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BREAKING THE JUDICIAL NOMINATIONS AND CONFIRMATIONS LOGJAM

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PARTICIPANTS:

PANEL TWO - PROSPECTS FOR CHANGE: REFORMING SENATE RULES SURROUNDING CONFIRMATION

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PROCEEDINGS

MR. MANN: That first panel was so engaging, it continues to this moment. I want to -- first of all, I'm Tom Mann, a senior fellow here at Brookings and I'm very pleased to moderate this second panel. I was in the audience for the first. I found it sobering and instructive. The one thing I didn't find was very encouraging or upbeat; I didn't come out of it with a sense of how we get out of this mess.

In fact, it reminds me of the broader problem of American politics today and I think one of the questions our panel will be wrestling with is just how distinctive is the particular problem of the nomination/confirmation process of Federal judges and justices and how much of it is a part of the broader fabric of American politics. Forty-one years of watching, analyzing American politics, I've -- I haven't seen it at as low a point in my own personal view with the triumph of ideology and partisanship over institutional responsibilities.

A few years ago with a friend I directed some of that fire at the Congress, but it -- the roots of the problem are deeply embedded in our political system, but the problems are manifest in different ways across the institutions and I think the organizers of this conference were quite right to call attention to the particular problems in the judiciary in the administration of justice when delays in filling vacancies on the Court and the build up of workload to the breaking point creates particular problems in a system that prides itself on adherence to the rule of law. You know, it's obligatory for politicians to talk about American exceptionalism, you know, we are the best of all possible political systems, and of course we have the best healthcare and we have the best everything. Well, it just isn't so. We have some serious problems in our politics and this afternoon in our second panel we're going to try to move from the problem to see if in fact we can't detect some elements of the forces that are driving this that might be amenable to some amelioration, whether it's small time institutional fixes, whether it's the use of shame, whether in fact it really is going to require some broader transformation in the party system and in the way in which elected officials approach their job.

That's our challenge here today and we've got a terrific group of people who are

going to address that. We will, as in the first panel, begin with some initial presentations, follow with a discussion amongst ourselves, and then move to questions and comments from the audience. We will begin with Eleanor or Eldie Acheson who is vice president, general counsel, and corporate secretary of Amtrak. From 1993 to 2001 she was the assistant attorney general for the Office of Policy Development in the Justice Department and in that capacity managed the department's role in the Clinton administration's judicial appointments process.

Eldie, we're delighted to have you here.

Then to my far left, Manus Cooney who served for 13 years as chief counsel and staff director of the Senate Judiciary Committee when it was chaired by Senator Orrin Hatch of Utah.

And finally, my colleague at Brookings, a senior fellow at Brookings and professor of political science, Sarah Binder.

The rest of their bios is available to you in the materials that have been distributed. Eldie, get us going.

MS. ACHESON: Okay. Thank you very much, Tom. It's very good to be here.

As I see it, with the current situation, there are three problems and I'll address them in an overview in ascending order of difficulty and challenge to remedy. First and most easily remedied is the administration's challenges. Notwithstanding what the President said during the campaign, it is now, we have to sadly acknowledge, clear that once in office, or even before he came into office, he had not established the priority or invested the resources necessary to build the infrastructure for the judicial appointment process and to focus on sort of the biggest dynamic sword that there is in that -- there are two -- one is nominations and to keep the nominations pipeline up to the Senate full at all times. Your highest calling is to have a nominee for every vacancy and that is absolutely critical because if you do not have that kind of pressure, whatever it is you run into, you do not have standing to complain about a lot, and you need it particularly if you're coming into office with a Senate that your party controls, because that's your opportunity for blowing through as many nomination processes as possible and getting as many people through and in anticipation of the first midterm and other things which, as we all

know, don't always go the way of the President in office.

And your second big, sort of, light sword that you have is the President himself, the President talking all the time about judicial appointments and how important they are in a particular context, which I will get to later, and yet -- as yet, unfortunately, we have heard nothing from President Obama since his inauguration. We heard from the current White House counsel for the first time when he spoke to ACS, I think in acknowledgement, sort of muted, of the Executive Branch's slowness to get started, but also a recognition of the impact of the problem and they clearly are going to get cracking about this.

I think for those of us who are, you know, at least in my case, Democrats and support Democratic presidents, is that the person who wrote the playbook for how this needs to be done is George W. Bush, and if you read in judicature the four years -- or actually the eight years, the -- Elliot Slotnick at Ohio State University and Sheldon Goldman at University of Massachusetts write these very, very arms length, sort of no political bias, no ideological bias, but, you know, examinations of the judicial appointment processes, when you step back and read the last one they did that sums up the entire GWB administration, you see what was done there and it is the game book, the playbook for how you have to do this. You have to start thinking you're going to be elected president. You have to have people lined up. You have to have a really good process that's sufficiently staffed and led by people who know what they're doing. And you have to start out -- I think a comment was made and maybe, Ben, you made it, but a comment was made earlier about, you know, we've gotten into this business of presidents sort of refusing to offer an olive branch to the -- or, you know, they want to whack the prior administration as the parties switch off, but, again, you have to give credit to G. W. Bush who came in and on March, whatever it was, 13th, you know, five months or four months after he was inaugurated had this picture in the East Room of all these Circuit Court nominees, they weren't even District Court nominees, and two of them were Democrats and one of those Democrats was a total nod to who got whacked in the last go-round of the administration, and it was a brilliant thing to do politically whether or not he intended to keep that up.

So, that's something that is part of the problem here. This administration can fix

it for sure if they are now realizing what they need to do. The unrecoverable part, it's highly remediable, but the unrecoverable part is the first Congress that they have lost.

The second problem, which Manus will be our guru on having spent all the time that he did in the position he did in the Senate, but the second problem is clearly the Senate and, you know, it's just not possible to live in the United States and not think that the Senate of the United States is just a mess, whether you're on the left or you're on the right, it is just a -- just a disaster. And it's so depressing when, you know, particularly in this context, you look and you see that much advice on both sides is given, you read blogs and you read this and you've got people saying to the Republicans, okay, this is how you continue to screw President Obama and you stall his nominees and you do this and then there are people on the left who are writing about, well, if the Republicans are going to do this, if the minority is going to do this in the Senate, then we need to do this. Make them "feel the pain" was one of the things that I read. And in doing this all you were doing is essentially contributing to the guerilla warfare manual that has been developed over the years to establish yet new tactics and new fronts in the increasingly collateral warfare that has taken the Senate far from its duty to exercise its advise and consent responsibility for Federal judges.

