

27 for being here.

28 And I also want to express my appreciation for the participation of our most
29 senior member, Senator Byrd, who watches these proceedings like a hawk. He knows
30 the rules better than anybody else, and so I would ask unanimous consent that his
31 written statement be submitted for the record.

32 [The prepared statement of Senator submitted for the record:]

33 Chairman Schumer. Now today I am also very glad to welcome Senators
34 Wyden, McCaskill and Grassley as our first panel. All three of them have been leaders
35 in efforts to end anonymous or secret holds and shine light on the kinds of long-term
36 delays that can hold up a nomination or a bill for weeks or months or even longer, and it
37 is done in the dark of night.

38 I applaud Senators Wyden and Grassley for their sustained commitment over
39 more than 10 years to this issue, again and again and again urging the Senate to take
40 action.

41 I also congratulate Senator McCaskill for her energetic and now successful
42 campaign in this Congress to break loose nominations that have gotten stuck. I say
43 “successful” because more than two-thirds of the Senators have signed her letter,
44 pledging not to use secret or anonymous holds themselves.

45 I look forward to hearing from these three witnesses in our first panel.

46 This is the third in a series of hearings I have called for this Committee to
47 examine the filibuster and its impact on the Senate. Our first hearing in April focused

48 on the history of the filibuster. Our second hearing in May dealt with the impact of the
49 filibuster in the current Congress and on the functioning of the government. Today's
50 focus is on "Silent Filibusters, Holds-- secret and otherwise-- and the Senate
51 Confirmation Process."

52 Now we did have some good news on this front yesterday with the passage by
53 unanimous consent of 64 stalled nominations. Three of them, who nobody voted
54 against, were first nominated on July 9th of 2009. That is almost a year ago. Why
55 were they blocked for so long? That illustrates vividly the problem we are examining in
56 this hearing.

57 Despite the easing of the logjam yesterday, what we have seen overall in this
58 Congress is the worst obstruction of Presidential nominations in recent memory, and
59 the delays in confirmation are affecting the ability of both the Judiciary and the
60 Executive Branch to do their jobs. Even under a Senate that flipped to Democratic
61 control, President Bush's nominations fared far better than have President Obama's.
62 President George Bush's Cabinet was fully confirmed in 13 days; President Obama's took
63 99 days.

64 As this Congress has progressed, the President's nominees continue to languish,
65 often when they have little or no real opposition. As of June 17th, President Obama
66 had 137 nominations pending on the Executive Calendar. At the same point in his first
67 term, President Bush had only 45.

68 Here's another indicator - judgeships. As of June 21st, of 84 judges nominated
69 by President Obama, 34 had been confirmed; that is 40 percent. For President Bush in
70 the same period, 57 out of 105 judges had been confirmed; that was 54 percent. Now
71 if this pace keeps up, President Obama will have the lowest judicial confirmation rate for
72 his first Congress of any modern President. That is not a superlative that any of us
73 should be proud of.

74 As for nominations to the executive agencies, at the end of 2009, President
75 Obama had one-third more pending confirmation than President Bush had at the end of
76 his first year, one-third more. That meant that almost a quarter of all the Obama
77 nominations were carried over to the second session of this Congress, and they are
78 waiting longer to be confirmed than the typical nominee in previous administrations.

79 For too many nominees, like some of those confirmed yesterday, it is months,
80 even a year, and longer. Clearly, something is wrong, and we need to do something
81 about it. Many of these delays relate to current Senate procedures, and here we can
82 get into a back and forth where I think neither party is blameless. But there is a
83 logjam, and we are trying to work in a bi-partisan way to figure our way out of it.

84 What do we mean by "hold" or "silent filibusters" when we talk about Senate
85 procedures? While there is no single definition, it generally refers to the indication by
86 an individual Senator of a party that if a bill or nomination is brought up in the future
87 they would object to debating it. This threat of a filibuster is what gives holds their
88 strength even though there is no requirement for a Majority Leader to honor a hold

89 request. So it is sort of the first step backed up by the filibuster, which is what we have
90 been talking about, whether they are silent, whether they are secret, or not.

91 As the use of anonymous holds has escalated over the last 35 years, there have
92 been repeated attempts to address their use, as our first panel of witnesses will discuss
93 today. Under the advice and consent provisions of the Constitution, the Senate is
94 responsible for confirming or rejecting presidential nominees. But it appears that the
95 Senate, an institution designed to be deliberative and slow, is now dangerously close to
96 gridlocked.

97 When we are not able to get good, qualified people to be confirmed to
98 government positions in a timely manner, it hurts the country. We will hear more
99 from our second panel about how the excessive delays are devastating to the operation
100 of government and to the efforts to recruit people to federal jobs. If it is known that
101 once you are nominated and leave your job you are going to have to wait months and
102 months and months, and then you might not be confirmed. So, who is going to take a
103 Federal job in the future? And that is going to hurt all of us.

104 Today's hearing will continue what I hope is a thoughtful, deliberative
105 examination of issues related to the filibuster by this Committee. As I said before, we
106 are not trying to put blame on one party or the other; we are trying to deal with the
107 problem that has brought us close to gridlock. We hope it will serve as a basis for
108 future discussions. I believe it will show that we need to consider reforms to improve
109 the confirmation process.

110 [The prepared statement of Chairman Schumer submitted for the record:]

111 Chairman Schumer. All Committee members and witnesses are asked to limit
112 their remarks to five minutes. We will not have questions after the first panel, but we
113 will, time permitting, have questions for the second. I look forward to listening to our
114 colleagues and the experts who have come to share knowledge and experience with us.
115 I now turn to Senator Bennett for his remarks.

116 **OPENING STATEMENT OF SENATOR BENNETT**

117 Senator Bennett. Thank you very much, Mr. Chairman. I welcome our
118 colleagues here.

119 I do not have an opening statement but will respond just briefly to the
120 comments that you have made, particularly to the numbers with respect to those that
121 have been held up. Speaking, if I may, however presumptuous it may sound, on behalf
122 of my Leader, Senator McConnell, who has been Chairman of this Committee, I would
123 point out that prior to Memorial Day Senator McConnell asked unanimous consent to
124 approve over 60 people who had been held, and it was a Senator of the Majority Party
125 who objected to that.

126 And there were 64 nominations cleared yesterday by unanimous consent, with
127 Senator McConnell's support. Most of them were on the list of those that he offered
128 on the 27th of May to be cleared, and, as I say, they were objected to by a member of
129 the Majority.

130 So I do not dispute in any way, Mr. Chairman, the numbers that you have cited,

131 but I do not want to leave the impression that all of the obstruction that has come as a
132 result of the use of holds has come from the Minority side. If indeed these 60 that
133 Senator McConnell tried to get through by unanimous consent had in fact been
134 approved in May, the statistics you have referred would have taken the number of
135 people being held down from 108 to 48, which is very close to the ballpark of that that
136 you had cited for previous Presidents.

137 That does not change the import of this hearing because the hearing is to talk
138 about holds generically, without respect to party. I think it is an appropriate hearing to
139 be held, and I appreciate your having called it and look forward to the testimony of our
140 colleagues.

141 Chairman Schumer. With the indulgence of my other colleagues here, we
142 usually have opening statements from all of the members of the panel, but we have
143 three members waiting. Would it be all right to go forward with our three panel
144 members?

145 Do you want to say something, Lamar?

146 Senator Alexander. I would, but I will be glad, could I do it after they make
147 their statements.

148 Chairman Schumer. Is that okay with everybody?

149 Senator Pryor. Yes, I would like to do the same thing.

150 Chairman Schumer. Great. Okay. Terrific.

151 Okay. Well, we have three panel members who all really deserve to be here by

152 their work and their records.

153 Since 1977, Senator Ron Wyden has been a powerful force in the crusade to
154 change Senate rules that allow Senators to block nominations and legislation
155 anonymously. Since that time, along with Senator Grassley, Senator Wyden has been
156 undeterred in his efforts to end secret holds. His current initiative, the Secret Holds
157 Elimination Act, reduces the disclosure deadline from six days to two, requires
158 disclosure whether or not the bill or nomination has been brought to the floor. As a
159 matter of practice, Senator Wyden publically announces any hold he has placed on a
160 nominee or a piece of legislation by inserting that statement in the Congressional
161 Record.

162 Senator Chuck Grassley, for over a decade, has been one of the primary voices to
163 increase transparency and accountability in the Senate by strengthening the disclosure
164 requirement for holds. In 1999, Senator Grassley sent a letter to the Senate leaders
165 that outlined a provision where any Senators placing a hold must notify the sponsor of
166 the legislation and the Committee jurisdiction. In both the 109th and 110th
167 Congresses, along with Senator Wyden, he authored the initiative to require the public
168 disclosure of holds in ethics reform bills.

169 Senator Claire McCaskill has been a vocal critic of the use of secret holds since
170 she has been here and is currently calling for changes in Senate rules that would end the
171 use of secret holds definitively. She has spearheaded a letter to the Senate leadership
172 requesting them to bring an end to the practice of permitting secret holds. This letter

173 also serves as a pledge for Senators to sign, promising that they will not place secret
174 holds on legislation or nominations. As of yesterday, 68 Senators had signed the
175 pledge, and Senator McCaskill told me she expects the number to grow.

176 Senators, your entire statements will be read into the record, and proceed as
177 you wish.

178 Senator Wyden, you may begin.

179 **STATEMENT OF HON. RON WYDEN, A UNITED STATES SENATOR FROM THE STATE OF**
180 **OREGON**

181
182 Senator Wyden. Thank you very much, Mr. Chairman, and there certainly
183 should not be a filibuster at any Senate reform hearings. So I am going to be very brief,
184 and I thank you and colleagues for your courtesy.

185 As you indicated, Mr. Chairman, for more than a dozen years, Senator Grassley
186 and I, a Democrat and a Republican, have sat at tables just like this one, pulling out all
187 the stops to persuade the United States Senate to stop doing public business in secret,
188 and we are very pleased to be joined by Senator McCaskill who brings us energy and
189 passion and skilled advocacy to the cause.

