Testimony of Thomas E. Mann
W. Averell Harriman Chair and Senior Fellow, The Brookings Institution

Before the
Committee on Rules and Administration
U.S. Senate
June 23, 2010

Executive Summary

The focus of my testimony at this hearing is the impact of the increasing use of filibusters and holds on the Senate confirmation of presidential appointees. Because it holds the constitutional authority to withhold its approval of presidential appointments, the Senate can wield formidable negative power. How responsibly the Senate exercises that power importantly shapes the performance of the executive and judicial branches.

All presidential appointments subject to Senate confirmation are not equal. Approximately 65,000 military appointments and promotions and many of the roughly 4,000 civilian nominations are routinely confirmed each Congress. More problematic are appellate judicial nominations and senior appointees in cabinet departments and executive agencies. In the case of the former, the confirmation process over the last three decades has become increasingly prolonged and contentious. The confirmation rate of presidential circuit court appointments has plummeted from above 90% in the late 1970s and early 1980s to below 50% in recent years. These delays in confirming appellate judges have led to increased vacancy rates, which has produced longer case processing times and rising caseloads per judge on federal dockets.

Even more disconcerting has been the impact of the changing confirmation process on the ability of presidents to staff their administrations. The average time taken to confirm nominees in the first year of new administrations has steadily increased (from 51.5 days under George H.W. Bush to 60.8 days under Barack Obama) while the percentage of presidential nominations confirmed by the end of the first year declined (from 80.1% under Bush 41 to 64.4% under Obama).

Senators have long viewed the confirmation process as an opportunity to express their policy views and to get the administration's attention on a matter of importance to them or their constituents. But the culture of today's Senate provides no restraints on the exercise of this potential power and no protection of the country's interest in having a newly-elected president move quickly and effectively to form a government.

The costs of the serious flaws on our appointment and confirmation process outweigh the benefits. Government agencies are ill-equipped to operate effectively and to be held accountable by Congress; able individuals willing to serve their country are subject to uncertainty and major disruptions in their personal and professional lives; huge amounts of precious time in the White House and Senate are diverted from much more pressing needs.

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Chairman Schumer, Ranking Member Bennett, and members of the Committee. Thank you for inviting me to testify today in the third in your series of important and informative hearings on the filibuster.

Testimony presented at the first two hearings usefully clarified the origins of unlimited debate in the Senate, circumstances surrounding the adoption of Rule XXII in 1917 and its subsequent amendment, changing norms and practices regarding the use of filibusters, holds, and cloture petitions, and in recent years the extraordinary increase in the frequency of extended-debate-related problems on major measures before the Senate.

I concur with the scholarly consensus that the emergence of an ideologically polarized Senate, with sharp party differences on most important issues, appears to be a major force behind the routinization of the filibuster. The striking unity within each of the party caucuses reflects this ideological separation but also arises from the rough parity between the parties. Control of the Senate is now regularly up for grabs. Both parties have powerful incentives to use the available parliamentary tools to wage a permanent campaign to retain or regain majority status. The resulting procedural arms race has served individual and partisan interests but has diminished the Senate as an institution and weakened the country's capacity to govern.

The focus of my testimony at this hearing is the impact of the increasing use of filibusters and holds on the Senate confirmation of presidential appointees.

The Constitution provides that the President "shall nominate, and by and with the Advise and Consent of the Senate, shall appoint Ambassadors, other Public Ministers and Counsels, Judges of the Supreme Court, and all Other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law . . ." The Framers differed amongst themselves on the proper role of the Senate in the nomination and confirmation process so it is no surprise that this has been a bone of contention between the branches throughout the course of American history. Because it holds the constitutional authority to withhold its approval of presidential appointments, the Senate can wield formidable negative power. How responsibly the Senate exercises that power importantly shapes the performance of the executive and judicial branches.

All presidential appointments subject to Senate confirmation are not equal. Approximately 65,000 military appointments and promotions are routinely confirmed

each Congress, with very few (though occasionally prominent) delays or rejections. Many of the roughly 4,000 civilian nominations considered each Congress are handled by the Senate in a similar fashion. These include appointments and promotions in the Foreign Service and Public Health Service as well as many nominations to part-time positions on boards and advisory commissions. In many other cases (U.S. attorneys, U.S. Marshals, and U.S. district judges), a long-standing custom of "senatorial courtesy" gives home-state senators support to object if they are not fully consulted by the White House before nominations are submitted. In addition, a number of fixed-term appointments to commissions, boards, and other multi-member entities are required by their enabling statutes to maintain political balance in some way or to follow an explicit selection procedure. In both cases, these consultations and selection processes go some distance in limiting the potential friction between the branches in resolving their shared responsibility. (Not the entire distance, to be sure. Nominees to the Federal Election Commission have often been subject to prolonged delays, even denying it the ability to have a quorum to conduct business during much of the 2008 election campaign. Similar examples can be found with the Election Assistance Commission and other regulatory bodies and boards.) Consequently, it is no surprise that 99% percent of presidential appointees are confirmed routinely by the Senate.[1]

