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SENATE PROCEDURES TO CONFIRM NOMINEES

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COMMITTEE ON RULES AND ADMINISTRATION

SECOND SESSION

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C O N T E N T S

SENATE PROCEDURES TO CONFIRM NOMINEES

TUESDAY, JULY 30, 2024

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

The Committee met, pursuant to notice, at 2:45 p.m., in Room 301, Russell Senate Office Building, Hon. Amy Klobuchar, Chairwoman of the Committee, presiding.

Present: Senators Klobuchar, Fischer, Merkley, Butler, and Wicker.

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

Chairwoman KLOBUCHAR. All right. I call to order this hearing of the Rules Committee on Senate Procedures to Confirm Nominees, or get them confirmed. That is our goal. I would like to thank Ranking Member Fischer and our colleagues for being here, as well as our witnesses, Jenny Mattingley from the Nonpartisan Partnership for Public Service, as well as Sean Stiff, and Elizabeth Rybicki of the Congressional Research Service. Thank you all for joining us.

Today we are going to hear from these three nonpartisan experts about the increasing amount of time it has been taking for the Senate to confirm nominees from Presidents of both parties. We want to make that clear from the beginning. This is not actually any kind of a partisan fight we are engaging in. Senator Fischer and I get along quite well. We are looking at this in the context of now and in the future and how this has been getting worse and worse and worse, regardless of party, and the impact these delays have on our government, have on the people that we want to recruit to be in our government, and what we can do to address it.

The facts speak for themselves. In recent decades, it has taken longer to confirm nominees for each successive President. According to the Partnership for Public Service, in the first two years of the current Administration, it took more than 156 days, on average, to confirm each executive branch nominee, up from 107 days during the Trump administration, 92 days under President Obama, and nearly three times as long as the Clinton administration, which was 56.8 days.

As the Senate spends more of its time working on nominations, this leaves less time for legislating on issues that are important to the American people—difficult issues that sometimes take days to resolve bills. More than 55 percent of Senate votes in the first two

years of both President Biden's and President Trump's terms were on nominations, which is over a sixfold increase compared to the average under the four previous Presidents, which was 8.5 percent of votes.

The number of cloture votes—the votes we take to end debate on a nomination—has also skyrocketed, with more than 200 so far for executive branch nominees under our current President and 170 under his predecessor, a dramatic increase from the total of just 20 under both Presidents George W. Bush, who had 9, and Clinton at 11. That is 20 for two Presidents, and now we are at over 200 and before that—the last administration had 170.

There are a lot of other statistics that I know you want to hear me roll off here, but one thing is clear and it is very straightforward: under both parties, we are spending a lot more time voting on nominations than in the past, and it is taking more time under each administration. Pretty soon we are going to become a full-time employment agency. Although we do not really even discuss the applicants, we just go in and vote, and go in and vote.

The time the Senate is spending to confirm nominees not only impacts our work and legislation, but also delays a President—no matter his or her party—from filling important positions.

Here is what that looks like. While the Secretary and Deputy Secretary for five key Cabinet departments—Commerce, Defense, Energy, State, and Treasury—took an average of 18 and 67 days, respectively, to confirm during this Administration, other positions at those departments, like undersecretaries and assistant secretaries—the people that you may not read about in the newspaper—they took more than 350 days.

Significantly, it is taking longer for nominees during a President's first year in office, when they are trying to jumpstart their work on key issues, to get confirmed. The average time taken to confirm these nominees in the current and previous administrations was nearly triple what it was under President Reagan.

We know that there are qualified people interested in serving in government regardless of party, and you can leave talented people in limbo for literally a year, years, or at least months, creating uncertainty in their lives. It is a reason a lot of people do not even want to try doing it. That is not what we want in our country.

The good news is there are actions we can take to improve things. One idea is to change the rules of the Senate so we could consider multiple nominees at the same time. We would still have a vote, but we would do what we call blocking them together. We would not do the top Cabinet people that way, but you could do a group within a department that way. That is something that Senators King and Cardin and I have been working on to bundle up to 10 nominees at once—we are not talking about 100—10 nominees at once.

This would have allowed the 27 Department of Defense positions we confirmed in the first year of the current Administration—not including the Secretary of Defense—to be confirmed in three sets of votes during a single week. What a game changer for the Defense Department and our country's security.

We could also consider an idea such as one Senators Lankford and Blunt proposed in 2019, so that either side could yield back

time on the Senate floor if they wanted final votes to happen more quickly by dividing the two hours of time after cloture equally between the parties.

There are also ideas like reducing the number of positions that require Senate confirmation, which is now more than 1,200. I know Chairman Peters on Homeland Security has been interested in this topic.

There is precedent for bipartisan efforts in this area like in 2011, when the Senate passed two proposals with overwhelming support from a bipartisan working group led by Senators Collins and Schumer with Senators Lieberman and Alexander—one to expedite consideration of certain nominations by a vote of 89–8, and one to reduce the number of Senate-confirmed positions by 163, by a vote of 79–20. No, it is not much when you are dealing with 1,200, but it is still 163 people that can actually get into the jobs. I supported both these proposals at the time, as did Leader McConnell and Senator Wicker, who are on this Committee.

What we are here to discuss today is not about giving an advantage to one party or the other. That is why it is good to do it when the election is in flux, and with bipartisan support. These options could be designed to take effect in the future when you do not know who is going to be the President, regardless of the outcome of this election.

The Framers recognized the importance of the Senate's role to provide a check on the executive branch by requiring advice and consent over key positions in our government. As the Rules Committee, it is important that we take a close look at Senate procedures and how they are working, and that we are willing to partner across the aisle on commonsense measures to improve how we do our work on behalf of the American people.

The only other possibility, if we are not able to do this together, is that one party the other can just do it by invoking what we call the nuclear option—that has happened in the past. I would rather do this together, but of course, that is also a possibility, and it would at least speed things up.

Whatever it is, what we are doing now is not working, and we are spending all our time on being a full-time employment agency, when there are so many pressing issues before the United States Senate.

Thank you for our witnesses for being here. I will now recognize Ranking Member Deb Fischer for her opening. Thank you.

OPENING STATEMENT OF HONORABLE DEB FISCHER, A UNITED STATES SENATOR FROM THE STATE OF NEBRASKA

Senator FISCHER. Good afternoon. I would like to thank Chairwoman Klobuchar for holding this hearing, and I would also like to thank our three witnesses for being with us.

Today we are here to learn about the nomination process in the United States Senate, changes to the process, over time, and what, if any, changes may improve that process.

In taking up a nomination, the Senate is carrying out its constitutional responsibilities. First, the Appointments Clause of the Constitution explicitly directs the Senate to provide advice and consent. Second, nominations provide the Senate an opportunity for

oversight, and while oversight responsibilities are not explicit in the Constitution, the Supreme Court has said they are inherent in the legislative process, set forth by Article I.

The Constitution does not subject every Presidential appointment to the advice and consent process. It only requires advice and consent for the principal officers. However, the Constitution does allow Congress to decide whether to apply advice and consent to inferior officers. I am sure our experts from the Congressional Research Service will explain the difference between a principal and an inferior officer.

But the important thing to remember is that these individuals will be charged with carrying out the President's policy agenda and the laws passed by Congress. These individuals will be accountable to Congress for the agencies they have been appointed to manage.

The oversight process is a valuable oversight tool. It provides leverage to get responses to congressional oversight requests from agencies that might otherwise be reluctant to share that information. It is also a chance for the Senate to speak directly to nominees about Senate priorities.

Outside of the Senate's constitutional responsibilities, the Senate has a tradition of robust debate and protections for the minority party. Those traditions apply to the nominations process, as well. When an individual Senator holds a nomination through the unanimous consent process, that Senator is engaging the Senate's tradition of robust debate. Conversations surrounding the Senate's confirmation process have been going on for decades. There have been large and small efforts to reform the process over the years. The last large-scale change came in the 112th Congress and removed 163 positions from Senate confirmation and created the Privilege Calendar.

Those conversations continue today. Just last week, Senator Grassley and Senator Cortez Masto introduced a bipartisan bill that would require Senate confirmation for the Director of the Secret Service. It is a call to subject that director to greater oversight after the assassination attempt of President Trump. While this bill only applies to one position, it is an example of how oversight concerns can drive changes to the nominations process.

It is also an illustration of why proposed changes to the nomination process must be carefully and thoughtfully considered. The nominations process must balance the constitutional responsibilities of advice and consent and oversight and traditions of the Senate, with the desires of an administration to fill positions quickly.

I look forward to today's testimony. Thank you, Madam Chair.

Chairwoman KLOBUCHAR. Thank you, Ranking Member Fischer.

I will introduce our witnesses, two of them, and then Senator Fischer will introduce Mr. Stiff. Thank you.

Our first witness is Jenny Mattingley, Vice President for Government Affairs at the Partnership for Public Service. She previously served with the Office of Management and Budget and as founding director of the White House Leadership Development Program. She received her bachelor's degree from Whitman College and her master's from GW University.

Our next witness is Elizabeth Rybicki, a specialist on Congress and the legislative process, also at CRS, where Sean Stiff also

works. She first began her career at CRS as an intern, and after time with the National Archives and Records Administration returned to CRS in 2002. She received her bachelor's degree from Dartmouth College and her doctorate from none other than the University of Minnesota. Excellent choice.

Ranking Member Fischer.

Senator FISCHER. I thought you were going to have me comment on the excellent choice.

Chairwoman KLOBUCHAR. No, I was going to—you could do that.

Senator FISCHER. I will say very good choice.

Chairwoman KLOBUCHAR. We will not go over that Nebraska-Gophers game I attended.

Senator FISCHER. Stop. Stop. Do not be harsh.

Chairwoman KLOBUCHAR. Go ahead.

Senator FISCHER. Mr. Stiff, welcome. Mr. Stiff is a legislative attorney for the American Law Division of the Congressional Research Service. He principally covers appropriations law, federal credit programs, government organization, oversight, and related constitutional issues. He joined CRS in 2019, after practicing litigation with an Ohio-based firm on a broad range of federal and state legal matters.

I welcome you here today and thank you for your information you are going to provide us with.

Chairwoman KLOBUCHAR. If the witnesses could rise and raise their right hand.

Do you swear that the testimony you are about to give is the whole truth, and the truth, and nothing but the truth, so help you God?

Ms. MATTINGLEY. I do.

Mr. STIFF. I do.

Ms. RYBICKI. I do.

Chairwoman KLOBUCHAR. Thank you. You can all be seated, and Ms. Mattingley, you are recognized for five minutes.

OPENING STATEMENT OF JENNY MATTINGLEY, VICE PRESIDENT OF GOVERNMENT AFFAIRS, PARTNERSHIP FOR PUBLIC SERVICE, WASHINGTON, DC

Ms. MATTINGLEY. Chairwoman Klobuchar, Ranking Member Fischer, and Members of the Committee, I am with the Partnership for Public Service, a nonpartisan, nonprofit that focuses on building a better government and stronger democracy. The Partnership is home to the Center for Presidential Transition, a nonpartisan source of knowledge and resources on transitioning of government from one administration to the next.

One specific area of focus for our work is the role that strong leadership plays in effective agency performance and service delivery for your constituents. Senate-confirmed appointees are crucial to that leadership.

Thank you for the opportunity to speak with you today about the Senate confirmation process. As you know, this is a fundamental role of the Senate, as enshrined in Article II of the Constitution. This process is meant to give the Senate a strong role in assessing the quality of nominees for the most critical appointments and to

serve as a crucial part of the checks and balances between the branches.

But it has become unworkable and is likely to get worse. The data tells an eye-opening story. Between 1960 and 2020, the number of Senate-confirmed positions increased by over 70 percent, from 779 to around 1,340. In President Reagan's first term, it took an average of 49 days to confirm his nominees. For President Trump's first term is soared to an average of 160 days, and now, for the first term to date for President Biden, that average is 182 days, an almost four times increase.

In the 1990's, over 85 percent of votes were on legislation, very few on nominations. Today, over 60 percent of votes are on nominations. During the 1990's and early 2000's, there were only 35 cloture votes total on executive nominees. Since then there have been 425 cloture votes on nominees.

What you have experienced as Senators, and what our research confirms, is that filling these positions is not just an issue between Election Day and early into a new administration. It is a major challenge throughout the term of any modern presidency.

Delays in getting leadership in place have ripple effects across our government and ultimately impact the people government serves. Under the current dysfunctional system, each stakeholder in the process loses—the Senate, the executive branch, the public, and individuals who step up to serve our country as appointees.

For the Senate, the time spent processing nominations clearly eats into time it could be spending on legislative and other priorities. Potential appointees undergo an appropriately intense vetting process but face uncertainty of how long the confirmation process will take and if their nomination will be considered at all. To make this investment and have their lives, as well as that of their families, stuck in confirmation limbo, discourages qualified individuals from wanting to serve.

For agencies, the lengthy vacancies slows decision-making, long-term strategic planning, modernization efforts, and undermines employee morale. This harms the performance of agencies and impacts services, from veterans' care to support for American's farmers. Nowhere is that clearer than the national security space. After the horrible attack on our country on September 11, 2001, the bipartisan commission tasked with investigating the attack raised alarm about vacancies in top national security positions in a President's first year, and recommended that these positions be expedited for consideration. In 2001, only 57 percent of top national security positions were filled on the day of 9/11, yet 20 years later, on September 11, 2021, only 27 percent of those positions were filled. While that raised to 67 percent by the end of the calendar year 2021, we are clearly falling short of the 9/11 Commission's call to action.

It is clear that the confirmation process needs to be reformed to preserve the Senate's constitutional role of advice and consent while also providing reasonable, efficient paths to confirmation for qualified individuals. Key areas of consideration offered in my written testimony include developing a bundling model for nominations to allow for at least some nominations to be batched together for a final vote on the Senate floor; improving the Privileged Calendar;

and pursuing other changes to Senate processes for executive branch nominations.

Just as in 2011, when then leaders for the Rules Committee, Senator Schumer and Senator Alexander, led confirmation reform efforts, it is imperative to pair reduction in the overall level of Senate-confirmed positions with any process changes. If not, any process reforms achieved will be diminished by the unwieldy number of positions subject to confirmation.

Improving the Senate confirmation process is not just a good government initiative. It is a national security, public health, and economic imperative. Our government needs capable leaders to address the country's most urgent needs and to act in moments of crisis.

Thank you again for your focus on this important issue. We look forward to working with you to find solutions to these tough challenges.

[The prepared statement of Ms. Mattingley was submitted for the record.]

Chairwoman KLOBUCHAR. Very good. Thank you very much.

Mr. STIFF.

OPENING STATEMENT OF SEAN M. STIFF, LEGISLATIVE ATTORNEY, CONGRESSIONAL RESEARCH SERVICE, WASHINGTON, DC

Mr. STIFF. Thank you, Chairwoman Klobuchar, Ranking Member Fischer, and Members of the Committee. My name is Sean Stiff. I am a legislative attorney in the American Law Division of the Congressional Research Service, and I am honored to testify here today on the Appointments Clause of the United States Constitution and the Senate's advice and consent function.

The Appointments Clause appears in Article II, Section 2. It begins by stating that President shall nominate, and by and with the advice and consent of the Senate, shall appoint Ambassadors, other public ministers, and consuls, judges of the Supreme Court, and all other officers of the United States whose appointment is not provided for elsewhere in the Constitution.

Writing in April 1788, Alexander Hamilton argued that giving the President the sole responsibility to pick a nominee would instill in the President a livelier sense of duty, and giving the Senate the sole power to then confirm a nominee would restrain the President's choice.

Now the Senate does not need to confirm all officers, and that is because the clause continues by recognizing a class of officers called "inferior" officers, for whom Senate advice and consent is the default method of appointment but not the only method. The clause says that the Congress may, by law, vest the appointment of such inferior officers as they think proper, in the President alone, in the courts of law, or in the heads of departments.

If Congress chooses to reexamine an existing Senate confirmation requirement—and there are hundreds of existing statutory positions that do call for advice and consent—Supreme Court precedent helps identify Congress' legal discretion in this regard. That precedent distinguishes officers from non-officers and principal officers from inferior officers.

Deciding whether an individual is an officer determines whether the clause applies at all. An officer holds an office. The court has said that holding office connotes tenure, duration, and duties that are described in statute. Contrast that with a non-officer, who, for example, has only occasional duties.

In addition, the court has said an officer exercises significant authority under federal law. A non-officer does not. We know some of the powers that count as significant authority from Supreme Court case law, issuing a regulation, for example.

Now if the person holds a statutory position and wields significant authority, they are an officer, but what kind of officer? A person is an inferior officer, the court has said, if some other person appointed as a principal officer supervises or directs their work. They are a principal officer, by contrast, if no other principal officer directs their work. The Senate must, under the Appointments Clause, confirm principal officers. It does not need to confirm inferior officers or non-officers.

There are potential tradeoffs for requiring Senate confirmation when the Constitution does not. The advice and consent function could be a powerful tool. The court has said that the Senate's confirmation decisions are unreviewable, so Senators can reject or confirm a nominee for most any reason.

The confirmation process allows Senators to obtain commitments from nominees about how the nominee will conduct themselves when in office, if confirmed, and it also gives Senators a point of leverage with the administration who is looking to have that nominee confirmed.

On the other hand, as we have heard, the confirmation process can take time, both for the executive branch and for the Senate. Some positions might go vacant as a result. Acting officials might fill others, which a Senator might not prefer.

Whether confirmed or not, officers are subject to Congress' broad power to inquire and to control agency funding. These potential tradeoffs for requiring Senate confirmation when the Constitution does not point in one direction, and Senators can and do disagree. But what is clear, according to the court, is that in those circumstances where the Appointments Clause does not require advice and consent, it is up to Congress to decide how to strike that balance.

I welcome your questions.

[The prepared statement of Mr. Stiff was submitted for the record.]

Chairwoman KLOBUCHAR. Thank you very much.

Next up, Ms. Rybicki.

OPENING STATEMENT OF ELIZABETH RYBICKI, SPECIALIST ON CONGRESS AND THE LEGISLATIVE PROCESS, CONGRESSIONAL RESEARCH SERVICE, WASHINGTON, DC

Ms. RYBICKI. Thank you, Madam Chair, Ranking Member Fischer, and Members of the Committee. I am truly honored to be here to speak about the Senate rules and procedures for considering nominations.

I want to tell you at the outset that there are many people at the Congressional Research Service who work on the confirmation

process and legislative process who have helped, and especially Mike Greene, who has worked a lot in this area, as well, with me.

As you know, the Senate relies on its committee system to process the high number of nominations that it receives, and this means the job of the committees is not just to review the information that is received from the executive branch, like the financial disclosure report, but also to do their own investigations. Committees have their own questionnaires. Committees meet with nominees, because after all, these nominees are going to be the ones who are ensuring that the laws are being executed the way Congress intended.

Committees have also the responsibility of holding public hearings, right. Most nominations have hearings in which nominees can be questioned by all Senators, and sometimes they are even asked to commit to returning to the Senate to answer questions as those come up.

When a committee recommends further action, that does require the committee to meet with a majority of its members present to vote to report that nomination. The only other way for a nomination to be removed from committee is through unanimous consent action on the floor. The full Senate could discharge a committee. But otherwise a committee has to meet to report.

Now there is a special category of nominations, as the Chairwoman mentioned in her opening statement, of privileged nominations. These nominations are not formally sent to committee, and so the committee does not have to meet to report them. But the committees of jurisdiction are still collecting that information. They are doing the same kinds of investigations. Once they have indicated that the information has been gathered, then that nomination can be—it is in the same parliamentary status as if the committee had reported. This Privileged Nominations Calendar was a result of the 2011 bipartisan reforms that took place, that put a number of nominations in that category.

Now, for the full Senate to act there are essentially two routes for consideration on the Senate floor. The first, and most common, if we look back several Congresses, is to use unanimous consent, right, and unanimous consent, this is cleared in advance with all personnel offices, and as long as a Senator does not indicate that they have an objection, then that nomination can pass rapidly on the floor.

Absent unanimous consent, then the Senate has to use its cloture process, and the cloture process has five steps. First, there has to be an agreement to take up the nomination. This is a non-debatable motion. It is a simple majority vote. Once on the nomination, the second step, you can file cloture on the nomination. Cloture proposes to bring the nomination to a vote. But the vote on cloture does not happen the day that cloture is made. There is a two days of session ripening period before the Senate votes on cloture. That is a majority vote for nominations, but what it does is limit further consideration to a maximum of two hours for most nominations. It is 30 hours for the highest ranking.

The fourth step is debate, and then the fifth would be the vote on confirmation. We have, to process a single nomination, by the cloture process, taking up the nomination, filing cloture, 2-day

waiting period, vote on cloture, up to two hours of debate for most nominations, of debate, and then the vote on confirmation.

What we see in practice in the Senate is the use of stacking motions. The vote the Senators just took before this meeting, that was a cloture motion on the nomination. By unanimous consent, they will be voting, after this hearing, they will vote to actually confirm the nomination.

The stacking of cloture motions is what the Leader can do in order to have that 2-day ripening period occur at the same time. Yesterday the Majority Leader filed cloture on three nominations. Those three cloture motions will ripen tomorrow. But then from that point on they have to be considered sequentially, absent unanimous consent. There could be a cloture vote, by the book and under the rule there would be, two hours later, the confirmation vote, then immediately after, the vote on the already ripened second cloture motion, and then up to two hours of debate before the vote on confirmation of the second nomination, followed by the cloture vote on the third nomination. The Senate schedules these votes by unanimous consent agreements for the convenience of all Senators, so we have predictability about when the vote is going to occur. But those unanimous consent agreements reflect the terms of the rules.

My written testimony talks about the rules changes, some of which have been bipartisan in the Senate, most prominently the 2011 reforms. I look forward to answering your questions. Thank you very much.

[The prepared statement of Ms. Rybicki was submitted for the record.]

Chairwoman KLOBUCHAR. Very good. Thank you all.

United States women just won gold in gymnastics. I just want to point that out. Suni Lee, from Minnesota. I just want to point that out.

Okay. Let's talk about getting gold, how we could improve this process, move our team along, regardless of side.

Could you talk, Ms. Mattingley, about how reliance on these acting officials impacts the work of the Federal Government, when you do not have people that have actually been confirmed in the jobs for sometimes years?

Ms. MATTINGLEY. Absolutely. Thank you for that question. One of the things we have seen, and likely you have seen, is that many agencies rely on the use of acting officials when a position is vacant, when it is awaiting confirmation. Agencies often either have career officials or other political appointees act in those positions.

One of the things we have seen, both on what I have heard from officials who are acting, is that it is very tough sometimes to make those long-term decisions, especially if an agency is in need of reform, and dealing with management challenges, because acting officials are only there for a certain length of time.

Additionally, with vacancies for agencies and the staff that is in agencies, they also are in a bit of a limbo because they do not know which work is going to be carried forward once the political appointees comes in.

Chairwoman KLOBUCHAR. Good. Mr. Stiff, can there be legal constraints on the actings?

Mr. STIFF. Thank you for the question. The primary statute that provides for acting officials is the Federal Vacancies Reform Act, and it limits the extent to which someone can temporarily serve as an acting official in essentially two ways. First, who can serve, and then for how long someone can serve. There is the possibility that at some point if the statutory time period is run, for example, then the office would go vacant, which raises questions about whether the non-delegable duties of that office can be exercised, and if so, by whom.

Chairwoman KLOBUCHAR. Right. Ms. Mattingley, just one other quick question. What impact do you think it has in your roles with OMB and the like on people being willing to even put their name in, when you could have your whole family put on hold for a year or so?

Ms. MATTINGLEY. Absolutely. Thank you for that question. I have certainly talked to many folks who are being considered for positions over the years, and one of the things that they are concerned about is whether and how long it will take them to get confirmed. When I think about it, I was talking to a group of technologists the other day, senior folks who work on cyber, on AI, some of the big issues agencies are facing. They were highly concerned about whether they would need to relocate their families, especially since they have aging parents to care for, as well as spouses to consider.

It becomes this limbo, if you will, and this uncertainty of how the process works. It becomes a really personal, tricky decision to getting these qualified folks to step up.

Chairwoman KLOBUCHAR. Exactly. Ms. Rybicki, talking about solutions here, this idea of bundling. Could you talk about what the process now is with multiples and why it takes so long and how they end up—when I look at this more non-controversial ones, they end up getting confirmed anyway, with nearly a unanimous vote, and if we could just put them together you could have literally the same person could vote against the group of ten, or can vote against each one. They could still have their voice heard in that way. But we would not have this crazy situation.

Do you want to answer that?

Ms. RYBICKI. Yes, you are correct that under the current process, while many nominations are approved en bloc, meaning all together, that is done by unanimous consent. Absent unanimous consent, then each nomination has to be considered one at a time. You cannot bundle together under the current procedure.

Chairwoman KLOBUCHAR. We have bundled a few times here and there, but the same person who may want to object to the same thing would object to the bundling.

Ms. RYBICKI. Well, right, even excluding some military promotions and foreign service nominations that arrive in the Senate and in lists of dozens or hundreds, so those are routinely. It is about half, historically, are still passed by unanimous consent, and a large proportion, over 80 percent of the hundreds or so that are approved by unanimous consent are approved in en blocs. But that is by unanimous consent only.

Chairwoman KLOBUCHAR. Right. Right. But if you were to change the rules somehow, with some thresholds you get to your blocking, probably with the committee chairs agreeing to it. I just

keep thinking—Senator Wicker had to walk out for a call—the Department of Defense argument that I made with these three groups of ten. You could get them done in a week instead of the months and months and months it took.

Ms. Mattingley, do you think the blocking idea would be an improvement?

