



Kristine Simmons

Vice President, Government Affairs

Partnership for Public Service

Written statement prepared for

The Senate Committee on Homeland Security

and Governmental Affairs

Hearing entitled,

**“Examining the Senate Confirmation Process
and Federal Vacancies”**

March 3, 2022

Introduction

Chairman Peters, Ranking Member Portman, members of the Homeland Security and Governmental Affairs Committee, thank you for the opportunity to appear before you today to discuss the impacts of federal vacancies and the importance of improving the Senate confirmation process. My name is Kristine Simmons, and I am the Vice President of Government Affairs at the Partnership for Public Service, a non-partisan, non-profit organization committed to building a better government and stronger democracy. The Partnership is home to the Center for Presidential Transition, which provides extensive knowledge, information and resources to promote a smooth transfer of power between administrations. One of the most significant responsibilities of a new administration is the selection, vetting and appointment of presidential personnel with the advice and consent of the Senate.

In 2011, the Partnership appeared before this committee to outline critical bottlenecks in the processes for appointing and confirming presidential personnel and to propose several key recommendations.¹ We applaud the Committee for its commitment to bipartisan oversight and legislation to improve the appointments process. We believe there are worthwhile opportunities to build on success of a decade ago, when this Committee played a leading role in consideration and enactment of the Presidential Appointment Efficiency and Streamlining Act, which reduced the overall number of Senate-confirmed positions by 163 and established the Working Group on Streamlining Paperwork for Executive Nominations.²

The data tell us that, despite the progress made in 2011 and 2012, the Senate confirmation process has become longer and resulted in a lower confirmation rate of first-year nominations for each successive administration since President George W. Bush. The number of political appointees subject to Senate confirmation has grown by nearly 60% since 1960, and the average time to confirm a nominee has nearly tripled since the Reagan administration.³

A new president is responsible for appointing nearly 4,000 political appointees, with roughly 1,200 requiring Senate confirmation. Filling these top positions with qualified candidates is one of the most significant responsibilities of any new administration. However, in the first two years of the Bush, Obama and Trump administrations, 30% of Senate confirmed positions never received a nomination,⁴ as found by Professor David Lewis of Vanderbilt University. Even with the limited number of nominations made, the Senate has confirmed a lower and lower percentage of nominations in the first year of these same 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 and now just 55% of President Joe Biden's first-year nominees. Without improvements, the next president, regardless of party, will encounter even more difficulty in filling positions that are important to our government and to the people it serves.

¹ The Partnership's recommendations included reducing the number of appointees requiring Senate confirmation, avoiding creating new positions subject to Senate confirmation and improving the executive branch process for selecting and advancing nominations. "Written Testimony of Max Stier President and CEO Partnership for Public Service." Hearing on "Eliminating the Bottlenecks: Streamlining the Nominations Process," The U.S. Senate Committee on Homeland Security and Governmental Affairs, 2011. Retrieved from <https://www.hsgac.senate.gov/imo/media/doc/TestimonyStier20110302.pdf>

² "Presidential Appointment Efficiency and Streamlining Act of 2011." S.679, 112th Congress, 2011-2012 (P.L. 112-166). Retrieved from <https://www.congress.gov/112/plaws/publ166/PLAW-112publ166.pdf>

³ Partnership for Public Service, "Joe Biden's First Year in Office" Nominations and Confirmations," January 2020". Available at <https://presidentialtransition.org/publications/joe-bidens-first-year-in-office/>

⁴ Lewis, David E., 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. doi:10.1111/psq.12697

Under the current system, each stakeholder in the process loses: the Senate, the administration and the public. The large number of appointees is more than the Senate can reasonably process and undermines the Senate’s advice and consent duties, confirmation delays prevent administrations from staffing key agencies and vacancies across government weaken its effectiveness for the public. We believe that 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. However, even non-controversial nominees will face long, arduous paths to confirmation, and some positions will never have a nominee at all. Fixing this process can bolster the Senate’s constitutional responsibilities, strengthen government and encourage talented individuals to enter public service.

