Judicial Nominations in the First Year of the Obama Administration

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The National Press Club

Panel Discussion:

- *Moderator,* **Michael Gerhardt**, Samuel Ashe Distinguished Professor in Constitutional Law, University of North Carolina School of Law.
- **Doug Kendall**, Founder and President, Constitutional Accountability Center (CAC).
- **Orin Kerr**, Professor, The George Washington University School of Law.
- **Bill Lurye**, AFL-CIO Associate General Counsel.

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Meera Trehan: Hello; I'm Meera Trehan, Associate Director of Programs at the American Constitution Society. For those of you unfamiliar with ACS, we're a national network of lawyers, law students, policy makers, and judges dedicated to promoting the vitality of the US Constitution and the fundamental values it espouses--genuine equality, individual rights and liberties, democracy, access to justice, and the rule of law.

I'd like to welcome you all to today's event, *Judicial Nominations in the First Year of the Obama Administration*. With this program, ACS launches a new series of programming, *The Future of the Courts; Nominations, Confirmations, and the Pursuit of Justice*.

Last night President Obama addressed some of the many issues that we're facing as a nation, and to be sure, the list is long. One matter, however, that appears to have received less attention over the past year is the state of, and the many vacancies on, the Federal Bench. Today's panel will take an in-depth look at that topic. How does the current administration's record square with previous administrations? How does the Senate's treatment of nominees compare with that in years past? What is the real world impact of judges or the lack thereof on the federal bench? And looking forward, what might we expect from nominations in the coming year?

We have a stellar panel to help us sort through these questions and more. Our Moderator is the eminently qualified Michael Gerhardt, the Samuel Ashe Distinguished Professor in Constitutional Law from UNC Law School. Professor Gerhardt has published extensively and testified numerous times on this topic and we're thrilled to have him with us here today. Professor Gerhardt?

Michael Gerhardt: Well thank you. I appreciate the opportunity to be here today and I particularly appreciate the opportunity to moderate today's events. I want to thank the American Constitution Society for putting this together, for allowing me to moderate, and for finding such other great panelists.

What I thought I would do at the outset is just briefly introduce my fellow panelists and then perhaps just review some basic facts that you may already know--you're already familiar with. Even before I do that, I should emphasize, of course, that today's topic is timely; it's always timely. It always seems to be timely to talk about judicial nominations, either at the beginning of a Presidency, near the end of it, in the middle--at any time. I can also perhaps say that this is especially timely given that it's one day after the *State of the Union*, given that it's not too long after a--an important election in the state of Massachusetts that seems to have shifted the balance of power so to speak in the United States Senate, and for that matter one year into the President's term, and even beyond that, several months before important mid-term elections. All of that provides not just a backdrop to our discussion today, but I suspect will influence what we have to say about it and it will certainly influence what happens with respect to judicial nominations over the next year or so.

Now with that in mind, I want to introduce my fellow panelists in the order in which they will speak, and then as I said, I just want to mention a few other things about the basic topic before I turn the microphone over to them.

We're going to proceed alphabetically beginning with Doug Kendall, and--and Doug like the others has a wonderful biography that's in front of you, so I--I don't want

anybody to feel bad if I don't go through all the details in it, but I--but I at least want to acknowledge that Doug is the Founder and President of the Constitutional Accountability Center and certainly has written about and done a great deal with respect to judicial relations in recent years.

To my immediate right is my fellow Law Professor, Orin Kerr, from George Washington University Law School. And Orin and I had the great honor to be able to work in the United States Senate this last summer, though we can't tell you anything about what we did. It turns out we didn't work too far from each other, but I also would add, and I think I'm speaking not just for myself but for Orin that we are happily here today in our personal capacities and that means as law professors.

And then our third speaker I want to thank for being here on short notice is Bill Lurye, the Associate General Counsel from the AFL-CIO. And as we'll find out very shortly, I'm sure each has an important perspective to share with respect to today's topic.

A year into President Obama's presidency or term, he has a grand total of 15 judicial confirmations. Well that number actually ranks lower than the numbers for other presidents preceding him, including President Clinton, President George W. Bush, and even other presidents. In fact it's far lower than President Bush's number after his first year in office. President Obama also had fewer nominations made to the judicial vacancies than other presidents at this point in their terms. And--and beyond that he has by at least one count, 19 judicial nominations pending, but I should point out that sometimes there's not agreement on the exact numbers which itself would make a rather interesting topic for discussion at some point.

The one area in which he has perhaps ranked less well against his predecessors is one that of course bears more directly on his administration and that is in fact he's been slower to make nominations than other Presidents at this point in their presidency. At the same time, the Senate Judiciary Committee has moved faster in considering its nominations than it has moved in recent years with respect to other presidents' nominations at this point in their presidencies. There are other comparative statistics; we can go through those at some point. That certainly sets up the background and of course somewhere perhaps not too far in the background is the fact that in his first year in office, of course, President Obama had the opportunity to make a Supreme Court nomination, Justice Sonia Sotomayor, whom the Senate confirmed.

Now with those facts or data at least in--in the background so to speak, I want to turn it over to each of my fellow panelists for at least five minutes each to sort of give you their opening thoughts. And then I'll follow-up with a question, and I will begin with Doug.

Doug Kendall: Thanks Michael and thanks for--to the ACS for having this event on what I think is an absolutely critical juncture in the judicial nominations process in the Obama Presidency. I think the remarks of President Obama last night, followed by the little interlude by Justice Alito responding to those remarks, highlight just how tense this issue is, how important this is, and I just want to go back through in a little more detail some of the disturbing facts that Michael just laid out. And I'm using 2009 figures, not totally up-to-date, just so there's a little more apples and apples between--comparison between Obama, Clinton, and Bush.

In 2009, President Obama nominated a total of 33 federal judges. The Senate confirmed a total of 12 Judges. In comparison, during the same period, President Bush nominated 65 judges, so about twice that; President Clinton nominated 45 judges. The Senator confirmed 27 of President Clinton's judges during that--during the first year of his presidency; it confirmed 28 of President Bush's Judges even though the Democrats controlled the Senate. So it was--President Bush was for most of that time dealing with a Democratic controlled Senate and yet he confirmed--there were--the Senate confirmed over twice as many judges as they confirmed last year for President Obama.

These nomination and confirmation totals are pathetic. And they're irresponsible in a--in a time where we have over 100 vacancies on the federal bench, 31 of which are considered judicial emergencies. Obviously President Obama has a sole constitutional responsibility for making nominations; the fault for that low total has to be put on him and his administration. And what's surprising about that is that this President, this Vice President, are both constitutional lawyers, scholars; they have put together a team of staff that has more experience on the judicial nomination and confirmation issue I think by far than any in history if you go through all the talent on this issue at DOJ, at the White House Counsel's Office, at the--at the Office of the Vice President in particular.

But still, I think we all have to recognize that the judicial nominations process broke down internally at the White House in 2009 and it needs to be fixed in 2010.

The Senate obviously has to be to blame for the low number of confirmations; despite the record low number of nominations, it still took a record 137 days on average from the time of nomination to the time of confirmation for judges. That's far higher than

either under Bush or under Clinton. And the Senate still left two-thirds of President Obama's low number of 33 nominees pending at the end of 2003. That's ridiculous.

And what's interesting and--and Michael mentioned this is that the normal bottleneck in the confirmation process, which is the Senate Judiciary Committee has just been humming along. It's not been the problem at all; the entire problem has--has been on the floor and the lion's share of the blame here has to go to Senate Republican leadership. Senator McConnell has been doing something that no leader in history has done, which is made the most uncontroversial, the least controversial nominees of President Obama, people who came out of the Judiciary Committee by unanimous or nearly unanimous votes, made them a pawn in an effort to slow this process down to a crawl. And you know you have to spread blame even further around. I think the Senate Democratic leadership could have spent--done more and spent more energy about getting floor time and--and calling Republican leaders on their bluff and--and forcing confirmation votes.

