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# Appointment and Confirmation of Executive Branch Leadership: An Overview

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## Summary

The Constitution divides the responsibility for populating the top positions in the executive branch of the federal government between the President and the Senate. Article II, Section 2 empowers the President to nominate and, by and with the advice and consent of the Senate, to appoint the principal officers of the United States, as well as some subordinate officers.

These positions are generally filled through the advice and consent process, which can be divided into three stages:

1. The White House selects and clears a prospective appointee before sending a formal nomination to the Senate.
2. The Senate determines whether to confirm a nomination. For most nominations, much of this process occurs at the committee level.
3. The confirmed nominee is given a commission and sworn into office, after which he or she has full authority to carry out the duties of the office.

The President may also be able to fill vacancies in advice and consent positions in the executive branch temporarily through other means. In some cases, the President may be able to designate an official to serve in a vacant position on a temporary basis under the Federal Vacancies Reform Act or under statutory authority specific to the position. Alternatively, if circumstances permit and certain conditions are met, the President could choose to give a recess appointment to an individual. Such an appointment would last until the end of the next session of the Senate. In practice, recess appointments have become less common in recent years.

Congress has selectively included certain types of statutory provisions when establishing specific executive branch positions. These provisions include those that require appointees to have specified qualifications, set fixed terms of office, limit the circumstances under which the President can remove an officeholder, specify how the chair of a collegial board or commission will be selected and may be removed, and allow an incumbent to remain in office past the end of a term until a successor is appointed (also referred to as a holdover provision). Although these types of provisions may be found in the establishing statutes for a variety of positions, they are particularly common for members of regulatory and other collegial boards and commissions. In some cases, these types of provisions have influenced the dynamics of the Senate confirmation process. They may also be factored into the selection and vetting process in the Administration.

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## Introduction

The Constitution divides the responsibility for populating the top positions in the federal government between the President and the Senate. The appointments clause (Article II, Section 2) empowers the President to nominate and, by and with the advice and consent of the Senate, to appoint the principal officers of the United States, as well as some subordinate officers.<sup>1</sup> Specifically, the appointments clause provides that

[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.

The Constitution further authorizes Congress to vest the appointment of “inferior Officers ... in the President alone, in the Courts of Law, or in the Heads of Departments.” Thus, some high-ranking positions in the federal government may be filled through means other than presidential appointment with Senate confirmation, and Congress has created many such positions in statute.<sup>2</sup> But if Congress does not alter the method of appointment, inferior officers are also appointed through advice and consent.

Officers of the United States are those appointees who are “exercising *significant authority* pursuant to the laws of the United States” (emphasis added)<sup>3</sup> in a “‘continuing’ position established by law.”<sup>4</sup>

This report provides an overview of appointments of principal and inferior officers through appointment by the President with the advice and consent of the Senate. These positions are often referred to as “advice and consent positions” or “PAS positions.”<sup>5</sup> Inferior officer positions that

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<sup>1</sup> For a constitutional and historical overview of the appointment process, see Michael J. Gerhardt, *The Federal Appointments Process: A Constitutional & Historical Analysis* (Durham, NC: Duke University Press, 2003). See also CRS, “Article II, Section 2, Clause 3,” *Constitution Annotated*, [https://constitution.congress.gov/browse/article-2/#II\\_S2\\_C2](https://constitution.congress.gov/browse/article-2/#II_S2_C2).

<sup>2</sup> For information on the distinction between principal and inferior officers of the United States, see CRS, “Appointing ‘Inferior Officers,’” *Constitution Annotated*, [https://constitution.congress.gov/browse/essay/artII-S2-C2-2-1-4/ALDE\\_00001141/](https://constitution.congress.gov/browse/essay/artII-S2-C2-2-1-4/ALDE_00001141/). One study found that the President was authorized by law to fill 321 positions government-wide without the advice and consent of the Senate (U.S. Government Accountability Office, *Characteristics of Presidential Appointments That Do Not Require Senate Confirmation*, GAO-13-299R, March 1, 2013, <http://www.gao.gov/products/GAO-13-299R>). The Chief Justice is directed in statute to appoint certain officers, such as the director of the Administrative Office of the United States Courts (28 U.S.C. §601). For more information on the appointing power of the Chief Justice, see James E. Pfander, “The Chief Justice, the Appointment of Inferior Officers, and the ‘Court of Law’ Requirement,” *Northwestern University Law Review*, vol. 107, no. 3 (2013), pp. 1125-1180, <http://www.law.northwestern.edu/lawreview/v107/n3/1125/LR107n3Pfander.pdf>. Certain positions, including several thousand in the Senior Executive Service (SES), are appointed by agency heads, as provided by law. For more information about the SES, see CRS In Focus IF11743, *The Senior Executive Service: An Overview*, by Maeve P. Carey; and the Office of Personnel Management’s overview of the SES on its website at <https://www.opm.gov/policy-data-oversight/senior-executive-service/>.

<sup>3</sup> *Buckley v. Valeo*, 424 U.S. 1, 126 (1976). For further information on the distinction between officers and employees of the United States, see CRS, “Distinguishing Between Officers and Non-Officers,” *Constitution Annotated*, [https://constitution.congress.gov/browse/essay/artII-S2-C2-2-1-3-2/ALDE\\_00001139/](https://constitution.congress.gov/browse/essay/artII-S2-C2-2-1-3-2/ALDE_00001139/).