190 What I thought I would do, Mr. Chairman, is just take a few minutes and walk the
191 Committee through the odyssey that this reform journey has been on. The fact is the
192 United States Senate has already voted repeatedly--repeatedly, Mr. Chairman and
193 colleagues--to ban secret holds. In 1997 and again in 1998, the Senate actually voted
194 unanimously for amendments to ban secret holds. This is not an abstraction. It is not

195 a question of what you ought to do. The Senate voted twice to ban holds,
196 unanimously. In fact, seven years almost to this date, I was before this Committee as
197 well, talking about how we were finally going to get this done.

198 But every time the Senate voted to pass legislation ending holds in the Senate,
199 bills ending secret holds would then get changed in secret, usually in a conference
200 committee.

201 So the question is would you not think that a bill reforming Senate procedure,
202 that the Senate passed overwhelmingly, would come back from a conference with the
203 House with a ban on secret holds being intact? That would be logical, and it would be
204 wrong.

205 Now we have tried, Senator Grassley and I, a whole host of efforts to finally ban
206 these holds. In 1999, we actually got personal commitments from both the
207 Democratic and Republican Leader that neither Leader would honor unless it was
208 formally made in writing. That commitment was made in a letter to colleagues. It
209 was published in the Congressional Record. So the Democratic and Republican
210 Leaders, Mr. Chairman, said they would not honor a secret hold.

211 However, that pledge was not enforced, and, as Senator Grassley and I have
212 pointed in this 12-year-long odyssey, both Democrats and Republicans continued to
213 employ secret holds in the 106th Congress.

214 Now that year, Senator Grassley and I got another amendment passed here in
215 the Senate to ban secret holds. This was a recorded vote, colleagues, 84 to 13. That

216 was included in the House, in the Honest Leadership and Open Government Act, and it
217 was passed into law.

218 That also came back from conference riddled with loopholes. The practice of
219 secret holds has continued.

220 So, Mr. Chairman, our message, and it is a bipartisan one, is the stalling on secret
221 holds reform has gone on long enough. It is time to end this stranglehold on the
222 question of public business being done in public. It ought to be non-negotiable. If
223 you cannot do it in public, you really should not be doing it, and that ought to be the
224 rule with respect to Senate procedures.

225 And thanks to Senator McCaskill's good work, we have got new strength for this
226 final push to stop flouting the public's right to know. The American people want
227 accountability.

228 You have outlined the fact that this has gone on, on both sides of the aisle, and
229 let me just touch on a couple of additional arguments.

230 First, some claim that a secret hold does not prevent the Senate from
231 considering a nomination or piece of legislation. The reality is it actually does, Mr.
232 Chairman and colleagues. If the Leader has to file cloture, go through all of the
233 procedures, especially at this time of the year, as a practical matter, it is not going to
234 happen.

235 So a secret hold, in effect, is one of the most powerful tools that a United States
236 Senator has. It can be exercised in secret, and for all practice purposes it means that

237 the American people will not even get a peek at a bill or a nomination. It was an
238 incredible power that Senators have picked up. It has never been written down
239 anywhere.

240 The history of these holds, there is the hostage hold, the rolling hold, the Mae
241 West “come up and see me sometime” hold. The Senate has as many versions of holds
242 as pro wrestling, and the power to tie the Senate in knots is just as incapacitating as a
243 smack-down wrestling move.

244 Let me close with one last point that is not really brought up, Mr. Chairman.
245 Secret holds and ending them will take a weapon out of the arsenal of lobbyists. The
246 fact is that at lobbyist’s dream is to get some Senator to put a secret hold on something.
247 The lobbyist’s fingerprints are not on it. There is no public debate. If you can get a
248 United States Senator to put an anonymous hold on a bill, it is a lobbyist’s jackpot. And
249 some of them are so good they can play both sides of the street as a result of being able
250 to do it.

251 So I close, Mr. Chairman, with this: The essence of holds reform is eliminating
252 them altogether, requiring public disclosure of any hold or objection in the Senate and
253 consequences if a Senator fails to disclose a secret hold.

254 Mr. Chairman, it is time to end this dozen-year debate in the United States
255 Senate about whether or not public business is going to be done in public. Senator
256 Grassley and I are going to prosecute this cause until it actually happens, and we are
257 very, very happy to have the passion and energy of Senator McCaskill.

258 Thank you, Mr. Chairman.

259 [The prepared statement of Senator Wyden submitted for the record:]

260 Chairman Schumer. Thank you, Senator Wyden.

261 Senator Grassley.

262 **STATEMENT OF HON. CHUCK GRASSLEY, A UNITED STATES SENATOR FROM THE STATE**
263 **OF IOWA**

264

265 Senator Grassley. The three of us, Mr. Chairman, just want to bring some

266 transparency to the practice of holds in the Senate. It is a very informal process in the

267 Senate, so it is easier said than done, just how to make them public, but I think our

268 proposal does the trick.

269 You know a hold arises out of a Senator's right to withhold consent when

270 unanimous consent is asked. A Senator has a right to object to a unanimous consent

271 request if the Senator does not support it or he needs more information. A Senator, in

272 fact, has an obligation to object if he feels an item is not in the interest of his

273 constituents or if he has not had the opportunity to make an informed decision.

274 Now in the old days, it was quite simple to do this, when Senators did most of

275 their business at their desk on the Senate floor, just to stand up and say, I object. But

276 now since most of us find the necessity of being off the Senate floor, in committee

277 hearings or meetings with constituents and for a lot of other reasons, we rely on our

278 Majority and Minority Leaders to protect our rights and prerogatives as individual

279 Senators by asking them to object.

280 Just as any Senator has a right to stand up on the Senate floor and publically say,
281 I object, it is perfectly legitimate to ask another Senator to object in his behalf if he
282 cannot be there. Senators have no inherent right to have others object on their behalf,
283 however, if they want to keep that fact secret, and particularly if it is motivated out of
284 secrecy.

285 So what I object to is not the use of holds, because I do that myself, but the word
286 "secret" in secret holds. If a Senator has a legitimate reason to object to proceeding to
287 a bill or a nominee, then he ought to have the guts to say so publically.

288 A Senator may object because he does not agree with the substance of the bill or
289 because the Senator has not had adequate opportunity to review the issue.
290 Regardless, we should have no fear of being held accountable by our constituents or
291 anybody else if we are acting in their interest. I have certainly not experienced any
292 negative reaction from my policy of making public the fact of who it is, Chuck Grassley,
293 and why I put a hold on a nomination or a bill.

294 So, over a decade ago, as Senator Wyden has said, we started with a simple
295 proposed rule that any Senator placing a hold must publish that hold in the
296 Congressional Record, which Senator Wyden and I have done voluntarily ever since.
297 That proposal was blocked in the Senate, but we were offered a non-binding policy by
298 the Leaders instead. Of course, as Senator Wyden said, that did not really do the job.

299 We kept trying, and when Senator Lott became Chairman of the Rules
300 Committee he took an interest in the issue as former Majority Leader, to deal with the
301 issue of secrecy. In fact, we had a hearing like this, as Senator Wyden said, seven years
302 ago.

303 Senator Lott offered to work with us, and, along with Senator Byrd, we crafted a
304 proposal that was more workable and enforceable. That proposal was adopted, as
305 Senator Wyden said, 84 to 13. But you know what, even with that outstanding vote, it
306 never got enacted.

307 Then our proposal was included in the so-called Honest Leadership and Open
308 Government Act. Ironically, in a move that reflected neither honest leadership nor
309 open government, our provisions were altered so substantially behind closed doors
310 before the bill became law that they were not workable.

311 Our current proposal would restore important features that were in that very
312 amendment as originally adopted in the Senate and make it even more enforceable. In
313 our proposed standing order, in order for a Majority or Minority Leader to recognize a
314 hold, the Senator placing the hold must get a statement in the record within two days
315 and must give permission to their Leader at the time they place the hold to object in
316 that Senator's name. Since the Leader will automatically have permission to name the
317 Senator on whose behalf they are objecting, there will no longer be any expectation or
318 pressure on the Leader to keep the hold secret.

319 Further, if a Senator objects to a unanimous consent request and does not name

320 another Senator as having the objection, the objecting Senator will then be listed as
321 having that hold.

322 So this will end entirely the situation where one Senator objects but is able to
323 remain coy about whether it is in their own objection or some other unnamed Senator.
324 All objections will have to be owned up to.

325 Again, our proposal protects the right of individual Senators to withhold their
326 consent but makes it public. The public's business ought to be public.

327 Thank you.

328 [The prepared statement of Senator Grassley submitted for the record:]

329 Chairman Schumer. Thank you, Senator Grassley.

330 Senator McCaskill.

331 **STATEMENT OF HON. CLAIRE MCCASKILL, A UNITED STATES SENATOR FROM THE**
332 **STATE OF MISSOURI**

333
334 Senator McCaskill. Thank you, Mr. Chairman and Ranking Member Bennett and
335 the other members of the Committee, for having this hearing.

336 I, first and most importantly, want to thank Senator Wyden and Senator
337 Grassley. I am clearly standing on their shoulders. They have been tilling in this field
338 for years and years, and they have been the leaders on this issue. I am happy to join
339 their cause and perhaps provide some of that obnoxiously pushy passion that can
340 maybe get this across the finish line. I have a feeling that this is one of the traditions of
341 the Senate that is going to take some obnoxiously pushy passion to actually end.

342 This practice reminds me of my kids when they were very little, when I would
343 watch them play in the back yard, and one of them would try to get the other one to do
344 something, and then they would stick out their tongue, put their hands on their hips and
345 say, try to make me.

