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**Introduction:**

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## PROCEEDINGS

MR. WITTES: Welcome to Brookings and specifically to the eighth, I believe, in our Campaign 2012 series of events.

My name is Benjamin Wittes. I'm a senior fellow in Governance Studies here at Brookings, and actually this is an all-Governance Studies event. Most of our events have had a mix of people from around the Institution, but in this one, the Governance Studies Department has kind of seized the podium, and we're not giving it up.

For those of you who haven't been to any of the prior events, let me just give you a little bit of an overview of the Campaign 2012 Project. My job in general in these events is to welcome you and then get off the stage and get out of the way, and that's exactly what I'm going to do today.

For each of these events, what we've tried to do is to create -- we tried to divide the world of policy up into 12 issue sets and have a single scholar or group of scholars write a principal paper, both assessing the record of the Obama administration in the area and assessing the merits of the critique that first the primary candidates and now Mitt Romney have made on that subject, and then try to synthesize those areas, those critiques, and that record into something like advice for the next administration, how to handle the particular issue area involved.

Today's subject, which is actually one that the candidates are not talking very much about, is institutional reform. And we included this, frankly, knowing that the candidates were unlikely to discuss it very much as such, because we felt that it was an issue that while candidates can avoid often people who have to govern can't and that the questions facing the country in a range of areas were of sufficient severity that they would necessarily implicate certain institutional questions in the coming years.

And so today to discuss these issues we have the author of our main paper, Bill Galston, as well as the author of two commenting papers, Russ Whitehurst, and Sarah Binder; and as with all of these events, we have a moderator to shepherd the conversation from *POLITICO*, congressional editor Marty Kady.

And with that, I'd like to welcome you all here and get out of the way. Thanks very much.

MR. KADY: Thanks so much, everyone, for coming. I don't know how many of you are here because part of the title of this is Campaign 2012 or how many of you are genuinely interested in government institutional reform. But we're going to try to do our best to blend these topics.

As Bill warned beforehand, I want to make sure government

reform doesn't come across as a boring topic, and the reality is that it isn't, and it is a political topic.

The candidates aren't talking about government reform and institutional reform in those words per se, but when you're talking about ACA or Dodd-Frank or, you know, getting rid of or expanding the Financial Protection Bureau, that's government reform in and of itself. Tax cuts or tax increases, that's a version of government reform. There's a lot of talk about tax reform. We've been writing a lot about sequestration, which is, I think, a manner of government reform, how you'd carry that out.

But if you read Bill Galston's paper here, he has a really nice overview of how we get to these important points in government reform over the course of American history but also very recent history. Talks a lot about the American -- what is the health care law called again, the ACA --

SEVERAL VOICES: The Affordable Health Care Act.

MR. KADY: You hear "Obamacare" so often that I always forget the actual --

MR. KADY: How soon we forget.

MR. KADY: Talk a lot about Dodd-Frank, and then you have a lot of interesting proposals, some of which are, you know, partisan, some of which are not partisan, some of which are unrealistic -- even

you'd probably admit unrealistic -- in our current divided government. But, yeah, there are some things worth fleshing out there, whether it's entitlement review or the way we do judicial nominations or the way we do redistricting. I mean, these are things that the candidates aren't talking about, the campaigns aren't talking about. But who gets control of the Senate, who gets control of the House, who wins the presidency will have a major impact on whether we do anything or the directions we take on these topics that aren't necessarily right there in the mainstream of the political coverage and stuff you'll see on the home page of *POLITICO* every day or any other publication, but things that the next administration and the next Congress will definitely have an impact on.

But I wanted to turn the bulk of the discussion over to you to talk a little bit about what you want to get across here and some of the highlights of your paper, and how your reviews on institutional reform impact Campaign 2012.

MR. GALSTON: Well, thanks. Thanks so much for teeing up this discussion. I have to say, you know, I'm a little bit startled to see a full room for a discussion of this topic. I'm even more startled by what I take the median age of the audience to be. (Laughter) You know, I would have predicted that there would be lots of people whose hair and resumes look more like mine, and I'm delighted to see so many young and, I hope,

ardent prospective government reformers in the audience. And let me assure you that it is very steady work, which is, you know, I think an appealing prospect in these, you know, economically volatile times.

(Laughter)

Why did I write this paper? Well, it reads very abstractly, but in many ways it's a very personal paper. I've been mucking around Washington for three decades now, and I have observed that we obsess about politics, you know, the minutia of daily politics, you know? From time to time we actually condescend to talk about public policy, but very rarely do we focus on the institutional context within which politics transpires and within which policy gets made. And everybody who's studied the matter at all seriously understands that the way institutions are structured and the rules and procedures that they set up drive outcomes to a remarkable extent. Members of Congress understand that, which is why they fight so hard about relatively minor and apparently obscure changes in the congressional rules. They understand that procedure and substance are intimately linked. But the rest of the political system doesn't.

This is not a mistake that we have always made in American history. It's not a pervasive omission or oversight. As a matter of fact -- and I talk about this some at the beginning of my paper -- at crisis points in

American history, American policymakers have always resorted to institutional reform, not to the exclusion of policy changes but as the indispensable precondition for those changes and the way of giving them sustainability over time. And some of my favorite examples include, for example, the creation of the Federal Reserve Board in response to a series of financial panics in the last decade of the 19th century and the first decade of the 20th. In one of them, the entire political system had to go cap and hand to J.P. Morgan, who served as sort of an informal central banker, and without that the crash of 1907 might have turned into the first Great Depression.

And similarly, in the New Deal, many of the institutions that we now take for granted were created in response to a crisis of capacity of the federal government to deal with the national economy. After World War II, we had a crisis of effectiveness, this time in foreign policy, which led to institutions that we now take for granted such as the Unified Department of Defense, the Central Intelligence Agency, and many others.

Concern about the environment rose in the 1960s in response not only to whatever citizens could see before them but also to famous provocative books, such as Rachel Carson's *Silent Spring*. And we ended up with an institution that we now take for granted, although we

argue about it a lot, namely, the EPA, et cetera. And, you know, there was something approaching a crisis of governance around Watergate, and we forget how much of the run-up to Watergate was motivated by conflict between Congress and the Executive Branch, particularly over control of the budget, and Congress responded in 1974 with the Congressional Budget Act, which created the CBO, which we all now take for granted as the neutral scorekeeper of the federal government. I could go on and on.

And my argument, in brief, is this. We have reached -- and I'll be deliberately dramatic here -- something approaching a crisis of governance in the contemporary United States. There has been a massive withdrawal of public trust and confidence from our governing institutions. We can explain this. We can try to explain it away. And part of it has to do with the development of partisan polarization in recent decades. But in part, it is a crisis of governmental effectiveness. The American people are not satisfied with the status quo. They want their government to focus on change and reform. And what they see is government institutions tied up in knots.

So, my thesis is that without resorting to whole-scale constitutional revision, which is very difficult and, arguable, I think not necessary in current circumstances, that the two presidential candidates, however much they choose or not choose to talk about institutional reform,



should be aware of just how necessary it is.