<sup>4</sup> *Lucia v. SEC*, 138 S. Ct. 2044, 2051 (quoting *United States v. Germaine*, 99 U.S. 508, 511-12 (1878)).

<sup>5</sup> This abbreviation stands for Presidential Appointment with Senate Confirmation. U.S. Congress, House Committee on Oversight and Reform, *United States Government Policy and Supporting Positions*, committee print, prepared by U.S. Office of Personnel Management, 116<sup>th</sup> Cong., 2<sup>nd</sup> sess., December 2020 (Washington: GPO, 2020), p. v.

do not require Senate advice and consent are beyond the scope of this report, as are positions in the federal judiciary.<sup>6</sup>

The report begins by explaining the three distinct stages that comprise the advice and consent process. These three stages are selection and nomination, Senate consideration, and appointment. The report then provides an overview of options that may be available to the President for temporarily filling vacant advice and consent positions, including through use of authorities available under the Federal Vacancies Reform Act and the recess appointments clause of the Constitution. Finally, it discusses certain types of statutory provisions that Congress has applied selectively to specific advice and consent positions in the executive branch: qualifications for officeholders, fixed terms of office, limitations on presidential removal, appointment and removal of chairs, and holdover provisions.

## Appointments Under the Advice and Consent Process

The appointment process for executive branch positions is generally considered to have three stages: selection and nomination by the President, consideration by the Senate, and appointment by the President.

### Selection, Clearance, and Nomination

In the first stage, the White House selects and clears a prospective appointee before sending the formal nomination to the Senate. With the assistance of, and preliminary vetting by, the White House Office of Presidential Personnel, the President selects a candidate for the position.<sup>7</sup> Members of Congress and interested parties sometimes have recommended candidates for specific PAS positions, particularly for positions located within a Member's state. Members have offered their suggestions by letter and by contact with a White House liaison.<sup>8</sup> In general, the President is under no obligation to follow such recommendations. In the case of the Senate, however, it has been argued that Senators are constitutionally entitled, by virtue of the advice and consent clause noted above, to provide advice to the President regarding his selection, although the extent of this entitlement is a matter of some debate.<sup>9</sup> As a practical matter, when Senators have perceived insufficient pre-nomination consultation has occurred, they have sometimes

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<sup>6</sup> For information about judicial appointments, see CRS Report R44235, *Supreme Court Appointment Process: President's Selection of a Nominee*, by Barry J. McMillion; CRS Report R44236, *Supreme Court Appointment Process: Consideration by the Senate Judiciary Committee*, by Barry J. McMillion; CRS Report R44234, *Supreme Court Appointment Process: Senate Debate and Confirmation Vote*, by Barry J. McMillion; CRS Report R43762, *The Appointment Process for U.S. Circuit and District Court Nominations: An Overview*, by Barry J. McMillion; and CRS Report R44975, *The Blue Slip Process for U.S. Circuit and District Court Nominations: Frequently Asked Questions*, by Barry J. McMillion.

<sup>7</sup> The current personnel selection and clearance process described here is the result of a number of historical developments in the post-World War II era in the White House's Executive Office of the President. For more information about the historical development of personnel recruiting and other practices, see G. Calvin Mackenzie, *The Politics of Presidential Appointments* (New York: The Free Press, 1981); and White House Transition Project Report, "The Office of Presidential Personnel," 2020, <https://whitehousetransitionproject.org/transition-resources-2/office-briefs/>.

<sup>8</sup> Council for Excellence in Government's Presidential Appointee Initiative, *A Survivor's Guide for Presidential Nominees*, Brookings Institution, November 2000, pp. 31-32.

<sup>9</sup> See, for example, Gerhardt, *The Federal Appointments Process*, pp. 29-34.

exercised their procedural prerogatives to delay, or even effectively block, consideration of a nomination.<sup>10</sup>

During the clearance process,<sup>11</sup> the candidate prepares and submits several forms, including the “Public Financial Disclosure Report” (OGE 278e),<sup>12</sup> the “Questionnaire for National Security Positions” (SF 86), and a supplement to SF 86 (“86 Supplement”). Some past Administrations have also required a White House Personal Data Statement or similar questionnaire providing information for White House use.<sup>13</sup> The clearance process often includes a background investigation conducted by the Federal Bureau of Investigation (FBI), which prepares a report that is delivered to the White House. It also includes a review of financial disclosure materials by the Office of Government Ethics (OGE) and an ethics official for the agency to which the candidate is to be nominated.<sup>14</sup> If conflicts of interest are found during the background investigation, OGE and the agency ethics officer may work with the candidate to mitigate the conflicts. At the completion of the clearance process, the nomination is ready to be submitted to the Senate.

The selection and clearance stage has often been the longest part of the appointment process. There have been lengthy delays at times, particularly when many candidates have been processed simultaneously, such as at the beginning of an Administration or where conflicts needed to be resolved. Candidates for higher-level positions have often been accorded priority in this process. In an effort to reduce the elapsed time between a new President’s inauguration and the appointment of his or her national security team, Congress has amended the Presidential Transition Act of 1963 several times in recent years.<sup>15</sup> Among other provisions, these amendments encourage a President-elect to submit, for security clearance, potential nominees to

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<sup>10</sup> See, for example, Gerhardt, *The Federal Appointments Process*, pp. 152-153.

<sup>11</sup> The White House process for clearing individuals before nominating them is distinct from the process that individuals undertake to obtain a formal security clearance to be eligible for access to classified information. Regarding the latter process, see CRS Report R43216, *Security Clearance Process: Answers to Frequently Asked Questions*, by Michelle D. Christensen.

