

THE BROOKINGS INSTITUTION

BREAKING THE JUDICIAL NOMINATIONS AND CONFIRMATIONS LOGJAM

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**PARTICIPANTS:**

**Welcoming Remarks:**

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**PANEL ONE - THE JUDICIAL LOGJAM: HOW IT CAME ABOUT AND ITS IMPACT UPON THE COURTS**

**Moderator:**

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**Panelists:**

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## P R O C E E D I N G S

MR. WITTES: So thank you all for coming, braving the tornadoes and the dire reports of the harshest sort of weather.

My name is Benjamin Wittes. I'm a senior fellow here at Brookings. And it's great to welcome you to this event which unfortunately is on a subject that is about as dire and unpleasant as the weather, which is to say, the current state of judicial confirmations and nominations.

When I started writing about this subject in the mid and late '90s I thought we were in a race to the bottom. And I really actually, the only thing that I had wrong was that I really underestimated how low the bottom was. We've gone actually a lot further than -- I thought we had really sort of bottomed out in '97, '98 when people were kind of waiting around for a long time to get confirmed, and I didn't think -- I guess I sort of thought if you'd asked me maybe it could get a little bit worse but I certainly didn't imagine that it would get as bad as it has gotten. And so I guess the purpose of today's event, we wanted to talk a bit about the institutional impact on the judiciary, on the sort of personal impact on nominees and the willingness to serve as a result of it. And also to sort of try to imagine a little bit whether we can kind of scrape ourselves off the bottom here and whether there's sort of a more -- a more constructive way that we can proceed in this.

So we put together two panels, one of which is going to try to examine the current lay of the land and one of which is sort of to try to imagine whether there's sort of more constructive strategies that we can think of. And I will not detain further with introductory remarks but will turn it over to Ashley now. And let's get to it. Thank you.

MS. BELLEAU: Thank you, Ben. And thank each of you all for coming today.

I'm delighted to be here on behalf of the Federal Bar Association to join

the Brookings Institution in cosponsoring this important forum on the vacancy crisis in the Federal Court system. We would like to thank the foundation of the Federal Bar Association for its generous financial support for our efforts.

Why does the Federal Bar Association believe that judicial vacancies matter? The phrase justice delayed is justice denied describes the situation that we are facing in a number of circuits and districts around our country. Judicial vacancies undermine the capacity of our courts to render justice promptly as the public expects and as due process demands. The Federal Court system is bursting at the seams. With 12 percent of Article 3 judgeships vacant, temporary judgeships expiring, no new judgeships in sight, caseloads at record numbers in some of our courts, and more courts in record emergency crisis mode than ever before. This is what's creating an emergency crisis in our third branch of government.

The mission of the Federal Bar Association is to promote the vitality of the federal legal system and the federal courts and to promote effective legal practice before the federal courts and federal agencies. The members of our association are attorneys in the private sector and the public sector who practice in the federal courts and before federal agencies. They experience firsthand the pernicious effects vacancies have on the caseloads before the courts and the speed of justice with which justice is being served. The large number of vacancies are causing unnecessary hardship and increased cost on individuals and businesses with lawsuits pending in those federal courts. Our members favor faster action from Washington in filling the vacancies on the federal bench.

The Federal Bar Association, as a matter of policy, takes no position on the credentials or qualifications of specific nominees to the federal bench. The FBA's foremost interest lies in the assurance of prompt, dispositive action by the President in nominating qualified federal judicial candidates and the Senate in either confirming or not

confirming them in a prompt manner. That is why over the last year the Federal Bar Association has devoted considerable attention to the vacancy crisis in our federal courts. We have called and continue to call upon the President and the Senate to move more vigorously and responsibly nominate and consider nominees to the federal court. The FBA continues to raise its voice and urge action and the development of strategies to strengthen the effective administration of justice for our members, the judiciary, and the public. That is why the FBA has partnered with the Brookings Institution today to sponsor this judicial issues forum.

According to a recent article in the Washington Post, this year federal judges are retiring or resigning on average almost at one judge per week. These departures are increasing the workloads of the remaining judges and delaying trials. When federal judges resign or retire they create vacancies that need to be addressed promptly. When vacancies on the federal bench in some districts or circuits continue to go unfilled as we'll hear from two of our esteemed federal judges who have graciously agreed to be here today, that can lead to harmful delay in the prompt and effective administration of justice.

We are privileged today to have two excellent panels comprised of distinguished federal judges, a former Justice Department official, a former Senate Judiciary Committee staff director, and experts from the Brookings Institution to illuminate this important issue. We look forward to hearing from our first panel about how the judicial vacancy crisis came about, confirmation trends over the last several administrations and the impact of vacancies on the lives of our court.

Our second panel will take a probing look at the Senate's exercise of its confirmation responsibilities, the rules that govern how confirmations can and cannot move forward, and the chances of building upon recent reforms and Senate rules to produce a more prompt confirmation process.

To begin our discussion today it's my pleasure to introduce the moderator of our first panel, William N. LaForge. Bill is a principal of LaForge Government Relations and a past president of the Federal Bar Association. He is an accomplished lawyer, advocate, academic, and marathon runner. From his early days as a prosecutor and a deputy chancellery court clerk in the Mississippi Delta, to 14 years as a senior congressional policy advisory, coupled with more than a decade in private practice, Bill has extensive experience in the courts and in Washington. Drawing on his vast experience, Bill recently wrote a book about testifying before Congress. We're fortunate today to have Bill LaForge moderate our first panel. Bill.

MR. LAFORGE: Thank you, Ashley. Ladies and gentlemen, welcome to the leadoff panel discussion today focusing on the judicial logjam, how it came about, and its impact on the U.S. court system. It's a pleasure for me to serve as moderator. Our mission as you have heard is to essentially lay out the problems, to provide a snapshot, if you will, of the lay of the land, and to set the stage for the next panel and further discussion about possible changes and remedies and reforms. This is a hot topic as Ashley and Ben have both noted for us. Our role today is to really provide you with information so that you can make decisions on your own as well. It has been a subject matter widely written about and spoken about recently in his state of the judiciary. At the completion of this past year, Chief Justice Roberts indicated the urgent need for Democrats and Republicans to put aside bickering and to fill federal judicial vacancies. He pointed out persistent problems of senators from opposing parties blocking action on nominees. He talked about the need for a long-term solution and for parties to need to find those solutions to agree. And he talked about the vacancies that erode quality of justice.

So we have a task before us today. One of our panelists today is actually quoted in a Post article that came out about 20 days ago entitled Vacancies on

Federal Bench Hit Crisis Point. So we are teeing this issue up today. We have a truly blue ribbon panel of experts to tee up these issues, the blend of two United States District Court judges and two fellows from Brookings provides us with a perfect team to offer facts, evidence, evidence, anecdotes, and analysis that set the table for the next panel. And our aim today will be to tell it like it is.

Our format calls for affirmative presentations and remarks from each panelist to be followed by questions posed by me as moderator, and then questions from recognized members of the audience. And there will be someone walking around with a microphone. When that time comes we'll recognize you and ask you to speak in the microphone and address your question to the individual presenter on the panel.

Brief biographical information for each panelist joining us up here today is available in the handouts you received. By way of brief introduction, however, I would say we are very pleased to welcome to the panel and to this event today Chief Judge Royce Lamberth of the United States District Court for the District of Columbia to my left. To his left, Judge Royal Furgeson, senior judge from the United States District Court for the Western District of Texas. And from The Brookings Institution to my far right, Russell Wheeler, a visiting fellow for Brookings, and Ben Wittes, from whom you've already heard who is a senior fellow from Brookings.

So without further ado, let's get right down to it. Kicking things off we'll start with Russell Wheeler from Brookings. Russell.

MR. WHEELER: Thanks. Thanks very much, Bill.

Our focus today is primarily on what's ahead of us but a look back and provide some perspective on where we've been. I'm going to be speaking from this handout which was available at the registration desk, and whenever we get into numbers about nominations and confirmations you're in an area that has been the object of some of the most exquisite spinning in Washington that you can imagine. You sometimes

wonder if the people are talking about the same Senate and the same government in terms of the relative assessments of how administrations and Senates have performed.