The other thing that is equally depressing that you read all the time is much dredging up of Senate rules and process history by both, again, the majority and the minority, to illuminate, rationalize, or justify action or inaction. And all that does, you know, whatever position or so-called principle all of that is being brought forward in aid of, is to further demonstrate that the Senate has got to fast-forward itself quickly into the 21st century and reform its processes to achieve transparency, greater efficiency, consideration, and a vote on nominees, on those nominees the administration chooses to press. And I don't think that so much because nominees are entitled to a vote, that's because the Constitution, I believe, really means that the Senate needs to give those people a vote. That's part of their duty. They can advise and they can choose not to consent, but they ought to do it. That's the weight of their constitutional responsibility, and they owe it to the courts as we heard from judges -- Chief Judge Lamberth and Judge Chief Judge Furgeson.

But none of that appears to be, you know, where they're headed. If they were, if you had people in the Senate -- and I think there are some new members who seem to be understanding that this is, as somebody said earlier, a race to the bottom, and mutual immolation bringing the court system down with it is really what, in the end, will come. What needs to happen is a reform process that establishes a regular order of action at the committee and on the floor, regular hearings -- regularly scheduled hearings -- for judges and that will put pressure on the Executive Branch to get people up there. Regular committee votes, yes, there can be holds of a week and so forth here and there, but it ought to be a known feature of the landscape. Somebody has a problem, they can be held over a week, but that's it. Know that by the time somebody's had a hearing, they've already been at the committee for about a month, sometimes a lot longer than that. There's plenty of time to air issues that come up.

There should be reasonable time limits on not only committee holds -- holdovers or holds, but holds on the floor. And, finally, there's got to be transparency, not only about the objector, who the objector is, the person who's got the hold, but what the objection is, because in my time, I heard many, many times the objection was a point of personal privilege by a senator and sometimes senators shared what those points of personal privilege are, and I certainly have no intention of disclosing some of the things I heard, but I think in probably the 12 or 15 times I heard somebody explain what the basis of, maybe three of those things went to some qualification suitability of the then nominee. A lot of them were things that if your child came home from sixth grade and said, I don't like X because of Y, you would sit them down and have a conversation with them about, sort of, maturity and growing up and letting go. Letting go is something senators are not good at and they have very, very long memories, and it is ridiculous to have a process that ends a nomination based on some of the things I've heard. It doesn't happen often, but it's there, and that goes back to what an administration needs to do, an administration doing this the right way.

Mr. Smith asked about resources and the time spent in due diligence of candidates, this is exactly what that is for, is trying to smoke out everything about that candidate that does go to qualification, suitability, also confirmability, and try to engage with senators and

their staffs to get problems -- to air problems and determine whether they're going to be showstoppers or not. But that process of reform needs to happen so that it can lead, over some reasonable period of time, to a vote -- vote up, or vote down, but to a vote, and again, I don't think that's so much about the nominee although they have a huge interest in it given everything they have exposed themselves to in this, but it's absolutely about the Senate's responsibility and the court.

And the last problem that I see, which frankly is the most pervasive and damaging and difficult to remedy, and we've talked about, you know, one aspect of it in a very, very good panel -- the politicization and this fear that somehow any appointment is tilting one's -- the whole court system, sort of, more in favor of one ideology, one philosophy, one party, than another. But what's really gotten implicated in all of this, I think, which is another way to look at the problem, is that there is this pervasive, damaging, highly difficult to remedy problem of a widening, a very large and widening failure to understand, lack of understanding of, and regard for the public administration of justice and for the critical core element, the judges, are in the fair, timely, and efficient administration of justice, total lack of understanding about the people who put themselves forward as candidates and nominees, and also what judges really do.

I think you heard, from Judge Furgeson and Judge Lamberth, some very, very compellingly illustrated examples of the kind of really critically important, not very glamorous except to the people involved, hard work the judges do. And one of the things that I had the privilege of doing in my job at the Justice Department was not only working on the judicial appointment process, but representing the Department on judicial conference committees, whether it was civil rules or the Criminal Law Committee or this committee or that committee, often there was a substantive practice area -- assistant attorney general, but the attorney general had asked that because we were working on judicial appointments, that seemed like a very good connection. And so I saw -- I spent eight years, seven years maybe, plus, of meetings of the Criminal Law Committee, for example, which is a group of judges who were appointed by the Judicial Conference, to worry about a lot of institutional problems with the federal criminal issues and institutions. And they spent -- just to pick a problem -- they spent more time focused on, with

the Bureau of Prisons and other institutions and trying to get resources for the Congress -- on the whole, then, hugely pressing issue of suitable institutions for juvenile offenders in the federal criminal law system, of which there was a hugely growing number with a highly disproportionate number of those people being Native American. And as you heard this -- and I could illustrate with other kinds of things -- being discussed, there was no way you could tell what judge in that room was appointed by a Democratic president or a Republican president. They had a huge, not just institutional concern, but personal compassion for what was happening to those people.

And, you know, you can bring up any administration of justice type of problem -- judges just don't sit in their courtrooms and decide cases. They have far -- not more important, but other and equally significant in other ways, administration responsibilities, particularly those who serve on committees like that and they are a lot of them. But there seems to be a total failure to grasp in the Senate that people have lost sight of -- maybe that's the issue -- what's really at stake here? And certainly the judiciary is not responsible for this. The judiciary is a fairly quiet body of the three branches.

The executive certainly has some responsibility to the extent it fails in its duty to have nominations up there for every vacancy, but it really is the Senate, and it's reflected in and illustrated by the politicization of the judicial appointment process and the courts generally, the stalling of the process, which has completely eroded the candidate base. I know from my experience, Rachel Brand, who was at the White House the first four years of the Bush administration and then at Justice, doing essentially this job, knew this from her experience. Susan Davies, who's up in the White House counsel now, leading the charge and doing her level best has had this from her experience.

It is actually not the pay, it is the process of the due diligence, the sort of vetting of the candidate and the nomination process that drives people away from this system and most particularly the people, who Judge Furgeson was talking about, from the private sector. So, that is a hugely damaging thing.

The attacking of courts and judges for decisions -- I think, you know, you might all remember the first Congress of the Bush administration, there was a big flare up and hoopla

about sentencing and they were dragging up federal judges and subpoenaing records from the courts of federal judges. I mean, you know, not the way to go I would have thought. Limiting jurisdiction, as Ben mentioned, that's been going on of some time. Fights over how to limit jurisdiction of the federal courts and, clearly, the failure to pay federal judges the salary commensurate with their duties and responsibilities under the Constitution, or even to allow them a cola. Now, I don't think that is anything necessarily that keeps too many people out of it. It's not something I heard. It may be something that people are hearing more today, but it's less about what that does to the candidate pool. It's more, to me, about what that says about the Senate, and actually the Congress as a whole, because that implicates the House.