346 This is an issue where Senators have voted shamefully--shamefully. Senators
347 have voted for Senator Grassley's and Senator Wyden's proposals, and taken on the
348 cloak of accountability and reform, and then behind closed doors have participated in
349 the very practice they voted to end. That is the definition of cowardice. That is the
350 definition of a tradition that really smears the good name of the United States Senate.
351 That is not what this body is about. That is not the kind of people that should be in the
352 Senate. And that is the kind of practice that we need to finally, once and for all, end.

353 Imagine the public humiliation that would have occurred yesterday when there
354 was unanimous consent that was successfully shepherded through the Senate, and
355 there were 64 people that were confirmed, and there were a handful of them that had
356 been on the Executive Calendar for months and months and months, and yet there was
357 not one negative vote against their nomination. Not one negative vote. They hung
358 out on that Executive Calendar for months on end because someone wanted them to,
359 but we will never know who it was.

360 And what would have their explanation been to the press yesterday and to the
361 people they represent, when they voted to confirm after months and months and
362 months? They do not want to have to make that explanation. That is why the secret

363 hold has such a powerful hold on the body, because you can avoid accountability.

364 This is a very simple message. This is not about ending the hold. I respect the
365 tradition of the Senate on holds. It should be a Senator's prerogative to object to
366 anything that is trying to be done unanimously, but there is no good reason for it to be
367 done in the darkness of night.

368 The simple message is there are now 68 Senators I am representing at this
369 microphone this morning: 56 Democrats, 2 Independents that caucus with the
370 Democratic Party and 10 Republicans. They have all said in writing, they want to
371 abolish the secret hold and they will not participate in secret holds.

372 The secret holds a courtesy granted to Senators at the expense of our
373 democracy, and democracy is only as strong as the faith the American people have in it.
374 They must believe that it truly is a democracy, and the hit our democracy is taking at the
375 expense of secret holds is not worth the convenience to Senators to avoid the
376 accountability.

377 This is a political era where I think it is obvious that secret holds have been used
378 by both sides of the aisle as a political tool, not as a method to take more time to learn
379 about a nominee or to get questions answered, but as a political tool in the overarching
380 game of the success of our team is the failure of the other team. And I indict both
381 parties for this conduct. It is not just the Republican Party that is now in the Minority.
382 I think both parties are guilty of it.

383 And it is that game, that the success of our party is defined by the failure of

384 yours, that is leading to the cynicism that is rampant in America right now about what
385 we have chosen for careers, and I cannot blame them, especially if we cannot find it
386 within ourselves to do away with the secret hold.

387 If we can do away with the secret hold, then I think we maybe will be striking the
388 note that America is looking for--that we can, on a bipartisan basis, say there are certain
389 traditions here that maybe are not such a good idea anymore, that openness and
390 transparency is what the people of this Country deserve. This is an urgent matter.

391 We have laws on the books, but they are not enforceable. I look forward to
392 working with this Committee, and with Senator Grassley and Senator Wyden, to find the
393 right approach that is enforceable. The attempts have been incredibly important, that
394 Senator Grassley and Senator Wyden have made to end this practice, but the problem is
395 the enforcement. That is where the rub is. That is where Senators want to avoid
396 those uncomfortable moments that they are going to be called on the carpet and
397 enforced to name who they are holding and why. That is the key here.

398 And in the coming days, I will be working as hard as I know how, with Senator
399 Grassley and Senator Wyden, through their leadership and the leadership of this
400 Committee, to find the right approach, so that we can get this done once and for all. I
401 think America deserves it.

402 Thank you, Mr. Chairman.

403 [The prepared statement of Senator McCaskill submitted for the record:]

404 Chairman Schumer. Well, I want to thank all three of our colleagues for really

405 excellent and passionate testimony.

406 I have to say after all the years that Senators Wyden, Grassley and McCaskill
407 have worked on secret holds, I believe it is an idea whose time has truly come not de
408 jure, if you will, but de facto, relating to Senator McCaskill's point. We are going to
409 work together to end secret holds, and I commit to the three of you today that I will
410 work with you to achieve that end.

411 With that, I thank our three witnesses for coming, and we will now go to opening
412 statements.

413 Senator Udall, would you like to say something?

414 **OPENING STATEMENT OF SENATOR UDALL**

415 Senator Udall. Thank you, Chairman Schumer, and thank you for holding this
416 hearing. I very much appreciate--

417 Chairman Schumer. Before you begin, Senator Udall, and then after you,
418 Senator Alexander, I have to step out for a brief second.

419 Senator Udall. [Presiding.] Okay. I appreciate the testimony today of our
420 three colleagues.

421 Over the past few months, during this series of hearings, we have discussed and
422 debated example after example of how the filibuster in particular and the Senate's
423 incapacitating rules in general too often stand in the way of achieving real progress for
424 the American people. Today's topic, secret holds and the confirmation process, is just
425 one more example of how manipulation of the rules continues to foster a level of

426 gridlock and obstruction unlike any we have ever seen before.

427 I want to commend Senator McCaskill for her dedication to transparency and
428 government. Her fight to end the practice of secret holds is a worthy one that I
429 wholeheartedly support.

430 Earlier this year, I was proud to sign onto her letter, and today we have heard
431 from her, and she has gathered enough support to surpass the 67-vote threshold
432 required to consider and amend the Senate rules. That is no small task, as everyone in
433 on this Committee would attest. She should be congratulated for her work, as should
434 all of our colleagues, Democrat and Republican, who have signed onto this effort.

435 This bipartisan effort is proof that we are capable of working together. But the
436 mere fact that we have to have this conversation, that Senator McCaskill had to work
437 for months for 67 votes, to change rules that the Constitution clearly authorizes us to do
438 with a simple majority vote, illustrates that secret holds are just another symptom of a
439 much larger problem.

440 The problem is the Senate rules themselves. The current rules, specifically Rule
441 V and Rule XXII, effectively deny a majority of the Senate the opportunity to ever change
442 its rules, something the drafters of the Constitution never intended. As I have
443 explained numerous times throughout this series of hearings, a simple majority of the
444 Senate can adopt or amend its rules at the beginning of a new Congress because it is not
445 bound by the rules of the previous Congress. Many colleagues, as well as
446 constitutional scholars, agree with me.

447 It is through this path by a majority vote at the beginning of the next Congress
448 that we can reform the abusive holds, secret filibusters and the broken confirmation
449 process. We can end the need for multiple cloture votes on the same matter, and we
450 can instead begin to focus on the important issues at hand.

451 Now critics will argue that the two-thirds vote requirement for cloture on a rules
452 change is reasonable. They will say that Senator McCaskill managed to gather 67
453 Senators, so it must be an achievable threshold. As I said a moment ago, I commend
454 her for her diligence in building support to end secret holds, but I think it is also
455 important to understand that other crucial reform efforts have failed because
456 inexplicably it takes the same number of Senators to amend our rules as it takes to
457 amend the United States Constitution.

458 The effect of holds on both legislation and the confirmation of nominees is not a
459 new problem. In January, 1979, Senator Byrd, then Majority Leader, proposed
460 changing the Senate rules to limit debate to 30 minutes on a motion to proceed. Doing
461 so would have significantly weakened the power of holds and thus curbed their abuse.
462 At the time, Leader Byrd took to the Senate floor and said that unlimited debate on a
463 motion to proceed, "Makes the Majority Leader and the Majority Party the subject of
464 control, and the will, of the Minority. If I move to take up a matter, then one Senator
465 can hold up the Senate for as long as he can stand on his feet."

466 Despite the moderate change that Senator Byrd proposed, it did not have the
467 necessary 67 votes to overcome a filibuster.

468 Efforts to reform the motion to proceed have continued since. In 1984, a
469 bipartisan study group recommended placing a 2-hour limit on the debate of a motion
470 to proceed. That recommendation was ignored.

471 In 1993, Congress convened a Joint Committee on the Organization of Congress
472 to determine how it could be a better institution. Senator Peter Domenici, my
473 immediate predecessor, was the Co-Chairman of the Committee and at the hearing he
474 said, "If we abolish the debatable motion to proceed, we have gone a long way to
475 defusing the validity of holds because a hold is predicated on the fact that you cannot
476 get a bill up without a filibuster."

477 Despite a final recommendation of the Joint Committee to limit debate on a
478 motion to proceed, nothing came of it.

479 Talking about change and reform does not solve the problem. We can hold
480 hearings, convene bipartisan committees and study the problem to death; until we
481 agree that the Constitution provides the right for each Senate to adopt its rules of
482 proceedings by a majority vote, there will be no real reform.

483 Thank you, Chairman Schumer.

484 And I would just ask that an April 19 Roll Call article titled, "In Senate, Motion to
485 Proceed Should be Non-Debatable" be included with my statement in the record.

486 Thank you.

487 Chairman Schumer. [Presiding.] Without objection.

488 [The prepared statement of Senator Udall and information submitted for the

489 record:]

490 Chairman Schumer. Again I want to thank Senator Udall, not only for his
491 excellent testimony today and his excellent opening statement, but also for his interest
492 in this issue. It which helped importune this Committee to call this series of hearings.

493 Senator Alexander.

494 **OPENING STATEMENT OF SENATOR ALEXANDER**

495 Senator Alexander. Thanks, Mr. Chairman, and thank you for having the
496 hearing.

497 To put matters in perspective from my point of view, to begin with, one, I have
498 supported abolishing secret holds and will again and was one of ten Senators to write
499 the conferees in 2006 in saying do what we voted to do.

500 Two, there is nothing new about them. I have told the story here of how when
501 President Bush, the first, nominated me for Education Secretary, Senator Metzenbaum
502 held me up for three months, and how Senator Rudman was held up by a Senator. He
503 found out who made the hold and ran against him and beat him. So this all goes back
504 through history.

505 And at the beginning of this Congress I convened a couple of bipartisan
506 breakfasts on the subject of slow confirmations, and I wrote an article and made a floor
507 speech called "Innocent Until Nominated" out of concern that President Obama and
508 other Presidents were not being allowed to get people in place. I found it was a little
509 more complicated than it seemed. One reason was the President was slow making

510 nominations.

