

**A RESOLUTION TO IMPROVE PROCEDURES  
FOR THE CONSIDERATION OF NOMINATIONS  
IN THE SENATE**

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**HEARING**  
BEFORE THE  
**COMMITTEE ON RULES AND  
ADMINISTRATION**  
**UNITED STATES SENATE**  
**ONE HUNDRED FIFTEENTH CONGRESS**  
FIRST SESSION

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COMMITTEE ON RULES AND ADMINISTRATION

FIRST SESSION

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# C O N T E N T S

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	Pages
OPENING STATEMENT OF:	
Hon. Richard Shelby, Chairman, a U.S. Senator from the State of Alabama ....	1
Hon. Amy Klobuchar, a U.S. Senator from the State of Minnesota .....	2
Hon. James Lankford, a U.S. Senator from the State of Oklahoma .....	5
PREPARED STATEMENTS OF:	
Hon. James Lankford, a U.S. Senator from the State of Oklahoma .....	26
Hon. Senator Leahy, a U.S. Senator from the State of Vermont .....	29
MATERIALS SUBMITTED FOR THE RECORD:	
Press release from Hon. Mitch McConnell, a U.S. Senator from the State of Kentucky .....	31



## **A RESOLUTION TO IMPROVE PROCEDURES FOR THE CONSIDERATION OF NOMINATIONS IN THE SENATE**

**TUESDAY, DECEMBER 19, 2017**

UNITED STATES SENATE,  
COMMITTEE ON RULES AND ADMINISTRATION,  
*Washington, DC.*

The committee met, pursuant to notice, at 2:29 p.m., in Room SR-301, Russell Senate Office Building, Hon. Richard C. Shelby, Chairman of the committee, presiding.

**Present:** Senators Shelby, Alexander, Blunt, Capito, Wicker, Fischer, Klobuchar, Udall, Leahy, King, and Cortez Masto.

**Also Present:** Senator Merkley.

### **OPENING STATEMENT OF HONORABLE RICHARD SHELBY, CHAIRMAN, A U.S. SENATOR FROM THE STATE OF ALABAMA**

Chairman SHELBY. The hearing will come to order. Today the Committee on Rules and Administration will receive testimony on Senate Resolution 355, Improving Procedures for Consideration of Nominations in the U.S. Senate.

I want to thank Senator Lankford, who is here with us at the table, for agreeing to appear before us today to discuss the merits of his resolution.

In 2010, this committee undertook a comprehensive examination of the filibuster in the United States Senate. That examination was conducted in response to an ongoing debate about invoking the nuclear option. While no action was taken immediately following the conclusion of the committee's work, the Senate did take steps in early 2013 to modify some of the rules and procedures for considering bills, conference reports, and certain nominations during that Congress.

Later that same year, the Senate took a more drastic step and invoked the nuclear option for certain nominations. Invoking the nuclear option effected a permanent change, as my colleagues well know, but the other changes which improved the efficiency of the Senate's operations were temporary and expired at the end of the 113th Congress.

Today we will revisit one aspect of those temporary changes: limiting the post-cloture debate time for certain nominations and consider whether to restore it permanently, as provided for in Senator Lankford's resolution.

Like the change enacted in 2013, this resolution proposes to reduce the current 30-hour window for post-cloture consideration of

certain nominations to 8 or 2 hours, depending on the type of nominee. The Lankford resolution also preserves the full amount of post-cloture debate time on nominations to the highest levels of the executive branch, the circuit courts, and the supreme court, just like its predecessor.

In short, this resolution is designed to return the Senate to a time when it effectively and efficiently fulfilled its constitutional duty to confirm appointments that are necessary to the day-to-day functioning of our Government.

The post-cloture debate time provided by this resolution will once again allow the Senate to deliberate, to debate, and to vote on nominees in a timely way. As was evidenced in the 113th Congress, this change does not inhibit members from debating or deliberating on the qualifications of nominees. It merely shortens what is currently an unreasonably long process.

Admittedly, I did not support this change in the 113th Congress. I was concerned then that once the Senate altered the rules, there would be no turning back. I worried that the changes proposed at the time would limit each Senator's voice and power, traits that I believe we have always tried to protect in this great deliberative institution. But I witnessed something different. Nominees, whether I supported or opposed them, were debated and voted on in a timely, practical manner.

More importantly, the Senate no longer wasted countless hours waiting, not to hear from colleagues about the virtues or vices of certain nominees, not to debate their attributes or deficiencies, not to discuss whether they were fit or unfit for the job, just waiting for 30 hours of post-cloture debate time to expire.

In 2013, the Senate was able to swiftly carry out its constitutional duties, and we witnessed a timely filling of judicial and executive branch vacancies. Reducing the post-cloture debate time in 2013 allowed the Senate to stop waiting and start acting.

That is exactly what I believe we need today. The American people are frustrated with Washington gridlock. They believe that we cannot get even the simplest of things done. We need to fix this. We need to restore the process to what it once was, and I believe this is an opportunity to do this.

I look forward to the testimony today and the debate that follows in support of this resolution.

Senator Klobuchar.

**OPENING STATEMENT OF HONORABLE AMY KLOBUCHAR, A  
UNITED STATES SENATOR FROM THE STATE OF MINNESOTA**

Senator KLOBUCHAR. Thank you very much, Mr. Chairman, and thank you to all the members that are here. Thank you to Senator Lankford for appearing before us, and I want to thank him for his heartfelt desire to make the Senate work better, and also two of my colleagues that are here, and that is Senator Udall, who is a member of this committee and has long worked on this issue, as well as Senator Merkley, who is a visiting member today, and thank him for his work. The three of us, along with a few other people, Senator Shaheen and others, have worked on this issue the last time that we saw some changes. In fact, when I first got to the Senate, our first bill that we introduced, our new class back in

2006, was devoted to something related to this, which was ethics reform, which made some significant changes to lobbying rules as well as gift rules and other things. Then we went on to support in 2010 an end to the secret holds, and, obviously, this committee and members of this committee are now looking at changes to the sexual harassment policies that are in place in the Senate, and just recently with the Chairman's help passed a law—a rule change that requires mandatory sexual harassment training.

There has been work year after year on these issues, and I thank Senator Lankford for bringing this to our attention. As you will see from my remarks, I just feel that this is not the right moment to make these changes to the rule, and I will explain.

Many people refer to the Senate as “the world’s greatest deliberative body” because the Senate is an institution which is designed for the careful consideration and debate of proposed laws and nominations. How we deliberate, as I mentioned, is governed by Senate rules, and only once in the history of the cloture process has the Senate voted to permanently reduce the time we have to debate an issue. That happened back—I am looking at Senator Alexander, who is an expert on this. That happened back in 1986 when we went from 100 hours of post-cloture debate time to the current rule of 30 hours. The resolution we are considering today asks us to make a second permanent change.

As Senator Lankford notes in his written testimony, following years of failing to get nominees confirmed, the Senate voted 78–16 to temporarily change the rules on post-cloture debate time in 2013. But it is important to note that back in 2013, the circumstances were very different than they are today. Nominations required a 60-vote threshold back then. The blue slip process for judicial nominees was respected, and a thorough process to select qualified judicial nominees was in place.

Despite all of this, important Federal positions remained unfilled even though qualified nominees were waiting to be confirmed. To address this issue back then, a bipartisan super-majority of the Senate supported a temporary change to the rules. Where are we today?

Well, first, the reality is that nominees are getting confirmed. On Thursday, just this last Thursday, Leader McConnell highlighted the fact that, and I quote, “Senate Republicans are closing in on the record for the most circuit court appointments in a President’s first year in office.” Mr. Chairman, without objection, I ask that the press release provided by Senator McConnell’s office on December 14th of 2017 be entered into the hearing record.

Chairman SHELBY. Without objection.

[The press release was submitted for the record.]

Senator KLOBUCHAR. Thank you. The title reads, “Judicial Appointments Are The Sleeper Story That Matters. Circuit Courts: A Dozen Trump Appointees ... In His First Year In The White House.”

President Trump has, in fact, successfully appointed 12 circuit court judges, more than any other President in the first year of office since the Federal appellate courts were established 126 years ago. In addition to my service on this committee, I also serve on the Judiciary Committee, which I have seen firsthand the process

and pace at which these nominees are being processed. President Trump will have 19 judges confirmed in the first year of his Presidency compared to just 13 for President Obama in the same time period. In the Judiciary Committee, we have reported 44 judicial nominees to the Senate floor already this year. But in President Obama's first year in office, we reported only 23 nominees out of committee. The committee also reported just 32 nominees in the first year of President Bush's term and 28 in the first year of President Clinton's compared to the 44 we have seen this year.

It is also instructive to look at the end of President Obama's term when just 22 judicial nominees were confirmed in his last 2 years in office. That is the fewest in a Congress since Harry Truman was President.

When you look at the facts, it is clear that, as my Republican colleagues have acknowledged, the current Congress is on track for a record-breaking year of advancing judicial nominees, and it is unnecessary at this moment to change the rules of the Senate. As I have told Senator Lankford, this is something we could consider perhaps before a new president comes into office. But now, when nominees are moving through the process, with many in a purely partisan manner, this change would only add to the partisan atmosphere.