Today, I will provide an overview of the state of the Senate confirmation process, illustrate how federal vacancies have impacted all recent administrations and propose the following recommendations:

1. Reduce the number of presidential appointments subject to Senate confirmation
2. Consider changes to the Senate’s privileged nominations calendar, Senate Rule XXXI on returned nominations and other Senate processes
3. Expand the “hold over” tradition and consider adopting fixed terms for Senate-confirmed positions that require technical expertise and have become difficult to fill
4. Implement the recommendations from the Working Group on Streamlining Paperwork for Executive Nominations
5. Revisit the Federal Vacancies Reform Act and modernize the Plum Book.

The Senate has an exclusive responsibility to provide advice and consent to the president’s nominations.

Article II section 2 of the Constitution specifies that a president shall nominate, by and with the advice and consent of the Senate “Ambassadors, 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 by Law.”⁵ The Senate’s advice and consent responsibilities reflect the founders’ 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 administration, while limiting their ability to appoint unsuitable officials or candidates presenting conflicts of interest.⁶ However, the growing number of appointees and inefficient confirmation process undermine the framers’ intent. When the Senate is unable to vote on nominees and positions remain vacant, advice and consent duties are denied. Nonetheless, the work of agencies continues to move forward, with acting officials temporarily assuming the responsibilities of positions subject to Senate confirmation. The Senate’s time and resources are limited, and Members’ advice and consent duties only account for one of the Senate’s many critical responsibilities. Our reform recommendations, including reducing the number of Senate-confirmed positions, aim to allow the Senate to more efficiently and effectively review the positions regarded as most important to an administration and for which Senate confirmation is most meaningful.

⁵ Constitution of the United States, Article. 2, Section. 2, cl.2. Retrieved from: <https://constitution.congress.gov/browse/article-2/section-2/clause-2/>

⁶ Max Stier, “It’s time to fix the broken Senate confirmation process,” Roll Call, November 15, 2021. Retrieved from <https://rollcall.com/2021/11/15/its-time-to-fix-the-broken-senate-confirmation-process/>

The State of the Senate Confirmation Process

As the nation grapples with a global pandemic, an economic crisis, foreign wars and ongoing national security threats, key administration positions remain without confirmed leadership. Unfortunately, this problem is not a new one but reflects trends across administrations. For example, vacancies in Senate-confirmed positions have significantly increased over the past four administrations. Most recently, Trump nominees spent about 80,000 cumulative days (219 years) awaiting confirmation – roughly 19% longer than in the first year of the Clinton administration.⁷ These longer confirmation times contribute to extended vacancies. According to Yale professor Christina Kinane, from 1977 to 2015, Senate positions without a confirmed appointee fluctuated between 10% and 40%.⁸

In 2016, the Partnership’s Center for Presidential Transition and The Washington Post launched a political appointee tracker to follow the progress of key Senate-confirmed positions.⁹ Today, we track nearly 800 of the 1,200 Senate-confirmed positions, including Cabinet secretaries, deputy and assistant secretaries, heads of agencies, ambassadors and other critical leadership jobs. This tool has helped us uncover key confirmation trends which have informed many of today’s recommendations.

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

When Congress reorganizes federal departments and agencies, creates new agencies or establishes positions to implement laws and programs, it also has the ability to determine which positions will be subject to Senate confirmation. Between 1960 and 2016, the number of Senate-confirmed positions increased by nearly 60%, from 779 to 1,237.¹⁰ In the last 11 years alone, roughly 60 new Senate-confirmed positions were added to the already growing list.¹¹ These 60 new positions are more than one-third of the number of positions that were converted from being Senate-confirmed by the Presidential Appointment Efficiency and Streamlining Act.

Added layers of government leadership have changed the nature of many Senate-confirmed positions.

