

## G. Calvin Mackenzie

### Executive Summary of Testimony on June 23, 2010

Our presidential appointments process now undermines the very purposes it was designed to serve. It doesn't welcome talented leaders to public service; it repels them. It doesn't smooth the transition from the private to the public sector; it turns it into a torture chamber. It doesn't speed the start-up of administrations just elected by the American people; it slows the process almost to a standstill.

The confirmation process is not the sole source of delay in filling executive or judicial positions, but the simple fact is that it takes far too long to confirm presidential appointees. Why?

- There are too many appointees and too many hearings—creating scheduling nightmares for Senate committees, over-worked staffs, and long delays for many nominees.
- The problem is compounded by the growing use of “holds” by individual senators seeking to postpone—or prevent—confirmation.
- Filibusters are another source of delay. It's now taken for granted that no nominee can be confirmed without 60 reliable supporters in the Senate.
- Delay occurs as well because every nominee must now endure an obstacle course that's littered with questionnaires, reports, and investigations. These are inconsistent in the information they seek and they're often redundant.

All of this imposes a heavy burden of uncertainty on nominees. Once they agree to enter the appointments process, they never know when—or if—they'll emerge.

These are human lives. Good people have agreed, often at significant personal sacrifice, to serve their country. And far too often we treat them like pawns in a cruel game. They're forced to put their lives on hold, to step aside from their careers and jobs, to forego income, and then to twist in the wind while the fates of their appointments are decided by a Senate with little or no sense of urgency.

We must do better than this. And we can. We have recognized the ailments of the confirmation process, and their potential cures, for a long time. I hope this Committee will now initiate the action necessary to implement some of those cures.

# **G. Calvin Mackenzie**

**Goldfarb Family Distinguished Professor  
of American Government**

**Colby College**

**Testimony  
Before  
The Committee on Rules and Administration  
United States Senate**

**June 23, 2010**

**Let me express my gratitude to the chairman and members of this committee for inviting me to testify on this important matter.**

**For almost 40 years, I have been a student of the presidential appointments process. In that time, I have had frequent and often lengthy conversations with almost everyone who has served as a principal personnel advisor to all of our presidents back to President Truman. I have spent many days up here observing confirmation hearings and debates and asking questions of members of this body and the staff directors and chief counsels of these committees. I have served on or directed most of the blue-ribbon commissions that have studied the appointment process over the past three decades.**

**In these years, I have interviewed hundreds of presidential appointees, collected and sorted and analyzed data, probed for patterns, sought broader meanings. That is the work of scholarship, and that is my business. My work is not partisan; I have no one's axe to grind nor ox to gore.**

**What has carried me through all these years is a simple notion: that in a democracy the purpose of an election is to form a government. Those who win elections should be able to govern.**

But in a democracy as large and complex as ours, no one leader can govern alone. It is fundamental and essential that victory in a presidential election should be swiftly followed by the recruitment and emplacement of the talented Americans who will help a president to do the work the American people elected him or her to do.

That is to say, simply, there ought to be a presidential appointments process that works -- swiftly, effectively, rationally. Nothing could be more basic to good government.

But we do not have a presidential appointment process that works. In fact, we have in Washington today a presidential appointments 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. In this wonderful age of new democracies blooming all around us, many have chosen to copy elements of our Constitution and the processes that serve them. But one process that no other country has chosen to copy is the one we use to fill our top executive posts. And for good reason. Even those untutored in democracy know a lemon when they see one.

In the early 1980s, I helped to write a book called *America's Unelected Government* that complained about some of the flaws in the presidential appointments process. Watching the travails of the Reagan administration as it sought to get its appointees in place, it was hard then to imagine that things could get much worse. But in retrospect that seems almost like a golden age for presidential appointments.

Steadily ever since then, the presidential appointments process has deteriorated. Can you imagine in your wildest fantasies any group of rational people sitting down and designing an appointment process like the one we're discussing today, a process:

- Where an average position requires more than six months, and frequently a year or more, to fill.
- That reaches down so deeply into the federal hierarchy that new administrations have to come up with thousands of recruits and somehow hope to meld them into effective management teams.