Ms. MATTINGLEY. We do think that it is a very promising idea to look at batching nominees together so that there is one vote for several nominees at a time, particularly those that are non-controversial, and both looking at ones that are already on the Privileged Calendar or looking across other nominees.

Chairwoman KLOBUCHAR. Just one last question because my colleagues are here. 2011, successful in the Privileged Calendar—and also was that the time some of them were omitted then? What made that successful, that that worked back then?

Ms. MATTINGLEY. What made it successful is that there were multiple Senators who took a look at the data, took a look at how the process was impacting the Senate, impacting agencies, and determined that a solution at that point needed to be made. It was a bipartisan effort, as mentioned earlier.

Really the data at that time was already showing trend lines that the process was getting slower and slower, and that data has just gotten worse from here in terms of length.

Chairwoman KLOBUCHAR. Okay. Thank you. Senator Fischer.

Senator FISCHER. Thank you, Madam Chair. Mr. Stiff, you told us a little bit about the principal officeholder and the inferior officeholder, and just what identified them as such, that obviously an officer holds and office. You said it exercises significant authority, including regulations.

If Congress did decide to remove a position from advice and consent, how would Congress signal its view that the position does not fit within that principal definition?

Mr. STIFF. Ultimately the question of whether a position is a principal officer is determined by the duties and responsibilities of that office and the relation to other officers. One way to signal it, in sort a non-binding sense, would be a finding section or a Sense of Congress expressing the view of Congress that this is not a principal officer. More directly, pairing the change in the appointment method with changes in the relationships of that office to other officers, to make them as a legal matter or a principal officer, make their work subject to direction and supervision by someone else.

Senator FISCHER. In the findings, basically we need a checklist, like you provided, that would define what a principal is, what an inferior officer is. Would you recommend something that concrete to be in the legislation? What would you do?

Mr. STIFF. You could use, and certainly Congress does use, Sense of Congress provisions. They are not typically deemed operative, though. At the end of the day it is still going to be a legal question of whether the substantive authorities of the office are those of the principal officer or the inferior officer.

Senator FISCHER. If we would remove a principal officer from the process, as we have it now, for advice and consent, what would be possible consequences of that? Do you see positives and negatives? What do you see as consequences?

Mr. STIFF. I can sort of speak for the legal consequences of taking someone who, as a legal matter, is a principal officer and making them appointable in some way other than advice and consent. In that circumstance there would be the potential that if a party with standing or a party that is the subject of an enforcement action raises an Appointments Clause argument saying that this is, as a legal matter, a principal officer, but they are improperly appointed, the court has said that a person in that position exercises authority that they do not lawfully have.

In past cases we have seen the Supreme Court, for example, set aside actions of officials who are acting in a way that was inconsistent with their method of appointment.

Senator FISCHER. How would the court determine standing in a case like this? Would it depend on what position it would be for, what department it would be in? How would that be determined, would you wager a guess on?

Mr. STIFF. The standing analysis is whether the person bringing or maintaining the suit suffered an injury that is traceable to the challenged government action. Oftentimes, though, these Appointments Clause issues are raised as defenses to actions that are brought by the government itself.

Senator FISCHER. Would that be difficult to be able to prove that you would suffer from that?

Mr. STIFF. I think it depends on the case. But when the court has taken up Appointments Clause issues in recent years it has focused on sort of the merits question of whether this is a properly appointed officer.

Senator FISCHER. Okay. Thank you.

Ms. Rybicki, in the past when we have watched the Senate consider nomination reform there have been advantages and disadvantages that have been considered. What do you think would be advantages and disadvantages that we should consider when we are looking at future effort in reforming the nomination process?

Ms. RYBICKI. Yes. When you look at the history of past efforts to change procedure you can see that there is general agreement on the goal of the confirmation process in that generally Senators want the vacancies to be filled, right. There is not a Senator saying that we want to this to take forever. There is an efficiency goal.

There is also, though, a goal of meeting the advice and consent role of the Senate, right. Senators do not want the Senate to be a rubber stamp, so there is an important evaluation rule.

But what you see from a procedure prospective, we have got these two goals of efficiency and evaluation, and what really matters and what we see from the history of this is what the details of that procedural reform are. Because you are trying to strike a balance where it is both letting the Senate make a decision, right, as well as still preserving this ability of evaluation.

Senator FISCHER. When we look at the reform that took place in 2011, that has been brought up a couple of time here, did any of those changes result in any meaningful change at the pace we are doing nominations currently in the Senate?

Ms. RYBICKI. I defer to the excellent data by the Partnership as well as my colleague, Barry McMillion has cut circuit and district court nominations—if by "pace" you mean length of time?

Senator FISCHER. Yes.

Ms. RYBICKI. Right. As we have heard, one way to measure is how many days it takes for confirmation, right, that has increased. But when looking at various changes, you know, it also can be we are looking at a particular type, like could circuit court nominations possibly go through faster than the district court nominations, and that can be something to look at, as well.

The 2011 reforms were ones that allowed them move without going to committee, right, and so it did not have a process for floor consideration. It is just about skipping that committee step. We do see, in another study by one of my colleagues, about 11 percent of those do get requested to be referred to committee by one Senator. But that means for the vast majority they are not going to committee, and the committee is not having that meeting and voting to report.

Senator FISCHER. Thank you.

Chairwoman KLOBUCHAR. Very good. Next up, Senator Merkley.

Senator MERKLEY. Thank you, Madam Chair, and thank you to both you and Ranking Member Fischer for holding this conversation. The perspective that many of us see on nominations is that the challenge is a reflection of almost tribal-level warfare between the parties.

The minority, regardless of if there is a President of the opposite party in the Oval Office, has an incentive to slow things down, make it difficult, extract promises, regardless of who is there, which is why right now is the right time for us to have this conversation. We have no idea who will be in the Oval Office. We have no idea who will be in the majority of the Senate.

I would love—there have been three nuclear options, both parties have engaged in it, regarding nominations. Wouldn't it be great if this committee could really sit down and hash out reforms, recognizing that this expanding tension in which warfare is conducted by the minority against the President of an opposite party is just not serving our democracy well. Again, thank you for holding the hearing.

But the only way I see us pursuing these reforms is by that type of conversation, when we are uncertain about who will be in charge in the future, or it is going to happen by nuclear option, when one side is extremely frustrated, as has happened three times so far.

Anyway, so that says how challenging this is. I think the stats, Ms. Mattingley, that you put forward about how many of our votes are now on—I think it was your testimony—on cloture votes on nominations, that 15 percent of our votes under Bush and 14 percent under Obama in their first terms were on nominations, and with President Trump it was 64 percent. It has just gotten higher.

I mean, here you have 100 talented people coming together with all their experience in the world, and we just spend an incredibly, tediously slow nomination process instead of putting all those talents to work on legislation to make America better.

Senator MERKLEY. One of the things mentioned was the Privileged Calendar and how it was reformed, that was intended to work better but did not work so well, and there are some ideas in your testimony about how we could improve that. Could any of you elaborate?

Ms. MATTINGLEY. I am happy to go ahead and take that one. We do think there are a couple of ways that you could think about reforming the Privileged Calendar currently. Right now we could think about raising the number of Senators it takes to refer a nominee back to committee. As mentioned earlier, the nominees that go onto the Privileged Calendar are not going to committee first, but a Senator can request that they go back to committee. You could also look at making that request referral come from a member of the committee of jurisdiction who is going to be overseeing that.

We also think that more positions could be added. One of the groups of positions that is on the Privileged Calendar are part-time boards and commissions. Think about National Council of the Humanities. There are all these boards and commissions that Congress has created multiple positions on, and many of those positions have advice and consent requirements from the Senate. But a lot of these boards and commissions currently are vacant. They do not actually have anybody sitting in there on them.

Some of these are positions that do not need to be confirmed, because they are not the top agency folks who are overseeing these large agencies with significant management experience, these are part-time folks. We could certainly look at some of those positions, about both whether they need to be converted to a different type of political appointment or if they should be moved to an improved Privileged Calendar for faster consideration.

Senator MERKLEY. But what I have seen in the testimony was that the actual time for folks on the Privileged Calendar is slower than those who go to committee, and it is slower now than when that reform was passed. Just getting fewer people, or more people on the Privileged list does not help us.

Ms. MATTINGLEY. That is correct. That is why one of our recommendations is for a lot of these boards and commissions that are part-time, for persistently vacant positions, for positions like chief financial officers, chief information officers, where a vast majority are already not Senate-confirmed—we think those are ripe for consideration of moving to a different type presidential appointment and moving them away from needing Senate confirmation.

Senator MERKLEY. Yes. Thank you. Just earlier today we were having a conversation in Foreign Relations Committee about the damage that is being done to our competition with China because they have Ambassadors in place, working hard, in so many countries, where we have so many vacancies. Just an example of how there was a bipartisan conversation earlier today about the damage being done to the United States' interests because of this broken nomination process.

Somehow we have to find a way to overcome our partisan instincts in a very partisan world, and I think now is a great time, when we do not know who will be in charge. I am really glad we are holding this hearing.

Chairwoman KLOBUCHAR. Okay. Thank you. Thank you, Senator Merkley, for your leadership in this area for so long. I am just hoping something is going to happen where we can move on one of these proposals, and one of these days we are going to be victorious

because no one wants to come—they did not run for the Senate to run an employment agency, year after year after year.

Senator Butler, you are next. Senator Butler is here with us for a short period of time. She has a very big interest in moving this along.

Senator BUTLER. Thank you, Senator Klobuchar and Ranking Member Fischer, for today's hearing. I am sure my appearance at today's hearing was a little curious for folks. Not only do I take my service to the Committee seriously, and to the chamber, but this is actually one of the areas that I am dumbfounded by. I have been trying to understand, through conversations with my colleagues, Committee Members, how does this work, how does these rules get created, why do we do it this way.

To be here and to be able to ask questions here, from people who are actually looking at this objectively, with the intention of trying to further enable this body to do the people's work, it was an opportunity that I could not pass up.

Senator Klobuchar appropriately characterized it. My time here is short, and I want to have as great an impact on doing the work of the people of California and the people of this country, in as an impactful way as I possibly can. That being said, I have not only been dumbfounded but have reached times of great frustration trying to understand exactly how to do that.

I serve on the Judiciary Committee, where many district courts in California have vacancies, and have had longstanding vacancies, and vacancies that truly create a delay in justice for California residents. This is not just an exercise in trying to understand the processes of the Senate. It truly is about how do we do the best job that we can, for the most people that we can, to, in my opinion, further enable the functions of government on behalf of the people who need it most.

Here are my questions.

There was a set of potential solutions that were outlined in some of the documents, and in conversations that I have had with my colleagues, solutions that have been proposed in the past, solutions that have not yet been proposed but are under examination.

Mr. Stiff, I just wanted to note, there was this sort of question of reducing the number of Senate-confirmed positions, and we have had some conversation and questions about that. I would like to know your thoughts about Ms. Mattingley's, just last comment, about reducing the number of positions that go to advice and consent, or could be sort of just left to the executive office to figure out.

You talked about a standing question. But when I think about my service on Homeland Security, for example, and our responsibility of oversight of the United States Postal Service, there is a board of directors for the United States Postal Service and then there is Postal Service commission, both requiring hearings and the like. Talk to me a little bit about some of those more secondary positions, like the commission. How do you respond, or how would you apply your response to Senator Fischer in situations where there potentially are redundancies and positions that have been vacant for a while, and Ms. Mattingley's sort of reference in her last comment?

That is a lot, but I am really just trying to—I want to understand how your opinion on standing applies across the spectrum of duties and appointments.

Mr. STIFF. Sure. The sort of fundamental question, right, is whether there is another appointment methods that the Constitution allows for a given position. That is answered by determining whether the person we are talking about is a principal officer versus an inferior officer. I cannot speak to any particular position here today. But in the past the court has determined whether someone is subject to direction and supervision by another principal officer by asking, for example, can they be removed by that other person? Does that other person review and have the ability to revise the decisions they make? Do they exercise other sorts of administrative control, like establishing procedures, that the person we are looking at has to follow?

Those are all the sorts of direction and supervision questions you would consider if you were looking at a given position, to say can we change the appointment method without running afoul with the Appointments Clause.

Senator BUTLER. Thank you, Madam Chair. I intend to submit a couple of questions to the record for the——

Chairwoman KLOBUCHAR. Okay. If you have an extra one, that is fine.

Senator BUTLER. No. I will submit them to the record. I know we are trying to move along.

Chairwoman KLOBUCHAR. Yes. We are trying to show how we can be efficient in the Senate.

Senator Fischer, did you want to ask anything? Okay, good.

Senator Merkley and I were just talking, in a very constructive way, just how we really have to move on this soon if we are going to, obviously in the fall, in September, if we are going to make even minor changes to confirmation. It would take a lot of people agreeing. I just think it would be so smart. As we know, many of these have passed when we did not know what the outcome of an election was, and as I noted, the other alternative is one party or the other, if they end up winning, we are just going to have to do something, because it is just so unfair to people who are up for these positions. It is so unfair to the country. It so hurts our competitiveness and our security interests internationally when we hold these off. There are a lot of Senators interested in moving on this, so we will make it our job to try to figure out, with Senator Fischer, if there is anything we can do before this election.

But I really appreciated your thoughtful commentary today, and thank you for the productive hearing. I look forward to continuing to work with my colleagues on this Committee in a bipartisan manner to ensure the Senate functions efficiently. We are always good when there is something sudden that comes up we have to do, but it is grinding, day in and day out, and some of these major issues are just left out there, where I think we could come together on something on housing or childcare, budget issues. It just becomes very frustrating for everyone.

With that, thanks for your ideas and your thoughtful discussion. The hearing record will remain open for one week, and we are adjourned. Thank you.

[Whereupon, at 3:44 p.m., the hearing was adjourned.]

APPENDIX MATERIAL SUBMITTED

PARTNERSHIP
FOR PUBLIC SERVICE

Jenny Mattingley

Vice President of Government Affairs

Partnership for Public Service

Written statement prepared for

The U.S. Senate Committee on Rules and Administration

Hearing entitled,

"Senate Procedures to Confirm Nominees"

July 30, 2024

Introduction

Chairwoman Klobuchar, Ranking Member Fischer, and members of the Committee on Rules and Administration, thank you for the opportunity to appear before you today to discuss Senate procedures for confirmation of positions subject to the advice and consent of the United States Senate.

I am Jenny Mattingley, Vice President of Government Affairs of the Partnership for Public Service, a nonpartisan, nonprofit organization dedicated to building a better government and stronger democracy. The Partnership is home to the Center for Presidential Transition, the premier nonpartisan source of knowledge and resources on the transitioning of government from one administration to the next – whether it be a transfer of power to a new administration or a transition to the second term of a presidency. The Center also focuses on data, policies and practices that underpin transitions, the confirmation process, and the political appointee vetting process – identifying barriers and opportunities to making these processes more effective for the Senate and the executive branch.

One area of particular focus for the Center is the role of leadership across the federal government. Strong leadership is key to the success of any organization, including political appointee roles at each federal agency. One of the more significant responsibilities of a president is the vetting, selection and appointment of political appointees, totaling around 4,000 – far greater than any other modern democracy. Of these appointees, over 1,300 are subject to the advice and consent of the Senate before they assume their duties.

Filling these positions would be a daunting task under the best of circumstances. In today's dangerous world of escalating crises, it is a race against time. Yet with each successive president, the Senate confirmation process becomes more arduous. This is true for nearly all nominees, including those for senior national security positions. The work required to select, nominate and vote on presidential appointees is longer, more complicated and more uncertain. Many positions remain vacant for months or years; some will never be filled. Presidents may intentionally leave positions vacant or rely on a succession of temporary officials in the absence of a Senate-confirmed leader.

Under the current system, each stakeholder in the process loses: the Senate, the executive branch, the public, and individuals who step up to serve our country as appointees. The broken process is undermining the Senate's constitutional powers, both because it has led to executive branch efforts to sidestep Senate confirmation altogether by relying on non-confirmed officials, and because the extraordinary amount of time being spent on nominations is time lost from the Senate's role of legislating. Agencies suffer from gaps in leadership that hobble long-term planning and the execution of the responsibilities Congress has assigned them, which is a disservice to your constituents. Moreover, the increasingly laborious experience that nominees—and their families—experience in going through the confirmation process discourages qualified individuals from wanting to accept a nomination.

Improving the Senate confirmation process is not just a good government initiative – it is a national security, public health and economic imperative. Our government needs capable leaders to address the country's most urgent needs and to act in moments of crisis. However, even non-controversial nominees will face long, arduous paths to confirmation, and some positions will never have a nominee at all. Improving this process can bolster the Senate's constitutional responsibilities, strengthen government and encourage talented individuals to enter public service.

In 2011, the Chairs and Ranking Members of the Rules Committee and the Homeland Security and Governmental Affairs Committee, along with the then-Majority and Minority leaders, joined in a bipartisan push to improve the appointments process. That bipartisan effort led to enactment of S. Res. 116,[1] creating the Privileged Calendar to expedite confirmation procedures for around 300 nominees, and the passage of the Presidential Appointment Efficiency and Streamlining Act of 2011,[2] which reduced by over 160 the number of positions subject to Senate confirmation. More work is needed to build on these past efforts.

Key recommendations I highlight in this testimony are:

- Develop a model for "bundling" nominations, which would allow for at least some nominations to be batched together for a final vote on the Senate floor.
- Improve the Privileged Calendar and pursue other changes to Senate processes for executive branch nominations that could win broad bipartisan support.
- Reduce the number of positions subject to Senate confirmation – modeling on the bipartisan effort led by Rules Committee leaders in 2011.
- Revisit the 2012 and 2013 recommendations of the Working Group on Streamlining Paperwork for Executive Nominations.[3]
- Increase transparency into the leadership of our government and the appointments process, while also strengthening agency accountability to Congress during vacancies by improving the Federal Vacancies Reform Act.

Some of these recommendations fall outside of the jurisdiction of the Rules Committee. Some implicate Senate procedures, some require action by both houses of Congress, and some can be addressed through Executive Branch attention. The range of proposals is offered to help show the bigger picture of potential improvements to the vetting, nomination and confirmation of an appointee.

Your hearing today will help inform how we might increase the efficiency of getting qualified political leaders in place. My testimony today will summarize the Partnership's latest research showing that the confirmation process, for civilian executive branch nominees, is in dire straits. I will also discuss the consequences of the dysfunction and offer solutions to help get qualified individuals in place expeditiously while also preserving the Senate's advice and consent role.

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[1] S. Res. 116, 112th Congress.
[2] Presidential Appointment Efficiency and Streamlining Act of 2011, Public Law No. 112-166.
[3] The Working Group was established by Sec. 4 of the Presidential Appointment Efficiency and Streamlining Act of 2011, Public Law No. 112-166.

The Scope of the Problem

Since 2008, the Partnership and our Center for Presidential Transition have worked to improve presidential transitions. We study each transition and provide, on a nonpartisan basis, information on what has and has not worked to transition teams, incoming and outgoing administrations, career agency transition officials, Congress, the media and the public. We have produced a significant body of research reports, documenting the growing challenges that each president faces in filling Senate-confirmed positions. Also, the Center for Presidential Transition, with the Washington Post, maintains a political appointee tracker to follow the progress of key Senate-confirmed positions.[4] Today, we track roughly 800 Senate-confirmed positions, including Cabinet secretaries, deputy and assistant secretaries, heads of agencies, ambassadors and other critical leadership jobs. This tool, along with our other research, has helped us uncover key confirmation trends which have informed this testimony.

We think a few statistics and charts tell the story.[5]

The number of Senate-confirmed positions has grown for decades.

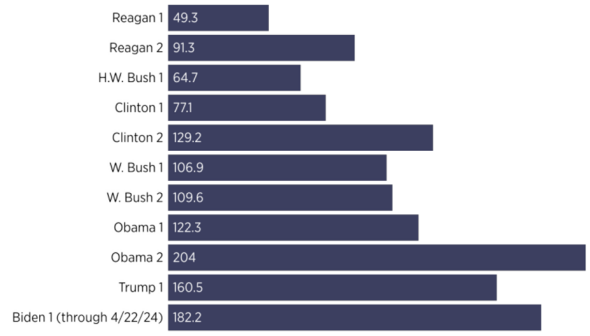
When Congress reorganizes federal departments and agencies, creates new agencies, adds new responsibilities or establishes positions to implement laws and programs, it has the ability to determine which politically appointed positions will be subject to Senate confirmation. Between 1960 and 2020, the number of Senate-confirmed positions increased by over 70%, from 779 to 1,340.[6]

The Senate confirmation process takes longer in each successive presidential administration.

It takes the Senate nearly four times as long to confirm or reject a nominee today as it did during President Ronald Reagan's administration. During President Biden's first term in office to date, the Senate took an average of 182 days to confirm nominees compared with 49 days during the first term of President Reagan.[7]

[4] https://www.washingtonpost.com/politics/interactive/2020/biden-appointee-tracker/
[5] Additional information and data on confirmations included in the Appendix to this testimony.
[6] David E. Lewis, "Political Appointees to the Federal Bureaucracy," Feb. 20, 2024, University of Chicago Center for Effective Government Democracy Reform Primer Series. Available at https://effectivegov.uchicago.edu/primers/political-appointees-to-the-federal-bureaucracy
[7] Chris Piper, "Taking stock of the vacancy crisis across cabinet departments," April 25, 2024. Available at https://presidentialtransition.org/blog/taking-stock-of-the-vacancy-crisis-across-cabinet-departments/

Average Days to Confirmation Across Terms of Last Seven Administrations



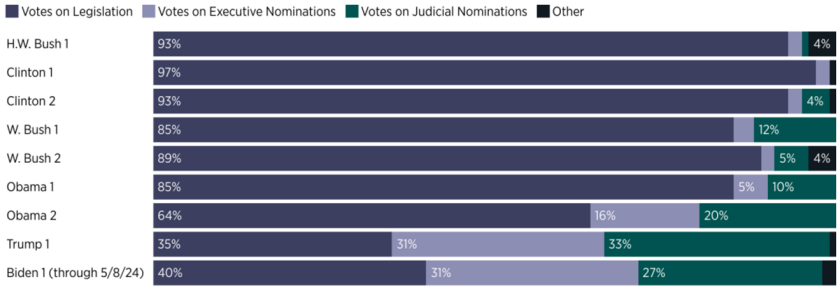
Note: Data excludes judicial, military, U.S. marshal and U.S. attorney nominees.
Source: Partnership for Public Service

In a stark break from the past, the percentage of Senate votes on nominations now far exceeds votes on legislation.

Procedural votes, cloture votes to end debate and direct votes on presidential nominations made up 64 percent of all recorded Senate votes during President Trump's administration, and 58 percent so far into President Biden's administration. This compares with just 15 percent during the first term of George W. Bush's presidency and 14 percent during Barack Obama's.

Meanwhile, votes on amendments, to end debates and for final passage of legislation accounted for only 35 percent of all recorded votes during Trump's first term in office and 40 percent during Biden's time in office so far, compared with about 85 percent during the first term of both the W. Bush and Obama administrations.

Distribution of Recorded Votes Across Terms of Last Six Administrations



Source: Partnership for Public Service analysis of data from govtrack.us.

Layers upon layers of nominees create extended delays in confirmation of lower levels.

The overall length of time to confirmation has increased on average – although the delays are not standard for every position. While Cabinet secretaries and other high-profile positions are likely to move through the process in a timely way, lower-level positions and positions on part-time boards and commissions take much longer because they are generally a lower priority.

In the Biden administration, Cabinet secretaries and deputy secretaries took about 19 days and 59 days, respectively, to be confirmed. However, those further down the leadership hierarchy (e.g., assistant secretaries and directors), took around 200 days on average to be confirmed. This leaves many of the positions closest to agency operations vacant for extended periods of time. For example, it took President Biden's nominees an average of 505 days, from inauguration day to confirmation, to assume the six deputy undersecretary positions in the Department of Defense.[8]

Senate confirmed positions are vacant more frequently and for longer periods.

The growing challenges faced by executive branch nominees in the Senate confirmation process leave important agency leadership positions vacant for extended periods of time. This creates a leadership vacuum for the agencies tasked with carrying out the fundamental roles of government, from national security to infrastructure to health and safety, and means a new administration has less ability to implement its policy priorities.

Many of the most important positions across Cabinet departments face regular vacancies. Four Cabinet departments had 30% or more of their positions vacant as of March of this year. At the equivalent date during Trump's fourth year, nine Cabinet departments had 30% or more of their positions vacant.[9]

My organization has identified 83 positions requiring Senate confirmation that were vacant at least 50% of the time between the beginning of President Obama's administration (January 2009) and the first two years of the President Biden's administration (January 2023). This means these positions were vacant for at least half of this 14-year period. These positions range from the heads of major Cabinet bureaus to the chief financial officers of Cabinet departments.[10]

Extremely long-term vacancies invite questions about whether a position needs to be subject to Senate confirmation. For example, the position of assistant attorney general for the tax division at the Department of Justice has been vacant 84 percent of the time between 2009 and 2023.

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[8] Partnership for Public Service, Center for Presidential Transition, "Layered Leadership: Examining How Political Appointments Stack Up at Federal Agencies," Feb. 20, 2024. Available at https://presidentialtransition.org/reports-publications/layered-leadership-examining-how-political-appointments-stack-up-at-federal-agencies/

[9] Chris Piper, "Taking stock of the vacancy crisis across cabinet departments," April 25, 2024. Available at https://presidentialtransition.org/blog/taking-stock-of-the-vacancy-crisis-across-cabinet-departments/

[10] Partnership for Public Service, Center for Presidential Transition, "Persistently Vacant: Critical federal leadership positions go unfilled for years," July 9, 2024. Available at https://presidentialtransition.org/reports-publications/persistently-vacant-critical-federal-leadership-positions-go-unfilled-for-years/

Presidents have relied largely on career members of the senior executive service to lead the division.