In his book *Thickening Government: Federal Hierarchy and the Diffusion of Accountability*,¹² Paul Light charted how added layers of government can alter a position’s role within an agency. Assistant secretaries are one example of how positions change when government expands. The first assistant secretary positions were created in the 1850s and 1860s and represented the second layer of agency oversight, under the agency head. By 1935, the federal government included 38 assistant secretaries, but they remained high up in the chain of command. In 1960, these positions still occupied the third highest role within their agencies.¹³ By

⁷ Partnership for Public Service, “Unconfirmed: Why reducing the number of Senate-confirmed positions can make government more effective, August 9, 2021. Available at <https://presidentialtransition.org/publications/unconfirmed-reducing-number-senate-confirmed-positions/>

⁸ Kinane, Christina M., “Control without Confirmation: The Politics of Vacancies in Presidential Appointments.” *American Political Science Review*, 115 (2), 2021, pp. 599–614. doi:10.1017/s000305542000115x

⁹ The Partnership maintains the tracker in collaboration with the Washington Post. The current version of the tracker, the Biden Political Appointee Tracker, may be accessed at <https://ourpublicservice.org/political-appointee-tracker/>.

¹⁰ David Lewis’s analysis of U.S. Congress, Policy and Supporting Positions between 1990 and 2016, various years; and Partnership for Public Service analysis of U.S. Congress, Policy and Supporting Positions, various years.

¹¹ The Congressional Research Service identified roughly 64 new Senate-confirmed positions established through enacted legislation between 2011 and the present. Their research did not track whether or not these positions have ever been filled or if they continue to be Senate-confirmed positions today.

¹² Light, Paul “*Thickening Government: Federal Hierarchy and the Diffusion of Accountability*,” The Brookings Institution Press, 1995.

¹³ Light, Paul. “Our Tottering Confirmation Process.” The Brookings Institution, March 2, 2002. Retrieved from <https://www.brookings.edu/articles/our-tottering-confirmation-process/>

2000, and into today, the number of Senate-confirmed assistant secretaries has grown to over 120 and can sit several layers below their agencies' leaders.¹⁴ As Light points out, "this does not mean assistant secretaries are irrelevant... but they now function principally as part of a very long and complicated chain of accountability."¹⁵ The Senate should reconsider the confirmation status of these positions to account for their growth in number and reorientation in the government's leadership structure.

Nearly all Senate-confirmed assistant secretaries report to, and are under the direction and supervision of, layers of Senate confirmed officials and may not need Senate confirmation themselves. Today, of the 20 nominees who are currently waiting the longest to get confirmed, 30% of them are nominees for assistant secretary roles. All 20 nominees, including the assistant secretaries, have waited over 200 days each for confirmation, almost double that of the average Biden nominee.¹⁶ Altogether, the Senate has confirmed just 65 out of the 110 nominees put forth for assistant secretaries.¹⁷ Other positions that could be appropriate candidates for conversion away from Senate confirmation are the more than 200 part-time positions on boards and commissions that require confirmation. Transferring select boards and commissions, that do not require independent regulatory authority, into larger departments would convert confirmation of an appointee from the Senate to appointment by the Department's confirmed leadership. These are just a few examples of how Congress can reduce the number of Senate-confirmed appointees.

The Senate has confirmed a smaller percentage of first-year nominees in each of the last four administrations.

With an increase in the number of positions subject to Senate confirmation has come an increase in the time it takes to confirm these positions. The Partnership's Center for Presidential Transition examined these trends in a report on President Biden's first year confirmation trends¹⁸ and a report called *Unconfirmed: Why Reducing the Number of Senate-Confirmed Positions Can Make Government More Effective*.¹⁹ These reports identified several confirmation trends over recent administrations.

Our data focuses on nomination and confirmation trends in the first year of a new presidency.²⁰ A president's first year is a critical transition period in which key appointments are necessary to advance the president's policy agenda and optimize performance within government.

- **The Senate confirmation rate of nominees in a president's first year has declined over the past four administrations:** The Senate confirmed 75% of President W. Bush's year one nominees, 69% of President Obama's nominees, 57% of President Trump's nominees, and 55% of President Biden's nominees.

¹⁴ Data from the Partnership for Public Service.