I'll try to provide a few basic facts that I think really will hold up to analysis. So the first thing we notice is that confirmation rates for appellate nominees have been declining steadily since the days of the Carter administration when an astoundingly high 92 percent of appellate nominees got confirmed. And you can see that in table one of the handout I prepared. However, confirmation rates for district nominees have hovered generally right around the 90 percent mark. The only aberration to that statement other than the Obama administration's first two years was the first Bush administration and that relatively comparatively low confirmation rate is the result of a lot of nominations that came from the judgeship bill that was acted in 1990. Actually, in Bush's first 2 years the Senate confirmed 92 percent of his district judges.

Now, the question it seems to me is whether Obama's comparatively low confirmation rate for district judges in the first two years is going to persist, and stated more broadly, whether or not whatever virus is infecting the confirmation process for appellate judges is going to seep its way down on a permanent level to the district judges. So that's the first question we'll be looking at.

The second table tells you that the number of circuit vacancies at the start of the Clinton, at the start of the Bush II, and at the start of the Obama administration, and at the end of those administrations' first two years has stayed relatively constant. There were 17 appellate vacancies when President Clinton took office and there were 16 at the end of his first 2 years. And that was true as well for district vacancies for Clinton and for Bush. But if you'll notice in terms of district vacancies, the number of vacancies that President Obama inherited in January of 2009 doubled by the end of his first two years. And as a matter of fact, as of last Friday they had completely doubled: 83 compared to 41. Now, that's due partly to the dearth --

compared to the dearth of nominations that the Obama administration has submitted.

As you can see, for example, 78 district nominees for the Obama administration versus 98 in the first 2 years of the Bush administration. But that 78 number is misleading because Obama nominated 13 of those people in November and December of last year when their chances of confirmation were nonexistent. But even if you discount that, even if you discount those 13 nominees, as I said, his confirmation rate for district nominees in his first 2 years is only 67 percent. So again, are we looking at a fundamental change in how the Senate treats district nominees? Or is that an aberration? We have to wait to see.

The other thing you'll notice in this table is that the time from nomination to confirmation has been creeping steadily up. It certainly was during the first two years of the previous administrations. In other words, it took President Clinton's appellate nominees on average 103 days to get confirmed once they were nominated. It took President Obama's 260 days on average. As to district courts, the figures as you can see are 76 days on average for the first 2 years of the Clinton administration up to 175. And there's a variety of factors that are causing that. And the time between nomination and hearings and hearings and confirmation varies also. But the fundamental fact is it's just taking a lot longer.

Now, take a look at table 3. That just shows where the nomination process stood as of last Friday, February 25th, and how it stood on February 25th of 1995 and 2003. You can see that Obama has submitted at this point more nominees than did Clinton or Bush, 53 nominees versus 42, and for President Clinton, 15. But you'll notice of President Obama's nominees almost all of them are simply people he renominated who failed to get confirmed during the previous Senate.

And so one thing we'll be watching for is whether or not the increased tendency of presidents to renominate unsuccessful -- especially unsuccessful Court of



Appeals nominees continues. Over 8 years, 26 percent of President Clinton's appellate nominees were people he had nominated earlier who failed at confirmation. That figure went up to 30 percent for President Bush. So, in fact, four people he nominated three times. So we'll just have to wait to see how that plays out.

And then finally, you have to take care -- from table four you have to take care of easy predictions about what Senate are likely to do. For example, if you look at table four you'll see that from -- in 95-96 the confirmation rate for Court of Appeals judges was 55 percent, down from 86 percent in its first -- in the Clinton administration's first two years. As we know, the Senate changed hands starting in January of 1995 and so it's not too surprising perhaps to see a confirmation rate decline.

By the same token you would think President Bush's confirmation rate would increase once the Senate moved from Democratic control in 2001 to Republican control starting in 2003. But in fact, the confirmation rate for Bush's circuit nominees went down, not up, even though you had a more friendly Senate and the confirmation rate for district judges as you can see increased but only modestly. So there's a fair amount of numbers here and there's plenty more where they came from, but I think the basic question that we're looking at today is whether or not the -- whether or not the district confirmation process is going the way of the Court of Appeals confirmation process. Some things are certain. It's taking longer, it's -- one, it's taking longer and the confirmation rates are going down. Just how that's going to play itself out over the next two years, the next four, or even eight years perhaps of the Obama administration, we'll have to wait and see.

MR. LAFORGE: Thank you, Russell. Chief Judge Lamberth, what do these data mean in the real world? What's your take on the status quo?

CHIEF JUDGE LAMBERTH: I think the system is broken and I want to talk --

MR. LAFORGE: Turn on your mike.

CHIEF JUDGE LAMBERTH: I think the system is broken. I want to talk a little about why I believe that. First, all federal judges applaud what Chief Justice Roberts has done regarding the confirmation process. My favorite line from his year-end message was this: each political party has found it easy to turn on a dime from decrying to defending the blocking of judicial nominations depending on their changing political fortunes. And that's where we are right now. Last year at the University of Idaho, Chief Justice Roberts spoke about how the process of appointing new justices to the Supreme Court has become so polarized and politicized as senators try to pin down how a nominee might vote on a particular issue. The chief justice expressed the view that judicial nominees should not be expected to provide detailed ideological information during the confirmation process. The chief justice observed that that kind of questioning is inappropriate since judges are expected to be impartial in hearing the cases that come before them.

I agree with the chief justice, but I want to say more. The process for picking federal judges is totally broken and it badly needs to be fixed. I think there's a great deal of merit to an editorial in the Los Angeles Times last year calling for an end to the judges' war and to move beyond parties and battles over nominations to the federal courts. The *Los Angeles Times* observed that if President Obama wants to deliver on the bipartisanship that he promised, he should focus on the process for selecting federal judges.

I was nominated in March 1987 and the partisan fight in the Senate over my nomination lasted for six months and ended in a political compromise that allowed my nomination to be brought to a vote just before the Senate recessed for the year in November 1987. But that six-month fight over me pales in comparison to what occurs now. Two years and four years and other lengthy political battles over judges are now

not unusual. It doesn't matter which party controls the White House or the Senate. The paybacks and the bickering have been thoroughly bipartisan. Republicans are still seething about the way Judge Bork and Justice Thomas were treated. Democrats are still seething about the way the Republican-controlled Senate blocked or delayed some of President Clinton's judicial nominees. Republicans complained that the Democrats seeking revenge opposed mainstream and well-qualified judicial nominees of President George W. Bush.

I will tell you as an independent observer, both parties are right. I think President Obama and the Democrats who now control the Senate should recognize that excessive partisanship can fuel fire. It certainly has in the past. And Republicans also need to recognize that fact. I think it's time for Democrats and Republicans alike to join with the administration and try to stop this war. An impartial federal judiciary should be the goal of both political parties. The appointment of the most qualified nominees available should be the goal of all Americans. The long delays and partisan bickering have dissuaded some very capable lawyers from pursuing federal judgeships. We should be striving for the best and the brightest outstanding lawyers who can be fair and impartial judges.

Nominations, of course, are just the first step. Because of the Senate's role to advise and consent, it certainly makes sense for the White House to consult with senators before the nomination is finalized. And for district judges at least there is a tradition of considerable senatorial courtesy. Courtesy is one thing. For the President to totally advocate his constitutional power to nominate is not wise, and those who want to submit only one name for the President's consideration rather than three or a panel are asking the President to totally advocate his role in the process. The President should rightly refuse such entreaties from senators I believe. But the President still has to get his nominees confirmed.

In 2009, the 41 Republicans then in the Senate sent President Obama a letter in which they said we look forward to working with you as you consider nominees for the federal judiciary. They went on to say that, unfortunately, the judicial appointments process has become needlessly acrimonious. We would very much like to improve this process and we know you would as well. It is in that spirit that we write early on. This, I think, was March 2, 2009.