And let me just give you a couple of examples, which I don't think have to be politically insignificant. President Obama, just last night out on the West Coast, made a very interesting case, a case that he's made before, and that is that we've spent more than a decade embroiled in overseas wars, and in the case of both Iraq and Afghanistan we have tried to build new nations out of the ashes of the old. But, he says, we've now reached a point where, and I quote, "We have to do some nation building here at home." And I think most Americans agree with that.

Most Americans also agree that nation building has both a metaphorical and a very specific sense, and the specific sense is that the country is crumbling around us -- you know, our roads and bridges and highways -- not only our transportation infrastructure but all the other things that go into a 21st century infrastructure. Anybody who travels knows that we no longer have a world-class infrastructure, and it's getting worse every year as we invest less and less in infrastructure.

Everybody also knows that we don't have a lot of public money available. How do you square that circle? Well, I have argued until I'm blue in the face that we ought to do what candidate Obama recommended in 2008 and has sporadically returned to ever since, namely, the idea of a national infrastructure bank that can take a modicum

of public capital seed capital and around that grain of sand, you know, form a pearl in the oyster, gathering private capital around the public seed capital to be invested in infrastructure projects that pass a market test and not a political test. That is a new institution. But it would make a dramatic difference not only in the sources of funding but in the amounts of funding available for infrastructure and also for the kinds of projects in which we chose to invest.

I'll give you one more example. I think everybody acknowledges that the budget process of the United States government has broken down almost completely. We are trying to function with institutions and procedures that were laid down close to four decades ago in the Congressional Budget Act of 1974 and revised only sporadically and half-heartedly ever since. Well, the Governance Studies Division of Brookings gathered together a few months ago a bunch of bipartisan experts; a number of former heads of the Congressional Budget Office representing both political parties; senior former members of Congress, again representing both political parties; and many of the best budget experts in the country, and we came up with a package of institutional reforms for the federal budgeting process. I'm not going to go through them all now, but you put it all together and it represents a formula for increasing the effectiveness of the budgeting process of the United States,

cutting through some of the gridlock not assuming that the current level of partisan polarization goes away but creating institutions that work better in the context of partisan polarization.

And that will be my concluding thought. My concluding thought, just to tie a bow around it, is this. A lot of us have spent a lot of time charting the rise of political polarization, and there are different narratives even on the eighth floor of Brookings, 1755 Massachusetts Avenue, but we, I think, all agree on the phenomenon to be explained. And we all acknowledge, in different ways, that it has made it much more difficult for the government of the United States to carry out its mandate to carry out the people's business.

Now, I know I hope that in the decades to come, this peak of partisan polarization will subside. I'm not expecting a new era of good feeling. But I am hoping that it will return to something like more normal levels. But we don't have one or two decades to waste. We need a government that starts working better now. You know, we do politics with the political parties we have and not the political parties that we'd like to have, and I think that we need to think about institutional reforms that will work better even in the context of this intense contestation.

So, that will do for an opening statement, and that's why I wrote this paper, that's why I think it matters.

MR. KADY: Thank you so much. There are a lot of great thoughts there.

Before I transition to Russ here, I want to bring this back into the political moment that we're in.

We have a Republican House that can't pass an infrastructure bill, a highway bill. This used to be not easy, but there used to be a way to do this. You put all sorts of earmarks and goodies in there and they would roll on out, and, you know, everyone would get their bridges and their highways, and they would do some good work for national infrastructure, and they would do a lot of good political work for people. They can't pass that this year. They're on a temporary highway bill. They can't pass a farm bill, another thing they used to do every 5 years, 10 years, whatever their plans were. This used to be a little bit easier, because they could log-roll people, they could favor in there, and it would do some good policy work and some bad policy work.

But the Post Office is in a crisis. It's failing. It's going to miss a major debt payment. People's pensions may be affected very soon. And this Congress, particularly this House of Representatives, can't pass a postal reform bill.

Last summer we were engaged in the debt crisis. I mean, I remember covering the debt limit votes. It would be some unanimous

consent at 10 o'clock in the Senate on a Thursday night - oh, yeah, they just raised the debt limit. And no one even thought about it except maybe Tom Coburn would spend a few moments protesting it when we got to the brink of a default there.

So, what I'd like before I -- and you can respond to that, and we can also move over to Russ' response. How do we square the current makeup of Congress? We're still probably going to have a Republican House. We may have a Republican Senate, I don't know, but there's a group of people that don't want more government solutions. They want fewer government solutions. In fact, they want to kill ACA. They want to kill the Dodd-Frank Act. They'd block the appointee to the Consumer Protection Bureau.

Putting these ideas into the political reality of this Congress, the next Congress, and maybe at least the short-term future is sort of where I want to see if we can take this discussion. And if you want to respond to that and then we can move to Russ' response and his paper as well.

MR. GALSTON: Well, I have a feeling that people have already heard a lot from me. You know, the past 15 minutes --

MR. KADY: Okay, so why don't I pass the baton to a new generation of Americans?

MR. WHITEHURST: That would not be to me.

It's hard to disagree with my colleague, Bill, that, you know, it's harder to get things done than it used to be. And we could talk a little bit about why. I mean, one of the things I talked about in my response, my written response, to Bill was to imagine the center of American politics graphically and imagine that 25 years ago it looked like a bell-shaped curve where the center was not only the mean, the median, and the mode, but it had a real peak. That is, people tended to think about political issues in a way that could be characterized as modal. And we had institutions like Brookings that conspired to create a sense of what was modal that other people could sign onto. I believe, you know, that political opinion currently still has a mean, but imagine it as a rectangular distribution rather than a bell-shaped curve. People are all over the place. They have new media as a way of expressing more localized sets of opinions. We have bloggers and cable channels that conspire to generate localized sections of opinion and empower people to act on those opinions. And so I think we've just got a fundamentally different situation than we had before. It is less driven by elites than it used to be, and you can applaud it, in some respects, as giving voice to opinions by people who previously did not have a particularly strong voice. Nonetheless, it results in the problem of difficulty getting anything done politically,

certainly in Washington.

You know, I think Bill's solutions are maybe not the way to get there. That is, my experience in government, which is not as long as Bill's but has some substance to it, is that the way you get bipartisan movement is not by agreeing that we need to create new institutions or we need different ways of governance but deciding on a particular goal, an outcome, that there's enough bipartisanship around to pursue.

In the Bush Administration it was No Child Left Behind, the sense that American schools were failing, that we needed to do something to increase student achievement. You can argue about whether that worked out well or not, but it was certainly a bipartisan bill and that bill produced institutional changes. So my argument is that if you can agree congressionally or in the political process that there's an endpoint that is worth achieving, institutional reform can come along as part of the process of trying to achieve that endpoint. If you start with the goal of creating institutions that can produce better outputs, I think that is tougher to get accomplished. Almost any reform you can think of is one person's positive reform and another person's negative reform. And when we're left to speculate about what the political outcomes might be of a particular reform strategy, it becomes more politicized.