- That imposes on potential appointees so many torturous, humiliating and invasive questions and investigations that far too many refuse to accept the president's call to service, and many who do so come through it feeling bloodied and abused.
- That virtually ensures that a fifth or more of the top positions in the government will, at any moment in time, be without an incumbent who is a confirmed presidential appointee.

How did we get into this mess?

The answer is not simple, but there is one explanation we can reject out of hand. No one planned this appointment process, no one designed it, no one approved it. I can tell you that in several decades of conversations with presidents, their personnel advisors, senators, their committee staffs, and appointees themselves, I have never heard a single person praise the appointments process. I have heard many, however, who would like to bury it.

We have let our appointments process fall into a desperate state of disrepair so that now it often undermines the very purposes it was designed to serve. It doesn't welcome talented leaders to public service; it repels them. It doesn't smooth the transition from the private to the public sector; it turns it into a torture chamber. It doesn't speed the start-up of administrations just elected by the American people; it slows the process almost to a standstill.

Blame for the deterioration of the appointments process lies at both ends of Pennsylvania Avenue. This Committee's jurisdiction does not extend to the other end of the avenue, so let me address some of the flaws in the Senate confirmation process which I hope the Committee will address. Primary among those are delay, redundancy, inconsistency, and uncertainty.

The confirmation process is not the sole source of delay in filling executive or judicial positions, but the simple fact is that it takes far too long to confirm presidential appointees. The time required for a typical confirmation—not a controversial one—has steadily grown. My friend

Anne Joseph O’Connell of the Law School at Berkeley has done wonderful recent research on this. She reports that:

The Senate took an average of 60.8 days to confirm President Obama’s nominees in the administration’s first year, compared to 48.9 for President Clinton, 51.5 for President George H.W. Bush, and 57.9 for President George W. Bush. The gap between the number of nominations and number of confirmations was larger for the Obama administration than any previous administration after one year. President Obama had submitted nominations for 326 cabinet department and executive agency positions after one year, and the Senate had confirmed 262 of those nominations, leaving 64 pending. There were 46 nominations pending at the end of President George W. Bush’s first year and 29 pending at the end of President Clinton’s.<sup>1</sup>

Why is this? In part, because there are too many appointees and too many hearings. The number of presidential appointees requiring Senate confirmation seems to grow like Topsy. While President Obama was able to fill more PAS positions in departments and executive agencies in his first year in office than his 4 immediate predecessors, the percentage of PAS positions he was able to fill was the lowest of any of them because the overall number of such positions had grown by more than 40%.

And, while formal hearings are not universal for all presidential appointees, the number of those has grown as well. For the first 130 years of our history, confirmation hearings rarely occurred. Until 1929 nearly all were closed to press and public. Now we hold public hearings for even the lowest ranking nominees in all agencies—creating scheduling nightmares for Senate committees, over-worked staffs, and long delays for many nominees.

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<sup>1</sup> Anne Joseph O’Connell, *Waiting for Leadership: President Obama’s Record in Staffing Key Agency Positions and How to Improve the Appointments Process* (Washington, DC, Center for American Progress, April 2010), p. 2.

The problem is compounded by the growing use of “holds” by individual senators seeking to postpone—or prevent—confirmation. For scholars like me, holds are a formidable research problem. Counting them is a little like counting moonbeams or weighing fairy dust. They’re awfully hard to see. But we all know that the use of holds—especially in the confirmation process where nominees make very convenient hostages—has become epidemic.

Filibusters are another source of delay. Nominations are rarely filibustered in practice, but the threat of a filibuster has become such a constant of the confirmation process that it is now taken for granted that no nominee can be confirmed without 60 reliable supporters in the Senate. Filibusters are a recent development in the confirmation process. For most of our history, Senate practice and protocol held that there were not filibusters on nominations. According to the Congressional Research Service, there were no cloture votes on judicial nominations until 1968 nor on executive nominations until 1980. But then the floodgates opened and cloture votes occurred on 35 judicial and 36 executive branch nominations between 1968 and 2006.