The Republicans then went on to request two steps your administration can take to achieve that stated goal. But before the White House had an opportunity to even respond to the Republicans' letter or even receive it as far as I know, an interest group was already quoted in news accounts as saying that the letter submits the Republicans as the party of note and said that voters gave President Obama a mandate to appoint judges who understood that the constitutional laws provide for equal justice for all.

That kind of interest group reaction is exactly what causes or creates the poisonous atmosphere that exists in the Senate Judiciary Committee. Indeed, it is reliably reported that the interest groups on both side feed questions to senators on all the hot button issues of the day that so divide our country -- abortion, gay rights, guns, separation of church and state, death penalty -- and then they stand in the committee room to ensure that their senator performs adequately according to script. That's they the process is broken.

There are currently a large number of vacancies in the federal courts and many of those are characterized as judicial emergencies based on the size of the caseload and the amount of the time the seat has been empty. Shorthanded courts cannot function properly, and many litigants who face lengthy delays and crowded dockets are ultimately denied the justice they seek. The D.C. Circuit currently has two vacancies, including the seat vacated five years ago by Chief Justice Roberts. The

District Court has had four vacancies: Judge Kessler's slot from 2007; Judge Hogan from 2008; Judge Robertson, who took senior status in 2008 and then later resigned; and Judge Friedman, who took senior status in 2009.

Our court is swamped with Guantanamo cases which have been too long delayed and which we are currently trying to expedite but the result is we expect to try very few civil cases this spring or summer and only criminal case where the Speedy Trial Act dictates trial now. We need new judges just as many other courts do.

It took the administration 18 months to get our four nominees in place. I sent a letter in November to Senators Reid, McConnell, Lahey, and Sessions talking about the dire needs of my court. And I am pleased to report that two of our nominees were confirmed Christmas week. Two more were scheduled for a vote on an agreement made February 2nd and we thought the agreement was they would be voted on before the President's Day recess. Unfortunately, we don't have a senator in D.C. The senator from Georgia was able to get two Georgia judges who are going to be voted on not before the recess but this week now when the Senate comes back. And our other noncontroversial nominees are still in place. We still hope they'll be voted on soon, and I don't mean anything I'm saying today to dissuade the Senate from moving promptly to vote on the other two noncontroversial nominees to whom there is not even a word spoken against them in committee or on the floor or anywhere else to my knowledge.

This partisan bickering over who borked who and when eventually has resulted in confirmation hearings where the wife of the judicial nominee left the hearing room in tears because of the smears of her husband's good name and reputation. That really has a powerful and negative impact on persuading the best and the brightest to undertake the process of becoming a federal judge. One nominee whose nomination lapsed told me that she asked the President not to resubmit her name to the new Congress because she found the Senate confirmation process to be so demeaning.

Escalating smear tactics and partisanship grandstanding need to stop, and we need to end the war over selection of judges. There should be a joint agreement to stop. I say to both Republicans and Democrats you're injuring the federal judiciary and for the sake of our country which needs a fair and impartial and independent judiciary, stop this war. That's it.

MR. LAFORGE: Thank you, Judge Lamberth. You've laid out a great case.

We now turn to Judge Furgeson. Judge, what about vacancies and costs and temporary judgeships? With your opening remarks, please, sir.

JUDGE FURGESON: Thank you very much. I want to talk to you a little bit about the history of how we got here and how it has impacted on particular courts. I wish to emphasize border courts because I think that is where some of our most difficult problems now exist.

I came on the federal bench in 1994 and started my first year in El Paso. The El Paso division of the Western District of Texas and then moved to two divisions: the Pecos and the Midland divisions of the Western District of Texas.

Let me tell you a little bit about those two divisions. The El Paso division covers the two western-most counties in Texas. You have two cities slammed up against each other, El Paso on the north and (inaudible) Juarez on the south. They're separated by a trickle of a river inappropriately named the Rio Grande. It is, I think, one of the largest communities anywhere on any border in the world, probably a population of 2- to 3-, maybe even more, million people.

You've all read about El Paso and you've read about Juarez. Juarez is probably one of the real drug centers of Mexico or maybe anywhere. It's also perhaps the murder capital of the world. Last year 3,000 violent deaths occurred in Juarez. Although the violence hasn't seemed to seep over to El Paso, the fact that it is such a

drug corridor has overwhelmed the four district judges that now sit in El Paso.

Next to the El Paso division of the Western District of Texas is the Pecos division. It's very, very thinly populated. It encompasses 10 counties covering an area of over 30,000 square miles. The landmass of the Pecos division is larger than 11 states and at least half the size of 31 states. The division has a 400 mile border with Mexico so it also is a place that has a major corridor for drugs and illegal immigration from the south.

When I transferred to the Pecos and Midland divisions in 1995, I basically held court two places -- one in Midland and then 100 miles south and west in Pecos. So I was dividing my time 50/50. My first year in Pecos there were 43 criminal cases filed and I thought I can do this. Forty-three cases. That meant, you know, three or four criminal cases a month that I could handle. But that's when things changed in 1995 and 1996 when the Southwest Border Initiative occurred, and since that time every year border enforcement has grown and has tightened.

So just to give you an idea of what happened to me, in 1995 there were 43 criminal cases in Pecos and I was covering Pecos by riding a circuit and staying at the Oak Tree Inn and eating Macho Man burritos at the Terrazzas Café. My arteries took a hit during that time. At any rate, 43 cases in 1995, criminal cases in Pecos. The next year, 1996, there were 109 criminal cases filed so the docket doubled. In 1997, it doubled again to 228 cases, and by 2000 there were 458 criminal cases in Pecos.

So basically, the docket had grown tenfold in five years and I was scrambling. We were all scrambling. To give you some perspective, a normal federal court will handle during this period of time something like 75 to 85 to 90 criminal cases and I was handling 450. So I was handling around five times what a normal federal court would handle. And that didn't consider that I had a Midland docket that I had to take care of.

The problems were almost more difficult than I could deal with. There were many problems. First, as you all know, there's a constitutional and statutory requirement to give defendants a speedy trial. When you're dealing with 400 -- really more than 400 defendants because some of the cases had two or more, I was dealing with almost 600 defendants -- you really begin to have trouble giving people a speedy trial. And you start an assembly line process which is not optimal.

I was trying to tend to my Midland docket at the same time and keep it current, so often I'd be working at night in Pecos after a day of trials sentencing and taking please. You also have a problem, and this probably is something that people don't understand, but defendants are housed all over that area. And so sometimes the marshals would be traveling as far as 100, 150 miles away just to pick up prisoners, bring them to court, so they would start before sunup and sometimes finish sometime the next morning. The problem also is acute because of pretrial detention costs. Just to give you an idea, last year the pretrial detention cost for people awaiting trial in El Paso was over \$40 million. In Pecos last year it was over \$4 million. So when I was there it wasn't quite that but I realized every time I delayed something, not only did I chance a dismissal of the case but I also just continued to add costs into the pretrial detention fund.

The problem that occurred for me, and I think occurs for most border judges because I left in 2000, 2002, so in eight years the problem has only become more acute on the borders, but I would sometimes look out in the evening at the mass of people assembled in my courtroom and it would take me back to the days when I was a very young lawyer and my firm was assigning me to handle clients in night traffic court. And I felt like I was in night traffic court.

The problem, of course, in night traffic court if my client got fined it was going to be a couple of hundred bucks at the most, and the problem that I had with the defendants before me, they were looking at years -- potentially years and years in a



federal prison. And I was able to give them about as much attention as I could see those traffic judges giving their -- the defendants before them attention when the fines were about \$100 or \$200. It was not a good feeling and federal judges all across the border continue to deal with this problem of not having the time it takes to really consider what they're doing, especially in sentencing. And I don't think there's a federal judge in American that will tell you -- that will disagree with this statement. The hardest job we have is to sentence human beings. You know, it's something to judge another human being. And it's a very hard job. And to feel like you're not being able to give it near the attention it deserves creates a desperate sense of failure on your part.