Bill, in his paper, talked about a very interesting idea and that's kind of a negative poll tax. If you don't show up and vote, you get fined, and this works in Australia. They get 95 percent turnout. Our turnout is what, about 50 percent, less than 50 percent in most elections. Wouldn't it be a good thing if people were fined for not voting? We'd get a lot of turnout. Well, that probably sounds good to you if the people who don't traditionally turn out are minority, poor, and urban, and who would now be turning out in greater numbers. It probably doesn't seem so appealing to you if your party consists of people who are more White than Black, more rich than poor, more rural than urban, because you would lose control. So what seems a good reform strategy in the abstract has political consequences that immediately bar, I think, any bipartisanship in pushing things forward.

So I would argue that there are still possibilities for progress, but they are smaller-bore possibilities that don't have high visibility because the visibility itself is a barrier to progress. And I think there are many instances that one can point to where such reforms have occurred in the recent past and will occur in the future. One that I've argued for a lot is sort of a policy change, and I think there's bipartisan support for it, is providing real information to students and their parents who are shopping for a college about the outcomes of that choice; that is, how many



students graduate? How many get jobs? How much do they earn down the road? Creating that policy outcome is one that both Democrats and Republicans seems to think is an important thing to do, and doing that would necessarily produce institutional changes because you'd need governance changes in order to achieve that particular output. So smaller bore rather than larger bore, looking for outcomes rather than processes, might get us to the same place that Bill wants us to get to.

MR. KADY: To what extent -- I just want to follow up on one thing that you talked about, baby steps -- to what extent can things be done without Congress? Executive action, internal reviews of roles and the way agencies are structured. I mean one thought that every executive has is how can I bypass Congress on this because Congress can't do anything?

MR. WHITEHURST: Well, there's been a lot of that lately, hasn't there? I think if you're committed to governance as an important part of the way America works, then you're probably not fond, in principle, of the executive snatching from Congress what are traditionally, legitimately, and constitutionally, congressional prerogatives. So the rise in the power of the executive branch at the expense of Congress may contribute to some of the partisanship you see there now. I think the executive branch has considerable authority to create institutional change

without snatching from Congress its traditional prerogatives. The Office of Management and Budget has tremendous potential for good in the executive branch and often fulfills that potential by holding executive branch agencies to account for the money that they're spending. And to the extent that OMB is focused, for example, on more effective use of federal money and asking federal agencies to produce evidence that the money that they are expending is, in fact, producing the desirable results, it produces real positive change. And again, I have seen no real political partisanship around the issue of managing government more effectively within the executive branch.

MR. KADY: Sarah, your title is "The Depressing Logic of Reform's Bad Prospects." I'd like to insert maybe one more adjective, negative adjective, in there like -- but I'll let you respond with the skepticism that I feel in your --

MS. BINDER: I should fess up to admit that when I wrote this, I believe the title was "Response to Galston." So I think either Ben or a brilliant editor somewhere who gave it "The Depressing Logic of Reform's Bad Prospects," because that's actually pretty good, perhaps a little more depressing than I realized.

MR. KADY: I'm an editor. I'm used to getting blamed.

MS. BINDER: First, just a sidebar and then back to the depressing logic. The bright news about a mandate to vote is that if it's phrased as mandating and a small penalty for failure to vote, we know how John Roberts is going to vote on it when it comes to the Supreme Court. So I think things are looking up.

There's a sense that comes out, I think, of my response to Bill's piece that I think it's worth reflecting on just very briefly and some of it was picked up by what Russ had just said. Bill notes, I think importantly, one perspective about institutions, which as he phrases them are "arenas of cooperation," like these are the arenas in which people come together structured by a set of rules. Part of why I think reform's prospects are so dismal is because I think of institutions in quite a bit different way, which is to think of them as institutions essentially as structures of power; that is, people who create the roles in great institutions tend to like them, and people who are on the losing end of institutions tend to dislike them and thus want to reform them. And the politicians, of course, understand the consequences of structures and of institutions and rules, and thus are very hesitant to take on reform because they know that change in the rules has what we think of in the political science world as sort of distributional consequences. So there are winners and there are losers.

And so even when reform is successful, there are a set of outcomes that should make us a little bit hesitant, right? So first of all that we do get winners and losers in the way institutions are set up. So take the Consumer Financial Protection Bureau -- right there's a debate about whether there should be a five-member commission like the FDIC or whether it should be a single presidential-appointed person at the top. As it turns out this has been what Republicans have been fighting over in terms of repealing Dodd-Frank, right? They don't want that much authority exercised and appointed to a single person. They want a five-person commission. Of course, when Democrats created and passed Dodd-Frank out of the House in the first place, that's exactly what the CFPB looked like. It was a five-person commission in part because Democrats reasoned we're not going to be in the majority forever. There will be a Republican president, and we don't want a Republican appointee potentially dismantling consumer protection. They thought better of that logic, thinking that what we want is change now, right, and thus rethought that when it went through the Senate to create a single appointee.

Again, I raise the example just to keep in mind the distributional consequences of the way in which these institutions get reformed or created in the first place, which gives, I think, politicians and

often reformers sort of second thoughts about the difficulty and the cost and the benefits of reforming institutions.

So if the first consequence is that reform has winners and losers, the second consequence often is that we get institutions that look a little bit jerry rigged, right, at the end of the day, right. And that is they're in bed with so many compromises, by necessity given our political system, that we often wonder whether they will work. And so I'm thinking here of Bill's example, the federal reserve, which is this tremendous, as Bill pointed out, response to financial crisis and decades of bank panics and so forth and no longer wanted to go to JP Morgan to be bailed out. And we get this sort of grand compromise, as it turns out, or at least as we think of it at the time. There are compromises of Democrats, Republicans, Progressives, Populists, and what do you get? Well, you get this sort of crazy central bank. It's not a central bank, it's a decentral bank. We've got reserve banks in Kansas City. We have a reserve bank -- another one in St. Louis, Kansas, Dallas, I mean that's a crazy way to set up a central bank and that's something that I think the fed is still struggling with. It's one explanation of why the fed hasn't acted. Well, Bernanke has to get consensus from non-publicly appointed reserve bank presidents.

So there are all sorts of compromises that go into creating institutions, and we live with their consequences. Often of which is that

we design institutions that, perhaps not intentionally, but look often that they are designed and seemingly to fail.

Now, of course, for scholars or reformers that's a very tough challenge, right? First of all, designing a set or proposing a set of reforms that might be amenable to one side, let alone the other side, but you have to convince politicians that reform is in their best interests. And it's very hard, I think, to appeal to collective interests or institutional legitimacy in generating support for reform, right? You have to -- it's very hard to get members to think outside their immediate short-term political and policy interests. And we could think of other examples where that's come up -- filibuster reform and so forth -- but I'll leave it there for now.