511 But I am willing to do more of all that and would like to see us address that in a
512 bipartisan way, and I ask consent to include my article “Innocent Until Nominated” in
513 the record of the hearing.

514 Chairman Schumer. Without objection.

515 Senator Alexander. I also appreciate Senator Bennett’s comments on numbers.
516 As I heard the Chairman’s numbers, the 65 executive nominations that were approved
517 yesterday bring down to 45 or 53; the number is still pending. That is about the same
518 as President Bush had at this time, 45.

519 And we do know who was holding those up. It was the President. It was the
520 White House. According to the Republican Leader, the White House persuaded
521 Senator Reid to object to moving those nominations unless they included Craig Becker,
522 who in a bipartisan vote was not approved to go on the NLRB because of the fear that
523 he might eliminate the secret ballot in union elections by administrative fiat. So the
524 White House then agreed to remove his name from the list, and all 64 nominations went
525 through.

526 So there was no Senator holding up those 64. It was the White House, and we
527 do know who did that. So that is important to say.

528 I think Senator McCaskill is right, that the problem with this idea is not the idea
529 of getting rid of secret holds; it is enforcing that.

530 And I would suggest that a better way to approach the problem, if the problem is

531 delayed nominations, is simply to use the rules that we have. Senator Byrd suggested
532 that might work. We did a little computation, and let's look at this month. The
533 Senate has accomplished nothing in the last three weeks except by unanimous consent.
534 So Senator Reid could have moved on any controversial nomination on the 7th--that
535 was the Monday we came back--to bring up nominees, and by the end of this week he
536 could have forced through 8 controversial nominations if he had 60 votes.

537 That would have respected the weekends, that would have respected the
538 no-vote days, and it would have required a few all-night sessions. So that might have
539 persuaded those who objected not to object to others.

540 If Senator Reid wanted to continue to do that next week, he could have had 12
541 done, respecting weekends and no-vote days.

542 So the Majority Leader can bring up a motion. No motion to bring up an
543 executive nomination requires 60 votes; it just requires 51. So the Majority Leader
544 already has the authority.

545 And insofar as legislation goes, the nature of the Senate is that it is a place to
546 have unlimited debate and the right to amend, and so it is not a place where a freight
547 train is supposed to run through. It is just the reverse of that. It is a place that
548 operates by unanimous consent for a reason. If we change things, as the Senator from
549 New Mexico would propose, we would have two Houses of Representatives operated by
550 a majority vote. That might seem fine when you are in the Majority, but the shoe can
551 quickly be on the other foot. It might be on the other foot by next year.

573 way explain to folks in Virginia, why in a kind of a secret way someone can put
574 somebody's future on hold indefinitely makes any sense.

575 When the American public questions what we are doing in the first place up
576 here, to explain that this courtesy that was my understanding historically created back
577 in the time when folks came to Washington on horseback and they wanted to have a
578 courtesy to make sure that they could have somebody put on hold until the Senator got
579 here, to say that in the 21st Century, even as bad as air traffic may be, that that needs to
580 be maintained, and that people are not willing to fess up and explain why they are
581 against someone being confirmed and then have that vote on someone, makes no sense
582 to me. I have been proud to be with Senator McCaskill and Senator Whitehouse as we
583 collected those colleagues' efforts. I know we are at 67 right now. I think there are a
584 number of other colleagues who may join us. I would love to see this hit 75 or 80 and
585 truly be a bipartisan effort. It is long overdue, and the sooner we can act on this the
586 better.

587 Again as somebody new, I hesitate to counter Senator Alexander's comments,
588 but this idea that we should be spending all our time going through cloture votes and
589 60-vote margins for nominees that are supposed to be viewed as somewhat
590 controversial because they have either been put on hold or someone wants to filibuster
591 them, and then they pass, as the case of a judge that we had up for the Fourth Circuit
592 that was a former Supreme Court in the Commonwealth of Virginia, supported not only
593 by both Senator Webb and I but also by our Republican Governor, Governor

594 McDonnell--to have Barbara Keenan left in limbo for months on end and then confirmed
595 99 to nothing.

596 I may not be a total student of American history, but my memory of civics class
597 in American history is that the filibuster has been traditionally reserved for issues of
598 great consternation and requiring that supermajority and requiring being able to protect
599 the rights of the Minority. It is a sham to me when we have the time of the Senate
600 delayed to go through all this process and then time and again these judges are
601 confirmed, and others are confirmed, at north of 90 votes. I do not get it.

602 And again, respectful of the Senate's rules, it seems to me to be a waste of time.
603 It seems to be an abuse of power. It seems to me to be reflective of if we are going to
604 attract good people. Whether there is a Democratic President or a Republican
605 President, I think we will not attract quality folks.

606 I think Senator Alexander's comments about innocent until nominated reflect a
607 lot of the feeling around here. Yes, it is true that perhaps majorities can turn, but if
608 this becomes the rule de jour on a going forward basis, we are going to, I think,
609 undermine the ability for any administration to get their people in place in a timely
610 manner.

611 It is ridiculous that 18 months into this President's Administration, we have so
612 many senior members of this Administration still waiting to see whether they are going
613 to be able to serve. As a business guy and as a former governor, that is simply
614 unacceptable.

615 So I look forward to working with my colleagues on both sides of the aisle to try
616 bring a little--while respectful of the Senate's traditions and respectful of Minority
617 rights--a little more rationality to this process.

618 Thank you, Mr. Chairman.

619 Chairman Schumer. Well, I thank you, Senator Warner, for your excellent
620 comments, and again you are right. Senator Alexander calculated it would take us
621 eight days to do four nominees, or four days to do eight nominees. They need 60
622 votes, and that is your point here. They do not give us the 60 votes, and then we have
623 wasted all that time on the nomination.

624 Senator Warner. And if they do get 60 votes, then--

625 Chairman Schumer. Well, once they come to a hold agreement, but you cannot
626 do them seriatim without 60 votes. That is the way it has proceeded.

627 Okay. Well, we have three excellent witnesses, and I would like to call them
628 forward. I will introduce them as they come forward.

629 We first have G. Calvin Mackenzie. Professor Mackenzie is currently the
630 Goldfarb Family Distinguished Professor of Government at Colby College. He is author
631 of several books including *The Politics of Presidential Appointments and Innocent until*
632 *Nominated: the Breakdown of the Presidential Appointment Process*. Professor
633 Mackenzie is a graduate of Bowdoin College and has a Ph.D. in Government from
634 Harvard.

635 W. Lee Rawls is on the faculty of the National War College and is an adjunct

636 professor at the College of William and Mary. He is the author of the book, *In Praise of*
637 *Deadlock: How Partisan Struggle Makes Better Law*. Professor Rawls served as Chief
638 of Staff to Majority Leader Bill Frist, as Chief of Staff to Senator Pete Domenici, and as
639 Assistant Attorney General for the Office of Legislative Affairs at the U.S. Department of
640 Justice.

641 Finally, Thomas Mann is the W. Averell Harriman Chair and Senior Fellow in
642 Government at Brookings. He has also served as the Executive Director of the APSA,
643 the American Political Science Association, and co-authored the book *The Broken Branch*
644 and many articles on congressional reform. He has taught at Princeton University,
645 Johns Hopkins University, Georgetown University, the University of Virginia, and
646 American University.

647 We thank all three of our distinguished witnesses. I have read their
648 testimonies. They are excellent. They will all be submitted to the record. Each of
649 you may proceed as you wish, and if you can limit your statements to five minutes, the
650 Committee would appreciate it.

651 Professor Mackenzie, you may begin.

652 **STATEMENT OF G. CALVIN MACKENZIE, THE GOLDFARB FAMILY DISTINGUISHED**
653 **PROFESSOR OF GOVERNANCE, DEPARTMENT OF GOVERNMENT, COLBY COLLEGE**

654 Mr. Mackenzie. Thank you, Mr. Chairman, Ranking Member Bennett and
656 members of the Committee, for having me here.

657 For almost 40 years, I have been a student of the presidential appointments

658 process, and in that time I have interviewed hundreds of presidential appointees,
659 observed scores of confirmation hearings, collected and analyzed reams of data on this
660 process. That is the work of scholarship, and that is my business. I am not partisan.
661 I have no ox to gore and no one's axe to grind.

662 What has carried me through all of these years is a simple notion, and that is
663 that in a democracy the purpose of an election is to form a government. Those who
664 win elections ought to be able to govern. That is, to say simply, there ought to be a
665 presidential appointments process that works swiftly, effectively, rationally, to permit
666 the President to recruit and emplace the talented Americans whose help he or she will
667 need to govern this country. Nothing, it seems to me, could be more basic to good
668 government. But we do not have a presidential appointments process that works.

669 In fact, in this wonderful age when new democracies are blooming all over the
670 world, many of them have copied aspects of our Constitution and our government. But
671 one process that no other country has chosen to copy is the way we fill the top
672 executive posts in our government. And for good reason. Even those untutored in
673 democracy know a lemon when they see one.

674 Our appointments process now undermines the very purposes it was designed to
675 serve. It does not welcome talented people to public service; it repels them. It does
676 not smooth the transition from the private to the public sector; it turns it into a torture
677 chamber. It does not speed the startup of new administrations elected by the
678 American people; it slows that process to a standstill.

679 Blame for this, for the deterioration of the appointments process, lies at both
680 ends of Pennsylvania Avenue. This Committee's jurisdiction does not extend to the
681 other end of the avenue, so let me focus on the Senate confirmation process.

682 There are problems with this process, but primary among those are delay,
683 redundancy, inconsistency and uncertainty. The confirmation process is not the sole
684 source of delay in filling executive or judicial positions, but the simple fact is that it takes
685 far too long to confirm presidential appointees. The time required for a typical
686 confirmation, not a controversial one, a typical one, has steadily grown over the last
687 three decades. Even with a Senate controlled by his own party, as the Chairman
688 indicated in his opening remarks this morning, President Obama's appointees have been
689 confirmed more slowly than any of his predecessors.

