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## **9/11 Commission Recommendations: Changes to the Presidential Appointment and Presidential Transition Processes**

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# 9/11 Commission Recommendations: Changes to the Presidential Appointment and Presidential Transition Processes

## Summary

In its July 22, 2004, report, the National Commission on Terrorist Attacks Upon the United States (9/11 Commission) identified what it perceived as shortcomings in the appointment process during presidential transitions that could compromise national security policymaking in the early months of a new Administration. The commission reported, among other findings, that “the new [George W. Bush] administration did not have its deputy cabinet officers in place until the spring of 2001, and the critical subcabinet officials were not confirmed until the summer — if then. In other words, the new administration — like others before it — did not have its team on the job until at least six months after it took office.” Other observers of the presidential appointment process in recent years have similarly asserted that, in general, appointments during presidential transitions take too long.

The presidential appointment process usually involves three stages: selection and vetting; Senate consideration (as required); and formal appointment through commissioning and swearing in. Empirical evidence suggests that for top national security positions, on average, the first of these stages accounts for more than two-thirds of the elapsed time between inauguration and confirmation. Although Senate consideration of nominations sometimes takes many months, during the 2001 transition, most Secretaries, Deputy Secretaries, and Under Secretaries who might be considered part of the President’s national security team were confirmed less than 30 days after nomination. In contrast, the length of time past Inauguration Day required for the selection and vetting of candidates for these positions averaged about two months. Critics of the length of this appointment stage fault the financial disclosure and national security clearance processes.

The 9/11 Commission called for seven remedial changes under this recommendation. Six concern presidential appointments and transitions: initiation of the security clearance process for prospective appointees to national security positions immediately after the presidential election; pre-election identification, by each presidential candidate, of potential members of his transition team to allow for timely security clearance; pre-inaugural submission, to the Senate, of nominations by the President-elect to positions on the “national security team”; expedited Senate consideration of these nominations; elimination of advice and consent requirements for any “national security team” members below Level III of the Executive Schedule; and prompt and thorough written national security information exchange between the outgoing and incoming Administrations. One additional suggested change, centralization of the national security clearance process, is beyond the scope of this report.

Intelligence reform legislation with provisions related to these recommendations has been introduced (S. 2774, H.R. 5024, H.R. 5040, S. 2845 and H.R. 10). As of October 18, 2004, the Senate had passed S. 2845, the House had voted to amend S. 2845 with the text of H.R. 10, as passed, and the two chambers were preparing to go to conference. This report provides background information on, and analysis of, the changes proposed by the 9/11 Commission, and it will be updated as events warrant.

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# 9/11 Commission Recommendations: Changes to the Presidential Appointment and Presidential Transition Processes

## Introduction

*The 9/11 Commission Report: Final Report of the National Commission on Terrorist Attacks Upon the United States*, issued on July 22, 2004, included a recommendation that appointments to key national security positions at the time of presidential transitions occur more quickly. Intelligence reform legislation with provisions related to this recommendation has been introduced (S. 2774, H.R. 5024, H.R. 5040, S. 2845 and H.R. 10). As of October 18, 2004, the Senate had passed S. 2845, the House had voted to amend S. 2845 with the text of H.R. 10, as passed, and the two chambers were preparing to go to conference.

The goal of the 9/11 Commission's recommended changes would be to "minimize as much as possible the disruption of national security policymaking" and maintain national security continuity when a new President comes into office.<sup>1</sup> The recommendation addressed the commission's concern about the length of time a new Administration takes to install key national security personnel. The commission noted, in particular, the abbreviated transition period resulting from the delayed resolution of the 2000 presidential race. As the report stated, "Given that a presidential election in the United States brings wholesale change in personnel, this loss of time hampered the new administration in identifying, recruiting, clearing, and obtaining Senate confirmation of key appointees."<sup>2</sup> As a result, the commission reported, "the new administration did not have its deputy cabinet officers in place until the spring of 2001, and the critical subcabinet officials were not confirmed until the summer — if then. In other words, the new administration — like others before it — did not have its team on the job until at least six months after it took office."<sup>3</sup>

In line with its overall recommendation, the commission called for seven specific changes, six of which are related to presidential appointments and transitions. Two of these proposed changes are related to the national security clearance process during transitions. First, the commission recommended starting the security clearance process for prospective appointees to national security positions

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<sup>1</sup> U.S. National Commission on Terrorist Attacks Upon the United States, *The 9/11 Commission Report* (Washington: GPO, 2004), hereafter referred to as *9/11 Commission Report*, p. 422.

<sup>2</sup> *9/11 Commission Report*, p. 198.

<sup>3</sup> *9/11 Commission Report*, p. 422.

immediately after the presidential election. It also proposed that each presidential candidate identify, prior to the election, potential members of his or her transition team to facilitate quicker security clearances following the election.

Three additional recommendations would modify the nomination and Senate consideration processes for certain national security positions. First, the report proposed that nominations to positions on the “national security team”<sup>4</sup> be submitted to the Senate by the President-elect no later than the date of his or her inauguration. Furthermore, the commission called for expedited Senate consideration of these nominations. The final recommended change to the appointment process would be the elimination of advice and consent requirements for any “national security team” members below Level III of the Executive Schedule.

The commission also suggested that, beginning immediately after the election, the transition include a prompt and thorough written national security information exchange between the outgoing and incoming Administrations.

In addition to these six changes, the commission called for centralization of the security clearance process in one agency, including providing and maintaining security clearances and ensuring uniform standards.<sup>5</sup> This suggested change is outside the scope of this report.<sup>6</sup>

The next section of this CRS report provides summary information concerning relevant legislative activity, as of October 18, 2004. The remainder of the report provides background information on, and analysis of, the 9/11 Commission recommendations. It provides background information related to the presidential transition process, the process for filling positions to which the President makes appointments with the advice and consent of the Senate (PAS positions), temporary appointment options, and the length of appointment process during the 2000-2001 presidential transition. The report concludes with a more detailed discussion and analysis of the changes proposed by the commission.

## Legislative Activity

Intelligence reform legislation with provisions related to the presidential appointment and presidential transition processes has been introduced in the Senate and the House.

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<sup>4</sup> As discussed below, the phrase “national security team” was not defined in the report.

<sup>5</sup> *9/11 Commission Report*, p. 422.

<sup>6</sup> For further information on this recommendation, see “Security Clearance Modernization,” by Frederick M. Kaiser, in CRS Report RL32635, *H.R. 10 (9/11 Recommendations Implementation Act) and S. 2845 (National Intelligence Reform Act of 2004): A Comparative Analysis*.

**S. 2845.** On September 23, 2004, Senator Susan M. Collins, with Senator Joseph I. Lieberman, introduced S. 2845, the “National Intelligence Reform Act of 2004.” This legislation, as amended, was agreed to by the Senate on October 6. As of October 18, the House and Senate were preparing to go to conference on their respective versions of this bill.<sup>7</sup> (See “H.R. 10,” below.)