Longer delays and increased conflict over nominees lead to fewer first-year confirmations.

The Senate has confirmed a lower and lower percentage of nominations in the first year of administrations: The Senate confirmed 75% of President Bush's first-year nominees, 69% of President Barack Obama's first-year nominees, 57% of President Donald Trump's first-year nominees 55% of President Joe Biden's first-year nominees.[11]

Part-time board and commission positions see lengthy delays in confirmation.

Positions on part-time boards and commissions similarly take much longer to be confirmed than other positions.[12] In the last three administrations, these positions have had an average confirmation delay of over 200 days. Seven part-time boards and commissions have a confirmation delay of over 300 days on average since the George W. Bush administration. With lengthy delays in confirmation, many of these boards and commissions cannot operate as designed and others appear to be a low priority. For example, the National Association of Registered Agents and Brokers Board of Directors has not had a nominee confirmed to the board since it was created in 2015.

Consequences of Dysfunction

The Senate's advice and consent role, contained in Article II, section 2 of the Constitution, reflects the founder's vision of a system of checks and balances, where the Senate and the president share appointing power. The framers intended to give presidents the ability to staff their administrations, while limiting their ability to appoint unsuitable officials or candidates presenting conflicts of interest. The broken Senate confirmation of today harms effective governance in a number of ways.

The dysfunction of the confirmation process undermines the Senate's constitutional role. As I explained in my introductory comments, the dysfunctional confirmation process weakens the Senate's constitutional powers. First, the slowness of the process means that the president's personnel team must focus on the highest-priority positions, while nominations for other positions may take hundreds of days or never be forthcoming. Vacancies result in roles being performed by non-confirmed officials, often for extended periods. All of this undermines the Senate's advice and consent role, as well as hampering ongoing oversight when positions remain vacant. Second, the sharp rise in the percentage of floor votes on nominations takes time away from the Senate to spend floor time on legislation.

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[11] Partnership for Public Service, Center for Presidential Transition," Joe Biden's First Year in Office: Nominations and Confirmations," Jan. 9. 2022. Available at https://presidentialtransition.org/reports-publications/joe-bidens-first-year-in-office/

[12] Partnership for Public Service, Center for Presidential Transition, "Empty Seats: Slow Confirmation Process Leaves Many Part-Time Boards and Commissions with Vacancies," Dec. 20, 2023. Available at https://presidentialtransition.org/reports-publications/empty-seats/

The leadership gaps resulting from the broken confirmation process strain federal agencies. While a president can install temporary, "acting" leadership to fill these gaps, these officials cannot fully replace confirmed officials. Former commandant of the Coast Guard, Thad Allen, explained that when vacancies arise, "people who are in an acting capacity feel they do not have the power to make long-term changes and do what they need to do."[13]

This calls to mind an analogy that Max Stier, the Partnership's president and CEO, often uses – that of substitute teachers. We all recall a time when we had a substitute teacher and the difference in how the classroom was managed and how much was accomplished. It's no different for agencies. Acting officials may be skilled professionals—often they are drawn from the most well-respected ranks of career officials, especially at the start of an administration—but they are not perceived by those around them as having the full authority of the confirmed appointee, and they do not view themselves as having the right to make decisions with long-term impact. They also work under the strain of being dual-hatted, assuming the role of the vacant position while continuing to ensure the execution of their permanent position.

Vacancies have numerous ripple effects. In particular, they slow decision making and strategic planning, ultimately diluting the agency's ability to best serve the public interest. A sense of impermanent leadership can negatively affect employee morale – especially if no nomination is forthcoming, making employees wonder whether their agency is a priority.[14] Another impact of long-term vacancies at an agency is that decisions about filling other senior leadership positions are sometimes put on hold, especially when the vacancy is in the top leadership of the agency. Furthermore, excessive reliance on acting officials, or officials "performing the duties of the office," can invite legal challenges and raise questions about who is accountable to Congress and the public for performance of duties.

National security risks intensify when key officials are not in place. In 2004, a bipartisan commission issued its report the attacks on the United States on September 11, 2001.[15] One of the 9/11 Commission's most notable findings was that the Bush administration "like others before it—did not have its team on the job until at least six months after it took office." Key deputy Cabinet and subcabinet positions remained empty until the spring and summer of 2001, less than two months before 9/11. The Commission concluded that because "a catastrophic attack could occur with little or no notice, we should minimize as much as possible the disruption of national security policymaking during the change of administrations by accelerating the process for national security appointments." Despite the 9/11 Commission's call to action, the percentage of top national security positions confirmed by the twentieth anniversary of the attack in 2021 was only 27%,

[13] Partnership for Public Service, "Government Disservice: Overcoming Washington Dysfunction to Improve Congressional Stewardship of the Executive Branch," September 2015, p. 29. Available at https://ourpublicservice.org/publications/government-disservice/

[14] Chris Piper and David E. Lewis, "Do Vacancies Hurt Federal Agency Performance," June 24, 2022, Journal of Public Administration Research and Theory. Available at https://academic.oup.com/jpart/article-abstract/33/2/313/6617662?redirectedFrom=fulltext

[15] The 9/11 Commission Report: Final Report of the National Commission on Terrorist Attacks Upon the United States (9/11 Report) (July 22, 2004). Available at https://www.9-11commission.gov/report/911Report.pdf

compared to 57% on the day of the attack in 2001. Although the percentage rose to 67% by the end of President Biden's first year, we still fall short in addressing the 9/11 Commission's concern.[16]

The grueling confirmation process discourages qualified candidates from accepting a presidential appointment. Serving the American people as a presidential appointee is a privilege, and it comes with the responsibility of public trust. It is appropriate that individuals nominated for these important positions are subject to the Senate's review and scrutiny. Many former appointees have told us that serving the public in a presidential appointment was the toughest job they had ever had, but also the most rewarding.

However, the confirmation process as it works today is taking a toll on nominees, and on their families, which can discourage or prevent talented people from serving. Nominees must divulge personal information and subject their lives and families to public scrutiny. Many take leaves of absence from jobs or leave jobs altogether to avoid even the appearance of a conflict of interest, thus reducing their income; hire lawyers and accountants to ensure their paperwork is free from error; sell assets and take other steps to mitigate financial conflicts; and make plans to move their homes and families at personal expense – only to wait weeks, months or even longer, with no clear indication of when or if the Senate will consent to, or even consider, their nomination.

Taken together, the data on, and the consequences of, the current confirmation process point to an area that is ripe for reform.

Recommendations for Reform

Outlined below are options to improve the process for presidential appointments while maintaining, and potentially strengthening, the Senate's role in ensuring the qualifications of individuals selected to serve in the highest political positions in our government.

We'll begin with some ideas that fall within the jurisdiction of the Rules Committee.

1) Develop a "bundling" approach for the batching of some nominees for final vote.

Even with a reduced number of appointees subject to Senate confirmation, those who remain subject to advice and consent will face gridlock. The norms of the Senate have changed dramatically and gone are the days when Senators would vote for a president's qualified nominees out of respect for the office, even if they were of a different party or had strong policy disagreements with the nominee. The process is long and hard even for nominees who ultimately are confirmed by unanimous consent or with overwhelming support in the Senate. In light of the shift in norms, a

[16] Partnership for Public Service, Center for Presidential Transition," Joe Biden's First Year in Office: Nominations and Confirmations," Jan. 9. 2022. Available at https://presidentialtransition.org/reports-publications/joe-bidens-first-year-in-office/

shift in processes is not only reasonable but is necessary to make the confirmation process more manageable.

Senator Klobuchar has put forth a proposal that would allow the bundling of up to ten nominees from a committee to move to final vote.[17] This would allow a package of nominations to be put forth at once and voted on by majority vote, whereas now a package needs unanimous consent to move forward, meaning that a single Senator could block consideration of the package. The Partnership thinks this is a promising concept for consideration of executive branch nominations and potentially could be used for nominees on the Privileged Calendar and other categories of nominees.

2) Improve the Privileged Calendar and pursue other changes to Senate processes for executive branch nominations that could win broad bipartisan support.

We know that discussion of any changes to Senate rules or processes has been difficult within the institution. A conversation on potential changes is needed to determine whether bipartisan agreement can be reached on improvements to the confirmation process. In addition to bundling, areas of discussion should include:

***The Privileged Calendar*:** One obvious opportunity for improvement is the Privileged Calendar, which was established to expedite the consideration of nominees to noncontroversial positions but instead, has made those positions harder to fill.[18] The Privileged process was an innovation created by the Senate in 2011 to streamline the consideration of nominees to nearly 300 positions. While committees still review paperwork and qualifications of these nominees, the privileged process allows the nominees to be placed on the Senate's Executive Calendar unless a Senator requests referral to committee within ten session days of the completion of the nominee's paperwork. Once on the Executive Calendar, they wait with all other nominees for a final vote, and with limited floor time, it is likely that higher-profile positions are prioritized. In fact, the Partnership's 2022 research into these nominees shows that privileged nominees take longer to confirm now than they did before the privileged procedures were instituted, and privileged nominees continue to take longer to confirm than nominees subject to the regular confirmation process.[19]

The Senate should look for ways to create a more streamlined floor process and final vote for the privileged nominations – the bundling concept is promising here. Also, under the privileged process, any Senator can make a request for referral of a privileged nominee to committee. The Senate should raise the number of Senators it takes to refer a nominee to a committee and could also require that a request for referral come from a member of the committee of jurisdiction. Then,

[17] S. Res. 219, 118th Congress.
[18] S. Res. 116, 112th Congress.
[19] Carter Hirschhorn, Partnership for Public Service, Center for Presidential Transition, "(Not so) privileged nomination calendar," July 26, 2022. Available at https://presidentialtransition.org/reports-publications/not-so-privileged-nomination-calendar/

combined with these improvements, the Senate should add more positions to the list of nominees who go through the privileged process. And finally, as noted above, Congress should consider whether there are positions currently on the Privileged Calendar that could be converted to non-confirmed political appointments or career roles.

***The rule on returned nominations*:** The Senate should modernize its rule on returning nominations to the President, which dates back to 1868. Under Senate Rule XXXI, clause 6, nominations pending when the Senate adjourns sine die at the end of a session (1st or 2nd) or recesses for more than 30 days are returned to the President unless the Senate waives the rule by unanimous consent. Often, the return of a nomination has nothing to do with the qualifications of the nominee but results from delay over unrelated issues. Due to increasing confirmation delays, the number of returned nominations has increased significantly. Only seven nominations were returned in the first years of the W. Bush and Obama administration combined, while Trump and Biden had 85 and 118 nominations returned respectively. The return of the nominations places an additional burden on the Presidential Personnel Office, the Office of Government Ethics, agency ethics officers and the nominees, who in many cases must refresh financial disclosures. Re-nomination of those who have already been reported by committee also creates more unnecessary work for the committees. The Senate should revisit the rule and consider limiting its application to the end of the 2nd session and/or raising the number of Senators required to block waiver of the rule.

***Potential expedited procedures for early in a president's first term*:** Another option for the Senate could be to create special expectations or procedures for the first months or year of a presidential term. For example, Congress could revisit provisions of the Intelligence Reform and Terrorism Prevention Act of 2004, which included a sense of the Senate that administrations submit nominations for high-level national security positions, through the level of undersecretary, by Inauguration Day and encouraged the full Senate to vote on these positions within 30 days of nomination.[20] Congress could consider whether this expectation could be established for a broader set of national security positions. Also, given that any incoming president will face unique challenges—e.g., the economic crisis in 2009 or the pandemic in 2020—the Senate similarly should commit to the expedited consideration of all nominees identified by the incoming president as priorities and whose paperwork is submitted by Inauguration Day.

***Justifications for new statutorily-created presidential appointees*:** S. Res. 116, adopted by the Senate in 2011, provides that committees need to identify and justify the creation of new Senate-

[20] Public Law No. 108-293, Sec. 7601. The IRPTA sense of the Senate is a variation on a recommendation of the 9/11 Commission. The Commission recommended that a president-elect should submit the nominations of the entire new national security team, through the level of under secretary of cabinet departments, not later than January 20, and that the Senate, in return, should adopt special rules requiring hearings and votes to confirm or reject national security nominees within 30 days of their submission. The 9/11 Commission Report, supra note 15, p. 422.

confirmed positions.[21] Our review of Senate-confirmed positions created since 2011 found scant evidence of these types of justifications in committee reports. The Rules Committee could play an important role in educating other committees on this obligation and should consider stronger mechanisms to enforce it. Creating a position with Senate-confirmed status may be the default approach; instead, committees should carefully consider whether a position needs to be subject to advice and consent. The Rules Committee also could ensure that there is a public report at the end of each session (or at the end of a Congress) on the total number of new Senate-confirmed positions created, so that Congress understands the new confirmation responsibilities being placed on both the presidency and the Senate.

***Other areas for Committee exploration*:** There are several additional potential reform areas that could be explored by the committee for additional discussion and research. Again, we know that discussions related to Senate processes—even processes not ensconced in the Senate Rules—are always delicate. We remain optimistic, though, that healthy conversations such as today's hearing will lead to agreement on some changes that would make a real difference. These might include:

- Is it necessary to have both a cloture vote and a final vote on a nomination if the threshold is the same?
- Does there need to be an intervening day between the placement of a nomination on the Executive Calendar and consideration by the full Senate?[22]
- What other process changes could facilitate final Senate consideration, when vetting and consideration by the committee of jurisdiction have been conducted?

3) Reduce the number of positions subject to Senate confirmation.

Procedural changes must be accompanied by a reduction in the number of positions subject to advice and consent. Improved processes will be of negligible benefit if the overall number of positions requiring Senate confirmation remains unmanageable.

I note that while the Presidential Appointment Efficiency and Streamlining Act, the last successful piece of legislation to reduce the number of Senate-confirmed positions, was referred to the Committee on Homeland Security and Governmental Affairs, the primary sponsors of the bill were the then-Chairman and Ranking Member of the Rules Committee, Senator Charles Schumer and Senator Lamar Alexander. The reduction of Senate-confirmed positions was paired with creation of the Privileged Calendar as an overall reform package.

Reducing the number of unnecessary confirmations would enhance, not undermine, the Senate's advice and consent function by allowing the Senate to focus on the hundreds of high-level positions that warrant scrutiny due to their responsibilities and authorities. Positions converted to

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[21] S. Res. 116, 112th Congress. Sec. 4 of the resolution states that the report accompanying each bill or joint resolution of a public character reported by any committee shall contain an evaluation and justification made by such committee for the establishment in the measure being reported of any new position appointed by the president within an existing or new federal entity.

[22] Rule XXXI, clause 1.

presidential appointments not requiring Senate confirmation would be filled more efficiently, instead of positions remaining "vacant" while other unconfirmed appointees or career officials perform the duties of the position with little visibility to Congress. Congress would still have ample means to hold these presidential appointees accountable through its legislative, appropriations and oversight functions.

Several categories of nominees are ripe for consideration:

***Positions reporting to multiple other layers of Senate-confirmed positions*:** In many cases, a Senate-confirmed official reports up the chain to layers of other Senate-confirmed officials. For example, the Department of State has 26 positions four levels down. The Department of Defense has 17 positions five levels down.[23] In reviewing which positions should be subject to advice and consent, we recommend that the Senate start with the presumption that positions at the Assistant Secretary level or below—who typically report to multiple layers of Senate-confirmed officials—be presidential appointees but not subject to confirmation. This presumption could be overcome on a case-by-case basis by examining a position's unique responsibilities and authorities, which the Senate may decide should be subject to advice and consent.[24]

***Part-time boards and commissions*:** The Senate should also examine the multitude of boards and commission positions across the federal government, many of which are advisory or ceremonial. Many of these positions could be converted to nonconfirmed roles or to positions appointed by an agency-confirmed leader. In many cases, boards or commissions may have close to a dozen or more Senate-confirmed positions. For example, the Advisory Board for Cuba Broadcasting is administratively inactive and has not had someone confirmed to the board since 2005. Our Center for Presidential Transition report, Empty Seats, provides a full picture of vacancies on part-time boards and commissions.[25]

***Persistently vacant positions*:** The Senate also should examine appointee positions subject to advice and consent that have been chronically vacant to determine whether those positions should be converted to nonconfirmed status, career status, or even eliminated. For example, the deputy director of the National Science Foundation has been vacant since 2014. Our recent report

[23] Partnership for Public Service, Center for Presidential Transition, "Layered Leadership: Examining How Political Appointments Stack Up at Federal Agencies," Feb. 20, 2024. Available at https://presidentialtransition.org/reports-publications/layered-leadership-examining-how-political-appointments-stack-up-at-federal-agencies/

[24] Consistent with this approach, the 9/11 Commission recommended that positions in national security below Executive Level 3 (level of under secretary) not be subject to Senate confirmation. The 9/11 Commission report, supra note 15, p. 422.

[25] Partnership for Public Service, Center for Presidential Transition, "Empty Seats: Slow Confirmation Process Leaves Many Part-Time Boards and Commissions with Vacancies," Dec. 20, 2023. Available at https://presidentialtransition.org/reports-publications/empty-seats/.

Persistently Vacant provides details on positions that have experienced lengthy and frequent vacancies .[26]

***Technical, management and operational roles that benefit from consistent leadership over time*:** The Partnership recommends that Congress consider whether these types of positions would be better filled by political appointments not subject to confirmation or career officials. Chief financial officers also should be candidates for these changes. Their duties provide consistent, apolitical services that involve long-term financial planning and technical expertise. The CFO positions also take longer than average to appoint and confirm, leaving widespread vacancies across government, another factor in favor of shifting to a different model for CFOs.

The Partnership also recommends that Senate committees consider whether some positions lend themselves to fixed terms with professional qualifications to promote continuity and competence and to reduce the administrative burden caused by frequent turnover. We also recommend that some positions, given their management or professional nature, be treated with the expectation that they should not turn over with a change in administration, just as Inspectors General are expected to stay on the job from one administration to the next.

Another model would be to establish a term that spans administrations, with clear expectations for performance. Senate-confirmed positions that would lend themselves to greater continuity may include positions that require deep technical or specialized expertise, oversee long-term strategic planning and provide consistent delivery of apolitical services. The line between policy development and operational responsibilities is extremely important to consider in determining which positions would be appropriate for these models intended to promote continuity of service. The Under Secretary for Health at the Department of Veterans Affairs is a good example, being responsible for administering a health care system with a budget of over $100 billion. Despite the importance of this position, it has been vacant for a total of over seven years since mid-2009.

***Positions whose counterparts across the government have already been converted to non-confirmed positions*:** Congress at times has been inconsistent in whether it requires positions to be subject to confirmation based on their roles. For example, some agency Chief Information Officers are subject to confirmation; others are not. Some Assistant Secretaries for Legislative Affairs are subject to confirmation; some are not. Where Congress has seen fit to convert most of a certain category of positions, it likely makes sense to convert the rest of them.

Our report Unconfirmed provides further discussion of considerations Congress should undertake in deciding which positions should be removed from the requirement of Senate confirmation.[27]

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[26] Partnership for Public Service, Center for Presidential Transition, "Persistently Vacant: Critical federal leadership positions go unfilled for years," July 9, 2024. Available at https://presidentialtransition.org/reports-publications/persistently-vacant-critical-federal-leadership-positions-go-unfilled-for-years/

[27] Paul Hitlin and Carlos Galina, "Unconfirmed: Why reducing the number of senate-confirmed positions can make the government more effective," Partnership for Public Service, Center for Presidential Transition, Aug. 9, 2021. Available at https://ourpublicservice.org/publications/unconfirmed/

4) Revisit the recommendations of the Working Group on Streamlining Paperwork for Executive Nominations.

The Presidential Appointment Efficiency and Streamlining Act set up a bipartisan Working Group on Streamlining Paperwork for Executive Nominations. The Working Group produced two papers with recommendations on paperwork and background investigations.[28] Both the executive branch and Congress should examine the extent to which progress has been made on the recommendations of the two reports, which include: working to eliminate overlap and duplication among the various executive branch and Senate forms that a nominee must complete; creating a presumption for a 10-year background investigative scope for appointees subject to confirmation; and varying the paperwork and investigative scope depending on the nature of the position. While progress has been made on some of these fronts, much more could be done to implement the Working Group's recommendations.

The Partnership also strongly supports the Working Group's recommendation on the creation of a smart form, which would automatically populate appointee answers to comparable questions across multiple forms. A smart form would improve vetting by keeping the White House, transition teams, agencies, and appointees apprised of uncompleted tasks and what is necessary for appointees to move forward. As stressed by the Working Group, though, the efficiency of a smart form would depend on reducing duplicative or overlapping questions such as those that ask for similar information but in a slightly different way.

5) Increase transparency into the appointments process while also strengthening accountability of Congress over vacancies by improving the Federal Vacancies Reform Act.

In 2022, Congress passed the Periodically Listing Updates to Management Act (PLUM Act)[29] to provide basic transparency into who serves in political appointments or senior career positions across the federal government. The law requires a new, on-line version of the directory known as the Plum Book, which has been printed only every four years since it was first produced in 1952 for Dwight Eisenhower, who asked for a list of positions he could fill in his administration. Each Plum Book was filled with errors—missing positions, mislabeled appointments, obsolete titles and offices—that remain uncorrected once the Plum Book was published. To its credit, the Office of Personnel Management produced the first iteration of the new PLUM Act database in 2023, within the time frame required by the new law.

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[28] Working Group on Streamlining Paperwork for Executive Nominations, "Streamlining Paperwork for Executive Nominations," (Nov. 2012), available at https://www.oge.gov/web/OGE.nsf/0/018B7C7EC03481F5852585B6005A1306/$FILE/243ff5ca6d384f6fb89728a57e65552f3.pdf; "Streamlining the Background Investigation Process for Executive Nominations," (May 2013), available at https://www.oge.gov/web/OGE.nsf/0/3D7F6F69527C2F59852587E30066712F/$FILE/PAS%20Working%20Group%20Report%20on%20Background%20Investigations.pdf

[29] Public Law No. 117-263, Title LIII, Subtitle B.

The PLUM Act, though, only calls for the information to be updated on an annual basis. Congress should provide resources for OPM to make further enhancements to the database so that it eventually can be a close-to-real time directory providing transparency into leadership roles, the organizational structure of agencies, vacancies, and acting officials. A timelier database would also be a better tool for presidential transition teams as they prepare to staff the administration.

Congress also should revisit the Federal Vacancies Reform Act (FVRA),[30] which governs when an official may temporarily serve in a position subject to Senate confirmation when the position becomes vacant. By limiting the categories of officials who can serve on an acting basis, and by placing time limits on the number of days an acting official can serve, the FVRA aims to encourage a president to nominate individuals to fill positions subject to advice and consent. Over the years, different provisions of the FVRA have proven to be ineffective or ambiguous.

Given widespread and lengthy vacancies in each modern presidency, Congress should revisit the terms of the Vacancies Act and its relationship to agency specific succession schemes. Major issues include (1) revisiting who is eligible to act on a temporary basis when a Senate-confirmed official departs a position; (2) clarifying the relationship between the FVRA and agency-specific statutes addressing authority to appoint an acting official or orders of succession; (3) more clearly delineating what responsibilities of the office can be delegated when the FVRA time limits run.

Conclusion

Thank you again for holding this hearing and for exploring the current state of the confirmation process more deeply. As it stands, dysfunction in the process undermines the Senate's advice and consent role and prevents presidents from effectively filling leadership roles across government. It is an inefficient use of the Senate's precious time, discourages qualified individuals from accepting a presidential appointment and creates inefficiencies in government operations that taxpayers are funding. We appreciate the Rules Committee's role in being careful stewards of the Senate's rules and other processes, and we look forward to working with you to find ways to effectuate a more efficient confirmation process.

[30] 5 U.S.C. §§ 3354-3349c.

Appendix

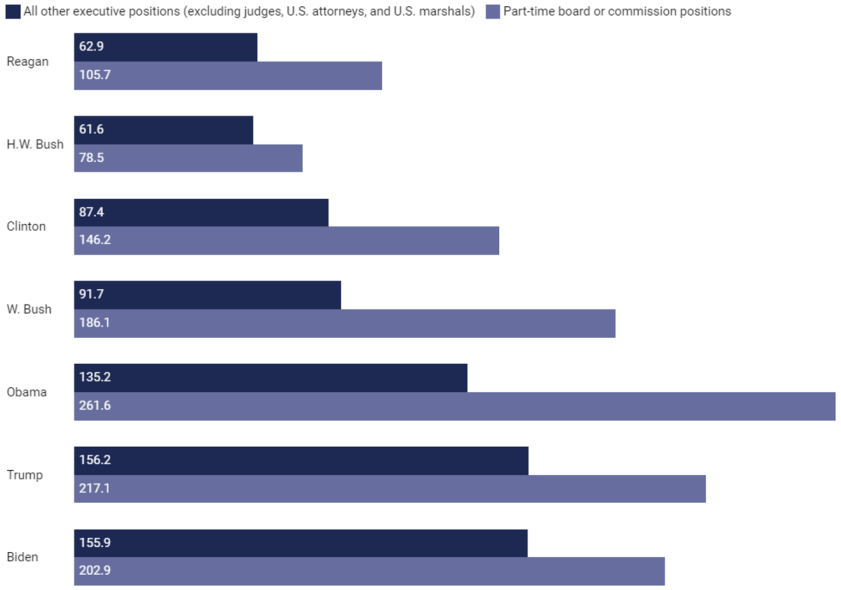
Average Appointment Delays During the Biden Administration for Senate-Confirmed Positions in Five Cabinet Departments with the Most Layering[31]

Layer	Time from inauguration to nomination (days)	Time from nomination to confirmation (days)	Total time to confirm (days)
Layer 1 (secretary)	0	18.6	18
Layer 2 (deputy secretary)	8	58.5	66.5
Layer 3 (undersecretaries, general counsel, certain directors and assistant secretaries)	190.4	162.7	349.7
Layer 4 (deputy undersecretaries, directors and assistant secretaries)	214.2	216.2	413
Layer 5 (directors and assistant secretaries)	253.1	186	404.5

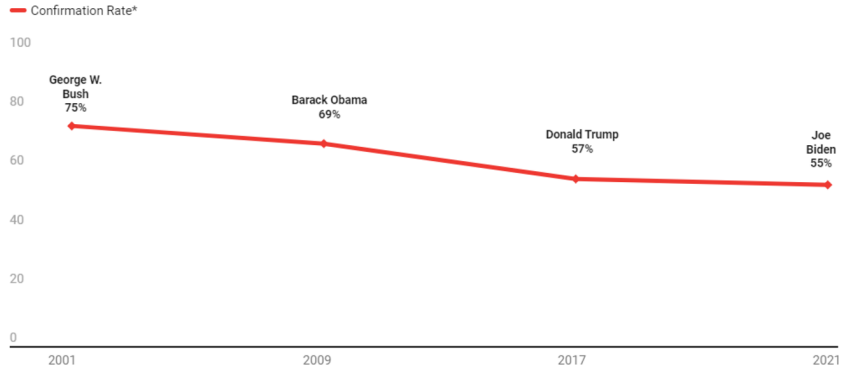
Note: Data updated through Feb. 7, 2024. Data from the Departments of Commerce, Defense, Energy, State and Treasury. Nomination delay is the time it takes the president from Inauguration Day to submit a nomination to the Senate. Confirmation delay is the time it takes the Senate to confirm a nominee from the time the president submitted the nomination. Time to confirmation is the time it takes from Inauguration Day to Senate confirmation.