MR. KADY: One of the areas that Bill talks about in his paper that's of interest to me is the redistricting as a prospect for reform and reducing polarization, and we're still in the process of going through the redistricting process for Congress and what's happening is what you'd expect to have happen. In states that are controlled by Republicans, they've given a few Democrats the death penalty. And in states controlled by Democrats, they've done the same to Republicans. There are a few North Carolina Democrats who will not return probably, and there are a few Illinois and New York Republicans who will not return after this fall. And every ten years we go through this process after the census. Well,

we have more people than you do, so we're going to move the districts around. And we have safe districts and safer districts, and it contributes to the long-term polarization.

But Bill, can you talk a little bit about redistricting because I think that contributes so much to what we see day to day in Capitol Hill. Because if you come from a completely safe district where you are a Republican plus 15 or a Democrat plus 15 percent, you have no incentive to go toward that fuzzy center that Russ talks about in his response.

MR. GALSTON: Well, I think you've just reminded us that state legislatures are the real death panels once high-riding politicians are consigned to the political graveyard.

First of all as my colleague, Tom Mann, and others have pointed out, I think when it comes to redistricting we have to be careful to curb our enthusiasm. If what you're really interested in changing at the end of the day is partisan polarization in the House of Representatives, then redistricting reform may move the needle, but it won't cure the bulk of the problem; but having said that, it's well worth undertaking. I think we are quite anomalous among the world's advanced democracies in allowing politicians to choose their voters more than the other way around, and there are models of less partisan processes in about half a dozen states in the country. It's clear that that's not going to be a top-down, federally

mandated, process. It will have to proceed state by state, and it will be a much harder slog in some states than others, but clearly it's an important and worthy objective. And if I could wave a wand, a lot more states would be doing it.

But now that you've so generously given me the floor back, just to stir the pot a little you'll let me respond to a few of the things that the other panelists have said. I think it's important to keep in mind that despite all of these political obstacles, despite the fact that institutional reform does produce winners and losers -- it's only partly a positive-sum game, it can also be a zero-sum game -- it is not always the case. It has not always been the case in American history that large as opposed to what Russ called small-bore institutional change has been possible. And it's been possible because it has happened, and it's made big differences. And it's made big differences in response to big problems. Small changes cure small problems, but only big changes can cure big problems.

And so I guess the threshold issue is what kind of situation are we now facing? And I don't think I'm alone in believing that from the standpoint of governance right now, the United States does not have a small problem. And the question is how are we going to respond to it other than wringing our hands or other than accepting this as the new normal, which speaking as a citizen and not just a scholar, I refuse to do



because if this is the new normal, then our country is in for a period of sustained decline. And I don't want to think what our politics are going to be in circumstances of sustained decline. So I think it's reform or die for the United States government, and I'm in favor of some real political ambition here. The Federal Reserve Board, as Sarah knows better than just about anybody, was, of course, a political compromise. But institutions are not condemned to ineffectiveness or futility because an act of Congress has given rise to them. And, indeed, if you compare the Federal Reserve Board to European central banks, yeah, on the one hand it's more ramshackle, you're absolutely right. On the other hand because it's more broad based, it has been more sustainable over time than a lot of the European central banks have proved to be. And I don't think it's any accident that people like Ron Paul for decades have been lonely cranks criticizing the fed; that the criticism of the fed has never really reached political escape velocity, and I think that has to do with the fact that there are some internal mechanisms within the Federal Reserve Board that do give it a broader representation of the opinion not just of the center, but of the different economic regions of the country. I think that's a plus and not a minus. And yeah, it produces some internal controversy. It may slow down action, but it seems to me that the Constitution of the United States is eloquent testimony to the fact that internalizing a certain amount of

conflict and slowing down action quite deliberately is not necessarily the enemy of good and effective governance.

So I see the fed as continuous with our constitutional traditions rather than a compromised anomaly that can't do its job. It doesn't do its job perfectly, but we're a whole lot better off with it than without it. And I would make the same case about the long list of institutional reforms, big reforms, with which I began my paper. They were intensely controversial at the time. Go back and take a look at the debates about the Department of Defense. So I think that the fact that something is big and controversial does not mean that it's impossible, even in these perilous times.

Now let me say a word about the president and Congress. Russ has articulated a widespread view, namely that we have witnessed in recent decades presidential aggrandizement at the expense of a weakened Congress. I'm not sure I buy that. I think I could make the opposite case with just as much cogency. I'll give you a couple of examples. Every president from FDR to Ronald Reagan enjoyed reorganization authority that enabled the president to take the lead in reorganizing the executive branch of the United States. Not without going to Congress, but allowing the president to set the agenda. And I think that was an important part of the fact that the government of the United States

was not stagnant. A series of presidents had the capacity to reform it, which they used. Similarly, many presidents enjoyed fast-track legislative authority in the area of trade. They don't have that anymore. Congress took that away, took it back. And you can read the Congressional Act of 1974 as a deliberate and in some respects successful effort on the part of Congress to take back some of the budget authority from the executive branch. And part of the title of that bill, if memory serves, was the "Anti-Impoundment Act of 1974." It was the deliberate response to Richard Nixon's effort to rein in what he saw as out-of-control federal spending through the use of executive power.

Okay, we can have a long debate as to whether the Congress did the right thing or the wrong thing, but suffice it to say that I think there's now a case for giving the president a little bit more leadership when it comes to budgeting. I'll give you an example of a reform I happen to favor. It's called "enhanced precision authority," and it is a constitutional version of the line-item veto, which in its flat form is unconstitutional. And it doesn't allow the president to strip out particular line items from the budget, but it does allow the president to single them out and re-propose them to Congress on a fast-track for up or down consideration. And there are a lot of people who think that would make a difference. And speaking of feasibility, it is the one budget reform that the

Chair of the House Budget Committee, Republican Paul Ryan, and his Democratic-ranking member, Chris Van Hollen, agree on and jointly proposed as part of a package of ten budget reform rules.

So I think once we start to think in reform terms and in institutional terms, we'll find out that there's some real gold in them that hills and there may even be more consensus.

And finally, I see institutions as places where people argue not just about means, but also about ends. And so the idea that we have to agree on the goals and then we can create institutions around that agreement -- that's one model of how you make institutions and how they work. Another one is that you know that you're going to need politics to address problems, and you try to set up institutions within which these problems can be most effectively argued out and acted on, details to come, and that's more the model that I'm functioning with.

MR. KADY: I can't not let Russ respond here at this point since you guys are at odds here. No chair throwing -- I know we don't do that here.

MR. WHITEHURST: No, we don't. For the sake of stagecraft, we're posing this as on the one hand and on the other hand -- there is a middle here. There are reforms that Bill has proposed if you'll read his paper that seem to me achievable. And the latter one you mentioned, I

think, is because Republicans would see this as a way of providing more budget discipline as a way of cutting federal spending, perhaps. And, like other reforms you've proposed, like bipartisan commissions to screen judicial nominees seem to be dead on arrival, because your bipartisan judge is my left-of-center judge. And so I don't want to be forced, as the executive, to choose from left-of-center judges.

So I think you have to go down the list and ask which of these, which of the proposals, is politically viable, and is the best way to achieve it to focus on the reform itself, or to focus on some end, like budget discipline, that you could bring the form into as a means to the end.