Section 1081 of S. 2845<sup>8</sup> would amend the Presidential Transition Act of 1963<sup>9</sup>

- to require that as soon as possible after the presidential election, the President-elect be provided with “a detailed classified, compartmented summary by the relevant outgoing executive branch officials of specific operational threats to national security; major military or covert operations; and pending decisions on possible uses of military force”;<sup>10</sup>
- to recommend submission by the President-elect to the agency with national security clearance functions of “names of candidates for high level national security positions through the level of undersecretary” as soon as possible after the presidential election;<sup>11</sup> and
- to require the responsible agency or agencies to carry out background investigations of these candidates for high-level national security positions “as expeditiously as possible ... before the date of the inauguration.”<sup>12</sup>

The bill would facilitate security clearances for transition team members in a similar manner, allowing each major party<sup>13</sup> presidential candidate to submit, before the general election, security clearance requests for “prospective transition team members who will have a need for access to classified information” in the course of their work. The legislation would direct that resulting investigations and eligibility

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<sup>7</sup> Technically, the two chambers would be conferencing on differing versions of S. 2845. To facilitate the discussion of the two bills in this report, however, the original designation of the House bill as H.R. 10 is retained. For a comprehensive comparison of the two versions of this legislation, see CRS Report RL32635, *H.R. 10 (9/11 Recommendations Implementation Act) and S. 2845 (National Intelligence Reform Act of 2004): A Comparative Analysis*.

<sup>8</sup> S. 2845, Section 1081 is similar to certain provisions of S. 2774 and H.R. 5040 related to presidential transitions. These two bills were introduced before S. 2845, on Sept. 7 and Sept. 9, 2004, respectively.

<sup>9</sup> The Presidential Transition Act (P.L. 88-277, codified at 3 U.S.C.102 note) authorizes the Administrator of General Services to provide, during a presidential transition, certain logistical support to the incoming and outgoing Presidents and Vice Presidents.

<sup>10</sup> S. 2845, Sec. 1081(a)(1).

<sup>11</sup> S. 2845, Sec. 1081(a)(3).

<sup>12</sup> *Ibid.*

<sup>13</sup> For the purposes of this provision, the bill gives the term “major party” the meaning provided in Section 9002(6) of the Internal Revenue Code of 1986.

determinations would be completed, as much as possible, by the day after the general election.<sup>14</sup>

The legislation contains an additional provision stating that it is “the sense of the Senate” that the nominations to the positions discussed above should be submitted by the President-elect to the Senate by Inauguration Day, and that Senate consideration of all such nominations received by this time should, “to the fullest extent possible,” be completed within 30 days of submission.<sup>15</sup>

S. 2845 would also

- require a report from the Office of Government Ethics (OGE) regarding potential improvements to the financial disclosure process for executive branch employees;
- direct the Office of Personnel Management (OPM) to transmit an electronic record “on Presidentially appointed positions,” with specified content, to a major party presidential candidate soon after his or her nomination, and to make such a record available to any other presidential candidate after this;
- direct each agency head to submit a PAS position reduction plan, with specified content, to the President, the Senate Committee on Governmental Affairs, and the House Committee on Government Reform; and
- require the Director of OGE, in consultation with the Attorney General, to “conduct a comprehensive review of conflict of interest laws relating to Federal employment,” with specified content and recipients.<sup>16</sup>

**H.R. 10.** On September 24, 2004, Speaker of the House J. Dennis Hastert introduced H.R. 10, the “9/11 Recommendations Implementation Act.” The legislation would, among other things, change the presidential appointments process for “national security positions,” change the presidential transition process, require PAS position reduction plans from agencies heads, and reorganize the national security clearance infrastructure.

On October 8, 2004, H.R. 10, as amended, was passed by the House. The rule for consideration of H.R. 10 provided that, upon transmittal of S. 2845 to the House, the House will have been considered to have stricken the content of S. 2845 and inserted instead the content of H.R. 10, passed the amended Senate bill, insisted on its amendment, and requested a conference on the bill with the Senate.<sup>17</sup> As of

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<sup>14</sup> S. 2845, Sec. 1081(c).

<sup>15</sup> S. 2845, Sec. 1081(b).

<sup>16</sup> S. 2845, Sec. 1102.

<sup>17</sup> H.Res. 827.

October 18, the House and Senate were preparing to go to conference on the their respective versions of this bill.<sup>18</sup>

With regard to the presidential appointment process, H.R. 10 would create a category for “national security positions” that would be treated differently from other high-level policymaking positions in that process. The category would include

those positions that involve activities of the United States Government that are concerned with the protection of the Nation from foreign aggression, terrorism, or espionage, including development of defense plans or policies, intelligence or counterintelligence activities, and related activities concerned with the preservation of military strength of the United States and protection of the homeland; and positions that require regular use of, or access to, classified information.<sup>19</sup>

A list of such national security positions to which appointments are made with the advice and consent of the Senate would be developed and maintained by OPM.<sup>20</sup> Appointments to any positions on this list that are compensated at Executive Schedule Levels IV or V would no longer be subject to Senate confirmation and would be appointed by the President alone. For listed positions at Executive Schedule Levels II and III, Senate confirmation would still be required unless a “confirmation vote” had not occurred within 30 legislative days of nomination. In this case, the appointment would be made by the President alone. The bill would define “legislative day,” in this context, as a day on which the Senate is in session.<sup>21</sup>

Section 5042 of H.R. 10 would rewrite the presidential inaugural transition section (5 U.S.C. 3349a) of the “Federal Vacancies Reform Act of 1998” (Vacancies Act).<sup>22</sup> It would allow incumbent or newly elected Presidents, following an inauguration, to make certain types of temporary appointments to certain advice and consent positions without two restrictions in the Vacancies Act that would otherwise apply.

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<sup>18</sup> Technically, the two chambers would be conferencing on differing versions of S. 2845. To facilitate the discussion of the two bills in this report, however, the original designation of the House bill as H.R. 10 is retained. For a comprehensive comparison of the two versions of this legislation, see CRS Report RL32635, *H.R. 10 (9/11 Recommendations Implementation Act) and S. 2845 (National Intelligence Reform Act of 2004): A Comparative Analysis*.

<sup>19</sup> H.R. 10, Sec. 5041(a).

<sup>20</sup> H.R. 10, Sec. 5041(b).

<sup>21</sup> H.R. 10, Sec. 5041(c).

<sup>22</sup> The Vacancies Act is codified at 5 U.S.C. 3345-3349d. The presidential inaugural transition section is Sec. 3349a. For a brief description of Vacancies Act provisions, see CRS Report RS21412, *Limited-Term Appointments to Presidentially Appointed, Senate-Confirmed Positions*, by Henry B. Hogue. For a more detailed discussion and analysis of the Vacancies Act, see CRS Report 98-892, *The New Vacancies Act: Congress Acts to Protect the Senate's Confirmation Prerogative*, by Morton Rosenberg.



The Vacancies Act allows the President to make temporary appointments, without the advice and consent of the Senate, to positions that would otherwise require such advice and consent (PAS positions). At present, the presidential inaugural transition section of the act allows a newly inaugurated President to make such appointments for longer terms than would otherwise be allowed by the act. The rewritten presidential transition section would continue to permit this practice for newly inaugurated Presidents.

The rewritten section would also add a provision that would apply to both incumbent and newly inaugurated Presidents. It would remove, for “national security positions” during inaugural periods, certain limitations related to one temporary appointment method. The Vacancies Act presently provides three methods for temporarily filling vacant PAS positions. One method allows the President to direct an officer or employee of an agency where a PAS position vacancy exists to temporarily perform the functions and duties of that office. The law requires that such a person (1) must have been at the agency for not less than 90 of the preceding 365 days and (2) must have been paid at a rate equal to or greater than a position at GS-15 of the General Schedule. Section 5042 would remove these two requirements for “any vacancy in any specified national security position that exists during the 60-day period beginning on inauguration day.” With regard to this provision, the legislation would define “specified national security position[s]” as “not more than 20 positions requiring Senate confirmation, not to include more than three heads of Executive Departments, which are designated by the President on or after an inauguration day as positions for which the duties involve substantial responsibility for national security.”<sup>23</sup>

H.R. 10 would direct agency heads to submit, to the President, the Senate Governmental Affairs Committee, and the House Government Reform Committee, plans for the reduction in the number and levels of presidentially appointed positions requiring the advice and consent of the Senate.<sup>24</sup>

Section 5077 of H.R. 10 would make changes to the national security clearance process during presidential transitions. It would require the President-elect to submit to a proposed National Intelligence Director the names of “candidates for high-level national security positions” at or above the under secretary level as soon as possible after a general election. It would give the proposed National Intelligence Director responsibility for the “expeditious completion” of background investigations for such individuals before Inauguration Day. The legislation, if passed, would also direct each major party presidential candidate, except an incumbent, to submit, before the general election, “requests for security clearances for prospective transition team members who will have a need for access to classified information.” It would require that related background investigations and eligibility determinations be completed, “to the fullest extent practicable,” by the day after the general election.<sup>25</sup>

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<sup>23</sup> H.R. 10, Sec. 5042.