At any rate, that was the experience I had. You can imagine what would happen when a vacancy occurs. In fact, I was moving -- transferring to San Antonio. I didn't leave Pecos until my substitute came on because there was no way I could leave a vacancy in the Pecos and Midland divisions. Right now in the Western District of Texas we have two vacancies out of 13 judges, but those two vacancies are causing a desperate problem. One is in El Paso. El Paso is assigned four judges and really they need a fifth or a sixth. In fact, the Judicial Conference of the United States has recommended four additional judges for the Western District of Texas, which would mean at least two, one at least to El Paso and one at least to Pecos. So when you say El Paso has one vacancy, it probably has two and maybe three.

To give you an idea, Judge Briones, who was the judge that took senior status, he stays on so not to cripple that docket and he just passed his 68th birthday. But last year Judge Briones closed 150 civil cases and 793 criminal cases. That's close to about eight times what a federal judge would handle in a normal situation. He took senior status in hopes that his court would have a vacancy that could be filled. Two years later it's not filled. Two years later the other vacancy in the Western District is not filled.

The word dire has been used several times and the fact of the matter is

on the border the situation is dire. We need more federal judges, we need more judgeships, and pending vacancies create an enormous difficulty. You know, we need to do our civil cases. The business of America is business, and when businesses can't figure out if their patents are good, their contracts are good, they can't figure out what to do about their tax situation and so forth and so on, things bog down. And businesses need a strong rule of law and prompt rulings by judges. And they can't get it on the border. And the border's problems seep into the interior of the United States because the fact of the matter is judges come to the border to sacrifice and help the rest of us.

Committed, hardworking judges are being pushed beyond their endurance on the border. They soldier on but the costs are incalculable. Vacancies desperately need to be filled; new judges desperately need to be added. We owe that to our border judges. We owe that to our citizens. We owe that to our constitution. We owe that to the rule of law. And we rule it to the cause of justice.

Thank you very much.

MR. LAFORGE: Thank you, Judge Furgeson. Quite a compelling case you make.

To hit clean up for us and bring it altogether we turn to Ben Wittes from The Brookings Institution, and to tee it up, Ben, historically why are we so unable to address the obstacles that have been pointed out by the panelists?

MR. WITTES: So, you know, one of the oddities of this whole subject is that -- and I watched this subject from what I think is a unique perch for many years which was as the editorial writer at the *Washington Post* who actually wrote the legal affairs editorials and the editorials on a lot of these nominations. And the *Post* is an interesting vantage point from which to see it because it's a newspaper that isn't strongly associated with any ideological precommitments and, therefore, it's sort of unlike sort of other newspapers where everybody sort of assumes they know where they're going to

come out. But this was kind of thought of as in play. And so a lot of people talked to us from both sides and you could sort of see. You had a very interesting window on the process that nobody else -- I think probably nobody else really had.

And one of the things that was very striking to me as I played that role for almost 10 years was how everybody described themselves all the time as playing defense. Nobody ever perceived themselves as this sort of party on offense that was, you know, going after people or sort of making the process work. Everybody's description of their own role was always fundamentally defensive. So from the left you would hear, you know, the rightists trying to pack the courts with right wing ideologues who will rollback the hard won gains of the Civil Rights Movement. And we're just trying to prevent that from happening. Right? And from the right you would hear the sort of mirror image of this. The left is trying to stop reasonable moderates, you know, mainstream conservatives and pack the courts with liberal activists who will, you know, who will deliver the policy goals that they cannot achieve through the democratic practice. And we're just trying to stop that. Nobody ever presented themselves as having sort of affirmative ambitions in the nominations process that they were willing to, you know, let's face it, what the process is really about. Destroy people's reputations, stop the other side from getting what it wants and, you know, get yours and prevent them from getting theirs. Nobody ever sort of perceived themselves as playing that role.

And the irony of it is, of course, from the outside that's exactly what the entire process is, and I sort of just to amplify on Judge Lamberth's points, you know, the remarkable thing about the process is how it is consistently framed in sort of partisan and defensive terms when what is really happening is an institutional confrontation. And so let's, like, roll this back a little bit and talk about it in institutional terms, which is up until -- and Russell's data is really very illuminating on this point. This is an overview, but it's -- and it's reductionist in some respects, but it's basically accurate, up through the Carter

administration and actually through much of the Reagan administration. There was an understanding about lower court nominees, which is that they took between 30 and 60 days to confirm unless there was some extraordinary reason why they shouldn't like, you know, corruption or, you know, something very dramatic.

This starts to change in the late Reagan administration and it accelerates -- the change accelerates from then until now. And here's the point that really undermines the sort of partisan component of the debate. It changes whether -- whichever party controls the White House it gets worse. And whichever party controls the Senate, it also gets worse. So you would think if one of the mythologies, the defensive mythologies were basically accurate, you would think when you have periods of Democratic control over this it gets better. Or when you have periods of Republican control over blank it gets better. But none of that -- you can see short blips where things improve but basically things get worse no matter who is in control of which institution. And I think the only explanation that I've ever been able to think of for this is that we have realized as a society, and particularly the Senate and the interest groups that advocate in this area, have realized that the judiciary is an extraordinarily powerful institution, set of institutions. And they've realized as well that once you confirm somebody to a federal judgeship there's not that much you can do about what that person does, save reversal, and that's really, you know, that takes doing. The person then turns around and does something similar in another case. Right? I mean, federal judges are significant creatures. And so there has been a pretty widespread decision to mind the gates more carefully. And that's actually I think the institutional confrontation that you're seeing.

Now, I think this decision is completely bipartisan. It's completely -- everybody denounces it when the other side does it and everybody participates in it. And there is one really big problem with it, which is that we're bad at it. We're really bad at looking at somebody prospectively and deciding what kind of judge they're going to be

because that's actually sort of hard. And it's not, you know, it's, you know, you think you can ask. There are these very clever questions that you can ask in the confirmation process except the judges -- would-be judges rightly don't want to answer questions in the confirmation process and they're not there to bear their souls to you as a senator or as an interest group, particularly because they know that, you know, anything they say -- it's not just that it can be used against them; it is certain to be used against them.

And so there's a reluctance on the part of the nominees to cooperate with these sort of inquisitorial exercises. And the result is that we have this very meaningless and very mean set of confrontations between individuals who stand in for the judiciary which they cannot possibly represent and a group of senators who are trying to mind the gateways more carefully egged on by an energized set of interest groups that are, you know, with limited capacity to anticipate what sort of judges we're going to get.

I want to say one role -- one word about the role of the interest groups, several of which have representatives here. I, you know, I think there is -- it is an inevitable role. It is an important role. And there are many different ways to play it, some much more honorable than others. I have to be very vague about how I tell this story for reasons that will become obvious. But when I was writing editorials I was once approached by a representative of an interest group that was advocating against a particular nominee. This was, just to be clear, not a Supreme Court nominee. And this person gave me two reports on this nominee. One of the reports was the public report and the other report was in a sealed envelope. And I was told that this was for my eyes only and I could not attribute anything in it to anybody associated with this group.

Now, I never opened the envelope. I threw it out unopened because I actually don't believe in allegations to which no one will put their name. But I throw that out as an example of just how raw this stuff gets. I mean, this was -- somebody had taken the time to prepare a report which presumably contained disparaging information of

such dubious origins that they weren't prepared to associate themselves with it.

I will close with the following thought experiment. And I think this one really lays out the stakes in this thing. The D.C. Circuit -- I spent a lot of time watching the D.C. Circuit for reasons related to the Guantanamo cases that Judge Lamberth alluded to before. And, you know, in the last 10 years, since Judge Tatel was confirmed to the D.C. Circuit in 1993 -- so it's really, you know, been almost a decade -- there has not been a single uncontested nominee to that court. In periods of unified government, in periods of divided government, nobody has been confirmed to that court without a fight.

Two of the people who have not been confirmed to that court are Justice Kagan, who as nominated at the end of the Clinton administration and never got a hearing, and her old law school friend, Miguel Estrada, who is now practicing at Gibson Dunn. And you know, these are two of the most talented and they are also old law school friends of one another. You know, two of the most talented people of their respective political movements. And I think it's just an interesting thought experiment to say, well, you can have a D.C. Circuit with both of them or you can have a D.C. Circuit with neither of them. But you don't get as a Republican to have a D.C. Circuit with Estrada and not with Kagan, and you don't get as a Democrat to have a D.C. Circuit with Kagan but not with Estrada.