And a fix for this is really -- this is a big problem, and it's going to require a big fix led by big people and in my book that means Presidents should not just start talking about his nominees and how important it is that they get through. The President's got to take on this issue. He's got to take it on with Chief Justice Roberts, retired justice -- anybody else he can get from the current Supreme Court who's interested, and there may be some, retired justices of the court, present if they can do it, although they may be too mired in their own personal back and forth, but former majority and minority leaders of the Senate and the Judiciary Committee and the ABA, state bar leaderships, and, I think as the federal bar has suggested, the business community. But there needs to be a very big coalition to talk about this because it is a very significant problem.

And that's the end of my initial thing.

MR. MANN: But only the beginning of your contribution at this panel. Thank you so much.

Okay, Manus, we've heard the Senate is a mess.

MR. COONEY: Look, I think -- thank you, first of all, for having me here. And I will say that, you know, I had the good fortune of working with Eldie for a number of years on the Hill and I found her to be a very straightforward and thorough person and I think where there's a will to work together things can get achieved whether it's -- importantly in this area you need a will, and on the part of both the executive and legislative branches of government. I'm not sure that always exists and I think that that's an important thing to bear in mind.

I think -- fundamentally, I think it's important to recognize that not everything in Washington can be a priority. Not everything can be a priority ever, but particularly when it comes to politics. Time is limited; floor time is even more limited. So, you know, the question then to ask is, you know, is this a priority in Washington these days, because Congress and Washington can and do respond to priorities and the electoral repercussions of acting or failing to act have a very good way of defining what is and what is not a priority. And when you add to the fact the more the federal government takes on as a responsibility, the harder it is to make one particular set of issues priorities as well.

So, the question one has to ask right now is, is the judicial appointments and confirmation process a priority in Washington? I would say citing some of what Eldie just pointed out that it is not. You know, first of all you need presidential -- you ask about any other issue, public policy issue, you have to have presidential leadership, whether it's healthcare reform, the budget, what have you. On this issue, there is not sufficient presidential leadership to force a focusing of the mind of policymakers to try to reach agreement. There are nominees for less than half of the vacancies on the Federal Court, and frankly, citing parochial definitions of judicial emergency that are -- just don't pass the straight face test on Capital Hill is not sufficient to suggest -- to tell people in Washington that they have to -- in the Senate, much less -- that they need to change the way in which they're doing things.

I would say that, as Eldie put it -- pointed out -- that at least in so far as the Bush administration, you know, Bush tried to set a tone early on. He had people ready to go that were in the pipeline. There was a leadership and resource commitment. He hired people up and put them in positions of authority to cut the deals that needed to be cut. He used the bully pulpit and he made the floor a priority. We saw the Gang of Twelve and the threatening of the "nuclear option" to try to force a deal on judges. Again, with presidential leadership there comes a -- there is a tendency for senators to start focusing on those issues that the President is speaking to.

I would say that with respect to this, the first thing one would need if we want to see some change in the manner in which judges -- let's just say the time it takes to confirm a judge and the process by which that confirmation takes place, you would need to make it a

priority and the President would need to do so. The bar, judges, and think tanks whose attention turns to these things on a revolving basis, depending upon who's in the Executive Branch, despite the impressive credentials of everyone who may be in that room are not going to move the needle at all, frankly, on this issue simply because you're competing with so many other more pressing electorally significant matters.

So, I agree with Eldie, it's a big problem to the extent that it's keeping more qualified people from submitting their names. I would agree that it's unfair to the nominees, whether they be Democrat or Republican nominees. You look at the length of time it takes to get from appointment to confirmation, regardless of which President made it, the amount of time it can take in the Senate, just isn't right.

I was recently at an executive business meeting of the Senate Judiciary Committee, the markup, and it was one of the first markups of the new Congress and Senator Leahy, who's the chairman of the committee, gave a statement and speech on the need to move judges. And Senator Grassley, the new ranking member, pulled out his speech and gave a speech on how fast the Republicans have moved in processing judges, and I had happened to be sitting next to a colleague of mine who had the job I had on the Judiciary Committee immediately preceding me and we just started laughing and we just said to one another, you know, it's the same speeches, just different people giving them. And it's true. Things haven't changed significantly except for the people making the arguments. Unfortunately, you know, at the end -- when you look at it, unlike legislation -- Senator Hatch, when I worked for him, I always used to say that you can't lose sight of the fact that you're dealing with individuals and not legislation, not ideas, and these people have careers, they have reputations, they have families and the like, and they deserve better.

So, you know, Senator Hatch, at least, tried to make a concerted effort to engage and work with the administration where possible and, frankly, there was very little up side to moving more nominees. In fact, you know, he probably got more criticism from the right than he did from the left for the number of nominees he had moved.

So, I agree that in many ways it is a big problem but I would not say -- I would not

suggest that it's only a problem of the Senate. The administration needs to send folks forward as well. I think whatever rules apply for one party in power need to apply to the other party in power. To suggest that we need to change the filibuster rules today so that Democratic nominees only need 50 votes but Republican nominees need 60 votes is just ridiculous.

So, it's going to require a big fix, a long-term fix, and something that can be enforced regardless of who's in power, whichever party it may be, and so you do need to add other stakeholders. I think you need to bring in the business community. I think you need to bring in any and all folks, representatives, who would be impacted by this and if you're serious about addressing this, dedicate the resources, time, and talent it takes to try to move toward some sort of solution that's in the best interest of the country.

Thank you.

MR. MANN: Manus, thank you very much. Sarah Binder?

MS. BINDER: Thank you very much and thanks for including me. I'd like to make two arguments today about the prospects for change in the new Congress with respect to judicial confirmation politics.

First, if past patterns of and in advise and consent are at all predictive about the current Senate, then I don't think we should expect to see the current logjam broken any time soon. And second, despite the Reed-McConnell handshake on Senate rules and the effort to reign in secret holds on bills and nominations, I'm somewhat skeptical that those steps will really make a difference. It's possible that they couldn't actually make things worse, so I hope, Tom, you weren't counting on me to cheer you up today.

Okay, first, just something on past patterns to see how they might play out in the current Senate. If you picked up a confirmation rate graph on your way in here today, there are a number -- four different elements of the trends here over time that I think are worth taking a moment to think about. Here, first, the most obvious trend, the plummeting confirmation rates over time reaching back from the 1940s to the last Congress ending in December.

Second, not shown on the graph here -- but these are simply confirmation rates - - not shown are the amount of time that Manus referred to from nomination to confirmation.

We've seen rising delays over the years. Early Reagan years, 1980s average about one to two months to confirm nominee. That number doubles in the early Clinton years to four months, on average. It has doubled again in the last Congress, that first Obama congress. We're talking on average for nominees who do eventually get confirmed, an eight or nine month wait for confirmation which matched the statistic by the end of the Clinton years.