<sup>24</sup> H.R. 10, Sec. 5044.

<sup>25</sup> H.R. 10, Sec. 5077.

**S. 2774 and H.R. 5040.** On September 7, 2004, a bipartisan group of Senators, led by Senators John McCain and Joseph I. Lieberman, introduced S. 2774, the “9-11 Commission Report Implementation Act of 2004.” A companion bill, H.R. 5040, was introduced in the House by Representative Christopher Shays on September 9. As of October 18, 2004, S. 2774 had been placed on the Senate Legislative Calendar and was available for further Senate consideration. H.R. 5040 had been referred to 10 committees. As its title suggests, this legislation, if enacted, would implement most of the commission’s recommended changes.

Presidential transition process provisions similar to those in Section 401 of each of these bills were later incorporated by amendment into S. 2845.<sup>26</sup> These include provisions, described above in more detail, that would amend the Presidential Transition Act of 1963,<sup>27</sup> express a sense of the Senate regarding expedited consideration of national security nominees, and facilitate security clearances for transition team members.<sup>28</sup>

**H.R. 5024.** On September 8, 2004, Representative Nancy Pelosi introduced H.R. 5024, the “9/11 Commission Recommendations Implementation Act of 2004.” With regard to presidential transitions and appointments, the legislation would provide that it is

the sense of Congress that the President and Congress should take steps to minimize, to the extent possible, the disruption of national security policymaking during a change of presidential administrations by accelerating the process for national security appointments that require the advice and consent of the Senate in order for transitions from one President to the next to proceed more effectively and to allow new officials to assume their new responsibilities as quickly as possible.<sup>29</sup>

As of October 18, 2004, H.R. 5024 had been referred to 11 committees of the House.

## Presidential Transitions and Appointments

As the 9/11 Commission pointed out, presidential transitions involve large-scale changes in the political leadership of the executive branch. **Table 1** summarizes Office of Personnel Management (OPM) data indicating that more than 2,300 political appointees occupied positions in the 15 departments alone as of December 2003. These officials included top-level policymaking presidential appointees, political managers, and confidential support staff. Unlike career public service

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<sup>26</sup> S. 2845, Sec. 1081.

<sup>27</sup> The Presidential Transition Act (P.L. 88-277, codified at 3 U.S.C.102 note) authorizes the Administrator of General Services to provide, during a presidential transition, certain logistical support to the incoming and outgoing Presidents and Vice Presidents.

<sup>28</sup> S. 2774, Sec. 401.

<sup>29</sup> H.R. 5024, Sec. 804.

executives and employees, top political officials in the federal departments and agencies nearly always serve at the pleasure of the President or agency head. These officials typically resign when the Administration changes, especially if the incoming President is from a different party. Not all political appointees change with a change in Administration, however. Some presidential appointees, such as members of most regulatory commissions, serve in fixed-term positions, and these appointees may continue to serve out their terms when the President changes.

**Table 1. Political Appointees by Department and Appointment Type as of December 2003**

Department	Pres. Appt. Requiring Senate Approval	Pres. Appt. Not Requiring Senate Approval	Non-Career Senior Executive Service	Schedule C	Other <sup>a</sup>	Total
Agriculture	13	—	43	166	—	222
Commerce	21	—	41	92	—	154
Defense	55	13	84	105	5	262
Education	11	26	17	125	—	179
Energy	17	2	34	63	2	118
Health and Human Services	6	3	42	47	6	104
Homeland Security	15	5	40	82	1	143
Housing and Urban Development	11	1	18	66	—	96
Interior	15	4	35	39	—	93
Justice	119	—	57	84	1	261
Labor	15	1	23	104	2	145
State	31	—	35	113	156	335
Transportation	15	—	24	39	2	80
Treasury	20	3	21	35	1	80
Veterans Affairs	6	1	10	12	2	31
<b>Total</b>	<b>370</b>	<b>59</b>	<b>524</b>	<b>1172</b>	<b>178</b>	<b>2303</b>

**Source:** U.S. Office of Personnel Management Central Personnel Data File. Specifications of data run are available from the author.

<sup>a</sup> Includes ambassadors and other executive appointments not specified.

The length of presidential transitions, particularly between those of different political parties, has been of concern to observers for at least 19 years.<sup>30</sup> The appointment process is likely to develop a bottleneck during this time, even under the best of circumstances, due to the large number of candidates who must be selected, vetted, and, in the case of PAS positions, considered by the Senate. As noted in a previous CRS report, nominees had been confirmed for only 6% of the vacant PAS positions by the end of the first 100 days of the George W. Bush Administration.<sup>31</sup> Delays in installing new leadership would not be welcome at any time, but they may be particularly problematic during the transition period between Presidents. As noted by the 9/11 Commission, a new President is likely to need his or her top advisers in place to address contemporary security issues. Furthermore, the President has limited time following his or her election to initiate an administrative and legislative agenda.

## The Appointment Process for PAS Positions<sup>32</sup>

Under the Constitution, the power to appoint the top officers of the United States is shared by the President and the Senate. The appointment process consists of three stages — selection and vetting, Senate consideration, and appointment.

### Selection and Vetting

The first stage of the process begins with the President's selection of a candidate for the position. Following this selection, the candidate needs to be cleared for nomination. The Office of the Counsel to the President oversees this part of the process, which usually includes background investigations conducted by the Federal Bureau of Investigation (FBI), Internal Revenue Service (IRS), Office of Government Ethics (OGE), and an ethics official for the agency to which the President wishes to appoint the candidate. Once the Office of the Counsel has cleared the candidate, the nomination is ready to be submitted to the Senate. The first stage is often the longest part of the appointment process, so attention to this stage may be particularly important if reducing the length of the process is desired. Candidates for higher-level positions, such as Cabinet Secretaries, are often accorded priority in this process.

A nominee has no legal authority to assume the duties and responsibilities of the position; the authority comes with Senate confirmation and presidential appointment (the nominee's receipt of his or her commission and swearing in). The President may sometimes make a temporary appointment to a PAS position without Senate confirmation. If circumstances permit and conditions are met, as described in detail

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<sup>30</sup> See, for example, National Academy of Public Administration, *Leadership in Jeopardy: The Fraying of the Presidential Appointments System* (Washington: National Academy of Public Administration, 1985), pp. 9-10.

<sup>31</sup> CRS Report RL31054, *Nominations and Confirmations to Policy Positions in the First 100 Days of the George W. Bush, William J. Clinton, and Ronald W. Reagan Administrations*, by Rogelio Garcia (archived CRS report available from the author).