More problematic are appellate judicial nominations (numbering roughly 25 to 50 per Congress) and the 400 or so Senate-confirmed senior positions in cabinet departments and executive agencies (excluding ambassadors) who serve at the pleasure of the president. In the case of the former, the confirmation process over the last three decades has become increasingly prolonged and contentious. The confirmation rate of presidential circuit court appointments has plummeted from above 90% in the late 1970s and early 1980s to below 50% in recent years.[2] A particularly acrimonious confrontation over the delay of several judicial nominations in 2005 led then Majority Leader Bill Frist to threaten to use the so-called "nuclear option" – a ruling from the chair sustained by a simple majority of senators to establish that the Constitution required the Senate to vote up or down on every judicial nomination (effectively cloture by simple majority). Before Frist's deadline for breaking the impasse arrived, a group of 14 senators (seven Democrats and seven Republicans) reached an informal pact to oppose Frist's "reform-by-ruling" and to deny Democrats the ability to filibuster several of the pending nominations.[3] This diffused the immediate situation but did little to alter the long-run trajectory of the judicial confirmation process. Lifetime appointments and high ideological stakes provided ample incentives for senators whenever feasible to use holds and silent filibusters to prevent a majority of their colleagues from acting on judicial nominations.

[1] Elizabeth Rybicki, "Senate Consideration of Presidential Nominations: Committee and Floor Procedure," Congressional Research Service, May 8, 2009.
[2] Rutkus, Steven and M. A. Sollenberger, "Judicial Nomination Statistics: U.S. Districting and Circuit Courts, 1977-2003," Congressional Research Service, February 23, 2004.
[3] Binder, Sarah, A. J. Madonna S, S, and Smith, "Going Nuclear, Senate Style,"*Perspectives on Politics*, Vol. 5 (4, December): 729-40.

Theses delays in confirming appellate judges have led to increased vacancy rates, which has produced longer case processing times and rising caseloads per judge on federal dockets.[4] Moreover, the conflict over appellate judges is spilling over to the district court appointments, which are beginning to produce similarly low rates of confirmation.

Even more disconcerting has been the impact of the changing confirmation process on the ability of presidents to staff their administrations. My colleague on this panel, Cal Mackenzie, this country's preeminent student of the presidential appointments process, has in his prepared testimony made a powerful case that "we have in Washington today a presidential appointment process that is a less efficient and less effective mechanism for staffing the senior levels of government than its counterparts in any other industrialized democracy." Professor Mackenzie summarizes the longstanding flaws in the present system and documents how it has steadily deteriorated over the last several decades. That deterioration has occurred at both ends of Pennsylvania Avenue. In fact, delays in filling senior executive positions are substantially larger at the nomination than the confirmation stage. This reflects in substantial part a defensive posture by new administrations seeking to reduce or eliminate any possibility of adverse publicity about any of their nominees surfacing after they are chosen. But the trends over the last four administrations place an increasing responsibility for delays with the Senate. As Professor Mackenzie, drawing on important new work on this subject by Professor Anne Joseph O'Connell of the University of California, Berkeley School of Law,[5] notes, the average time taken to confirm nominees in the first year of new administrations has steadily increased (from 51.5 days under George H.W. Bush to 60.8 days under Barack Obama) while the percentage of presidential nominations confirmed by the end of the first year declined (from 80.1% under Bush 41 to 64.4% under Obama).

These discouraging statistics actually understate the problem. Cabinet secretaries are usually confirmed within a couple of weeks while top noncabinet agency officials take on average almost three months. Some nominees have been subject to much more extended delays, putting their personal lives on hold for many months and critical positions unfilled for much or all of a president's first year in office. Some cabinet secretaries have had to manage with only skeleton senior staffs, with few empowered with the formal authority that is contingent on Senate confirmation. Recent administrations have many horror stories associated with the absence of timely confirmation of its top executives.

The Obama administration is no exception. Indeed, its stories are more numerous and telling than those that came before it. Consider just a few examples. In the midst of a financial meltdown and critical decisions to be made on the implementation of TARP,

[4] Sarah Binder and Forrest Maltzman, *Advice and Dissent: The Struggle to Shape the Federal Judiciary* (Washington, D.C.: Brookings, 2009).

[5] Anne Joseph O'Connell, "Vacant Offices: Delays in Staffing Top Agency Positions," Southern California Law Review (2009) and "Waiting for Leadership: President Obama's Record in Staffing Key Agency Positions and How to Improve the Appointments Process," Center for American Progress (April 2010).

the Treasury Department had no Senate-confirmed officials in many high-ranking policy positions, including**:** Deputy Secretary, Undersecretary for International Affairs, Undersecretary for Domestic Finance, Assistant Secretary for Tax Policy, Assistant Secretary for Financial Markets, Assistant Secretary for Financial Stability, and Assistant Secretary for Legislative Affairs**.** One of those nominees, Lael Brainard, a former colleague of mine at Brookings, was nominated for the key position of Undersecretary for International Affairs on March 23, 2009 but did not get confirmed until April 20, 2010, over a year later. Her problem was tax-related, reportedly over a deduction she claimed on a home office. Yet her husband, Kurt Campbell, was nominated for a post at the State Department and confirmed by the Senate in about two months, even though they filed a joint tax return.