And we can come back to this. I don't think we should expect the Senate to rubber stamp nominees. I think delay, in fact, often taking time to scrutinize nominees who are going to get lifetime appointments to the bench does make sense, but we do have to wonder about the exponential increase in delay confirmation times over the last 20+ -- 20, 30 years.

The third trend here is that confirmation is particularly tough in presidential election years, as in upcoming 2012. On average since 1940s, 80 percent of appellate court nominees were confirmed in non-presidential election years compared to just over 60 percent of appellate court nominees confirmed when there is a presidential context looming, which you can see in the spikes down every four years here.

The fourth trend here to note here that was touched on in the first panel, I believe, is that conflict has now spilled over to confirmation politics for consideration of district court nominees, nominees which we thought typically, at least looking at the patterns here, were relatively immune to partisan disputes because they really are trial courts, they are not the courts of last resort, and as was pointed out in the last panel, these are not judges making ideological decisions, they are running trials.

So, I think it may be a stretch to say we'd have to see a miraculous turnaround here, but I think it would be somewhat miraculous to see a turn down in the heat over nominations going into a presidential election year when senators from the opposition party have an incentive to drag their feet in hopes of winning back the White House. Democrats have done this historically; you can see it on the graph. Republicans have done it historically as well. As has been pointed out here, there are no innocent parties here when we think about the patterns in advise and consent.

So, first, I'm not too hopeful based on past patterns that this senate will look

terribly different from the ones which have preceded it. Second, just a couple words on the Senate's new procedural agreement. What did, exactly, senators agree to and why do I think -- or, why am I skeptical that it might not have a huge impact here? It's possible that it even might hurt advise and consent process.

So, the Senate adopted a new standing order, not technically a change in its rules, that is aimed at reducing, among other things, the number of holds that senators place on bills and nominations. Just briefly, what is a hold? Think of it as a threat to filibuster. How might that work? The majority leader might make a non-debatable motion to proceed to go into executive session and to call up a particular nomination but then he would need unanimous consent to actually get to an up or down confirmation vote. And at that moment of asking for unanimous consent, a senator on the floor could object or lodge an objection on behalf of a senator who has placed a hold off the Senate floor.

There is no requirement in Senate rules that requires the Senate Majority Leader to respect that hold, however he would need to file cloture if there has been an objection. So, in essence -- and of course that would need 60 votes and a significant number of time to get through -- to get to a cloture vote, and if you don't have a guaranty of 60 votes for confirmation, majority leaders have been hesitant to spend the time to go through the process.

Okay, so what does the new standing order say? Essentially it says that if a senator lodges an objection with his or her own leader from either the majority or the minority party, within 48 hours that senator has to place a notice in the Congressional Record revealing the intention to object should the majority leader go to the floor and ask for unanimous consent. If he or she -- if that senator does not register the objection in the Congressional Record, then whoever is on the floor and who lodges the objection on behalf of that senator, is supposed to name the senator who placed the hold. If not, the hold then gets attributed to the senator who's actually on the floor placing the objection.

What is the likely impact here? Well, we can work through a number of scenarios here and I'm sure Manus would have a sense of how it might actually play out. One possibility is that it works as planned, that is, the objecting senator not only announces an

intention to object, he places is in the Congressional Record. And then what? Well, there isn't anything in the standing order that would require the lifting of the hold, right, it is simply essentially a transparency move with the implication that transparency will have effects of its own. And in theory transparency could either shame a senator, as Tom made reference to, right, we are expecting a different behavior. Perhaps the announcement of a hold will shame that senator into saying, well, maybe these aren't really good points of personal privilege here, as Eldie mentioned, perhaps I need to lift this hold and let the process go through. That's one possible outcome. The other possible outcome is that the senator stands up for the reasons for which he or she placed the hold in the first place. Many senators do have very clear reasons on which to want to delay consideration of moving to a confirmation vote. And in that case I'm not quite sure why I would expect this new standing order to have really any impact on affecting the confirmation rates themselves.

And, most perniciously, is potentially the unintended consequence of requiring transparency on holds which is now that in theory transparency is required I could easily imagine groups on the outside going to a senator and saying, if you really object to that nominee I'd like you to place a hold and put that objection on the record so that we can all see you go on record. In that case I would expect the standing order to increase holds, which would surely, I think, be the unintended consequence of well-intentioned reforms.

All that said, it might work. The process might reduce the more egregious holds for which senators perhaps might be taking a nomination hostage for other valid reasons, to produce attention onto some unrelated issue. It's possible. But I'm not quite sure why the new standing order -- why transparency would necessarily dissuade Senators from their priorities, and given the polarization of the parties over the policy decisions of the bench, given the onset of a presidential election, I'm not quite sure why we'd expect to see immediate transformation.

Just briefly then I was asked to talk a little bit about potential reforms. There is always a debate amongst senators as well as, of course, amongst legislative scholars whether the problems of the Senate are one of behavior or of the institution. The hold reform really is a bit of a test here. The effectiveness of the reform will depend in part on senators' behavior and

willingness to comply with the intention of the reforms.

I may tend more toward institutional solutions rather than relying on senators' improved behavior, but of course any successful reform is probably going to rely a little bit on both behavior and institutions. One idea we floated in the advise and consent book out front is to have some sort of mechanism for moving to a fast track procedure for confirmation votes. The question though -- think of fast track for reconciliation, trade agreements, environmental votes, war powers, right, all the elements, Congressional Review Act, all the episodes in which Senators create fast tracks -- the question then is what would precipitate a fast track? How would you get onto that fast track to get, say, a confirmation vote within, say, two months or so? One possibility is to encourage Senators to set up vetting committees in the states with the understanding that if the White House were to select a candidate from one of those committee recommendations then that nominee would be a guaranteed fast track to a confirmation vote. Of course it's not quite clear to me whether senators in the opposition party would -- depends what their goals are here. They may decide, gee, if I want to have an impact on the selection here, particularly, I guess, at district court level here of the selection of the nominee, then, yes, I'd set up a selection committee in hopes of getting that person selected and then swift confirmation would make sense. But it may also be senators could calculate, gee, if I don't set up a vetting committee and I don't then solicit -- send nominees to the White House, well then there's no fast track and then the vacancy remains open which may be pleasing to that senator as well.

So, I don't think there's a perfect solution here but it may be that some combination of harnessing President's incentive for swifter votes as well as senators' incentives to have more ability to submit advice that's listened to. Perhaps there's some hybrid marriage there between the two incentives.

But I'll stop there for now.

