

“Examining the Senate Confirmation Process and Federal Vacancies”

United States Senate  
Committee on Homeland Security and Governmental Affairs

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**Testimony of Adam J. White\***

I am grateful for the opportunity to testify on these crucial matters. The appointment of effective, public-spirited leadership in administrative agencies is a constitutional issue of utmost importance.<sup>1</sup> As this Committee considers possible reforms to the appointments process, it must keep in mind the connection between the Senate’s specific role in *appointments*, and its broader role in *administration*. If current circumstances justify a reduction in the number of offices needing Senate confirmation, then such reductions should also be an opportunity to increase the Senate’s attention to the remaining Senate-confirmed appointments, and its investment in other forms of administrative oversight and legislation.

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<sup>1</sup> The Senate’s constitutional responsibility in the appointment of officers and judges has been a subject of my research and writing, most recently during my service on the Presidential Commission on the Supreme Court of the United States. See, e.g., [Toward the Framers’ Understanding of “Advice and Consent”: A Historical and Textual Inquiry](#), 29 HARV. J.L. & PUB. POL’Y 103 (2005); [“The Senate’s Trial,” National Review Online](#) (Dec. 19, 2019); [Separate Statement of Commissioner Adam White](#), Presidential Comm’n on the Supreme Court of the United States (Dec. 15, 2021); [The Supreme Court Fights Are Really About the Senate](#), HARV. J.L. & PUB. POL’Y PER CURIAM (Spring 2022).

Accordingly, my testimony offers a broader frame for the matter at hand: not simply appointments *per se*, but the Senate’s broader constitutional responsibility for helping to ensure effective, steady administration. Then, after surveying some of the specific prudential considerations informing proposals to reform appointments, I highlight several ways in which narrow reform of administration appointments should be connected to broader reforms of administrative oversight.

The great constitutional crisis of our era is not Congress’s growing presence in administration, but its growing absence. The goal of reform should be not reducing the Senate’s role, but recalibrating and reinvigorating it.

## **I. “Steady Administration” and the Senate’s Constitutional Responsibilities**

Americans are fiercely interested in constitutional government, but matters of administration tend to attract less spirited interest. Few would think of day-to-day administration as a “constitutional” issue at all—but the generation that wrote and ratified our Constitution knew better.

The founding generation’s greatest mind on constitutional administration, Alexander Hamilton, urged that “the true test of a good government is its aptitude and tendency to produce a good administration.”<sup>2</sup> He knew that a government cannot sustain the trust and respect of the people unless it actually produces effective governance in concrete ways. Congress’s enactment of good laws is the first step, but even the best legislation is worth little if the government fails to actually

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<sup>2</sup> Federalist Nos. 68 & 76.

administer those laws effectively and responsibly. Only steady administration, with a reliable rule of law, provides the sturdy foundation upon which American life can build and flourish.<sup>3</sup>

This notion of “steady administration” requires, in turn, both the energetic efforts of the executive branch and the steadying influence of the Senate. Those two values might seem to be mutually opposed, but in fact, they can and must work in conjunction with one another. The need to strike a proper balance between these two constitutional necessities is a timeless challenge of American government,<sup>4</sup> and it is exemplified by the issues before this Committee today.

Our constitutional government depends on “energy in the Executive.” As Hamilton famously explained, the Constitution created a powerful and energetic presidency for the sake of national security, but also for the sake of “steady administration of the laws” at home.<sup>5</sup> That energy is possible only in a system where execution of the laws is committed to a single president who oversees the

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<sup>3</sup> See, e.g., Federalist No. 72 (warning against “disgraceful and ruinous mutability in the administration of the government”). An utter failure of federal administration was among the “vices” that James Madison saw in the Articles of Confederation, spurring him to pursue a new Constitution. See James Madison, *Vices of the Political System of the United States* (Apr. 1787) (describing “acts of Congs. which depending for their execution on the will of the state legislatures, wch. are tho’ nominally authoritative, in fact recommendatory only”).