[31] https://presidentialtransition.org/reports-publications/layered-leadership-examining-how-political-appointments-stack-up-at-federal-agencies/

Average Days for the Senate to Confirm Presidential Nominee by Type of Position[32]



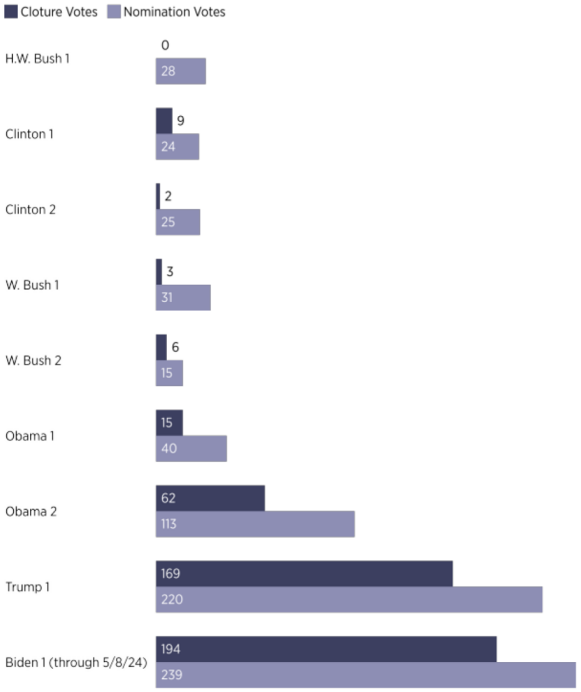
Percent of Nominations Confirmed in a President's First Year[33]



Note: Confirmation rate refers to the percentage of the first-year nominations confirmed in an administration's first year.

[32] https://presidentialtransition.org/reports-publications/empty-seats/
[33] https://presidentialtransition.org/reports-publications/joe-bidens-first-year-in-office/

Number of Recorded Cloture and Nomination Votes on Executive Nominees Across Terms of Last Six Administrations



Note: Data excludes military, U.S. marshal and U.S. attorney nominees.
Source: Partnership for Public Service analysis of data from govtrack.us.

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TESTIMONY

Statement of

Sean M. Stiff
Legislative Attorney

Before

Rules and Administration Committee
U.S. Senate

Hearing on

"Senate Procedures to Confirm Nominees"

July 30, 2024

Congressional Research Service
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Chairwoman Klobuchar, Ranking Member Fischer, and Members of the Committee:

My name is Sean Stiff, and I am a legislative attorney in the American Law Division of the Congressional Research Service. I am honored to testify at today's hearing to discuss Congress's authority to change the appointment method for federal offices currently appointed through Senate confirmation and possible implications for a decrease in such positions.

Writing in the *Federalist Papers*, Alexander Hamilton argued that "the true test of a good government is its aptitude and tendency to produce a good administration."[1] Producing "good administration," he argued, required an appointment method that would "promote a judicious choice" in federal office holders.[2] To Hamilton, the framework then proposed in the Constitution[3]—the Appointments Clause of Article II, § 2—struck the proper balance for selecting "Officers of the United States."[4] Lodging in the President the authority to nominate certain officers would fix in one person the "sole and undivided responsibility" of the choice of nominee.[5] Lodging in the Senate the power to then confirm the President's nominee would "be an excellent check" on evils that might arise from an appointment power vested only in the President.[6] Having to "submit the propriety" of the President's choice "to the discussion and determination of a different and independent body" would (for example) ensure that the President took care when nominating those subject to Senate advice and consent.[7]

Hamilton was not just a leading proponent of the Appointments Clause. He was the first to receive the Senate's advice and consent to head an executive department.[8] In the years since 1789, the number of positions subject to the Senate's advice and consent has increased substantially. In 2020, based on data supplied by the Office of Personnel Management (OPM), the House Committee on Oversight and Government Reform counted more than 1,100 positions in agencies and departments that were subject to the Senate's advice and consent.[9] Congress continues to establish new requirements for Senate confirmation.[10]

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[1] THE FEDERALIST NO. 76, at 455 (Alexander Hamilton) (Clinton Rossiter ed., 1961) (internal quotation marks omitted).

[2] *Id.*

[3] U.S. CONST. art. II, § 2, cl. 2.

[4] THE FEDERALIST NO. 76, at 455 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

[5] *Id.* at 455–56. The Supreme Court has explained that the Clause "adds a degree of accountability" to the Senate as well. United States v. Arthrex, Inc., 594 U.S. 1, 12 (2021) (explaining that the Senate may share "public blame 'for both the making of a bad appointment and the rejection of a good one'" (quoting Edmond v. United States, 520 U.S. 651, 660 (1997))).

[6] THE FEDERALIST NO. 76, at 457 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

[7] *Id.* at 457–58; *see also* THE FEDERALIST NO. 77, at 460 (Alexander Hamilton) (arguing that the "restraining" effect on the President of Senate confirmation "is precisely what must have been intended" by the Constitution's drafters).

[8] On September 11, 1789, the Senate received a message from President George Washington listing nine nominees for executive or judicial office, with Alexander Hamilton listed first as the President's nominee to be the first Secretary of the Treasury. The Senate gave its consent the same day. *See* 1 J. OF THE EXEC. PROCEEDINGS OF THE SENATE OF THE UNITED STATES: FROM THE COMMENCEMENT OF THE FIRST, TO THE TERMINATION OF THE NINETEENTH CONGS. 25 (1828). Earlier in the session, the Senate confirmed nominees to other offices, including revenue collectors, naval officers, and surveyors. *See, e.g.*, *id.* at 12–13.

[9] H. COMM. ON OVERSIGHT & GOV'T REFORM, U.S. GOVERNMENT POLICY AND SUPPORTING POSITIONS iii, 212 (2020) [hereinafter 2020 PLUM BOOK] (counting 1,118 positions subject to Presidential appointment with Senate confirmation based on data supplied by the Office of Personnel Management as of June 2020 of "civil service leadership and support positions in the legislative and executive branches of the Federal Government that may be subject to noncompetitive appointment").

[10] For example, in successive National Defense Authorization Acts, Congress established new positions within the Department of State that are subject to the Senate's advice and consent. *See* James M. Inhofe National Defense Authorization Act for Fiscal Year 2023, Pub. L. No. 117-263, § 5562(c)(1), (2)(A), 136 Stat. 2395, 3351–52 (2022) (Ambassador-At-Large for Global Health Security and Diplomacy); National Defense Authorization Act for Fiscal Year 2024, Pub. L. No. 118-31, § 6405(b), 137 Stat. 136, 998 (2023) (Special Envoy to the Pacific Islands Forum). In the National Defense Authorization Act for Fiscal Year 2022, Congress required Senate confirmation for any "Special Envoy, Special Representative, Special Coordinator, Special Negotiator, Envoy, Representative, Coordinator, Special Advisor, or other position performing a similar function, regardless of title," if that person would exercise significant authority under federal law. Pub. L. No. 117-81, § 5105, 135 Stat. 1541, 2346 (2021).

While presidential appointment with the Senate's advice and consent is the "default" method of appointment for "Officers of the United States" within the meaning of the Appointments Clause, not all officers must undergo Senate confirmation.[11] The Appointments Clause delineates a class of officers, "inferior Officers," for which Congress has more flexibility in structuring appointments.[12] Congress may direct that inferior officers receive the Senate's advice and consent[13] or dispense with Senate confirmation and vest appointments in the President alone, in a court of law, or in a head of a department.[14] Whatever choice it makes, it must do so "by law."[15] Congress has thus established positions that have never required Senate advice and consent.[16] It has also removed Senate confirmation requirements from existing positions, resulting in appointments vested (for example) solely in the President.[17] Congress may decide to amend statutory appointment frameworks because, as the Supreme Court has recognized, Congress may have elected to employ Senate confirmation where the Clause does not require it.[18]

Decisions about whether to attach a Senate confirmation requirement to a newly established position or to remove such a requirement from an existing position pose legal and practical considerations for Congress. On the legal front, Congress may consider the choices available, as a matter of constitutional law, for directing how a position is to be filled. These choices are determined by answering two questions. The first question is whether the position concerned would be filled by an "Officer[] of the United States."[19] If so, the Appointments Clause would govern. If not, Congress would have discretion to structure appointments in other ways. If a position would be filled by an officer, the second question is whether that individual would be a *principal officer* who may be appointed only by the President, by and with the advice and consent of the Senate, or an *inferior officer* who may, in Congress's discretion, be appointed in the same manner or by the alternative methods described in the Clause.[20] On the practical front, Congress may consider whether the perceived benefits of confirming a nominee when the Constitution does not require it outweigh the perceived costs of granting the Senate's advice and consent.[21]

Structuring Appointments: Legal Considerations

Under the Appointments Clause of the Constitution, the President

> shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established

[11] Edmond v. United States, 520 U.S. 651, 660 (1997).

[12] U.S. CONST. art. II, § 2, cl. 2; *see also* United States v. Germaine, 99 U.S. 508, 510 (1879) (stating that the Constitution's drafters foresaw that it might "be inconvenient" to require Senate advice and consent in all cases "when offices became numerous").

[13] *Edmond*, 520 U.S. at 660.

[14] U.S. CONST. art. II, § 2, cl. 2.

[15] *Id*.

[16] *See, e.g.*, 5 U.S.C. § 7119(c)(2) (solely vesting in the President the power to appoint the Chair and members of the Federal Service Impasses Panel).

[17] *See* Presidential Appointment Efficiency and Streamlining Act of 2011, Pub. L. No. 112-166, § 2, 126 Stat. 1283, 1283 (2012) (eliminating Senate confirmation requirements for dozens of positions).

[18] Fin. Oversight & Mgmt. Bd. for Puerto Rico v. Aurelius Inv., LLC, 590 U.S. 448, 459 (2020) ("At times, Congress may wish to require Senate confirmation for policy reasons.").

[19] *See infra* "Distinguishing Officers of the United States from Functionaries."

[20] *See infra* "Distinguishing Principal Officers from Inferior Officers" and "Vesting Appointment Power."

[21] *See infra* "Structuring Appointments: Other Considerations."

> by Law: but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.[22]

Aside from the category of officers who are expressly excluded from the Clause's coverage—those whose appointments are "otherwise provided for" in the Constitution[23]—the Court has stated that "all persons who can be said to hold an office under the [federal] government" were "intended to be included within one or the other of these modes of appointment."[24] Governing all officer appointments in this way, the Court has said, advances important separation of powers interests. For example, by limiting "the universe of eligible recipients" of appointment power to the categories listed, the Clause "prevents Congress from dispensing" appointment power "too freely" and widely.[25]

The Appointments Clause does not "merely deal[] with etiquette or protocol" in making appointments.[26] The Clause has, instead, a "substantive meaning."[27] An individual must be "appointed in the manner prescribed" to lawfully exercise "significant authority pursuant to the laws of the United States."[28] A purported exercise of significant authority by an actor whose appointment does not conform with the Clause is invalid,[29] though judicial remedies in Appointments Clause cases have differed.[30]

Aside from being a prerequisite to an officer's lawful exercise of federal power, the Appointments Clause is notable because it describes one of the few scenarios in which one of the two houses of Congress may act independently of both the other house and of the President in a manner that affects persons outside the legislative branch. Congress usually may only alter the "legal rights, duties and relations of persons" outside of the legislative branch if its action complies with the procedural requirements of Article I, § 7 of the Constitution.[31] For example, a bill cannot become a law until it passes both houses, is presented to the President, and either approved by him or enacted over his veto.[32] The Appointments Clause is one of only

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[22] U.S. CONST. art. II, § 2, cl. 2. The Constitution states that the President may "fill up all Vacancies that may happen during the Recess of the Senate, by granting Commissions which shall expire at the End of their next Session." *Id.* art. II, § 2, cl. 3. The Court has referred to this recess-appointment power as "a subsidiary, not a primary, method for appointing officers of the United States." NLRB v. Noel Canning, 573 U.S. 513, 522 (2014). The Appointments Clause is the "primary method." *See id.*

[23] *See* Buckley v. Valeo, 424 U.S. 1, 127 (1976) (per curiam).

[24] United States v. Germaine, 99 U.S. 508, 510 (1879); *see also* Weiss v. United States, 510 U.S. 163, 170 (1994) (stating that "the Appointments Clause applies to military officers"). However, the Court has construed the Appointments Clause's reference to officers "of the United States" to exclude "local officers" who "Congress vests with primarily local duties" when it legislates with respect to the District of Columbia or the territories. Fin. Oversight & Mgmt. Bd. for P.R. v. Aurelius Inv., LLC, 590 U.S. 448, 460, 464 (2020).

[25] Freytag v. Comm'r, 501 U.S. 868, 880 (1991).

[26] *Buckley*, 424 U.S. at 125.

[27] *Id.* at 126.

[28] *Id.*

[29] *Cf., e.g.*, Collins v. Yellen, 594 U.S. 220, 258 (2021) (characterizing a prior Appointments Clause decision as involving "a Government actor's exercise of power that the actor did not lawfully possess" (citing Lucia v. SEC, 585 U.S. 237 (2018))); Ryder v. United States, 515 U.S. 177, 185 (1995) (explaining that, when it provides "relief to a claimant raising an Appointments Clause challenge," a court "invalidates actions taken pursuant to defective title"). Thus, if Congress were to remove a Senate confirmation requirement from an existing position that, as a matter of law, is occupied by a principal officer, the actions of the officer who occupied that position without Senate confirmation may be vulnerable to legal challenge.

[30] *Compare Buckley*, 424 U.S. at 188 (according "de facto validity" to the past acts of an improperly constituted Federal Election Commission), *with Ryder*, 515 U.S. at 185, 188 (granting the petitioner "a hearing before a properly appointed panel" of the military court that affirmed his conviction and declining to extend *Buckley* or another prior case "beyond their facts" to the extent either "may be thought to have implicitly applied a form of the de facto officer doctrine").

[31] INS v. Chadha, 462 U.S. 919, 952 (1983).

[32] U.S. CONST. art. I, § 7, cl. 2. A bill passed by both houses may also become law, "in like Manner" as if the President "had signed it," if the bill is "not be returned by the President within ten Days (Sundays excepted) after it shall have been presented to him." *Id.*

four constitutional provisions that authorize one house to "act alone with the unreviewable force of law, not subject to the President's veto."[33]

Supreme Court decisions result in a two-step analysis for deciding whether the "nature of" an actor's "responsibilities is consistent with their method of appointment,"[34] though not all decisions address both steps in detail.[35] First, a court generally decides whether the Clause governs the actor's appointment at all. In particular, this first step resolves whether the actor is an "Officer[] of the United States."[36] Second, if the Clause governs, a court typically decides whether the actor is a principal officer or an inferior officer.[37] Having made that determination, a court is then able to compare the actor's actual method of appointment to the methods that the Clause allows for the relevant type of officer. This same two-step analysis would govern the choices available to Congress, as a matter of constitutional law, when deciding how new or existing positions might be filled.

Distinguishing Officers of the United States from Functionaries

The first step in deciding whether an actor's responsibilities fit with their method of appointment requires deciding whether the actor is an "Officer[] of the United States," as the Appointments Clause uses that term.[38] The Supreme Court has used several terms to describe an actor who does not fit the officer category, including "lesser functionaries"[39] and "mere employees."[40] The "broad swath" of the government's workforce fall in the "functionary" category.[41] Congress need not structure the selection of functionaries according to the Appointments Clause.[42]

Two features distinguish officers of the United States from functionaries. First, the Court has read the term "officer" to embrace concepts of "tenure, duration, emolument, and duties."[43] Their positions are "established by law" and their "duties and functions" are "delineated in a statute."[44] Officers perform duties that are "continuing and permanent."[45] Functionaries, on the other hand, perform duties that are only "occasional or temporary"[46] Thus, an individual selected ad hoc to advise on a "particular case,"

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[33] *Chadha*, 462 U.S. at 955. The other three types of single-house authority are the House's power to impeach, U.S. CONST. art. I, § 2, cl. 5, and the Senate's powers to try impeachments and concur to treaties, *id.* art. I, § 3, cl. 6, art. II, § 2, cl. 2.

[34] United States v. Arthrex, Inc., 594 U.S. 1, 13 (2021).

[35] *See, e.g.*, Morrison v. Olson, 487 U.S. 654, 671 n.12 (1988) ("It is clear that appellant is an 'officer' of the United States, not an 'employee.'").

[36] *See infra* "Distinguishing Officers of the United States from Functionaries."

[37] *See infra* "Distinguishing Principal Officers from Inferior Officers."

[38] U.S. CONST. art. II, § 2, cl. 2.

[39] Buckley v. Valeo, 424 U.S. 1, 126 n.162 (1976) (per curiam).

[40] Freytag v. Comm'r, 501 U.S. 868, 882 (1991); *cf.* United States v. Maurice, 26 F.Cas. 1211, 1214 (Marshall, Circuit Justice, C.C.D. Va. 1823) ("Although an office is 'an employment,' it does not follow that every employment is an office.").

[41] Lucia v. SEC, 585 U.S. 237, 245 (2018); *compare* United States v. Germaine, 99 U.S. 508, 509 (1879) (stating that "nine-tenths of the persons rendering service to the government" are an "agent or employ[ee] working for the government and paid by it" but not officers of the United States), *with* Free Enter. Fund v. Pub. Co. Acct. Oversight Bd., 561 U.S. 477, 506 (2010) (estimating that the "applicable proportion" of those serving the federal government who are functionaries "has of course increased dramatically since 1879").

[42] *Lucia*, 558 U.S. at 245 (explaining that "the Appointments Clause cares not a whit about" who names functionaries to their positions).

[43] *Germaine*, 99 U.S. at 511.

[44] *Freytag*, 501 U.S. at 881; *see also* United States v. Smith, 124 U.S. 525, 532 (1888) (holding that the clerk of a collector was not an officer of the United States because although a statute charged the collector with duties connected to public money, their clerk performed "only such duties as may be assigned" by the collector).

[45] United States v. Hartwell, 73 U.S. 385, 393 (1867).

[46] *Germaine*, 99 U.S. at 512.

without more "general functions" or "continuous duties," is not an officer even though a statute provides for that person's limited role.[47]

Second, an officer exercises "significant authority pursuant to the laws of the United States."[48] This factor focuses "on the extent of power an individual wields in carrying out" their "assigned functions."[49] An officer carries out "important" functions while exercising "significant discretion."[50] By contrast, a "ministerial" duty, one that does not entail the exercise of discretion, does not point to officer status.[51]

Although the Supreme Court has not identified the precise boundaries of significant authority,[52] it has identified types of federal authority that are likely to be "significant" for purposes of determining officer status. In the 1976 decision of *Buckley v. Valeo*, the Court examined the powers of the Federal Election Commission (FEC) in light of how its six voting members were then appointed.[53] In particular, none of the voting members were appointed in the manner prescribed by the Appointments Clause.[54] Four voting commissioners were appointed solely by Congressional action.[55] The President nominated the remaining two, subject to confirmation by both houses.[56] Ruling that the FEC was not made up of officers of the United States, the Court held that the FEC could not exercise its statutory power to conduct "civil litigation in the courts of the United States for vindicating public rights" because that would entail the exercise of significant authority under federal law.[57] Likewise, the Court determined that the FEC could not lawfully make rules or determine a person's eligibility for federal elective office because those and related functions also fit the significant-authority category.[58] The FEC could, though, exercise statutory powers of an "investigative and informative nature."[59] Congress could itself exercise these powers, so it could confer them on officials it created, even if those officials were not appointed consistent with the Appointments Clause.[60]

Further examples of "significant authority" appear in the Court's more recent decisions examining the actions of officials charged with adjudicatory functions. In two cases, the Court explained that an official's power to take testimony, conduct trials, rule on the admissibility of evidence, and enforce discovery orders ranked as significant authority.[61] In addition, the official in each case could issue

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[47] Auffmordt v. Hedden, 137 U.S. 310, 327 (1890) (concluding that, though a statute called for the "selection" of a "merchant appraiser" to reappraise the value of imported goods after an initial customs appraisal, the merchant appraiser was not an officer of the United States given their episodic duties); *see also Germaine*, 99 U.S. at 511–12 (ruling that a surgeon sometimes tasked with examining pensioners or claimants was not an officer).

[48] Buckley v. Valeo, 424 U.S. 1, 126 (1976) (per curiam).

[49] Lucia v. SEC, 585 U.S. 237, 245 (2018).

[50] Freytag v. Comm'r, 501 U.S. 868, 882 (1991).

[51] *See id.* at 881–82 (stating that functions of special trial judges were "more than ministerial tasks").

[52] *See Lucia*, 585 U.S. at 245–46 (acknowledging that the significant authority "standard is no doubt framed in general terms" but declining to "elaborate" on the standard, reasoning that another precedent resolved the case).

[53] 424 U.S. at 127.

[54] *Id.* at 137.

[55] Federal Election Campaign Act Amendments of 1974, Pub. L. No. 93-443, § 208(a), 88 Stat. 1263, 1281 (vesting in the President pro tempore of the Senate and the Speaker of the House the power appoint two voting members each, subject to confirmation by a majority of both houses).

[56] *Id.* (vesting in the President the power to appoint two voting members, subject to confirmation by a majority of both houses).

[57] *Buckley*, 424 U.S. at 140.

[58] *Id.* at 140–41.

[59] *Id.* at 137.

[60] *Id.* at 138–39.

[61] Freytag v. Comm'r, 501 U.S. 868, 881 (1991) (examining the powers of a special trial judge (STJ) appointed by the Chief Judge of the U.S. Tax Court); *see also* Lucia v. SEC, 585 U.S. 237, 248 (2018) (stating that "point for point—straight from (continued...)

decisions with varying effects on the parties' rights. One official, a U.S. Tax Court special trial judge, could issue proposed findings that only took effect if adopted by a regular judge of the Tax Court.[62] The other official, an SEC administrative law judge (ALJ), had somewhat broader authority. The ALJ's initial decisions were subject to review by the SEC.[63] If the SEC declined review, the ALJ's decision was, by statute, "deemed the action of the Commission."[64] Thus, neither official had the power to issue final decisions not subject to review by another officer.[65] However, as the Court explained, both were officers in view of their other, important discretionary powers, because having "final decision-making authority" is not an essential trait for an officer.[66]

Distinguishing Principal Officers from Inferior Officers

Deciding that an actor is as an officer of the United States means that the Appointments Clause governs the position that person fills, but it does not identify which of the constitutionally described appointment methods may be used to fill that office. A court must also decide whether the officer acts as a principal officer or instead as an inferior officer. Once a court determines an officer's principal- or inferior-officer status, the court may then compare the officer's actual appointment method with constitutionally permissible methods. If the two fit, then the officer's appointment is constitutional.[67]

The Appointments Clause does not itself use the term "principal officers" when identifying the "Officers of the United States" who the President must appoint, by and with the advice and consent of the Senate.[68] Rather, that term has emerged in Supreme Court decisions as "shorthand" to describe "noninferior officers."[69] While having "final decision-making authority" is not an essential trait of an officer,[70] the existence (or not) of final decisionmaking authority helps distinguish a principal officer from an inferior officer.[71]

The Court has explained that the "term 'inferior officer' connotes a relationship with some higher ranking officer or officers below the President."[72] An inferior officer, in other words, has a superior aside from the President.[73] While the "chain of command" is the focus, organizational charts and titles do not necessarily

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Freytag's list—the [SEC's] ALJs have equivalent duties and powers as STJs in conducting adversarial inquiries"). In a third case, the Court agreed with the parties that administrative patent judges charged with reconsidering the validity of an issued patent exercised significant authority and thus were officers of the United States. *See* United States v. Arthrex, Inc., 594 U.S. 1, 13 (2021); *see also* Weiss v. United States, 510 U.S. 163, 169 (1994) (reciting the parties' agreement that "because of the authority and responsibilities they possess," military judges empowered to hear appeals from courts martial were officers of the United States).