<sup>12</sup> For more information about OGE Form 278e and related financial disclosure requirements, see U.S. Office of Government Ethics, *Nominee Guide*, 2020, [https://www.oge.gov/web/oge.nsf/0/77E34818F9A59979852585B6005A24BB/\\$FILE/Guide%20for%20Nominees%202020\\_accessible.pdf](https://www.oge.gov/web/oge.nsf/0/77E34818F9A59979852585B6005A24BB/$FILE/Guide%20for%20Nominees%202020_accessible.pdf).

<sup>13</sup> More detailed information about the selection and clearance process for nominees to executive branch positions can be found in a November 2012 study that was conducted pursuant to P.L. 112-166, the Presidential Appointment Efficiency and Streamlining Act. See Working Group on Streamlining Paperwork for Executive Nominations, *Streamlining Paperwork for Executive Nominations: Report to the President and the Chairs and Ranking Members of the Senate Committee on Homeland Security and Governmental Affairs and the Senate Committee on Rules and Administration*, November 2012, <http://www.hsgac.senate.gov/download/report-of-working-group-on-streamlining-paperwork-for-executive-nominations-final>.

See also National Academy of Public Administration, *A Survivor’s Guide for Presidential Nominees*, 2013 ed., <http://www.napawash.org/wp-content/uploads/2013/05/SurvivorsGuide2013.pdf>; and Partnership for Public Service Center for Presidential Transition and Boston Consulting Group, *Presidential Transition Guide: A Comprehensive Guide to the Activities Required During the Transition*, 4<sup>th</sup> ed., April 2020, <https://presidentialtransition.org/publications/presidential-transition-guide/>.

<sup>14</sup> OGE has a variety of materials addressing this process available on the portion of its website relating to presidential transitions; see <https://www.oge.gov/web/oge.nsf/Resources/Presidential%20Election%20Readiness>. See, in particular, OGE, *Nominee Guide*, 2020, [https://www.oge.gov/web/oge.nsf/0/77E34818F9A59979852585B6005A24BB/\\$FILE/Guide%20for%20Nominees%202020\\_accessible.pdf](https://www.oge.gov/web/oge.nsf/0/77E34818F9A59979852585B6005A24BB/$FILE/Guide%20for%20Nominees%202020_accessible.pdf); and OGE, *The Presidential Transition Guide*, 2020, [https://www.oge.gov/web/oge.nsf/0/29BDCA10DAA7FFC6852585BA006B6ACC/\\$FILE/Transition%20Guide\\_2020.pdf](https://www.oge.gov/web/oge.nsf/0/29BDCA10DAA7FFC6852585BA006B6ACC/$FILE/Transition%20Guide_2020.pdf).

<sup>15</sup> 3 U.S.C. §102 note. For more on this statute, see CRS Report R46602, *Presidential Transition Act: Provisions and Funding*, by Henry B. Hogue.

high-level national security positions as soon as possible after the election.<sup>16</sup> A separate provision of law, enacted as part of the Federal Vacancies Reform Act of 1998 (Vacancies Act), lengthens the potential duration of a temporary appointment during presidential transitions, facilitating control of a new President over the executive branch while the appointment process proceeds. (See section below entitled “Temporarily Filling Advice and Consent Positions.”)<sup>17</sup>

A nominee has no legal authority to assume the duties and responsibilities of the position by virtue of the nomination. Authority to act comes once the nominee has received Senate confirmation and presidential appointment or through another method of assigning duties, such as a designation of an acting official under the Vacancies Act, a recess appointment, or a redelegation of functions.<sup>18</sup>

## Senate Consideration

In the second stage of the appointment process, the Senate alone determines whether or not to confirm a nomination.<sup>19</sup> The Senate’s action on a nomination varies, depending largely on the importance of the position involved, existing political circumstances, and policy implications. Many presidential appointees are confirmed routinely by the Senate, without public debate. Other appointees receive more attention from Congress and the media through hearings, investigations, and floor debate. Historically, the Senate has shown particular interest in nominees’ views and how they are likely to affect public policy.<sup>20</sup> Two other factors have sometimes affected the examination of a nominee’s personal and professional qualities: whether the President’s party controlled the Senate and the degree to which the President became involved in supporting the nomination.

Much of the Senate confirmation process occurs at the committee level. Administratively, nominations are received by the Senate executive clerk, who usually arranges for the referral of the nominations to committee according to the Senate rules and precedents.<sup>21</sup> Committee nomination activity has generally included investigation, hearing, and reporting stages. As part of investigatory work, committees have drawn on information provided by the White House, as well as information they themselves have collected. Some committees have held hearings on nearly all nominations; others have held hearings for only some. Hearings provide a public forum to discuss

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<sup>16</sup> The Presidential Transition Act, as amended, also authorizes the provision by the incumbent Administration of certain pre-election transition support for eligible presidential candidates to facilitate early selection and internal vetting of potential nominees. It authorizes eligible candidates to fund pre-election transition activities through their campaigns.

<sup>17</sup> 5 U.S.C. §3349a(b). Notably, this statute does not apply to regulatory and other collegial boards and commissions.