So President Obama enters 2010 with 102 vacancies on the federal bench right now, over 20 already--already known future vacancies, a likely vacancy on the Supreme Court, and a Republican minority that is almost certain to try to stop him at every turn. So why am I optimistic? **[*Laughs*]** It's a great question obviously but I'm optimistic for a couple of reasons. The first is that if you look back at the Clinton Administration, it--it's not that different from where we were then. Clinton also started relatively slow on judicial nominations; he also had a Supreme Court vacancy he had to deal with the first year. He actually had more vacancies going into 1994 than--than President Obama does now. He had--he was less popular. He had less members of his own party in the Senate

and yet he still confirmed a Supreme Court Justice and over 100 lower court judges during 1994. So this can be done.

Second, President Obama has a new team at the White House Counsel's Office and still has within its Administration the most talented in history on this issue. The challenge for the new team really is to get those cogs, those pieces moving together, and if they do so this process could ramp up very quickly.

And finally, and I think as I alluded to before, with its reaction to Citizens United, the President and the administration finally seem to have realized just how much the future of the federal judiciary matters. And hopefully that will translate this year into both greater attention and greater energy within the Administration on this issue. It better; it's probably--it may be their best chance over the next year to put their mark on the future of the federal judiciary.

Michael Gerhardt: Thank you. I'm going to turn next to Orin.

Orin Kerr: Thanks Michael; it's a--it's a pleasure to be here. Thank you to the ACS for inviting me.

I wanted to start off with a couple sort of obvious points. Maybe--maybe obvious but also worth mentioning, first there's the question of our nominations going too slowly, too quickly; I think of it as kind of like watching a football game and asking does the one team have enough first downs? It depends on which side you're rooting for right, so if you're on one side, there's never enough first downs; if you're on the other side, there's always too many. So a lot of this is just--it's a political process in which you know

different people are going to have different perspectives on which kinds of judges they like and their attitudes as to what is too fast or too slow are just going to reflect that.

In terms of why the process is going relatively slowly in this Administration, I think the main reason is that the Obama Administration just has not made the judiciary a major priority and it's--it's as simple as that. Obviously the Sotomayor nomination took a lot of time and energy and--and it's interesting to speculate what the process would have looked like without that nomination. But that took a lot of time and energy and in all likelihood we'll have another opening and another process this summer assuming Justice Stevens announces his resignation, which I think is--is likely. So--so it's just a lack of interest; many other things on the President's plate and it's just not being worth all the energy it takes to--to make movement in the Senate. I think it's probably what's driving the speed.

In--in terms of what's going on in the Senate, I think the--the question is--why should Judges be any different from any other issue on Capitol Hill, any other issue in the Senate? As long as we imagine or as long as we take the view that judges are essentially there to enact political agendas that we're not able to get through the political process, if that's considered an acceptable view of what a Judge does then of course, the political actors that can put a check on those of the opposite party are going to do so. That's just a question of how you think of judges and what should judges do. And--and I think it goes on--on both sides; clearly there are people on both sides that see judges as a way of enacting policy but as a long-term investment instead of a short-term investment. So it's you know putting somebody on the bench for 10 or 20 years with the idea that they'll be able to do some things that you as a political matter like.

And as long as that's sort of part of the understanding of what judges do, of course the--the process in the Senate is going to look like the process in the Senate for every other highly political issue.

And I was looking at the mission statement of the ACS and so you know it talks about the importance of fundamental principles, of human dignity, genuine equality, access to justice, all of which are great values, but whether they're actually values written into existing law is another question. And so the issue is--to what extent are those enforceable and different people are going to have different visions as to what that means and what the Constitution means. So obviously the political checks are going to be there. So then I think the only way out of the political environment is to--is to move to a different vision in which judges are not expected to play this role, but I don't think it's the world we're in right now or at least it's a minority of people, I confess, I'm one to think that it--judging should be a very boring job with very few political moments. But that's not the world we're in; so of course the process is going to look the way it looks.

One last comment; in regards to the Senate Republicans taking uncontroversial nominees and--and making them controversial, this question sort of--where is the mainstream of the judiciary--of the judicial nominations process? That I think is a really interesting aspect of--of the judicial nomination process as a whole. A lot of what goes on in the process is defining the mainstream. So activists on both sides have a particular vision of the kind of judge that they want, but most Americans, most--most people don't really follow these issues of course, so they just want somebody who is a moderate, who is mainstream; so there's a lot of defining the mainstream. And everybody who wants a nominee to be confirmed says the nominee is mainstream. Everybody who doesn't want a

nominee to confirm says the nominee is an extremist, is outside the mainstream. You've probably heard these phrases before. And of course there is no predetermined mainstream, so that becomes a political question with both sides trying to define the mainstream. And that line is going to move over time. So I--I think it's hard to say there's sort of a preset mainstream and one side is breaking the rules by calling somebody outside the mainstream when they shouldn't. Every side is going to see that of the other one, but again it--it goes back to the political process.

Michael Gerhardt: Thank you. And for our last opening statement I'll turn to Bill.

Bill Lurye: Thank you. Excuse me; for those of you who came to see Lynn Rhinehart today, she sends her regrets. Unfortunately she's a little under the weather today. At the AFL-CIO we are deeply concerned about where we are with judicial nominations after the first year of the Obama administration. We have watched judicial nominations closely since the middle of the Clinton administration after we looked closely at the impact of the judiciary on the lives of working families--working men and--and women.

We're concerned as Doug alluded to earlier because the vacancy rate is at a historical high in the courts whether it's you look at the numbers or you look at the percentages. The historical vacancy rates in the courts has been about five-percent give or take a little bit and right now it's at about 10-percent for the Court of Appeals, about 13-percent for the federal district courts. And what that means at least in--in--at the circuit court level is that the circuit courts are dominated by Bush one and Bush two appointees

with the result being that working families and the unions that represent them and sync to represent them tend to draw panels that are comprised largely of Republican appointees.

Now that might not seem like a big deal if you believe that your party identification and your prior history, your prior life's history will not affect the outcome of a case. Well in the labor--that may be true in a case where it's one corporation versus another or perhaps a treaty case or perhaps one state against another, but study after study has shown that that's not true in the world of labor and employment law. Even the Chief Judge for the Sixth Circuit last year in an interview in the *Washington Post* acknowledged that when it came to labor and employment cases it seemed that party identification really did govern the outcome of a case.

Now granted the fact that somebody is a Democrat or a Republican doesn't guarantee that they will decide a case for a union or for a worker or against the union or--or against the worker. But certainly it tends to show that the individual based on the party identification comes from a certain point of view.

Now studies have shown that during the Clinton Administration, President Clinton was more concerned with diversity on the Court than he was ideology. And so the Clinton judges have tended to be a little bit more conservative and perhaps not as friendly to--to workers as--as we'd like. Certainly that was true during the Bush--well, certainly during the Bush years the opposite was true. Ideology governed. There was a study in *Judicature Law Journal* just published last summer that showed that the primary focus was--was ideology and not diversity; that in fact President Bush appointed many more white males than he did women or African-Americans or other people of color.

This President during his campaign promised time and time again to appoint people to the bench who reflected America; that the bench, all benches, the Supreme Court, the Court of Appeals and District Court would be made up of a more diverse background--not just people of color and not just more women, but people from different professional walks of life. Cyrus Mehri, who may be here today, testified at the Senate Judiciary Committee in 2008 that based on his review of the *Judicial Almanac* there were no labor lawyers, no in-house labor lawyers in the--sitting on any Court of Appeals. In fact, there's one union lawyer that sat on the Court of Appeals as of the end of 2008. There was only one consumer advocate; there were no lawyers who sat on the Court who had any connection to a nonprofit, public interest organization for 30 years prior to that time. There were virtually no public defenders, although almost half the Judiciary was made up of--of prosecutors. The other half was made up mostly of folks who came out of large corporate firms or came out of a--the Judiciary itself or a political--a political background.