[62] *Freytag*, 501 U.S. at 873. The Tax Court could assign an STJ cases in four categories. As to the first three categories, but not the fourth, the STJ had the power to "hear *and* decide" assigned cases. *Id.* at 876. However, *Freytag* concerned a case assigned under the fourth category. *Id.* at 876–77; *but see id.* at 882 (alternatively stating that the STJ was an inferior officer due to the powers they wielded in cases assigned in the first three categories).

[63] *Lucia*, 585 U.S. at 242.

[64] *Id.*

[65] *Freytag*, 501 U.S. at 881–82; *Lucia*, 585 U.S. at 249.

[66] *Lucia*, 585 U.S. at 247 (stating that the Court had "explicitly reject[ed]" a dissenting justice's "theory that final decisionmaking authority is a sine qua non of officer status").

[67] *See* United States v. Arthrex, Inc., 594 U.S. 1, 23 (2021) (holding that the "unreviewable authority" of administrative patent judges in certain proceedings was "incompatible with their appointment by the Secretary to an inferior office").

[68] U.S. CONST. art. I, § 2, cl. 2.

[69] *Arthrex, Inc.*, 594 U.S. at 12.

[70] *See supra* note 66 and accompanying text.

[71] *Arthrex, Inc.*, 594 U.S. at 23.

[72] Edmond v. United States, 520 U.S. 651, 662 (1997).

[73] *Id.*

mark one officer as the superior of another for Appointments Clause purposes.[74] An officer has a superior—and thus is an inferior officer—if their "work is directed and supervised at some level by others" who were appointed as principal officers.[75] Review of agency decisions by the federal courts cannot provide the supervision necessary to mark an officer as an inferior officer.[76]

The Court has distinguished principal officers from inferior officers in the context of agency adjudications. There, the Court explained that one executive-branch officer's power to "rehear" and "reverse" the decisions of another equated to the power to direct and supervise the second officer's work.[77] Judges of the Coast Guard Court of Criminal Appeals were inferior officers because the Court of Appeals for the Armed Forces, an executive branch entity, could set aside their decisions.[78] Members of the Patent Trial and Appeal Board, on the other hand, exercised power inconsistent with their appointment as inferior officers because no other principal officer in the executive branch could review their patent validity decisions.[79] In these cases, the Court's analysis focused on the finality of these administrative judges' decisions about private rights because that power (whether final or not) was the "significant authority" that marked them as "Officers of the United States."[80] The added power to wield such significant authority with finality is what can separate a principal officer from inferior officer.[81]

In deciding these two cases, its most recent examinations of the principal-inferior officer divide, the Court emphasized that it was not attempting "to set forth an exclusive criterion for distinguishing between principal and inferior officers for Appointments Clause purposes."[82] The Court has written that the two decisions "do not address supervision outside the context of adjudication."[83] Older cases examine the principal-inferior officer divide in the context of nonadjudicatory offices, but how these newer and older cases relate is unclear. In the 1988 decision of *Morrison v. Olson*, the Court rejected an argument that a court-appointed independent counsel acted as a principal officer but was improperly appointed as an inferior officer.[84] Under the statute that provided for their appointment, the independent counsel had the "full power and independent authority to exercise all investigative and prosecutorial functions and powers of the Department of Justice" as to certain high-ranking government officials and offenses.[85] The Attorney General could remove the independent counsel only for cause.[86] The Court said it did not have to "decide exactly where the line falls between" principal and inferior officers because the independent counsel was "clearly" an inferior officer in view of their "limited" duties, jurisdiction, and tenure.[87]

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[74] *Arthrex, Inc*., 594 U.S. at 15, 18.

[75] *Edmond*, 520 U.S. at 663.

[76] *Arthrex, Inc*., 594 U.S. at 17.

[77] *Id*. at 25.

[78] *Edmond*, 520 U.S. at 665 ("What is significant is that the judges of the Court of Criminal Appeals have no power to render a final decision on behalf of the United States unless permitted to do so by other Executive officers.").

[79] *Arthrex, Inc*., 594 U.S. at 23.

[80] *See id*. at 14 (explaining that the Patent and Trademark Office was the "boss" of Patent and Trademark Board members on "administrative" matters but not "when it comes to the one thing that makes the [members] officers exercising 'significant authority' in the first place—their power to issue decisions on patentability" (quoting Buckley v. Valeo, 424 U.S. 1, 126 (1976) (per curiam))).

[81] *See id.*

[82] *Id*. at 23.

[83] *Id*.

[84] 487 U.S. 654, 671–72 (1988).

[85] *Id*. at 662 (quoting 28 U.S.C. § 594(a)).

[86] *Id*. at 663.

[87] *Id*. at 671–72.

Vesting Appointment Power

When applied to a particular actor, this two-step analysis identifies Congress's legal discretion for structuring an appointment. If the first step of this analysis determines that an actor is a functionary, the Appointments Clause would not constrain Congress.[88] If the analysis identifies the actor as a principal officer, then Congress must require the Senate's advice and consent.[89] If, on the other hand, the actor is an inferior officer, Congress may use the "default manner of appointment for inferior officers," which is appointment by the President with the advice and consent of the Senate.[90] Alternatively, Congress may dispense with Senate confirmation and decide that the President alone, the head of a department, or the courts of law should make the appointment.[91]

Vesting an appointment solely in the President is straightforward.[92] Vesting an appointment in the head of a department entails placing an inferior officer's appointment in the hands of an officer "in charge of a great division of the executive branch."[93] These executive branch divisions include administrative units that are "freestanding component[s] of the Executive Branch,"[94] such as executive departments[95] and independent agencies.[96] The Clause's use of the term "head[]" allows Congress to vest appointment authority in a multimember body that leads a "department[]."[97] Congress may not grant the "heads of bureaus or lesser divisions" the power to appoint inferior officers.[98] These lesser officials are "mere aids and subordinates of the heads of the department."[99] Finally, vesting an appointment in the "Courts of Law" entails placing appointment authority either in an Article III court or in an Article I court that "exercise[s] judicial power and perform exclusively judicial functions."[100] The Court has rejected claims that Congress could not require a federal court to appoint an inferior officer who purportedly would perform only executive duties,[101] but it has raised the possibility that an interbranch appointment could

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[88] *See supra* note 42 and accompanying text.

[89] *See supra* note 69 and accompanying text.

[90] *Edmond*, 520 U.S. at 660.

[91] U.S. CONST. art. II, § 2, cl. 2.

[92] *See, e.g.*, 21 U.S.C. § 1703(a)(1)(B) ("There shall be a Deputy Director" of the Office of National Drug Control Policy "who shall report directly to the Director, and who shall be appointed by the President, and shall serve at the pleasure of the President").

[93] Burnap v. United States, 252 U.S. 512, 515 (1920).

[94] Free Enter. Fund v. Pub. Co. Acct. Oversight Bd., 561 U.S. 477, 511 (2010) (citing the Postmaster General as an example of a department head who was historically treated as capable of appointing inferior officers when authorized by law but lacked the "title of Secretary or any role in the President's Cabinet").

[95] *Burnap*, 252 U.S. at 515 (Department of War).

[96] Lucia v. SEC, 585 U.S. 237, 243 (2018) (SEC).

[97] *Free Enter. Fund*, 561 U.S. at 512–13 (finding "no reason why" Congress may not vest an inferior officer appointment in a "multimember body" that heads a department given that the Constitution permits "collective" inferior-officer appointments by the "Courts of Law" and collective appointments by the House of Representatives and Senate of their officers).

[98] *Burnap*, 252 U.S. at 515.

[99] United States v. Germaine, 99 U.S. 508, 511 (1879); *cf.* Freytag v. Comm'r, 501 U.S. 868, 885 (1991) ("We cannot accept" the "assumption that every part of the Executive Branch is a department, the head of which is eligible to receive the appointment power").

[100] *Freytag*, 501 U.S. at 892 ("The Tax Court's exclusively judicial role distinguishes it from other non-Article III tribunals that perform multiple functions and provides the limit on the diffusion of appointment power that the Constitution demands.").

[101] *See, e.g.*, Rice v. Ames, 180 U.S. 371, 378 (1901) ("Congress having provided for commissioners, who are not judges in the constitutional sense, had a perfect right under" the Appointments Clause "to invest the district or circuit courts with the power of appointment"); *Ex parte* Siebold, 100 U.S. 371, 397 (1879) ("It is no doubt usual and proper to vest the appointment of inferior officers in that department of the government, executive or judicial, or in that particular executive department to which the duties of such officers appertain. But there is no absolute requirement to this effect in the Constitution.").

raise separation of powers issues if it would "impair the constitutional functions assigned to one of the branches."[102]

Granting Advice and Consent

The Appointments Clause addresses *who* must receive Senate confirmation, but the Court has not interpreted the Clause to address *how* the Senate may consent to a nomination. Article I, Section 5 of the Constitution provides the Senate its authority to structure proceedings on nominations. The provision states that each house may "determine the Rules of its Proceedings, punish its Members for disorderly Behaviour, and, with the Concurrence of two thirds, expel a Member."[103] The Court has described this language as a "broad delegation of authority to the Senate to determine how and when to conduct its business."[104] The Senate may decide "all matters of method" to employ in its proceedings as long as there is "a 'reasonable relation between the mode or method of proceeding established by'" a Senate rule "and the result which is sought to be attained."[105] A Senate rule also cannot "ignore constitutional restraints or violate fundamental rights."[106] Thus, for example, when asked to decide whether an individual lawfully held the office of chair of the Federal Power Commission in light of the Senate's attempted reconsideration of its earlier resolution of confirmation, the Court interpreted relevant Senate rules, rather than the Appointments Clause.[107]

Structuring Appointments: Other Considerations

Federal statutes require the President to fill hundreds of positions in the executive branch with the Senate's advice and consent.[108] For positions that need not be filled by a principal officer,[109] though, the Appointments Clause would not compel Senate confirmation, and one Congress may choose to reevaluate the appointment framework established by its predecessor.[110] Several considerations might inform such a reexamination.

Senate confirmation may carry benefits from Congress's perspective. At its core, requiring the Senate's advice and consent allows each Senator to judge a nominee before their appointment to office, which in turn affects how the President might approach selecting nominees for such offices. As Alexander Hamilton noted, the possibility that a nominee might be rejected may give the President "a strong motive to [take] care in proposing" a nominee.[111] The President may (for example) consult with Senators on the suitability of a prospective nominee before making the nomination.[112]

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[102] *See* Morrison v. Olson, 487 U.S. 654, 675–79 (1988) (rejecting a challenge to court appointment of an independent counsel).

[103] U.S. CONST. art. I, § 5, cl. 2.

[104] NLRB v. Noel Canning, 573 U.S. 513, 550 (2014).

[105] *Id.* (quoting United States v. Ballin, 144 U.S. 1, 5 (1892)).

[106] *Id.*

[107] *See* United States v. Smith, 286 U.S. 6, 28, 33 (1932).

[108] *See supra* note 9 and accompanying text.

[109] Congress could also convert a principal officer into an inferior officer by making the "significant authority" that they wield subject to the direction and supervision of another principal officer. *See* "Distinguishing Principal Officers from Inferior Officers."

[110] *Cf.* JOSEPH STORY, 3 COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 1529 (1833) (noting that in "one age the appointment might be most proper in the president" while "in another age" a head-of-department appointment may be best).

[111] THE FEDERALIST NO. 76, at 458 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

[112] CRS Report RL31980, *Senate Consideration of Presidential Nominations: Committee and Floor Procedure*, by Elizabeth Rybicki (2023), at 2 ("The President would prefer a smooth and fast confirmation process, so he may decide to consult with Senators prior to choosing a nominee.").

Once the President puts forward a nominee, a requirement for Senate advice and consent allows a Senator to judge the nominee according to whichever qualities a Senator considers relevant to the position. A Senator might reject a nominee for policy reasons.[113] Congress might also seek to affect the qualities of a nominee using statutory qualification requirements, but these may be less effective, on their own, than the Senate's advice and consent. First, Congress may only establish statutory qualification requirements through the regular lawmaking process, which requires agreement of both houses and presentment to the President.[114] The Senate confirmation process allows the Senate to "act alone," "not subject to the President's veto."[115] Second, the Constitution may set outer limits on Congress's ability to set statutory qualification requirements. The Supreme Court has not ruled on whether particular statutory qualifications are consistent with the Appointments Clause. It has said, though, that while Congress may set "reasonable and relevant qualifications" for office, those qualifications cannot be so restrictive as to amount to a "legislative designation" of a nominee.[116] The executive branch has argued that certain statutory qualifications exceed Congress's authority under similar reasoning.[117] By contrast, the Court has described the Senate's advice and consent power as "unreviewable,"[118] and the executive branch has conceded the Senate's "'sole responsibility of consenting to the President's choice.'"[119]

The confirmation process also allows Members to secure commitments from a nominee about how they will comport themselves when in office. These commitments can be routine promises "to respond to requests to appear and testify before any duly constituted committee of the Senate."[120] Commitments can also affect weightier issues. During the May 1973 hearing on the nomination of Elliot Richardson to be Attorney General, held following the Watergate break-in, Senators questioned the nominee about his views on the independence necessary for a special prosecutor. Senator Philip Hart urged that confirmation be delayed until the Committee had "an agreement on the ground rules establishing the independence of this special prosecutor."[121] The Senate eventually confirmed Attorney General Richardson, who then appointed Archibald Cox as special prosecutor.[122] When President Richard Nixon directed Attorney General Richardson to fire Cox, Richardson opted to resign, offering his reasons in a resignation letter. Among others, Richardson mentioned that "many" times during his confirmation process he had committed to "assure the independence of the special prosecutor," so he opted to resign rather than break

[113] *Cf.* INS v. Chadha, 462 U.S. 919, 952 (1983) (stating that the Senate's exercise of its advice and consent function is "unreviewable").

[114] U.S. CONST. art. I, § 7, cl 2.

[115] *Chadha*, 462 U.S. at 952.

[116] Myers v. United States, 272 U.S. 52, 128–29 (1926).

[117] *See, e.g.*, Constitutionality of Statute Governing Appointment of U.S. Trade Representative, 20 Op. O.L.C. 279, 279 (1996) (arguing that a statute, now codified at 19 U.S.C. § 2171(b)(4), that bars a person from being appointed as the U.S. Trade Representative if they had advised a foreign entity in a trade dispute with the United States was an "unconstitutional intrusion on the President's power of appointment").

[118] *Chadha*, 462 U.S. at 952.

[119] *Constitutionality of Statute Governing Appointment of U.S. Trade Representative*, 20 Op. O.L.C. at 280 (quoting Pub. Citizen v. U.S. Dep't of Just., 491 U.S. 440, 487 (1989) (Kennedy, J., concurring).

[120] *See, e.g.*, S. EXEC. CALENDAR, 118th Cong., Issue No. 281 at 3 (July 23, 2024) (noting with an asterisk nominees who had made such a commitment).

[121] *See Nomination of Elliot L. Richardson to be Attorney General: Hearing Before the S. Comm. on the Judiciary*, 93rd Cong. 12 (1973) (statement of Sen. Philip A. Hart).

[122] CRS Report R47102, *Executive Privilege and Presidential Communications: Judicial Principles*, by Todd Garvey (2022), at 10.

those commitments.[123] Senators continue to secure substantive commitments from nominees.[124] Along similar lines, if a current federal official expects to be nominated to a position requiring the Senate's advice and consent, they may be more willing to cooperate with the Senate in their current role than they would be if they did not expect to undergo Senate confirmation.

Aside from commitments that Senators may obtain from the nominee themselves, a Senator may use a pending nomination as a point of leverage with an agency. For example, a Senator might place a hold on a nomination and communicate what an agency needs to do for the hold to be lifted.[125]

Senate confirmation of officers may also carry costs from Congress's perspective. Compared to an inferior officer appointment vested solely in another branch, the need to secure the Senate's advice and consent can delay filling positions with potential effects on the duties vested in those positions, particularly at the start of a new presidential administration. The more positions that are subject to Senate confirmation, the longer it may take for the President to submit nominations to the Senate.[126] Further delay may then arise as the Senate deliberates on nominations. Confirmation-related workloads may fall heavier on certain committees than on others. In 2020, based on OPM data, the House Committee on Oversight and Government Reform counted more than 1,100 positions in agencies and departments that were subject to the Senate's advice and consent.[127] Though not all positions receive the same degree of vetting,[128] more than 40% were located in two agencies, the Departments of State (254) and Justice (218).[129] There were far fewer Senate-confirmed positions in any other single agency or department.[130] Though much of "the Senate confirmation process occurs at the committee level," other steps in the Senate's process for providing advice and consent can add to the chamber's workload.[131]

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[123] Letter from Elliot Richardson, Att'y Gen'l, U.S. Dep't of Just., to President Richard M. Nixon, (Oct. 20, 1973) ("I trust that you understand that I could not in light of these firm and repeated commitments carry out your direction" that the special counsel be fired), *reprinted in Ziegler Statement and Texts of Letters*, N.Y. TIMES, Oct. 21, 1973, at 61.

[124] *See, e.g.*, Letter from Steven Engel to Sen. Charles Grassley (July 12, 2017) (committing that, if confirmed as Assistant Attorney General, Office of Legal Counsel (OLC), the nominee would ensure that OLC's "legal advice" concerning congressional access to information "would be consistent with" the principle that "the Executive Branch's cooperation should not be simply what could be judicially mandated"), *reprinted in* 163 CONG. REC. S4077, S4079 (daily ed. July 19, 2017).

[125] *See, e.g.*, Letter from Sen. Richard Durbin to Michael Mukasey, Att'y Gen., U.S. Dep't of Just. (Feb. 7, 2008) (advising the Attorney General that a hold placed on a nominee to be Deputy Attorney General would be lifted following an earlier request for information), *reprinted in The Office of Professional Responsibility Investigation into the Office of Legal Counsel Memoranda: Hearing Before the S. Comm. on the Judiciary*, 111th Cong. 92–93 (2010). A "hold" is an "informal practice whereby Senators communicate to Senate leaders, often in the form of a letter, their policy views and scheduling preferences regarding measures and matters available for floor consideration." CRS Report R43563, *"Holds" in the Senate*, by Mark J. Oleszek (2017), at 1.

[126] S. REP. NO. 112-24, at 3 (noting that "typically the presidential selection and vetting" process "consumes the majority of the time from vacancy to appointment").

[127] 2020 PLUM BOOK, *supra* note 9, at 209–12.

[128] S. REP. NO. 112-24, at 2 ("As one would expect, the length of time to fill positions varies with the level and nature of the position.").

[129] 2020 PLUM BOOK, *supra* note 9, at 209–12. These figures include only "civil service leadership and support positions in the legislative and executive branches of the Federal Government that may be subject to noncompetitive appointment." *Id.* at iii.

[130] *Id.* at 209–12 (listing the Office of the Secretary of Defense's 44 Senate-confirmed positions as the third-largest single "agency or department" count).

[131] CRS Report R44083, *Appointment and Confirmation of Executive Branch Leadership: An Overview*, by Henry B. Hogue and Maeve P. Carey (2021), at 4–6.

Delay can lead to vacancies in offices that are subject to Senate confirmation. The Federal Vacancies Reform Act (FVRA), among other statutes,[132] ensures that the duties of an office requiring the advice and consent of the Senate can be performed by an acting official in certain circumstances.[133] However, the FVRA does not authorize acting officials for all offices whose regular occupant requires the Senate's advice and consent,[134] which might result in a vacant office whose functions or duties no other individual could perform.[135] When the FVRA does authorize an acting official, it does so subject to limits, which also may impact agency operations.[136] Even if the FVRA permits use of an acting official, a Senator may, in a given case, disfavor that arrangement as a policy matter.[137]

As described above, Senate confirmation requirements create potential points of leverage for Senators to press, but removing confirmation requirements would not necessarily deprive the Senate of effective oversight of inferior officers. Congress has tools beyond the Senate's advice and consent power for conducting oversight, such as its implied constitutional power of inquiry[138] and its authority under the Appropriations Clause.[139] Congress may use its power to inquire, for example, to probe any "subject on which legislation may be had,"[140] which would include an inferior officer's exercise of their statutory authorities.

Congress may decide that, for a given position, the perceived benefits of a Senate confirmation requirement outweigh its perceived costs. For example, Congress may decide that, based on the role filled by certain inferior officers, the Senate should continue to judge nominee qualifications, even if doing so risks delay in filling those offices. Congress may just as well decide, though, that given its other oversight authorities, Senate confirmation is not necessary for those inferior officers. So long as the Appointments Clause does not require Senate confirmation, that judgment is "Congress's to make."[141]

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[132] *See* 5 U.S.C. § 3347(a) (stating that the Federal Vacancies Reform Act (FVRA) is the "exclusive" means for "temporarily authorizing" certain acting officials unless another statute provides authority that meets certain criteria or the President exercises the recess appointment power).

[133] *See, e.g.*, NLRB v. SW Gen., Inc., 580 U.S. 288, 293 (2017) ("Congress has long accounted for this reality by authorizing the President to direct certain officials to temporarily carry out the duties of a" vacant office that normally requires Senate confirmation "in an acting capacity, without Senate confirmation.").

[134] *See* 5 U.S.C. § 3349c.

[135] *See id.* § 3348(b)-(d).

[136] *See* CRS Report R44997, *The Vacancies Act: A Legal Overview*, by Valerie C. Brannon (2022), at 13–15 (discussing for how long an acting official may serve under the FVRA).

[137] For example, the FVRA allows certain individuals to serve an acting official even if the Senate has never confirmed that person to a position requiring advice and consent. *See* 5 U.S.C. § 3345(a)–(b) (permitting either the "first assistant to the office" or "a person who serves in an office for which appointment is required to be made by the President, by and with the advice and consent of the Senate" to perform the functions and duties of the vacant office temporarily in an acting capacity).

[138] *See* CRS Testimony TE10086, *Breaking the Logjam Part 3: Restoring Transparency and Accountability in the Accommodation Process*, by Sean M. Stiff (2023), at 2 (discussing Congress's implied constitutional power of inquiry).

[139] *See* CRS Report R46417, *Congress's Power Over Appropriations: Constitutional and Statutory Provisions*, by Sean M. Stiff (2020), at 13-16.

[140] Eastland v. U.S. Servicemen's Fund, 421 U.S. 491, 506 (1975).

[141] Weiss v. United States, 510 U.S. 163, 187 (1994) (Souter, J., concurring).

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TESTIMONY

Statement of

Elizabeth Rybicki
Specialist on Congress and the Legislative Process

Before

Rules and Administration Committee
U.S. Senate

Hearing on

"Senate Procedures to Confirm Nominees"

July 30, 2024

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CRS TESTIMONY
Prepared for Congress

Chairwoman Klobuchar, Ranking Member Fischer, and members of the Committee, I am honored to have been invited to present testimony, on behalf of the Congressional Research Service, on Senate procedures for considering presidential nominations. As the Committee requested, I am going to begin with a brief explanation of current Senate procedures for confirming nominations. I will also provide some historical information on the Senate confirmation process, specifically, as requested, on the various efforts to change Senate procedures, as well as recent changes in practice.

Current Procedure and Practice

The Senate, in recent years, has received from the President between 800 and 1,200 civilian nominations each Congress; the number varies based on vacancies, which for many executive branch positions are higher at the start of a new presidential term.[1] If foreign service nominations and noncivilian military appointments and promotions are included in the total, approximately 45,000 nominations are received by the Senate each two-year Congress. Foreign service and military nominations are usually submitted as lists of names that are normally considered together by unanimous consent.[2]

To screen and process nominations, the Senate relies on its committee system. Most nominations are referred to committee according to the Senate's rules and precedents concerning committee jurisdiction. The committees are responsible for collecting information on the nominations, which includes not only reviewing some material collected by the executive branch, such as a financial disclosure report, but also conducting their own investigations. Most committees have their own forms and questionnaires, which can be tailored to the nomination, and committee members and staff sometimes meet with nominees. The committees, in this way, can assess possible conflicts of interest as well as the background of nominees; nominees to many positions are required by law to meet certain qualifications, such as a expertise in specified areas.[3] Committees can choose to hold public hearings on nominations, where Senators from both parties have an opportunity to ask questions of the nominee, express policy positions, and discuss relevant programs and other issues related to the committee's oversight role.[4] The nominee is often asked to commit, sometimes in response to an public question from the committee chair in a hearing, to being responsive to future committee requests, including to testify, if confirmed.[5]

Nominations referred to committee cannot be considered by the full Senate unless (1) a majority of the committee votes to report them or (2) the Senate discharges the committee from consideration of the nomination, which, in practice, occurs only with the unanimous consent of the Senate.[6] Some

[1] Including foreign service nominations, which are typically submitted as lists of nominations that are considered together by unanimous consent, the Senate in recent Congress has received between approximately 4000 and 5000 civilian nominations each Congress. For the number of nominations received in the last two Congresses, see "Resume of Congressional Activity," Daily Digest, *Congressional Record*, daily edition, vol. 169 (Jan. 24, 2023), p. D55; "Interim Resume of Congressional Activity," Daily Digest, *Congressional Record*, daily edition, vol. 168 (Jan. 4, 2022), p. D11; "Interim Resume of Congressional Activity," Daily Digest, *Congressional Record*, daily edition, vol. 167 (Jan. 25, 2021), p. D59; "Interim Resume of Congressional Activity," Daily Digest, *Congressional Record*, daily edition, vol. 166 (Jan. 7, 2020), p. D17.

[2] Nominations that are submitted on lists such as these are normally assigned a single presidential nomination number even though the list contains multiple individual nominations. For example, PN842 in the 118th Congress included 391 named officers nominated for appointment to the rank of Major in the United States Air Force (https://www.congress.gov/nomination/118th-congress/842).