Other critical positions with urgent responsibilities for a Senate-confirmed appointee subject to extended vacancies included Commissioner of U.S. Customs and Border Protection, director of the Transportation Security Administration, head of the National Highway Traffic Safety Administration, and director of the Centers for Medicare and Medicaid Services. To be sure, delays associated with filling these and other senior executive positions often arose during the nominating process and sometimes were associated with genuine concerns about the nominee. But the evidence strongly supports the view that many nominees get caught in ideological and partisan battles in the Senate or become hostages to the personal agendas of individual senators, often unrelated to the nominee or the position to be filled.

Currently, there is no foolproof way of discerning how many nominations are subject to holds by individual senators. The effort to limit secret holds initiated by Senators Wyden and Grassley as part of the 2007 ethics bill has loopholes that have rendered it largely ineffective. One can, however, examine the list of nominations that have been approved by committees and placed on the Senate executive calendar. One presumes that absent a hold or other signal of a filibuster, the Majority Leader would move expeditiously to call up these nominations. Not that long ago it was rare that nominees would linger on the list of pending confirmation for days, weeks, and months. On Memorial Day 2002, during George W. Bush's administration, 13 nominations were pending on the executive calendar. Eight years later, under Obama, the number was 108.[6]

Senators have long viewed the confirmation process as an opportunity to express their policy views and to get the administration's attention on a matter of importance to them or their constituents. But the culture of today's Senate provides no restraints on the exercise of this potential power and no protection of the country's interest in having a newly-elected president move quickly and effectively to form a government. One telling indicator of the arbitrary and self-indulgent use of holds on nominees is when a successful cloture vote to overcome a longstanding hold is followed by a near-unanimous vote for confirmation. This happens with increasing frequency in the Senate.

[6] "You Really Got A Hold On Me," National Public Radio, June 2, 2010.

In my view and that of virtually the entire policy and scholarly communities, the costs of the serious flaws on our appointment and confirmation process outweigh the benefits. Government agencies are ill-equipped to operate effectively and to be held accountable by Congress; able individuals willing to serve their country are subject to uncertainty and major disruptions in their personal and professional lives; huge amounts of precious time in the White House and Senate are diverted from much more pressing needs.

I understand that subsequent hearings will deal more directly with remedies to the shortcoming of governance associated with obstruction in the Senate. Let me conclude by urging you to consider two proposals: an effective end to anonymous holds on nominations and, more ambitiously, a fast-track system that sets time limits on committee and floor action for the confirmation of senior executive nominations.

THOMAS E. MANN

Thomas E. Mann is the W. Averell Harriman Chair and Senior Fellow in Governance Studies at The Brookings Institution. Between 1987 and 1999, he was Director of Governmental Studies at Brookings. Before that, Mann was executive director of the American Political Science Association.

Born on September 10, 1944, in Milwaukee, he earned his B.A. in political science at the University of Florida and his M.A. and Ph.D. at the University of Michigan. He first came to Washington in 1969 as a Congressional Fellow in the offices of Senator Philip A. Hart and Representative James G. O'Hara.

Mann has taught at Princeton University, Johns Hopkins University, Georgetown University, the University of Virginia and American University; conducted polls for congressional candidates; worked as a consultant to IBM and the Public Broadcasting Service; chaired the Board of Overseers of the National Election Studies; and served as an expert witness in the constitutional defense of the McCain-Feingold campaign finance law. He lectures frequently in the United States and abroad on American politics and public policy and is also a regular contributor to newspaper stories and television and radio programs on politics and governance.

Mann is a fellow of the American Academy of Arts and Sciences and a member of the Council on Foreign Relations. He is a recipient of the American Political Science Association's Frank J. Goodnow and Charles E. Merriam Awards.

Mann's published works include *Unsafe at Any Margin: Interpreting Congressional Elections*; *Vital Statistics on Congress*; *The New Congress*; *A Question of Balance: The President, the Congress and Foreign Policy*; *Media Polls in American Politics*; *Renewing Congress*; *Congress, the Press, and the Public*; *Intensive Care: How Congress Shapes Health Policy*; *Campaign Finance Reform: A Sourcebook*; *The Permanent Campaign and Its Future; Inside the Campaign Finance Battle: Court Testimony on the New Reforms*; *The New Campaign Finance Sourcebook*; and *Party Lines: Competition, Partisanship and Congressional Redistricting*. He has also written numerous scholarly articles and opinion pieces on various aspects of American politics, including elections, political parties, Congress, the presidency and public policymaking.

He is currently working on projects dealing with redistricting, election administration, campaign finance, and congressional performance. He and Norman Ornstein recently published an updated edition of *The Broken Branch: How Congress is Failing America and How to Get It Back on Track* (Oxford University Press, 2008).

Mann resides in Bethesda, Maryland with his wife Sheilah, who is also a political scientist. They have two children, Ted, formerly an assistant curator at the Guggenheim Museum in New York and now a graduate student in the NYU Institute of Fine Arts, and Stephanie, a marketing manager at Clorox in Oakland, California.