The danger involved in reducing the debate time to expedite the confirmation of nominees that we are considering was also highlighted by Louisiana Republican Senator Kennedy last week during a Judiciary Committee hearing. I was at that hearing. Many people have seen the video of Senator Kennedy asking Matthew Petersen, a nominee to be a district court judge, basic legal questions. Petersen was unable to answer any of them. Yesterday Mr. Petersen withdrew his nomination. Last week, the administration also withdrew the nominations of Jeff Mateer and Brett Talley at Chairman Grassley's urging. They are just 3 of the 18 nominees that have been withdrawn this year, and those nominees were withdrawn after the committee process.

These nominees and others demonstrate the importance of careful consideration of nominees for executive branch positions and lifetime appointments to the bench. I will also note that the American Bar Association has now rated 4 of the 56 judicial nominees put forward by the Trump administration as "Not Qualified," including 2 who received that rating unanimously. That is fairly unprecedented given the fact that before this year, the ABA had only issued that rating twice since 1989, and we have seen two more of these ratings this year already.

The American people deserve qualified judges who will interpret the law fairly, and the best way to get judges who are fair and impartial is to have a solid evaluation and confirmation process on where the executive branch is collaborating with the Senate and we have ample time to review and debate these nominees.

At a time when we have seen unprecedented challenges to the judiciary and to the rule of law, we need appropriate checks to ensure the selection of qualified nominees to both the executive and judicial branch now more than ever.

Before we turn to Senator Lankford, I would like to note that I am glad we are having a hearing in this committee. I hope we will



have more, Mr. Chairman, next year. I also appreciate Senator Lankford's work with me on the state election infrastructure issue, something that has exciting developments there and it would be a great topic for a hearing. I just thought I would put in that plug.

With that, thank you very much, Mr. Chairman.

Chairman SHELBY. Senator Lankford, your written testimony will be made part of the hearing record, as you know. You proceed as you wish.

**STATEMENT OF HONORABLE JAMES LANKFORD, A UNITED STATES SENATOR FROM THE STATE OF OKLAHOMA**

Senator LANKFORD. Thank you, Mr. Chairman and Ranking Member, friends and colleagues. I anticipate this to be dialogue. I do not think a single one of us thinks that things are going swimmingly. We are not engaging on the issues.

We do consume a tremendous amount of time, not in 30 hours of debate but in 30 hours of silence on the Senate floor, with occasionally someone to step up and speak on something unrelated to the 30 hours of debate on the floor for that nominee.

This is not so much a debate about if only we had 30 hours of debate, we would get so many facts out on so many individuals, because we are really not debating individuals. The work is done in the committees. The work is done in the back-and-forth with the administration. That is where it really occurs.

The challenge is we have learned as a body that we are now either going to do nominees or we are going to do legislation, but we cannot do both, because if the calendar is full for a week on three nominations, you will never get to any legislation. We continue to have our constituents come to us and say, "When is the Senate going to vote on things?" We can respond, "We are," on nominations. But we do not have time for nominations and legislation.

This continues to accelerate. The issue that we are going to continue to face is the gridlock on Capitol Hill is spreading across the rest of Washington, and the more that you have nominees that are not confirmed in every agency, all of us and our constituent services folks and all of our legislative staff will tell us they are calling over to agencies and the agencies are saying, "We cannot give you an answer. There is not a Senate-confirmed person there."

As that spreads, it affects all of our constituent services; it affects every permit that we request; it affects every bit of the process that happens. The gridlock that is here is moving over there. That does not help us long term.

I tried to be able to give just some basic examples of this and some history of it as we deal with the post-cloture debate just on nominations. Starting in 1949, from 1949 to 1992, there were 12 cloture votes for nominations during that entire time period. Then starting in 1993, the Senate averaged around six cloture votes for nominations through 2004. In the 109th session, the average jumped to nine cloture votes for nominations for a year. Then from 2009 to 2012, it jumped again to 13 in a year.

In 2013, the beginning of President Obama's second term, the Senate determined that something had to be done about nominations. In January 2013, the Senate passed S. Res. 15 by a vote of 78-16, standing order just for that one session to reduce post-clo-

ture debate time for most executive branch nominees from 30 hours to 8 hours and reduced that to 2 hours for district court nominees. Under the standing order, the post-cloture debate for the Supreme Court Justice and Cabinet-level nominations all stayed at 30 hours.

The standing order in 2013 was an attempt to avoid the nuclear option. As we know now well from history, that did not occur. The nuclear option was still invoked in November of that same year. That original, that standing order, though, remained and it functioned through the rest of 2014. We saw the operation of it.

Now, in 2013, the Senate considered it intolerable that the Senate would have 13 to 15 cloture votes in a year on nominations. This year, we have had 63 cloture votes on nominations. That is not comparable to where we were. It is an acceleration.

I would say to this body we all know the direction of this body. We have 63 cloture votes on nominations now for this President. When the Presidential party changes, there will be a future Democratic President; Republicans will say they did 63 to us, we will do 120 to them. Then the next time it will be we will do 240 to them, as we have watched this over the last 20 years slowly go up year by year. I do not know how that turns around until this body determines that is going to turn around. Enough is enough.

The rules of the Senate are not something that we can just complain about and do nothing about. The Senators control the rules of the Senate, and at some point we have to determine this is getting out of hand. We have to be able to solve it.

Now, I was not here in 2013 when the nuclear option was invoked, but I have heard the stories of the frustration that was rising. My Democratic colleagues believe that Republicans were pushing it too far, and so they determined something has to be done to get this set. I would just say I have the sense that we are in a very similar position, that this can be pushed too far, and at some point Republicans respond, "Something has to be done." For the sake of the future, not just this administration but for the sake of the future, we have to determine how we are going to do this and to be able to put this in place in a way that actually works.

Senator Merkley is my next-door neighbor. I was probably in the Senate 3 weeks, and he reached out to me and said, "Can we sit and talk about rules? I have heard you mention some things about rules." I sat in his office. We shared a commonality on a lot of these issues in the sense that we have to be able to find a way to actually resolve these issues, not just talk about them but figure out how it is going to work long term.

Senator Merkley had a proposal to take all nominations to 2 hours, period, except for Supreme Court nominations, to be able to advance those still to 30. There is not a lot of debate that happens on the floor anymore. Most of it happens in committee. Now with 51 votes for all nominees, the outcome is most often certain. It is really determined before we ever get there. The issue is: Are we going to do legislation and nominations or are we only going to do nominations?

As I mentioned in my written testimony, the Roosevelt term for the first 100 days, that can never be a marker again, because from here on out every president in their first 100 days will not even get their Cabinet in place. They will not be able to move legislation be-

cause they will not be able to get personnel, because it will be tit for tat from here on out.

Losing that time period is a great loss to the American people, and it is unexplainable to those of us in the Senate. My proposal is simple. Let us take the rule that was done during that time period, in 2013, with wide bipartisan support and let us make it permanent and say this is how we are going to continue to function from here on out.

I would very much appreciate the conversation on it. If there is a better idea to do it, I am willing to be able to take it on and to be able to say what can we do to be able to fix this. But the best idea that I had was to take one that was already done and was already agreed on and say let us make it permanent and go from here on out.

With that, Mr. Chairman, I would be glad to entertain questions.

[The prepared statement of Senator Lankford was submitted for the record.]

Chairman SHELBY. Thank you.

Senator Lankford, the Senate has confirmed approximately 260, it is my understanding, of the President's civilian executive branch nominees. On average, it has taken the Senate 71 days to confirm these officials. You have probably got better data than I have. How do these figures compare with what the Senate has done in past administrations? You alluded to that already.

Senator LANKFORD. It is the same advance you would consider. It took about 50 days during the Obama administration, and it took about 30 or 40 days during the Bush administration time and during the Clinton administration. We are watching that slowly inch up as well.

Chairman SHELBY. You have also alluded to the impact on the executive branch, whether it is a Democrat or Republican. Do you know which departments have been hit the hardest by the current confirmation slowdown? What are some of the real-world implications of these vacancies? How would your proposal alleviate some of the staffing—

Senator LANKFORD. The hardest hit right now would be State Department and DOD. The State Department has 20, 22 or so that are currently pending and waiting. Of course, they have a very large group of those that have to go through the process. DOD has about 15, I believe, somewhere in there, that they are waiting on.

The real-world implications are the things that all of us have seen from our constituent services. When they get a call—I can just give you one example. We had wildfires that were moving through western Oklahoma and through southern Kansas. We had a wildfire literally larger than the State of Rhode Island that was burning. Farm Services needed a confirmed individual to be able to get some answers back on that. We did not have a confirmed individual, so our farmers and ranchers had to wait for weeks until there was a confirmed individual to be able to actually answer the question to be able to start the process. Those farmers and ranchers were literally living off of hay that was being donated from other places because they could not get disaster relief aid that, with a confirmed individual, would have been just immediate. We see that with FERC. There are a lot of examples of that.

Chairman SHELBY. Senator, you have alluded to wasting time on a lot of it, just letting the clock run but no debate or anything. Cloture has become, I understand—and I have been here like all of you—a routine part of the confirmation process even for nominees that enjoy broad bipartisan support. The confirmation of David Nye, some of you might recall, to be a district court judge is a glaring example of this. His nomination was subject to the cloture process and extended post-cloture debate even though he was ultimately confirmed by a vote of 100–0.

What would be the reason to force debate on a nominee that enjoys this type of support? In other words, it looks like it would be common sense to move these people—either party, you know?