<sup>18</sup> In *Buckley v. Valeo*, the Supreme Court held that “any appointee exercising significant authority pursuant to the laws of the United States is an ‘Officer of the United States,’ and must, therefore, be appointed in the manner prescribed” in Article II, Section 2, clause 2, of the Constitution (424 U.S. 1, 126 (1976)). This would appear to preclude consultants and nominees, who have not been so appointed, from exercising such authority. The exclusivity provision of the Vacancies Act (5 U.S.C. §3347) is consistent with this interpretation. It establishes the act as the “exclusive means for temporarily authorizing an acting official to perform the functions and duties of” most advice and consent positions unless otherwise expressly provided in law or unless the President uses his recess appointment authority.

<sup>19</sup> For further information on the procedures of this stage of the appointment process, see CRS Report RL31980, *Senate Consideration of Presidential Nominations: Committee and Floor Procedure*, by Elizabeth Rybicki.

<sup>20</sup> Mackenzie, *The Politics of Presidential Appointments*, pp. 97-189.

<sup>21</sup> Formally, the presiding officer of the Senate makes the referrals. For more information, see Floyd M. Riddick and Alan S. Frumin, *Riddick’s Senate Procedure: Precedents and Practices*, 101<sup>st</sup> Cong., 2<sup>nd</sup> sess., S.Doc. 101-28 (Washington: GPO, 1992), pp. 1154-1158; and CRS Report RL31980, *Senate Consideration of Presidential Nominations: Committee and Floor Procedure*, by Elizabeth Rybicki.



a nomination and any issues related to the program or agency for which the nominee would be responsible. Even where confirmation has been thought by most to be a virtual certainty, hearings have provided Senators and the nominee with opportunities to go on the record with particular views or commitments. Senators have used hearings to explore nominees' qualifications, articulate policy perspectives, or raise related oversight issues.

In response to an increasing perception among many Senators that processing and confirming nominations to over 1,000 positions in the executive branch was becoming too burdensome, a bipartisan effort was undertaken in 2011 to address how the Senate processes nominations.<sup>22</sup> In August 2011, the Senate agreed to S.Res. 116, a resolution “to provide for expedited Senate consideration of certain nominations subject to advice and consent.” The procedure allows certain nominations to be eligible for consideration by the full Senate without formal committee action (unless any Senator requests committee referral).<sup>23</sup>

With regard to each nomination that is referred to a committee, the committee may decline to act on it at any point—upon referral, after investigation, or after a hearing. If the committee votes to report a nomination to the full Senate, it has three options: It may report the nomination favorably, unfavorably, or without recommendation. A failure to obtain a majority on the motion to report means the nomination will not be reported to the Senate at that time. Failure of a nomination to make it out of committee has occurred for a variety of reasons, including opposition to the nomination, inadequate amount of time for consideration of the nomination, or factors that may not be directly related to the merits of the nomination. If the committee declines to report a nomination, the Senate may, under certain circumstances, discharge the committee from further consideration of the nomination in order to bring it to the floor.<sup>24</sup>

The Senate has historically confirmed most, but not all, executive branch nominations. In rare instances, a vote to confirm a nomination has failed on the Senate floor. Often, unsuccessful nominations fail to be reported or discharged from committee, as just discussed. Sometimes, however, a nomination is reported from committee but is not taken up on the floor of the Senate because of opposition to it by one or more Senators. Because of this opposition, the Senate is not able to consider and confirm the nomination by unanimous consent. The Senate will sometimes

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<sup>22</sup> See Sen. Charles Schumer, remarks in Senate, *Congressional Record*, daily edition, vol. 157 (March 30, 2011), p. S1988; and Sen. Susan Collins, remarks in Senate, *Congressional Record*, daily edition, vol. 157 (March 30, 2011), p. S1990.

<sup>23</sup> See CRS Report R46273, *Consideration of Privileged Nominations in the Senate*, by Michael Greene. For more information on S.Res. 116, including the list of positions included in the resolution, see CRS Report R41872, *Presidential Appointments, the Senate's Confirmation Process, and Changes Made in the 112th Congress*, by Maeve P. Carey.

In August 2011, the Senate also passed S. 679, the Presidential Appointment Streamlining and Efficiency Act of 2011, which was enacted in August 2012 (P.L. 112-166). That law removed the requirement for the Senate's advice and consent for appointees to 163 positions in the executive branch, as well as hundreds of positions in the National Oceanic and Atmospheric Administration Officer Corps and the Public Health Service Officer Corps, authorizing the President alone to appoint those officials. For more information, see CRS Report R41872, *Presidential Appointments, the Senate's Confirmation Process, and Changes Made in the 112th Congress*, by Maeve P. Carey; and U.S. Congress, Senate Committee on Homeland Security and Governmental Affairs, Presidential Appointment Efficiency and Streamlining Act of 2011, report to accompany S. 679, to reduce the number of executive positions subject to Senate confirmation, 112<sup>th</sup> Cong., 1<sup>st</sup> sess., June 21, 2011, S.Rept. 112-24 (Washington: GPO, 2011).