¹⁵ Light, Paul. "Our Tottering Confirmation Process." The Brookings Institution, March 2, 2002. Retrieved from <https://www.brookings.edu/articles/our-tottering-confirmation-process/>

¹⁶ Data from the Partnership for Public Service.

¹⁷ Ibid.

¹⁸ Partnership for Public Service, "Joe Biden's First Year in Office" Nominations and Confirmations," January 2020". Available at <https://presidentialtransition.org/publications/joe-bidens-first-year-in-office/>

¹⁹ Partnership for Public Service, "Unconfirmed: Why reducing the number of Senate-confirmed positions can make government more effective, August 9, 2021. Available at <https://presidentialtransition.org/publications/unconfirmed-reducing-number-senate-confirmed-positions/>

²⁰ Data compiled by the Center for Presidential Transition from Congress.gov and The Washington Post and Partnership for Public Service Biden Political Appointee Tracker. The tracker includes all full-time, civilian positions in the executive branch that require Senate confirmation except for judges, marshals and U.S. attorneys.

- **The Senate confirmation rate of ambassadors has declined in the first year of the past four administrations:** The Senate confirmed 90% of President W. Bush’s ambassador nominees, 85% of President Obama’s ambassador nominees, 75% of President Trump’s ambassador nominees, and 63% of President Biden’s ambassador nominees.
- **The Senate confirmed a smaller percentage of the top national security positions by September 11 in 2021 than it did two decades earlier, in 2001:** The Senate confirmed 57% of President W. Bush’s top Senate-confirmed positions at the Pentagon, Department of Justice and Department of State combined (excluding ambassadors, U.S. marshals, and U.S. attorneys) and only 27% of the top positions at the same agencies for President Biden.²¹
- **The number of nominations returned under Senate Rule XXXI at the end of a president’s first year has increased over the past four administrations:** Zero nominations were returned at the end of President George W. Bush’s first year²², five nominations were returned at the end of President Obama’s first year, 59 nominations were returned at the end of President Trump’s first year, and 97 nominations were returned at the end of President Biden’s first year.
- **The number of cloture motions has risen in the past five administrations:** The number of cloture motions on executive branch nominees has increased from 17 in each of the Clinton and W. Bush administrations to 101 and 189 in the Obama and Trump administrations respectively. At the end of President Biden’s first year, he already had 110 cloture motions filed on executive branch nominees.

Previous efforts to improve the confirmation process have had a limited effect.

Congress has passed several pieces of legislation to help improve the Senate-confirmation process.²³ In 2011, The Presidential Appointment Efficiency and Streamlining Act reduced the overall number of Senate-confirmed positions by 163, and S. Res. 116 (112th Congress, 2011-2012) created the Privileged Calendar to expedite Senate consideration of 285 nominations.²⁴ In 2004, The Intelligence Reform and Terrorism Prevention Act expedited security clearances for key national security positions, recommended that administrations submit nominations for national security positions by Inauguration Day and encouraged the full Senate to vote on these positions within 30 days of nomination.²⁵ Bipartisan amendments that this Committee has made to the Presidential Transition Act have made it possible for transition teams to prepare a new president to make key appointments early and to meet these timelines as a national security imperative.²⁶ This Committee’s oversight of these recommendations and authorities is essential to ensure that they are having the desired effect on the appointments process.

²¹ Hirschhorn, Carter and Hyman, Dan. “Two decades later: How lessons from the 9/11 Commission Report can help us improve the political appointment process and protect our national security.” Center for Presidential Transition, Partnership for Public Service, September 9, 2021. Available at <https://ourpublicservice.org/blog/how-lessons-from-the-9-11-commission-report-can-help-us-improve-the-political-appointment-process/>

²² This number does not include 162 of Bush’s pending nominations returned by the Senate during the August recess in 2001, as was required by congressional procedure.

²³ Ibid.