Senator LANKFORD. The joy of the Senate is the minority can always express their displeasure in a multitude of different ways, and even for an individual that you demand 30 hours of post-cloture debate, then everyone votes on them 100 to nothing would be a complete anomaly to the 25-years-ago Senate. That was never done. In fact, there were no cloture votes requested, and there had been the ability to be able to do that since 1949. There were none until 1968, and that is one that Republicans and Democrats agreed on together to be able to do, to be able to stop one of LBJ's Supreme Court nomination changes. As he wanted to be able to move someone different into leadership, there was an agreement to try to shut that down.

This was unheard of. Nominations moved by unanimous consent. That is how they moved. If there was a major problem, then you had a big issue or found a way to be able to resolve it. This has now become standard practice. That is why I say the rule has been there. The practice, though, has changed. Now our rules have to catch up to our practice, or nothing is going to ever change on this.

Chairman SHELBY. Senator Lankford, your resolution would restore one of the post-cloture process changes in the Senate from the 113th Congress. I believe that change struck the appropriate balance between preserving time for debate without needlessly delaying the inevitable confirmation of nominees.

In your view, is there any reason the Senate should not restore this process change? We call it the "Reid Rule."

Senator LANKFORD. No. I think we should do it, and it is not just for this Congress. I know there will be debate, but it will be for the next one and for the next one and for the next one. If we do not establish a principle to be able to get out there, I can assure you, after the next election, when a Democratic President is elected, Democrats will come to Republicans and say, "Okay, now we need to do that rule you were talking about and you liked so much. Now is the time to vote for it." Republicans will say, "No, not now. Now it is the next election. We will do it."

At some point, we just have to determine for the future this has to be resolved; otherwise, it never gets done.

Chairman SHELBY. Senator Klobuchar.

Senator KLOBUCHAR. Thank you very much, Mr. Chairman. I appreciate that last thought, and I hope that could happen. But our issue is right now that we are in this reality, and the reality is that the Majority leader has just put out a press released talking about all they have got in a record—the administration has got a record

number of judges through. We have had a number of judges withdraw because they were clearly unqualified, and we have had a Republican Senator cross-examine a judge who was clearly unqualified and whereas you have noted at this partisan time. If we were to move forward on this with this proposal, which would not meet the 60-vote threshold, I believe, because of the fact that it is viewed as partisan as opposed to a bipartisan effort that maybe could have been worked up in a different way.

The other thing that I think we have not talked about and I did not mention in my opening is that we have invoked cloture for 64 nominees, and for 54 of them we used 8 or fewer hours of post-cloture debate. I just think that we should realize that some of the issue with these positions not being filled, which I hope you will acknowledge, Senator Lankford, is that people were not being nominated on the executive branch side, particularly in places like the State Department; and that when you look at the real facts here, for 54 of the 64, it was 8 or fewer hours. I wondered if you would respond to that practical argument.

Senator LANKFORD. Sure, and I would be glad to. Even 54 would be—that is a larger number of requests even for a cloture vote than the last four Congresses combined—not years but last four Congresses combined. To even request a cloture vote—this was done by unanimous consent—to know this is going to move, so why slow down the process and demand additional hours for post-cloture. Even that shows the radical change that has really occurred in the shift in time. As far as the nominees that are three nominees or several that the administration has brought up, went through the committee process, and then were set aside, that happened even before they got to the floor, and I think that will continue to happen, and I would assume that would happen regardless of who the President is. They are going to put some people up that are not going to perform well, that Senators from both parties should step back and say our advice and consent is no, and to do that in the committee process.

I do not know of any of those that were addressed once they got to the floor. Once they get to the floor, there may be 30 hours of debate or 8 hours or 2 hours, but most of the time, as I can recall—and maybe somebody can correct me—once they got to the floor, it was done. Catching them happened in the committee process.

Senator KLOBUCHAR. I just think back to some of the efforts that have been made earlier, especially the one I know Senator Collins was involved in trying to—and I am not remembering the Democrat, but to try to limit the number of people who were confirmable by the Senate and made some changes so that it would take effect into the next administration regardless of who the President was. To me, those efforts were bipartisan, and I know you have been talking to our colleagues, but—

Senator LANKFORD. I would have no issue with that.

Senator KLOBUCHAR. Okay. You compare your resolution—the last question here—to one passed in 2013, and as we discussed, that was temporary, and it was at a time when we had a 60-vote threshold. As I see Senator Leahy here, from a Judiciary Committee standpoint most significantly, that was at a time when the blue slip process still applied for circuit court nominees, and that

has now been changed for circuit court but not for district or U.S. Attorney.

To me, it seems like there were other protections in place at that time, and while I would agree with you that time is not our favorite protection—that is why I have worked with Senators Merkley and Udall in the past. As you see these protections that we have had in the past going away, it makes you not want to make these changes right now. That is why I would like you to discuss that, acknowledge why we would want to move on this now if you are on our side of the aisle.

Senator LANKFORD. I would be glad to on that. The only portion of the 2013 proposal is the sunset that has experienced a change on this at all. I literally took the exact same language as 2013, removed the sunset, and said this becomes permanent. My request is to make it a standing order, which would require 60 votes and make it a permanent standing order without any sunset date on it. That is the request, and that is why I said let us take the exact language.

I do understand it has changed from 60 votes to 50 votes. That was done in a nontraditional way. I understand the world changed, but the world radically changed in November of 2013, regardless of what we are doing with this. That protection lost—the issue about the 60 votes or 50 votes, I was not here at the time in the Senate, but that was one of the long-term consequences regardless of what is done. You lose some of those protections in the process. The time is there.

The blue slip issue is, quite frankly, a great conversation piece. That is something that Senator Leahy has handled as Chairman of the Judiciary, very different than most of his colleagues that were Senate Judiciary Chairmen for the last 100 years. As you look at the last 100 years in the Senate Judiciary Committee, most of them did not treat the blue slip the same way Senator Leahy did. Senator Kennedy did not. Senator Biden did not. Senator Hatch did not. Senator Grassley does not. They have handled it in different ways. But that is a Senate tradition to be able to establish whether this is consent that happens or it is a locked-in requirement that you have to be able to get that blue slip back and forth.

I look forward to the ongoing—

Senator KLOBUCHAR. You can tell Senator Leahy wants to jump in at this moment.

Senator LANKFORD. I am eager to be able to have that conversation. I would say that he handled that in a way that was consistent both with a Republican and a Democrat President, to his credit on that, exactly the same way on how the blue slip process would be handled, but it was different than other predecessors in exactly the way they actually applied it in that as a single tradition.

Chairman SHELBY. Senator Blunt.

Senator BLUNT. Thank you, Chairman.

You know, the elimination, obviously, of the 60-vote protection, except for the Supreme Court, was done by a Congress controlled by Democrats. The blue slip, I think even Senator Hatch—I will be interested to hear what Senator Leahy has to say about this. I think Senator Hatch—the blue slip has not been at all consistent, but what has been most inconsistent was using the debate time as

a clear delaying tactic. Nobody is opposed to 30 hours of debate time if there was actually 30 hours of debate. It has already been mentioned the 100–0 vote after 30 hours of no discussion at all. I know there was earlier a 98–2 vote, and there was 20 minutes of debate about the nominee, and it was 20 minutes for the nominee. Certainly we could eventually get these people confirmed if we do not do anything else. But it is clear that this is being used to slow down the other work of the Senate and for no other purpose.

You said, Senator Lankford, that there have been—let me see if I have got this right. I think you said there have been 63 cloture motions this year. I looked at this in October, and if I recall the mid-October number right, there had been 47 this year. At the same time for President Obama, there had been three. For President Bush there had been one. For President Clinton there had been one. For President Bush 43 there had been zero. The previous four Presidents, there had been five cloture motions by that time in October. The 47 this time, is the debate more strenuous on these nominees this time, Senator Lankford? Have you looked at the debate clock and how much is actual debate and how much is just time spent on other things?

Senator LANKFORD. With some rare exceptions, obviously, with some very heated Cabinet officials, this rule that I am proposing would not change those a bit. They would still be 30 hours for those individuals. For the other individuals, the debate clock was rarely used. Sometimes, as you mentioned, as short as 20 minutes, and usually those were the two Senators from that state that were actually coming to speak well of the individual from their state, and then otherwise the C-SPAN cameras rolled with riveting silence during that time period. That is an issue for us.

A practical example of that is Judge Scott Palk from my state. Judge Palk was one of those that required extended cloture time. Scott Palk had been nominated by President Obama as a district court judge, was renominated by President Trump as a district court judge, still required a cloture vote to be able to go through the process and extended debate, and I recall only Senator Inhofe and I actually spoke about him on the floor when the actual extended debate time was required. When he arrived at his desk, he was handed 125 backlog cases that hit his desk the same day that he got there. This has real-world consequences the more that this slows down the process.

Senator BLUNT. Is one of the consequences that we cannot get to other work during this 47 or 63 times 30 hours that we would use—

Senator LANKFORD. When you are post-cloture, you cannot bring up other things, as this body knows extremely well. As I mentioned before, we can either do nominations or legislation, but the Senate cannot walk and chew gum at the same time. We can only do one thing at a time. If we have extended debate and required post-cloture, if that is going to be the vehicle that will do it, that will permanently block any legislation from being done because we have to do personnel as well as legislation.