[3] For more information, see CRS Report RL33886, *Statutory Qualifications for Executive Branch Positions*, by Henry B. Hogue.

[4] See "The Confirmation Process" in CRS Report RL30240, *Congressional Oversight Manual*, coordinated by Ben Wilhelm, Todd Garvey, and Christopher M. Davis.

[5] Under a long-standing practice of the Senate, the Senate's *Executive Calendar* indicates, by asterisks next to the nomination, the "nominee's commitment to respond to requests to appear and testify before any duly constituted committee of the Senate."

[6] For more information, see CRS congressional distribution memorandum, "Discharging a Committee from Consideration of a Nomination: Current Procedure and Historical Practice" by Michael Greene and Elizabeth Rybicki, May 31, 2017, available from the authors to congressional requesters.

nominations, called "privileged" nominations, are not referred to committee (unless any single Senator requests referral). However, even privileged nominations are still screened by committee and are not eligible for floor consideration until 10 session days after the committee has indicated to the Executive Clerk that biographical and financial information on the nominee has been received.[7]

Unanimous Consent

Nominations supported by the committee of jurisdiction are most often taken up and approved by the full Senate without a roll call vote. This is true for both military and civilian nominations, although fewer civilian nominations are approved without a roll call vote in current practice than they were previously (See **Table 1**). Military and foreign service nominations are routinely taken up and confirmed on the Senate floor *en bloc* (as a group) by unanimous consent.[8]

Approving a nomination by unanimous consent requires that a Senator ask, during a session of the Senate, for that action to occur. Such requests are usually made by the majority leader (or his designee), and the presiding officer responds by inquiring if any Senator objects to the unanimous consent request. If no Senator objects, then the nomination or nominations are confirmed. In some cases, the unanimous consent request is to take up a nomination, or very often a group of nominations, and to vote on them; when there is no objection to the request, the Senate's practice is to immediately confirm them by voice vote.[9]

In practice, the majority leader does not usually ask unanimous consent to confirm nominations this way without first communicating with the minority leader and all other Senators to determine if any Senator would object. A *hold* on a nomination is a communication to the majority or minority leader that a Senator would object to taking up or approving the nomination by unanimous consent. If the majority leader learns any Senator would object, he usually does not ask unanimous consent on the floor and may try to address the concerns of the Senator.

[7] For more information, see section below, "'Privileged' Nominations (S.Res. 116, 112th Congress)" and CRS Report R46273, *Consideration of Privileged Nominations in the Senate*, by Michael Greene.

[8] For example, on May 23, 2024, the Senate took up and confirmed 1,940 Air Force nominations *en bloc* by unanimous consent *Congressional Record,* daily edition, vol. 170 (May 23, 2024), p. S3879-80.

[9] The Congress.gov database does not appear to accurately distinguish between, on the one hand, approval by unanimous consent, and on the other, approval by voice vote after unanimous consent agreement is reached to hold the vote. Distinguishing between those technically confirmed by voice vote and those confirmed by unanimous consent would therefore require examination of the *Congressional Record* for each nomination. In both cases, party leaders have communicated with all Senators in advance to determine if there is an objection, and the length of time it requires to approve the nomination on the floor is the same in both cases.

Table 1. Number of Confirmed Civilian Nominations, With and Without Roll Call Vote

108th to 118th Congress (January 7, 2003-July 11, 2024)

Congress	Number of Nominations Confirmed	Number (%) of Confirmed Nominations Approved without a Roll Call Vote	Number (%) of Confirmed Nominations Approved with a Roll Call Vote[a]
108th (2003-2004)	713	631 (88%)	82 (12%)
109th (2005-2006)	740	692 (94%)	48 (6%)
110th (2007-2008)	**545**	**514 (94%)**	**31 (6%)**
111th (2009-2010)	920	855 (93%)	65 (7%)
112th (2011-2012)	573	488 (85%)	85 (15%)
113th (through Nov. 20, 2013)[b]	213	164 (77%)	49 (23%)
113th (Nov. 21, 2013-2014)[b]	398	244 (61%)	154 (39%)
114th (2015-2016)	**264**	**219 (83%)**	**45 (17%)**
115th (2017-2018)	715	529 (74%)	186 (26%)
116th (2019-2020)[c]	518	264 (51%)	254 (49%)
117th (2021-2022)	817	530 (65%)	287 (35%)
118th (2023-July 11, 2024)	302	123 (41%)	179 (59%)

Source: Congress.gov

Notes: Bolded entries indicate Congresses when the majority party in the Senate was a different party than the President. Excludes civilian nominations normally confirmed *en bloc* from lists submitted by the President, including nominations to the foreign service, the Public Health Service, and the civilian uniformed services of the National Oceanic and Atmospheric Administration. CRS determined nominations confirmed by searching "confirmed by yea-nay vote" or "confirmed by the Senate by Yea-Nay vote" for all confirmed civilian nominations.

a. In a few instances, the Senate invoked cloture by roll call vote and confirmed the nomination by voice vote. These cases are included in the totals of nominations approved with a roll call vote: 2 nominations each in the 109th, 111th, and 112th Congresses; 4 each in the 115th and 116th Congresses; and 15 in the 113th Congress, 14 after Nov. 20, 2013.

b. On November 21, 2013, the Senate reversed a ruling of the presiding officer and, through the reversal, reinterpreted Senate Rule XXII to require only a majority to invoke cloture on presidential nominations (except those to the Supreme Court). Prior to November 21, 2013, a vote of three-fifths of the Senate (60 Senators if no more than one vacancy) was required to invoke cloture. In addition, in the 113th Congress, a temporary standing order was in effect that reduced the time limit for consideration of most nominations after cloture was invoked.

c. On April 3, 2019, the Senate reinterpreted Senate Rule XXII to reduce, from 30 hours to 2 hours, the maximum time allowed for consideration of most nominations after cloture is invoked.

Cloture

In the absence of unanimous consent, the Senate must consider each nomination separately. The question of confirmation is a debatable one in the Senate and may require a cloture process in order to end debate and reach a vote. Under current Senate precedents, invoking cloture on a nomination requires majority support, and most nominations are subject to a maximum of two additional hours of post-cloture debate.[10]

[10] Bullet point summary of cloture steps below is adapted from CRS Insight IN12200, *Holds on Nominations*, by Elizabeth Rybicki and Michael Greene. For nominations subject to 30 hours of post-cloture debate, see **Table 4**.

Absent unanimous consent, the steps to confirm a nomination include:

- The Senate votes on a non-debatable motion to proceed to executive session to take up a nomination on the *Executive Calendar*.[11]
- The majority leader (or his designee) files cloture on the nomination.[12] The Senate must wait two session days before voting on cloture, absent unanimous consent to alter this "ripening period." The Senate can conduct other business during these two days, and usually does.
- Two days of session later, the Senate votes on cloture.[13] The rule requires that the vote to invoke cloture be a roll call vote. If a majority of Senators voting support cloture, then cloture is invoked, and further consideration of the nomination is limited.
- The Senate conducts post-cloture debate on the nomination. For all but the highest-ranking nominations, the maximum time for consideration of a nomination after cloture is invoked is two hours. Once cloture is invoked on a matter, the Senate can consider other business during the post-cloture period only by unanimous consent.
- After post-cloture debate time expires, or when no Senator seeks to discuss the nomination further, the Senate votes on the nomination.[14] Confirmation requires majority support.
- The motion to reconsider the confirmation vote is routinely, by unanimous consent, considered made and laid upon the table.[15] This final parliamentary step prevents the possibility of a re-vote on the nomination and immediately returns the approved nomination to the President.

Stacked Cloture Motions

Confirming a large number of nominations separately using the cloture process can take considerable floor time. To expedite the process somewhat, it is common for the majority leader to file cloture on several nominations, sequentially, on the same day (sometimes referred to as "stacking" cloture motions); the cloture motions then ripen simultaneously over the next two session days.

In order to stack cloture motions, the majority leader first makes a non-debatable motion to enter executive session to take up a specific nomination. The motion is routinely agreed to by voice vote, though any Senator could, with a sufficient second, secure a roll call vote. Next, the majority leader files cloture on the nomination and then makes a non-debatable motion to return to legislative session (also routinely agreed to by voice vote). The majority leader can repeat these steps for any number of nominations. However, when deciding when and whether to stack cloture motions on multiple nominations, another consideration is the possible effect on other items of business on the Senate agenda. Once cloture has been filed on a matter, unanimous consent is required to withdraw the cloture motion. In

[11] This motion is routinely approved immediately without a roll call vote—but with sufficient support, a Senator could secure a roll call vote on this question. The motion requires a majority vote to pass.

[12] In order to properly present a cloture motion on the Senate floor, Senate Rule XXII requires that it be signed by at least 16 Senators. Once the cloture motion is filed on the floor, it is read aloud in its entirety by the clerk. However, the Senate routinely waives the reading of the motion by unanimous consent.

[13] Prior to voting on the motion to invoke cloture, Senate Rule XXII requires the presiding officer to direct the clerk to call the roll in order to establish that a quorum is present. The Senate routinely waives this quorum call by unanimous consent, but any Senator could object and force this vote to occur.

[14] The vote is taken by voice, unless a Senator with sufficient support requests a roll call vote on the question of confirming the nomination. Securing a recorded vote requires the support of one-fifth of Senators present. When conducting business, the Senate assumes a quorum is present, which consists of a majority of at least 51 Senators. A minimum sufficient second for securing a recorded vote, therefore, requires 11 Senators (one-fifth of 51).

[15] Absent unanimous consent to table the motion to reconsider, a majority of the Senate could immediately vote to table the motion to reconsider if it were offered.

addition, once cloture is invoked, during the post-cloture consideration time, unanimous consent is required to move on to any other Senate business.

Stacked cloture motions filed sequentially on multiple nominations ripen simultaneously. Two days of session later, each nomination must still be considered separately and in sequence; that is, first a vote to invoke cloture, then up to two hours of post-cloture debate, and, finally, a vote on confirmation for the nominee. The process is repeated for each stacked nomination. As a result of stacking cloture motions, the Senate is often able to confirm several nominations on the day that the cloture motions mature. This typically requires Senators come to the floor multiple times during the day to vote, since clustering the roll call votes requires unanimous consent.

The use of cloture to process nominations, which was uncommon 20 years ago, has now become routine. In the vast majority of cases where cloture is filed on nominations there are two roll call votes cast in connection with them: one on the motion to invoke cloture and one to confirm the nomination. For the convenience of all Senators, the Senate usually enters into unanimous consent agreements that establish the times for the cloture and confirmation votes, but these unanimous consent agreements largely reflect what would occur under the procedures just described when cloture motions are stacked.

It is common, for example, for the majority leader to stack cloture motions on three nominations at a time, and for subsequent unanimous consent agreements to establish when the six roll call votes to process these three nominations will occur. Cloture motions are frequently stacked on three nominations at the end of one week that then ripen the following Tuesday. Unanimous consent agreements sometimes set the first cloture vote before the weekly caucus meetings, and set the first confirmation vote (followed immediately by the cloture vote on the second nomination) when the Senate returns to session after the meeting. To provide for predictability in the schedule, the time for the confirmation vote on the second nomination (followed immediately by the cloture vote on the third nomination) is also typically agreed to by unanimous consent, reflecting the terms of the rule that allow a maximum of two hours. Sometimes the unanimous consent agreements arrange for these votes to all occur on the same day—usually with two or three hours between cloture and confirmation votes—but it is just as likely that the six votes taken in relation to the stack of three nominations will occur over the course of two days of session.

Table 2 provides data on the number of roll call votes in relation to nominations and the number of days on which a roll call vote was cast in relation to nominations, by Congress, from the 108th Congress (2003-2004) to the 118th Congress through July 11, 2024. The number of days on which the Senate takes roll call votes in relation to nominations has also increased, and it is not unusual for there to be multiple roll call votes on a single day.

Table 2. Roll Call Votes in Relation to Nominations

108th to 118th Congress (January 7, 2003-July 11, 2024)

Congress	Number of Roll Call Votes in Relation to Nominations (% of All Roll Call Votes)	Number of Days with Roll Call Votes in Relation to Nominations	Number of Nominations Subject to Cloture Votes	
			All	Judicial (%)
108th (2003-2004)	106 (16%)	73	11	10 (91%)
109th (2005-2006)	59 (9%)	46	11	6 (55%)
110th (2007-2008)	**37 (6%)**	**28**	**1**	**1 (100%)**
111th (2009-2010)	76 (11%)	59	12	2 (17%)
112th (2011-2012)	93 (19%)	79	10	6 (60%)
113th (through Nov. 20, 2013)[a]	67 (28%)	47	14[b]	1 (7%)
113th (Nov. 21, 2013-2014)[a]	299 (71%)	86	131	86 (66%)
114th (2015-2016)	**47 (9%)**	**45**	**2**	**0**
115th (2017-2018)	330 (55%)	181	127	48 (38%)
116th (2019-2020)[c]	515 (72%)	173	244	154 (63%)
117th (2021-2022)	559 (59%)	202	245	100 (41%)
118th (2023-July 11, 2024)	357 (63%)	146	173	102 (59%)

Sources: Senate roll call data available at https://www.senate.gov/legislative/common/generic/roll_call_lists.htm; Cloture vote data available at https://www.senate.gov/legislative/cloture/clotureCounts.htm; Archived CRS Report RL32878, *Cloture Attempts on Nominations: Data and Historical Development Through November 20, 2013*, by Richard S. Beth, Elizabeth Rybicki, and Michael Greene, updated Sept. 28, 2018; CRS congressional distribution memorandum, "Nominations with Cloture Motions, 113th (2013-2014); 114th (2015-2016); and 115th (2017-2018) Congresses," by Elizabeth Rybicki, Michael Greene, and Richard S. Beth, Jan. 15, 2019.

Notes: Bolded entries indicate Congresses when the majority party in the Senate was a different party than the President. Includes roll call votes with a PN in the "issue" field of the Senate data, such as votes on confirmation, votes on cloture on a nomination, votes to reconsider cloture votes, and votes to enter executive session to take up a nomination.

a. On November 21, 2013, the Senate reversed a ruling of the presiding officer, and, through the reversal, reinterpreted Senate Rule XXII to require only a majority to invoke cloture on presidential nominations (except those to the Supreme Court). Prior to November 21, 2013, a vote of three-fifths of the Senate (60 Senators if no more than one vacancy) was required to invoke cloture. In addition, in the 113th Congress, a temporary standing order was in effect that reduced the time limit for consideration of most nominations after cloture was invoked.

b. Does not include four failed cloture attempts on four nominations that occurred prior to November 21, 2013, because subsequent successful cloture votes were held on all four nominations after the reinterpretation of the rule and are included in the total in the next row.

c. On April 3, 2019, the Senate reinterpreted Senate Rule XXII to reduce, from 30 hours to 2 hours, the maximum time allowed for consideration of most nominations after cloture is invoked.

Nominations Returned to the President (Senate Rule XXXI, paragraph 6)

Paragraph 6 of Senate Rule XXXI requires that nominations that are not confirmed or rejected by the Senate be returned to the President at the end of a session, or when the Senate adjourns or recesses for more than 30 days. *Pro forma* sessions held during a recess of the Senate count as days of session. Holding *pro forma* sessions has become routine in recent years, and these sessions (effectively every third

day) prevent returns of nominations during longer state work periods.[16] Between the first and second sessions of a Congress, however, the Senate must waive the rule, or else nominations will be automatically returned at the end of the first session.[17] The President must submit a new nomination to the Senate to have the nominee considered in the second session, which could require a Senate committee to report the new nomination.

The Senate usually reaches unanimous consent agreements to allow some nominations to remain "in status quo" between the first and second sessions of a Congress. The Senate sometimes exempts specific nominees from such unanimous consent agreements, allowing them to be returned during the recess or adjournment. According to a Congressional Research Service report, "In recent years, while unanimous consent continues to be reached to hold over some nominations, larger numbers of nominations have been returned to the President during adjournments between sessions of the Senate."[18]

Recent Efforts to Change Senate Procedures for Considering Nominations

In the past 20 years, there has been Senate interest in the process for confirming nominations, and several efforts, some successful, to change Senate procedures. Below, as you requested, CRS has summarized several of these attempts, beginning with a resolution reported by the Committee on Rules and Administration in the 108th Congress (2003-2004) affecting the cloture threshold for nominations, and ending with a resolution reported this year that would have allowed cloture to be filed on multiple military nominations, *en bloc*.[19]

Proposal to Reduce the Number of Votes to Invoke Cloture on Successive Cloture Motions on the Same Nomination (S.Res. 138, 108th Congress)

On June 26, 2003, the Committee on Rules and Administration reported S. Res. 138, a resolution to amend the cloture rule (Rule XXI, paragraph 2) relating to the consideration of nominations requiring the advice and consent of the Senate.[20] The resolution proposed that after a failed cloture vote on a nomination (in which less than three-fifths of Senators duly chosen and sworn had voted to end debate), additional cloture motions on the same nomination could be made, but the threshold necessary to invoke cloture pursuant to each subsequent motion would drop by three votes until the threshold reached a level

[16] For more information, see CRS Report R42977, *Sessions, Adjournments, and Recesses of Congress*, by Valerie Heitshusen.

[17] Unanimous consent may be necessary to waive the rule. See Floyd M. Riddick and Alan S. Frumin, Riddick's Senate Procedure: Precedents and Practices, 101st Cong., 2nd sess., S.Doc. 101-28 (Washington: GPO, 1992), p. 946. For more information, see CRS Report R46664, *Return of Nominations to the President Under Senate Rule XXXI*, by Michael Greene, page 2, footnote 5.

[18] CRS Report R46664, *Return of Nominations to the President Under Senate Rule XXXI*, by Michael Greene.

[19] Although beyond the scope of this testimony, during this time period the Senate has also considered possible changes to the practice of placing "holds" on both legislation and nominations. The Senate Rules and Administration Committee held hearings on the topic, and in 2011 the Senate agreed to S.Res. 28, "a resolution to establish as a standing order of the Senate that a Senator publicly disclose a notice of intent to objecting to any measure or matter." For more information, see archived CRS Report RL31685, *Proposals to Reform 'Holds' in the Senate*, by Walter J. Oleszek.

[20] According to press coverage, the resolution was reported by voice vote with only majority party members of the committee present. See David Miller, "Senate Rules and Administration Committee Markup: Panel OKs Measure that Would Change Rules for Approving Judicial Nominees," *CQ Committee Coverage*, June 24, 2003.

equal to or less than a majority of the full Senate. This final cloture motion would then be agreed to only if a simple majority of Senators duly chosen and sworn agreed.

For example, under this proposal, if there was not more than one vacancy in the Senate, the threshold would have started at 60 votes required, but votes on subsequent cloture motions (on the same question) would have dropped to 57, then 54, then 51. The proposal prohibited the filing of a subsequent cloture motion until the Senate had disposed of the previous one, and it retained the timing process under the cloture rule at the time—that is, the two-day waiting period and a maximum of 30 hours of post-cloture consideration. In previous Congresses, similar resolutions ratcheting down the number needed to invoke cloture had been introduced, though those proposals applied to all questions, not just nominations.[21]

The majority leader submitted the resolution, cosponsored by the Chair of the Rules and Administration Committee, after repeated failed cloture votes on two judicial nominations.[22] The Rules and Administration Committee held a hearing in early June on the proposal, and the chair argued that, historically, cloture had not been filed often on nominations, and that the practice of a minority of Senators preventing judicial nominations from reaching a vote was unconstitutional.[23] Senators and Senate observers were discussing what was referred to at the time as the "constitutional option," or sometimes the "nuclear option," which was an unspecified plan to change Senate procedures with only simple majority support, presumably by taking unusual actions to overcome the supermajority support necessary under established procedures.[24] In a related Senate Judiciary Committee hearing held in May, Senators opposed to changing procedures to allow a nomination to move forward with simple majority support argued nominations had been delayed or not confirmed many times in Senate history, including under the previous administration when their party controlled the White House and the other party controlled the Senate. They pointed to the number of judicial nominations that had been confirmed that Congress, and argued the Senate was an important check on the nature of the nominees selected by the President.[25]

The full Senate never attempted formal action on S.Res. 138 in the 108th Congress (2003-2004), but it was discussed on the Senate floor by several Senators, on November 12-14, 2003, when the Senate organized a multi-day debate on the process for considering judicial nominations.[26] In the following Congress, the majority and minority leaders reportedly were discussing possible changes to the rules, including one proposed by the majority leader that would have guaranteed a vote on a nomination after 100 hours of

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[21] In 1995, Senator Harkin, on behalf of himself and Senators Lieberman, Pell, and Robb, offered an amendment proposing a similar process that would have applied to all matters; the amendment was tabled, 76-19 ("Amending Paragraph 2 of Rule XXV," *Congressional Record*, daily edition, vol. 141 (January 4, 1995), p. S30 and (January 5, 1995), p. S438). See also S.Res. 85, 108th Congress, to amend paragraph 2 of rule XXII of the Standing Rules of the Senate, submitted by Senator Miller on March 13, 2003. For more information on "ratchet" proposals, on which this summary is based, see CRS congressional distribution memorandum, "Proposals to Change Senate Rules Submitted January 3, 2013," by Valerie Heitshusen and Elizabeth Rybicki, Jan. 18, 2013, pp. 7-11, available upon request from the author.

[22] In the 108th Congress, there were 7 cloture votes on the nomination of Miguel A. Estrada to be a Circuit Judge and four on the nomination of Priscilla Richman Owen to be a Circuit Judge.

[23] Statement of Senator Trent Lott, "Judicial Confirmation Process," *CQ Committee Testimony*, June 5, 2003. Full hearing transcript not available.

[24] See, for example, John Cornyn. "Our Broken Judicial Confirmation Process and the Need for Filibuster Reform." *Harvard Journal of Law and Public Policy,* vol. 27, fall 2003, pp. 181-230; Robert C. Byrd. "In Defense of Senate Tradition." *Congressional Record,* daily edition, vol. 151, March 20, 2005, pp. S3100-S3103; Martin B. Gold and Dimple Gupta. "The Constitutional Option to Change Senate Rules and Procedures: A Majoritarian Means to Overcome the Filibuster." Harvard Journal of Law and Public Policy, vol. 28, fall 2004, pp. 205-272.

[25] U.S. Congress, Senate Judiciary Committee, *Judicial Nominations, Filibusters, and the Constitution: When a Majority Is Denied Its Right to Consent*, 108th Cong., 1st sess., May 6, 2003, 108-227 (Washington: GPO, 2003).

[26] *Congressional Record*, daily edition, vol. 149, November 12, 2003, pp. S14529; S14580; S14663-S14665; S14765-S14767; See also Keith Perine and Mary Clare Jalonic, "Senate's Marathon Debate Ends with More Judges Blocked," *CQ Today Online News*, November 14, 2003.

debate.[27] In May of 2005, reportedly after leadership talks had ceased, the majority leader filed cloture on a judicial nomination that had been subject to multiple failed cloture motions for several years. The expectation was that a simple majority would use novel procedures (a "constitutional" or "nuclear option") to lower the cloture threshold. However, a group of Senators, seven from each party, entered into an agreement that prevented the reinterpretation of the rule and moved several judicial nominations forward.[28]

"Privileged Nominations" (S.Res. 116, 112th Congress)

On May 12, 2011, the Senate Rules and Administration Committee reported S.Res. 116, a resolution to create a new process to allow some nominations to specified positions to bypass formal committee consideration (unless requested by any Senator). The resolution emerged from bipartisan negotiations, including the Chairs and Ranking Members of the Rules and Administration Committee and the Homeland Security and Governmental Affairs Committee, that also resulted in the introduction and eventual enactment of S. 679 (P.L. 112-116), a law that eliminated the requirement for advice and consent of the Senate for 163 positions.[29] The nominations included in S.Res.116, as reported, were largely to part-time positions to boards and commissions.

The full Senate considered the resolution on June 29, 2011, pursuant to a unanimous consent agreement that allowed only relevant amendments. One amendment, sponsored by the Chair and Ranking Member of the Rules and Administration Committee, was agreed to by unanimous consent. The amendment added 39 positions to the resolution, including full-time chief financial officers and certain assistant secretaries, that had previously been included in the bill eliminating the advice and consent requirement. The amendment also added a requirement that any committee report accompanying a bill or joint resolution, "contain an evaluation and justification made by such committee for the establishment in the measure being reported of any new position appointed by the President within an existing or new Federal entity." The Senate agreed to the resolution by a vote of 89-8 on June 29, 2011.[30]

The resolution, as approved by the Senate, provided that 272 nominations to specified positions in executive branch agencies, independent agencies, and oversight boards and advisory councils would not be referred to committee unless a Senator requested referral.[31] Instead of being immediately referred, these nominations are instead listed in a special section of the *Executive Calendar*, a document distributed daily to congressional offices and available online. This section of the Calendar is titled "Privileged Nominations." After the chair of the committee with jurisdiction over a nomination has notified the executive clerk that biographical and financial information on the nominee has been received, this is indicated in the Calendar. After 10 days of Senate session, the nomination is moved from the "Privileged Nominations" section of the Calendar and placed on the "Nominations" section with the same status as a nomination that had been reported by a committee. Importantly, at any time that the nomination is listed

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[27] Statement issued by the Office of the Majority Leader, published in "Viewpoint," *Roll Call*, May 17, 2005, p. 4.

[28] For a description of the agreement, see "Judicial Filibusters," *Congressional Record*, daily edition, vol. 151 (May 25, 2003), pp. S5859-S5860. For more information, see archived CRS Report RS22208, The "Memorandum of Understanding:" A Senate Compromise on Judicial Filibusters, by Walter J. Oleszek, July 26, 2005.

