwin D. Webb Professor of Law
New York University School of Law

Kermit Roosevelt
Assistant Professor
University of Pennsylvania Law School

Thomas D. Rowe, Jr.
Elvin R. Latty Professor of Law
Duke University Law School

Thomas O. Sargentich
Professor of Law
American University-Washington College
of Law

Leo Schmolka
Professor of Law
New York University School of Law

Christopher H. Schroeder
Charles S. Murphy Professor & Professor,
Public Policy Studies
Duke University School of Law

Herman Schwartz
Professor of Law
American University-Washington College
of Law

Stephen J. Schulhofer
Professor of Law
New York University School of Law

Aviam Soifer
Professor of Law
Boston College Law School

Girardeau A. Spann
Professor of Law
Georgetown University Law Center

Juliet Stumpf
Acting Assistant Professor of Lawyering
New York University Law School

Andrew E. Taslitz
Professor of Law
Howard University Law School

Kim Taylor-Thompson
Professor of Law
New York University School of Law

Ruti G. Teitel
Ernst Stiefel Professor of Comparative Law
New York Law School

William J. Turner
Willie Person Mangum Professor
University of North Carolina School of Law

Kathryn R. Urbonya
Professor of Law
The College of William and Mary Law School

Stephen Wermiel
Associate Professor of Law
American University Washington College
of Law

Robin West
Professor of Law
Georgetown University Law School

Adam Winkler
Acting Professor of Law
University of California at Los Angeles
School of Law