Senator BLUNT. The large percentage of this President's first-year appointments, while we are not done with this yet, if you

wanted to do this in a way that only dramatically affected the next President, the first year of this Presidency is gone.

Senator LANKFORD. Right.

Senator BLUNT. The next first year of a Presidency is for whoever is the next President. We could spend a lot of time, I guess, getting upset with each other about this year, but we are about to get to the point where this will no longer have eaten up the first year of a Presidency. By most standards, the most productive time in a Presidency is the first year. That one is gone, and it is gone with 63 times 30 hours of time spent on nominations that, with a handful of exceptions, there was no debate. We ought to be talking about the first year of the next President, no matter who that is, or the next Presidency, no matter who that is. This is as good a time as any to do that. The first year is gone. The nominations that have come up in the last 3 years are not nearly as consequential or pressing, and so if you want to talk about what we are doing for the next President, what we would decide to do right now would have much more impact on the next President than this President, who has already lost a year of legislative time because of the delay that has been used for these nominations. I would like to see us do this for the next President, no matter who the next President is.

Chairman SHELBY. Senator King.

Senator KING. Senator Lankford, I appreciate your coming today and bringing this proposal forward and treating it as a dialogue because it is an important question. I just have a couple of questions just to understand the facts.

My understanding is that this year, when we have had all of these cloture motions, very rarely have we used all the time. Most nominees have been 10 hours or less. Isn't that the case? I think Attorney General Sessions and maybe Mr. Pruitt went over 20 hours.

Senator LANKFORD. Correct. Most of them have been around that time, but it is usually a full legislative day. While it may not have been 30 legislative hours, it was a full calendar day, and so that was a full day. For instance, a typical week on a lot of these, you would do three nominations in a week, maybe four or five in a week. But then you do not get to any legislation because while you are post-cloture, you cannot bring anything else up.

Senator KING. If you are post-cloture, but the 30 hours are not necessarily all used. Is there another option here of saying you could have 30 hours, but if there is no actual debate or discussion after a certain grace period, nobody comes to the floor, then you could reduce the time based upon no debate.

Senator LANKFORD. Sure, you could actually force the issue, and for any Majority Leader, they could come to the floor as soon as there is silence and call for the vote.

Senator KING. That can be done under the current rule.

Senator LANKFORD. That can be done under current rule. That actually dials up the volume even more, and I would assume it is one of the things the Majority Leader and Minority Leader can negotiate at any point, "I am not going to do that." Or, "We are going to force people to actually be on the floor to be able to do it." But that is something the Majority Leader and Minority Leader could



do. But that forcing mechanism could be done under any expression of that.

By the way, it is time equally divided, so let us say it is 30 hours, time equally divided; it is really 15 hours for the minority party, 15 for the majority. If the majority party chooses not to exercise that, a 30-hour debate is really 15 hours. But that is still, obviously, a full calendar day.

Senator KING. I take it that you would not be receptive to—or perhaps you would—returning—you are basically putting back into place what the Chairman referred to as the “Reid Rule.”

Senator LANKFORD. Right.

Senator KING. At the time that rule was accepted in January of 2013, there was a 60-vote requirement. Would you accept returning to that 60-vote requirement?

Senator LANKFORD. I would not only in the sense that that seems to be a genie out of the bottle at this point. Once you have crossed that threshold of saying 51 votes makes that decision that you can shift back and forth, I do not know how you undo that. Even if you undid it for this Congress, there would be every incentive in a future Congress just to be able to flip it so that would turn on and off.

Senator KING. One other parliamentary question, and you mentioned this, that part of your motivation here is to open up more time for the Senate to do a variety of things.

Senator LANKFORD. Correct.

Senator KING. What about allowing other matters to come before the Senate during the post-cloture period if there is no debate upon the nominee, a dual track, in effect?

Senator LANKFORD. Dual tracking is something that has been done by the Senate by unanimous consent before. If you have a 2, 8, or 30, you would not necessarily need that because you could already dual track just based on the calendar, you would have post-cloture. You could do, for instance, a district court judge in the morning at 2 hours, or you could do one that is—in the afternoon do one that is 8 hours and do only 4 hours used by one side and still do legislation in the morning.

Senator KING. You could do a district court judge within the 30 hours for a Cabinet nominee, for example, if the 30 hours for the Cabinet nominee are not being used.

Senator LANKFORD. Right. I would think that would be appropriate only in the sense that if it is not being used, go ahead and bring it to the vote and get it resolved. For Cabinet, there are about 22 individuals that are considered Cabinet—or 21 that are considered Cabinet-level individuals, Supreme Court, or circuit court. I would think those individuals, we would use the majority of that 30 hours of time. That is a bigger issue. More people are going to be engaged. I have no issue with trying to make sure that those get the maximum amount of time. But for the rest, now that it is 51 for votes, most of the action on the floor is perfunctory or not used at all.

Senator KING. Well, as you noted early in your testimony, the Senate traditionally has operated in a way that respects the rights of the minority and that it has that in its nature. If we have gone from 60 to 51, and if we are shortening the time, and if we are

drifting away from the blue slip requirement, it seems to me we are moving very rapidly toward a majority only. You know, one possibility would be to take your recommendation and say it will be in rules on January 1st of 2021. In other words, none of us know who the President is going to be, who the majority is going to be, and then we would be able to consider it more in the abstract than in the present-day political situation.

Senator LANKFORD. Quite frankly, there were several budget proposals and such that I made, and counterproposals that I made a year ago to try to—and this was one of them, to say we should do this now before this election. I did not have a lot of my Democratic colleagues that wanted to engage at that point as well, even when it was unknown who the next person would be. I think there is no easy moment to do it. If you set it in place at any moment, it will be a challenge because someone on either base is going to scream you are giving away your ability to enforce leverage.

What I am trying to do is to be able to get the Senate back regardless of who is President, regardless who is in the majority or minority, to be able to operate. The nominations process, starting with the nuclear option that happened in 2013, that November, and then again the nuclear option again being exercised on the Supreme Court, the nominations process has dramatically changed, and the rules have not caught up to that operation.

Senator KING. Thank you.

Thank you, Mr. Chairman.

Chairman SHELBY. Senator Alexander.

Senator ALEXANDER. Thank you, Mr. Chairman.

I would like to continue the tone of the dialogue between Senator Lankford and Senator King but make this statement: After the 1980 elections, Democratic Senator Robert C. Byrd suddenly became the Minority Leader, and Republican Howard Baker became the Majority Leader. Baker went to Byrd and said, “Bob, I will never know the rules as well as you do. I will make a deal with you. I will not surprise you if you will not surprise me.” Byrd said, “Let me think about it.”

[Laughter.]

The next day, Byrd said yes and they managed the Senate for 4 years together. I have heard Senator Leahy say it was one of the best, if not the best, functioning of the Senate that he has seen.

That is what we are talking about today, functioning as an institution, making the Senate work. We claim the Senate is unique, but that is only true if it works. Senator Lankford’s proposal is modest because it would reinstate a bipartisan standing order that we adopted for 2 years. His proposal is important because it would reinstate the practice of changing our rules according to the rules.

I hope the committee will unanimously recommend Lankford’s proposal to the full Senate. I want to say three things about it.

First, it is the same proposal that was adopted 78–16 in January of 2013. It is true it took 60 votes then to end debate on a nomination, and later that year Democrats used the nuclear option so that it only took a majority vote. But that was not really a change in practice because throughout the Senate’s history, Presidential nominees were almost always approved by a majority vote. Even when the rules permitted it, cloture was never once used to block

the nomination of a Cabinet member, never once used to block the nomination of a Federal district judge. The only time it was used with a Supreme Court Justice was 1968 with Justice Fortas, as was mentioned, and never used for circuit judges until Democrats blocked nominees of George W. Bush in 2003. The point is the custom has always been that Presidential nominations are decided by a majority vote. By custom and by rule, his proposal is the same as the 2013 standing order.

Second, this is an opportunity to reinstate the practice of changing the rules of the Senate according to the rules—that is, 67 votes to change a rule, 60 to pass a new standing order. Each party has demonstrated that we know how to do it the wrong way. The problem with that, as Senator Levin once said, is that a Senate in which a majority can change the rules anytime it wants is a Senate without rules. Continuing to ignore the rules will lead to ending the filibuster on legislation and destroy the uniqueness of the Senate. In Senator Byrd's last speech right here before this committee in 2010, he implored us, "Never, ever, ever get rid of the filibuster. It is," he said, "the guardian of minority rights and an essential engine for consensus."

Third, the Senate needs a change in behavior more than a change in rules. We changed the rules in 2012 and 2013 to make it easier for President Obama and his successors. I spent a lot of time on that, as had many others. We eliminated secret holds, required 72 hours to review legislation, made 373 nominations privileged, eliminated confirmation of 163 major positions, eliminated the need to confirm 3,163 noncontroversial positions. We did all that. We adopted several measures to speed up the motion to proceed and shorten post-cloture debate. Still, the nuclear option has been used twice since then. I would say that on November 21st, when we used it, there were 20 judges and 56 executive nominations pending, only 4 more than 60 days. Twice as many are pending today, 24 more than 60 days. Conditions are worse today than when the Democrats said we needed to use the nuclear option.