<sup>24</sup> In the 117<sup>th</sup> Congress, the Senate agreed to S.Res. 27, which creates a debate-limited motion to allow a majority of the Senate to discharge a committee in the event there is a tie vote on a motion to report. For more information on the discharge process, see CRS congressional distribution memorandum, “Discharging a Committee from Consideration of a Nomination: Current Procedure and Historical Practice,” by Michael Greene and Elizabeth Rybicki, May 31, 2017. This memorandum is available to congressional clients from its authors upon request.



seek to overcome this opposition by invoking cloture.<sup>25</sup> Historically, invoking cloture was usually a difficult and time-consuming way to confirm a nomination. The support of three-fifths of the Senate was needed to invoke cloture, and this vote would be followed by up to 30 hours of debate on the nomination before a vote on confirmation itself. In November 2013, the Senate reinterpreted its rules to mean that only a simple majority of those Senators voting is required to invoke cloture on any executive branch nomination.<sup>26</sup> The number of hours of post-cloture debate was unchanged by the 2013 precedent, but in 2019 the Senate reinterpreted its rules again to reduce post-cloture consideration to two hours for all but the highest level of executive branch nominations.<sup>27</sup>

Senate rules provide that “nominations neither confirmed nor rejected during the session at which they are made shall not be acted upon at any succeeding session without being again made to the Senate by the President.”<sup>28</sup> In practice, such nominations have sometimes been returned to the President at the end of the first session and are always returned to the President at the end of the Congress. Nominations may also be returned automatically to the President at the beginning of a recess of more than 30 days, but the Senate rule providing for this return has often been waived.<sup>29</sup>

## Appointment

In the final stage of the appointment process, the confirmed nominee is given a commission signed by the President (which bears the Great Seal of the United States) and sworn into office.<sup>30</sup> The President may sign the commission at any time after confirmation, at which time the appointment becomes official. Once the appointee is given the commission and sworn in, he or she has full authority to carry out the responsibilities of the office.

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<sup>25</sup> In brief, cloture is a Senate procedure that limits further consideration of a pending nomination or other matter to a specified number of hours. For more information on cloture attempts on nominations, see CRS Report RL31980, *Senate Consideration of Presidential Nominations: Committee and Floor Procedure*, by Elizabeth Rybicki.

<sup>26</sup> This 2013 reinterpretation applied to the consideration of all nominations except for nominations to the Supreme Court. See CRS Report R43331, *Majority Cloture for Nominations: Implications and the “Nuclear” Proceedings of November 21, 2013*, by Valerie Heitschusen. In 2017, however, the Senate reinterpreted its rules to allow a simple majority of those Senators voting to invoke cloture on nominations to the Supreme Court as well. See CRS Report R44819, *Senate Proceedings Establishing Majority Cloture for Supreme Court Nominations: In Brief*, by Valerie Heitschusen.

<sup>27</sup> The majority leader made a point of order that “postcloture time under rule XXII for all executive branch nominations other than a position at level 1 of the Executive Schedule under section 5312 of title 5 of the United States Code is 2 hours.” The presiding officer did not sustain the point of order. The majority leader appealed the ruling of the chair, and the Senate voted 51-48 to reverse the ruling. *Congressional Record*, daily edition, vol. 165 (April 3, 2019), p. S2220. For more information, see CRS Report RL31980, *Senate Consideration of Presidential Nominations: Committee and Floor Procedure*, by Elizabeth Rybicki, pp. 11-12.

<sup>28</sup> The rule may be found in U.S. Congress, Senate Committee on Rules and Administration, *Senate Manual*, 112<sup>th</sup> Cong., 1<sup>st</sup> sess., S.Doc. 112-1 (Washington: GPO, 2011), p. 58, Rule XXXI, paragraph 6, of the Standing Rules of the Senate.

<sup>29</sup> See CRS Report R46664, *Return of Nominations to the President under Senate Rule XXXI*, by Michael Greene. For an example of a waiver of the rule, see Sen. Harry Reid, “Nominations in Status Quo,” *Congressional Record*, daily edition, vol. 158 (August 2, 2012), p. S6006.

<sup>30</sup> See CRS, “Legal Requirement When Appointing an Officer,” *Constitution Annotated*, [https://constitution.congress.gov/browse/essay/artII-S2-C2-2-1-3-1/ALDE\\_00001138/](https://constitution.congress.gov/browse/essay/artII-S2-C2-2-1-3-1/ALDE_00001138/). See also 5 U.S.C. §3331 and 5 U.S.C. §2901-2903.

## Temporarily Filling Advice and Consent Positions

The Constitution also empowers the President to make a limited-term appointment to fill a vacancy without Senate confirmation when the Senate is in recess. Recess appointments expire at the end of the following session of the Senate.<sup>31</sup> Although recess appointments were common in the past, Presidents now use this authority rarely, if ever. From the 110<sup>th</sup> Congress on, Congress has regularly used specific scheduling practices in an attempt to prevent the President from making recess appointments, and it appears that these practices have been effective in doing so. More information about the recess appointment power and the evolution of its use and curtailment may be found in other CRS reports.<sup>32</sup>

Congress has provided more limited statutory authority for filling vacant PAS positions on a temporary basis, as well. Under the Vacancies Act,<sup>33</sup> when an executive agency position requiring confirmation becomes vacant, it may be filled temporarily in one of three ways:

1. The first assistant to such a position may automatically assume the functions and duties of the office;
2. The President may direct any officer who is occupying a position requiring Senate confirmation to perform those tasks; or
3. The President may select any officer or employee of the subject agency who is 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 in that position for at least 90 of the preceding 365 days.

A temporary appointment made under the Vacancies Act is initially limited to 210 days from the date of the vacancy, but the time periods for service are extended if the President submits a nomination for the position. In addition, during a presidential transition, the 210-day restriction period does not begin until either 90 days after the President assumes office or 90 days after the vacancy occurs if the vacancy exists during a 60-day period beginning on Inauguration Day.