²⁴ Congressional Research Service, “Consideration of Privileged Nominations in the Senate,” R46273, Mar. 2020. Retrieved from https://www.everycrsreport.com/files/20200316_R46273_20b98c8cc0035beec9d0fffc2af77de528d1c366.pdf

²⁵ “The Intelligence Reform and Terrorism Prevention Act,” S.2845, 108th Congress, 2003-2004 (P.L. 108-458). Retrieved here <https://www.govinfo.gov/content/pkg/PLAW-108publ458/pdf/PLAW-108publ458.pdf>

²⁶ Since 2000, the Act was updated the following times: the Presidential Transition Act of 2000 (P.L. 106-293), the Pre-Election Presidential Act of 2010 (P.L. 111-283), the Edward “Ted” Kaufman and Michael Leavitt Presidential Transitions Act of 2015 (P.L. 114-136), and the Presidential Transition Enhancement Act of 2019 (P.L. 116-121).

Our analysis of the privileged nomination process reveals that S. Res. 116, which was intended to streamline the confirmation process for select positions,²⁷ has had the unintended consequence of making the process longer for nominees to many of these roles. The Privileged Calendar was intended to accelerate the nominations of individuals for traditionally non-controversial positions by allowing them to go directly to the Executive Calendar unless a Senator requested that the nomination be referred to committee. These nominations are eligible for consideration by the full Senate for a vote if no senator requests referral to committee within 10 session days of the completion of the nominee’s paperwork. However, the average Senate-confirmation time for full-time, privileged nominees has increased since their positions were placed on the Privileged Calendar. Since the resolution was adopted in 2011 through the Trump administration, confirmed nominations placed on the Privileged Calendar took an average of about 150 days to confirm. Equivalent positions took an average of about 90 days to confirm in the ten years before the Privileged Calendar was established. While confirmation times for all nominees have increased over the past decade, the time it takes to confirm privileged nominees for full-time positions has increased at a greater rate than all other nominees. While the Privileged Calendar does not fall under the jurisdiction of this committee, we believe that the Calendar’s functionality is critical to the health of confirmation process and there is room for improvement.

The path to Senate confirmation is increasingly complex and discourages qualified candidates from serving.

The increasingly slow pace of the confirmation process is not solely attributed to the growing number of appointees; nominees today face more scrutiny than ever before, and they are required to navigate lengthy, opaque, and sometimes repetitive vetting and security clearance forms and processes.

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 sometimes 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.

Rise in social media and online platforms for routine transactions, evolving state-level marijuana laws, and more complex financial products and portfolios have contributed new areas of scrutiny to an already-lengthy process.

Streamlining the paperwork for nominees could help improve this process and is not a new recommendation. In 2012, Congress created the Working Group on Streamlining the Paperwork for Executive Nominations.²⁸ The Working Group published two reports: one for streamlining the paperwork

²⁷ “The vast majority of the 285 nominations designated as privileged are part-time positions to various boards and commissions, though some full-time positions are privileged as well (e.g., chief financial officers and certain assistant secretaries in Cabinet-level agencies).” A full list of positions included on the Privileged Calendar can be found here: <https://bit.ly/3KdePtL>

²⁸ Sec. 4 of P.L 112-166.

required of Senate-confirmed presidential nominees and another for reviewing background investigation requirements for these same nominees. The Working Group proposed several recommendations, including the adoption of a set of common core questions that would be adopted by the executive branch and Senate committees to facilitate faster vetting and reduce administrative burden on nominees and Senate staff. These reforms also would include modifications to repetitive and duplicative questions across the various forms required of nominees, including the SF-86 Questionnaire for National Security Positions and SF-86 Supplement. These recommendations remain unimplemented, and the Senate could use these as a starting point to reform the nominee paperwork process. Improvements will benefit both the nominee and the committee in charge of considering that nomination.

Federal Vacancies Have Hurt all Recent Administrations

The growing number of political appointees, confirmation delays and process inefficiencies result in administration after administration with leadership gaps in key Senate-confirmed positions. 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.”²⁹ In a 2014 opinion piece, Former Secretary of State, John Kerry, warned that vacancies have an impact on our national security when writing, “Make no mistake: Vacancies in so many world capitals send a dangerous message to allies and adversaries alike about America’s engagement.”³⁰ Vacant positions have consequences to every administration, regardless of party, and their prevalence harms agency agility and effectiveness.