MR. MANN: I want more, Sarah. Let's talk a bit more about the Senate first because that was certainly a central feature of Eldie's comments. I think Manus sees the reality there that has been present for a long time and is not about to change. And speaking from our own experience over this last year in sort of advising and working with groups of senators really

trying to press ahead with some changes in the rules what emerged was really nothing more than an agreement -- informal agreement between the majority and minority leaders to try to deescalate the war, to back down, to have fewer filibusters and fewer restraints on amendments and some agreement to move nominees, both executive and judicial, suggesting in the end they really fell back on saying, okay, we'll back off for a while and try to move things along.

Manus, is that the best we can expect?

MR. COONEY: I think that, I mean, the best we can expect is what the public demands of them and maybe set it a little bit higher and they'll fall short of that. I think the reality is that this isn't a priority for the public. People aren't paying attention to this, they don't really care, and for the bar to insist that it's an emergency and it's a crisis in the face of the budget situation we're facing -- I mean, we had people in here earlier bemoaning the fact that they're not making enough money when we're seeing \$64 billion in cuts to the discretionary spending in the House last -- two weeks ago. Wake up. This is not the issue that people outside the Beltway -- that you think it is and, you know, one suggestion for slowing down the nomination and appointments process might be to remove the bar associations completely from the confirmation - - from the qualifications process but I imagine there's a good number of people in this room who would be appalled at the notion that we would take the bar out of the equation. And so don't expect anyone to jump up and down and say -- and cheer on the notion that, ah, you'll get fair treatment if you turn over the selection of candidates for federal district court judges in your state to your local bar association. Let them decide for you, and if they've been picked by -- they've been vetted by the bar association in your state, well then we're going to presume that they're entitled to be treated fairly. If they're not, well, senator fill-in-the-blank, on the Democratic side of the aisle, is free to filibuster your judges.

I think the reality is that if you look at the history -- recent history -- I mean, frankly, President Obama's judges have been from nomination to confirmation on both the circuit and district court level have pended in the Senate a shorter period of time than President Bush's. I don't -- I hazard to -- I know the Brookings Institution has been following this issue for some times. Brookings Institution used to chair a process, The Three Branches Conference, where the

Chief Justice, the Attorney General, and the Chairman of the Judiciary Committee in the Senate would meet regularly to discuss issues of import to the judicial branch and the three branches of government, where they aligned -- this was one of those issues that would come up. I would imagine you try to put that conference together today, you'd be lucky to have any one of the three to appear. Perhaps the Chief might come given his recent report, but it would be tough.

And so I think that -- forgive me for -- I don't know that there's any one particular issue, one reform I would suggest that might change the dynamic -- I think the reality is, I think, you know, we have to realize that in the grand scheme of things this just isn't as important as it is to many of the people in this room to the general population, and if it is, we need to elevate it somehow and the way to do it isn't to continue to just preach to the choir, it's to go out and reach out to other stakeholders, bring them into the room, and create a broader coalition of allied interests to elevate this and get the President to pay attention and to convince people in Congress and the Senate, in particular, that there's a political price to be paid for not taking action.

MR. MANN: I'm going to set this up for Eldie, but Manus, I really want to sort of challenge the notion that you can expect a democracy to work effectively based on the specific and most intense priorities that you seem to imagine coming from the public. If good government depended entirely on a citizenry that was very clearly, rationally, in an informed basis, sort of laying out what needed to be done, this republic would have ended a long time ago. There really is a division of labor and people in government have a responsibility, I would argue, including the public administration of justice, and hearing the reports from our district judges on the first panel, you know, stands in such contrast to the kind of response I'm used to getting sort of from the Hill, you know, go find -- build a coalition to get us to do it. Well, goddamn it, you've got some responsibilities as Orrin, when he was chairman of the Judiciary Committee, to do the right thing, and we don't work so well if we don't have people with that kind of a commitment.

You know, it turns out it's great to talk about priorities and presidential priorities, but, you know, presidents are one among many. There are a lot of voices out there in the public. You may not have heard, there was an economic collapse, a financial collapse, you know, we're

on the verge of a Great Depression. There were a few problems to tend to and it's probably not surprising the Clinton -- I mean, the Obama administration wasn't up to speed on the court appointments, although it should have been. You know, he's got staff and other things can get done, but the idea that, gee, if the President just takes this on, that will capture the attention of the Congress and the public and we'll get something, I think, really overstates the possibility of things -- everything getting done because it's a presidential priority.

I'd suggest much of what gets done gets done without the public engaged in, and gets done, thank God, because some responsible policymakers in both parties, and public administrators, sort of get together and try to figure out how to deal with some serious problems.

Forgive me for going on, but I was just thinking, you mentioned the focus on a \$64 billion -- if ever there was a case of sort of misguided priorities, I mean, we've got a huge long-term deficit and debt problem, we -- and we have a short-term problem of high unemployment. If ever there were a time not to spend all of our energy on making these kind of cuts in one slice in the budget, it's now. So, priorities have a way of getting screwed up, and I'm not sure, Eldie, given these broader problems that we can expect the President to ride to our rescue.

MS. COONEY: That was a heck of a question, Tom.

MR. MANN: Well, I've been sitting there the whole time.

MS. COONEY: Well, I think it is not unfair to ask of the President of the United States -- I mean, you know, usually -- when I ran out of my office today, I meant to stop and grab my little pocket Constitution and I forgot because I was grabbing my umbrella instead, but, you know, this is kind of a core function and it's gone. I mean, much of what we've talked about today is, this has gone from being a matter that was really an uncontroverted Executive Branch-Legislative Branch function all through, you know, some pretty wild times when people were focused on other great disasters, the Great Depression, World War II, and everything, this went along fine and the Presidents sent up their nominees and every once in a while there was a hiccup and we can all debate -- this isn't the panel for it -- for what happened that sort of precipitated -- Ben made an allusion a little bit to the beginning of Bork, but, you know, why was

Bork important? We can all have issues about, you know, what was starting to come into the federal courts that hadn't been coming into the federal courts before? All sorts of social issues, you know, women's rights, reproductive choice, race issues, you can, you know, the history of the United States in the 20th century is really what's to blame here, okay.

But nonetheless, presidents, notwithstanding all of that, now have to deal -- their Constitutional responsibility is no less, and the same is true of the Senate. So, to me, President Obama has his challenges, President Clinton had his challenges and God knows, President Bush had his challenges, you know, starting with 9-11. These were all huge things that happened that distract presidents and can totally flip priorities and give somebody rubric for their presidency that they never even imagined when they were campaigning for president which is clearly what happened, you know, with President Bush.