Even--well, **[*Laughs*]** it's--it's--it's--the President, as I said, wants to--believes that it was important to change the makeup of the Court. Someone earlier this year, someone well known, said--agreed and I'm quoting now--*every aspect of your career broadens your outlook and gives insights that you wouldn't have in some other aspect of the legal practice. That's why I think it's good for the Court to have people of varying backgrounds.*

This person said--*your whole life you've done nothing but be a judge*, referring to the system we currently have where a District Court Judge goes to the Appeals Court and then from the Appeals Court to the Supreme Court, and we now have a professional

Judiciary. *Your whole life you've done nothing but be a judge and you come to think the government is always right. Now you contrast with the English system where in most--in the most important courts, the Judges not only have been spending their whole lives with their snout in the public trough; they've been suing the government. They've been defending their clients of the government. It's a different mindset.*

This individual was stating that--that was good. The individual, not Barak Obama, not Doug Kendall, but Antonin Scalia in remarks to a Law School in Jackson, Mississippi in January of this year.

So where are we based on the President's promises after the first year? Well, to a large extent he's lived up to the promise of appointing a more diverse Court. We see more African Americans and other people of color appointed to--to the Courts. In California, the Central District of--of California, Los Angeles District--Federal District Court, Dolly Gee was confirmed on Christmas Eve, the first Chinese-American female ever to be an Article III judge in this country. Denny Chin has been nominated to sit on the 2nd Circuit Court of Appeals; he would be the only Pacific-American who would be sitting on the Court of Appeals. He had a background of being an employment lawyer. Dolly Gee was a former Union Lawyer. The President has nominated--nominated Jane Stranch to the 6th Circuit, a union lawyer. He has nominated public defenders to the Bench. He has nominated legal service lawyers to the Bench. Now I can't say that that's been the case with every nominee, but certainly to this--to--to where we sit today, he--in our minds, he's at least tried to uphold that standard.

Now the election last week in Massachusetts caused a lot of handwringing, certainly in the progressive community and the subset of that community that pays

attention to judicial nominations. The fear being that we now only have 59 votes in the Senate, and therefore woe is us; we will no longer see progressive nominees. We certainly at the AFL-CIO hope that's not the case. We believe that the impact of the Massachusetts election is overstated; that 59 votes in Democratic caucus should more than assure that any nominee that the president puts out will be confirmed by the Senate and will not be successfully-filibustered by the Republicans.

The Republicans tried to filibuster one nominee this past year, David Hamilton of the Northern District of Indiana--I'm sorry, the Southern District of Indiana, the Chief Judge, because at one time he represented the ACLU. In the cloture vote they were able to put together 29 votes--29 votes; they needed 41. We have to remember that the Republicans in 2003, 2004, 2005 repeatedly came out against Democratic attempts to filibuster judicial candidates. One of them, Lamar Alexander, twice in 2003 and 2005 in his words gave a pledge--a pledge that he would never filibuster a judicial nominee. Jeff Sessions, who is the Ranking Member of the Senate Judiciary Committee said much the same thing and McConnell, the Minority Leader echoed that. In fact, 29 Republican Senators at one time or another, current Senators, Republican Senators at one time or another has said they will not and others should not filibuster judicial nominees.

Now they changed their minds; there's no question. Sessions voted to filibuster--filibuster Hamilton but my point is this--that we and the White House in particular should not be concerned the fact that there's now only 59 votes. Very few judicial nominees in American history have ever been successfully filibustered. Now the parties argue over who that may be and whether Abe Fortes was the last one in 1968 or whether there was

some more recent, but the fact is that very few have ever been successfully filibustered and even fewer--even fewer have ever lost an up or down vote.

During the Bush years, the first term of the Bush Administration, Doug alluded to the fact that President Bush had to face a majority Democratic Senate. And yet out of the 100 nominees, exactly 100 nominees that were confirmed in his first two years in office with the Democrats controlling the Senate, only two nominees even drew one vote against them. All of the others were approved unanimously with a roll-call vote or--or by voice vote. We don't see any reason why that will change with the nominees that--that President Clinton--not President Clinton--that President Obama, excuse me, will put forth.

And one final note on that; I'm sure I've over--taken too much time. Think back to Clarence Thomas. Think back to what the first President Bush was confronted with in 1991. The Republicans only had 43 seats and yet Thomas for all the controversy surrounding Thomas was confirmed 52 to 48--52 to 48. I submit to you that there's no candidate that this President will put out there who will be so far to the left by anybody's measure in this room that they cannot be voted on or cannot be--cannot beat any attempt at a filibuster and certainly who will fail in an up or down vote.

Michael Gerhardt: Thank you Bill. I'm going to turn to Doug with a question that kind of feeds a little bit off of what Bill just said and then ask for others to respond and I'll go through that with each of you and at that point we may be able to open it up to everybody else with questions.

But Bill, Doug--excuse me; obviously one issue that a lot of people have on their minds is the significance of the election in Massachusetts and how that may or may not change the dynamic in the Senate. So what--what is your take on that?

Doug Kendall: Well I think Bill is largely right that it's not--it's not a question of whether Republicans have 41--40 or 41 votes; it's a question of whether 41 Republicans are willing--or 41 members of the Senate are willing to filibuster a judicial nominee, particularly one assuming that he is--that he or she is otherwise qualified for the job and that it's somebody that--that should be on the Bench in that position. And you know we don't know that; we do know as Bill said that there were unequivocal statements by Republican after Republican; just about every one of their Republican caucus said between 2003 and 2005 that filibustering judicial nominations was an awful idea, was unconstitutional, was something they would never ever do. And so you know we have those statements; they're all on record. They're up on our website. You can look at them if you want them. They're out there.

Now not--notwithstanding that, 29 Republicans, many of them who said they would never filibuster, turned around and filibustered President Obama's very first nominee, a nominee who was you know--had been on the district bench for 15 years, incredibly well-respected, ABA, you know unanimously well qualified, had the support of the senior Republican in the Senate, the strong support of Dick Luger and yet they still turned around and said he was out of the mainstream. He was an extraordinary circumstance and we're going to filibuster. But you know so the question is on future nominees does that 29 votes become 41 votes and are there any one--is there anyone in

the Republican caucus who just says you know what; we said we weren't going to do that. This is a really awful thing to do to--to filibuster someone who is qualified to be on the Bench.

And getting back to the point, Orin, you know, made this point about this all being about politics and it's all about whether you know your party is in charge and how many votes you have and--and that once you make it political that's the way it's going to be. Well first of all, the process isn't political since at least 1795 when you know the Senate rejected John--Jay over his opposition or support for the Jay Treaty or--or Justice Rutledge for his support….

Doug Kendall: To all you Jay fans out there--. **[*Laughs*]**

Doug Kendall: Sorry; sorry I messed up the facts, but you know over the Jay Treaty and so the--the process has been political and it's going to be political once you accept *Marbury v. Madison*, which is that the Supreme Court gets to review the constitutionality of statutes. So it--it's always been a political process yet we've somehow largely maintained a system by which at least some judges and--and Justices get through the process with pretty lopsided votes and without filibusters and without blocking techniques. And I think that's just a good government value that we all should share and it's not about--there's going to be controversial nominees. There's going to be fights over them, but we should at least agree that people come out--coming out of the Senate Judiciary Committee by unanimous votes by 19--18 to 1 votes should get a quick vote on the Senate Floor. There's some things about the constitutional responsibility to "advice

and consent" that should be upheld even with the recognition that there are political stakes in this game.

Michael Gerhardt: Thank you; let me turn to Orin for a response.