Several positions have had vacancies throughout multiple administrations. In some cases, these positions are filled with acting officials while other positions will remain unfilled for years. For example, the Department of Veterans Affairs’ Undersecretary for Health has been without a confirmed appointee since January 2017. The position, which has had several unconfirmed officials perform the duties of the office, oversees the country’s largest health care system, with 9 million enrolled veterans. In October, VA officials set up the fifth commission to find a nominee since 2017.³¹ Since 2015, the Director of the Bureau of Alcohol, Tobacco, Firearms and Explosives at the Department of Justice has been vacant. This position has only had one confirmed nominee since it was created fifteen years ago.³² Other positions without confirmed leadership across multiple administrations include Assistant Attorney General for the Tax Division at the Department of Justice and Director for the Indian Health Service at the Department of Health and Human Services.³³

Senate-confirmed chief financial officers and inspectors general have become two of the top three positions waiting the longest amount of time from nomination to confirmation. Between 1990 and 2020, the Senate

²⁹ Partnership for Public Service, “Government Disservice: Overcoming Washington Dysfunction to Improve Congressional Stewardship of the Executive Branch,” September 2016. Available at <https://ourpublicservice.org/wp-content/uploads/2019/02/Government-Disservice.pdf>

³⁰ Ibid.

³¹ Shane III, Leo, “VA relaunches search for top health official after problems surface with previous hiring attempt,” Military times, Oct. 19, 2021. Retrieved from <https://www.militarytimes.com/veterans/2021/10/19/va-relaunches-search-for-top-health-official-after-problems-surface-with-previous-hiring-attempt/>

³² Min Kim, Seung and Pager, Tyler, “White House pulls nomination of ATF chief amid pushback over gun-control advocacy,” The Washington Post, Sept. 10, 2021. Retrieved from https://www.washingtonpost.com/politics/chipman-atf-withdraw/2021/09/09/d5804a3a-1108-11ec-a511-cb913c7e5ba0_story.html

³³ Partnership for Public Service, “Unconfirmed,” 2021.

has taken an average of 121 days to confirm inspectors general and 104 days to confirm CFOs.³⁴ Chief financial officers manage federal government resources, oversee agency finances and strengthen the federal workforce. Currently, 14 out of 24 CFOs are Senate-confirmed, and the remaining 10 are career executives. Of the 14 Senate-confirmed CFOs, only three have been confirmed and eight CFO roles remain without a nominee. Inspectors general face similar confirmation trends³⁵ but with one notable difference – administrations will traditionally hold over individuals in these positions because they are appointed without regard to political affiliation and perform an essential management function. Right now, seven inspectors general positions have not had a confirmed leader for over 400 days, and three have not had a confirmed leader for over 1600 days - about four years.³⁶ Over the years, this Committee has expressed bipartisan concern about vacant inspector general positions and has urged administrations of both parties to nominate qualified candidates to serve in Senate-confirmed inspector general roles.

History teaches that government needs top officials in place to respond to crises.

Last year was the 20th anniversary of the September 11 terrorist attacks, a tragedy that forever changed the country. This anniversary was also a reminder of the lessons we have learned two decades later. In 2004, a bipartisan commission investigated the attacks and published the “9/11 Commission Report.” One of the 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.”³⁷ 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.”³⁸

Despite the commission’s recommendations, the Partnership’s data shows that the Senate confirmed a smaller percentage of the top national security positions by September 11 in 2021 than it had in 2001. By September 11, 2021, the Senate confirmed just 27% of the top 139 positions at the Pentagon, Justice and State departments combined (excluding ambassadors, U.S. marshals and U.S. attorneys), as compared to 57% of the top 123 Senate-confirmed positions on the day of the attacks.³⁹ At the end of President Biden’s year one, the Senate had confirmed 67% of these top national security nominations.⁴⁰