But nonetheless, presidents have responsibilities. So, I would just argue that this is a core thing that we have to ask of our presidents to focus on, whoever they are, and I think the Senate bears, you know, the concomitant -- you know, the matching responsibility, and it's got to be pressed. And the Senate's not going to do anything if nothing comes up there for it to do and so the President's got two jobs, he's got to get stuff up there for the Senate to do, and then he's got to pound on them to do it. And it really -- it's not rocket science as far as the mechanics -- the political mechanics of this. I mean, when I look back on it, and your slip of when you said, you know, caused President Clinton to be so delayed -- the only thing that I -- I mean, I'm so distressed about the current administration in this particular regard, and people who work for me are in there trying to make it better, so, you know, I have a little bit of a personal stake, but I have to say that he's making us look good which is something that -- all we got was criticism, criticism, criticism for so many years. But I think -- to me, that's why this is -- the process itself can be fixed and can really be expedited, both on the Executive Branch side and on the Senate side.

I mean, I think a good question to ask -- that I would ask Manus is, you know, would the Senate ever agree to hold, with a time limit, so that if the issue is that important to a senator, he has the time or she has the time to investigate what the issue is thoroughly and then share it with his or her colleagues and then let the ax fall with the vote, one way or another? I

mean, it's a -- and what's good for the goose would be good for the gander. What's good for, you know, one time majority will be good for the minority or the party with the President in office, however it works, but you have a hold for whatever it is?

MR. COONEY: I think that there's a -- and I'd be interested in hearing from Sarah on this as well -- I think that there's a -- you know, just to be clear on what a hold is, a hold is a -- the ability of a member to basically notify the leadership that he or she intends to assert their rights to object to any unanimous consent to move a nomination forward or a piece of legislation or an amendment to a bill or what have you. So, if the leadership intends to make something a priority and wants to move judges, they can move judges, and that person or persons have to come out and object and make their case. And cloture can be filed, and more often than not, that person will, you know, yield and a vote will be scheduled.

I raise that to point out simply that it's -- votes can be forced on judicial nominations, but is there a political will to do it in the face of so many other pressing priorities and so many other areas of responsibility for the Congress and for the Senate, in particular. And so to Thomas' point, I agree that in a perfect world good government would develop and arrive and I think that some of the things that have been suggested here could put in place a structure that would make it easier for government and a select judicial appointments process to work more fluidly and subject it to less political gamesmanship.

However, it's important to bear in mind that to the extent that that political power is seeded from either Senate or the Executive Branch, it's going somewhere else. Someone else will be -- you know, it may be disbursed and spread across a wider range of players, but someone -- it will be disbursed but somebody will have more authority, and that's just something that you're not going to see United States Senators, you know, give up without some broader sort of a reform initiative that also subjects the Executive Branch to more transparency in the light, and that sort of thing.

MR. MANN: Sarah?

MS. BINDER: I guess I would follow up on Manus' point about the expectations, perhaps the majority leader could call up these nominees, and I think it's an important point to be

made and I think one thing that might be helpful is to think about the constraints on why leaders -- why Senator Reid doesn't more often do that, because I would agree with you that at least some attempts might be instructive if not effective, but there are at least two constraints as I see them. And, again, as an outsider, arm's length -- short arms -- but arm's length -- first of all, time constraints, and I think this gets to Manus's point about priorities. If this is a top priority, time constraints be damned. Fine, this is my number one and I'm going to consume the amount of time it takes to file the cloture motion, go through and so on and so forth.

Now, having said that, if it's a -- obviously, if it's a lower priority, then time constraints matter. Right? You might want to spend the time on the FAA bill or the patent bill or other bills and thus nominations would fall to the bottom, perhaps because of this issue of not broader electoral interest in it.

But I think there's also another constraint here on leaders, it's simply the uncertainty about what happens when he actually holds the holders -- the anonymous holders' feet to the fire, holds the opposition party's feet to the fire. There's uncertainty about the outcome, you know, leaders don't like to lose unless they want to make a political point, and they're -- perhaps that's part of what some groups are saying, go ahead, make the point. But if there's uncertainty about the outcome we might expect the leader not in fact to go ahead, worst to be to lose a cloture vote, perhaps, not necessarily, but perhaps to lose the cloture vote would be worse.

If you know what the outcome's going to be, if it's going to be 85, 90 votes for cloture, then I'd expect we'd see Reid more often go actually through with the cloture vote, but you'd only get an expectation, or you'd only expect 85, 90 votes for cloture if the salience of that nomination was uneven across the Senate. Right? If the ones who cared intensely about a particular nominee were, say, the home state senators, but if the salience is pretty widespread about the opposition party, then we might expect the party to close ranks on a cloture vote, and if you don't have 60 votes then we could expect the leader not to pull those votes -- the nominees up for confirmation vote because, in fact, he doesn't want -- doesn't have a failed cloture vote.

Again, there may be political reasons to have a failed cloture vote, but putting

that aside, you know, so the question is, how widespread is the salience of these nominees? Well, you made a very valid point about, sort of, the limited electoral importance of these nominees, but I'd say that salience within the Senate is pretty widespread and that's part of the problem here. Take the spillover to district court nominations in terms of the failure rates here. Part is that the sort of elevated salience of district court judges and the nominations has increased the failure rates for these confirmations and increased the delays. Also think about how the blue slip has been used, right, this practice that allows the home state senators to essentially put quiet kibosh on a nomination. Well, some chairman's of the Senate Judiciary Committees in recent years have said, well, I'm not really going to let the blue slip be dispositive, I'm not going to let the home state senators automatically veto nominees, I'm going to use that as informational and I'm going to bring that nomination up on the floor and file cloture. Well, if you're not simply letting the home state senators veto nominees, that's because salience is pretty widespread across the Senate and they're not simply going to defer to home state senators.

So, I think the salience of these nominees is pretty high. I think unlike bills you can't compromise the nominee, right, and so other episodes where you might file cloture because it would induce compromise, right, we can all think of bills where filing cloture brought the sides together to talk -- they can't really do that on a nomination because it's up or it's down.

But, again, I think that there's room, there's behavioral room here for improvement in how the Senate functions, and a little more aggressiveness, perhaps, in calling up nominations for cloture votes.

MR. MANN: But I'm wondering if in the end the roots of the problem are so deep, they're manifest in the development of parliamentary-like parties that are ideologically polarized and internally homogeneous with a rough level of parity between the parties making the stakes extremely high for any action taken in the Congress, House, and Senate, which prevents the very kind of give and take negotiation deliberation by which the institution used to work.

You know, our Senate is a very peculiar institution in the world of legislatures. It works when you have some ideological overlap between the parties, some degree, assuming you don't have super, super majorities that can just rule on their own, and some meaningful norms

that provide for self-restraint in the use of tools.