<sup>4</sup> See Federalist No. 37 (“Among the difficulties encountered by the convention, a very important one must have lain in combining the requisite stability and energy in government, with the inviolable attention due to liberty and to the republican form. ... Energy in government is essential to that security against external and internal danger, and to that prompt and salutary execution of the laws which enter into the very definition of good government. Stability in government is essential to national character and to the advantages annexed to it, as well as to that repose and confidence in the minds of the people, which are among the chief blessings of civil society.”)

<sup>5</sup> Federalist No. 70.

executive branch. He holds the agencies accountable, and he in turn is held accountable by the people themselves.

Yet while the President alone bears the Constitution's duty to "take Care that the Laws be faithfully executed,"<sup>6</sup> this task requires the assistance of countless others. "Because no single person could fulfill that responsibility alone," the Supreme Court reiterated last year, "the Framers expected that the President would rely on subordinate officers for assistance."<sup>7</sup> More specifically, the President needs to staff his administration with people he can trust: "He must place in each member of his official family, and his chief executive subordinates, implicit faith," the Supreme Court emphasized a century ago in one of its seminal decisions on executive power; he needs to have "confidence in the intelligence, ability, judgment or loyalty" of his administration's key personnel.<sup>8</sup>

All of this, taken by itself, might be seen as counseling in favor of minimizing any delay in appointing personnel to administrative agencies. Yet the Constitution embodies countervailing considerations that deserve equal attention. For while Presidents need to staff their administrations, the unfettered power to quickly appoint officers would carry obvious risks.

Here, too, Alexander Hamilton's defense of the Constitution makes the point clear. A President enjoying total discretion in "disposition of offices" would "be

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<sup>6</sup> U.S. Const. art. II, § 3

<sup>7</sup> *Seila Law LLC v. CFPB*, 140 S. Ct. 2183, 2191 (2021).

<sup>8</sup> *Myers v. U.S.*, 272 U.S. 52, 117 (1926) ("the President alone and unaided could not execute the laws. He must execute them by the assistance of subordinates").

governed much more by his private inclinations and interests” than by pure public-spiritedness.<sup>9</sup> Thus the Constitution gave the Senate its own crucial responsibility in the appointments process, requiring the President to win the Senate’s advice and consent before appointing officers—a necessarily slower process that would provide “an excellent check upon a spirit of favoritism in the President, and would tend greatly to prevent the appointment of unfit characters.”<sup>10</sup>

The Senate’s role was not intended to rob the executive branch of its energy, or of the President’s trust in his subordinates. Rather, the Senate’s role is intended to ensure that a President’s own lesser instincts do not result in an administration filled with lesser figures—people selected simply because they are (per Hamilton, again) “personally allied to him,” or “possessing the necessary insignificance and pliancy to render them the obsequious instruments of his pleasure.”<sup>11</sup> The Senate must take some time and effort to improve the appointment of officers, precisely so that those officers, once appointed, will do the best possible job of assisting the President in the energetic work of administration.

In this, Hamilton was echoing insights from the Constitutional Convention. James Madison, for example, argued that a Senate role in appointments “would unite the advantage of responsibility in the Executive with the security afforded in

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<sup>9</sup> Federalist No. 76.

<sup>10</sup> *Id.* Of course, the President also has power to temporarily appoint officers during Senate recesses. And, as noted further below, Congress can vest the power to appoint “inferior officers” in the President alone, or the heads of departments, or in the courts.

<sup>11</sup> *Id.*

the [Senate]” against “any incautious or corrupt nomination by the Executive.”<sup>12</sup>

Another of the Constitution’s key authors, Gouverneur Morris, argued for the Senate’s advice-and-consent role in executive appointments because “as the President was to nominate, there would be responsibility, and as the Senate was to concur, there would be security.”<sup>13</sup>

Thus, the Constitution needs both the executive branch’s energy and the Senate’s contributions to efficacy and stability. This is no easy thing, and the balance might need to be adjusted over time, by Congress’s power to delegate the appointment of some “inferior officers” completely to the discretion of the President himself, or the heads of departments, or the courts.<sup>14</sup>

Yet Congress must always be aware of the fact that removing the Senate from the appointments process is not a cost-free exercise. It is easy to tally the benefits of a swifter and more unilateral appointments process, if only by tallying up the number of offices that can be more quickly filled. The costs of reducing the Senate’s role are subtler and easier to overlook, but no less weighty.