And so my question that I'd like to close with is what do you prefer? Do you prefer a D.C. Circuit with both of them or do you prefer a D.C. Circuit with neither of them? And I think when you frame the question that way almost everybody will choose both, and yet we as a society have chosen neither. I think it's an incredibly stupid choice. And I will close with that.

MR. LAFORGE: Excellent analysis, men. Thank you very much.

And it's the perfect segue to the moderator's first question. And that is this. In presidential and Senate campaigns candidates of both parties say elect me and

we'll keep the other party from placing their judges on the bench. The judiciary in that respect is then politicized in the process, so to speak. Is there a trickledown effect in the opinion of this panel to circuit and district courts? Because most of that animus is focused on the Supreme Court. Is there a trickledown effect, however, in the political process for the second branch to the third branch particularly at district and circuit court levels? We'll start with Russell.

MR. WHEELER: As I was listening to Ben speak about these confrontations in the Court of Appeals for the most part I was thinking that it's obviously trickle down to there because now your chances of getting confirmed as a Court of Appeals nominee are about 2 out of 3 and they used to be pretty much 1 out of 10.

SPEAKER: Nine out of 10.

MR. WHEELER: Nine out of 10, sorry. One out of 10, that'll be in a couple years. (Laughter)

Now, if you watch the Senate Judiciary Committee hearings for district nominees, which I sometimes do, except for a few cases you don't see that much animosity and that much, you know, gotcha kind of questioning. But the figure I gave you, even under the most generous interpretation, a 67 percent confirmation rate for Obama's district nominees tells you it's gotten there. And it's gotten there for reasons that are kind of hard to distinguish. Now, it's not because the district courts are not important, which sometimes people say all the actions of the Court of Appeals. That's not the case but they've been spared this up until recently. But now you have district nominees who wait an awful long time, get no hostile questions, there doesn't appear to be a fight about them, but then they wait forever to get confirmed, and when they get confirmed they get confirmed by a voice vote.

And so I'm like Ben. I'm not entirely sure what's going on on the district level, but the short answer to your question is yeah, sure, it's creeped down there. And

the question is is it going to stay there?

MR. LAFORGE: Judge Furgeson?

JUDGE FURGESON: Well, I can speak I think more for the district judges than the appellate judges. I don't feel it's crept down to our level. We are where everything starts. What I really can't understand is what the fight is about district judges. We are really doing the bread and butter work of the courts. We're the boots on the ground. We're where everything starts. Most of what we do doesn't get appealed, and so our judgments are final. But really, the hot button issues that we talk about -- the health, you know, the health care bill has gone to, what, four or five district judges. They've all done their best, but it's only gone to four or five. There are, what, 600 of us and we're not dealing with the health care bill.

I've never had an abortion issue in my court in 17 years. We deal with bread and butter issues. We're trying to move these cases. We're trying to comply with the Speedy Trial Act. We're trying to make sure that the rule of law works and that justice gets done. And for some reason we can't even get district judges through this process anymore, and that's really a deep concern because especially on the border courts, if you start letting vacancies rise there, you know, you're going to see assembly line justice that none of us want to see and that really is not justice. And it's a desperate problem. And for the life of me I can't understand where the fight is.

I serve with judges who were appointed by Republican presidents and we basically see things the same way. We're basically trying to figure out what the law is and what the facts are and to get the right decision. And so it really is a giant mystery to me and to most of my colleagues about why there's such a fight about us.

MR. LAFORGE: Chief Judge Lamberth.

CHIEF JUDGE LAMBERTH: I echo what Royal says. I find it puzzling as well. In my own court we have a variety of judges appointed by both Democratic and



Republican presidents and we are a very collegial court. We all get along well together. We have -- I think when the final story is written about Guantanamo, we have worked together, 13 of us who did these cases in an extraordinary fashion with a broad spectrum of political and other backgrounds, and yet we did everything on a consensus. The majority opinion of the Supreme Court said we want these cases acted on expeditiously but we're not going to give the district court any guidance; we're sure they can figure it out. Very helpful. I'd been chief judge one month when that came down. (Laughter)

And so I started meetings with my 13 judges, and we really have come to a very broad consensus on the way we would make up this law, which we've made up. We had no guidance from Congress. We had four different definitions from President Bush. We got two words in it changed by President Obama, and other than that we've been off and running doing the best we could with adjudicating these cases with very little political differences among the judges.

Obviously, judges look at evidence differently sometimes and see it differently, but we've developed a broad consensus across the board, and I think all of us are dumfounded in the same way that Judge Furgeson is talking about as to why there should be all this controversy about mere district judges. I don't think that it's healthy and I'm not totally convinced that it's true. Russell Wheeler's statistics are -- could be changed by just a slight change in the Senate where they were on this kick about not letting noncontroversials through without getting something in return. If they go back to the way that they have done, of letting noncontroversials through without delaying their votes, it would change those statistics fairly rapidly and within a short time. So I'm not convinced that we've lost the battle for district courts forever, and I hope we haven't.

MR. LAFORGE: Taking it a step further, we've heard obstacles mentioned that are institutional in nature, some that are partisan or political in nature. How do each of you on the panel see the mix of institutional, vis-à-vis political or partisan

obstacles? What is that mix? 50/50? 25/75? Or does it matter? We'll start with Judge Furgeson and come right down the panel.

JUDGE FURGESON: Well, I don't think it matters. It seems that to me both sides bear equal fault in this process. You know, I've certainly hoped that in some way things would change but I agree with basically the speakers on the other side of Bill, that both Ken -- both what Ben and Russell have said, it doesn't seem like it makes a difference who's in the White House or who controls the Senate. The problem seems the same. And I'm way out in Texas so I don't know if I can help understand the dynamics of the problem.

MR. LAFORGE: Judge Lamberth.

JUDGE LAMBERTH: I live in D.C. and I don't understand it either.

(Laughter)

MR. LAFORGE: Gentlemen from Brookings, is there a distinction between the institution of political that really makes a difference?

MR. WITTES: I think they blend into each other at this point. So the institutional problem is that the Senate is, as I described before, minding the gateways more closely and is bad at the job. The Senate is subject to partisan shifts and partisan retributions. And so when you talk about the institutional quality of the way the Senate does its job, the partisan dimension immediately comes up unnecessarily unless you have very strong senatorial norms that militate against it. Now, those norms used to exist. There used to be an understanding that you didn't stop district judges. That this was just something you didn't do. There used to be an understanding, and this is not even very long ago that you voted for the other side's Supreme Court justices. I mean remember that as, you know, as late as, well, when Sandra Day O'Connor is nominated, you know, the nomination takes a few weeks. There's sort of a love fest of a hearing and she's confirmed unanimously very quickly.

The idea that these are contested, and that was more norm than exception up into the Reagan administration. The idea that these are politically contested events is a recent idea and it's not a -- so, you know, when you say the partisan dimensions involve the breakdown of norms in the institutional function, and in that sense I don't think they can be separated but there's both going on. And there's one other feature, you know, of the partisan contest which is simple retribution. You know, one of the reasons you can't get a D.C. Circuit nominee confirmed anymore, at least without a big fight, is that nobody wants to not retaliate for the last nominee attacked. You know, after David Tatel was nominated, Merrick Garland was nominated and Merrick Garland sat around for a very long time. What seemed then like a very long time. It was I think 13 or 14 months or something. And it was, you know, outrageous. And then you had two Clinton nominees at the end of the Clinton administration who never got vote -- Elena Kagan and Alan Schneider. Democrats responded to that in, you know, in the cases of Miguel Estrada and John Roberts, who himself had been the subject of a stalling exercise at the end of the first Bush administration.

So at every stage you have -- now you have retaliation through the person of Caitlin Halligan. None of this has much to do with the merits of the individuals in question, nor necessarily with institutional anything. It has a lot to do with the fact that senators know that if they don't retaliate they will have lost.