Now, what we've developed into, I think, is parliamentary systems but no parliamentary governance whereby majorities empowered by the election can take actions to staff their administrations as well as the judiciary and put their programs in place and then be held accountable by the next election. We don't allow that and it seems to me that's the big change in the Senate and that's why this problem isn't going to be solved any time soon, and it also -- it's either going to lead to some change in the party system, as we had in the early part of the 20th Century, or it's going to build pressure to demand changes to make the Senate more a majoritarian body. I don't know which one I'd bet on coming first, but let me invite our participants to make any response to, sort of, that -- to that particular argument, and anything else they want to say.

We have only five minutes left. Before you make those comments, let's have a question from the audience.

MR. SUGAMELI: Hi, I'm Glenn Sugameli with Defenders of Wildlife. I've been running the "Judging the Environment" program on federal judicial nominations for about a decade now. I would just say a couple things I would like reactions to. One is that I think it's very different from the last administration where there were very specific articulated issues with a certain number of nominees, virtually every one of them circuit court. What you now have, and some people have recognized on the panel repeatedly is, this is not only extended to district court nominees, but it's extended to district court nominees who have very strong home state Republican senator support and unanimous votes in the Judiciary Committee and when they're finally confirmed, unanimous votes on the floor. And that's new for those people to have been delayed for months and months and months and months. And those include people from the Southern District of Texas we heard from earlier, Diana Saldaña finally was confirmed but way after Senator Cornyn and Senator Hutchison would have wished. Utah there was major delay from a circuit nominee. Many other examples -- Mississippi District Court, Mississippi Supreme Court. I've got on my judgingtheenvironment.org website dozens of links to Republican senators pushing hard for nominees who were delayed and delayed and delayed and delayed from their

home state saying, this is an emergency, this is a real emergency, and they're still not getting votes. And one of the differences might be, in terms of the holds now, having to be -- it's much easier to have a hold if it's somebody that you really have some substantive concern about and that you actually then have a divided vote on the floor.

There actually was one vote in this Congress -- the last Congress -- that both the cloture vote and the vote on the merits were unanimous, which is at least unique in my experience and -- but I don't think you'll have too many of those if it's clear who made the objection. You objected but you didn't vote against cloture? You objected and you didn't vote against the nominee? That's a very strong -- hard position to take, and that's where most of the people are nowadays.

And one last point is, I think -- I agree with you in terms of the need for more leadership, but in terms of people caring about it, at least to the extent, again, I've gathered hundreds of editorials, op-eds, letters to the editor, statements by local bar associations and others, particularly in areas where there are indeed really emergencies or vacancies being held up. There were just two major editorials from Utah papers, major story, major story along the border judges that we talked about earlier in the San Antonio paper, editorial in the Houston Chronicle, et cetera.

So, I think to the extent to which there's an identifiable problem, you really can have more concern and it rises up to higher levels. Central District of Illinois, one judge doing the work of four. Two nominees, absolutely non controversial, still held up, still not confirmed. Those are real problems and they can get people to really focus on them in a way that the public will understand, maybe not across the board, maybe not all the cases, but it's gotten so bad and there are so many examples where there's just no justification for delaying these people and that's clear when you get a unanimous committee vote and the only real delay has been the vote on the floor. That's the other thing, talked about regular order -- there has been regular order on hearings, there has been regular hearing order on committee votes, the problem has been these holds on the floor.

So, any reactions to that, I'd be interested.

MR. MANN: Yeah. Thank you very much. Who would like to react?

MR. COONEY: I know, I think there were 14 district court nominees of President Bush's who both -- all of which had home state senator support from both senators that didn't even get a vote in committee. The average time it takes for a district court to be confirmed in the Senate under -- for the Obama administration is less than 140 days. It was close to 180 days for President Bush. So, I think -- look, I think that -- you know, we can all cite statistics and throw numbers around that -- is it not? What was the average for Bush?

My point is --

MR. SUGAMELI: The problem is, a lot of them haven't been confirmed yet, so the numbers (inaudible).

MR. COONEY: My point is, is that we can have numbers, we can toss them around, and you can make your arguments. I think that the reality is, is that what we're hearing from some forces is, well, now home state support should not only be not dispositive to the negative, it should be deferred to entirely by the institution, and I don't think that that's what people intend.

MR. SUGAMELI: Republican home states have the support where there's unanimous committee votes, unanimous floor votes. No opposition, they're still held up for months and months. Did that ever happen in the last administration? Can you give me any names of where that happened?

MR. COONEY: Republican home state senators --

MR. SUGAMELI: Whereas the other party -- in this case, it was -- (inaudible) -- sorry, this case is Republican or Republican-Democratic home state senator support, unanimous votes in committee, no objections by anybody, unanimous votes on the floor and they're still held up for many, many months, way beyond the point where the members of the party which is objecting, in this case the Republicans --

MR. COONEY: Are we talking about like the 13 judges that were reported out during the lame duck session of the Congress?

MR. SUGAMELI: No, I'm talking about people who were -- no, I'm not. I'm

talking about people -- like Matheson, who was voted out back in June and was held up for months and months and months.

MR. COONEY: With the support of Senator Hatch, and he was confirmed.

MR. SUGAMELI: Finally, after many, many months. Why did it take so long? Were there any cases like that in the last administration?

MR. COONEY: Talk to Senator Reid, talk to Senator Reid, he's the majority leader.

MR. SUGAMELI: And he can't bring cloture on every nominee when there's 100 being held up, not 5 or 10.

MR. COONEY: If you want to have votes -- I mean, the reality is, is that I go back to my point, in the end, this has to be a priority and to the extent that it's not a priority for this administration or for the majority in the Senate, for the majority leader, that's a problem that is a public policy problem, but don't blame it all on the Republicans.

MR. MANN: Sarah or Eldie? No? Yeah?

MS. BELLEAU: Ashley Belleau, Federal Bar Association. My question to the panel is do we see a window -- a short window of opportunity before the 2012 elections when we don't know which way it's going to go, that the Senate might change its rules to put those timeframes on? You have so much time to vet a candidate and vote them either up or down in the committee and out to the floor. Do you see a window there?

MS. BINDER: Not particularly. There's -- I think there's a good faith handshake between Reid and McConnell to reduce some of the heat and I think there's -- and there's some expectation that they're going to let things play out for this Congress and the next and not to try to change the rules again or to change procedures here, see how long the handshake holds, but I think there's some incentive to -- amongst the players here to let things cool down, but just time's too short. Oddly, no Senate time -- days, (inaudible) weeks, but time (inaudible) and time is short to actually put something in place before 2012. It just seems that the historical statistics don't really lend much support for that.

MR. MANN: Okay, last question and then we're going to have some closing

remarks.