690 Why is this? Well, first there are too many appointees and too many hearings.
691 For the first 130 years of our history, there were no confirmation hearings at all. Now
692 we hold them for even for the lowest ranking nominees in all agencies, creating
693 scheduling nightmares for Senate committees, overworked staffs, and long delays for
694 many nominees.

695 That problem is compounded by the growing use of holds, which you have a
696 heard a lot about here this morning. For scholars like me, holds are a formidable
697 research problem. Counting them is a little like counting moonbeams or weighing fairy
698 dust; they are awfully hard to see. But we all know that holds, especially in the
699 confirmation process where nominees make especially convenient hostages, have

700 become epidemic in the Senate.

701 Filibusters are another source of delay. Nominations are rarely filibustered in
702 practice, but the threat of a filibuster has become so common and constant that we
703 now know that it takes 60 reliable supporters in the Senate to get almost anybody
704 confirmed.

705 Delay occurs as well because every nominee must now endure an obstacle
706 course that is littered with questionnaires, reports, investigations and vetting. These
707 are inconsistent in the information they seek, and they are often redundant, especially
708 of similar investigations and questionnaires managed by the White House.

709 All of this imposes a heavy burden of uncertainty on those who are willing to be
710 nominees. Once they agree to enter the appointment process they never know when,
711 or if, they will emerge. When a friend says I have been nominated by the President to
712 a position in government, is it congratulation or commiseration which we offer?

713 These are human lives, and I think this is a very important part of this concern
714 that is overlooked. Good people have agreed, often at significant personal sacrifice, to
715 serve their Country. Far too often, we treat them like pawns in a cruel game. They
716 are forced to put their lives on hold, to step aside from their careers and jobs, to forego
717 income, and then to twist in the wind while the fates of their appointments are decided
718 by a Senate with little or no sense of urgency.

719 We must do better than this, and I believe that we can. We have recognized
720 the ailments of the confirmation process and the cures for those ailments for a long

721 time. I have suggested some of those in my written testimony, and I would be pleased
722 to talk about those in our question period after this.

723 But what is needed now, more than anything else, is simply some common
724 sense, some commitment to undertake this task and, most importantly, some
725 leadership. I commend this Committee and its Chairman and its members for taking
726 on that task, and I hope you are successful in doing it.

727 Thank you, Mr. Chairman.

728 [The prepared statement of Mr. Mackenzie submitted for the record:]

729 Chairman Schumer. Thank you, Professor Mackenzie.

730 Mr. Rawls.

731 **STATEMENT OF W. LEE RAWLS, FACULTY, NATIONAL WAR COLLEGE AND ADJUNCT**
732 **PROFESSOR, COLLEGE OF WILLIAM AND MARY**

733
734 Mr. Rawls. Thank you, Mr. Chairman. Thank you, Senator Bennett. My
735 pleasure to be here.

736 I think of the three folks before you, I will be the minority voice with respect to
737 the nominations process, both judicial and for the Executive Branch nominees. My
738 written testimony is basically an unrepentant defense of extended debate. My view is
739 that whatever bipartisanship, moderation, continuity and consensus that are anywhere
740 to be found in the American legislative process come from the filibuster. Absent that
741 leverage, it will not exist. So my feeling is the Senate plays an extremely important
742 role where this point of leverage from the Minority requires that all parties sit down and

743 negotiate, and sometimes it works, sometimes it does not.

744 I have in my mind the filibuster as a two-sided coin. On one side, you have the
745 virtues I have just mentioned. The other side, you have the fact that matters are
746 slowed down to the point that individual members, as expressed here today, feel
747 extremely frustrated.

748 My belief is the U.S. Senate is unique in the known legislative universe. It is
749 unique because of the permissive rules involved and Minority rights, and that any
750 change with respect to the rules, with respect to extended debate, would fundamentally
751 alter the DNA of the United States Senate and how it works.

752 In addition, America, despite all the failings indicated, is still the richest, most
753 powerful Nation in the world, and so I think the Committee should be very cautious
754 when it considers any changes to one of the key branches in the constitutional scheme
755 for separation of powers, recognizing that the filibuster was not in the original
756 Constitution.

757 With my defense of first principles on the filibuster on the record, let me just
758 turn quickly to the issues before the Committee today, basically the nominations
759 process, and I my counterpunching views on several matters.

760 First, when I was nominated to be Assistant Attorney General for Legislative
761 Affairs, I was held up. I was held up by a member of today's Majority. And, lo and
762 behold, it was for good reason. Now I felt that it was something of a waste, but it took
763 us a while to negotiate, to get through, but I certainly recognized the rights of that

764 particular member, and he had a particular gripe with respect to the department at the
765 time.

766 I was held with two other nominees of the department. My view at the time
767 was he should have held them and not me because my job is to go down to the
768 Legislative Affairs and take phone calls from the members. I felt like I deserved
769 something like combat pay rather than to be held, but we will leave that as a personal
770 view.

771 I would like to echo Professor Mackenzie's view that there are just too many
772 nominees that come to the Senate for review. It would not take much to cut that by a
773 third to a half. It has become very elaborate. We have tax documents. We have
774 investigators. I was at the FBI for a while. We have all sorts of people that works on
775 this. We spend a lot of time.

776 I think the members should just ask, who do we really want to talk to? And my
777 criteria would be if a member of a committee wants to talk to the individual nominee, is
778 willing to meet with them and goes to their hearing, then that nominee should be
779 subjected to advice and consent. Absent that, I hate to say it, but something like
780 Assistant Dogcatcher at the FEC, I do not see why the members are spending their time
781 on that many nominees.

782 Generally, the Cabinet goes pretty quickly, and then we just lose track
783 somewhere with respect to middle management, and I think there is a compelling case
784 to be made for moving faster with respect to middle management. One of the things

785 is just to focus, set priorities. And if I had a gut instinct it would be that the problem
786 really comes mostly from committee staff on both sides that are reluctant to surrender
787 turn. The member themselves would be really quite willing to set priorities.

788 On judges, my view is, having been here in the Senate as Chief of Staff for
789 Senator Frist when we had a 51-49 margin, that I have a tough time pulling out the violin
790 for folks who have a 59-41 margin. So I will, in a sense, take a pass on that. The
791 judges are lifetime appointees, and I think some close scrutiny is completely in order.
792 Again, I think it is a matter of focus.

793 The last point I would make is that when I was with Senator Frist we spent a lot
794 of time on nominees. We even kept some of the members of the Majority and
795 Minority in all around the clock on one occasion. So, I am probably on a different
796 wavelength than some of my colleagues here.

797 Given that, I would be prepared to discuss any nuances in question and answer.

798 [The prepared statement of Mr. Rawls submitted for the record:]

799 Chairman Schumer. Thank you for your counterpunches, Mr. Rawls.

800 Mr. Mann.

801 **STATEMENT OF THOMAS E. MANN, SENIOR FELLOW, GOVERNANCE STUDIES AND THE**
802 **W. AVERELL HARRIMAN CHAIR, THE BROOKINGS INSTITUTION**

803

804 Mr. Mann. Mr. Chairman, Mr. Ranking Member, Senators Udall and Warner,

805 first of all, I want to commend you for holding this series of hearings on filibusters and

806 holds.

807 We have seen now through the testimony that has come before us, through
808 statements by Senators and discussions, that changing norms and practices regarding
809 the use of filibusters, holds and cloture petitions have produced something very
810 different than what my dear friend Lee Rawls has been talking about--that in fact, in
811 recent years there has been an extraordinary increase in the frequency of extended
812 debate-related problems on major measures and nominations that come before the
813 Senate. We also ought to face up to the fact that this is driven by the ideological
814 polarization of the parties in the Country and in the Senate, combined with the
815 increased partisanship that flows from it and the fact that Majority Party control can
816 change in an election. The stakes are so high that the incentives are powerfully driving
817 a form of behavior that a colleague who testified earlier, Steven Smith, called a
818 procedural arms race by both the Minority and responses by the Majority, that have
819 diminished the Senate as an institution and weakened the Country's capacity to govern.
820 Those are serious charges, and I commend you for wrestling with them because the
821 Country depends upon it.

822 My testimony adds to the evidence, the statistics that the Chairman gave, that
823 my colleague Cal Mackenzie has given on judicial nominations and senior executive
824 positions, and I will not take the time to go through those now.

825 The reality is that, of course, there are thousands, tens of thousands of
826 nominations that come before this body, and 99 percent are routine and confirmed, but
827 there are problematics with circuit court judicial appointments and with senior level

828 executive appointment that cannot be denied. Confirmation rates have declined
829 dramatically in the courts. These delays in confirming appellate judges have led to
830 increased vacancy rates which have produced longer case processing times and rising
831 caseloads per judge on the Federal dockets. Moreover, the controversies and delays
832 over appellate judges are spilling over into district court appointments, which used to be
833 a pretty routine process.

834 The same evidence is available on senior executive positions. The delays are
835 really quite extraordinary, but you know the statistics actually understate the problem
836 because it does not look at the variability across agencies.

837 Some Senate committees have a practice of doing full-fledged IRS tax
838 investigations that depopulate, or disallow a new administration from populating,
839 staffing the Treasury Department when the financial system is on the verge of collapse.
840 There really is a tragedy in some of the stories. One nominee, a former colleague of
841 mine at Brookings, nominated for a crucially important position, waited 13 months in
842 the Senate--13 months over, we think, a minor tax matter that was the same as her
843 husband's. They filed a joint return. He was confirmed in less than two months a
844 year earlier, but somehow her nomination was held up. These stories are legendary
845 and are a real problem.

846 Listen, Senators have long viewed the confirmation process as an opportunity to
847 express their policy views and to get the administration's attention on matters of
848 importance today. But the culture of today's Senate provides no restraints on the

849 exercise of this potential power, no protection of the Country's interest in having a
850 newly elected President move quickly and effectively to form a government. You just
851 cannot allow old rules to be so twisted by new norms and a culture of permissiveness
852 that really damage our capacity to govern.