<sup>32</sup> For a more detailed discussion of the appointment process, see CRS Report RL32212, *The Appropriate Number of Advice and Consent Positions: An Analysis of the Issue and Proposals for Change*, by Henry B. Hogue.

below, the President may give the nominee a temporary appointment under the Vacancies Act<sup>33</sup> or a recess appointment to the position.<sup>34</sup> Both types of appointment confer upon the appointee the legal authority to carry out the duties of the office. A nominee who is hired as a consultant while awaiting confirmation may serve only in an advisory capacity.

## Senate Consideration

In the consideration stage, the Senate determines whether or not to confirm a nomination.<sup>35</sup> Each nomination is referred to the appropriate committee, where it may receive a hearing. After the hearing, if there is one, the committee usually votes to report the nomination back to the Senate, where it may be taken up and voted upon. Most nominations proceed through the process in a routine, timely fashion. During the 107<sup>th</sup> Congress, the Senate took a median<sup>36</sup> of 36 days to confirm a nomination to a full-time departmental position.<sup>37</sup> Nominations to policymaking positions can stall, however, or, in effect, die at any point. These outcomes are more likely with controversial nominations. Sometimes, however, Senators may block noncontroversial nominations through the use of holds<sup>38</sup> to gain leverage as part of a strategy to move unrelated legislation or nominations.

The Senate confirmation process is centered at the committee level. The rules and procedures of the committees frequently include timetables specifying minimum periods between steps in the process. Committee activity on nominations generally includes investigation, hearing, and reporting stages. Action at the committee level tends to be at the discretion of the chair. No Senate rule requires that a committee act on any nomination.

Although the Senate confirms most nominations, some are not confirmed. Rarely, however, is a nomination voted down on the Senate floor. Most rejections occur in committee, either by committee vote or by committee inaction. Rejections in committee occur for a variety of reasons, including opposition to the nomination, inadequate amount of time for consideration of the nomination, or factors that may have nothing to do with the merits of the nomination. If a nomination is not acted

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<sup>33</sup> 5 U.S.C. 3345-3349d.

<sup>34</sup> See CRS Report RS21412, *Limited-Term Appointments to Presidentially Appointed, Senate-Confirmed Positions*, by Henry B. Hogue.

<sup>35</sup> For further information, see CRS Report RL31980, *Senate Consideration of Presidential Nominations: Committee and Floor Procedure*, by Elizabeth Rybicki; and CRS Report RL31948, *Evolution of the Senate's Role in the Nomination and Confirmation Process, A Brief History*, by Betsy Palmer.

<sup>36</sup> The median is the middle value in a numerical distribution. In this case, half the confirmations took less time, and half took more time.

<sup>37</sup> CRS Report RL31346, *Presidential Appointments to Full-Time Positions in Executive Departments During the 107<sup>th</sup> Congress, 2001-2002*, by Henry B. Hogue.

<sup>38</sup> A "hold" is an informal Senate practice in which a Senator requests that his or her party leader delay floor action on a particular matter, in this case a nomination. See CRS Report 98-712, *"Holds" in the Senate*, by Walter Oleszek.

upon by the Senate by the end of a Congress, it is returned to the President. Pending nominations also may be returned automatically to the President at the beginning of a recess of 30 days or longer, but the Senate rule providing for this return is often waived.<sup>39</sup>

## Appointment

In the final stage, the confirmed nominee is given a commission signed by the President, with the seal of the United States affixed thereto, and is sworn into office. The President may sign the commission at any time after confirmation, and the appointment process is not complete until he or she does so. Once the appointee is given the commission and sworn in, he or she has full authority to carry out the responsibilities of the office. The length of the time between confirmation and appointment varies in accordance with the preferences of the Administration and appointee. It is usually shorter than either of the other two stages, and has not been identified as problematic by presidential appointment scholars.

## Temporary Staffing of PAS Positions During Presidential Transitions

Several provisions of law allow for temporarily filling PAS positions without Senate approval during presidential transitions, as well as at other times. Congress has provided limited statutory authority for temporary presidential appointments under the Federal Vacancies Reform Act of 1998.<sup>40</sup> Appointees under the Vacancies Act are authorized to “perform the functions and duties of the office temporarily in an acting capacity subject to the time limitations” provided in the act.<sup>41</sup> A temporary appointment under the Vacancies Act ordinarily may last up to 210 days (approximately seven months). During a presidential transition, however, the 210-day restriction period does not begin to run until either 90 days after the President assumes office (i.e., mid-April), or 90 days after the vacancy occurs, if it is within the 90-day inauguration period. Furthermore, the time restriction is suspended if a first or second nomination for the position has been submitted to the Senate for confirmation and is pending.

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<sup>39</sup> The rule may be found in U.S. Congress, Senate Committee on Rules and Administration, *Senate Manual*, 106<sup>th</sup> Cong., 1<sup>st</sup> sess., S. Doc. 106-1 (Washington: GPO, 1999), p. 55, Rule XXXI, paragraph 6 of the Standing Rules of the Senate. For an example of a waiver of the rule, see Sen. John E. Sununu, “Nomination in Status Quo,” *Congressional Record*, daily edition, vol. 149, July 31, 2003, p. S10844.

<sup>40</sup> P.L. 105-277, Div. C, Title I, Sec. 151; 5 U.S.C. 3345-3349d. The act does not apply to positions on multi-headed regulatory boards and commissions, to certain other specific positions that may be filled temporarily under other statutory provisions, or to new positions that have never been filled. This law superceded previous, similar statutory provisions. For more on the Vacancies Act, see CRS Report 98-892, *The New Vacancies Act: Congress Acts to Protect the Senate’s Confirmation Prerogative*, by Morton Rosenberg.

<sup>41</sup> 5 U.S.C. 3345(a)(1).

When an executive agency position requiring confirmation becomes vacant, it may be filled temporarily under the Vacancies Act in one of three ways. First, the first assistant to such a position may automatically assume the functions and duties of the office. This provision may be of limited utility to a new President, because he probably would not yet have installed a first assistant of his own choosing. Nonetheless, if the first assistant who becomes the acting leader is a career executive, he or she might lend continuity to agency operations and reduce organizational confusion and paralysis during the transition.

The Vacancies Act also provides that the President may direct an officer in any agency who is occupying a position requiring Senate confirmation to perform the tasks associated with the vacant position. Although this option would allow a new President to authorize one of his confirmed appointees to perform key tasks, it might be of limited utility in the early months of the new Administration when PAS positions in general are thinly staffed.

Finally, the Vacancies Act provides that the President may temporarily fill the vacant position with any officer or employee of the subject agency who has been occupying a position for which the rate of pay is equal to or greater than the minimum rate of pay at the GS-15 level, and who has been with the agency for at least 90 of the preceding 365 days. Under this provision, the President could draw, for example, from among an agency's career Senior Executive Service members, and this might allow him to select, as a temporary office holder, an individual who supports his policy preferences.

A second form of limited-term appointment without Senate confirmation is a presidential recess appointment. The President's authority to make recess appointments is conferred by the Constitution, which states that "[t]he President shall have Power to 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."<sup>42</sup> Recent Presidents have used this authority to make such appointments during both within-session (intrasession) Senate breaks and between-sessions (intersession) recesses. Intrasession recess appointments have, however, sometimes provoked controversy in the Senate, and there is also an academic literature that has drawn their legitimacy into question.<sup>43</sup> The constitutionality of such appointments has also been debated in briefs associated with a case before the United States Court of Appeals for

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<sup>42</sup> Article 2, Sec. 2, cl. 3 of the Constitution.