Delay occurs as well because every nominee must now endure an obstacle course that is littered with questionnaires, reports, and investigations. These are inconsistent in the information they seek and they are often redundant, especially of similar investigations and questionnaires managed by the White House. Every committee has its own forms and its own investigative practices. Little effort has ever occurred to coordinate those internally or with the White House, nor to make them more consistent and thus more predictable.

The delay, the redundancy, and the inconsistency impose a heavy burden on nominees. That is the burden of uncertainty. In hundreds of conversations I have had with nominees over the years, this is the complaint I’ve heard most often. Once they agree to enter the appointment process, they never know if—or when—they will emerge. When there is no action on their nominations, they often cannot find out why or what the likely length of the delay will be.

Imagine what this means to these nominees. A professor who today agreed to accept a presidential appointment would have to inform her dean that she would not be teaching this fall or for the next several

years. Income from her university would soon stop flowing; health insurance would be up in the air. Should she move her family to Washington and rent out or sell her house in St. Louis?

And what about the attorney in a large New York law firm? Once he's agreed to accept an appointment, he needs to shed all the clients who might pose a conflict of interest and he can't accept any new clients. Soon his partners begin to wonder why he's still in the office since he's making no rain for the firm. His income stream begins to dry up and he, too, faces numerous practical questions about relocating, children's schooling, and spouse's career impact. Delay and uncertainty hurt—they hurt the very people the government seeks to recruit, and often for no reasons that have anything to do with their fitness for the positions to which they've been nominated.

It is important for all of us to keep this powerful fact in mind: these are human lives. Good people have agreed, often at significant personal sacrifice, to serve their country. And far too often we treat them like pawns in a cruel game. They are forced to put their lives on hold, to step aside from their careers and jobs, to forego income, and then to twist in the wind while the fates of their appointments are decided by a Senate with little sense of urgency.

We must do better than this and we can do better. The confirmation process is not irreparably broken, not by a long shot. We have recognized its ailments for some time, and the cures are not hard to identify.

While reasonable people can admit that there may be times when one or more senators would like more time to gather information before voting on an appointment, that is rarely the true explanation of filibusters or holds. Much more often, their motivation is political and usually in ways that have little to do with the qualifications and character of the nominee. So an important step toward speeding up the confirmation process is to truncate both holds and filibusters.

On the subject of holds, there have been many reform proposals from senators in recent years.<sup>2</sup> The most promising of these, it seems to me,

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<sup>2</sup> See CRS Report RL31685, Proposals to Reform "Holds" in the Senate, by Walter J. Oleszek.

are to limit the length of time that any member may hold up a nomination (perhaps 14 days) and to require that a hold must have the support of some minimum number of senators (perhaps 10). The actual number of days or the minimum number of supporting senators can be worked out once the principle has been established that holds should not unduly delay the business of putting an administration in place.

Filibusters have little place in the nomination process, at least on nominations to cabinet departments and executive agencies. We lived without such filibusters for nearly all of our history before 1980, and we can live without them now. If the Senate is unwilling to bar filibusters completely on executive appointments, it might reconsider a resolution reported by this Committee in the 108<sup>th</sup> Congress (S. Res. 138) that would have altered Rule XXII by placing a steadily-decreasing threshold for cloture on nominations until, after a time, cloture could be achieved by majority vote.

My personal view is that every nomination and every nominee deserves an up-or-down vote and that filibusters have no place anywhere in the confirmation process. But some make the argument, not unreasonably, that lifetime appointments to the federal courts demand greater scrutiny and a broader base of support before being confirmed. In their view, this justifies the occasional deployment of filibusters to delay or defeat such nominations. I find little basis for that view in the Constitution, and I don't share it.

I believe the best way to reduce delay and uncertainty in the confirmation process is to place time limits on each of its stages. The clock would start when the nomination is received from the president. Then there would be limits on how long it could linger in committee before being reported to the floor, perhaps 30 business days for most executive appointments. Committees might be encouraged as well to adopt the standard practice of holding no formal hearings on nominees except those of greatest importance, perhaps those holding positions paid at Executive Level III or above. If the committee had not acted at the end of 30 days, it could be automatically discharged and the nomination brought to the Senate floor unless a majority of the Senate voted to give the committee an additional (and fixed) amount of time for consideration.