Clearly, I think, there are a lot of examples where the latter mechanism works. You favor a mechanism for the reform in the abstraction because good things will follow from it. And I don't know which of is right. Perhaps we're both wrong. We'll have to wait and see.

MR. KADY: One of the things, though -- and I want to go to Sarah on this --

MR. GALSTON: Sarah will decide. (Laughs)

MS. BINDER: It's easier that way for all of us.

MR. KADY: One of the things that doesn't involve creating new institutions, but rather reviewing existing institutions, that interests me

here, is this idea of entitlement review that you put on paper: reviewing Social Security, Medicare, Medicaid, every five years. And if Congress doesn't restore certain balances, you would have mandatory either cuts or revenue increases, or some combination of the two. That sounds a little bit like the super-committee model: If you don't do something, then there's a trigger that is painful.

That doesn't sound like a partisan idea. It doesn't sound like an idea that will involve creating new agencies or institutions. It sounds like something that could actually be done.

But is that something that's a realistic, baby-step way to start addressing the long-term crisis that ensure that people my age don't have any Social Security or Medicare?

MS. BINDER: My hunch is that it's a non-starter -- politically, even though in policy terms it makes sense, right? If you take Republicans, who have been outspoken on reducing entitlements, and if we take Democrats at their word that they do support entitlements, also it's tougher to tell until the rubber hits the road. But if the broader question is that Democrats and Republicans disagree about future long-term deficits and how to reduce them, and if entitlements, from the Democrats' perspective is just one part of the puzzle, then they're not going to want to

play game even if it seems like this is one seemingly small step that turns out probably to be a big step.

MR. GALSTON: Let me -- you know, let me comment on this example, because I think it's really interesting.

First of all, full disclosure -- where did I get this idea?

Answer: that notorious bastion of conservatism known as Sweden. You know, the Swedes had their own version of our current problems about 20 years ago. And after a very intensive period of policy review, another governance studies scholar, Kent Weaver, has written at some considerable length about this process, they came out with a new procedure, which wasn't designed either necessarily to cut these programs, or to raise revenue to fund the programs at their current and future levels, it was intended, rather, to force the legislature to do one or the other, or some combination of the two.

So the end in view -- you're absolutely -- this is a good example of why the difference between us is only semantic to some extent -- the end in view was long-term solvency for these programs. There was a disagreement as to how to attain that end. And this Swedish mechanism institutionalized that disagreement, without necessarily putting its thumb on the scale one way or the other. All it said was that we, the purpose of this institution is to rule out what is now the default setting,

namely programs that year after year after year cost more and more, without corresponding revenue stream to fund it. That is an unacceptable outcome. But how you deal with the closing of the gap, between the promises and the revenue, is a matter for politics.

And it's not clear to me why either political party, if it's being responsible and honest with the people, should necessarily dissent from the proposition that we could pay for the government that the people are insisting upon. And that is the point of that mechanism.

Now, to be cynical, there's obvious political advantage for both political parties in, you know, in enabling the government to do things that politicians don't have to fund. But I think we're now up against the consequences of that. And my argument is that because the two political parties are fundamentally at odds on that question, what we need to do through institutional reform is to rule out this pernicious default position which is undermining the future of the country. And we can do that in, you know, in an even-handed way.

So -- now, you and Sarah may be right that this is a total non-starter. But I would like to believe that we are not systematically incapable, as a government, as a country, of doing reasonable things that other governments with fiscal problems and governance difficulties have



found the wit and the will to do. But that may just be the cockeyed American optimist in me.

MR. KADY: Well, let me circle back to the 2012 campaign a little bit. We started off by noting that the campaigns aren't talking directly about government reform. But what do you think -- we know a little bit about what Obama government reform looks like, and what it may look like, but we don't really have a sense from Mitt Romney.

I'll ask you to speculate a little bit, based on what you've heard on the campaign so far -- what does institutional reform look like in a Romney presidency?

MR. GALSTON: Well, there's one thing we don't have to speculate about, and that is he's in favor of the most ambitious form of institutional reform that the American political system allows, namely a constitutional amendment. Because he's said that he's in favor of a constitutional balance-the-budget amendment.

So that's a pretty big-ticket item right there.

SPEAKER: (off mic)

MR. GALSTON: Beyond, you know, beyond that, I will confess, having read Mr. Romney's 160-page, single-spaced campaign manifesto from stem to stern, I'm not entirely clear on his government reform agenda, but I'd be willing to bet, sight unseen, that he would check

the box in front of each one of Chairman Ryan's budget reforms in that House package, and probably lots of other things, as well.

But that's -- I've exceeded the limits of my ignorance here.

MR. KADY: What do you think, Russ?

MR. WHITEHURST: Well, the choice between President Obama and Governor Romney is largely a choice about the strength and power of the federal government with regard to a variety of matters, from education to financial markets. And there is a choice there. The choice may not have been articulated in clear policy principles, but people know what they're voting for, when they vote between these two candidates on that issue of federalism: the degree of control of the federal government versus states and citizens over their affairs. I think there is a clear choice there. It's articulated in some places, it isn't in others.

Education's the area I cover, and it's been, since both the President and Governor Romney are in some sense reformists, it's been a little hard to see the space between them on some education issues. They, for example, are both in favor of state systems that do a better job of systematically evaluating teachers, and providing incentives for the best teachers to stay in the profession, and the worst teachers to leave. But there is a real choice there with regard to the Governor's proposal for open public school choice so that federal funds follow children wherever they

want to go, including if they're in D.C., Alexandria, or to charter schools in the District. And that flows from a difference in perspective about whether education reform should be a regulated federal enterprise, or whether it should be a market-based solution. So I think there are differences there.

I think that the campaigns are not going to be about the reform of institutions. People are worried about jobs, and they want something that they think will serve their interests, rather than abstractions.

MR. KADY: Do you get a sense that the first several months in a Romney presidency would be about undoing things? You know, well, "We're going to roll-back ACA, or roll-back Dodd-Frank."

But what do you think --

MR. WHITEHURST: Well, undoing things can also be thought of as doing things.

MR. KADY: That is a point -- it's a version of government reform.

MS. BINDER: Well, within my area of Congress, where we think of institutions pretty narrowly defined, that's not anywhere on the radar of the presidential campaigns. It will appear to some extent in congressional campaigns, over the question of the Senate and the filibuster. But Republicans, through Minority Leader McConnell -- because

of uncertainty about whether he'll be in the majority or the minority -- has said we're not for filibuster reform. And he challenges the Democrats to show that they are for filibuster reform if they're in the minority.

So there will be a talk about it, but I don't expect much.

MR. GALSTON: I can think of one more -- and this is a big one. I think that, as president, Governor, Mr. Romney, would try to change Medicaid from an entitlement to a block grant, and to send it to the states. That is not just a policy change; that is a very important institutional shift. And it also represents an important step in the direction that Russ just gestured towards, and that is re-conceiving federalism.