Orin Kerr: Well I mean I think first to the extent that we're focusing on ,you know, inconsistent things that politicians have said, that's obviously a broad category, right, so we could try to find some politician who has not said inconsistent things about judicial nominations. So going back to the football analogy, you know when possession of the ball changes sides, so does what everybody says, right; it's just sort of part of the--part of the dynamic. And it's very easy to point to the other side having no longer being consistent with what they said before but of course your side is not being consistent either. So--so I think everybody does change sides.

In terms of the process being political, of course, the process is going to be political. That's built into the constitutional formulation that one politician nominates and a group of politicians votes to confirm or not, so obviously you can't bypass the political process. But I think there's--there's a really important question of what--what do you want judges to do? And do--do you want judges to enact social change along the lines of that which you prefer as a policy matter or do you want judges to just follow the law and rule on cases or controversies and go home? And to the extent that you--you think the former is the right model, then of course the process is going to be as political as a bill would be proposed in the Senate on that same issue that a judge might rule on. So I just--I think the real question is--is there anything that can lift us out of the deep politics and sort

of judiciary--nominations being just like every other political issue? And the only thing that can really lift us out of that and put us on--on a--in a position where I think we should be where good nominees on both sides--right now great nominees on both sides are treated terribly. It's--it's a terrible process. And I think the only way to move to a process that's better is for both sides to not look to the judiciary as a way of enacting their political agenda. And--and the question is--is that--is that really going to happen?

Michael Gerhardt: Bill?

Bill Lurye: It strikes me that every time the Republicans are out of power they say Democrats don't do what we just did. We just politicized the courts; we made sure that the most conservative nominees that we could find now sit on the federal courts, right.

I'm going to put aside the Supreme Court for a moment; certainly that's an important court to Labor. It's important to all of us. But our battles are really at the court of appeals. That's where most of Labor's issues and--and employment lawyers' issues get decided. And to--and to say--to say that--that we should not seek or that the Obama administration should not seek lawyers who will read labor and employment statutes or any other statute in the way that they were intended to be interpreted and apply them in that manner, I think, is a little bit beyond the pale given the judicial activism that we've seen from those appointed by President Bush, one, two, and President Reagan before him.

We just saw it in *Citizens United* in the Supreme Court; we--we just saw it in FBL, the *Gross* case where they decided an issue not presented to them in a labor and

employment case; the list goes on and on and on. To say that we don't have or we should not have or that the process is not political well it's--it's a little wrong. The system has been politicized and it's quite clear that the Republicans are going to, as Doug said, do everything they can to slow up President Obama's nominations because they know that they will be reading these statutes in a way that we believe that they were intended to be read and in a way that's fair and more equitable to--to--to workers and their families.

Michael Gerhardt: Okay; thank you. Let me toss a question or Orin at this point, and I just want to sort of follow-up a little bit on what you've been suggesting Orin--a couple comments. And I--I don't mean to put any words in your mouth, so obviously correct whatever I say to the extent it's wrong, but are you--is it your view or do you have a view that the process is pretty much the same as it's been--is it worse with respect to lower court nominations? Is it? That's--that's the first half of my question, and then the second half to come back to what you were saying about how we could pull ourselves out of this is where would the--where would the common ground, that you would believe could exist that would bring Senators together that would comprise that higher--that would comprise that way?

Orin Kerr: You know to be honest, I don't think I can make a--a historical claim with enough accuracy to really want to take a position on it. My--my very general impression is that it's worse than it--than it has been on both sides. But it--it's hard to say and in part the difficulty I think is that going back to defining the mainstream question. So let's say we all sort of generally agree in the abstract that a mainstream nominee should get

through without a problem and a radical extremist should not get through, whatever--whatever you think that means. Well, how do you then define--classify which tradition--you know which past nominee who didn't get through was a radical versus not a radical, which--who is mainstream and who is not mainstream; I mean we can each point to nominees on both parties I think that were--should have been confirmed and--and were not. So the historical question I think--I think is a difficult one.

In terms of moving to a different view of--of judges, I--my own view would be that a broad commitment to judicial restraint among both Republicans and Democrats among sort of liberals and conservatives would be the way to move us to a position where we don't think of judges as politicians with robes. And--and that's the way to do it.

Now of course both sides are going to say, "well, that's great but the other side isn't going to do it, right?" And--and--and maybe--maybe, so maybe we're just stuck in this endless process where anything goes. I don't--I'm not that cynical but if you are I'm not going to try to persuade youthat's wrong.

Michael Gerhardt: Okay; I'll turn to Bill.

Bill Lurye: Yeah; I--I guess I have a couple of concerns with that. First, some people would say the mainstream candidates are those who the Republicans agree are mainstream and therefore won't object to them, will--will return their blue slip and--and will vote for them; that constitutes mainstream. From my perspective that constitutes letting the Republicans continue to pick who sits on the federal court all to the disadvantage of--of the broader community.

I've--I've always been fascinated by the idea that people believe that judges whether they're state court or federal are sort of these neutral umpires. I mean we've heard that over and over again that they're umpires. Folks, I guess maybe I'm too much of a cynic but I've never believed that--that to be the case. I mean Scalia obviously doesn't believe that to be the case. People bring their life's experience to the table with them and they've shaped certain--they have certain views and they'll read the same statute and they'll come out differently based--based on their life's views and that has nothing to do with empathy. Remember that debate, or lack of empathy, but it is shaped by--by life's experiences. And I would--I would submit to you that--that the--that this has always been--been the case. And to say that now we should seek only people who will--who will call it in a non-political way is--is really simply not possible.

Michael Gerhardt: Doug?

Doug Kendall: I wanted to say that I think--I read a lot of what Orin writes and I think Orin--Orin is often times a--a good neutral broker about things. I've--I've always respected his writing because I don't know where he's going to come out on an issue. And I think in that and--and there's other commentators on the right that I would put in that category. And I hope Constitutional Accountability Center's commentary on issues fits in that category as well.

There are some things about the law that are fixed; the text to the Constitution is what it says. We can differ about what those words mean. The history of our Republic you know is malleable and can be you know contorted to different interpretations. But

there is history there; it's real, it's something we can look to. And so--and there are other sources; there is something about the role of judges that we can define and agree upon. And I think the more we do that, the more we talk across the aisles and among conservatives and progressives about what the real fixed principles are, what the text of the Constitution says, what its role should be, the more we can try to find agreement, try to find ways of defining this dispute down to real things that matter. There are very distinct differences between the way conservatives and liberals interpret the Constitution and the law. But there are some areas where we can agree and perhaps define a little bit of what the mainstream looks like and what outside the mainstream means.

And so before we give up entirely on that project I just wanted to pitch the idea that we should at least be trying to talk to each other about what the Constitution means, what the role of the judges is, and we shouldn't give up on that enterprise.

Michael Gerhardt: Well as an academic I'm heartened to hear that. **[*Laughs*]** Our purpose in the world if fulfilled, but--but let me turn to Bill then with a question if--if I may. And I want to sort of just get your reaction to what I perceive might be a strategy of the President's. And I'm wondering if what I'm about to describe is a strategy of the President's and how--how--whether or not you think it's either working or how you think it's--what could--how effective it is.

If you look at his circuit court nominations they're overwhelmingly people who are sitting as judges. I don't think that's an accident. So I'm wondering first, do you sort of agree that--that seems to be a--a pattern; do you think it's a good strategy to go with circuit nominations and how do you think it's working.

Bill Lurye: Right; I think that by and large it has been the pattern. This President so far has mostly sought to elevate District Court judges to the Court of Appeals. I think in two instances, Virginia and in North Carolina, now he's elevating state court judges to--to the Court of Appeals. And in one instance, Jane Stranch, the Sixth Circuit, she has no prior judicial background. He's taking her from a law firm and--and putting her on the Sixth Circuit which is--which is not unprecedented but--but certainly unusual in recent times.