Crises occur in every administration, and when they occur, our government needs confirmed leadership in place. Vacancy examples from across administrations emphasize this lesson. In the first five weeks of his presidency, Bill Clinton faced a Haiti refugee crisis and the first World Trade Center bombing. As noted, President George W. Bush was only 8 months into his presidency, and with notable vacancies, during the September 11 terrorist attacks. During the height of the financial crisis in President Barack Obama’s first term, he and his Treasury Secretary were without key senior officials at the Treasury Department, including a deputy secretary. Leading up to and during the first days of the COVID-19 pandemic, President Trump lacked key Senate-confirmed nominees responsible for a pandemic response at the Department of

³⁴ Partnership, “Reforming the Role of Chief Financial Officers.” Center for Presidential Transition, Partnership for Public Service, Oct. 8, 2020 (updated Jan. 5, 2021). Available at <https://presidentialtransition.org/blog/role-of-chief-financial-officers/>

³⁵ Bubl , Courtney, “Biden Moves to Fill More Inspector General Vacancies Announcing 3 Nominees,” Government Executive, Oct. 7, 2021. Retrieved from <https://www.govexec.com/oversight/2021/10/biden-moves-fill-more-inspector-general-vacancies-announcing-3-nominees/185932/>

³⁶ Oversight.gov, “Inspector General Vacancies.” Retrieved from <https://www.oversight.gov/ig-vacancies>

³⁷ The 9/11 Commission Report: Final Report of the National Commission on Terrorist Attacks Upon the United States, 22 July 2004. <https://www.govinfo.gov/app/details/GPO-911REPORT>

³⁸ Ibid.

³⁹ Hirschhorn, Carter and Hyman, Dan. “Two decades later.”

⁴⁰ Data from the Partnership for Public Service.

Homeland Security, the Federal Emergency Management Agency and Department of Health and Human Services.⁴¹ These examples reinforce the commission’s recognition that a “catastrophic attack could occur with little or no notice,” and an efficient and timely appointment process is needed to prepare for such occurrences.

What Can Congress Do?

1. Reduce the number of presidential appointments subject to Senate confirmation

To reduce vacancies while also respecting the Senate’s constitutional authority to provide advice and consent on key executive branch nominations, the Partnership recommends reducing the number of positions subject to advice and consent. As a starting point, 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. 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. 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.

Reducing the number of unnecessary confirmations would enhance, not undermine, the Senate’s advice and consent function by allowing the Senate to focus its vetting on a smaller (though still large) number of high-level positions. Positions that are converted to 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.

2. Consider changes to the Senate’s privileged nominations calendar, Senate Rule XXXI on returned nominations and other Senate processes

The Senate confirmation process is increasingly long and arduous even for nominees who are ultimately confirmed by unanimous consent or with overwhelming support in the Senate. This 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. The Senate should revisit its processes to allow for smoother paths to a final vote.

One potentially fruitful area for improvement is the Privileged Calendar, which was established by the Senate in 2011 and creates a streamlined process for nearly 300 positions. The privileged process allows the nominees to bypass a committee hearing and be placed on the Executive Calendar unless a Senator requests referral to committee within ten session days of the completion of the nominee’s paperwork. The privileged nominees, though, still get caught up in lengthy floor procedures. In fact, the Partnership’s research into these nominees shows that many of them take more time to confirm than other nominees. The Senate should look for ways to create a more streamlined floor process for the privileged nominations and should consider adding more positions to the list of nominees who go through the privileged process.

⁴¹ Partnership for Public Service, “Unconfirmed,” 2021.

The Senate should also revisit its rule on returning nominations to the President. 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 nominee has nothing to do with the qualifications of the nominee but results from stalemates over unrelated issues. 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, which dates to the 1800s, 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.