## **II. The Current State of Administration and Appointments**

The Partnership for Public Service finds that the process for appointing officers with the Senate’s advice and consent is taking longer and longer, leaving too

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<sup>12</sup> See JAMES MADISON, NOTES OF DEBATES IN THE FEDERAL CONVENTION OF 1787, at 316 (on judicial appointments specifically).

<sup>13</sup> *Id.* at 598.

<sup>14</sup> U.S. Const. art. II, § 2, cl. 2.

many offices unfilled for too long.<sup>15</sup> I agree that it would be prudent for Congress to look for opportunities to remove some offices from Senate-confirmed appointment, and vest their appointments instead in the President or the agency heads. But any effort at reform must be informed by the circumstances that have given rise to the current state of affairs. Some of these considerations are evident in the Partnership’s own assessment.

“Since the middle of the 20th century,” the Partnership’s report observes, “the number of presidential appointees in the federal government has almost doubled, and the confirmation process for those who require Senate approval has become more arduous, lengthy, and politicized.”<sup>16</sup> This is true, but it also coincides with unfathomable growth in the power and discretion wielded by those administrative offices.

As the Partnership notes, “Congress has delegated increasing amounts of policymaking authority to federal agencies[.]”<sup>17</sup> Chief Justice Roberts put the point rather more colorfully: “The administrative state ‘wields vast power and touches almost every aspect of daily life.’ The Framers could hardly have envisioned today’s ‘vast and varied federal bureaucracy’ and the authority administrative agencies now

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<sup>15</sup> Partnership for Public Service, [\*Unconfirmed: Why Reducing the Number of Senate-Confirmed Positions Can Make Government More Effective\*](#) (Aug. 9, 2021).

<sup>16</sup> *Id.* (endnote omitted).

<sup>17</sup> *Id.*

hold over our economic, social, and political activities. “The administrative state with its reams of regulations would leave them rubbing their eyes.”<sup>18</sup>

This growth in the agencies’ power and discretion also results in dramatic swings in policy, from one presidency to the next. Each new administration, energized by its electoral victory, moves swiftly to undertake profound changes in the most consequential policy matters of modern life: from health care, to capital markets, to energy and the environment, and more. The appointment of new officers to oversee these policy shifts, especially at the start of a new administration, is immensely consequential.

While agencies have grown more powerful, Congress has gradually reduced one of its most important tools for oversight: the power of the purse. Alongside the Senate’s power in appointments, Congress’s power of the purse was recognized to be “the most complete and effectual weapon with which any constitution can arm the immediate representatives of the people, for obtaining a redress of every grievance, and for carrying into effect every just and salutary measure,” as Madison noted.<sup>19</sup> But today, Congress’s purse is losing its power, for two reasons. First, many agencies enjoy funding streams that are partly or wholly disconnected from Congress’s appropriations process.<sup>20</sup> And second, as the federal appropriations

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<sup>18</sup> *City of Arlington v. FCC*, 133 S. Ct. 1863, 1878 (2013) (Roberts, C.J., dissenting) (citations and brackets omitted).

<sup>19</sup> Federalist No. 58.

<sup>20</sup> As a lawyer in private practice, I co-authored a Supreme Court brief emphasizing the importance of Senate advice-and-consent in an era of declining congressional power over appropriations. *See* Amicus Br. of State Nat’l Bank *et al.*, *NLRB v. Noel Canning*, No. 12-1281 (Nov. 25, 2013).



process continues to break down into stand-offs, continuing resolutions, and omnibus spending bills, it becomes ever more disconnected from the actual oversight of agencies.<sup>21</sup>

And Congress's shrinking power of the purse exacerbates the other problems of Congress's decreasing role in legislation. The decades-long project of delegating broad power and discretion to agencies undermines the incentives for new legislation, by shifting the center of policymaking gravity from Congress to the agencies, making subsequent legislative efforts more difficult.<sup>22</sup>

Needless to say, the current process for Senate confirmation is not ideal. Nominees seeking Senate confirmation face daunting and extensive questions from Senators, possibly deterring some high-quality candidates from pursuing agency leadership positions.<sup>23</sup> Then again, nominees sometimes secure confirmation even without answering questions to Senators' satisfaction.<sup>24</sup>

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<sup>21</sup> See, e.g., Andrew J. Taylor, "[Reforming the Appropriations Process](#)," *Nat'l Affairs* (Spring 2019).