<sup>43</sup> Regarding Senate controversy, see Sen. George Mitchell, "The Senate's Constitutional Authority to Advise and Consent to the Appointment of Federal Officers," *Congressional Record*, vol. 139, July 1, 1993, p. 15266; and Senate Legal Counsel, "Memorandum of United States Senate as Amicus Curiae in Support of Plaintiffs' Motion, and in Opposition to Defendants' Motions, for Summary Judgment on Count Two," U.S. District Court for the District of Columbia, *Mackie v. Clinton*, C.A. No. 93-0032-LFO, *Congressional Record*, vol. 139, July 1, 1993, pp. 15267-15274. For academic literature, see, for example, Michael A. Carrier, "When Is the Senate in Recess for Purposes of the Recess Appointments Clause?" *Michigan Law Review*, vol. 92, June 1994.

the Eleventh Circuit.<sup>44</sup> Recess appointments expire at the end of the next session of Congress. As a result, a recess appointment may last for less than a year, or nearly two years, depending on when the appointment is made.

At times, a nominee is hired as a consultant while awaiting confirmation, but he or she may serve only in an advisory capacity and may not take on the functions and duties of the office to which he or she has been nominated. A nominee to a Senate-confirmed position has no legal authority to assume the responsibilities of this position; the authority comes with one of the limited-term appointments discussed above, or with Senate confirmation and subsequent presidential appointment.

## The Length of the Appointment Process

In its report, the 9/11 Commission asserted that the length of the appointment process for positions on the President's "national security team" at the time of presidential transitions is too long. It expressed particular concern about appointments to these positions during the 2000-2001 transition. How long was taken to fill the positions? According to the commission, the 2001 appointments were not completed until at least six months after the President took office. This claim is difficult to verify, because the report did not define the parameters of the national security team. Neither the specific positions nor the total number of positions on the team were identified. According to a commission staff member, the team includes top appointees at the Departments of Defense, Homeland Security, Justice, and State and the Central Intelligence Agency,<sup>45</sup> but it remains unclear which positions in the hierarchies of these agencies are included.

Although the "national security team" remains undefined, a review of the length of the appointment process for some of the positions likely to be included might be helpful in identifying the scope of the problem the commission seeks to solve. The report specifically calls for expedited Senate consideration procedures for "national security team" positions through Level III of the Executive Schedule. This suggests that the commission would include positions at least through the level of Under Secretary.

**Table 2** provides appointment information concerning positions at Levels I, II, and III of the Executive Schedule for the departments and agencies identified by commission staff. The table identifies, for each position, the Senate committee of jurisdiction, name of the first confirmed George W. Bush appointee, date the nomination was received by the Senate, and confirmation date. It also provides a calculation of the days elapsed during the first two stages of the process, presidential

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<sup>44</sup> For the principal arguments, see Sen. Edward M. Kennedy, "Brief of Amicus Curiae Senator Edward M. Kennedy in Support of Petitioner," U.S. Court of Appeals for the Eleventh Circuit, *Stephens v. Evans*, No. 02-16424; and U.S. Dept. of Justice, "Brief for the Intervenor United States Supporting the Constitutionality of Judge Pryor's Appointment as a Judge of This Court," U.S. Court of Appeals for the Eleventh Circuit, *Stephens v. Evans*, No. 02-16424.

<sup>45</sup> Information received from 9/11 Commission staff via telephone, Aug. 3, 2004.



selection and vetting, and Senate consideration. For the purposes of the table, the selection process for most of the listed positions, which were vacated at some time prior to, or shortly after, the end of the Clinton presidency, was considered to have begun at the time of the President's inauguration. The selection process for positions in the Department of Homeland Security, which was established well after the 2000-2001 presidential transition, was considered to have begun at the time the Homeland Security Act was enacted. The process by which Robert S. Mueller, III, was selected to be the Director of the FBI was considered to have begun at the time of the previous director's resignation on June 25, 2001. The process by which Porter J. Goss, was selected to be the Director of Central Intelligence was considered to have begun at the time of the previous director's departure on July 11, 2004. Among the Level I, II, and III positions at the Departments of Defense, Homeland Security, Justice, and State, and the Central Intelligence Agency, not all had been vacated and refilled with Bush appointees by the end of September 2004, and this is noted, where appropriate, in the table.

**Table 2** provides, for this group of positions, the mean and median numbers of days taken to complete each of the first two stages of the appointment process and to complete the entire process. These statistics show that, on average, President Bush's nominees for the specified positions are selected, nominated, and confirmed within three months. Although these processes took as long as seven months for some such appointments, 74% had been confirmed by the four-month mark.

**Table 2** also shows that, for this select group of positions, the average selection and vetting period is more than twice as long as the average period of Senate consideration. For most of the positions shown in the table — 19 of 28 — Senate consideration took fewer than the 9/11 Commission's recommended 30 days.

**Table 2. Initial Appointments by President George W. Bush to Top Positions at the Departments of Defense, Homeland Security, Justice, State, and the Central Intelligence Agency**

<b>Position title</b>	<b>Senate committee of jurisdiction</b>	<b>First confirmed nomination to the position by President George W. Bush</b>	<b>Date nomination received in the Senate</b>	<b>Confirmation date</b>	<b>Days from inauguration, enactment, or vacancy to nomination</b>	<b>Days elapsed from nomination to confirmation</b>	<b>Days from inauguration, enactment, or vacancy to confirmation</b>
<i>Department of Defense</i>							
Secretary of Defense	Armed Services	Donald Rumsfeld <sup>a</sup>	01/20/01	01/20/01	0	1	1
Deputy Secretary	Armed Services	Paul D. Wolfowitz	02/15/01	02/28/01	26	13	39
Under Secretary - Acquisition, Technology, and Logistics	Armed Services	Edward C. Aldridge, Jr.	04/23/01	05/08/01	93	15	108
Under Secretary - Comptroller and Chief Financial Officer	Armed Services	Dov S. Zakheim	03/13/01	05/01/01	52	49	101
Under Secretary - Policy	Armed Services	Douglas J. Feith	04/30/01	07/12/01	100	73	173
Under Secretary - Personnel and Readiness	Armed Services	David S. C. Chu	04/30/01	05/26/01	100	26	126
Under Secretary - Intelligence <sup>b</sup>	Armed Services	Stephen A. Cambone	02/04/03	03/07/03	64	31	95
Secretary of the Air Force	Armed Services	James G. Roche	05/07/01	05/24/01	107	17	124
Secretary of the Army	Armed Services	Thomas E. White	05/01/01	05/24/01	101	23	124
Secretary of the Navy	Armed Services	Gordon England	04/30/01	05/22/01	100	22	122
<i>Department of Homeland Security<sup>c</sup></i>							
Secretary	Governmental Affairs	Thomas J. Ridge	01/07/03	01/22/03	43	15	58
Deputy Secretary	Governmental Affairs	Gordon England <sup>d</sup>	01/07/03	01/30/03	43	23	66