[29] The law also eliminated the advice and consent requirement for approximately 2,855 positions from the Public Health Service and National Oceanic and Atmospheric Administration officer corps, which typically were submitted on long lists considered by the Senate *en bloc* by unanimous consent. For more information, see CRS Report R41872, *Presidential Appointments, the Senate's Confirmation Process, and Changes Made in the 112th Congress*, by Maeve P. Carey.

[30] For more information, see CRS Report R46273, *Consideration of Privileged Nominations in the Senate*, by Michael Greene.

[31] In 2015, the Senate created a new 13-member Board of Directors for the National Association of Registered Agents and Brokers positions in the Terrorism Risk Insurance Program Reauthorization Act of 2015 (P.L. 114-1), members of which are considered privileged nominations under the terms of the law.

in the "Privileged Nominations" section of the *Executive Calendar*, any Senator can request that a nomination be referred, and it is then sent to the appropriate committee of jurisdiction.

Senators who supported the resolution argued that it would make for easier confirmation for specified nominations. The Chair of the Rules Committee stated that it was his presumption that once privileged nominations had reached the regular section of the *Executive Calendar,* "these noncontroversial positions would be passed by unanimous consent."[32] A cosponsor of the resolution stated, the day it was submitted, that the resolution "retains the authority of the Senate over these positions, but streamlines the process, lessening the burden on the Senate for routine, non-controversial nominations and providing for a faster road to confirmation as well."[33] Although committees are still responsible for gathering information on the nominee, including financial and biographical information, the work and time necessary to prepare for a public business meeting is saved. In addition, Senators do not have to meet formally, with a majority of the committee physically present, to vote to move the nomination forward, a responsibility that can be challenging given the multiple demands for Senators' time.[34] If any Senator wishes the nomination to go through the regular process, that Senator can request referral, and committees have sometimes chosen to hold hearings on privileged nominations.

According to a previous study conducted by the Congressional Research Service, since the privileged nominations process went into effect during the 112th Congress, on June 29, 2011, the Senate has considered 634 privileged nominations, and 58 (9.1%) have been referred at the request of a Senator.[35]

Temporary Standing Order: Reduced Post-Cloture Consideration for Nominations (Section 2 of S.Res. 15, 113th Congress)

On January 24, 2013, the Senate approved a resolution, S.Res. 15, affecting the process for considering nominations. The resolution established a temporary Senate standing order that was in effect only in the 113th Congress (2013-2014). At the time the standing order was approved, a vote of three-fifths of the Senate was required to invoke cloture on a nomination, and a successful cloture vote would limit further consideration of the nomination to a maximum of 30 hours. The standing order reduced the 30-hour period to 8 hours for most nominations, and to 2 hours for U.S. district court nominations. The specific nominations affected and excluded by the standing order are listed in **Table 3**. In addition, while the hours for post-cloture consideration under Rule XXII are not equally divided, under the standing order they were divided "in the usual form."[36]

The resolution was taken up the same day it was submitted and considered pursuant to a unanimous consent agreement requiring 60 votes for adoption. The Senate agreed to S.Res. 15 by a roll call vote of 78-16.[37]

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[32] Sen. Chuck Schumer, remarks in Senate, *Congressional Record*, daily edition, vol. 157 (June 29, 2011), p. S4203.

[33] Sen. Susan Collins, remarks in Senate, *Congressional Record*, daily edition, vol. 157 (March 30, 2011), p. S1990.

[34] Summary based on longer discussion in CRS Report R41872, *Presidential Appointments, the Senate's Confirmation Process, and Changes Made in the 112th Congress*, by Maeve P. Carey, pp. 13-15.

[35] CRS Report R46273, *Consideration of Privileged Nominations in the Senate*, by Michael Greene.

[36] When time is divided in the usual form, a manager from each side controls half the time, and yields portions of time to members on his or her side. It is possible for a manager to yield back time when it is controlled, which could further reduce the maximum time for post-cloture consideration. Under Rule XXII, the cloture rule, time cannot be yielded back. For information on "the usual form," see Floyd M. Riddick and Alan S. Frumin, *Riddick's Senate Procedure* (hereafter, *Riddick's*), 101st Cong., 2nd sess., S. Doc. 101-28 (Washington: GPO, 1992), pp. 1367-1368.

[37] *Congressional Record,* daily edition, vol. 159 (January 24, 2013), p. S272.

Table 3. Maximum Number of Hours of Post-Cloture Consideration of Nominations Under Temporary Standing Order of the 113th Congress

Pursuant to S.Res.15 and Senate Rule XXII

Nomination	Maximum Consideration
U.S. district courts	2 hours
Courts with fixed terms, such as the court of claims, the tax court, and presumably the territorial courts	8 hours
All executive branch positions except 21 high level positions	8 hours
21 high level executive branch positions, including the head of each executive department.[a]	30 hours
The Supreme Court, the U.S. Circuit Court of Appeals, and the U.S. Court of International Trade	30 hours

Source: S.Res. 15, Section 2

Notes: [a] The standing order excludes positions "at level I of the Executive Schedule under section 5312 of title 5, United States Code," which, in addition to the 15 heads of departments (14 Secretaries and the Attorney General), includes the United States Trade Representative; the Director of the Office of Management and Budget; the Commissioner of Social Security, Social Security Administration; the Director of National Drug Control Policy; the Chairman of the Board of Governors of the Federal Reserve System; and the Director of National Intelligence.

The standing order responded to concerns related to the process of approving nominations. Although many factors were understood to contribute to the length of time required for processing nominations,[38] one concern was the possibility that one Senator could delay approval of a nomination that, if brought to a vote, would be approved by a large margin.[39] The leverage individual Senators have in the nominations process derives in part from the time that could be required for a cloture process on each of the hundreds of nominations the Senate receives from the President. One expectation was that altering the timing of the cloture process would reduce this leverage, and perhaps facilitate reaching unanimous consent agreements for the disposition of the nominations.[40]

Reduced Threshold for Invoking Cloture on Nominations Other Than to the Supreme Court: Reinterpretation of the Rule

On November 21, 2013, the Senate reinterpreted Senate Rule XXII to allow a majority of Senators voting to invoke cloture on all nominations other than to the Supreme Court. The Senate did this by reversing a ruling by the presiding officer on a vote of 52-48.[41]

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[38] For more information, see archived CRS Report R41872, *Presidential Appointments, the Senate's Confirmation Process, and Changes Made in the 112th Congress*, by Maeve P. Carey; archived CRS Report R42732, *Length of Time from Nomination to Confirmation for "Uncontroversial" U.S. Circuit and District Court Nominees: Detailed Analysis*, by Barry J. McMillion; archived CRS Report RL33118, *Speed of Presidential and Senate Actions on Supreme Court Nominations, 1900-2010*, by R. Sam Garrett and Denis Steven Rutkus; and archived CRS Report R40119, *Filling Advice and Consent Positions at the Outset of a New Administration*, by Henry B. Hogue and Maureen Bearden.

[39] See, for example, *Congressional Record,* daily edition, vol. 158 (July 30, 2012), p. S5654, and (December 13, 2012), pp. S3011-S3013.

[40] The majority leader stated that "it is our expectation that this new process for considering nominations as set out in this order will not be the norm, but that the two leaders will continue to work together to schedule votes on nominees in a timely manner by unanimous consent, except in extraordinary circumstances." (*Congressional Record*, daily edition, vol. 159 (January 24, 2013), p. S272.)

[41] *Congressional Record*, daily edition, vol. 159 (November 21, 2013), pp. S8417-S8418.

It is uncommon for the Senate to reverse a decision by the presiding officer.[42] Any Senator can attempt to reverse a ruling by making an appeal, and most appeals are decided by majority vote.[43] In most circumstances, however, appeals are debatable, and therefore supermajority support (through a cloture process) is typically necessary to reach a vote to reverse a decision of the presiding officer. In the November 21 proceedings, the appeal raised in those parliamentary circumstances was apparently determined to not be debatable.[44] Therefore, when the majority leader challenged the ruling of the presiding officer, the question on whether the ruling should stand as the judgment of the Senate was put immediately to a vote. The Senate voted that the ruling should not stand, and thereby supported instead the position of the majority leader.[45]

The majority leader had announced his intention to attempt to reinterpret the rule after a failed cloture vote on a D.C. Circuit nomination; two other nominations to fill the other two vacancies on that Court had failed earlier in the Congress.[46] Senators who supported the reinterpretation of the rule argued it was a necessary response to Senators opposing cloture and also blocking consideration of nominations by unanimous consent. Those opposed to the reinterpretation argued that the requirement for supermajority support was consistent with the advice and consent role of the Senate, since it encouraged communication and cooperation between the branches regardless of party control of the Senate and the Presidency. Furthermore, the method of changing the procedures was controversial, as some argued it could have unexpected and potentially far-reaching consequences on Senate proceedings.[47]

This reinterpretation of the rule as it applied to the nominations process impacted the small proportion of nominations that had long been subject to close scrutiny by the full Senate each Congress, and it affected proceedings on other nominations as well. In the past, some nominations with demonstrated majority support were not confirmed by the Senate because cloture could not be invoked; other nominations might not have received any floor consideration because it was anticipated that supermajority support could not be obtained for approval. Under the 2013 reinterpretation of Senate Rules, such nominations can be confirmed. In addition, under the previous interpretation of Senate Rule XXII, the President might have selected nominees with the understanding that the support of more than a majority might effectively be necessary. Under the new procedures, this practice could have changed, although it is not possible to identify and measure such a change.

Most nominations, both before and after the reinterpretation of the rule, are never subjected to a cloture process, however. They are approved swiftly on the floor by unanimous consent, reflecting practices of consultation both prior to presidential selection of nominees and Senate discussions prior to floor

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[42] Since 1965, the Senate has reversed a decision of the presiding officer 36 times. CRS identified reversals through a search of roll call votes, and it is possible (although unlikely) that other reversals occurred without a roll call vote on any associated question. For more information, see CRS congressional distribution memorandum, "Senate Decisions Reversing a Ruling of the Presiding Officer, 1965-March 31, 2017" (available to congressional clients on request from the author of this testimony).

[43] For more information, see CRS Report 98-306, *Points of Order, Rulings, and Appeals in the Senate*, by Valerie Heitshusen.

[44] The majority leader made the appeal in between two questions that were not debatable. *Riddick's Senate Procedure* states that "appeals arising in connection with a non-debatable motion" are not debatable (p. 726). The particular parliamentary actions of November 21 were unique in that it was the first time an appeal was made after a motion to reconsider a cloture vote was agreed to but before the cloture vote. No Senator made a parliamentary inquiry or a point of order regarding whether the appeal was debatable, and no debate was attempted.

[45] The procedures used to reinterpret the cloture rule were referred to as "the nuclear option." For more information, see CRS Report R43331, *Majority Cloture for Nominations: Implications and the "Nuclear" Proceedings*, by Valerie Heitshusen; CRS Report R42929, *Procedures for Considering Changes in Senate Rules*, by Richard S. Beth and CRS Report RL32843, *"Entrenchment" of Senate Procedure and the "Nuclear Option" for Change: Possible Proceedings and Their Implications*, by Richard S. Beth.

[46] Burgess Everett, "Reid Weighing Nuclear Option," *Politico,* Nov. 19, 2013.

[47] See, for example, remarks of the majority leader and the minority leader, *Congressional Record,* daily edition, vol. 159 (November 21, 2013), p. S8414-S8416.

consideration. The practices for considering such nominees pursuant to negotiated unanimous consent agreements appear to have been impacted by the 2013 decision of the Senate.[48] Unanimous consent is still required to process nominations expeditiously, and the number of nominations subject to a cloture motion has increased since the reinterpretation of the rule in 2013 (**Table 2**).

Reduced Threshold for Invoking Cloture on All Nominations: Reinterpretation of the Rule

In April of 2017, the Senate reinterpreted Rule XXII in order to allow cloture to be invoked on all nominations by a majority of Senators voting (a quorum being present), including nominations to the U.S. Supreme Court.[49] This expanded the effect of similar actions taken by the Senate in November 2013, which changed the cloture vote requirement to a majority for nominations *except* to the Supreme Court.[50] The first Supreme Court nomination submitted to the Senate after the 2013 reinterpretation of the cloture rule was that of Merrick B. Garland in 2016; the Judiciary Committee did not report the nomination and it was never considered on the Senate floor.[51] The reinterpretation therefore occurred on the first Supreme Court nomination taken up on the floor by the Senate since the reinterpretation. Senators in favor of the reinterpretation argued that it was a necessary response to actions that had been taken by the other party for decades to prevent confirmation of judicial nominations. They argued that members of the minority party had voted for cloture on Supreme Court nominations in the past, even if they opposed the nominations, and that the change was necessary if this norm was not going to be followed. Those opposed to the reinterpretation argued that it was the other side that had been blocking or preventing judicial nominations, including the prior nominee to the vacancy on the Supreme Court, and that the supermajority threshold should remain to permit more Senators to influence the selection of nominations.[52]

Proposal for Reduced Post-Cloture Time on Nominations (S.Res. 355, 115th Congress; S.Res. 50, 116th Congress)

In both the 115th Congress (2017-2018) and the 116th Congress (2019-2020), the Committee on Rules and Administration reported out resolutions proposing to reduce the maximum time allowed for consideration of nominations after cloture was invoked.

In the 115th Congress, the committee reported, 10-9, S.Res. 355, which had the same terms as those agreed to temporarily in the 113th Congress (S.Res. 15). S.Res. 355 would have reduced the maximum time allowed for consideration of a nomination after cloture was invoked to eight hours, excluding the highest-level executive and judicial positions, which would have remained at 30 hours. The resolution also proposed that post-cloture time for district court nominations be reduced to two hours. It further

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[48] For a discussion of the effect shortly after the decision on consideration of district court nominations, see CRS Report R43762, *The Appointment Process for U.S. Circuit and District Court Nominations: An Overview*, by Barry J. McMillion, pp. 36-38.

[49] *Congressional Record*, daily edition, vol. 163 (April 6, 2017), pp. S2388-S2390.

[50] For more information, see CRS Report R44819, *Senate Proceedings Establishing Majority Cloture for Supreme Court Nominations: In Brief*, by Valerie Heitshusen.

[51] On March 16, 2016, President Obama had nominated Merrick B. Garland to the Supreme Court, but the Senate Judiciary Committee did not hold a hearing on or report the nomination. CRS Report RL33225, *Supreme Court Nominations, 1789 to 2020: Actions by the Senate, the Judiciary Committee, and the President*, by Barry J. McMillion.

[52] See, for example, remarks by the majority leader and minority leader, *Congressional Record,* vol. 163 (April 6, 2017), pp. S2383-S2385.

provided that the time be divided, "in the usual form," meaning a manager on each side would control half the time and yield portions to those who wished to speak.[53]

Proponents of the resolution argued that waiting for post-cloture time to expire, when the outcome was certain, was not constructive. Opponents argued the change would result in a further erosion of minority rights.[54] Supporters of the change further argued that the pace of Senate confirmation of the new President's nominees was problematic, while those opposed disagreed, pointing toward the nominations that had been confirmed, and, further, arguing that the nominations were requiring increased scrutiny in response to the White House vetting process.[55] The full Senate did not take any action on S.Res. 355 in the 115th Congress.

The following Congress, the Rules and Administration Committee reported, 9-3, S.Res. 50, which also proposed to reduce post-cloture consideration time, but in a different way. This second resolution would have reduced post-cloture time to two hours, equally divided in the usual form, for all district court nominations and some executive branch nominations. The executive branch nominations that would have remained at 30 hours included not just the same 21 high-level nominations left at 30 hours by the standing order in the 113th Congress, but also members of several Commissions.[56] All judicial nominations except district court nominations would have remained subject to 30 hours of post-cloture consideration.

During the committee markup, proponents cited the number of lower-level executive branch nominees that had not been confirmed, despite having been supported by members from both parties in committee. Some also argued that vacancies in the executive branch would erode the advice and consent role of the Senate, as executive branch agencies had to rely on acting officials to perform leadership roles. Senators on the committee also argued that the use of cloture on nominations had increased, and that the nominations, when they reached a vote, often received bipartisan support. Senators opposed argued that the current process helped to ensure nominees had the proper qualifications, and they also proposed that any rules change proposal take effect in a future Congress (when it would not be known which party would be in the White House or the majority). The current procedure, it was argued, encouraged bipartisanship; shortening the post-cloture time would allow majority party Senators to push nominations through more easily.[57]

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[53] As mentioned above, it is possible for a manager to yield back time when it is controlled, which could further reduce the maximum time for post-cloture consideration. For information on the "usual form," see Floyd M. Riddick and Alan S. Frumin, *Riddick's Senate Procedure* (hereafter, *Riddick's*), 101st Cong., 2nd sess., S. Doc. 101-28 (Washington: GPO, 1992), pp. 1367-1368.

[54] In addition to the reduced threshold for cloture, opponents pointed to a recent change in practice regarding the "blue slip" policy of the Judiciary Committee. For more information, see CRS Report R44975, *The Blue Slip Process for U.S. Circuit and District Court Nominations (1917-Present)*, by Barry J. McMillion.

[55] *Congressional Record*, daily edition, vol. 164 (April 24, 2018), pp. S2361-S2364; *Congressional Record*, daily edition, vol. 164 (April 25, 2018), pp. S2407-S2408; See also Jacob Holzman, "Senate Rules and Administration Committee Markup: Panel Moves Resolution to Change Senate Debate," *CQ Markup and Vote Coverage*, April 25, 2018; Ed Pesce, "Boiling Mad About Nominations," *CQ Senate*, April 25, 2018.

[56] Nominations to be a member of the following commissions and boards would have remained subject to a maximum of 30 hours of post-cloture consideration: Equal Employment Opportunity Commission; the Securities and Exchange Commission; Federal Election Commission; Federal Energy Regulatory Commission; Federal Trade Commission; National Labor Relations Board; Commodity Futures Trading Commission; Consumer Product Safety Commission; Federal Communications Commission; Surface Transportation Board; Nuclear Regulatory Commission; Federal Deposit Insurance Corporation; Board of Governors of the Federal Reserve System.

[57] "Full Committee Business Meeting," February 13, 2019, video, available at https://www.rules.senate.gov/hearings/full-committee-business-meeting, visited July 20, 2024. See also Niels Lesniewski, "Senate Rules and Administration Committee: Panel Spars Over Judges, Advances GOP Effort to Cut Nomination Debate Time." *CQ Committee Coverage*, February 13, 2019.

The Senate majority leader moved to proceed to consider S.Res. 50 on March 28, 2019, and filed cloture on the motion.[58] The cloture vote on the motion to proceed, which would have required the support of three-fifths of the Senate, failed, 51-48, on April 2, 2019.

Reduced Post-Cloture Time on Nominations: Reinterpretation of the Rule

On April 3, 2019, the Senate reinterpreted Senate Rule XXII to reduce, from 30 hours to 2 hours, the maximum time allowed for consideration of most nominations after cloture is invoked. The Senate took this step by reversing two rulings by the presiding officer. The first vote established that "postcloture time under rule XXII for all executive branch nominations other than a position at level 1 of the Executive Schedule under section 5312 of title 5 of the United States Code is 2 hours."[59] On the second vote, the Senate established that "postcloture time under rule XXII for all judicial nominations, other than circuit courts or Supreme Court of the United States, is 2 hours"[60] (see **Table 4**).

Table 4. Maximum Number of Hours of Post-Cloture Consideration of Nominations

Pursuant to a Reinterpretation of Senate Rules on April 3, 2019

Nomination	Maximum Consideration
U.S. district courts and all other judicial positions except the U.S. Supreme Court and the U.S. Circuit Court of Appeals	2 hours
All executive branch positions except 21 high-level positions	2 hours
21 high-level executive branch positions, including the head of each executive department[a]	30 hours
The U.S. Supreme Court and the U.S. Circuit Court of Appeals	30 hours

Source: *Congressional Record*, daily edition, vol. 165 (April 3, 2019), pp. S2220 and S2225.

a. The decision excluded positions "at level I of the Executive Schedule under section 5312 of title 5, United States Code," which, in addition to the 15 heads of departments (14 Secretaries and the Attorney General), includes the United States Trade Representative, the Director of the Office of Management and Budget, the Commissioner of Social Security, the Director of National Drug Control Policy, the Chairman of the Board of Governors of the Federal Reserve System, and the Director of National Intelligence.

In most circumstances appeals of the chair's ruling are debatable, and therefore supermajority support (through a cloture process) is typically necessary to reach a vote to reverse a decision of the presiding officer. In the April 3 proceedings, however, the appeal was raised after cloture had been invoked on a nomination. Senate Rule XXII states that after a successful cloture vote, "appeals from the decision of the presiding officer, shall be decided without debate."[61] Therefore, when the majority leader appealed the

[58] For the majority leader's statement regarding the resolution, see *Congressional Record,* daily edition, vol. 165 (March 28, 2019), pp. S2081-S2082.

[59] The majority leader made a point of order that such executive branch nominations were subject to two hours of post-cloture consideration. The presiding officer did not sustain the point of order. The majority leader appealed the ruling of the chair, and the Senate voted 51-48 to reverse the ruling. *Congressional Record*, daily edition, vol. 165 (April 3, 2019), p. S2220.

[60] The majority leader made a point of order that such judicial branch nominations were subject to two hours of post-cloture consideration. The presiding officer did not sustain the point of order. The majority leader appealed the ruling of the chair, and the Senate voted 51-48 to reverse the ruling. *Congressional Record*, daily edition, vol. 165 (April 3, 2019), p. S2225.

[61] This was a different parliamentary situation than the two occasions on which the Senate reinterpreted the rule to lower the threshold necessary to invoke cloture. In those cases, the appeal could not be made after cloture was invoked, since it was necessary to reinterpret the rule prior to the cloture vote in order to establish the lower threshold. In both of those cases, the majority leader a the time made the appeal in between two questions that were not debatable. *Riddick's Senate Procedure* states (continued...)

rulings of the presiding officer, the questions on whether the ruling should stand as the judgment of the Senate received a vote without an opportunity for extended debate. In each case, the Senate voted that the ruling should not stand, and thereby supported instead the position of the majority leader.

Providing for *En Bloc* Consideration of Military Nominations (S.Res. 444, 118th Congress)

On November 14, 2023, the Rules and Administration Committee voted to report, 9-7, S.Res. 444, a resolution proposing a temporary process that would allow the Senate to consider more than one military nomination at a time (referred to as *en bloc* consideration).[62]

The procedures proposed in S.Res. 444 would apply to military promotions and appointments reported favorably by the Armed Services Committee, excluding nominations to the eight positions that make up the Joint Chiefs of Staff (defined by law) and excluding nominations to be a commander of the 11 combatant commands (also defined by law, including separate provisions of law concerning the combatant command for special operations forces and for cyber operations).

S.Res. 444 would allow a group of military nominations to be considered under the same cloture process that can currently be used for a single nomination. Specifically, under S.Res. 444, the steps to confirm a group of military nominations in the absence of unanimous consent would include the following:

- The majority leader (or his designee) makes a motion to proceed to consider a group of military nominations. Qualifying military nominations can only be included in the motion if they were reported favorably by the Armed Services Committee on or before the previous calendar day.
- The Senate votes on the motion to proceed; this motion is not debatable and requires majority support for approval.
- If the Senate agrees to take up the group of nominations, a single cloture motion can be filed on that group of nominations.
- Two days of session later, the Senate votes on cloture. If a majority of Senators voting support cloture, then cloture is invoked, and further consideration of the nomination is limited.
- The Senate conducts post-cloture consideration on the nominations for a maximum of two hours.
- After the two hours of post-cloture consideration expires, or when no Senator seeks recognition to continue consideration of the nominations, the Senate takes a single vote to confirm the group of nominations, which requires majority support.
- The motion to reconsider the confirmation vote is considered made and tabled (i.e., adversely disposed of). This action makes the confirmation vote on the group of nominations final and immediately triggers notification to the President of Senate approval of the nominations.

Under the terms of S.Res. 444, at no time during this process could a Senator force consideration of each nomination separately by demanding a division of the question. Although infrequent, under regular Senate procedures, a single Senator can cause some questions that consist of multiple parts, such as an

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that "appeals arising in connection with a non-debatable motion" are not debatable (p. 726). The particular parliamentary actions of November 21, 2013, were unique in that it was the first time an appeal was made after a motion to reconsider a cloture vote was agreed to, but before the cloture vote. The same procedural steps were followed on April 6, 2017, in relation to the vote necessary to invoke cloture on Supreme Court nominations.

[62] Senator Jack Reed, chair of the Senate Armed Services Committee, submitted S.Res. 444 on October 31, 2023. Earlier in the Congress, on May 18, 2023, the chair of the Committee on Rules and Administration submitted S.Res. 219, which also concerned the *en bloc* consideration of nominations.

amendment inserting several sections into a bill, to be divided for a separate debate and vote on each component part. S.Res. 444 explicitly states that this parliamentary action would not be permitted.

S.Res. 444, if agreed to, would be in effect only during the 118th Congress. There is no limit on the number of times this motion to consider military nominations *en bloc* could be used during the Congress.

S.Res. 444 was introduced in response to a Senator having announced a blanket hold on military nominations.[63] The Senator lifted the hold December 5, 2023[64], and the full Senate has not taken any action on S.Res. 444.

[63] Caroline Coudriet, "Democrats Prepare Resolution to Bypass Tuberville Blockade," *CQ News*, November 1, 2023.

[64] Liz Goodwin and Dan Lamothe, "Tommy Tuberville Announces End to Blanket Military Holds," *Washington Post*, December 5, 2023.