The Vacancies Act does not apply to positions on multimember boards or commissions that govern independent establishments or government corporations.<sup>34</sup>

In some cases, Congress has expressly provided in statute for the temporary filling of vacancies in a particular advice and consent position. Generally, such provisions employ one or more of several methods: (1) a specified official is automatically designated as acting; (2) a specified official is automatically designated as acting, unless the President provides otherwise; (3) the President designates an official to serve in an acting capacity; or (4) the head of the agency in which the vacancy exists designates an acting official.<sup>35</sup>

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<sup>31</sup> U.S. Constitution, Art. II, §2, cl. 3. “The 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>32</sup> See CRS Report RS21308, *Recess Appointments: Frequently Asked Questions*, by Henry B. Hogue; CRS Report R42329, *Recess Appointments Made by President Barack Obama*, by Henry B. Hogue; and CRS Report R43030, *The Recess Appointment Power After Noel Canning v. NLRB: Constitutional Implications*, by Todd Garvey and David H. Carpenter.

<sup>33</sup> P.L. 105-277, Div. C, Title I, §151; 112 Stat. 2681-611; 5 U.S.C. §§3345-3349d.

<sup>34</sup> For more on the Vacancies Act, see CRS Report R44997, *The Vacancies Act: A Legal Overview*, by Valerie C. Brannon; and Anne Joseph O’Connell, *Acting Agency Officials and Delegations of Authority*, Administrative Conference of the United States, December 1, 2019, <https://www.acus.gov/report/final-report-acting-agency-officials>.

<sup>35</sup> See CRS Report RS21412, *Temporarily Filling Presidentially Appointed, Senate-Confirmed Positions*, by Henry B.

When the time limitations of the Vacancies Act have been exhausted, Administrations have sometimes arranged for the functions of a vacant office to be carried out indefinitely or for a specified period by another individual, usually the first assistant, pursuant to a delegation of authority by the agency head.<sup>36</sup> In such instances, the official carries out these functions without assuming the vacant office. Generally, these functions may include any *except* those few that are statutorily vested specifically, and only, in the vacant office (“non-delegable duties”).

## Selectively Applied Statutory Provisions

Congress has selectively enacted certain types of statutory provisions when establishing specific executive branch positions. These provisions pertain to qualifications, fixed terms of office, limitations on presidential removal of an officeholder, chair selection and removal, and holdover authority. Although these types of provisions may be found in the establishing statutes for a variety of positions, they are particularly common for members of regulatory and other collegial boards and commissions. In some cases, these types of provisions have influenced the dynamics of the Senate confirmation process discussed above. They may also be factored into the selection and vetting process in the Administration. Each of these statutory provision types is discussed below.

### Qualifications

In many instances, Congress has mandated that appointees to particular leadership positions meet specified requirements. Some statutory qualification provisions, such as those for the administrator of the Federal Emergency Management Agency (FEMA), require that appointees have certain experience, skills, or educational backgrounds that are associated with competence.<sup>37</sup> Other qualification provisions address a variety of characteristics, such as citizenship status, residency, or, for the purpose of maintaining political balance on regulatory boards, political party affiliation. Congress has, however, used qualification provisions selectively: Most executive branch positions do not have statutory qualifications.

Statutory qualifications associated with a particular position might affect the selection and Senate consideration of nominees. The Administration’s selection process might be limited to a smaller group of potential candidates for the position than would otherwise be the case. On one hand, such a limitation might yield a nominee who has the profile envisioned when the office was established. On the other hand, the statutory requirement might prevent the nomination of an individual who did not meet one or more of the qualifications but is otherwise well-suited for the post. Should the President nominate an individual whose qualifications are perceived to fall short of the statutory requirements, the Senate must then determine whether to take note of that fact and whether to confirm the nominee nonetheless.<sup>38</sup>

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Hogue.

<sup>36</sup> See Anne Joseph O’Connell, *Acting Agency Officials and Delegations of Authority*.

<sup>37</sup> Section 313 of Title 6 of the *United States Code* provides that the FEMA administrator “shall be appointed by the President, by and with the advice and consent of the Senate ... from among individuals who have – (A) a demonstrated ability in and knowledge of emergency management and homeland security; and (B) not less than 5 years of executive leadership and management experience in the public or private sector.”

<sup>38</sup> For an in-depth discussion of qualifications, see CRS Report RL33886, *Statutory Qualifications for Executive Branch Positions*, by Henry B. Hogue.

Most boards and commissions are required, by statute, to have a political balance among their members (e.g., no more than three of five, or five of seven, may be from the same political party), so the White House has often negotiated over nominations to these positions with leaders of the opposition party in Congress. These negotiations involve both political and policy considerations, especially when the board or commission is involved in areas that, at the time, may be particularly sensitive. This has sometimes resulted in a packaging process in which the President has submitted several nominations together for positions on a particular board or commission, and the Senate has then considered and confirmed them as a group.<sup>39</sup>

## Fixed Terms and Removal Limitations

Some advice and consent positions have statutorily set terms of office, typically periods of four to seven years. Such a term may be set to coincide with the presidential election cycle, as it does for the director of the Office of Personnel Management,<sup>40</sup> or to overlap Administrations, as it does with the director of the FBI.<sup>41</sup> As discussed below, fixed terms are common for members of collegial boards and commissions, and the terms of the members of such a body are often designed to expire in a staggered manner.