<b>Position title</b>	<b>Senate committee of jurisdiction</b>	<b>First confirmed nomination to the position by President George W. Bush</b>	<b>Date nomination received in the Senate</b>	<b>Confirmation date</b>	<b>Days from inauguration, enactment, or vacancy to nomination</b>	<b>Days elapsed from nomination to confirmation</b>	<b>Days from inauguration, enactment, or vacancy to confirmation</b>
Under Secretary — Border and Transportation Security	Commerce, Science, and Transportation	Asa Hutchinson <sup>d</sup>	01/10/03	01/23/03	46	13	59
Under Secretary — Emergency Preparedness and Response	Governmental Affairs	Michael D. Brown <sup>e</sup>	na	na	na	na	na
Under Secretary — Information Analysis and Infrastructure Protection	Intelligence	Frank Libutti	04/28/03	06/23/03	154	56	210
Under Secretary — Management	Governmental Affairs	Janet Hale <sup>d</sup>	01/21/03	03/06/03	57	44	101
Under Secretary — Science and Technology	Commerce, Science, and Transportation	Charles E. McQueary	02/14/03	03/19/03	81	33	114
<i>Department of Justice</i>							
Attorney General	Judiciary	John Ashcroft	01/29/01	02/01/01	9	3	12
Deputy Attorney General	Judiciary	Larry D. Thompson	03/22/01	05/10/01	61	49	110
Director — Federal Bureau of Investigation (FBI)	Judiciary	Robert S. Mueller, III <sup>f</sup>	07/18/01	08/02/01	23	15	38
<i>Department of State</i>							
Secretary	Foreign Relations	Colin L. Powell <sup>a</sup>	01/20/01	01/20/01	0	1	1
Deputy Secretary	Foreign Relations	Richard L. Armitage	03/08/01	03/23/01	47	15	62
Under Secretary — Economic, Business, and Agricultural Affairs	Foreign Relations	(No confirmed Bush appointment to this position as of October 18, 2004)					

Position title	Senate committee of jurisdiction	First confirmed nomination to the position by President George W. Bush	Date nomination received in the Senate	Confirmation date	Days from inauguration, enactment, or vacancy to nomination	Days elapsed from nomination to confirmation	Days from inauguration, enactment, or vacancy to confirmation	
Under Secretary — Global Affairs	Foreign Relations	Paula J. Dobriansky	04/04/01	04/26/01	74	22	96	
Under Secretary — Arms Control and International Security	Foreign Relations	John R. Bolton	03/08/01	03/23/01	47	15	62	
Under Secretary — Management	Foreign Relations	Grant S. Green, Jr.	03/08/01	03/28/01	47	20	67	
Under Secretary — Political Affairs	Foreign Relations	Marc I. Grossman	03/08/01	03/23/01	47	15	62	
Under Secretary — Public Diplomacy and Public Affairs	Foreign Relations	Charlotte L. Beers <sup>g</sup>	06/29/01	09/26/01	160	58	218	
<i>Central Intelligence Agency</i>								
Director of Central Intelligence	Intelligence	Porter J. Goss <sup>h</sup>	09/07/04	09/22/04	58	15	73	
Deputy Director of Central Intelligence	Intelligence	(No confirmed Bush appointment to this position as of August 2004)						
Deputy Director of Central Intelligence — Community Management	Intelligence	Larry C. Kindsvateri	05/11/04	07/22/04	na	72	na	
<b>Median elapsed days</b>					57	21	95	
<b>Mean elapsed days</b>					64	27	90	

<sup>a</sup> Although the first day the new President formally submitted nominations to the Senate was Inauguration Day, Senate committees held hearings on some top nominations before this time, and the Senate was therefore ready to confirm the nominees on the same day they were nominated.

<sup>b</sup> This position was created by P.L. 107-314, Sec. 901(a), enacted Dec. 2, 2002.

<sup>c</sup> The Homeland Security Act of 2002 (P.L. 107-296), which created the Department of Homeland Security, was signed into law on Nov. 25, 2002.

<sup>d</sup> On Jan. 27, 2003, President Bush announced his intention to designate England, Hutchinson, Hale, and one other individual as acting officials in their intended positions. (U.S. President (George W. Bush), “Digest of Other White House Announcements,” *Weekly Compilation of Presidential Documents*, vol. 39, Jan. 27, 2003, p. 145.) These actions were taken

under Sec. 1511(c)(1) of the act. (Information received from Department of Homeland Security, Office of the Deputy Secretary, via telephone conversation, Jan. 28, 2003.) England, Hutchinson, and Hale were later confirmed as shown.

<sup>e</sup> According to DHS sources, Brown was appointed under Sec. 1511(c)(2) of the act, which provides that reconfirmation by the Senate is not required by the law for “any officer whose agency is transferred to the Department pursuant to this act and whose duties following such transfer are germane to those performed before such transfer.” (Information received from Department of Homeland Security, Office of Legislative Affairs, via telephone conversation, Mar. 12, 2003.) He was previously nominated to be deputy director of the Federal Emergency Management Agency (FEMA) on Mar. 21, 2002 and confirmed on Aug. 1, 2002.

<sup>f</sup> Vacancy information for Mueller’s predecessor, Louis J. Freeh, is from the FBI’s history page, available at [<http://www.fbi.gov/libref/directors/freeh.htm>], visited Aug. 16, 2004.

<sup>g</sup> Technically, Beers was nominated twice. She was first nominated on June 29, 2001, and this nomination was returned to the President on Aug. 3, 2001, at the beginning of a 31-day Senate recess, under the provisions of Senate Rule XXXI, paragraph 6 of the Standing Rules of the Senate. She was nominated again on Sept. 4, 2001. The 31 days of the Senate recess are not included in the calculations, in this row, of days elapsed.

<sup>h</sup> Vacancy information for Goss’s predecessor, George Tenet, is from Terence Hunt, “Bush Taps Rep. Porter Goss to Head CIA,” *Associated Press*, Aug. 10, 2004.

## 9/11 Commission Recommendations

The overall recommendation of the 9/11 Commission calling for changes to the appointment process as a way of improving the presidential transition process stated the following:

Since 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. We think the process could be improved significantly so transitions can work more effectively and allow new officials to assume their new responsibilities as quickly as possible.<sup>46</sup>

This general recommendation was followed by seven more specific recommended changes, six of which are discussed below.<sup>47</sup>

### Early Security Clearance for Certain Prospective Appointees

The commission recommended two changes to the security clearance process related to presidential transitions. First, presidential candidates should, before the election, “submit the names of selected members of their prospective transition teams to the FBI so that, if necessary, those team members can obtain security clearances immediately after the election is over.” Similarly, immediately following the election, the President-elect should submit, for national security clearance, names of prospective nominees to national security positions.<sup>48</sup>

The security clearance process was developed in the wake of World War II as a means of verifying federal employee and contractor loyalty to the United States and providing standards and criteria for access, by employees and contractors, to classified national security information. The primary legal authorities undergirding the system are found in executive orders by President Dwight D. Eisenhower (E.O. 10450) and President William J. Clinton (E.O. 12968).<sup>49</sup> Certain statutory provisions also affect the clearance system in specific areas of the federal government.<sup>50</sup> The system provides for three levels of clearance for most agencies: confidential, secret,

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<sup>46</sup> *9/11 Commission Report*, p. 422.

<sup>47</sup> The seventh change called for by the commission, centralization of the national security clearance process in one agency, is beyond the scope of this report.

<sup>48</sup> *9/11 Commission Report*, p. 422.

<sup>49</sup> U.S. President (Eisenhower), “Security Requirements for Government Employment,” Executive Order 10450, 18 *Federal Register* 2489, Apr. 27, 1953; U.S. President (Clinton), “Access to Classified Information,” Executive Order 12968, 60 *Federal Register* 40245, Aug. 2, 1995.

<sup>50</sup> For identification and discussion of these authorities, see CRS Congressional Distribution Memorandum *Security Clearance Program: An Overview*, by Frederick M. Kaiser.

and top secret. Individuals may also be cleared for access to Sensitive Compartmentalized Information.<sup>51</sup>

As part of the security clearance system, a candidate for appointment to a full-time PAS position usually is required to complete the “Questionnaire for National Security Positions” (SF 86). This information is then referred to the FBI for a full field background investigation at the top-secret level. The nomination is not submitted to the Senate until after this investigation is completed. The length of time taken to complete the investigation varies, depending on the complexity of the individual’s background, whether or not the potential appointee has been cleared before, and the workload of the investigations unit at the FBI. Although some investigations are completed relatively quickly, other investigations may take up to six months.<sup>52</sup>

Two of the commission’s recommended changes, early background checks for potential transition team members and prospective nominees, might allow the President-elect and his key staff to be briefed on national security matters sooner than is presently the case. This would presumably allow the nascent Administration to formulate adequate national security policies prior to taking the reins of government, as a consequence of access to classified information. Furthermore, it might facilitate the earlier submission of key nominations to the Senate.