We do have a great concern with that. We--we think that--we think that--that with all due respect to--and this is not intended to be directed at any particular nominee, we--we think that the President is missing an opportunity. In the Fourth Circuit there are a lot of open seats where, two in--there's one in Maryland and two in North Carolina, one in Virginia, now one in South Carolina, where new thought could have been put on the Court of Appeals, people with fresh ideas, people with a more diverse background than are currently sitting on--on the--the benches on which they sit, and so to the extent that the President is not doing that we--we are greatly disappointed and hope that he would look more to the academic world. Certainly there are highly qualified people who--who have never sat on the bench but who could easily sit on the Court of Appeals and--and in law firms where individuals have--have demonstrated a commitment to--to--to understanding what--what impacts the lives of working people and have shown a history of--of some type of--of commitment to--to working with them.

Michael Gerhardt: Doug?

Doug Kendall: I--I think I agree with all that. I think that there should be a balance between people who are the great judges in the state courts and the lower federal courts and the advocates and scholars that are--that are also voices needed to be heard on the--the lower federal courts and the Supreme Court. I think--I don't think the balance has been struck right in terms of between the professional federal judiciary if--if you call it that and--and having advocates' and scholars' voices added to the Bench. But--but I don't think--I don't think it's bad to--I understand why he wants to appoint sitting federal judges. They're probably easier to confirm; they have the--you know the kind of credibility and the--the resume that makes confirmation fairly easy.

Michael Gerhardt: Okay, Orin?

Orin Kerr: I--I would agree with that entirely. I'd also add that after eight years of--of not nominating anybody on the Democratic side there's a build-up of people that either are going to be nominated now or never going to be nominated that are currently District Court judges. So the time to nominate them would be in the beginning of the new Administration and I suspect that there's sort of a backlog of--of people that have been--long been identified as potential future Court of Appeals judges on the District Court that are going to be nominated and then after a year or two we'll see a lot less of that. So I think there's a time down part of that, too.

Michael Gerhardt: Let me just throw out--a question out to the whole panel and you all can deal with this question as you each see fit, and then we'll open it up to the audience.

And--and that's--and what I'm wondering about is what suggestions if any--. Well let me rephrase that. What--what do you think--what advice I suppose would you give to the President, may be a way to put the question. Would it--should he be more combative and what's the consequence of that? Should he seek to find more common ground at this stage? You know heading into mid-terms what would you advise people at that end of Pennsylvania Avenue?

Bill Lurye: I guess you know I don't--I don't see that it necessarily has to be combative. I guess it--it will be. You know our advice is that and I think I--I may have indicated this earlier is to not back away from his campaign promises, to find people of all walks of life, diversity as we traditionally define, people of color and--and women and the disabled, to not back away from that and not take the easy route and just elevate some--somebody off of a District Court bench because they've been there for 20 years and it might be easy or with all due respect to my friends in the corporate world, to pull someone out of a big corporate firm thinking that well maybe you know they'll have some business support and that will translate into supporting the Republicans. And even though they might be a Democrat it wouldn't be in our view fulfilling a promise. So we--we think he really should--should pursue his prior strategy.

Michael Gerhardt: Doug?

Doug Kendall: Three quick things; one, I think the President needs to define what an Obama Judge is and meaning, you know, what does it mean when I'm going to appoint

somebody to the Federal Bench? And I think the--the best definition is just based on excellence, somebody who is going to be a great Judge, somebody who is incredibly qualified for it. You know the way I've put it in one point is the next generation of brilliant legal minds.

And then you have to enforce that; you have to--and you have to do so by two things. One is externally with Senators having ground rules and enforcing them, and internally, within your administration, having something of a Chinese wall. Ground rules which are, you know should have been pretty well-established by now, are that you know the Senators have a fair amount of impact at the District Court. They have some input at the Circuit Court level but that it's the president's choice, particularly at that level. And so you can make recommendations but the--we may not accept them and if they don't meet our standards we won't accept them.

And then internally this Chinese wall thing; I think you have to--a successful judicial nominations operations at White House is to the extent they can Chinese wall the judicial picking operation from the political operation. That doesn't mean you don't vet them. That doesn't mean you don't look for things that--that are really going to cause you trouble. But you don't play politics with, okay, we need Senator Webb's vote for healthcare, so we'll give him whoever he wants for this Fourth Circuit slot. You don't make those political deals. You Chinese wall the judicial operation, judge-picking operation from those political considerations as much as possible. And you--you do that to kind of make; you know make sure that you are picking the judges that meet your standards.

Michael Gerhardt: Professor Kerr?

Orin Kerr: **[*Laughs*]** Do you really want me to answer this question? I would say, Mr. President, you've got so much on your plate **[*Laughs*]**--. There's--you're--there's just too much else going on to really focus on judicial issues.

Michael Gerhardt: **[*Laughs*]** Well, that's not very bipartisan though. Well, this is a good time to open it up to our audience and I know we have many people who know a lot about the subject and if you have comments or questions please feel free to go ahead. Oh we have microphones on the sides I believe, on each side, so please go to the microphone if you don't mind to ask a question. That way it gets recorded.

Question: My--my question is two part; first of all, has Obama appointed any Republicans? And secondly, have the Senators had much influence on Obama's Nominations?

Doug Kendall I mean he certainly worked very closely with Republican Senators, so Beverly Martin, who is a nominee out of Georgia was enthusiastically supported by both the two conservative Republican senators from down there. I--I don't know frankly whether any of his nominees are registered Republicans or not and I would be surprised if they are but I don't know that answer. But he certainly has done things like found nominees from very tough places like Georgia where I would have thought he would

actually have more trouble doing so and he's done so by listening very carefully to the Senators you know and in some ways I think too much.

Bill Lurye: Yeah; I think that's right. I think he's--he's actually behind the scenes. People don't realize he's been very bipartisan. I mean he--he's got someone just confirmed to the Eleventh Circuit out of Georgia where it's two Republican senators. He has a nominee to the Sixth Circuit that both Republican senators signed off on and--and testified on behalf of, in North Carolina, Senator Burr signed off--Burr signed off on both of them and in Indiana, Senator Luger was--was--was quite vocal in support of David Hamilton to the Seventh Circuit and now supports some of the District Court nominees that--that the President has been--has made. So he has been working behind the scenes to--to do that.

Michael Gerhardt: I should have said that I think the practice is to allow the press to go forward--first with their questions but you'll have to forgive me. I'm not going to know who is **[*Laughs*]** a member of the press or not, so you have to identify yourself. Yes, yes; sir?

Question: I'm not a member of the press.

Michael Gerhardt: Okay; so much for that practice. **[*Laughs*]**

Question: One question; what--what do you see--what do you see happening in 2010 at the Circuit Court level in particular?

Doug Kendall: Well there's a lot of vacancies. I think he's got to nominate them quickly. I mean one of the things that you know is--is incredibly frustrating are places like the DC Circuit where there's not even Senator input and we still don't have a nominee over a year within the Administration. And that's an absolutely critical seat where the Court--you have a closely divided Court. Some of the biggest parts of the President's agenda like using the Clean Air Act to combat climate change will be decided by that Court in the next couple of years. It's--he--it's not a Court that he can afford to leave vacancies on or not even make nominations to. And so my--my hope and assumption is that we will see over the next--next weeks and months a lot of nominations including a bunch to the Court of Appeals.