The change in behavior we need boils down to one word: restraint. Senators Baker and Byrd were successful because Senators did not insist on using every right and prerogative. Motions to proceed and unanimous consent requests were routinely granted. Senators did not block other Senators' amendments. They simply voted no. Presidential nominations were almost never blocked by requiring a cloture vote.

Last summer, a Supreme Court Justice was asked how Justices are able to get along when they have such different philosophies in such controversial issues. I was listening at the time. The Justice's reply was, "Each of us tries to remember that the Constitution and the institution are more important than our own opinion."

Senator Lankford's proposal is an opportunity to demonstrate that United States Senators can remember that the institution is more important than our own opinions. I hope we will unanimously recommend his proposal to the full Senate.

Thank you.

Chairman SHELBY. Senator Cortez Masto.

Senator CORTEZ MASTO. Thank you, Mr. Chair. Thank you for having this hearing. Senator Lankford, let me say thank you for

bringing this forward. As a new Member to the Senate, I appreciate this discussion and look forward to further discussion. I am not sure I am completely behind the language that you have but look forward to further discussion on the concept.

Let me just start with that. As a new Member—and you talked a little bit about Justice Scott Palk and the fact that he had come before the Senate before, so why wasn't it quicker? Well, I was not here then, and I think for purposes of new Senators, this is all new to us as well. I would not like to see a quick process moving through, particularly as an attorney who cares about the judiciary and what happens on it. I am not on the Judiciary Committee but would like the time to properly vet these individuals. I think for purposes of moving forward for new Senators, we want to give them that authority as well, and just because they are not here to vote previously, that would be my concern. I would be curious, your thoughts on how we address that.

Senator LANKFORD. Sure. There are several things in that. One is obviously they get vetted in the committee process. It is well known when they go on the calendar, staff has the opportunity to be able to pull and say these are potentials that are coming up on the executive calendar to be able to do the vetting and the process.

If there is a request—and, again, you go back through history on this, 25 years ago it was extremely rare even to have one cloture vote on a nominee. Now we have 63, 64 just this year. In the past, obviously, this was able to be done. You go back, again, 20, 25 years ago, there were even more nominees on the calendar. That list has been shortened, thankfully, and it needs to be shortened some more. That is an opportunity.

One thing that I had not mentioned earlier as well that is part of the challenge of, well, we cannot do it now because we are in the middle of a Presidential time. Republicans stepped across the aisle in 2013, met with Democrats, and voted with 78 votes at the beginning of President Obama's term to say we are going to change this and to not do extended debate for all of this. Let us do 2, 8, and 30. Republicans did cross the aisle and say we understand for a brand-new President that is going to bring a lot of new nominees—as a second-term President, a lot of people leave after the end of the first term, and so that is a rush again of nominees. Republicans opened it up and said we are going to take heat from our own base, but the President should be able to get his nominees, and they worked through the process.

Senator CORTEZ MASTO. No, and I appreciate that, absolutely. Are you saying also that—I think one of the concerns that I saw coming through as a new member is there were a number put up at one time, four or five in a panel, rushing those through. That would be another concern. Are you saying that process would still occur or—

Senator LANKFORD. That would hopefully occur because there are 1,200 to do.

Senator CORTEZ MASTO. Right.

Senator LANKFORD. I think there will still be quite a few in a panel in a committee, and I still assume that there will be quite a few. But any time they move in a bloc, that is a unanimous consent agreement that everyone's staff and every member has the op-

portunity to be able to see those individuals and say, yes, I can sign off on this. They will move as a bloc.

Senator CORTEZ MASTO. Right. No, and I appreciate that. For people, particularly for me, who may be not on those committees, I would want the time to be able to vet, thoroughly vet those.

Senator LANKFORD. Sure.

Senator CORTEZ MASTO. For the purposes of the advice and consent that I am required to do.

Senator LANKFORD. That would not change.

Senator CORTEZ MASTO. The next question I have, everything that we are talking about here today, we are talking about the delays particularly here in the Senate. Are you also considering the delays in the nominations from this administration? I have not heard discussion on that, and let me just say I know that traditionally in the past, Presidents have had more nominations at this point in time. My understanding—and this may be wrong, but President Trump has been historically slow in submitting nominations to the Senate; 250 out of 624 positions requiring Senate confirmation are still without a nominee. My understanding, that is unique compared to other Presidents at this point—

Senator LANKFORD. I do not know if it is unique. It is unique in the last 20 years, certainly. I have not gone back any farther than that. But I would say President Clinton, President Bush, President Bush, President Obama all had more nominees that the White House had actually put out to Congress by this point. By this point, I would guess somewhere around 150 fewer than President Obama at this point, maybe more than that, that President Trump has put out than President Obama. But that is still, even those that he has put out, fewer have moved as well. It is really a both-and on this. The White House owes us a lot more people to be able to put through the nomination process, but even if they got here, we are not moving them at the pace that they actually need to be moved, because typically they move in large blocs rather than one at a time, with 8 or 30 hours required for it. In the past, the Senate has looked at it and said as long as this person is competent to do the task—they may not philosophically agree with them, but they philosophically agree with the President, the President can pick his own staff.

Senator CORTEZ MASTO. Thank you. I know my time is running out. The only other concern I would have is the vetting. My understanding and concern is that this particular administration has not engaged in proper vetting of some of these nominees, and so we want to take the time to make sure that vetting occurs. But let me just say this: I look forward to continuing the conversation on this along with the remarks of my colleagues on this subject as well. Thank you for bringing this forward.

Senator LANKFORD. Sure. Advice and consent is our constitutional responsibility, Senator.

Chairman SHELBY. Senator Udall.

Senator UDALL. Chairman Shelby, thank you so much for this hearing, and I would like to continue on the same tone, Senator Lankford, and very much appreciate your sincere interest in wanting to make the Senate work better, I hope for both sides, the majority and the minority.

Senator LANKFORD. Right.

Senator UDALL. Reforming the Senate rules is something I have been talking about and working on since I joined the body in 2009. Senators Harkin, Merkley, and I, along with other members, have been introducing resolutions and having good bipartisan discussions for many years.

In January 2011, we introduced a rules reform package. One provision in that package would have reduced the post-cloture time on nominations from 30 hours to 2 hours, with Supreme Court nominees being the only exception. Today's hearing indicates that my Republican colleagues have finally agreed with this position—

Senator LANKFORD. If you are asking for a motion to take your amendment, I would second it.

Senator UDALL. Now that—I am not. I am not. But now that the President is a Republican and they are in the majority. But we proposed a package of reforms that benefited both the majority and the minority. Today's proposal benefits only the majority, and the majority is looking to rush it through without expert testimony or bipartisan negotiation.

There are other key differences between then and now. When we made our proposal to reduce post-cloture time to 2 hours—and these have been mentioned several times; you have heard them—you still needed 60 votes to invoke cloture, which was a real restraint on everybody. Blue slips were still honored for all judicial nominees. The minority still had a voice in the confirmation process. That is the important part, and I think Senator Alexander talked about that in terms of restraint.

That is no longer the case. A simple majority can ram through even the most unqualified nominees. Today's hearing is about how to do it even faster. President Trump will be the first President in history who is able to confirm all of his nominees with a simple majority, and his party controls the Senate. It is pretty shocking that the majority is complaining about obstruction.

Let us be clear. One of the biggest problems with this administration's nominees is that they have proven through the Senate's normal vetting process to be unqualified, even to the majority. There is a huge difference between conservative and unqualified. We expect a Republican President to appoint conservative nominees, but we do not expect unqualified nominees, and none of us should tolerate it. President Trump is sending the Senate judicial nominees who are rated "Unqualified" by the American Bar Association, nominees who cannot answer basic questions about the law, nominees to be trial judges who have never tried a case, nominees with serious conflicts of interest, nominees with no substantive experience in the position that they are being appointed to.

In the campaign, President Trump said, and I quote—and this was something I was really looking forward to—"I am going to surround"—this is his quote: "I am going to surround myself with only the best and most serious people. We want top-of-the-line professionals." This is yet another statement by the President that has been proven false.

My colleagues on the other side of the aisle seem willing to abdicate our advice and consent responsibilities and just act as a rubber stamp.

Senator Lankford, your proposal should be considered, but only if additional reforms are included as part of a good-faith, bipartisan negotiation to include the minority's voice in the confirmation process. For years, Senator Merkley and I have advocated for what we call the "talking filibuster." It would allow the minority to filibuster nominees and legislation, but only with a significant effort and willingness to hold the floor and continue debate. I think that is what you talked about. You wanted to see that vacant time be used or, if it was not being used, used on something else. If we are going to look at reforms, it should not be in a hastily scheduled hearing with only Senator Lankford as a witness during the last week of the session and when other major legislation is being considered.

I do appreciate that the markup was postponed. I hope it is not rescheduled until we have had additional hearings, good-faith negotiations with the minority, and the ability to consider a variety of reforms from other Senators as well. Since the Republicans took over, the Rules Committee has been essentially dormant. In nearly 3 years, they have had only one substantive hearing until today, and that was a confirmation hearing for the Library of Congress. When Leader Schumer chaired this committee, he took reform seriously. In 2010, we had six hearings on examining the filibuster. Over the course of 5 months, we heard testimony from over 26 members; 18 members entered statements in the hearing record. We heard from legal experts and former parliamentarians. Senator Byrd provided his insights, as has been talked about here. We used what we learned from those hearings to draft our reform package in January 2010 and 2011.