MR. LAFORGE: Russell?

MR. WHEELER: Just real quickly. I want to agree with Judge Lamberth. As I said before, whether this current situation for district judges as aberrational or not we don't know. I mean, you could see -- you could see that rate go back up and we might be back to the good old days when district judges by and large got confirmed unless there was some real problem with them. We just don't know that yet. But the more interesting thing is as both of them said these are, unlike the Court of Appeals, I think just because

there are so many more cases in the district courts, the job of a district judge just has much less ideological component to it to the degree the Court of Appeals judges do, too. And that's overstated. And so it's just so puzzling to see why. I mean, two district judges got picked out in the last congress: Edward Chen from San Francisco and Louis Butler from Wisconsin. Those were the two lightning rods as far as district judges go and they didn't get confirmed. They've been renominated and I doubt they'll get confirmed this time. But I'm more perplexed by the judge from the Eastern District of California which has the highest weighted caseload in the country and she's a magistrate judge, well regarded. There was a little bit of something about the death penalty. People pick at something about anybody. And she waited until the lame duck session to get confirmed. It escapes me. I'm sure there's a reason for it but it escapes me. I don't know what it is.

MR. LAFORGE: And this I would direct to any of you who would like to respond. Have any of the recently procedural and rules reforms being discussed in the Senate put a dent in the problems you've identified? What else needs to be done? Anyone?

SPEAKER: I'll pass.

MR. LAFORGE: You guys, you study this all the time.

MR. WHEELER: Our lives aren't that bad. (Laughter) I'll leave that for the next panel. And I think they'll pick that up. And there have been some rules changes some others talked about but I think they can certainly speak about that better than can I.

MR. WITTES: I'd just like to say one thing about it. Less about the specifics of any individual proposed rule change than about the moment that we're in with respect to the possibility of rules changes.

We're in a moment that doesn't happen very often. We don't know at the end of the next election cycle which party is going to control the White House and we don't know which party is going to control the Senate. And that gives you the opportunity

if you think about rule changes now that go into effect at the beginning of the next Congress, that rare sort of Rawlsian opportunity to create rules behind a veil of ignorance, it's a good time to think about in the abstract what the rules should be if you didn't know who they were going to help and you didn't know who they were going to hurt.

MR. LAFORGE: Very good. Judge? Any comment?

JUDGE FURGESON: I agree with that. Ben is right. I made a proposal similar to what I did today at what we call the Flannery lecture in March of '09 and I had the advantage of I had the attorney general, Eric Holder there introduce me for the speech so the Obama people had to listen to my spiel. And I was promising how I would really put the squeeze on Republican senators to try to come around and I would contact some Republican senators that I knew, the two from Texas in particular, and see if that was the time.

I thought with Obama coming in and a fresh sweep that might be the time. It turned out it wasn't the time. The Republicans had decided early on they weren't going to cooperate on anything and the time should have been before that. So maybe next year is the time. Right after that election turned out not to be the time, that's clear.

MR. LAFORGE: Thank you. This question is for the judges. Is there a backlog in your district that you would like to comment on? Or do you know of other districts that have backlogs that are the results of the problems we've identified? Judge Lamberth.

CHIEF JUDGE LAMBERTH: Well, there certainly is in our district. That's why we're having a hard time getting civil trials. But that largely was the result of so many vacancies at one time and we now have a fifth. Judge Urbina has taken senior status. There's no nominee yet for that but it's in the works. We've used visiting judges when we can and try to keep up with the civil side but many districts around the country,

not just us, have that exact same problem. And certainly, all the border courts have it. That's how I got to know Judge Roll so well who is the chief judge in Arizona because I was chairman of the Intercircuit Assignment Committee for the Judicial Conference for five years so I was responsible for sending visiting judges to the border courts. And a lot of my work was with him and he was very diligent in trying to get judges to come to Phoenix and Tucson and handle this enormous caseload they have in those courts. They had vacancies, could not get them filled, couldn't get them confirmed. Just the same things we're talking about today.

MR. LAFORGE: Judge Furgeson, more on backlog?

JUDGE FURGESON: The Western District of Texas is either the second or third heaviest docket in the United States. The heaviest docket is the Eastern District of California and, you know, that's Sacramento. That's where there's been an enormous amount of growth. I think that docket almost has a caseload twice of what a normal judge would have anywhere else in the nation. In the Western District it's about 50 to 60 percent higher. Those backlogs exist and I don't know how those judges -- the judges on the border or the judges in the Eastern District of California are doing it. I told you that David Briones, who is going to be 70 pretty soon handled almost 800 criminal cases last year. How much longer he can do that remains to be seen, and if he steps down the El Paso Division of the Western District of Texas will go into absolute gridlock.

So we need not only vacancies filled but we need new judgeships. The Western District of Texas needs I think four new judges and I think probably the Eastern District of California may need as many as five new judges. The Judicial Conference of the United States has an ominous judge bill in front of the Congress asking that these judgeships be created. And again, that's not happening. The last ominous judge bill was in 1990. There have been some judges added for border courts but we are really falling behind. And there is a need not only to fill vacancies but create new judgeships and fill

those.

MR. LAFORGE: Thank you, Judge. I have one more question I'm going to ask and then I'm going to reserve time for audience questions. So if you all are thinking about those be prepared. We'll have a microphone I think coming around in just a moment. And I will call on you in just a moment.

But the question I have first for both judges, first as a chief judge, Judge Lamberth and then as a senior judge yourself, Judge Furgeson, would each of you comment on the role of senior judges in mitigating the impact of the shortages?

CHIEF JUDGE LAMBERTH: We would be sinking without senior judges. We've been very fortunate to keep senior judges working. They are obligated to work a quarter time to keep chambers and staff. Most of our work between half and three-quarters time and they're going to draw their full salary for life anyway so it's actually free labor. In our district we encourage a judge to take senior status the minute you're eligible so that we get another active judge and it gives us that extra person to deal with. Some districts they have a tradition of not doing it that way so I've dealt with a log of different chief judges who have different success stories about getting people to take senior status. From my point of view, the sooner they take it the better because then we have some extra labor to help us handle the caseload.

MR. LAFORGE: Judge Furgeson.

JUDGE FURGESON: I agree with Royce completely. If it weren't for senior judges our whole institution would be underwater. There are -- Judge Briones and I both took senior in the Western District of Texas for the purpose of getting vacancies and getting new judges. As I say, if Judge Briones ever stepped down, the three remaining judges in El Paso I think could not possibly even contemplate getting the job done. It would be at that point desperate. And how long a 70-year-old man can handle 800 criminal cases remains to be seen, but I don't think it can be too much longer.

MR. LAFORGE: Ben?

MR. WITTES: I just wanted to, you know, I completely agree with everything both of the judges just said about the service of senior judges and the importance of them. It's important to note that the same effect that they're describing at district courts -- at the district courts does not necessarily work with regard to Courts of Appeals and senior status, not because you don't get the extra seat but because the Courts of Appeals sometimes sit en banc, and when you take senior status you give up your role on the en banc court. And so the dynamics of it are going to be a little bit different at the appeals court level.

MR. LAFORGE: Thank you. I will now call on audience participants for questions in no particular order. We have a lady with a microphone here. If you would stand please, identify yourself, and the gentleman right here in front will be first. Please speak into the microphone so the record can hear you.

MR. SMITH: Bruce Smith from Brookings.

I just had a question on if we disaggregate the appointment process from, you know, not just one overall number between nomination and confirmation but there are different aspects of it it seems to me. And one, if you look up front as to how you get the nominations actually made, I wonder what significance the incredible agonizing each administration has got to be cleaner than the last one. We've got to examine everybody and they can't have any, you know, any improprieties and what not and what not. Is there kind of -- and then the scrutiny of the record and so forth. Is that a dimension here that we have to look at as a kind of conflict of interest requirement? I'm not urging absence of ethical standards but somehow with -- is there -- just getting nominations made and maybe, you know, looking at the different aspects of it and getting them voted on once you've actually had them made, but up front is there a kind of too protracted conflict of interest procedure that's (inaudible) before you can even put a



nomination up?