These two changes probably could be accomplished administratively with the cooperation of an incumbent Administration. The sitting President could submit to the FBI appropriate security clearance paperwork on behalf of candidates and the President-elect. The arrangement could be formalized through a memorandum of understanding that specified positions, procedures, and a time line. Because such an administrative approach would not be set in statute, its success would likely be tied to goodwill on the part of the parties involved, particularly the incumbent. Executive Order 10450 could be amended to establish this practice as a more routine part of the presidential transition process.

Alternatively, or in addition, a concurrent resolution of Congress expressing support for this approach might lead to more sustained and consistent employment of this practice. Congress could also elect to legislate such changes, possibly by amending the Presidential Transition Act of 1963.<sup>53</sup>

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<sup>51</sup> See “Director of Central Intelligence Directive 6/4,” available at [<http://www.dss.mil/nf/adr/index.htm>], visited Aug. 16, 2004.

<sup>52</sup> Information received from Federal Bureau of Investigation via telephone, Aug. 16, 2004.

<sup>53</sup> The Presidential Transition Act (P.L. 88-277, codified at 3 U.S.C.102 note) authorizes the Administrator of General Services to provide, during a presidential transition, certain logistical support to the incoming and outgoing Presidents and Vice Presidents.

## Recommended Changes in Advice and Consent for Certain Positions

The 9/11 Commission recommended the following regarding changes in the advice and consent process:

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. 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 Senate should not require confirmation of such executive appointees below Executive Level 3.<sup>54</sup>

**Early Nominations by the President-Elect.** Strictly speaking, the President-elect does not have the authority to submit nominations to the Senate before January 20. Under the Constitution, the power to appoint the principal officers of the United States is shared by the President and the Senate, and the President-elect does not have any appointment authority until he or she takes office.<sup>55</sup> Recent Presidents have routinely submitted nominations of their Cabinet members on Inauguration Day. Following the 9/11 Commission's recommendation, future Presidents would nominate "national security team" members on this day as well.

Alternative approaches might be taken to initiate Senate consideration of "national security team members" before the new President takes office.<sup>56</sup> One approach would be to start a Senate consideration process before the formal nomination of potential appointees. This practice has been followed with department secretaries and other Cabinet positions (for example, the Director of Management and Budget and the Administrator of the Environmental Protection Agency) during recent transitions. Prior to inauguration, Presidents-elect usually select and announce choices for these positions, and the Senate often holds hearings on these prospective nominations. During the 1992-1993 presidential transition, for example, pre-inaugural hearings on prospective nominations by President-elect William J. Clinton were held by the Senate Committees on Agriculture, Nutrition, and Forestry; Banking, Housing, and Urban Affairs; Energy and Natural Resources; Environment and Public Works; Finance; Foreign Relations; Governmental Affairs; and Labor

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<sup>54</sup> *9/11 Commission Report*, p. 422.

<sup>55</sup> The Constitution states, "[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 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." (Article II, Sec. 2, cl. 2.)

<sup>56</sup> Continuity in the national security system might also be maintained if the incoming Administration were to retain certain appointees from the outgoing Administration during the transition. The commission's report did not discuss this approach.



and Human Resources, among others.<sup>57</sup> As a result, eight presidential nominations were confirmed within the first week of the new Administration. In a similar manner, 12 high-level nominees were confirmed within the first week of the presidency of George W. Bush.<sup>58</sup> Congress could elect to follow this process for national security appointments as well.

Another approach would require cooperation between the outgoing and incoming Presidents, in order for incoming “national security team” members to be officially nominated prior to the new President’s inauguration. Under such a scenario, the sitting President would, as a courtesy, submit nominations on behalf of the President-elect. Once the nominations were submitted, the Senate could consider them just as it would nominations submitted after inauguration. If the Senate were to confirm such nominations prior to inauguration, the confirmed nominees could not take office until the President signed their commissions. This fact would allow the outgoing President to control the final outcome of the process until the inauguration of the new President. As with some of the potential changes to the security clearance process discussed above, this approach to pre-inaugural nominations would likely be tied to goodwill on the part of the parties involved.

**Time-Limited Senate Consideration.** Senate consideration of a nomination may take anywhere from less than a day to many months.<sup>59</sup> The 9/11 Commission proposed that the Senate “adopt special rules” that would limit the length of the consideration process for “national security team” positions to 30 days. Although the Senate could elect to adopt such a rule, rule changes are rare, in part because invoking cloture on a proposal to change Senate rules requires the support of two-thirds of the Senators present and voting.<sup>60</sup>

Limits on the length of the Senate consideration process could also be imposed by statute,<sup>61</sup> standing order, or unanimous consent. At present, no known statute or standing order provides for an overall time limit on Senate consideration of a

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<sup>57</sup> Senate Legal Counsel, “Memorandum of United States Senate as Amicus Curiae in Support of Plaintiffs’ Motion, and in Opposition to Defendants’ Motions, for Summary Judgment on Count Two,” U.S. District Court for the District of Columbia, *Mackie v. Clinton*, C.A. No. 93-0032-LFO, *Congressional Record*, vol. 139, July 1, 1993, p. 15267.

<sup>58</sup> Confirmation information was drawn from the Senate nominations database of the Legislative Information System, available at [<http://www.congress.gov/nomis/>], visited Aug. 16, 2004.

<sup>59</sup> For a detailed discussion of the Senate consideration process, see CRS Report RL31980, *Senate Consideration of Presidential Nominations: Committee and Floor Procedure*, by Elizabeth Rybicki.

<sup>60</sup> U.S. Congress, Senate Committee on Rules and Administration, *Senate Manual*, 106<sup>th</sup> Cong., 1<sup>st</sup> sess., S. Doc. 106-1 (Washington: GPO, 1999), p. 21, Rule XXII, paragraph 2 of the Standing Rules of the Senate.

<sup>61</sup> Statutory modifications to Senate procedures, including limits on debate for certain nominations, could be amended, waived, repealed, or ignored by the Senate.

nomination.<sup>62</sup> More commonly, the Senate has used unanimous consent (UC) agreements to structure, for individual nominations, the duration and other aspects of the consideration process. In the case of the nominations specified by the 9/11 Commission, the Senate could fashion a UC agreement or standing order structuring this 30-day consideration process. Such an agreement established prior to the election would continue to be binding in the next Congress, unless the agreement provided otherwise or was later modified.