Because Medicaid, since its inception, has been not only a pretty open-ended program, but it was also explicitly conceived as a partnership between the federal government and the states. It's one of the major fiscal connectors between the states and the federal government. And to re-conceive it, not only as a block grant, but also something over which the states would issue nearly plenipotentiary control, would be a profound shift, I believe, in our federal system, and not just in the funding of health care for the poor and the elderly and the disabled.

MR. KADY: And you can already see some of that underway with some of the Governor's challenges in the wake of the Supreme Court ruling --

MR. GALSTON: Absolutely.

MR. KADY: -- on the ACA.

MR. GALSTON: This is a big one.

MR. KADY: I think it's time to open up to audience questions here.

So -- there's someone with a mike, and there's someone with a hand up. So, can you guys meet somewhere between?

MR. SCARLIS: I'm Basil Scarlis. I've worked abroad for most of my life, and one thing I've observed is that part of our governance issue might be the federal presidential system that we have, as opposed to the parliamentary system in Europe.

And I want to know your views on that.

And, secondly -- and more importantly, perhaps -- is money and politics part of the reform effort? Is this part going to be discussed later on, by Brookings? Is that not a major area of reform?

MR. KADY: Who wants to start?

MR. GALSTON: I mean, the Supreme Court has spoken on money and politics, whether you agree with *Citizens United* or not.

MS. BINDER: And just on the question of institutional, comparative institutional differences -- and I'm no comparativist -- there's been ample work showing that, certainly, parliamentary systems do have

some advantage in terms of the majority party getting things done. Of course this also comes with more frequent alterations -- potentially, alterations of control, which may lead to reversals, less durable policy.

But I think I would observe that many of these parliaments, of late, themselves have encountered difficulty forming majority governments, so you end up with coalitional governments. And so that speaks to a broader, sort of generalized disagreements, or political conflict that makes it hard to create large, multi-party or, in our sense, bipartisan majorities, when there are such intense differences over outcomes.

And I'll leave the campaign finance stuff.

MR. GALSTON: Well, a couple of things. First of all, we're now in an interesting system, where we're having political parties' functioning more and more along parliamentary lines, but within a constitution that is not designed for political parties of that kind. Indeed, it wasn't designed for political parties of any kind, but especially not for that kind.

And so, in a way, the worst of all possible worlds is to have quasi-parliamentary political parties functioning, or not functioning, within a constitution of divided powers. And I don't think anybody would cheerfully recommend, you know -- recommend that system of government to

another country, unless that person wanted to do grave damage to that other country.

With regard to money and politics and campaign finance, first of all, it is perfectly true, I think, that the hands of reformers have been substantially tied by the Supreme Court -- which is why some people are now beginning to rethink a proposal that people like Bill Bradley made decades ago, a constitutional amendment as the only way of undoing this sequence of cases that started with *Buckley v. Valeo*, and led up to, evolved into *Citizens United*.

So, having said that, I can assure you that the government studies program at Brookings has not lowered the torch for campaign finance reform, and many people -- many people -- in our division have had a longstanding interest in that area, and have done very great work in that area. So the fact that I didn't deal with it in my paper is not a sign of lack of institutional interest or commitment, but only a sign of lack of expertise on my part -- coupled with the belief that my, you know, that my assigned topic was already plenty broad enough for one paper.

MR. KADY: In the back?

SPEAKER: Thanks much to the panelists. I'd like to welcome Mr. Kady to Brookings. I have admired your work for a good long time.

MR. KADY: He's biased.

SPEAKER: I just came in not too long ago, so please excuse me if it's repetitive. But I wonder if anyone of you all, and maybe especially you, Marty, could get to the point of whether any of the presidential candidates will discuss, to whatever degree, the fiscal cliff?

MR. KADY: That is something we didn't get to here, but that we're writing a lot about. The "fiscal cliff" is the combination of the Bush tax rates' expiring at the end of the year, the defense and domestic side sequestration that starts early next year, the doc-fix, which needs to have some action by the end of the year or Medicare reimbursement needs to change -- not to mention that we will have another debt-limit discussion sometime. I don't remember exactly when, but the debt-limit again, and it's sometimes a moving target.

The candidates are discussing it, but you know, Congress is not going to do anything before the election. I mean, they might do something during the lame-duck.

I mean, what do you all think the outlook is, I mean, on the fiscal cliff that we're going to hit before the end of the year?

MR. GALSTON: Well, let me drop a footnote here. Coincidentally, there was a panel at Brookings earlier this morning, you know, on which I also sat, dealing with exactly that question. And so there



is a lot of material now on the Brookings website. Senator Toomey came to lay out his proposal, and to respond to the speech that Senator Murray had given from that very podium not much more than a week ago. And then a bunch of us discussed your question.

And I think we pretty much agreed that the Congress is not only unlikely -- very unlikely -- to do anything between now and the election, but also almost as unlikely to do anything during the lame-duck on this issue. Because even though it seems like an interim question, it raises all of the largest issues that divide the two political parties.

So the consensus, at least on the morning panel, was that Congress, out of weariness or desperation, or perhaps, you know, hopes on one side or the other, would probably vote yet another extension of the status quo, coupled with pious promises to do better in 2013 than they managed to do in 2011 and 2012. And then, whether anything happens in 2013, which you would think the stage would be set for something to happen, will depend on all sorts of things -- including, by the way, the outcome of the elections.

If we end up with unified government -- that is to say, if Governor Romney gets 50.5 percent of the popular vote, if the Republicans get a minimum of 50 Senators and hold the House -- and I think all of those things would occur together -- then it strikes me as very

likely that this unified Republican government would try to deal with the fiscal cliff on its own terms. If they can find some Democrats to collaborate with them, fine. But if not, they would probably use existing institutional mechanisms to package as much of their fiscal program as possible into a single reconciliation bill, and then to ram it through on a party-line vote. Many of them have said as much.

MR. KADY: That's an important point.

MR. GALSTON: Yes.

MR. KADY: That you only need 51 votes if they use a budget reconciliation in the Senate to push through a tax-and-package, for the most part.

MR. GALSTON: Your question gets more interesting, if we end up with the same or a slightly different version of divided government after the election. If the President is re-elected, and either the status quo is maintained in both the House and the Senate, or even if the Republicans get 51 votes in the Senate, you would still have, you know, an irresistible force meeting an immovable object in the form of a presidential veto. And so either nothing would happen, or the parties would have to sit down and negotiate.

MR. WHITEHURST: We can bring it back to the topic of this panel by pointing out that the decision to sequester funds was, if you will,

a big governance-institutional reform. And so sometimes you have to watch out, you may get what you wish for, and it may not work out quite as well as expected.

MS. BINDER: At the time of the Super Committee this summer, I kept referring to this as not only just the usual kicking the can down the road, but this time they rigged the can to explode. But what I hadn't quite been cynical enough -- as if I'm not cynical enough -- but I should have been even more cynical, to think, yeah, I guess they could defuse the can. Now, I don't yet know quite whether they will do that, or whether there will be just another version of kicking the can down the road.