853 There are things to be done. Secret holds are a start, but let me just suggest
854 that in many confirmations holds are public, but they are extended and do as much
855 damage as private holds.

856 So what I urge you to do, in conclusion, is think about increasing the burden on
857 those who wish simply to delay action--maybe 60 percent of those present and voting to
858 get cloture vote, maybe fast-tracking nominations as we have done with various other
859 measures before the Senate. Think ambitiously. This is a serious problem.

860 [The prepared statement of Mr. Mann submitted for the record]

861 Chairman Schumer. Thank you, Professor Mann, and I thank everyone for their
862 really excellent testimony.

863 I have to make a quick phone call, so I am going to call on Senator Udall to ask
864 the first round of questions. Then we will go to Senator Bennett. Then we will finish
865 up.

866 Senator Udall. [Presiding.] Thank you, Senator Schumer, and I thank all of
867 three of you for your very, very thoughtful testimony here today.

868 Professor Mackenzie, you discuss in your testimony the negative consequences
869 of the filibuster on the confirmation process. One possible reform you mention is the

870 resolution considered by this Committee in the 108th Congress, Senate Res. 138. That
871 resolution would have altered Rule XXII by placing a steadily decreasing threshold for
872 cloture on nominations until after successive votes, cloture could be achieved by a
873 majority.

874 The lead sponsor of that resolution was Majority Leader Frist, and its
875 co-sponsors included three current Republican members of this Committee.

876 Do you see any negative consequences with this proposal, and what if it was
877 extended to cover all matters and not just the confirmation of nominees as Senator
878 Harkin has proposed?

879 Mr. Mackenzie. Thank you, Senator. I do not profess expertise on all matters
880 before the Senate, so let me just address the question of confirmations.

881 One can understand that there may be a time when a Senator or several
882 Senators would like more time to contemplate a nomination. They would like to get
883 more facts. They would like to carry through an investigation that has not been
884 completed, or something of that sort. So there may well be a time when postponing
885 action on a nomination, whether it is through a hold or a filibuster, is appropriate.

886 But where is the end game in all of that? You see these processes through the
887 eyes of those Americans who have committed no crime other than saying yes when the
888 President asked them to serve their Country, and they have no idea when the end game
889 is going to occur, if it is ever going to occur.

890 I think a process like the one that would have a decreasing majority needed to

891 sustain a filibuster or to bring it to cloture would make a good deal of sense, just to
892 force those who wanted more time to use that time in some profitable way and get it
893 done, and then let's have an up or down vote on the nominee.

894 Senator Udall. Now Professor, and you heard a member of this Committee say
895 earlier that if we make any of these changes like you have just talked about, that we are
896 going to turn the Senate into the House and thus become exactly like the House. Do
897 you have any comment on that?

898 Mr. Mackenzie. It was the first time I had ever heard the words "freight train"
899 in the same paragraph with "the Senate." That is not a fear that keeps most Americans
900 kept awake at night about.

901 I would ask those of you who have to make decisions on this: What does a
902 filibuster really accomplish other than delay and, in some cases, defeat of a nomination?

903 Does a filibuster change people's minds?

904 Does it convert doubters into supporters for a nomination?

905 Is there an actual debate that occurs on a filibuster that people listen to and are
906 open-minded about?

907 I think anybody who follows this body knows the answers to those questions are
908 usually no, and that a filibuster is a procedural tactic designed to prevent, or at least
909 delay, a nomination from being confirmed. That is problematic for new
910 administrations, it is problematic for old administrations, and it is certainly problematic
911 for the people whose nominations are under consideration.

912 Senator Udall. Thank you.

913 Tom Mann, would you also respond to this idea that if we change the rules,
914 while also respecting Minority rights, that somehow we are turning the Senate into the
915 House?

916 Mr. Mann. I do not. The filibuster, the routine filibuster was never
917 anticipated by the framers when they purposely set out to design two very different
918 institutions. The length of term, the method of appointment, the size of
919 constituency--they expected the Senate to be the saucer to cool the hot tea or coffee of
920 the House, even without this. So I think there are other safeguards built into the
921 system.

922 Having said that, you can go a long way in adjusting the rules of the Senate
923 without completely eliminating the possibility of a determined Minority stopping some
924 action in the Senate. You can do many things short of a blanket ultimate Majority
925 cloture vote, although I am not arguing against that or for it. I am saying there are
926 many things you can do.

927 You could say the nomination process to staff an administration should be so
928 routine a part of a new presidency or a new governorship that that is going on to a
929 separate track. It is already on the Executive Calendar. You could set up rules that
930 have a time limit associated with that, and you would not have to go through the
931 trouble of filing cloture motions.

932 It seems to me there are various ways of making adjustments in the rules to

933 confront the reality that they are producing, in this new world of polarized politics and
934 self-indulgence of individual Senators, a very destructive pattern of behavior.

935 Senator Udall. Thank you, Chairman Schumer. Thank you very much.

936 Chairman Schumer. [Presiding.] Thank you.

937 Senator Bennett.

938 Senator Bennett. Thank you very much, and thank you for your testimony, all
939 of you.

940 I wish this were a college seminar where we could get more deeply into all of the
941 issues that you raise because I have a number of reactions to some of the things that
942 you are saying. The first one, coming out of my own experience, is that there is a
943 judgment call that is made in this situation, and it is made by the Majority Leader.

944 Let me give you an example out of my own experience. I do not use holds as a
945 regular device. Very, very seldom, do I put a hold on any nomination, and I always do
946 it publically. I do not play the secret hold game.

947 This Administration performed something--we will not get into the details and
948 take the time--that I thought was absolutely egregious and outrageous, and the only
949 way I could demonstrate my concern about that was to put a hold on a nomination. It
950 was David Hayes, the Deputy Secretary of the Interior, against whom I have absolutely
951 nothing, no objection whatsoever, but the only way I could demonstrate my outrage at
952 what the Administration and the Secretary of Interior had done was put a hold on Mr.
953 Hayes's nomination.

954 You say you do not see the point? I immediately got everybody's attention to
955 the issue that I was talking about, and I had no other leverage with which to do that.

956 I got a phone call from the Majority Leader: Bob, what is the problem?

957 I described the problem.

958 He said, that is legitimate. See if you can work it out.

959 I had a phone call from Ken Salazar. We talked the thing through. As it turns
960 out, we cannot work it out, at which point I get a phone call from the Majority Leader:

961 Bob, I am going to have to file cloture on David Hayes's nomination.

962 All right, fine. He files cloture.

963 I go to my fellow Republicans, make a presentation to them as to what had been
964 done by the Department. Republicans who have absolutely no understanding of a
965 public lands State, who come from the East Coast original 13 colonies, do not have the
966 slightest idea what I am talking about, said to me, well, if they could do this to your
967 State, maybe they could do this to mine, and we are going to stand with you.

968 And we defeated that cloture petition, whereupon I get some more phone calls,
969 and some more negotiation goes on. Ultimately, while I did not get a reversal of the
970 proposal, pardon me, a reversal of the action, I get a commitment that David Hayes will
971 go to Utah, sit down with the constituents, experience firsthand--and he has told me
972 rather ruefully it was not the happiest experience of his life--the outrage that was there
973 in the State, and we got some kind of a progress going forward on it.

974 I do not think that that is a violation of anything the founders had in mind, and I

975 do think that is something that a member of the House could never, ever do. So I do
976 suggest that we might be turning the Senate into the House if we get rid of this.

977 Now, by contrast, do any of you know the individual whose nomination from
978 President Obama, in a Democratically-controlled Senate, whose nomination has been on
979 the calendar the longest?

980 Mr. Mann. A member of the FEC.

981 Senator Bennett. Right, John Sullivan, who has been nominated for the FEC.

982 Do you know who is holding him? It is not a secret hold.

983 All right. It is Senator Feingold and Senator McCain.

984 All right. Take the example I just gave of my experience with David Hayes.

985 The Majority Leader made a decision to file a cloture petition because he felt David
986 Hayes's nomination was sufficiently important that he move forward, and he ultimately
987 prevailed because I could not hold of the Republicans all of the time on that one. We
988 got the attention we wanted, and then there were Republicans who said I cannot keep
989 voting against cloture on this, Bob, and the thing moved forward.

990 The Majority Leader has made a decision not to proceed for John Sullivan, and
991 he has been on the list longer than any other nominee. This is not a decision the
992 Minority has made. This is a decision the Majority Leader has made, and I am not
993 questioning (A) his right to make it or the fact that he may have made the right decision.

994 But let us understand that the way the institution works is not quite the way it
995 may sound in a classroom. And there are ways to break a filibuster, there are ways to

996 move a nominee forward, and there are ways to make political points.

997 Back in the time when I was in the Minority the first time, we had a Majority
998 member who was mad at the Department of Interior, who put a blanket hold on every
999 nomination out of the Department until he got what he wanted in terms of a National
1000 Park designation. And it was very frustrating to every one of us on the Committee.

1001 I was on the Interior Committee. Now it is called the Natural Resources and
1002 Energy. I am old enough to call it the old Interior Committee.

1003 Every nominee before that Committee was held up by this Senator, and the hold
1004 was honored. That blanket hold on every nominee regardless of who they were--he
1005 did not even know their names--was honored by the then-Majority Leader, George
1006 Mitchell, and as a consequence nothing moved forward until the Senator got what he
1007 wanted.

1008 So I am opposed to secret holds, but I recognize in the volume of things--and I
1009 think your point about the volume of nominations is legitimate--the Majority Leader
1010 gets to make decisions here. I will shine the spotlight on this one, and I will quietly
1011 endorse the position of the Senator who says nobody from this department can go
1012 forward until that Senator gets what he wants, and it is the Majority Leader who plays a
1013 role here that a lot of us are not paying attention to.