<sup>22</sup> See, e.g., Adam J. White, "[Democracy, Delegation, and Distrust](#)," *The Hoover Institution: Defining Ideas* (Mar. 12, 2019); Adam J. White, "[The APA and the Decline of Steady Administration](#)," *Law & Liberty* (Aug. 25, 2021).

<sup>23</sup> See, e.g., Tevi Troy, "[Fixing the Confirmation Process](#)," *Nat'l Affairs* (Spring 2011) ("Even when a nominee does eventually get confirmed, the process involved is protracted, intrusive, and embarrassing, as would-be officials are forced to disclose many intimate details of their lives and personal histories, which can often end up in the hands of hostile lawmakers or reporters. In many cases, the process is also quite expensive[.]") (collecting examples); see also Report to the President and Senate Committee Chairs and Ranking Members, [Streamlining Paperwork for Executive Nominations](#) (Nov. 2012).

<sup>24</sup> See, e.g., Sylvan Lane, "Senate confirms Chopra to lead Consumer Financial Protection Bureau," *The Hill* (Sept. 30, 2021) ("GOP senators also insisted that Chopra should be disqualified from leading the CFPB after refusing to respond to questions about the acting director's dismissal of some bureau staff."); Associated Press, "Top priority for Department of Homeland Security pick: Vacancies, not terrorism," *Deseret News* (Nov. 13, 2013) ("Sen. Tom Coburn ... said he was concerned that prepared answers to 23 questions on Johnson's customary pre-hearing questionnaire used the exact wording as several other Obama administration nominees.").

Finally, even if the Senate’s confirmation process were working smoothly, it still might not serve its most important constitutional purpose. In an era when presidential administrations wield immense policymaking discretion, senior officials must exercise that discretion with self-restraint under the rule of law; they must lead vast bureaucracies serving under them; and they must have the fortitude to give candid feedback—and sometimes even pushback—to the President and agency leaders under whom they serve. For all of this, some of the nominee’s most crucial “qualifications” are found not on the candidate’s résumé or financial disclosures, but in the candidate’s character.<sup>25</sup>

Those qualifications can only be ascertained through the confirmation process, with nominees answering Senators’ questions. If the sheer quantity of Senate-confirmed positions renders a thorough vetting of each nominee impossible, then the Senate should focus first and foremost on the agency’s top officers, and hold them accountable for the subordinate officers and senior staff who would be appointed without Senate review.

### **III. Questions to Inform Reform**

Again, the Senate’s constitutional advice-and-consent responsibility is not an end in itself, but a tool for improving administration overall. It is one of several

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<sup>25</sup> Again, this was Hamilton’s emphatic point: the Constitution made the Senate responsible for granting or withholding its advice and consent, in order to deter Presidents from appointing persons “possessing the necessary insignificance and pliancy to render them the obsequious instruments of his pleasure.” *Federalist No. 76*. At the Constitutional Convention, delegates vigorously debated the relative abilities of the President and Senate to better ascertain the character of nominees. *See, e.g., JAMES MADISON, NOTES OF DEBATES IN THE FEDERAL CONVENTION OF 1787*, at 314–17, 598–99. Roger Sherman, for example, favored appointment of judges by the Senate alone because Senators “would bring into their deliberations a more diffusive knowledge of characters.” *Id.* at 316.

tools; others include Congress's power of the purse and the courts' power to decide cases challenging agency action. Accordingly, any effort to reform the Senate's role in appointments should also reinforce other tools for overseeing administrative agencies and constraining their discretion.

To be sure, even narrow reform of appointments alone would not be simple, as the Partnership for Public Service's study recognizes. Shifting confirmed offices to unconfirmed offices or even to career positions would require complicated and nuanced prudential judgments.<sup>26</sup> Yet I respectfully suggest that sound reform requires the Senate's careful consideration of still more related issues. Here are a few examples.