Bill Lurye: Yeah; I think--I think that's right. I think they're trying to get as much done before there's another Supreme Court opening. Whether that happens this year is--is--at least this panel seems to think will--will happen; I think they have a lot of folks in the pipeline right now and we'll be seeing a large number of nominees. Many of them may be district court because I think there's like 60-some openings in district court and many fewer on the court of appeals. But it--it's true the District of Columbia is--or the D.C. Circuit is--is a very important court, certainly to Labor. Employers around the country because it's such a--because the court has tilted so far to the right bring most of their labor cases there, most of their appeals from the National Labor Relations Board under

that law they get to choose between the circuit court where the events occurred or the D.C. Circuit. And they're coming to the D.C. Circuit. And our studies show that they're winning; we're--we're losing big organizing drives where unions have been voted in. The D.C. Circuit has thrown it out. Workers have been fired. The Labor Board has ordered them back to work. The D.C. Circuit overturns that order. So it's a court that we're vitally interested in. We--we believe that the President has to make appointments there and soon and--and appointments of--of people who really do get--get the law and intend to enforce and interpret them as--in the way that they've been written.

Michael Gerhardt: Yes; ma'am?

Question: Hi. The one actually that I haven't heard you guys talk about at all is the American Bar Association. And obviously Obama has brought back the American Bar Association to its normal--normal traditional role in vetting judges in this very quasi-official capacity. But as you said, with Judge Hamilton, he had--he was unanimously well qualified and yet he gets filibustered. So what do you see the role of the American Bar Association moving forward in the judicial nominations process?

Bill Lurye: Well those who have been around me in the few years I've been coordinating the AFL-CIO's Judicial Project have heard this speech more than once and I'll try to give a very short version of it. But and we've--we've told this to White House Counsel on more than one occasion that--that we were greatly concerned when they went back to pre-vetting nominees before--with the ABA.

It isn't that the ABA can't vet or shouldn't vet; our--our concern is that--and with all due respect to--to their panel, the ABA's national panel, they are--they tend to come--the vetters tend to come from a background that is different than the background of at least some of the nominees that we've seen the President make. And if you look at those ratings it appears that people who come from the--what I would call the nontraditional backgrounds where the president has tried to reach out and appoint a public defender or a union lawyer or someone else like that, the ratings tend to be lower. And we believe it's not fair to the--to the lawyers--that these are highly-qualified, highly-able lawyers but--but the panel looks at them differently because they--they don't come from a more traditional background or the background they're used to seeing people.

So I think that they've gone down that road. I think the administration will continue to use them, but it's not something that we're--we're very happy about.

Michael Gerhardt: Any other comments on that or--Orin?

Orin Kerr: Yeah; I would say at least looking at the ABA on the Republican side, I don't think any future Republican President is likely to use the ABA. I think probably the--the Bush-43 model of--of kind of kicking them out of the process is what most Republican presidents are going to do and it's because at least on the Republican side there's the same complaint that the ABA is being biased towards certain kinds of nominees and--and not towards--not in favor of Republican nominees certainly and to the contrary that it's essentially an interest group. So I think it's the difficulty of sort of

putting yourself out there as a neutral player. It's really tough to do that and I think it's going--I'm pessimistic about the future of that sort of role in a private group.

Michael Gerhardt: I feel compelled to ask the question; is there a neutral player?

Bill Lurye: Me. **[*Laughs*]**

Michael Gerhardt: Put that to a vote; yeah?

Orin Kerr: I don't think--I don't think there needs to be a neutral player. I think the difficulty is the ABA presents itself as a neutral player.

Doug Kendall: I would just say I think it would be helpful if there was a neutral arbiter in these debates about what constitutes a judge that--that warrants confirmation. I agree that--that kind of both sides are pretty suspicious right now of the ABA and their role.

Bill Lurye: And just--just to be an equal opportunity criticizer, let me say that--that we've had the same concern at the state bar level. Some of the Senators for example will turn to their state bars to do the vetting for them; you know they want to give the White House a few names. And we've unfortunately had instances where people who come from a--the nontraditional background have--have not fared well at all, that--that they've either not been rated qualified or not been treated at times we believe with the respect that--that they're due. And so we--we really would prefer that--that not happen.

Some of the Senators if I may, do use--do appoint their own panels and there can be problems there if they just simply mirror you know an ABA Panel where it's just mostly folks from let's say a corporate background. But where they--they attempt to have people of--from--from--of all stripes, all color, the panel I think, those Panels could--could conceivably work well. But you really need that diversity of--of background, of every type of background to make it work.

Michael Gerhardt: Yes; sir?

Victor Stone: Yeah, I'm Victor Stone. I have--a strategy does occur to me and I'd like to hear your comment on it. I have first-hand experience with Judges at the District Court and Federal Court of Appeals level. You haven't really distinguished to the extent that I think a strategy could between district court and court of appeals. There's no question the Supreme Court nominations are political and I think there's no question that the Court of Appeals nominations are political but District judges perhaps--at least in my experience--get one in a couple of hundred cases that has political overtones and they make hundreds more rulings on evidence typically where there is a jury sitting in the box than they do on political questions. I don't understand why there should be as it sounded like from the numbers before an even bigger vacancy rate compared to what's usual on the District Court than the Court of Appeals. Why shouldn't the president start throwing just District Court nominees, all of whom and if they don't like ABA well-qualified, I frankly the nominee has to have been lead counsel in three dozen cases to be minimally qualified? I've been before judges who don't--who did not know the rules of evidence from a

practical point of view. They may have been brilliant professors, but frankly they were hopeless as trial judges, because that's what that is--it's a trial court. And they went on thinking they were going to write a lot of opinions and the opportunities really rarely present themselves. So I mean I think that's a partial answer to that non-traditional question; yes, I'm delighted to have professors who have tried cases and non-profit lawyers who have tried cases on the bench. I'd love to see more diversity as long as the person at some level, state or federal has--has tried enough cases that--that they don't have to call a recess and talk with their law clerk every time an objection is made. And I've been in those courts.

But by packing the District Court full and there are always vacancies because the numbers are so great and judges retire and die, it seems to me that in itself would put pressure, because that means they move more cases along, on the Court of Appeals to get their business done and all of--every segment of society would be pressing their Senators to--to confirm some court of appeals judges and therefore that would just naturally move that process along.

In terms of nominees, it's--I thought it was always clear that the senior Congressman from that district or circuit of the party of the President made the nomination. In the District of Columbia, Eleanor Holmes Norton fills that role right now. So I don't really think there's any--any lack of people to pass the names along to the White House for them to consider. So my question is--isn't the strategy for the moment fill up the District Court as fast as you can; it's--it shouldn't be that political? If there is a nominee who slips through who is out of the mainstream, they get reversed by the court

of appeals, so their--their non-mainstream opinions don't do much damage and then let the process go from there.

Michael Gerhardt: Fair enough, so, more District judges?

Doug Kendall: Well there's a lot of vacancies. There's the vacancies--there's 102 vacancies; 82 are at the district court level. There are currently--or there are currently 16 nominations for those seats. There's 20 circuit court nominees and eight nominations for those courts right now. So most of what President Obama needs to do is--is nominate district judges; most of what the Senate needs to do is confirm district judges.

One thing that yeah; it--and that's all very straightforward. The Senate Judiciary Committee as we said is working you know--working very well getting those nominees to the floor. The--the slowdown and the bottle neck in the Senate so far has been at the floor level where the practice of moving judges even uncontroversial district court nominees that everybody thinks is qualified that come out of the--out of the Judiciary Committee unanimously voted upon, the--the practice of moving those through a process called "unanimous consent" where you don't have to have a floor debate and a roll-call vote has almost disappeared in the Senate. And what that means is that each one of these nominees has to get a little floor time, has to get a roll-call vote and that just gums up the process.

And so--so that's what the--the problem has been that from my opinion is that you know Senator McConnell has by--and the Republican caucus by denying you see on just about every nominee including non-controversial District Court nominees has made the

entire staffing process, which again there's always been--there's always been controversy, there's always been fights over this; it's--you know it's gotten worse over successive administrations but there's always been these kinds of District Court nominees that nobody thinks are controversial. They're just the best lawyers from the area that are agreed upon from the Senators of the states and we need to keep for the judiciary that process working because there really are. There are judicial emergencies in these places that need judges to prevent--to make sure justice goes forward. We need to put those people on the bench and no matter who the president is.