Once on the floor, the nomination would be guaranteed an up-or-down vote within 45 days. A simple majority of the Senate could vote to extend the time for floor consideration, but there would be no holds and no filibusters.

If it were deemed desirable to permit filibusters on judicial nominations, a procedure like that in S. Res. 138, described above, would limit their duration by steadily decreasing the number of votes necessary to invoke cloture.

The problems in the confirmation process directly affect what happens in the selection and recruitment processes. The actions of the Senate are often determinative in shaping the actions of the White House. The selection process has thickened over the years because presidents are often playing defense. Not wanting controversy or embarrassment and unable to know with certainty what the standards of any Senate committee are likely to be at any given time, they undertake investigation after investigation, vetting after vetting to protect themselves. This significantly slows the entire appointments process and makes it especially inhospitable to talented Americans.

An approach that might help to lower the level of conflict in the entire process, to speed it up, and to make it less repellent to potential appointees would be for the leaders of both parties in the Senate and the chairs and ranking members of the committees with large confirmation jurisdictions to meet with the President at the beginning of each Congress and negotiate a “treaty” in which they would both agree to a timetable for action on normal appointments and in which they would seek to identify the standards of fitness they will apply in seeking and confirming nominees. The appointments process has long suffered from a shortage of good will and mutual understanding. Any effort to overcome that would help to improve the administration of government and the quality of the public service.

I hope these suggestions contribute to the discussion of the important issues that inspired these hearings. The problems in the confirmation process are clear and deeply troubling. Solutions are at hand. What is needed now is some common sense, some commitment to undertake this task—commitment that reaches across party and institutional lines—and, most importantly, some leadership.

I hope these hearings will be the incubator for these reforms and that this committee will be their shepherd. That is noble and important work. I commend you for initiating it, and I wish you every success in accomplishing the reforms for which the Senate confirmation process so desperately cries out.

## G. Calvin Mackenzie



Cal Mackenzie holds an endowed chair as The Goldfarb Family Distinguished Professor of Government at Colby College where he has taught for 32 years. He is a graduate of Bowdoin College, where he served as a Trustee from 1986-1998, and he has a Ph.D. in Government from Harvard.

Mackenzie's professional work focuses on governance and public policy, with a special interest in presidential transitions and the politics of presidential appointments. He has been a consultant to presidential personnel staffs and congressional committees on those matters. Mackenzie frequently testifies on personnel and ethics issues before congressional committees and special commissions and has led seminars on government ethics for senior executives of the U.S. Treasury Department and the Internal Revenue Service. During and after the presidential transition in 2001, he was Senior Advisor to the Presidential Appointee Initiative in Washington while serving as Visiting Fellow at the Brookings Institution. In 2002, he was Senior Advisor to the National Commission on the Public Service chaired by Paul Volcker.

Mackenzie is the author or editor of more than fifteen books and scores of articles. Among those are *The Politics of Presidential Appointments*, *The House at Work*, *America's Unelected Government*, *The In-and-Outers*, *The Irony of Reform: Roots of American Political Disenchantment*, *Bucking the Deficit: Economic Policy Making in America* (with economist Saranna Thornton), *Innocent Until Nominated: The Breakdown of the Presidential Appointments Process*, and *Scandal Proof: Can Ethics Laws Make Government Ethical?* His latest book, *The Liberal Hour: Washington and the Politics of Change in the 1960s* (co-authored with historian Robert Weisbrot) was a finalist for the 2009 Pulitzer Prize in History.

In 1992, Mackenzie was appointed to serve as a chair of Maine's Board of Arbitration and Conciliation. In 1996, he was elected chairman of Maine's Commission on Governmental Ethics and Election Practices. During the 1999-2000 academic year, Mackenzie was the John Adams Fellow at the Institute of United States Studies at the University of London. In 2004, he was elected a Fellow of the National Academy of Public Administration. In 2005, he was a Fulbright Professor at Beijing Foreign Studies University in China.

Mackenzie served with the Army's First Cavalry Division in Vietnam in 1970 and 1971. From 1985 through 1988, he was Vice President for Development and Alumni Relations at Colby.