MR. LAFORGE: Russell?

MR. WHEELER: Well, Eldie Acheson who did that during the Clinton administration on the next panel can speak to it much better than I can for sure.

One thing that does interest me though is that is the variation in nominations getting made from state to state. Judge Furgeson talked about the Western District of Texas where there have been seven vacancies since the start of the Obama administration and two nominations and one confirmation. In New York, nine vacancies and only two nominations have been made. I'm getting back to the senators in a sense. In Pennsylvania, five vacancies and I think -- or seven and one nominee versus California where most of the vacancies at least have nominations, or Georgia where most of the vacancies at least have nominations. So, there's something else going on here between the White House and the senators and I don't pretend to know what it is but it sort of creates a variation. And as you can see from that little table I handed out, the average days from the announcement or the creation of the vacancy to the nomination is up to close to a year now.

MR. LAFORGE: Ben.

MR. WITTES: I also think that there is a dynamic there in which if you're terrified of what's going to happen in the confirmation process, as an administration you necessarily invest more energy in prenomination vetting by way of defense. So preemptive defense against what you expect to happen in the confirmation process. The result of that then is that you lengthen the nomination process which, you know, which is the effect that you were describing.

MR. LAFORGE: Other questions from the audience. Yes, sir.

MR. GLUCK: Thank you. My name is Peter Gluck and my question has to do with the potential creep of the delay and the number of vacancies down to the

district court level. And I'd like to suggest a possible explanation for that is that actually the stakes are quite high at the district court level because most of the decisions that get to the Supreme Court start out at the district court. The Supreme Court has very limited original jurisdiction. And you can look at the health care law. Four district courts have rendered a decision on the health care -- five. It's three to two. I don't remember which way it goes but these district court judges are looking at the same constitution and applying the health care law. And they've come to three either unconstitutional decisions or the other way around.

MR. LAFORGE: Judge Lamberth.

CHIEF JUDGE LAMBERTH: I think it's natural that judges -- district judges would differ on an issue like that because the Supreme Court itself is going to be five to four or six to three or whatever they are. I mean, they don't know themselves. They're making up federalism law as we go. I'm very fortunate I don't have one of those cases. I hope not to get one because I don't want to pick where the five votes are. I don't know where they are and where it's going to end up in the Supreme Court. But as a mere district judge I'm trying to predict what I think is the state of the law today.

That includes in my circuit. So in my circuit I probably have a better idea of where I think that law is going to go, but I've also got to figure out where do I think it's going to go in the Supreme Court. I don't have the foggiest and I don't think any of those five does. So you do the best you can. I don't think any of those five are doing it for any partisan or political reason. They're trying to figure out what kinds of principles of federalism do we apply to this kind of a question? And the way I see Judge Vincent in particular being pilloried now as though he's some right wing nut, I happen to know the guy. He's not and I think it's very unfortunate. It's sort of the way we all become characterized and pilloried for some sort of partisan leanings that I don't think are there for a guy like Judge Vincent.

MR. LAFORGE: Judge Furgeson.

JUDGE FURGESON: I agree with that completely. You know, we are writing on a new slate and these judges are doing their dead level best to figure out how this should be resolved. And to me it's not unusual that there would be differences. I don't want to minimize the importance of district judges. We put people in prison, patent cases start with us, of national importance. We have all sorts of cases that make a huge difference in the way the law works in this country. But we are never the final word on the big case. I mean, they're always going to go up. And I will tell you there is this feeling out I guess in the country that we're all partisans. You know, I will tell you, I just think that's not true. I know lots and lots of district judges. I've been a district judge for 17 years and we are really committed to try to make this system work and we are institutional people. And we want justice to be done. We believe in juries and the jury system.

So I think what we do is very important and I have a sense of that importance every day I step in the courtroom of how important it is, especially if I am sentencing someone to prison. But I will tell you the thought that district -- really, the thought that we're partisans is just I think a fallacy. Now, you can argue that with me all day long and we'll probably never agree on it, but at the level where I am we're just trying to get the cases done in a fair way. And I truly believe that.

MR. WHEELER: Bill?

MR. LAFORGE: Comment. Russell.

MR. WHEELER: I just want to something real quick. What Judge Furgeson said, there's a fair amount of empirical bearing that out, both by research done by Robert Carr and colleagues at the University of Houston and then a Brookings book published by Cass Sunstein and others. If you listen to FOX News and MSNBC you'd think the gap between Democratic and Republican appointed judges is, you know, 90/10.

It's really pretty close. In some areas it's indistinguishable. Criminal procedure cases. And in other areas it gets a little wider. But there is a fair amount of evidence, empirical evidence to support Judge Furgeson's, you know, well considered and experience-based statement.

MR. WITTES: And if I could just add to that, you know, I agree with all of that but I don't think you have to believe any of it to accept the idea that we shouldn't be fighting over district judges on the basis of things like the health care law. Even if you reject everything that was said by everybody, all three of my co-panelists, I challenge anyone in this room to think of a single significant ideological point of American law that was decided on a final basis by a U.S. district judge.

Criminal sentences? We decide those on the basis -- U.S. district judges decide that sort of thing. You know, how long you're going to spend, whether you're going to get executed or not. Okay. But a single significant point of substantive ideologically contested law, these are not decided by federal district judges ever. And I can promise you -- I can't promise you what the Supreme Court is going to do with the health care law, although we have an excellent program coming up on that on Wednesday which you should all come to. (Laughter) But I can't promise you what they're going to do but I can promise you that all five -- that not one of the five district judges' opinions who have weighed in on the subject will merit a moment's time in the consideration. And that's no disrespect to district judges in general. They just -- that's not the role that they play in our system and we shouldn't be fighting about them as though they were playing that role.

JUDGE FURGESON: I agree with that completely. And we know that. We know that the big issues are going up. We understand that. And our role is to do our best and send it up.

MR. LAFORGE: Question from the audience. Let's see, the lady over

here first. Then we'll get the rest of you.

MS. PICKLER: Hi, I'm Nedra Pickler with the Associated Press. I cover the federal courts. And I'm wondering if the panelists can talk about specifically what President Obama could do to address this problem or really anybody in the White House.

MR. LAFORGE: The next panel will be addressing remedies but we will allow comment on this.

MS. PICKLER: I saw that was about the Senate so I wondered if you all had something specifically from the White House.

MR. LAFORGE: Okay.

MR. WITTES: You know, at the beginning of the Bush administration I wrote this little editorial that said there's actually something that the Bush administration - the Bush administration is going to face a real bloodbath if it does not acknowledge the sense of ill use that Democrats right have over the way Clinton's nominees were treated. And you can say the same about the Obama administration with respect to the Bush administration, and you can say the same about whoever follows the Obama administration with respect to the Obama administration. Somebody at some point has to take a leadership role and say I don't want to play these games anymore. I want to acknowledge that wrong was done including by my party, and I want to figure out a way going forward to acknowledge what we did, acknowledge what was done to us, and figure out a different modus vivendi. And I think that has to be a matter of presidential leadership.

CHIEF JUDGE LAMBERTH: And I think -- I was just going to say I think the White House Counsel about a month more or less said that in a talk over at the American Constitution Society.

JUDGE FURGESON: Well, he started in that direction but he fell short. Nobody wants to do the part that Ben says of admitting they did wrong. So as long as

nobody is going to do that it's not going to happen.

MR. LAFORGE: Questions from the audience. Yes, sir.

MR. MILLHEISER: Thank you. Ian Millheiser from CAP.

It seems to me that the drop-off in district court judges in the last two years can be blamed on two factors. One is that the Senate has, you know, I know this is the discussion of the next panel, but the Senate has so many means of delay that if your agenda is to prevent things from happening and not just judicial confirmations, legislation from happening, then a handful of senators, and I don't believe in the 111th Congress it was the Republicans who were doing this. I believe it was a handful of senators can impose so much delay that they can use that as a roadblock to prevent other things from happening. That problem is likely to be solved in the 112th Congress because there is no longer a risk that legislation is going to be enacted.