But there's another, broader problem here, which is that in addition to polarization, which should vary over time, members don't like casting tough votes now for long-term benefits -- right? They are as myopic as voters are, right? They don't want to impose short-term costs if the benefit's in the future, because who knows if they'll be in office in the future. And if you add that, compound that with partisan differences, and institutional difficulties of legislating in a 60-vote threshold, it's kind of a recipe for why you don't get -- why we keep confronting these fiscal cliffs.

MR. GALSTON: I think that self-interest and myopia are constants of human nature, but they don't always dominate the policy process the way they do now. So, what's the difference?

MS. BINDER: Well, I think part of the difference here, though we keep labeling it polarization, right, that the two parties in partisan terms and ideological terms differ, but there's another dynamic going on here, which is both parties think that control of government is within reach, right. And so if you had polarization but you had a 40-year Democratic majority and no hope of ever becoming the minority, you might say, well, this is my chance to do a little compromise and see what I can get, play the game. But if control is within reach, right, who wants half a loaf, right? You want the whole darn loaf, and perhaps that changes

people's short-term perspectives.

MR. KADY: That's a really good point. In the back left here.

SPEAKER: My question is going to start out with a diagnosis and that diagnosis, I think, is going to inform the discussion and the question. The diagnosis is that we're beset by corruption at the top of the international financial system, and I know that for a fact, I'm a whistleblower from the World Bank. And I can tell you that I've been working with Congress on this issue for the last five years and there's a bipartisan solution that's very much within reach. What's the problem? The press. The press doesn't report to the public so that we can resolve the problem.

And so my question is, am I a cockeyed optimist? Is it beyond reach that the press will tell the public what's going on?

MR. KADY: Oh, wait, that's for me. (Laughter)

I'd like to think we will. I mean, my particular role, I'm the congressional editor at POLITICO, so we would report on the scandals you speak of as they would come down to some sort of congressional action or hearing. I mean, we've covered a good bit of the financial crisis in Europe and in America and the scandals that have come our way. If there are specific things that you think that we should be covering, reach

out.

The blue shirt back there.

MR. WALLACH: Hi, I'm Phil Wallach of Brookings. I have two points I want to make, the first is about Governor Romney's reform proposals. One thing he has put on the table is regulatory reform. You know, a lot of Republicans think that serious problems come from too many regulations choking off the economy right now. Governor Romney proposes a really significant restructuring of the way government works, that any rule proposed by a federal agency with costs more than \$100 million, would have to be passed by a congressional vote and the President signing it. So, that would be a really big restructuring of government and whether you think it's a good idea or not, I think it's worth debating.

The second question -- the second point I wanted to put out there is just to ask about legitimacy, sort of whether -- we know that Congress' legitimacy is at an historic low right now and all of our institutions in general seem to be suffering in the eyes of the public.

So, the question is, sort of, are these reforms that we've put on the table the kinds of things that can reverse those trends or is the public looking for something different? Why have they become so

dissatisfied? I'd be curious to hear each of the panelists' thoughts.

MR. WHITEHURST: On the issue of regulation, I don't think there's any -- again, I come at this from a background in education, there's no question that federal regulation carries a significant burden. I had a question a couple of weeks ago from somebody who for some reason thought I knew -- you know, had anybody calculated all of the burden associated with No Child Left Behind regulation and compliance, and the answer is, no. But you only have to go a little bit down that road to see that there was a lot of change in behavior that was generated by that regulation all the way down to the level of what individual teachers were doing in individual classrooms.

So, to have some sense other than the OMB paperwork burden accounting for what the real costs are of federal regulations seems to be a good thing. Whether having Congress get involved in that process is another question entirely. So, I'm not sure that this particular fix is the best fix, though I do think that something is needed to have a more careful accounting of the cost and burden of regulation.

MR. GALSTON: Well, thank you for bringing, you know, that proposal by Governor Romney to the attention of the assembled company because I actually think it raises some really profound questions that are

worth thinking through. You know, why are we having this discussion about regulation? Why do many candidates regularly invoke the explosion of the *Federal Register* as proof positive of government run amok?

Well, the answer is that since The New Deal, for more than three quarters of a century, we have increasingly employed a specifically new system of governance in the United States where the Congress of the United States passes very broad laws, many of which have general and incompletely specified terms in them, and then punts the implementation of those broadly conceived laws to the agencies and the departments in the Executive Branch, which then write the regulations and through the operation of the administration, Administrative Procedures Act, you know, make those -- turn those regulations from gleams in their eye to proposals to finished and adopted and binding regulations.

So, the post New Deal governance mode involves a new division of power between Congress and the Executive Branch, including agencies and agencies and departments that are poised uneasily between Congress and the Executive Branch. That's the way we've done business now for three quarters of a century.

And one reason we've done business that way is that if the Congress actually had to settle all of the detailed questions that its



legislation contemplates, it would never be able to get anything done. And given the size of the United States, given the size of our economy, many, many regulations are going to cross that \$100 million threshold. That's a rounding error for the federal government.

If you think the Congress of the United States is tied up in knots now -- this now gets to Russ's point -- imagine what it would be like if, in effect, Congress had to review and take direct legislative responsibility for what has been delegated to the Executive Branch for 75 years. I don't see how it would work, quite frankly. The only way I think it would work is if you suppose that the reach of the federal government and the modus operandi of the Congress of the United States could go back to the status quo ante, that is to say, the form of legislation that prevailed up to the late 1920s and early 1930s. I don't think that's going to happen. I think that's a bridge that we've crossed and it's burned down behind us.

And I know there are some people who have fantasies of bringing the Constitution in exile out of its exile and reinstating it as, you know, the mode of operation of the government of the United States. I don't think that's going to happen, so I think the proposal raises fascinating questions, but if implemented it would produce a train wreck in very short order.

MR. KADY: I want to clarify what he's talking about. I think one of the proposals is only a congressional review of new regulations that score at \$100 million --

MR. GALSTON: No, I understand. I understand that. But my hypothesis, given the size of our economy and the reach of the federal government, is that dozens of not hundreds of proposed regulations would cross that threshold. And then what are you going to do? Congress can't handle the business it now has on its plate.

MR. WHITEHURST: One might amend the governor's proposal to give Congress the authority to do that should it wish to rather than requiring that it do so for every piece of regulation --

MR. GALSTON: That's an interesting idea. Yeah.

MS. BINDER: I was going to take Phil's other question about trusting government and particularly trusting Congress and this legitimacy question.

Eventually Congress' approval rating will go up, cannot go down, and even when it goes up I will still be showing my opening Congress lecture to undergrads, I will still be showing the comparative institutional approval ratings where Congress is below Fidel Castro. I will never not show that slide long after Castro -- there's a lot congressional

scholars have agreed upon about the causes of this decline and there's a lot we still sort of disagree about.

The ones we agree about, certainly if you want to explain variation over time starting when we have good data, consistent data from the '70s to the present, government scandal tends to drag down approval ratings, even if it's a few bad apples or the whole bad institution, whether it's a House banking scandal or Koreagate -- not to date myself -- in the earlier period, but even more so than that throughout all these studies is economic performance, that Congress suffers when the economy is in the tank. And so it's very hard for us -- none of these models, right, given all the indicators for the poor economy and the longevity of this duration even after recession, we shouldn't be too surprised that approval ratings are in the dumps, right, just like voters hold the President accountable, there's also holding Congress accountable for the state of the economy.