If the majority is serious about rules reform, we need bipartisan support. To get that support, they will need to do it the right way. Let us hold hearings next year and develop a package of reforms we can all live with, whether we are in the majority or the minority. That was always our test when we crafted our legislation. The resolution we are considering today fails to meet that test. Rather than changing the rules in the middle of a Congress, we should debate and vote on a reform package at the start of the 116th Congress, regardless of which party is in the majority.

Senator Lankford, just one question here to you. Do you support additional hearings and good-faith, bipartisan negotiations to develop a reform proposal that can gain the necessary bipartisan support to actually pass the Senate? I would be happy to hear any additional thoughts you have in response.

Senator LANKFORD. Sure. With the Chairman's indulgence on this, I would have no issue obviously with additional hearings and conversations. When the Senate is actually meeting in a setting like this, when we are really talking about how do we solve things, we are at our best. We are at our worst when we say we are going to go talk on the floor, and no one is listening other than the C-SPAN audience, and we are not talking to each other. There are opportunities to be able to sit down to be able to work it out. We should certainly do that.

This was no trick play on my part. I am a new guy that has been here 3 years. My focus was I can see obviously what everyone else can see. It is not working, and it has not been. What can be done to actually get us back to where we can have debate again. If all of our dialogue on the floor is simply about 30 hours of debate on a judicial nomination that is going to pass 89–11, then that is not really accomplishing the task that we need to do to be able to fill out that full legislative day.

I remind this body that we had unlimited debate, and then it was limited to 100 hours later, and then it was limited to 30 hours. The funny part to me is: Why? In 1986, they limited it from 100 hours to 30 hours because that is when the C-SPAN cameras turned on, and the Senators determined they did not want the C-SPAN cameras focused in on an empty chamber of 100 hours of post-cloture debate with no one actually on the floor. They changed it to 30 hours because that is the maximum amount that had ever been used for post-cloture debate. Even though the rule was 100, they dropped it to 30 thinking we will give the maximum amount that it is. Now we do 30 hours of debate and rarely any of it is used.

We still are in the same situation. If we are going to get back to actually operating, I would suggest that we actually get back to operating and put our rules where our practice is.

Senator UDALL. What you have said in terms of identifying the tit for tat I think is very, very true. I have seen this over the years, both in the House and in the Senate. One side pushes the envelope on a particular rule or procedure. The next side comes back and says, you know, we have to show it to them. We are now in the majority. I am so thankful for your enthusiasm. You have been here for 3 years. You are still sticking with the idea of reform. A lot of Senators just give up and say whatever the rules are the rules. I appreciate that enthusiasm and coming up with proposals, and I hope that we can work to do something that makes the Senate work better and makes our Government work better, and the ultimate result obviously is producing for the people, and that is what we—

Senator LANKFORD. I hope we can. At the end of the day, if the pause on this is to say, well, let us wait 3 years and we will see if a Democratic President is elected and then we will want to talk about changing the rules on that, I do not see any particular enthusiasm from Republicans to say you are right, that is the right moment, after we have faced all these cloture rules for 4 years, then to flip it and say we are not going to do that anymore. That is not a realistic way that is actually going to be addressed. What I am trying to look for is what are the realistic moments that will actually fix this. There are lots of messaging things to say how we would do it. How are we really going to fix this?

Senator UDALL. Well, one of the parts of this that when you say “really fix it,” when the rules change as I have seen them happen in the middle of a Congress—and we talked about the nuclear option—

Senator LANKFORD. Yeah, like November of 2013.

Senator UDALL. Yeah, those kinds of—yeah, that is what I—those kinds of things cause a lot of bitterness, and that is why I



think, you know, rather than waiting until the next President, a year from now we have the 116th Congress coming in. We could work for a year, put our proposals out there, talk about them, and come up with a package.

Senator Merkley and I, in fact, have been talking about, you know, a year out try to get out some proposals, see if we can pull people together in a bipartisan way.

Senator KLOBUCHAR [presiding]. Senator Udall——

Senator UDALL. Senator Klobuchar, you are back.

Senator KLOBUCHAR. I am. I have returned. But Senators Lankford and Merkley may miss the vote. I thought I would let Senator Merkley—while he is not on the committee, he is the only one here right now who has not asked questions or said anything, so, Senator Merkley, given your work on it, if you want to quickly comment before you leave for the vote.

Senator MERKLEY. Well, thank you very much, Madam Ranking Member.

Senator KLOBUCHAR. You are welcome.

Senator MERKLEY. I appreciate the chance to sit in on the conversation. The first Senate that I saw in operation was in 1976 when I was here dropping out of college for a year to intern and volunteer for groups and watch how Congress worked. I had the chance to staff a tax reform bill that year in which there was never any suggestion of a super-majority needed for any amendment or moving to the floor, final vote. That was a very, very, very rare thing. In the course of these decades, we have gone from being what was essentially virtually always a simple-majority body to being a super-majority body. In the course of that, it would go from going the direction on almost all occasions that the majority thinks is the right direction to going on almost all occasions to which the minority thinks is the right direction. It is a very strange way and is not serving us well and is resulting in a lot of paralysis.

I really appreciate that you are helping to instigate a conversation. I do hope that this committee, which, unfortunately, I do not serve on, will decide to bring in the many experts who have watched the Senate, understand what has worked, what has changed over time, to have a real intense dialogue about how we can possibly put together a set of proposals.

The thing that Senator Udall and I have tried to do was to introduce when we were in the minority the same proposals that we introduced when we were in the majority. What we also tried to do was to introduce a package that would have things that benefited both sides so that it was not partisan, and that helped, made it easier to introduce it whether we were in the majority or the minority.

I am very concerned on the nomination side about the impact on the pipeline of qualified individuals who want to serve, knowing what they have to go through. When folks come to me and say, “Should I consider applying for or taking a position in the administration?” I say, “You know, is it one that requires Senate confirmation?” If they say yes, I say, “Well, you have got a lot to think about because the confirmation process has been one where you might sit in limbo forever.” That seems particularly inappropriate to use advice and consent as a tool to essentially conduct partisan

warfare on a President, no matter who is in power and who is in the minority.

I think this is a really important conversation. I encourage the committee to continue it. When you came in, I held over two dozen meetings with Republican colleagues trying to create some momentum behind consideration of a rules package. I obviously failed in that effort. But if we have energy from both sides of the aisle to engage in this, perhaps we can make this institution work a lot better, not just the nominating process but also the process of debating bills.

Thank you.

Senator LANKFORD. Thank you. I appreciate that, and I will make just one quick comment, and that is, people really do lose track of not only when there is not a Senate-confirmed individual, how hard that is on the agency, but how hard that is on the individual. It is not uncommon for an individual to have to quit their job to be able to actually go through the Senate confirmation process, and they are sitting without income. Their family is exposed for months and months and months as partisan bickering here goes back and forth on whether we are going to do nominations. That is not helpful to those individuals, getting future individuals, or to the agencies as a whole.

Senator KLOBUCHAR. Thank you, Senator Lankford. Some of that other experience that I have had has been also about delay before they come up for a vote. As you know, it is not just the 30 hours. That has been my experience with the ATF nominee, who we finally got through, or some of the judges.

Anyway, you are the only one that has not voted here, and Senator Shelby is coming back, and I know you have been willing to relinquish voting to stay, but there is no one left to ask you questions right now. I suppose you could leave and come back.

Senator LANKFORD. I would love to go vote.

Senator KLOBUCHAR. Okay. That would be a good idea.

Senator LANKFORD. My state does expect me to vote. I would be glad to vote and come back, if you all would like me to be able to come back. I will be gone 8 minutes and do that.

Senator KLOBUCHAR. Okay. That will be great. We will be temporarily adjourned then. Okay. Thank you.

[Recess.]

Chairman SHELBY [presiding]. The committee will come to order. Senator Alexander?

Senator ALEXANDER. Thanks, Senator Shelby.

I am glad to have a chance to have a little more of a dialogue with Senator Lankford than I did before, and I want to thank Senator Shelby for having this hearing and the staff for working on it. You know, I mentioned the Supreme Court Justice who I heard say that he gets along well with another member of the Court who has completely different views because they try to remember that the institution is more important than their own opinion. This is the committee that really is the custodian of the Senate as an institution, and I am glad to see the hearing. I hope the hearing leads to discussions.

I was just having a little discussion with Senator Klobuchar. Most of us want to be part of an institution that works, and we rec-

ognize once we are here for a while that the country, fractured as it is, needs an institution that builds consensus, and when we are at our best, that is what we do. I think back in our Health, Education, and Labor Committee of fixing No Child Left Behind, 21st Century Cures, the so-called Alexander-Murray small health care bill, which we have worked out and hopefully the Senate will pass and the House will pass, those are real triumphs because once they are passed into law, nobody is trying to repeal them because so many of us agreed.

Senator Lankford, I read the conditions that existed on November 21, 2013, when Senator Reid and Democrats used the so-called nuclear option. There were 20 judges and 56 executive nominations on the calendar. That is all there were. Only four of the executive nominations had been there more than 60 days. Maybe there is some sort of division between judges and executive nominations in terms of our ability to find a bipartisan solution here.