Even though they have statutorily established terms of office, appointees to many fixed-term positions serve at the pleasure of the President. This means that incumbents can be removed by the President at any time for any reason (or no stated reason), as is the case with most presidential appointments.<sup>42</sup> Lacking protection from removal, incumbents in these positions may remain subject to close guidance and direction from the President as well as to removal at the time of a presidential transition.<sup>43</sup> A fixed term might not prevent the removal of an incumbent by the President, but it might inhibit such an action, because it establishes the given period as the normal or expected tenure of an appointee. The length of the term might also influence the independence of the appointee from the President.<sup>44</sup> An official serving a short term may be more susceptible to presidential direction, especially if he or she might be reappointed by that President. On the other hand, an official whose term of office is longer than that of the President who appointed him or her may be less likely to feel a sense of allegiance or commitment to the President's successor.

In many instances where Congress has established a position with a fixed term, the statute provides that the President may remove an incumbent from office only for cause. For example, with regard to the Federal Energy Regulatory Commission, the *United States Code* provides that

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<sup>39</sup> For example, on September 23, 2013, the Senate, by unanimous consent, confirmed, en bloc, two nominees with different political party affiliations to seats on the Federal Election Commission. Two other nominations were also confirmed during this process. See Senator Harry Reid, "Unanimous Consent Request—Executive Calendar," remarks in the Senate, *Congressional Record*, daily edition, vol. 159, part 126 (September 23, 2013), p. S6674. See also Kenneth P. Doyle, "FEC Nominations of Goodman, Ravel Confirmed by Unanimous Senate Vote," *Bloomberg BNA Money & Politics Report*, September 23, 2013 (copy available from the authors to congressional clients upon request).

<sup>40</sup> 5 U.S.C. §1102.

<sup>41</sup> 28 U.S.C. §532 note. The term of the director of the FBI is 10 years. See CRS Report R44842, *FBI Director Nominations, 1973-2017*, by Henry B. Hogue.

<sup>42</sup> It has long been recognized that "the power of removal [is] incident to the power of appointment." *Ex Parte Hennen*, 38 U.S. (13 Pet.) 230, 259 (1839).

<sup>43</sup> By tradition, appointees to these positions usually step down when the appointing President leaves office unless asked to stay by the President-elect. Were an at-will appointee not to do so, the incoming President could remove him or her upon taking office.

<sup>44</sup> In the case of a commission, the longer the duration of the terms of its members, the lower the probability that one President will have the opportunity to appoint all of its members.

members “shall hold office for a term of 5 years and may be removed by the President only for inefficiency, neglect of duty, or malfeasance in office.”<sup>45</sup> Provisions such as this one limit the ability of a President to remove, or threaten to remove, an appointee solely for political reasons. Arguably, this is the characteristic with the most impact on the level of independence of an agency’s leadership from the President’s direction. Many independent regulatory boards and commissions have authorizing statutes with such provisions. Although such provisions are less common in laws establishing single administrator-headed agencies, the organic statutes for four of these organizations include them: the Social Security Administration, the Office of Special Counsel, the Federal Housing Finance Agency (FHFA), and the Consumer Financial Protection Bureau (CFPB).<sup>46</sup> A 2020 Supreme Court ruling found the provision pertaining to the CFPB unconstitutional.<sup>47</sup> Although the for-cause removal provisions in the other three statutes remain intact, their constitutionality may be drawn into question in future litigation.<sup>48</sup>

White House vetting and selection and Senate consideration of nominations to fixed-term positions might entail a set of considerations different from those involving an appointment of indefinite duration. Where incumbents are protected from at-will presidential removal, they are unlikely to be involuntarily removed from office. In addition, where the tenure of a nominee’s appointment would outlast that of an incumbent President, those Senators not of the President’s party might elect to prevent confirmation so as to preserve a vacancy that could be filled by an incoming President of their party.

The fixed terms for the members of many federal boards and commissions have set beginning and end dates irrespective of whether the posts are filled or when appointments are made.<sup>49</sup> In such cases, the term end dates of the various members are often staggered so that the terms do not expire all at once. This is intended to minimize the occurrence of simultaneous board member departures and thereby increase leadership continuity.

In the case of a position with a fixed term with set beginning and end dates, an individual is nominated to a particular seat and a particular term of office. An individual may be nominated and confirmed for a seat for the remainder of an unexpired term in order to replace an appointee who has resigned (or died). Alternatively, an individual might be nominated for an upcoming term with the expectation that the new term will be underway by the time of confirmation. Occasionally, where only a few months of the unexpired term remain, the President has submitted two nominations of the same person simultaneously—the first to complete the unexpired term and the second to complete the entire succeeding term of office.<sup>50</sup>

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<sup>45</sup> 42 U.S.C. §7171(b)(1).

<sup>46</sup> Unlike the other three agencies, CFPB is located within the Federal Reserve System (FRS). The bureau has a considerable amount of independence from FRS, however. See CRS In Focus IF10031, *Introduction to Financial Services: The Consumer Financial Protection Bureau (CFPB)*, by Cheryl R. Cooper and David H. Carpenter.

<sup>47</sup> *Seila Law LLC v. Consumer Financial Protection Bureau*, 140 S. Ct. 2183, 2192 (2020).

<sup>48</sup> See CRS Legal Sidebar LSB10507, *Supreme Court Rules CFPB Structure Unconstitutional: Implications for Congress*, by Jacob D. Shelly. A challenge to the FHFA removal provision was pending before the Supreme Court during the October 2020 term. See U.S. Supreme Court, Patrick J. Collins, et al., *Petitioners v. Janet L. Yellen, Secretary of the Treasury, et al.*, Docket for 19-422, <https://www.supremecourt.gov/docket/docketfiles/html/public/19-422.html>.