Now, some of that gets a little weeded out in periods of divided control where it's not clear who to blame, but voters are still happy to blame Congress, generally, for a poor economy.

Where people disagree about is the relevance of polarization in driving down views of Congress. I'm a little skeptical on that. I think many people like polarization because if you're a conservative you might

like the lack of policy action. There may be other reasons why you might prefer a polarized environment where you know where the two parties potentially stand for.

I think if there's a contribution of polarization here it is -- another thing, again, people disagree about is whether voters penalize Congress for failure to govern, right, and that the failure to produce policy outcomes regardless of your party do you still blame Congress. And the data there and the evidence is somewhat mixed, of course, because you always have to control for peoples' policy views that they're coming into, but there's some new and recent evidence that failure to act drives down approval, even controlling for the state of the economy.

MR. KADY: Right here.

MR. SHORE: My name is Steven Shore. We still haven't talked about the Supreme Court, which despite their, what I consider, the wisdom of their decision, at least in part, in the Affordable Care Act, nonetheless has been extremely polarized. Any thoughts about how the Court will be affected or the Court's role in relation to other branches of the government?

MR. GALSTON: Well, speaking of institutional reform, in an intemperate moment, of which I have not yet repented, I proposed that we

follow the model of every other advanced industrialized economy with a Constitutional Court and limit Supreme Court Justices to one nonrenewable 16-year term. That would, of course, require a constitutional amendment. But setting aside the inherent difficulty of doing that, why do I think it's a good idea?

Well, first of all, one reason that the stakes are so high for each Supreme Court nomination these days is the expectation that the President, if successful in getting that nominee confirmed, will put his imprint on the Court and on our jurisprudence for a full two generations, okay. And so, if it were limited to a single 16-year term, all other things being equal, there might be a small reduction in the temperature. I don't want to insist on that too much. What I'm sure of is this, that the current system creates perverse incentives for Presidents to nominate younger and younger people to the federal judiciary, in general, and to the Supreme Court, in particular, because if you can do that, then you know that your influence, given tenure during good behavior, is going to be all the longer. And that has led to a system in which, say, appellate judges who have crossed this magic bar of age 60 are suddenly regarded as less choice-worthy than people 10 or even 15 years younger than that.

And I personally believe that we have lost some first-rate

judicial minds and temperaments. We have been deprived of their services at the highest level of our judiciary because of that perverse incentive. And if there's anything that can be done to weaken it or eliminate it, I'm in favor of it.

Now, that, of course, gets to the proposal that I did make in this paper, but it's certainly not my invention, for these bipartisan judicial commissions, but one of the consequences, this is a double-edged sword because, on the one hand, you may get fewer considerably left-of-center liberal nominees, but, on the other hand, you'll also get fewer nominees who are outside, you know, a standard deviation from the median in the other direction as well.

And so the question is whether the political parties are willing to give up the left and right tails of the bell curve in order to enhance the chance that the president of their party will be able to get a nominee who inclines somewhat more in their direction than in the other party's direction.

And I'd be willing to defend the proposition that in circumstances in which the control of both the Congress and the Executive Branch has alternated with some rapidity, you know, this may be the functional equivalent of John Rawls' veil of ignorance. If you play

things out 10 years, it's not clear who's going to be in control of these institutions and so maybe both parties have more of an incentive in periods of this kind of uncertainty and oscillation to look for institutions that function a little bit more reliably. It means giving up your most preferred outcome in order to enhance your chances of getting, say, your second best outcome with greater regularity. It's not clear to me that that's a bad trade, even from a myopic and self-interested partisan point of view.

So, yeah, I think it is the case, certainly, that it is -- things are different when both parties have expectations of gaining power over the government as a whole or a particular institution, but if they've observed the history of recent American politics, they will have noticed that power gained is power soon lost and that that has policy consequences, as President Obama is now finding out.

So, maybe both parties now have an incentive, not to declare a truce, but to try to narrow the zone of conflict just a little bit in order to be able to sustain the changes that they do manage to enact through either the confirmation process or the legislative process.

MR. WHITEHURST: So Bill and I can end up agreeing on something, I think. I don't know that it's politically achievable at all, but limited terms for the federal judiciary seems to be an excellent idea. As

you may know now, once you're appointed a federal judge you serve for life, and there's this interesting quirk that I didn't understand until I talked about it with somebody last weekend. If you step down from the federal judiciary, you get your salary for life. And I said, why would that be? And it's because it's an incentive to get people to step down, right? If that were not there, you'd have an even greater problem than you have now, and that's people serving much longer than it's reasonable for them to serve.

So, a 10-year, 16-year term, something that assures turnover, something that, when you vote for a president, you would know what that president's power is going to be to appoint a Supreme Court judge would be an important institutional change, and I would vote for it were it a Constitutional amendment. How about that?

MR. GALSTON: Hooray.

MR. KADY: I think I'm going to take one more question here and then we have to wrap up.

SPEAKER: This is almost a follow-up question to the previous one, but in dealing with big changes for these big problems, do you think it's the case that institutional reform necessarily means some kind of shifting in the balance of power between either the electorate and the government or amongst the different branches? And if so, who do you



think is going to be a bigger roadblock to reform? Will it be the electorate and the people or is it going to be some other branch? You talk about like judicial reforms, you know, is the Judicial Branch going to fight back against Congress doing that? Or what are your thoughts about --

MR. WHITEHURST: Well, I think some institutional reforms do shift the balance of power between the branches of government, some that bill has proposed have that feature, so a fast-track appointment possibility for judges that are approved by a bipartisan panel shifts power in a number of ways. Other reforms can occur simply within one branch of government, so Congress can decide on a different set of operating rules for budgets or whatever and that changes the balance of power within that branch of government but not across branches of government.

So, I think it's a question of what the reform is or what the change is that you're interested in and it will have different consequences depending on its details.

MR. KADY: Did you want to go ahead? I think we're basically out of time, if anyone wanted to conclude in some way.

MR. GALSTON: Well, I guess I would conclude by saying that's an excellent question and one of the possible outcomes is that institutions will be more insulated from popular pressure than, you know,

than the alternatives. And two good examples of that -- and first of all, the Federal Reserve Board, which substantially withdrew control of monetary policy from the people through their elected representatives. Another example along the same lines is this base closing commission, the BRAC, which substantially diminishes the power of individual members of Congress to object to base closings that occur in their own districts or their own states.

So, this strategy of reform through insulation from direct popular pressure is one that I think is noteworthy and it can be good or bad depending on whether, you know, the commission or institution that's created produces better results for the country than the normal correlation of political forces would.

MR. KADY: I think we're out of time. I want to thank everyone for coming out and thank our great panelists, and thank you so much for letting *POLITICO* come here and moderate. (Applause)

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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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