Michael Gerhardt: Yes; sir?

Question: I think you all agree that the process is moving pretty slowly due, in part ,to the fact that the president is not nominating judges to begin with. I was wondering if you could give any--any suggestions as to why you think that might be; is it just that they're too busy as Mr. Kerr suggests that they should be or **[*Laughs*]** is it that there's a different mindset here. I just want to see if you could touch on that.

Michael Gerhardt: Can I add something to that question because I was about to toss out something as well which I think is consistent with what the question is. I was wondering--I was thinking of Jeff Toobin's article about President Obama's judicial nominations in which Jeff Toobin I think suggested, among other things, that this is just not an area in which the president intends to--it's not an area that the President intends to turn into a priority, that judges or judgeships or judicial nominations is not important to

him and some other things, which might be a partial answer to that question, but I--you all answer it any way you see fit.

Bill Lurye: Well I didn't hear the first part of the question. Could you--because the mic wasn't--I'm sorry.

Question: I think you all seem to--seem to agree that this process is moving pretty slowly in part due to the fact that the President hasn't been submitting the nominations to begin with and I was just wondering if you have any suggestions as to why that might be.

Bill Lurye: Why they're not moving more quickly? I--I think that--I do think that--I think Orin may have mentioned it or Doug that the Justice Sotomayor nomination really sucked the air out of--out of that process. I think that they--they had ramped up right after the election to start nominating judges quickly, were putting people in place, and--and starting to do that but once--once Justice Souter indicated he was retiring which was at the end of April, the very beginning of May, it seemed to us that despite what they were telling us, they focused all of their energies on finding a replacement and then having her confirmed. And you know so that took--you know May, June, July, August, and so it really was September before they started moving back to gearing up for these--. And it was almost like they were starting over with the circuit court and the district court, so I think that was a large part of it.

Is it a priority of the President? I--I'd like to think so; he certainly told the leadership of the AFL-CIO that it is. We--and we take him at--at his word. And we

expect as--as I said earlier, many more judges--many more nominations to start coming out over the next few months.

Michael Gerhardt: Yes; sir?

Question: Hi; yeah, one of the big elephants in the room here I think is the filibuster. I know it's been alluded to but is--is there, you know the filibuster has been increasingly analyzed in the last year or so with the healthcare issues and--and climate changes, this idea that the minority party can just constantly use the filibuster without actually going to the--the floor and actually carrying on debate. And so there's been some talk of changing the filibuster rules. I wonder if--if this might be an area where the Senate could begin putting some reins on the filibuster perhaps with following Mr. Kendall's analogy to the--the Chinese wall around the judicial process--the judicial nomination process perhaps by you know simply removing the filibuster as an option. Is there any--do you see any appetite in either of the parties to constrain the filibuster generally and particularly with regard to judicial nominations?

Michael Gerhardt: Doug?

Doug Kendall: Well I mean certainly there was an effort four years ago in what is called the nuclear option by Republicans to eliminate the ability of Senators to filibuster judicial nominations. I actually wrote a piece in *Roll Call* around that time saying that Democrats should learn to love the bomb, and kind of let the nuclear option go through, so that we

didn't face this in 2009 when we next--when a Democratic president next had the--had the office.

And I--I still--I mean I don't as a progressive who has seen what bad things over the last century, the filibuster has done from the Civil Rights Movement on down, I'm not ever going to be a big fan of the filibuster for any purposes. You know in terms of what happened there, what happened was we--we--we reached this gang of 14 deal, which supposedly sets up an extraordinary circumstance for the use of judicial filibuster. And that was one of the things in the Hamilton debate that was kind of debated over and over again. This was something that the centrists from both Parties at least seemed to agree upon that we will continue to have the filibuster but it really will be limited to extraordinary circumstances.

Now no one ever really defined that term and it's an eye-of-the-beholder type thing. But it should mean something and that's hopefully as we see this play out over the next year as--as Republicans next try to filibuster a nominee we'll see that at least you know several of the Republicans who were part of that deal kind of honor the idea that at least it has to be extraordinary. And so when you have somebody like David Hamilton who has bipartisan support you know a top ABA rating and is undeniable qualified that--that Republicans just say no to using that tactic. If it doesn't happen, if the--if they start marshalling filibusters on a lot of judges I think--I think the drum beat for real reform is going to increase.

Michael Gerhardt: May I add something to that? I think the world is more complicated than the filibuster. I think in fact what is happening a great deal of time as Doug alluded

to previously is you need unanimous consent. And so what you end up with in part are not so much filibusters but something closely related to them. And those are holes, anonymous holes, excuse me, which are done almost on a tag-team fashion and those I think stall the process. And that is related to the filibuster but it's different, so even getting at the filibuster wouldn't necessarily get at that. And--and it's maybe even less likely that Democrats would want to tinker that much with holes because they're supposed to be temporary. In any event, this is where knowing the rules of the game and the practices in the Senate and the norms in the Senate make a big deal of difference not to mention the priorities that get set by the Senate Majority Leader and the fights that the President wants to undertake.

Michael Gerhardt: Yes; sir? I am sorry I don't know everybody's name. Forgive me.

Question: I'm a political scientist who studies judicial politics, so just to let you know where I'm coming from. **[*Laughs*]** There's a consensus among political scientists that there are no judges today who are judicial restraint(ists). Certainly on the Supreme Court they're either conservative activists or liberal activists and almost all the court of appeals judges to us look like activists either conservative or liberal. My question is--it seems that voters and politicians on the Right have understood this fact and care about judges and when I look at the behavior of President Clinton, President Obama, and liberal politicians or progressive politicians, I don't see the voters and politicians on the left caring about the fact that we have so many vacancies on the courts and that we need to get the nominations moved. Whereas voters and politicians on the Right seem very attuned to

who was on the courts and what the process is. And I guess my question is why do the progressives not seem to care in the Senate; why do the conservatives seem to carry very deeply in the Senate?

Michael Gerhardt: Let me turn first to Orin for that.

Orin Kerr: I think that the history explains the different reactions of the two sides, so for the most part, not entirely but for the most part, the Supreme Court has been in the position of determining whether conservative social policies are allowable in the political process or are unconstitutional. So it hasn't been a question of mandating what--the conservative side but rather is the political process one that is allowed to take on this question? And the reaction you have when your political views are declared unconstitutional is a pretty strong reaction and we see it whenever the Supreme Court goes the other way; it's--it happens obviously although it's less common that the Supreme Court will declare unconstitutional something with the other political valance.

So I think decades of the Warren Court primarily striking down policies and--and *Roe v. Wade* is obviously one important example, where a lot of people on the other side say hey. Wait a minute; that's a core belief of mine that you're declaring unconstitutional. Decades of that sort of procedure builds up a real political movement towards thinking Judges are very important and there's just been less of that on the other side. There have been fewer examples of the progressive political agenda that was declared unconstitutional. "Sorry, you're not allowed to have labor unions," for example. You

can't imagine the Supreme Court ever saying that. And so it's--it's decades of that kind of example that I think build up the political coalition and make that a priority.

Michael Gerhardt: May I as moderator also just insert one thing here, too as an additional fact, because you know part of our job is to complicate the picture? I--I think there's another dimension as well that may explain to some extent the differences in how Democrats so to speak and Republicans have approached judicial nominations and that has to do with their different political agendas. That is to say Democratic presidents have tended to have more on their plate when it comes to domestic policy and other things. Think of President Clinton with healthcare reform and other things. President Obama, I understand, is considering healthcare legislation among other things. **[*Laughs*]**

And so, given the fact that there is more on the agenda domestically for your average Democratic president, than for your average Republican president, judicial nominations are going to rank differently for a Democratic president than they are for a Republican president. With less domestically of concern to a Republican president on average, judicial nominations rise to a higher level; they become more--not just more important. They become more overtly important, whereas for Democratic presidents it's more complicated. In any event any other reactions?