Your proposal does not affect circuit judges or Supreme Court Justices.

Senator LANKFORD. That is correct.

Senator ALEXANDER. It only affects Federal district judges. There are 19 judges on the calendar today that Senator McConnell could bring up. That is about the same number there were when the Democrats did the nuclear option, but there are 105 executive nominations. That is twice as many as there were when Senator Reid did the nuclear option in 2013. Do you think it would help us come to some bipartisan rules change if we could agree to reduce the number of executive nominations on the calendar and continued to argue a little bit more about the judges?

Senator LANKFORD. It would certainly help the dialogue. I am reminded of 2013 when the agreement was reached in that January time period to change to the 2, 8, and 30 rule, that Senator Reid and Senator McConnell had a colloquy back and forth on the floor at that point to be able to explain what was happening. At that time Senator Reid emphasized, though they were talking about times for cloture, cloture still should not be used—and his term was—“except in extraordinary circumstances.” In his statement even the 2-hour time period should not be used except in extraordinary circumstances where there is no wide agreement. That is how they settled the 2013 agreement saying, hey, we are not saying each person should go through this. The fear that I have is now that we have done this 60-plus times this year, we have set a new habit. We are gaining muscle memory that every nominee, whether district court and widely accepted, or whether a controversial Cabinet official, we are going to still go through the cloture. That does not help us as a body to be able to resolve it.

My hope would be that we can have a simple method that is put out there, whether you are a judicial for a lower court or whether you are nominee and get that established but still go back to the practice that we had in the past that a President is allowed to be able to get his staff without clogging up the calendar where you cannot do legislation at the same time.

Senator ALEXANDER. Well, that is very helpful, and I would say to the Chairman that, you know, any agreement at all that had some significance that could come of your proposal that were adopt-

ed in the regular order—that means in a bipartisan way with 60 votes—would be helpful because at least it would show that we still know how to change rules the right way instead of the wrong way. Talking about muscle memory, that would at least be a small step in the right direction, and I suspect it would also encourage a change in behavior if we did that.

Thank you very much for what you are accomplishing.

Senator LANKFORD. Thank you. Senator Alexander, if I can make just one quick comment as well. Senator Merkley had mentioned earlier his desire to be able to see maybe some things that might be beneficial to the minority as well as the majority in this package. I did not have an opportunity to be able to respond to that, but let me just say briefly this is a nonpartisan issue. There will be future Democratic Presidents like there will be current Republican or future Republican Presidents. This is trying to establish a principle that, regardless of who is in the White House, they should be able to get their staff in place and to be able to do that in an expeditious way.

Senator ALEXANDER. Well, and I worry some about what will happen when you have a Democratic President and a Republican Senate or a Republican President and a Democratic Senate. Senators have gotten into the mode of voting against Presidential nominees so often in a partisan way that you could foresee a situation where it was not just a slowdown of the people who a President needs to appoint. He could not get people appointed just because people would be afraid to vote for the nominee of the President of an opposite party. That is completely different than it ought to be and completely different than it was when I came here not that many years ago. Presidential nominees were routinely brought to the floor, and we routinely voted for them, even if we might not have appointed them ourselves, because we respected the fact that people had elected a President and he or she had a right to create a Government.

Senator LANKFORD. Right.

Senator ALEXANDER. Thank you very much, Senator Lankford, and thank you, Mr. Chairman. Thank you, Senator Klobuchar, to both of you, for your time and focus on this. I hope something comes of it.

Chairman SHELBY. Thank you, Senator.

Thank you, Senator Lankford, for your appearance today. I think we have had the beginning of a pretty good debate here, and we will see what happens now. I agree with Senator Alexander and our Leader, and, Senator Klobuchar, I wish we could work together on a bipartisan agreement that would benefit not the Democrats or Republicans, but would benefit the U.S. Senate and the American people.

Senators are advised that the hearing record will remain open for 5 business days so that they may submit any statements or questions for the record.

[The information referred to was submitted for the record.]

Thank you again, Senator, for your appearance.

Senator KLOBUCHAR. Thank you, Senator Lankford.

Senator LANKFORD. Thank you for doing this.

Chairman SHELBY. The committee is adjourned.

[Whereupon, at 3:57 p.m., the committee was adjourned.]

## **APPENDIX MATERIAL SUBMITTED**

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**Senate Committee on Rules and Administration Full Committee Hearing to consider S.Res.355**  
**Tuesday, December 19, 2017**

Chairman Shelby, Ranking Member Klobuchar, members of the Committee, thank you for the opportunity to appear before you today to discuss post-cloture debate time for certain executive branch and judicial nominees. As many of you have heard me discuss in public and private conversations over the past year, I believe the Senate has hit a point of gridlock and we are currently spreading our gridlock to the executive branch by not confirming nominations that require advice and consent.

However, this is not the first time that this body has found itself in that position. Over the past decade, the Senate has slowly increased the number and frequency of cloture votes for nominations. From 1949 to 1992, there were only 12 total cloture votes for nominations. Then, starting in the 1993, the Senate averaged around 6 nominations a year until through 2004. In the 109<sup>th</sup> Session, the average jumped to 9 a year, then in 2009-2012, the number jumped again to over 13 a year. In 2013, at the beginning of President Obama's second term, the Senate determined that something had to be done about nominations. In January of 2013, the Senate passed S.Res.15 by a vote of 78-16, a standing order to reduce post-cloture debate time for most executive branch nominees from 30 hours to 8 hours and reduce post-cloture debate time for district court nominees from 30 hours down to 2 hours. Under the standing order, post-cloture debate time for Supreme Court Justices and Cabinet-level nominations stayed at 30 hours for post-cloture debate.

The standing order in 2013 was an attempt to avoid the nuclear option on executive branch nominations – and for most of the year it worked. However, in November of that year, the Senate established new precedent for the number of votes to invoke cloture on nominations – moving it from a three-fifths majority to a simple majority. For the remainder of the 113<sup>th</sup> Congress, it only took a simple majority to invoke cloture and the standing order with reduced post-cloture debate time stayed in place.

At the end of the 113<sup>th</sup> Congress, the standing order expired, returning to the original 30 hours of post-cloture debate, but the simple majority threshold to invoke cloture still remained. For that reason, we find ourselves in an interesting place today.

In 2013, the Senate considered it intolerable that the Senate would have 13-15 cloture votes a year, so they acted. This year, we have had over 50 cloture votes on nominees. We are on a trajectory that frustrates the American people, the Senate and every agency. We are certainly on a course that will lead every future minority party to prevent any future Senate and any future President from taking any action in their first year. The old Roosevelt “first 100 days” focus is gone, since any new President of either party will now take more than 100 days just to get their cabinet selections through the Senate. To get a full contingency of staff, it will take over 11 years.

Mr. Chairman, that is why I’ve introduced S.Res.355 to bring post-cloture debate back to where it was in the 113<sup>th</sup> Congress and this time to make it permanent. It is consistent to what we have done before as a body and allow the Senate to move efficiently, while still ensuring every Senator’s voice has the opportunity to be heard. These are principles that both Democrats and Republicans should be able to agree on – regardless of whose party is in the White House.

Mr. Chairman, as the Senate slowly works through nominations, the business of American people gets delayed. When agencies have political appointee vacancies, permits are not issued, decisions are delayed, clarifications are stalled, and exceptions cannot be answered. Earlier this year, as FERC waited for several nominees to get approved, their quorum lapsed and they were unable to approve contested rate cases and pipelines. In Oklahoma, the Grand River Dam Authority was waiting on approval of a rule curve variance to keep water levels higher through the summer at a popular recreation area, which they were unable to receive until the nominations were approved and they had a quorum again. It sounds

simple, but this is the real, every day effect of not being able to clear presidential appointees in a timely manner.

The rules of the Senate are the responsibility of the Senators. If we cannot find a way to work together in a fair manner, it is our own fault. This rule change passed with bi-partisan support in a previous Congress – I ask why it could not pass in a bi-partisan way in this Congress.

Mr. Chairman, Ranking Member Klobuchar, members of the Committee, thank you for holding this important hearing today and allowing me to speak to each of you on this topic. I look forward to working with you in the days ahead to ensure that we can honor both the rules of the Senate and ensure that it's working well for the American people.



**Statement of Senator Patrick Leahy (D-Vt.),  
Senate Committee on Rules and Administration  
Hearing on S.Res.355, to Reduce Post-Cloture Debate Time  
December 19, 2017**

Thank you, Mr. Chairman. It is unfortunate that this is the first substantive hearing of the Rules Committee this year. Protecting the integrity and validity of our Federal elections is squarely – and exclusively – within the jurisdiction of this Committee. Despite the consensus of our intelligence community that Russia aggressively interfered in our 2016 elections, and almost certainly continues those efforts today, this Committee has failed to hold a single hearing this year about election integrity. That is nothing short of alarming.

Instead, today we are having a hearing on a resolution to reduce the time afforded to the Senate to debate nominations, including lifetime appointments to our Federal courts. It is surprising, too, that this resolution rises to the top of the priority list, given that President Trump's judicial picks are racing through the Senate. President Trump has had an unprecedented number of nominees reported out of the Judiciary Committee and confirmed in his first year. This is starkly different from 2009. By this time in his presidency, President Obama had only three circuit court judges confirmed; President Trump has had 12, more than any other president in history.