1014 Not a question, but a reaction to our excellent panel of witnesses and the
1015 comments that they have made to us, and if they want to react, I will assume that I will
1016 take the time of the others who are not here and allow them to react on their time.

1017 Chairman Schumer. Well, that would be a change in the Committee rules, if
1018 that is okay.

1019 Senator Bennett. All right. Never mind.

1020 Chairman Schumer. Go ahead. Do you gentleman want to react to that?

1021 Mr. Mann. Well, I just wanted to say, Senator, it is a classic collective action
1022 problem. You tell a legitimate story of trying to get a foothold, some attention, to be
1023 the squeaky wheel that gets the grease, that brings an administration's attention to a
1024 problem that you see.

1025 What if every Senator does that, multiple times, sometimes for less serious
1026 matters than you have raised? And we can come up with a lot of examples of those.
1027 Then it begins to do real damage to the capacity of the Senate to operate, and to an
1028 administration to get up and running.

1029 You have other resources. You powerfully sit on committees. You have
1030 influence over appropriations. You can hold press conferences. You can get
1031 attention other than taking nominations hostage. And it may just be that the cost of
1032 you and 99 of your colleagues doing this on a regular basis is too great, and you ought to
1033 use other resources.

1034 Chairman Schumer. Senator Warner.

1035 Senator Warner. Thank you, Mr. Chairman.

1036 A couple of comments, first of all, Senator Bennett, you started I think very good
1037 comments with something that increasingly seems to be absent. You said it has to be

1038 used with judgment. I have enormous respect for you, and I could live with the
1039 situation as long as we got rid of the secret holds, as long as there were 99 Bob Bennetts
1040 all exercising some level of judgment.

1041 I do want to try to let Mr. Rawls, who I know is chomping at the bit. I am going
1042 to give you good time to weigh in here.

1043 But I have to tell you, again as a new guy and never been a legislator, I am
1044 increasingly concerned. I hear it on my side. I hear it on your side. This is an
1045 institution where it seems like people start to hold grudges that have nothing to do with
1046 policy, and I have heard time and again from Minority members now, well, we are doing
1047 this because you guys did it.

1048 You know, I am trying to be this bipartisan guy, and they are: Well, we are
1049 doing this because you guys did it when we were in the Majority.

1050 Lord knows if it flips back and the Republicans are in the Majority, you are going
1051 to have an awful lot of Democrats who go through this litany of people. I just do not
1052 know how you run a modern, 21st Century government in that fashion.

1053 I am very biased as a non-legislative background, that I think, in short, the chief
1054 executive ought to have their team in place. If there is something wrong with
1055 somebody, it ought to be debated and the person ought to be voted up or down. And
1056 if they stink, the CEO ought to replace that person with somebody else.

1057 I am not sure it is an all or nothing proposition. There may be a proposition
1058 that says get rid of secret holds, and then you have some judgment, and if you go

1059 beyond X you only got so many cards you got to play. I do not know what the right,
1060 but there should be some way we could sort through this.

1061 I do want to make sure Mr. Rawls, who I would have gone to even earlier
1062 because as a William and Mary adjunct professor I want to honor that, if he actually
1063 lived in Virginia as opposed to Kensington, Maryland.

1064 Mr. Rawls, I guess the thing I want you to respond as the counterpuncher is the
1065 use of filibuster. I do not see it as anything, agreeing with our other witnesses, in most
1066 cases, other than delay when the person is then confirmed 99 to nothing, or 95 to
1067 nothing. If the person is confirmed even 80-20, even 90-10, there is still somebody felt
1068 strongly enough to make the case, and they may have lost the case, but they made the
1069 case for some reason.

1070 There was no case made when people are confirmed unanimously after being
1071 held in limbo for extended periods of time, whether you are judges or as Professor
1072 Mackenzie said.

1073 I have had the challenge of trying to recruit people to government. It is a hard,
1074 hard challenge. Never before have we needed more quality people to be willing to
1075 serve. If you are left in limbo for months, and now going on years on end, I do not care
1076 whether it is a Republican or Democratic President, we are not going to get good folks.

1077 So I just ask you this; how do you jar that need to have a thorough examination
1078 with these unanimous or near unanimous votes on these items?

1079 Mr. Rawls. Strangely enough, there is consensus at the table on the need to

1080 severely pare the number of nominees that get advice and consent. Once you say
1081 advice and consent in the Constitution, and then you have any form of delay and
1082 extended debate, you are going to get various examples.

1083 I have to say that Senator Bennett's world that he described is more than my
1084 world during my 13 years of staff on the Hill, where there are lots of negotiations.
1085 Usually nominees have a mentor or godfather, either in the Executive Branch or here.
1086 When that nominee is in trouble, the first thing the mentor does is get to the Hill and
1087 start talking and work it through. I have personally been part of a fair number of
1088 examples where things have worked through. So I just say that is more my world.

1089 Senator Warner. I would ask you to do a real-time check with some of your
1090 colleagues right now. As a new guy, that is not my experience of what is happening.

1091 Mr. Rawls. So my reaction would be, first, get the number of nominees down.
1092 As an executive for the State of Virginia, if you were having trouble with the legislature
1093 and they had 100 and you said to them: Why don't we really look at 10 and let's fight
1094 those fights, like Senator Bennett fought? Then get rid of the other 90. They do not
1095 need to come up.

1096 I am not an expert on the number of military that come up here, but you get
1097 dumped thousands of military nominees.

1098 Mr. Mann. Sixty-five thousand.

1099 Mr. Rawls. Sixty-five thousand from the U.S. Military, that is some monster
1100 waste. Then occasionally a member of one side or the other holds them all for some

1101 purpose, and you have a flap.

1102 So I think that not to put the full burden on the Senate, but I think the Senate
1103 itself should take a look at the nomination process. At the Department of Justice,
1104 there are five or six folks you need to be concerned with. You do not need 20 or 30
1105 and all that machinery that goes with it. So I suggest that for starters. Then if you
1106 have a problem after that, then you can keep grinding away.

1107 I would make one point made with respect to circuit court nominees. This is
1108 the real issue on the judges' side.

1109 Districts move, they get slowed, but they go through, and usually they have a
1110 home State Senator that starts fighting and holding the other guys' stuff at some point.

1111 The Supremes are so in the public that you play that. It is at a higher order.

1112 The circuits are where the risk is. I do not have an easy piece for it because in
1113 fact both sides have activated large-scale groups that follow these nominees very closely
1114 and engage when there is a nominee they do not like and urge one side or the other to
1115 limit those circuit court nominees. So that is the dilemma before the Committee.
1116 Because it is a lifetime appointment, I do not think you are going to get around the
1117 conflict. And to the extent that the courts have become more activist over the years, it
1118 just seems to me it is part of a fact of American life.

1119 I would like to make one last--

1120 Senator Warner. Can I just add one. I mean my time is way over, and the
1121 Chairman is probably not going to invite me back.

1122 Mr. Rawls. Yes, I am probably over too.

1123 Senator Warner. We have just done a lot of district court nominees that have
1124 had to have been filibustered with 90 unanimous nominees. So it is not just circuit
1125 court.

1126 Mr. Rawls. Right. The only thing I would say is that this is a function of the
1127 U.S. Senate has so much time each year in setting its priorities for nominees, and
1128 legislation. The focus has been legislation. I do not think the Nation has been
1129 diminished. Anybody that can do TARP, stimulus, major health care reform and getting
1130 ready to pass financial reform is actually not broken and is not diminishing the United
1131 States of America. If the fact is that a limited number of judicial nominees have been
1132 held along the way because there has not been floor time, that comes with it. That is
1133 the role of the Senate - setting those priorities.

1134 And the only other point I would make is if you give up Minority resistance to
1135 this, the role of the Senate vastly changes within the entire legislative machine. The
1136 Majority of the Senate determines what gets conducted, strategically and operationally.
1137 If you take away Minority resistance, the role the Majority Leader and his senior
1138 leadership plays vastly changes in the whole game.

1139 That is just a tirade on the side there.

1140 Chairman Schumer. Thank you, Senator Warner and Mr. Rawls.

1141 Senator Murray.

1142 Senator Murray. Mr. Chairman, I just want to thank you for having this hearing,

1143 and Senator Bennett and all of the panelists who have participated. I have watched a
1144 little bit from my office, and I just wanted to say I think this really an important
1145 discussion. It affects not just our quality of life but a whole lot of people who have
1146 been hung up in this process and any administration's ability to get anything done.

1147 I have joined with the majority of my colleagues in pledging to not use the secret
1148 hold procedure. I think that is a good first step.

1149 Particularly though, I find it very troubling that a single Senator hiding behind an
1150 arcane rule of the Senate can obstruct the nominations of literally dozens of presidential
1151 appointments usually, we are finding, for reasons that have nothing to do with that
1152 person or their background or the issue at hand. Earlier this year, there was a Senator
1153 who put a blanket hold on 70 nominees, and it was widely reported that the reason was
1154 that he was focused on 4 of those 70 and really just 2 issues within their entire purview.

1155 So to me, this is out of control, and we have to look at how we can change this,
1156 so the Senate can function, so these individuals can be appointed. And really to me,
1157 part of the problem is this secret hold. You do not even know who to go talk to, to
1158 work out an issue at this point.

1159 So I think this hearing is very important, and I am really pleased that the
1160 Chairman and Ranking Member are having hearings and looking at how we can move
1161 this.

1162 I do not have a lot of questions. I just wanted to ask the panelists sort of both
1163 sides of this. What is a valid reason for a secret hold? And secondly, are there other

1164 examples of the extremist use of this procedure besides the one I just mentioned?

1165 Mr. Mackenzie. I do not think there is a valid reason for a secret hold.

1166 I can imagine a circumstance when there might be a valid reason for a hold. I

1167 have argued over the years that holds ought to be time-limited, say 14 days. Then if

1168 the person placing the hold wanted to extend the hold, if they could get the

1169 concurrence of the majority of the Senate to do that, they could extend that.