Any rule, statute, standing order, or UC agreement placing limits on the consideration process would implicitly restrict the right of Senators to unlimited debate.<sup>63</sup> As a consequence, it would be impossible to filibuster or place an unlimited hold on a specified nomination. If time limits were placed on the Senate consideration process for “national security team” nominations, some might argue that this practice should be replicated for other groups of nominations.<sup>64</sup>

**Removing Advice and Consent Requirements Below Level III.** The 9/11 Commission suggested that presidential appointments to “national security team” positions that are compensated below Level III of the Executive Schedule should not be subject to the advice and consent of the Senate. The report does not specify which among the PAS positions below this level would be considered to be part of the “national security team.” Consequently, the type and total number of positions that would be affected is unknown. As a point of reference, the positions compensated at Levels IV and V of the Executive Schedule, throughout the federal government, include the following: assistant secretaries; inspectors general; some directors, administrators, deputy administrators, and assistant directors; general counsels; chief financial officers; chief information officers; and members of federal regulatory boards and commissions.<sup>65</sup>

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<sup>62</sup> For an example of a standing order that applies to the Senate consideration process but does not limit the overall duration of this process, see Sen. George Mitchell, “Joint Referral of Department of Energy Nomination,” remarks in the Senate, *Congressional Record*, vol. 136, June 28, 1990, pp. 16573-16574. Under this standing order, nominations to the position of Assistant Secretary of Energy for Environmental Management are referred jointly to the Committee on Armed Services and the Committee on Energy and Natural Resources. If one committee reports the nomination to the full Senate, the other committee has 30 days to report the nomination before this committee is discharged from further consideration of the nomination.

<sup>63</sup> For a general discussion of expedited procedures, see CRS Report 98-888, “*Fast Track*” or *Expedited Procedures: Their Purposes, Elements, and Implications*, by Christopher M. Davis.

<sup>64</sup> For additional information and analysis concerning the proposed changes to the Senate process for consideration of nominations, see CRS Report RL32551, *9/11 Commission Recommendations: The Senate Confirmation Process for Presidential Nominees*, by Betsy Palmer.

<sup>65</sup> 5 U.S.C. 5315 and 5316. For a list of full-time PAS positions at each department, as of the end of the 107<sup>th</sup> Congress, see CRS Report RL31346, *Presidential Appointments to Full-Time Positions in Executive Departments During the 107<sup>th</sup> Congress, 2001-2002*, by Henry B. Hogue.

The idea of removing advice and consent requirements from some PAS positions has been previously suggested by others.<sup>66</sup> The context of the commission's recommendation suggests that it believes taking this step would speed the appointment process and "allow new officials to assume their new responsibilities as quickly as possible."<sup>67</sup> Other proponents have contended that a reduction in the number of PAS positions would lead to a more efficient confirmation process in the Senate and faster appointments to the positions that continue to require advice and consent.<sup>68</sup>

If the advice and consent requirements were removed from certain positions with national security responsibilities compensated at Levels IV and V of the Executive Schedule, then Congress, under the Appointments Clause of the Constitution, could vest this authority "in the President alone, in the Courts of Law, or in the Heads of Departments."<sup>69</sup> Congress rarely delegates the appointment of officers outside the Executive Office of the President to the President alone, but it has recently done so for two offices in the Department of Homeland Security — the Assistant Secretary for Information Analysis and the Assistant Secretary for Infrastructure Protection.<sup>70</sup> More commonly, Congress delegates the appointment of lower-level officers to agency heads. In either case, the change in appointment authority might serve to increase the accountability of political appointees to the Administration and further centralize management in the area of national security.

When Congress delegates the authority for the appointment of an inferior officer to the President alone or to an agency head, it cedes some power over the federal bureaucracy to the executive branch. In such a case, Congress, particularly the Senate, may have reduced influence over the selection of the individual, and it gives up the opportunity to consider the individual's merits. In addition, congressional committees may have greater difficulty obtaining testimony from an appointee who has not been confirmed by the Senate. As previously mentioned, the Senate usually gains, during the confirmation process, a commitment from the nominee to respond to requests to come before committees of the Senate.<sup>71</sup> This commitment may not be necessary, under most circumstances, to obtain testimony. An argument could be made that Congress has the authority to call most officers with operational duties,

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<sup>66</sup> For a full discussion of previous recommendations and an analysis of related issues and options, see CRS Report RL32212, *The Appropriate Number of Advice and Consent Positions: An Analysis of the Issue and Proposals for Change*, by Henry B. Hogue.

<sup>67</sup> *9/11 Commission Report*, p. 422.

<sup>68</sup> For a discussion of these proponents arguments, see CRS Report RL32212, pp. 1-3.

<sup>69</sup> Article II, Sec. 2, cl. 2.

<sup>70</sup> P.L. 107-296, Sec. 201(b).

<sup>71</sup> For example, the Senate Committee on Governmental Affairs pre-hearing questionnaire for Michael J. Garcia, a nominee to be an Assistant Secretary at the Department of Homeland Security, included the following question: "Do you agree without reservation to respond to any reasonable summons to appear and testify before any duly constituted committee of the Congress if you are confirmed?" U.S. Congress, Senate Committee on Governmental Affairs, *Nominations of C. Stewart Verdery, Jr., and Michael J. Garcia*, hearing, 108<sup>th</sup> Cong., 1<sup>st</sup> sess., June 5, 2003 (Washington: GPO), p. 133.

regardless of appointment status, before its committees. As a practical matter, however, the commitment obtained at the time of confirmation may make this process easier for Congress.

The removal of advice and consent requirements may have political ramifications for the Senate. It could be argued that the confirmation process, in general, provides the Senate with leverage during negotiations with the President over related and unrelated matters, and that the removal of advice and consent requirements for these positions might reduce this leverage. The impact of such a change, should it be adopted, might hinge on the total number of positions involved and the specific positions affected, neither of which is specified in the commission's recommendation. Furthermore, if advice and consent requirements were to be removed from the appointment process for lower-level national security positions, some might argue that such requirements should be removed for similar positions in other parts of the federal government, broadening the potential impact on Senators' leverage by reducing the number of appointments potentially subject to negotiation.

## Information Exchange During Presidential Transitions

The final 9/11 Commission proposal related to its recommendation of presidential transition process improvement was stated as follows:

The outgoing administration should provide the president-elect, as soon as possible after election day, with a classified, compartmented list that catalogues specific, operational threats to national security; major military or covert operations; and pending decisions on the possible use of force. Such a document could provide both notice and a checklist, inviting a president-elect to inquire and learn more.<sup>72</sup>

During recent presidential transitions, presidential candidates and, later, Presidents-elect have been briefed on national security issues.<sup>73</sup> The commission proposed particular form and contents for written materials that are provided to the President-elect. As with the proposed national security clearance process changes discussed above, the commission's recommendations in this area could be put in place administratively. The adoption of this practice might be more consistent and regularized if it were established by executive order. Alternatively, or in addition, a concurrent resolution of Congress expressing support for this recommendation might encourage its successful adoption.

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<sup>72</sup> *9/11 Commission Report*, pp. 422-423.

<sup>73</sup> For references to this practice, see John L. Helgerson, *Getting to Know the President: CIA Briefings of Presidential Candidates, 1952-1992* (Washington: Central Intelligence Agency, 1996), chap. 1, and White House Press Briefing by Jake Siewert, Nov. 27, 2000, available at [<http://clinton6.nara.gov/2000/11/2000-11-27-press-briefing-by-jake-siewert.html>], visited Aug. 16, 2004.

## Conclusion

Observers who have studied the presidential transition process are in general agreement with the finding of the 9/11 Commission that it takes too long to staff the top positions in a new Administration. The commission expressed the greatest concern about “national security team” positions, although the report did not specify the members of this team. In the 2000-2001 transition, one possible set of members — top-level positions at the Departments of Defense, Homeland Security, Justice, and State — had been confirmed, on average, within about three months of the President’s inauguration. Selection and vetting of candidates — including background investigations and financial disclosure — accounted for most of this time, and statutory or administrative changes to these processes might shorten the time required to fill these positions. In most cases, the Senate consideration process was completed within a month of nomination, the time frame suggested by the commission. Findings might be different for a broader group of positions related to national security, or for PAS positions in general.