But the appointing president isn't the only difference between today and the past eight years. In the past year, Republicans have amassed virtually unchecked power to ram through President Trump's nominees. Republicans have done away with almost every remaining guardrail for quality and bipartisanship in our nominations process. For judicial nominees, Republicans have disregarded the important role of the ABA by denying it time to evaluate nominees and attempting to undermine its credibility when they disagree with an unqualified rating. Republicans have also routinely stacked hearing panels with multiple circuit court nominees. And now the Chairman of the Judiciary Committee has reversed course on his own "blue slip" policy, allowing President Trump's nominees to receive hearings without positive blue slips from home state Senators, when he did not extend the same treatment to President Obama's nominees.

Now, some members here will cite a Democratic "precedent" for changing the post-cloture debate rules. In 2013, in a bipartisan vote, the Senate agreed to a resolution to reduce post-cloture debate. It was good for the life of the 113th Congress, not the permanent rules change this resolution proposes. But let's remember all the facts, not just some of them: All of the other guardrails on the nominations process were intact at the time. Nominations were thoroughly vetted by both the administration and the Committees here in the Senate. We did not see judicial nominees advance like Brett Talley, Matthew Petersen, or Steven Gras. And nominees were still subject to a 60-vote threshold. For judicial nominations, including circuit nominees, cloture was never filed on the day in which a nomination was reported to the floor, as was the case with the *three* circuit nominees considered by the full Senate last week.

I understand that the Republican majority wants to cry foul and accuse Democrats of needlessly holding up our confirmation process. As the Dean of the Senate, however, I want every member of this panel – and every sitting Senator in this Congress – to know this: Having time to

thoughtfully consider lifetime appointments to the Federal bench is one of the most solemn duties of the Senate – and one that the Constitution calls on us to fulfill. We should not recklessly – and permanently – abandon that responsibility in the interest of partisan expediency.

“Obstruction” has become a term thrown about in the Senate whenever unanimous consent is not provided. Duty is a word we hear too little. Vermonters have, time and again, given me their trust to not only represent Vermont values here in Washington, but to protect the centuries-old institutions that have protected our democracy. I oppose this resolution. We cannot abandon the traditions that have made the Senate, at its best, the conscience of the nation, in exchange for short-term political gain.

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### **‘Judicial Appointments Are The Sleeper Story That Matters’**

*CIRCUIT COURTS: ‘A Dozen Trump Appointees... In His First Year In The  
White House’*

“Judicial appointments are the sleeper story that matters: Tax reform and the end of year spending deal will consume all of Washington’s oxygen until the end of the year. But quietly, a potentially far more important, though far less sexy story is unfolding.” ([‘Judicial Appointments Are The Sleeper Story That Matters.’ Axios, 11/19/2017](#))

### **‘Senate Republicans Close In On Record For Judicial Confirmations’**

**SEN. MCCONNELL:** ‘Under Chairman Grassley’s Leadership, The Senate Judiciary Committee Has Done Outstanding Work’

**SEN. MITCH MCCONNELL (R-KY):** “Under Chairman Grassley’s leadership, the Senate Judiciary Committee has done outstanding work to move these judicial nominees to the floor. I am grateful for his efforts...” (Sen. McConnell, Floor Remarks, 12/14/2017)

“President Trump and Senate Republicans are closing in on the record for the most federal appeals court judges confirmed during a president’s first year in office.” ([‘Trump, Senate Republicans Close In On Record For Judicial Confirmations.’ Washington Examiner, 12/12/2017](#))

“Senate Republicans are set to confirm three more of President Donald Trump’s appeals court picks this week, a push that will help set a record for the most such appointments in a president’s first year in office. The Senate is expected to confirm **Steve Gras** for the U.S. Court of Appeals for the 8th Circuit, and **James Ho** and **Don Willett** for the U.S. Court of Appeals for the 5th Circuit... That would mean at least a dozen Trump appointees would join the nation’s appeals courts — which have the last word in all but the 100 or so cases that the Supreme Court decides each year — in his first year in the White House. That comes in a year the Senate also confirmed Supreme Court Justice Neil Gorsuch in April.” ([‘Trump Poised To Set Record For Appeals Court Judges.’ Roll Call, 12/12/2017](#))

- “If Senate Republicans confirm Ho and Willett before Jan. 20, Trump would surpass the record held by former presidents John F. Kennedy and Richard Nixon. Both Kennedy and Nixon confirmed 11 federal appeals court nominees during their first year in office, according to the Federal Judicial Center.” ([“Trump, Senate Republicans Close In On Record For Judicial Confirmations,” Washington Examiner, 12/12/2017](#))
- “Compare that to Barack Obama, who successfully appointed three appeals court judges in his first year in office in 2009, as well as Justice Sonia Sotomayor.” ([“Trump Poised To Set Record For Appeals Court Judges,” Roll Call, 12/12/2017](#))

### President Trump ‘Is Rapidly Remaking The Federal Appellate And District Courts, With Highly Qualified Nominees’

**WALL STREET JOURNAL:** “Mr. Trump has nominated first-rate judges...” ([Editorial, “Running The Schumer Blockade,” The Wall Street Journal, 7/10/2017](#))

- **WSJ:** “... President Trump is rapidly remaking the federal appellate and district courts, with highly qualified nominees who fulfill his campaign promise to pick ‘constitutional conservatives.’” ([“Trump’s Excellent Judges,” The Wall Street Journal, 10/1/2017](#))

**PRESIDENT TRUMP:** “Thanks to @SenateMajLdr McConnell and the @SenateGOP we are appointing high-quality Federal District ...and Appeals Court Judges at a record clip! Our courts are rapidly changing for the better!” ([@realDonaldTrump, Twitter, 11/1/2017](#))

- **PRESIDENT TRUMP:** “...something that people aren’t talking about is how many judges we’ve had approved, whether it be the Court of Appeals, circuit judges, whether it be district judges. We have [a] tremendous [number], right now, under review. ... I think it’s one of the big unsung things of this administration... Many, many are in the pipeline. The level of quality is extraordinary.” ([President Trump, Press Conference, 10/16/2017](#))

**SEN. MITCH MCCONNELL (R-KY):** “As you’ve noticed, as soon as the circuit judge comes out of committee, I call ‘em up. I’m in charge of the schedule. I gotta choose what to bring up. Confirmation of circuit court judges is my top priority. As they come outta the committee they will be called up.” ([Hugh Hewitt Show, 11/4/2017](#))

**AMANDA MARCOTTE, Liberal:** “...Senate Majority Leader Mitch McConnell and Sen. Chuck Grassley, who chairs the Senate Judiciary Committee, have set up a factory-style assembly line for Trump’s judicial nominees, and are getting them confirmed at a dizzyingly fast rate. ... If liberals sometimes overlook the importance of the courts, rest assured that conservatives do not.” ([“Mitch McConnell Powers Up A Production Line For Trump’s Right-Wing Judges,” Salon, 11/8/2017](#))

**PLANNED PARENTHOOD:** “If Gorsuch is any indication of the types of judges Trump is tapping for lifetime appointments, we’re in trouble.” ([Twitter, @PPact, 10/21/17](#))

### ‘Democrats And Liberal Groups Have Been Unable To Stop Any Of Trump’s Nominees’

**BUZZFEED:** “...Democrats and liberal groups have been unable to stop any of Trump’s nominees from being confirmed by the Republican-controlled Senate.” ([“Republicans Want To Change The Rules To Let Trump Reshape The Judiciary ASAP,” BuzzFeed, 11/1/2017](#))

- “Democrats can’t do much to stop McConnell from pushing judges through.” (“The Senate Is About To Confirm A Frenzy Of Conservative Judges,” *Huffington Post*, 10/30/2017)
- “Democratic senators have used every parliamentary trick in their power to slow this particular Trump train. ... Democrats are forcing more cloture votes than any early presidency and demanding the full 30 hours of floor time per nominee that Senate rules allow.” (“It’s Time For GOP Leadership To Stop Letting Democrats Stall Judicial Nominations,” *The Federalist*, 10/19/2017)

**SEN. DICK DURBIN (D-IL):** “Senator McConnell controls the floor schedule. If he wants to schedule more votes on judges, I suppose he has the power to do so. He is exercising that power by doing something that has never happened in the history of the Senate.” (Sen. Durbin, Congressional Record, S.6886, 10/31/2017)

“I think it’s awful fast to move,” Democratic Sen. Dianne Feinstein of California, the ranking member on the Senate Judiciary Committee, told Politico.” (“McConnell Is Setting The Stage For Rapid-Fire Confirmation Of Trump’s Judicial Nominees,” *Business Insider*, 10/26/2017)

“Nan Aron, president of the progressive Alliance for Justice, said the rush to confirm the circuit court judges is the ‘Trump-GOP court takeover strategy in all its glory.’” (“McConnell Picks Up Pace On Trump’s Judges, Moves To Confirm Four Next Week,” *The Washington Times*, 10/26/2017)

**PEOPLE FOR THE AMERICAN WAY:** “The survival of our democracy depends on having independent courts with judges who protect everyone’s rights and who won’t let anyone trample on the Constitution. So it’s no surprise that Donald Trump and Mitch McConnell are moving at light speed to transform our federal judiciary ... this situation isn’t funny. He and Trump are quickly transforming the American judiciary...” (PFAW, Press Release, 10/30/2017)

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