The other factor though is that there is a breakdown in consensus I think around the Constitution around the law in this country. I think two years ago there was a bipartisan consensus that Carolene Products was correct. There was a broad presumption in favor of the constitutionality of laws and there was a bit of argument around, you know, what the rare exceptions to that should be. But that's very different than the world we live in now where the youngest member of the Judiciary Committee recently claimed that child labor laws are unconstitutional.

So I guess what my question is is to the extent that the second problem is driving this, at what point does it become reasonable for, you know, then you had the wonderful hypothetical is it better to have two judges or zero judges? If one of those judges thinks child labor laws is unconstitutional, at what point does it become reasonable to say, you know, maybe it is better to have zero judges?

MR. LAFORGE: Who wants this one?

MR. WITTES: I take it that question was directed at me so let me take a

crack at it.

So first of all I think you're grossly overstating the degree of consensus that used to exist on matters of jurisprudence in the United States as recently as two years ago. And I think you're also overstating the degree to which the consensus such as it was has broken down over the last two years. I think the question of whether the health care law is constitutional would have been as controversial in any time after Lopez as it is now. And it would have been a more difficult question maybe before race than it is now. But anytime after Lopez we were going to -- that you passed an individual mandate there was going to be a constitutional dispute over it.

Now, on the question of, look, your question about how bad does the other side have to be before you'd rather kill your own than let theirs get on a court is -- it's sort of a metaphysical question that I'm not sure I know how to answer. You know, I think you live in a country with the political debate that it has and, you know, you can go around -- you can prefer that everybody does rather than their people get on the bench. And I'm stating this, you know, from the point of view of any speaker. Right? I mean, there are a lot of people on the right who feel exactly the same way. They would rather have -- they would rather have nobody get confirmed than liberal activists be among the people who get confirmed.

I think this is just a recipe to, you know, a dysfunctional judiciary and it also gives up on the possibility that people persuade each other over time. And I think you have to at some level as a matter of civic faith, unless you just don't believe in law and you don't believe that there is a discipline of law that even aspires to operate independently of politics, whether it successfully does is a separate question, but you have to not believe in the aspiration to ultimately say you would rather have neither of two extraordinarily talented philosophically diverse people on a court than both of them. And I just can't go there. I just think it's -- I just think it lacks confidence in our ability to reason

with one another.

MR. LAFORGE: Any other comments? We'll have time for one more public question and then we'll have a quick summation by each panelists. So the lady in the far back.

SPEAKER: Thank you. My name is Mia. I'm here on behalf of the Council for Court Excellence.

My question is it seems as though you've attributed much of the logjam to the process of appointing and confirmation. Do you think that part of it can be attributed to something like the availability of nominees other than their dissuasion from the experience of the rigorous process of confirmation? Do you think there's any other factors, like declining interest in practicing public law or something like that?

MR. LAFORGE: Judge Furgeson. That's a very interesting question and I've asked that question myself. I think 30 years ago over two-thirds of the federal bench came from the private sector. Today, two-thirds of the federal bench comes from the public sector. You know, federal judges are keenly aware of this. In the 17 years I've been on the bench at least close to half of that time there have been no costs of living. And the other half, the cost of living has been below the general schedule for federal employees. We haven't kept pace salary-wise with what is happening especially in the private sector, and I have wondered -- I have no basis for this but I have wondered if there is a difficulty in attracting people from the private sector to the courts because they would give up a substantial amount of income with families and so forth, kids to send to college, and it just no longer makes sense to them.

As I said, I don't have any empirical data to support that but I've wondered that. But we do know that the private sector is not providing people to the judiciary in the numbers that happened 30 years ago. And I think it's always good to have balance, and the private sector is where you've got lawyers dealing with some of



the most difficult and complex questions of the day. And to have those kind of skilled lawyers in the federal system is good.

MR. LAFORGE: Others on the panel? We'll move then to a quick wrap-up, and I'm going to ask each panelist if they will to make two points. First, in response to this question, is there currently a deficit of public and business faith in the federal judiciary because of the shortfall of confirmations? And then secondly, anything else you would like to say in summation.

We'll start with Judge Furgeson.

JUDGE FURGESON: I can't answer the first question. I cannot answer the first question. I'm not for sure. But I would like to say this, that you know, in some ways sort of the spirit of our revolution was captured by Thomas Payne in Common Sense when he said in a monarchy the king is law but in a democracy the law is king. We are a nation based on the rule of law. And for the rule of law to work you've got to have sufficient judges to handle the cases and handle them in a thoughtful way. And in the federal system, especially in places like the border, we are -- we are in trouble because we don't have a sufficient number of judges to make the rule of law work the way it's supposed to. I think it's a crisis and I hope that the other two branches of government can do anything possible to relieve the crisis.

MR. LAFORGE: Thank you, Judge Furgeson. Chief Judge Lamberth.

CHIEF JUDGE LAMBERTH: I agree with Judge Furgeson totally and the only thing I would add is I express my appreciation both to the Federal Bar and to Brookings for producing this program today. I think the public should be better informed on the issues that we talked about here today, and I hope all of you will do your part to better inform the public on these issues. They're important issues and they face the judiciary on a constant basis. I think there's a crisis in the judiciary because of this issue of vacancies and caseload and not being able to get people confirmed to handle it. And

the broken process needs to be fixed and people of good will can, in fact, fix it. Eldie and some others have worked on that in the past and will give us some ideas on the next panel but I thank both Brookings and the Federal Bar for this program.

MR. LAFORGE: Ben and Russell, breach of faith with the public and with business and any other comments? Ben?

MR. WITTES: So I don't think there's a crisis of confidence in the judiciary but I think there could be if this doesn't -- if we continue this over a long enough period of time. I don't venture a guess how long it would take to really develop one.

I do think there are three other things that we should consider when we consider whether we want to completely destroy the judicial confirmation process. You know, the confirmation process is not the only pillar on which the -- certain modesty in the process. The idea that we don't, you know, destroy each other's nominees is not the only sort of self-imposed restraint that Congress has generally put on itself in terms of its dealings with the judiciary. It's a norm that developed over time and there were three other important ones, also none of them constitutionally required. One is that you don't muck with the court's jurisdiction because you don't like the substantive outcomes they give you. There have been various efforts to disrupt that norm over American history. None of them is very well smiled upon in retrospect. The second is that you don't impeach judges because you don't like decisions they make. And the third is that you don't make judicial budgets contingent on substantive outcomes.

Now, all of these are just like the confirmation process, just things that Congress does or declines to do out of institutional respect for the job the courts do. They're sort of matters of norm and comedy and they've developed over time because we thought they were important, not because there was, you know, constitutional law that required them.

And so I ask, you know, I wrote a little book about the decline of the

confirmation process and in this book I sort of pose the question how long do these other three pillars of the independent judiciary survive once we kick out the leg and we realize that gosh, you know, if we really hate, you know, the way the other side does jurisprudence enough to stop their judges, there's actually a lot of other things we could try, too. And so I just, you know, leave you with the question why not do some of those others as well.

MR. LAFORGE: To wrap it up, Russell Wheeler.

MR. WHEELER: Well, this will just be real quick in response to the question in the back about the changing nature of the background of judges. It just shows how this process can skew things in ways you wouldn't anticipate. A private practice lawyer gets offered a nomination in the district court and says, well, I've got to consider this. I'll lose my practice. People aren't going to sign on with a lawyer who is going to be perhaps leaving in a year. And a good private practice lawyer would say but I can put up with that because if I can afford it I can go on the bench. But now the person has to ask themselves I might not even get confirmed. At least if I went through that process, at least I'd be guaranteed confirmation at the end of it. That's far from clear anymore. So there's all these insidious things that are affecting the judiciary in ways that we don't recognize immediately. And that's all the more reason to try to figure out what to do about it.

MR. LAFORGE: Gentlemen on the panel, thank you very much. As Ashley opened by saying justice delayed is justice denied, that concludes the first panel and we'll move on to the second panel shortly. (Applause)