SEA: New Report Highlights Importance of Career Executives for Government Continuity

WASHINGTON, DC – Today, Marcus Hill, President of the Senior Executives Association (SEA)–representing the interests of over 10,000 career federal executives in the Senior Executive Service (SES), Senior Level (SL), Scientific and Professional (ST) and equivalent positions –released the following statement in response to a new report from the Center for Presidential Transition, *Persistently Vacant - Critical federal leadership positions go unfilled for years*:

"Unfilled positions that are normally the province of political appointees are often ably carried out on an acting basis by dedicated career Senior Executives, as Congress designed and intended. The men and women of the career Senior Executive Service are the federal government's top leaders selected on the basis of merit."

"Whether appointed roles are unfilled due to a lag in the nomination by an Administration, delayed action by the Senate, or gaps given a second term or presidential transition scenario, career federal executives have proven that they are ready and able to step up and into agency leadership positions. Career senior executives provide stability in administration and enable presidents to faithfully execute the law. They also provide important institutional memory and expertise on how best to implement priorities for new appointees of any administration"

"The Senior Executives Association (SEA) endorses the call to action in this report for the Senate to reevaluate and address the issues concerning ongoing vacancies for appointed positions.

"SEA has advocated for several reforms that speak directly to this report and its recommendations as part of our Joint SES Policy Agenda [cite]. Congress could also review the merits of shifting more management-focused roles, such as leadership for operational offices within agencies, from appointees to career executives who can provide long-term focus and implementation expertise. Finally, support should be strengthened for appointees who are confirmed – they should be provided with robust onboarding to enable success and required to have performance plans to ensure accountability."

Background

- Top career leaders in the federal government are members of the elite Senior Executive Service (SES), a cadre of 10,000 intended to provide continuity of government operations and a link between political leadership and the career federal workforce.
- In 2018 SEA, the Partnership for Public Service, and the Volcker Alliance released a Joint SES Policy Agenda which includes a number of recommended reforms to strengthen career and political leadership.
- Among these reforms include a call to Reduce the Number of Political Appointees overall, including those requiring Senate confirmation.

- SEA has also called for limiting the number of appointee roles for key management positions and designating more of such positions as Career Reserved to maintain continuity.

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The Senior Executives Association (SEA) is a professional association representing Senior Executive Service (SES) members and other career Federal leaders. Founded in 1980, SEA's goals are to improve the efficiency, effectiveness, and productivity of the Federal government; to advance the professionalism and advocate the interests of career Federal executives; and to enhance public recognition of their contributions. For more information, visit www.seniorexecs.org.

Senate Committee on Rules and Administration
Senate Procedures to Confirm Nominees
July 30, 2024
Questions for the Record
Ms. Jenny Mattingley

Chairwoman Klobuchar

Q: As you noted at the hearing, one of the results of delays in getting nominees confirmed is that positions are often left vacant for extended periods of time, with more than 80 Senate-confirmed positions having been vacant over 50 percent of the time between 2009 and 2023.

- Can you describe the impact these vacancies have on an agency's work?

A: Leadership is intrinsically tied to the ability of any organization to be successful. Vacancies in agencies can slow decision-making and confuse lines of leadership, ultimately undermining the effectiveness of the agency's ability to carry out responsibilities that Congress has authorized and funded. Vacancies hamper regular operations and also harm the ability of our government to protect against, prepare for, and respond to urgent national priorities such as national security threats, economic challenges, health crises, and natural disasters.

The adverse impacts on agencies include:

- Acting officials seldom view themselves as being in a position to make long-term decisions – they see that as the role of the Senate-confirmed official. Long-term vacancies therefore can slow both policy and operational decisions. One former official who held senior positions in the Departments of State and Defense under Presidents George W. Bush and Barack Obama characterized agencies as being thrown into "neutral gear" when there are acting officials.[1]
- The movement of one official into an acting role can trigger other lower-level officials moving up into acting roles. Some become dual-hatted, or triple-hatted, and all feel the need to ensure execution of their primary job they will return to when their acting status in another role ends. The musical chairs resulting from vacancies strain the bandwidth of those called into acting roles.
- Employees of the acting official may feel uncertainty about making decisions without the backing of the full authority of a Senate-confirmed official.
- A sense of impermanent leadership can negatively affect employee morale – especially if no nomination is forthcoming, making employees wonder whether their agency is a priority. In the Partnership's annual *Best Places to Work in the Federal Government®* rankings, across the years one thing has been clear – leadership is the number one driver of employee engagement. Employees who hold their leaders in high regard are more likely to be motivated, and that drives better performance.

[1] "Government Disservice: Overcoming Washington Dysfunction to Improve Congressional Stewardship of the Executive Branch." Partnership for Public Service, September 2016, p.29, https://ourpublicservice.org/publications/government-disservice/

- An agency's ability to recruit is diminished when the top positions in the agency are vacant, and vacancies at the top can also delay the filling of other senior political and career positions.
- Long-term vacancies may strain relations between the agency and Congress, as Members may view the absence of a nominee as a lack of attention by an administration to an agency, component, or program. Vacancies also can diminish Congress' visibility into who actually is performing the responsibilities of the vacant position.
- Excessive reliance on acting officials – or those "performing the duties" of the office – can invite legal challenges questioning consistency of decisions with the Federal Vacancies Reform Act, thus diverting agency resources to defending lawsuits.[2]

Q: One of the proposed reforms discussed during the hearing was reducing the number of Senate-confirmed positions.

- What criteria would you recommend be considered when evaluating positions that could be removed from the Senate confirmation process?

A: The first consideration in determining whether a position could be removed from Senate confirmation is the Appointments Clause under Article 2, section 2 of the Constitution, governing appointment of "officers" of the United States. As Sean Stiff of the Congressional Research Service explained before the Committee, the Constitution gives discretion to Congress as to whether "inferior officers" under the Appointments Clause must be subject to confirmation by the Senate, while the appointment of what the Supreme Court has come to call "principal officers" may only occur with the advice and consent (i.e., confirmation) of the Senate.

Under the Appointments Clause, certain categories of appointments – e.g., ambassadors, consuls, Supreme Court justices – are clearly subject to advice and consent. Otherwise, while the Supreme Court has not laid out exclusive criteria for distinguishing between principal and inferior officers, the Court has indicated that a key consideration is whether an officer is directed and supervised by another official who has been appointed as a principal officer. [3]

The Partnership submits that there is ample room, consistent with the Constitution and the consideration of supervision as identified by the Court, to convert positions currently subject to Senate confirmation to presidential or agency-head appointments not subject to confirmation.

As detailed in my testimony, particular positions for the Senate to consider for conversion to non-confirmed positions include:

- *Positions reporting to multiple layers of other Senate-confirmed positions.* We recommend starting with a presumption that assistant secretaries (or equivalent) and below should not require Senate confirmation, with the presumption being rebuttable by considering the criteria below.

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[2] Legal challenges have arisen, for example, regarding acting status of officials filling the roles of Attorney General at the Department of Justice, Director of U.S. Citizenship and Immigration Services at the Department of Homeland Security, and Director of the Bureau of Land Management at the Department of Interior.

[3] *Edmond v. United States*, 520 U.S. 651, 660 (1997). For discussion of related case law, see written testimony of Sean M. Stiff, Legislative Attorney, Congressional Research Service, submitted for this hearing.

- *Part-time board and commission positions.* While some part-time board and commission positions may fall into the principal officer category, many are advisory or ceremonial, or otherwise could be converted to nonconfirmed roles or to positions reporting to an agency leader.
- *Persistently vacant positions.* Many positions on the books as subject to Senate confirmation have been ignored or filled capably by non-confirmed political or career appointees.
- *Technical, management and operational roles that would benefit from long-term leadership.* Some highly specialized positions (e.g., Chief Financial Officers and Chief Information Officers) would benefit from an appointment model that encourages long-term leadership spanning across administrations.
- *Positions whose counterparts have already been converted to non-confirmed status.* Where Congress has seen fit to convert most or many of a certain category of positions to non-confirmed status (e.g. Chief Information Officers), it likely makes sense to convert the rest.

In deciding which positions to convert from confirmed to non-confirmed status, criteria Congress should consider include:

- Hierarchy: To what extent does the position report to, and is under direction and supervision of, other positions subject to Senate confirmation?
- Role of the position: Is the primary responsibility of the position policy-making or rule-making, or is it more focused on administrative or operational duties?
- Budgetary and organizational responsibility: What is the level of spending the position oversees, and how many personnel fall within the management of the position?
- Specialized technical or managerial skills required: Would the qualifications required to fill the position be better met by a different appointment model that would encourage more longevity of service – e.g., presidential appointment without confirmation or career status with a term appointment?
- Rate of vacancy: Has there been a high rate of vacancies in the position over time, leading to non-confirmed officials performing responsibilities?
- Comparability to other non-confirmed positions: Is the role of the position comparable to other positions across the government that are not subject to Senate confirmation?
- Necessity: Are some positions duplicative, or no longer needed, and therefore could be eliminated?
- Special oversight considerations: Does the position carry significant oversight responsibilities (e.g., the audit and inspection roles of Inspectors General) that would lead the Senate to want to retain its advice and consent role?

Senator Bennet

Senate Nomination Burden and Effect on Constitutional Role:

Q: Between 1960 and 2020, the number of Senate-confirmed positions increased by over 70%, from 779 to 1,340. Additionally, the Senate took an average of 182 days to confirm nominees compared, to 49 days during the first term of President Reagan. This has the potential to undermine the Senate's constitutional role to advise and consent.

- Can you expand on why it is important for the Senate to have this constitutional role? And how do our current procedures inhibit the Senate's ability to advise and consent — and conduct oversight?

A: The advice and consent role under the Appointments Clause of Article 2, section 2 of the Constitution is an extremely important part of the checks and balances of our government, with the responsibility of filling appointments shared between the president and the Senate. The proliferation of appointments subject to advice and consent, though – over 70 percent since 1960 – is straining the ability of both the White House and the Senate to fulfill its responsibilities. Many of these positions in the executive branch fall into the category of "inferior officers," whose positions, pursuant to the Appointments Clause, Congress may by law vest in the president alone or the heads of departments.

The proliferation of Senate-confirmed positions, combined with the increasingly slow confirmation process, undermines the advice and consent role because it results in long-term vacancies during which responsibilities are carried out by persons who have not been confirmed by the Senate. Long-term vacancies also complicate Congress' oversight of agencies, as lines of visibility into who performs responsibilities during vacancies can become blurred.

My written testimony provides examples of long-term vacancies and links to additional data points from our research. For example:

- It took an average of 505 days, from inauguration day to confirmation, to fill the six deputy undersecretary positions at the Department of Defense.[4]
- We identified 83 positions requiring Senate confirmation that were vacant at least 50 percent of the time between the beginning of President Obama's administration and the first two years of the Biden administration, meaning that they were vacant for at least half of this 14-year period.[5]
- For the ten part-time boards and commissions with the longest wait times, the average confirmation wait time ranges between 285 and 425 days.[6]

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[4] Partnership for Public Service, Center for Presidential Transition, "Layered Leadership: Examining How Political Appointments Stack Up at Federal Agencies," Feb. 20, 2024. Available at https://presidentialtransition.org/reports-publications/layered-leadership-examining-how-political-appointments stack-up-at-federal-agencies/

[5] Partnership for Public Service, Center for Presidential Transition, "Persistently Vacant: Critical federal leadership positions go unfilled for years," July 9, 2024. Available at https://presidentialtransition.org/reports publications/persistently-vacant-critical-federal-leadership-positions-go-unfilled-for-years/

[6] Partnership for Public Service, Center for Presidential Transition, "Empty Seats: Slow Confirmation Process Leaves Many Part-Time Boards and Commissions with Vacancies," Dec. 20, 2023. Available at https://presidentialtransition.org/reports-publications/empty-seats/

An added complication of the lengthy confirmation process is that it encourages administrations to bypass Senate confirmation altogether, leaving some positions unfilled and others filled by a succession of acting officials. This diminishes the ability of Congress to hold administrations accountable.

Other researchers have shed further light on the widespread vacancies. For example, David Lewis and Mark Richardson found that in the first two years of the W. Bush, Obama and Trump administration, 30 percent of Senate-confirmed positions never received a nomination.[7]

Procedural Barriers:

Q: What are the procedural barriers that have contributed the most to the extended timeline for confirming presidential nominees since 1960? For example, would you say that we use the privileged calendar less now than we used to? Does the Senate use the full post-cloture time more often that it did 50 years ago?

A: The sheer increase in the number of Senate-confirmed positions since 1960 is a root cause of the extended timeline for confirmations – it's simply more challenging for a president to vet and nominate, and for the Senate to confirm, appointees to fill over 1300 positions. Changing norms also have resulted in a slower process for many nominees. In the past, Senators were more deferential to presidents in allowing them to put their teams in place, even if they had some disagreements with presidents and their nominees on policy.

While we don't have precise data on use of post-cloture time, the rise in cloture votes shows a use of Senate procedure to slow down confirmations. In the first term of President George H.W Bush, there were no cloture votes on executive branch nominations. From President Clinton's first term through President Obama's first term, there were a total of 35 cloture votes on executive branch nominations. Then the number started to skyrocket: 62 in President Obama's second term, 169 in President Trump's term, and, as of August 2 of this year, 205 in President Biden's term.

Our research also shows that the privileged calendar, which was created in 2011, has not worked as intended. While the process expedites committee consideration by moving a nominee to the Executive Calendar without a committee vote, once they are on the Executive Calendar, they wait with all other nominees for a final vote, and with limited floor time, it is likely that higher-profile positions are prioritized. The Partnership's 2022 research on privileged nominations showed that privileged nominees take longer to confirm now than they did before the privileged procedures were instituted, and privileged nominees continue to take longer to confirm than nominees subject to the regular confirmation procedures.[8] We also hear anecdotally that the number of instances of Senators asking for a privileged nomination to be referred to committee is rising. We encourage the Senate to modernize the process for privileged nominations in order to expedite filling noncontroversial positions, as originally intended.

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[7] David E. Lewis and Mark D. Richardson, "The Very Best People: President Trump and the Management of Executive Personnel," Presidential Studies Quarterly, 51(1), 2021, pp. 51-70.

[8] Carter Hirschhorn, Partnership for Public Service, Center for Presidential Transition, "(Not so) privileged nomination calendar," July 26, 2022. Available at https://presidentialtransition.org/reports-publications/not-so privileged-nomination-calendar/

Senate Committee on Rules and Administration
Senate Procedures to Confirm Nominees
July 30, 2024
Questions for the Record
Mr. Sean M. Stiff

Chairwoman Klobuchar

- As we discussed at the hearing, the confirmation process is an important tool for the Senate in our government's system of checks and balances.
    - Can you expand on why it is important for the confirmation process to function effectively to preserve the Senate's role in our system of government?

The Appointments Clause vests the President with the exclusive power to nominate principal officers and the Senate with the exclusive power to confirm principal officers.[1] The same appointment method applies by default to inferior officers.[2] Alternatively, the Clause permits Congress to vest, by law, the appointment of inferior officers solely in the President, a department head, or a court of law.[3]

The Supreme Court has explained that, for those officers subject to Senate advice and consent, the Clause's division of responsibility safeguards the separation of powers. On one hand, the Clause prohibits congressional encroachment on the President's "exclusive" power to select such nominees, and the Senate may consider for appointment to federal office only those nominees put forward by the President.[4] On the other hand, the Senate's role in confirming nominees allows it to check the President's nomination power: the President chooses a nominee knowing that this person's appointment depends on the Senate's approval.[5]

As the Supreme Court has also explained, these mutual checks are not ends in themselves but advance important objectives. First, the Clause's division of responsibility provides an appointment framework that the Framers thought best for ensuring that qualified individuals hold federal office.[6] The Framers placed the power to nominate in one official who they believed was more likely than a collective body to pick a nominee based on fitness for a particular office.[7] If a President nonetheless allowed "a spirit of favoritism" to affect a nominee's selection, the Framers viewed the Senate's advice-and-consent role as a backstop that could prevent an unfit nominee from being confirmed.[8] Second, in the Court's view, the Clause ensures accountability

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[1] U.S. CONST. art. II, § 2, cl. 2.
[2] United States v. Arthrex, Inc., 594 U.S. 1, 12 (2021).
[3] U.S. CONST. art. II, § 2, cl. 2.
[4] Edmond v. United States, 520 U.S. 651, 659 (1997).
[5] THE FEDERALIST NO. 76, at 457 (Alexander Hamilton) (Clinton Rossiter ed., 1961) (arguing that the "necessity of" the Senate's "concurrence would have a powerful, though, in general, a silent operation" on the President's nominee selection).
[6] NLRB. v. Noel Canning, 573 U.S. 513, 523 (2014).
[7] *See Edmond*, 520 U.S. at 659 (stating that, in the Framers' view, the President would be more insulated from "interest-group pressure and personal favoritism than would a collective body").
[8] Fin. Oversight & Mgmt. Bd. for P.R. v. Aurelius Inv., LLC, 590 U.S. 448, 457 (2020) (internal quotation marks omitted).

for the actions of officeholders and lends those actions legitimacy.[9] The President bears primary responsibility for the actions of officers who the President alone was responsible for nominating.[10] Third, as with other features of the separation of powers, the Court has stated that a system of mutual checks that prevents one branch from becoming too powerful in appointments matters advances individual liberty.[11]

An effective Senate confirmation process can serve these goals. The Constitution largely leaves to the Senate decisions on how to structure its proceedings to confirm nominees. Under Article I, Section 5, each "House may determine the Rules of its Proceedings."[12] A Senate rule may not "ignore constitutional restraints or violate fundamental rights," but the Senate otherwise has broad discretion to structure its proceedings.[13] A rule falls within the Senate's authority if there is a "reasonable relation between" the rule (e.g., a rule governing the consideration of nominees) and "the result which is sought to be attained" (e.g., whether in fact the Senate consents to a nomination).[14] If a rule satisfies this reasonableness standard, the fact that the rule establishes a new or different mode of proceeding from what came before does not place the rule beyond the Senate's authority.[15] The Supreme Court has also instructed that the chambers' rulemaking authority does not depend on a court's assessment of whether a rule reflects good policy.[16] That determination is for the relevant chamber to make.[17]

Senator Bennet

Senate Nomination Burden and Effect on Constitutional Role:

- Between 1960 and 2020, the number of Senate-confirmed positions increased by over 70%, from 779 to 1,340. Additionally, the Senate took an average of 182 days to confirm nominees compared, to 49 days during the first term of President Reagan. This has the potential to undermine the Senate's constitutional role to advise and consent.
    - Can you expand on why it is important for the Senate to have this constitutional role? And how do our current procedures inhibit the Senate's ability to advise and consent — and conduct oversight?

The Supreme Court has explained that, by dividing appointment authority between the President and the Senate, the Appointments Clause serves three related objectives: ensuring that qualified

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[9] United States v. Arthrex, Inc., 594 U.S. 1, 11 (2021) (explaining that the authority wielded by officers of the United States "acquires its legitimacy and accountability to the public through 'a clear and effective chain of command' down from the President, on whom all the people vote." (quoting Free Enter. Fund v. Pub. Co. Acct. Oversight Bd., 561 U.S. 477, 498 (2010)).

[10] *Id.* at 12. Alexander Hamilton noted, though, that the Clause would result in the Senate bearing the "censure of rejecting a good" nominee. THE FEDERALIST NO. 77, at 461 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

[11] *See* Buckley v. Valeo, 424 U.S. 1, 122 (1976).

[12] U.S. CONST. art. I, § 5, cl. 2.

[13] United States v. Ballin, 144 U.S. 1, 5 (1892).

[14] *Id.* (examining a House procedure aimed at determining the existence of a quorum).

[15] *Id.*

[16] *Id.*

[17] *See id.*

individuals hold office,[18] making the President primarily responsible for the actions of those who he or she appoints,[19] and protecting individual liberty by dividing appointment-related powers between and the President and the Senate.[20] The Court has also explained that the Constitution empowers the Senate to adopt reasonable rules to structure its business—including considering executive nominations[21]—so long as those rules respect the separation of powers and fundamental rights.[22] As a legal matter, whether current procedures inhibit or advance the Senate's advice-and-consent or oversight roles is thus largely a determination for the Senate to make.[23]

As an attorney in the American Law Division of the Congressional Research Service (CRS), my testimony focuses on how the Appointments Clause, the Rules of Proceeding Clause, and related Supreme Court case law describe the Senate's role in the appointment of federal officers. These constitutional provisions and case law demarcate Congress's legal discretion to (for example) dispense with requiring advice and consent for particular federal officials. Questions about current Senate procedures under this legal framework are best addressed by my CRS colleague, Elizabeth Rybicki, Specialist on Congress and the Legislative Process. Her response to Questions for the Record will address the impact of current Senate procedures.

Procedural Barriers:

- What are the procedural barriers that have contributed the most to the extended timeline for confirming presidential nominees since 1960? For example, would you say that we use the privileged calendar less now than we used to? Does the Senate use the full post-cloture time more often that it did 50 years ago?

My testimony focuses on how constitutional provisions and related Supreme Court case law shape the legal parameters of how federal officials may be appointed, including the Senate's discretion to adopt procedures for considering nominations. Questions about the history and use of particular Senate procedures under this framework are best addressed by my CRS colleague, Elizabeth Rybicki, Specialist on Congress and the Legislative Process. Her response to Questions for the Record will address this question in more detail.

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[18] *See* Edmond v. United States, 520 U.S. 651, 659 (1997).
[19] United States v. Arthrex, Inc., 594 U.S. 1, 11–12 (2021).
[20] Buckley v. Valeo, 424 U.S. 1, 122 (1976).
[21] United States v. Smith, 286 U.S. 6, 33 (1932) (deciding that the appointment of the chair of the Federal Power Commission (FPC) was valid under the Senate's rules despite the Senate's attempt to reconsider its prior affirmative confirmation vote after the President had commissioned the FPC chair).
[22] *Ballin*, 144 U.S. at 5.
[23] *See id.*

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July 30, 2024
Questions for the Record
Ms. Elizabeth Rybicki

Chairwoman Klobuchar

- As we discussed at the hearing, the confirmation process is an important tool for the Senate in our government's system of checks and balances.
    - Can you expand on why it is important for the confirmation process to function effectively to preserve the Senate's role in our system of government?

As an expert on the legislative process, my testimony focused on the rules and procedures of the Senate. Questions about the system of checks and balances established by the U.S. Constitution are best addressed by my CRS colleague, Sean M. Stiff, Legislative Attorney. His response to Questions for the Record will address this question.

Senator Bennet

- What are the procedural barriers that have contributed the most to the extended timeline for confirming presidential nominees since 1960? For example, would you say that we use the privileged calendar less now than we used to? Does the Senate use the full post-cloture time more often that it did 50 years ago?

The question references an increase in the average length of time from nomination to confirmation since 1960, and asks what Senate procedures have contributed to this. As discussed more fully in CRS submitted written testimony, the Senate, in 2013, reinterpreted the cloture rule, lowering the threshold necessary to invoke cloture from three-fifths of the Senate to a majority of Senators voting, a quorum being present. After this change, there was an increase in the use of cloture on nominations, and an accompanying rise in the number and percentage of nominations confirmed with a roll call vote (see Table 1 and Table 2 of the written testimony). A further reinterpretation of the cloture rule in 2019 reduced post-cloture consideration time, and this change also appears to have led to an increased use of cloture on nominations. Prior to these reinterpretations, it was not that Senators were using less post-cloture time, it was that the Senate was using cloture less. Before the changes, a higher proportion of nominations were confirmed by the Senate by unanimous consent, a process which consumes little floor time and does not require the presence of Senators to vote.[1]

[1] Table 1, column 3, of the written testimony presents the number of confirmed nominations approved without a roll call vote since 2003, and Table 2, column 4, shows the number of nominations subject to cloture votes. For data on cloture on nominations prior to 2003, see Archived CRS Report RL32878, *Cloture Attempts on Nominations: Data and Historical Development Through November 20, 2013*, by Richard S. Beth, Elizabeth Rybicki, and Michael Greene. For a detailed discussion of how the 2013 reinterpretation affected consideration of district court

The 2013 and 2019 reinterpretations of the cloture rule appear to have resulted in more floor time being spent on nominations. These new procedures might also be a factor affecting the average length of time from nomination to confirmation for some nominations.[2] However, concerns about length of the confirmation process predate the 2013 change. CRS written testimony submitted for this hearing describes efforts to change Senate procedures, and the stated motivation behind those efforts, over a longer period, beginning with a formal rules-change proposal to lower the threshold necessary to invoke cloture that was reported by the Rules Committee in 2003. The "privileged nominations" process, approved in 2011, was also developed as part of a broader effort to improve the nominations process, as discussed in the written testimony.[3]

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nominations, see archived CRS Report R42732, *Length of Time from Nomination to Confirmation for "Uncontroversial" U.S. Circuit and District Court Nominees: Detailed Analysis*, by Barry J. McMillion.

[2] Reinterpretation of the cloture rule in 2013 allowed some nominations—of the class that are typically subject to close scrutiny by the full Senate—to be confirmed that might not have been confirmed before the reinterpretation, and such nominations might have been confirmed faster than they would have been before the reinterpretation. However, because a greater proportion of nominations are confirmed using a cloture process instead of by unanimous consent, requiring more floor time, the average length of time from confirmation to nomination of all nominations might be higher. Studies of specific classes of nominations over time are likely to be most illuminating concerning possible factors affecting the length of the appointments process. See, for example, CRS Report R45622, *Judicial Nomination Statistics and Analysis: U.S. Circuit and District Courts, 1977-2022*, by Barry J. McMillion.

[3] The "privileged nominations" procedures affect only committee consideration; the expectation at the time of the adoption of the standing order was that these nominations would continue to be approved by the full Senate by unanimous consent. For more information, see CRS Report R46273, *Consideration of Privileged Nominations in the Senate*, by Michael Greene.

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