1170 Senator Murray. So with 50 percent?

1171 Mr. Mackenzie. But if--excuse me, Senator. Go ahead.

1172 Senator Murray. A majority, 51 Senators?

1173 Mr. Mackenzie. Yes, a simple majority.

1174 But in a situation like the one that Senator Bennett described earlier, of having a

1175 substantive policy reason for wanting to work something out with the Interior

1176 Department, if 14 days is not long enough to do that and it is important enough to the

1177 Senate to hold up that nominee, that person going through this process, for a longer

1178 period, and a majority of the Senate would go along, that does not seem unreasonable

1179 to me.

1180 Secret holds, it is hard to make a brief for those.

1181 Senator Murray. Mr. Rawls?

1182 Mr. Rawls. Well, I have no defense on secret holds. I would have to say, and

1183 maybe just because I am a little bit of a dinosaur, but usually when somebody, as one of

1184 the staff when I was working in the Majority Leader's office used to say, if somebody

1185 takes a hostage, wait for the ransom note.

1186 So, as a general rule, at some point you can figure out who has the hold. So,
1187 within the Minority or Majority, they are not secret.

1188 If on a Committee, let's say the Judiciary Committee, if the Majority member
1189 were to go the Minority and the Minority member supported him, then it will not be
1190 secret. We will let that Minority member know.

1191 So I do not really know. I have to say at this stage I cannot say that I know
1192 exactly how the hold process is working in the Senate. But it used to be you would
1193 eventually penetrate, and you would know who it was, and then you would go over and
1194 negotiate.

1195 Senator Murray. But I do not get the point of secret. If I put a hold on
1196 somebody, I want the world to know what I am fighting for, and I also want my
1197 constituents to know what my logic is. I represent them. I do not come here
1198 uniquely, just somebody with a grudge. I represent people. So everybody has a right
1199 to know why I have placed a hold on somebody, and I need to make that public and
1200 make my arguments.

1201 So I do not understand the reason for secret.

1202 Mr. Rawls. I do not either. I was just saying as a matter of course, and maybe
1203 it is a lot worse today. Historically, you would find out who held, and then you would
1204 go talk to them. But if it is a real problem, then I do not have a brief on the secret side.

1205 Senator Murray. Mr. Mann?

1206 Mr. Mann. It has become a problem, much more so in recent times. It is
1207 complicated. The holds are informal processes, right? They are an indication of the
1208 possibility of objecting to a U.C. if it is raised on the floor. So Majority Leaders have to
1209 manage this information, and right now it is not in their interest in managing the floor to
1210 publicize and embarrass an individual Senator who wants it to be secret.

1211 So having the full body take some action, taking a moral stand if you will, even
1212 though it is difficult implementing it and you have be wary of building a hold into the
1213 rules, which does not now exist, and therefore legitimizing it to an extent it would not
1214 otherwise be legitimized. That is a very important matter, and so I urge caution.

1215 But sometimes moral suasion and shame can go a long way. If you build a
1216 strong norm, with support on both sides of the aisle, that this is not the way to do
1217 business, you may have some luck. But I think you are going to have to go beyond that
1218 if you are really going to discipline this process.

1219 Senator Murray. Okay. Thank you.

1220 Thank you very much, Mr. Chairman.

1221 Chairman Schumer. Thank you, Senator Murray, and thanks for coming.

1222 I guess I am questioning last here because I did not go first. You are all against
1223 secret holds. I want to thank all of you for testimony.

1224 Senator McCaskill, I think, made the point that it is the enforcement that is
1225 difficult, if not impossible. You could make sure, if you wanted, that someone's name
1226 was attached, but you know you could end up with the tradition that the Majority or

1227 Minority Leader would just put their name on all the time. Then there is an argument
1228 that the opprobrium that would attach to a Minority or Majority Leader who just
1229 blocked everything might discourage secret holds. I am not so sure that is true.

1230 Of course, I want to get rid of secret holds. I think they are wrong, and at least
1231 having someone's name attached is better than having nobody's name attached.

1232 I also think your comments make a lot of sense, Professor Mann. To actually do
1233 a rule, we would have to put a hold. We would make it official that holds exist, which
1234 is now more by tradition. I am not sure that is good idea.

1235 So what would you think of the idea, and I am going to ask all three witnesses
1236 about this general question, the idea of a standing order as opposed to a rule change
1237 which might do the same thing?

1238 So those are my questions to you all. Any thoughts on what would happen if it
1239 was just the Majority or Minority Leader who became de facto the only objector ever?
1240 Obviously, you can write in the law that if someone asked them to do it that person
1241 would have to put their name in. It would be very hard to enforce, and there is a way
1242 of not asking: Oh, gee, Majority Leader, I am not asking you to do this, but this would
1243 really hurt my State, kind of thing.

1244 So, what are your views about a rule versus a standing order, and your general
1245 views about enforceability on secret holds? We are not arguing about holds now, but
1246 secret holds.

1247 So would you like to begin, Professor Mackenzie?

1248 Mr. Mackenzie. Sure. I do not have an informed opinion on the difference
1249 between a standing order and rules change, but I think you are exactly right that the
1250 Senate is never more ingenious than when it is trying to avoid constraints on the
1251 behavior of individual members. I would expect that.

1252 There used to be a Senator here who some people called Senator No. One can
1253 imagine there might be a Senator Hold, who if you wanted to have a hold but did not
1254 want to have it identified with you, you might go to this Senator and he or she would
1255 willingly stand up and take the heat for that.

1256 So one does not know. Enforceability is always going to be a problem, but I do
1257 not think that ought to be a deterrent to going ahead and trying to make good rules.

1258 Chairman Schumer. Mr. Rawls?

1259 Mr. Rawls. I would put myself down as agnostic on rule versus standing order.
1260 I had not thought about the Majority/Minority Leaders becoming the official holders,
1261 and my gut is that is where you will end up. So that would be a substantial problem.

1262 I had in fact even envisioned there might be that each side would have an official
1263 designated as Senator Hold, but I do think it will flow then to the leadership. So I see
1264 that as a fundamental problem, not one that I think is easily solvable.

1265 So I think you are going to have a continuing problem with enforcement.

1266 Chairman Schumer. Mr. Mann?

1267 Mr. Mann. Mr. Chairman, I do believe there are enormous problems in
1268 enforcing any kind of a prohibition on secret holds.

1269 I think there are two things you can do. One is to retreat back to Rule XXII and
1270 make changes in that that would achieve the objective, but that would probably lead
1271 you to move in a more aggressive reform action than you may be prepared to do.

1272 The other is really a matter of moral suasion, of building an expectation. I
1273 mean norms change all the time in the Senate, and getting behind an effort to say what
1274 is legitimate and sort of moral, and we live in an era in which transparency is
1275 increasingly important in all aspects of our lives and of governance more generally.

1276 So it may be that is the direction, which would lead me to say a standing order,
1277 or a sense of the Senate, rather than trying to--I recommend against giving a hold a
1278 formal standing in the rules. I think that would do real damage.

1279 Chairman Schumer. Thank you.

1280 One final question and then we will call it a day. Mr. Rawls mentioned limiting
1281 the number of nominees who actually came before the Senate. He proposed, I guess it
1282 would be object as you go, or something like that. People would have to demand a
1283 hearing or whatever, and otherwise they would go through. Could you each talk about
1284 limiting who actually has to be confirmed?

1285 Mr. Rawls. And I was not for being that formal. I was just thinking that the
1286 committee themselves should ask themselves which of these nominees do we want to
1287 hear from, who do we actually want to meet.

1288 Chairman Schumer. But did you mean generically or specifically, in other
1289 words, the Assistant Secretary of Defense for Procurement? I do not even know if

1290 there is one.

1291 Mr. Rawls. I was going to say generically.

1292 Chairman Schumer. Generically.

1293 Mr. Rawls. I think the committees should look at their nominees and then
1294 make a concerted effort to reduce the number, so that there is a focus on the senior
1295 folks that provide oversight, and I would leave that really--

1296 Chairman Schumer. And then we would somehow institutionalize that, that
1297 only these six people in the Department of Interior would need confirmation.

1298 Mr. Rawls. Yes, yes, along those lines.

1299 Chairman Schumer. What does Professor Mackenzie and Mr. Mann think of
1300 that?

1301 Mr. Mackenzie. I have argued for almost 30 years that there are too many
1302 presidential appointees. I wish we could go back to 30 years ago when the number
1303 was a lot smaller than it is now. What we thought was a nightmare then looks like the
1304 golden age of presidential appointments now.

1305 The system is overwhelmed. It is not just the system down here. In many
1306 ways, it is the system at the other end of the avenue. The ability of a President, new to
1307 government, to come into office, to find the hundreds of very good people with
1308 enormously different skills sets--a lot of these are very technical jobs--and to get them
1309 into the pipeline and down here, and then for all of you to deal with them, I think we
1310 simply have not been able to do it very successfully. At some point, we ought to say

1311 maybe there are just too many of these.

1312 Chairman Schumer. Mr. Mann, last word.

1313 Mr. Mann. I strongly urge you to look into this. The Constitution gives the
1314 Congress, under its advice and consent authority, to power to delegate to others,
1315 including the President, the lone appointment of other officers of the Executive Branch.
1316 So it is done by statute.

1317 You could explicitly reduce the number of presidential appointees that require
1318 Senate confirmation. That would still retain enough for the Senate to have, as Senator
1319 Bennett's examples, where they could get the administration's attention. But it would
1320 clean up the process a great deal. It would be a huge advance.

1321 Chairman Schumer. Great. And on that harmonious and concurrent note,
1322 first, the record will remain open for five business days for additional statements and
1323 questions from Rules Committee members. Since there is no further business before
1324 the Committee, we are adjourned.

1325 I want to thank all the witnesses here and our colleagues on the Committee, as
1326 well as my colleagues who testified today.

1327 [Whereupon, at 11:45 a.m., the Committee was adjourned.]