3. Expand the “hold over” tradition and consider adopting fixed terms for Senate-confirmed positions that require technical expertise and have become difficult to fill

The Partnership recommends that this Committee 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. The Center for Presidential Transition’s report, *Unconfirmed*, explains how fixed terms and holdover norms offer related solutions to the problem of extended vacancies in positions difficult to fill: “By formally converting appropriate roles to term position (and monitoring their use) or otherwise encouraging holdovers, the Senate could encourage stability and expertise in critical roles while maintaining its advisory power and helping reduce its workload.”⁴²

The report outlines several methods of identifying positions that could benefit from fixed terms or the expectation that the officeholder will serve from one administration to the next. Senate-confirmed positions that would lend themselves to greater continuity may include positions that require deep technical expertise, oversee long-term strategic planning and provide consistent delivery of apolitical services. Chief financial officers, for example, could be candidates for these changes. Their duties provide consistent, apolitical services that involve long-term financial planning and technical expertise. CFOs also offer another factor that would make them suitable for these changes; their positions take longer than average to appoint and confirm, leaving widespread vacancies across government.

4. Implement the recommendations from 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. We urge both the Senate and the executive branch to revisit the unimplemented recommendations of these 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 investigative scope for appointees subject to confirmation, and varying the paperwork and investigative scope depending on the nature of the position.

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

⁴² Ibid.

forms. As stressed by the Working Group, 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. A smart form would speed the completion of vetting processes and reduce innocent mistakes that may slow an appointee's progress. As noted by the Working Group, a smart form also would help appointees measure progress in completing paperwork. The Partnership believes this type of dashboard would improve efficiency of the vetting process by showing what information and forms are needed at each step of the appointee process, and the status and completion of each step. This would keep the White House, transition teams, agencies, and appointees apprised of uncompleted tasks and what is necessary for appointees to move forward.

5. Revisit the Federal Vacancies Reform Act and modernize the Plum Book.

Congress should pass the PLUM (Periodically Listing Updates to Management) Act to provide basic transparency into who serves in political appointments or senior career positions across the federal government. The current version of this directory, known as the Plum Book, is issued only every four years – in an election year – and is produced largely the same way it was first produced in 1952 for Dwight Eisenhower, who asked for a list of positions he could fill in his administration. The Plum Book is only a once-every-four-years snapshot in time and therefore fails to provide timely transparency to the public. Each Plum Book is filled with errors – missing positions, mislabeled appointments, obsolete titles and offices – that remain uncorrected once the Plum Book is published.⁴³ Moreover, the last several Plum Books have been published well after the election – far too late to be a useful tool for transition teams, which must begin preparations well before the election. The PLUM Act would remedy these deficiencies by ensuring monthly updates of information, allowing for correction of errors as soon as they are caught, and providing information in downloadable, machine-readable format. We applaud Senators Carper, Braun, and Merkley for sponsoring the bipartisan PLUM Act.

Congress also should revisit the Federal Vacancies Reform Act (“Vacancies Act”), 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 Vacancies Act aims to encourage a president to nominate individuals to fill positions subject to advice and consent. Over the years, different provisions of the Vacancies Act 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.⁴⁴

Conclusion

Our nation is best served when federal departments and agencies are led by well-qualified individuals with the tools and authorities they need to be successful. We encourage the Senate and the administration to take steps to streamline and improve the process by which people are appointed to senior roles, so that our government is more efficient, effective and accountable to those it serves. Thank you for the opportunity to share these recommendations with you. I would be pleased to answer any questions.

⁴³ Jones, Emma and Condrey, Christina “The Three Big Mistakes in the 2020 Plum Book.” Center for Presidential Transition, Partnership for Public Service, Jun. 30, 2021. Available at <https://presidentialtransition.org/blog/the-three-big-mistakes-in-the-2020-plum-book/>

⁴⁴ “Statement of James-Christian B. Blockwood Executive Vice President Partnership for Public Service.” Hearing on “Improving Government Accountability and Transparency,” The House Committee on Oversight and Reform, 2021. Retrieved from <https://ourpublicservice.org/wp-content/uploads/2021/05/Blockwood-Testimony-to-House-Oversight-and-Reform-Committee.pdf>