Doug Kendall: No; I think those are the best points.

Michael Gerhardt: Glenn?

Glenn Sugameli: Yeah; kind of a follow-up to the last two points. I'm Glenn Sugameli and run the Judging the Environment Project for the environmental community on judicial nominations for the last eight years. First of all with regard to what was just said and the references earlier, from our perspective in the environmental community what we want are judges that will uphold and enforce the law and not create some new rights somewhere. And it's exactly the sort of challenges that Professor Kerr was talking about where the claims that are made that parts of the Clean Air Act or Clean Water Act or Endangered Species Act are somehow unconstitutional under some strange theory that have gotten some votes in the lower courts but no majorities, are the ones that we're most concerned about.

But I also wanted to ask something that was referenced at the very beginning but not since, which is whether some of this debate can change or will change in light of the *Citizens United* campaign finance five to four decision that we just had last week? The--it really seems to me that there--if--a lot of commentary, a lot of Senator statements, a lot of other things have focused on for example, Chief Justice Roberts' testimony when he was being confirmed that he believed in minimalism, that he believed in *stare decisis* -- of going along with precedent, that he believed in consensus and building a broad consensus across the Court; a lot of people have said that's just the opposite of what happened here where the Court actually decided an issue that was not presented before them. They--they ruled much broader than they needed to; it badly split the Court and that even what I've seen is even a lot of commentators who agree that the plaintiff should have one, really don't like what happened.

And then of course you had the interlude that Doug referred to during the State of the Union Address with--with Justice Alito which I think will raise this in the popular viewpoint. For example, I would just say--say one brief thing. I have a Judging the Environment website where I've collected excerpts and links to 125 editorials and a few major Op-Eds which are critical of the *Citizens United* decision just in the last week and they come from all across the country, small papers, large papers, conservative, liberal and there does seem to be a possible moment here that can change some of the debate towards conservative judicial activism towards what Professor Kerr was talking about was where your political views or your agenda, campaign reform has been ruled unconstitutional at state, local, and--and national level and whether that could be a moment combined with the Alito, Obama whatever you want to call it last night--to raise this as an issue that people will understand it really is important who is on the Courts and it--and it's important for progressives in particular?

Michael Gerhardt: Who wants to be the first--?

Doug Kendall: I--I think Glenn you're exactly right about the importance of *Citizens United*. I don't think we've seen a reaction just from the President on down but across the country and by editorial boards to a Supreme Court opinion like this at least since *Bush v. Gore*, I think it's a very big deal. I think though that Orin is probably right in terms of--I mean I think both of the two prior points were right in terms of you know the--the energy on the right about this is--is built up over decades of Republican Presidents campaigning on these issues starting from President Nixon in the '60s campaigning against the

criminal procedure rulings of the Supreme Court. And--and so it's really it's built up; I don't think any one opinion is going to have that transformational an impact. But I think it's a big deal.

Orin Kerr: I--I doubt that the one decision will make much of the difference, at least in the current political environment where campaign finance is something that is not you know--people are not talking about all day long sort of--it's not the hot political question. It might have been a little different if the Court had gone that way in the *McConnell v. FEC* case in 2004 when this was more of a high profile question, so I think this is one more issue but I think it's also hard to sort of have a political reaction to it in part because the issues are pretty complicated as a legal matter. So there's--there's some legal questions that really boil down to a really--that--that are accurately conducive to a soundbyte and this sort of--campaign finance, well it can--you know is it really free speech? Is it not free speech? Should it be regulated or shouldn't be? Hard--hard questions I think and complicated technical ones, so I think that keeps it from being an issue that's going to resonate over the long-run.

Michael Gerhardt: Yes; ma'am?

Question: So my question is about age and how much that should play into the President's considerations about who he's nominating in the sense that judicial nominations to the federal bench are lifetime appointments. They can be the President's greatest legacy. And so along those lines, how old is too old, but on the other side how

young is too young? I mean someone who is only in their late 30s might be on the Bench for a long time, but have they had enough experience to develop a--a legal philosophy to you know--know the Rules of Evidence or to really understand the complexities of campaign finance law or whatever it is that they're going to have to do once they get to the bench?

Bill Lurye: Well it's--it's hard to say that there's any hard and fast rule. I mean to say otherwise you know would--would just--would be wrong. You know President Bush, George W. Bush towards the end of his Administration nominated I believe two people who were confirmed at the circuit, two women, who were late 30s, early 40s and really to our way of thinking didn't have much to commend them to--to sit on the Fifth Circuit, very little experience.

It's--it's a fine line; you know certainly you want people who are reasonably young but you want as you just said to make sure that they have an understanding of--of how to be a judge, whether it's a trial court judge or--or appellate court judge. Now as far as too old, hard to say; you know it's just hard to say. But certainly you know if the idea is as--as it was during the Bush administration that you appoint somebody as young as possible to perpetuate your ideology then you would want somebody as young as possible.

Doug Kendall: And it's certainly a fact that President Obama has been nominating older candidates to the Court of Appeals. There's an article by David Fontana a few months ago about--that kind of documented the average age of appellate court nominees. And

President Obama's nominees were five or six years older on average than--than President--the two President Bush(es)' Nominees I think were the figures. And--and that certainly does affect your legacy. I think--I think if you look at the Nominees to the Fourth Circuit, when they are confirmed, the--at least the two--the first two nominees, Judge Davis and Judge Keenan, will be older on average than President Bush's nominees are now. **[*Laughs*]** Right; so--so they will come onto the Bench in a new Presidency already older than President Bush's nominees to that same court. So it's--that affects your legacy; you can't--it's something I think presidents have to take into consideration.

Orin Kerr: I--I would just add that the--the importance I think of age is not so much in legal ability. You know you can have a law clerk who is a real--you know who can really pick up the law really quickly. I think the importance is having the life experience, the trial experience, as was pointed out earlier, the wisdom to have just seen the world from enough different perspectives to not think oh you know I've--I've always had this thought; I'm going to run with it. And--and I worry about those that have been judges since they were very young or those who were nominated at a very young age who are a little too confident that they're right. So I kind of side with Learned Hand, the spirit of liberty is the spirit that's not too sure it's right. And I think you get that more with an older nominee than a younger one.

Michael Gerhardt: Well that might be a perfect place for me to sort of begin to wrap things up since it's almost 1:30. In fact to just pick up on what Orin is saying, it used to be the case and this is a long time ago that judicial nominations were the culmination of a

career. Sometimes actually these days it might be fair to say they're the beginning of a career. And that is a different dynamic. That's one new thing in a sense we've got to wrestle with.

Let me just throw out a couple others before I close. The second is something we had talked about before but we haven't acknowledged quite so explicit today; the court of appeals have to a large extent become the final courts with respect to many legal issues. That might explain to some extent the more heated concern about those courts. A third is also this tendency to opt for sitting judges as Supreme Court nominees, and so what that has done I think in part is put a focus on the courts that it's--who do you let on those courts because they're the likely place from which the next nominees will come? So in a sense the fights have kind of moved one step sooner as well; that's another dynamic we haven't mentioned but it's all part of this mix.

And of course the final thing that we can note is that to what--is just consider to what extent is the Supreme Court part of all this mix? You know we have mentioned the possibility of another vacancy arising; to what extent does that inform the conduct with respect to other nominations? To what extent are people setting precedents in a sense or even markers in how they deal with lower court nominations that would telegraph in a sense how they deal with the Supreme Court nominations?

I know we will be heatedly debating these issues for months if not another year to come, and so I would welcome the opportunity to return to talk about the second year of President Obama's judicial nominations. Thank you. **[*Applause*]**