*Recalibrating Review of the Remaining Senate-Confirmed Positions:*

Removing lower-level offices from Senate confirmation would make the senior offices even more consequential. Agency leaders would be responsible for the appointment of significant positions, or for oversight of career civil servants wielding powers so significant that they previously required Senate confirmation. For that reason, any reduction in the Senate's role in appointing an agency's officers should be coupled with an *increase* in the Senate's scrutiny of the remaining appointments, precisely to ensure that those appointees are well qualified to lead, manage, and hold accountable the vast and varied bureaucracy serving under them. As noted above, this is a line of inquiry that cannot be resolved on résumés; it

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<sup>26</sup> See Partnership for Public Service, *supra* note 15 (sections on "When to Convert Senate-Confirmed Political Appointees," "Convert Political Appointments to Career Roles," "Convert Political Appointments of Executive Branch Boards and Commissions to Agency-Controlled Positions").

requires real, substantive hearings, demanding the best and most public-spirited efforts of not just the nominees but also of the Senators.

*Modernizing the Civil Service:* To the extent that reforming Senate advice-and-consent requires transferring positions of significant authority into the career civil service, that change will further exacerbate the already pressing need for serious modernization of the federal civil service. Such reform is already long overdue: federal employment is far too disconnected from modern trends in recruiting, developing, managing, and leading a skilled workforce.<sup>27</sup> And it presents not just practical human-resources considerations, but also fundamental constitutional considerations, given the President’s responsibility to take care that the laws be faithfully executed.

*Restoring the Power of the Purse:* Some thoughtful analysts suggest that the oversight function offered by the Senate’s advice-and-consent process could be better achieved through Congress’s broader oversight activities and its power of the purse.<sup>28</sup> But such reform would raise the question of whether these other mechanisms actually serve oversight functions effectively. The Senate must not decrease its oversight role in appointments without first ensuring that Congress can increase its oversight role in appropriations.

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<sup>27</sup> See, e.g., Bill Valdez & Adam White, “[A Realistic Path to Modernizing the Civil Service](#),” *GovExec* (Oct. 25, 2019).

<sup>28</sup> See, e.g., James Pfiffner *et al.*, [Strengthening Administrative Leadership: Fixing the Appointments Process](#) (“If senators have complaints about the administration’s policy judgments, they can take up those complaints most directly with the White House or less directly through committee hearings and the appropriations process, all of which are legitimate ways of expressing policy disagreements.”)

Finally, if Congress identifies opportunities to reduce the Senate’s role in appointments, then it should consider connecting such reform to other legislative reforms to regulatory agencies. The REINS Act, for example, would reduce agencies’ policymaking discretion by requiring those agencies to pursue the most significant new regulatory proposals through new legislation instead of unilateral rulemaking. Such reform would help lower the policymaking stakes for many agency appointments, rendering Senate confirmation less necessary by reinvigorating Congress’s legislative and limiting administrative agencies’ discretion.<sup>29</sup>

Similarly, the Regulatory Accountability Act’s reforms for judicial review of agency actions would provide a steadying influence on administration, improving agency analysis and transparency with more searching judicial oversight. These reforms, too, would help to lower the policymaking stakes for agency appointments, though they would make the work of administration slower.<sup>30</sup>

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Ultimately, any discussion of reforming the Senate’s confirmation process should be anchored in the constitutional question: How can our government deliver administration that benefits from both the Executive’s energy and the Senate’s security? How can the Senate adjust its role in *appointments* without abdicating its responsibility for good *administration*?

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<sup>29</sup> S.B. 68, 117th Cong., “Regulations from the Executive in Need of Scrutiny Act of 2021.”

<sup>30</sup> S.B. 2278, 117th Cong.

Surely the process for appointing administrative officers can be reformed in ways that help to make administration more energetic and effective, and such reforms deserve serious consideration. But any time and resources that the Senate saves by participating in fewer appointments should be re-invested in the Senate's remaining confirmations, and in Congress's other legislative and oversight activities. As Hamilton recognized, the true test of constitutional government is its ability to produce good administration, and we face that test now more than ever.