SPEAKER: With regard to more controversial nominees, could we possibly have a solution analogous to what went on before 1850 when in order to admit a slave state you had to admit a free state, in other words, have nominees and payers, you know, we'll take your ideologue if you'll take our ideologue?

SPEAKER: Ben, what a solution.

MR. COONEY: Well, again, I think when you have those sorts of pairings or, you know, ratios or however you want to do it, it has consequences. Perhaps -- a perfect -- a good historic example is New York. Senator Moynihan and Senator D'Amato had an understanding that whichever one's party was in the Executive -- was in the White House, they would get three of every four judicial nominees, and the other would get the fourth. So, throughout the Clinton administration when Senator D'Amato was in the Senate and Senator Moynihan, the senior senator from New York, was in the Senate, Moynihan got three of every four nominees and D'Amato got one, and he agreed to support Moynihan's three and Moynihan agreed to support his one.

So, you end up with situations where you have a George Bush nominating a Sonya Sotomayor to the district court. Now, depending upon who you ask, that was either a good result -- sorry, to the district court -- and so depending upon who you ask -- oh, no, the Court of Appeals, excuse me -- so, depending upon who you ask, it's a question -- it all depends upon who you ask as to whether that's a good outcome or not. It's very subjective. But it did move the process along in New York insofar as I can recall.

I think with the Clinton administration they were willing to embrace that sort of constructive working relationship between senators of a different party willing to work together, so you ended up with a less confrontational process.

You had other states where that wasn't the case and as a result you wouldn't get blue slips submitted immediately and that was always a problem for the staff. I mean, the Senate Judiciary Committee staff, professional staff, that's reviewing these nominations oftentimes, you know, for many, many days, you know, wants resolution. They're not necessarily looking for

problems. They'd like to try to get consensus around a nominee if they can -- they'd much rather work on nominees who are qualified and have home state senator support than those that are contentious.

MR. MANN: Eldie?

MS. ACHESON: Well, I was just going to add to what Manus said, that you had these institutional arrangements in a few places. In other places, senators of different parties just worked together and, you know, they didn't necessarily have a three out of four or kind of that fixed arrangement as in New York, but the relationship between the senators, Republicans and Democrats, was so strong, that they had developed a practice of, you know, sort of checking out whoever they were going to put forward to the administration, either of them with the other, and, you know, I think in these two contexts they were also senators, you know, devoted to making sure that the people involved were sort of clearing the bars. Like in New York State, in addition to this deal that Manus described, you know, everybody's got to go through the association of the bar of the City of New York, and about five other clearances, so you tend to get fairly, fairly well known, highly regarded and experienced, qualified people just sort of on the basics. And there were plenty of de facto arrangements that went on between senators. And then the third thing that can happen -- this is no way, I think, to -- you know, you can't do this every time, but was to make the deal that Ben talked about. And we did that to the horror of, you know, a lot of the groups on the left, from time to time. And I shouldn't say "we" in the sense that I didn't do it, those were decisions made at a very high level, but President Clinton, on occasion, decided that it was a reasonable thing in the circumstances to accept a candidate from a Republican or a group of Republican senators in a circuit. We did it with a Circuit Court appointee, a couple, and paired them with Clinton's picks, and interestingly there was a proposal to do this in Michigan with those two Sixth Circuit seats that went completely unfilled for the longest time. And among the Clinton staff, which was hugely divided on this issue, there was a camp of people, you know, between the Justice Department and the White House, who thought this was a deal we should make because otherwise the Sixth Circuit was going to have two or three vacancies for a very long time and we had an opportunity to get, I think, two people who we thought would be great

and somebody who Senator Abraham was very interested in, and there was another camp who felt this would be a disaster and major capitulation and the two Democratic senators from Michigan, I think, favored that side and we were never able to persuade the President that was a sensible thing to do, and I think in retrospect, it would have been better than having those vacancies go for all that period of time.

MR. COONEY: Thomas, if I could just add --

MR. MANN: Yes.

MR. COONEY: -- real briefly, the -- to your point, sometimes good government needs to work and I agree, but for those kinds of arrangements and the good government to work, it takes time and it takes a political will and a recognition that working together we can do more than by sitting back and waiting for others to give us direction, right, so taking the bull by the horns.

It was very clear as far as Senator Hatch was concerned when he was chairman of the committee. Yes, there were instances where he did not agree with the Clinton administration, but he took the view -- and to Eldie's credit and the team she had at the Department in the White House -- there was a level of attentiveness to the nominations process where Senator Hatch knew that if he identified a problem nominee that was being considered ahead of the nomination being made and communicated that, it would at least be considered. And we took the view, much to the horror of conservative -- the movement groups out there, the far right, that -- we took the view, hey, if we can stop a nominee before they end up on the floor of the Senate, we've stopped that person from getting on the court -- on a court -- what does it matter whether they've never been nominated or they're defeated on the floor of the Senate? They're just not a judge. So, by engaging we were able, we felt, to keep some, you know, more problematic people -- the people we might be concerned with -- from actually having been sent up and putting the administration in the position of having to lock its -- dig its heels in and us having to fight it out.

Of course that requires us to give back and agree to move some other nominations and you had a dialogue that took place, but for that to happen, for that dialogue to

take place, that takes time. It takes, you know -- it needs to be made a priority, both within the Judiciary Committees, in the Senate, the leadership, and at the other end of Pennsylvania Avenue. In the absence of that you end up with -- at least in the Senate, I can tell you, for the chief counsel on the staff, they go, okay, well, I'm going to focus on patent reform which is on the floor right now.

So, here we are talking about the judicial emergency, we have a patent reform bill on the floor of the Senate, we'll be spending the lion's share of this week debating that. Which is more important? Some would submit that this is more important, but here we are debating patent reform. We'll see the number of floor votes on that and several dates spent debating whether we move to a first to file system or not or have, you know, post grant review positions and the threshold for post grant review. I mean, that's what the Senate's doing this week, not debating President Obama's judges.

MR. MANN: Well, listen, we haven't solved it, but we've certainly clarified it thanks to our sterling panelists here. I want to thank Eldie and Sarah and Manus, and to Russell and to Ben for helping to put this together, to Judge Lamberth and to the Federal Bar Association for joining with us in trying to bring a little more light and a little less heat to a very, very difficult and controversial aspect of American politics.

Thank you so much for coming. We are adjourned.

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I, Carleton J. Anderson, III do hereby certify that the forgoing electronic file when originally transmitted was reduced to text at my direction; that said transcript is a true record of the proceedings therein referenced; that I am neither counsel for, related to, nor employed by any of the parties to the action in which these proceedings were taken; and, furthermore, that I am neither a relative or employee of any attorney or counsel employed by the parties hereto, nor financially or otherwise interested in the outcome of this action.

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