<sup>49</sup> For example, each of the five seats on the Equal Employment Opportunity Commission has a five-year term. Each year on July 1, the term of one seat expires. On the following day the five-year clock for this seat’s next term begins, regardless of whether the seat is occupied. In contrast, for a few agencies, such as the Chemical Safety and Hazard Investigation Board, the full term begins to run when an appointee takes office, and it expires after the incumbent has held the post for the requisite period of time.

<sup>50</sup> For example, on August 2, 2017, President Trump submitted two nominations of Kevin J. McIntyre to be a member



## Appointment and Removal of Chairs

On some commissions, the chair is subject to Senate confirmation and must be appointed from among the incumbent commissioners. If the President wishes to appoint someone who is not on the commission to be chair, two nominations are submitted simultaneously for the nominee—one for member and the other for chair. For many independent boards and commissions, the chair is appointed from among the group’s members by the President alone without a separate nomination. Often, the President will make his intentions clear when nominating a member whom he plans to designate as chair once confirmed.

Chairs of executive branch boards and commissions typically serve in that role at the pleasure of the President. Thus, a President could generally remove an incumbent from his or her role as chair as a result of a policy or political disagreement. However, the President would usually have to satisfy a higher “for cause” threshold for removing the same individual from his or her role as a member of the board or commission.

## Holdover Provisions

Some statutes that establish fixed terms for particular positions also permit an incumbent to remain in office past the end of her or his term without additional appointment or confirmation. In some cases, such a “holdover” provision allows an official to continue serving until he or she is replaced.<sup>51</sup> In other cases, the individual may serve for a specified period linked to the calendar<sup>52</sup> or for some period that is linked to the congressional schedule.<sup>53</sup>

Holdover provisions may affect the dynamics of the advice and consent process. If the President, on one hand, or key Senators, on the other, are satisfied with the performance of an incumbent member serving in a holdover capacity, nomination or confirmation of a successor might be less likely than it would be if the position were vacant. Some boards and commissions have experienced extended periods during which one or more of their members are serving in a holdover capacity. For example, as of January 2021, two of the six members of the Federal Election Commission had been serving in a holdover capacity for more than a decade.

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of the Federal Energy Regulatory Commission. The first of these was to complete the remainder of a five-year term that was to expire on June 30, 2018. The second nomination was to the full five years of the succeeding term, which was to expire on June 30, 2023. The Senate confirmed both nominations on November 2, 2017.

<sup>51</sup> For example, with regard to the Federal Trade Commission, the *United States Code* provides that “upon the expiration of his term of office a Commissioner shall continue to serve until his successor shall have been appointed and shall have qualified” (15 U.S.C. §41).

<sup>52</sup> For example, with regard to the Consumer Product Safety Commission, the *United States Code* provides that a commissioner “may continue to serve after the expiration of this term until his successor has taken office, except that he may not so continue to serve more than one year after the date on which his term would otherwise expire” (15 U.S.C. §2053(b)(2)).

<sup>53</sup> For example, with regard to the Equal Employment Opportunity Commission, the *United States Code* provides that “all members of the Commission shall continue to serve until their successors are appointed and qualified, except that no such member of the Commission shall continue to serve (1) for more than sixty days when the Congress is in session unless a nomination to fill such vacancy shall have been submitted to the Senate, or (2) after the adjournment sine die of the session of the Senate in which such nomination was submitted” (42 U.S.C. §2000e-4(a)).

## Appendix. Additional CRS Information on Presidential Appointments

A number of CRS reports discuss the process and characteristics described above, as well as other related topics. Those reports include the following:

- CRS Report RL31980, *Senate Consideration of Presidential Nominations: Committee and Floor Procedure*, by Elizabeth Rybicki
- CRS Report R46273, *Consideration of Privileged Nominations in the Senate*, by Michael Greene
- CRS Report R46664, *Return of Nominations to the President under Senate Rule XXXI*, by Michael Greene
- CRS Report R42963, *Nominations to Cabinet Positions During Inter-Term Transitions Since 1984*, by Maeve P. Carey, Michael Greene, and Henry B. Hogue
- CRS Report R41872, *Presidential Appointments, the Senate's Confirmation Process, and Changes Made in the 112th Congress*, by Maeve P. Carey
- CRS Report R44997, *The Vacancies Act: A Legal Overview*, by Valerie C. Brannon
- CRS Report RS21308, *Recess Appointments: Frequently Asked Questions*, by Henry B. Hogue
- CRS Report R43030, *The Recess Appointment Power After Noel Canning v. NLRB: Constitutional Implications*, by Todd Garvey and David H. Carpenter
- CRS Report RL33886, *Statutory Qualifications for Executive Branch Positions*, by Henry B. Hogue

In addition, CRS has a number of tracking reports that compile data on nominations made by the President in each Congress to full-time positions in the executive branch. See, for example, CRS Report R45004, *Presidential Appointments to Full-Time Positions in Executive Departments During the 114th Congress*, by Michael Greene and Jared C. Nagel; CRS Report R45028, *Presidential Appointments to Full-Time Positions in Independent and Other Agencies During the 114th Congress*, by Jared C. Nagel and Michael Greene; and CRS Report R46317, *Presidential Appointments to Full-Time Positions on Regulatory and Other Collegial Boards and Commissions, 115th Congress*, by Kathleen E. Marchsteiner.

### Author Information

Henry B. Hogue  
Specialist in American National Government

Maeve P. Carey  
Specialist in Government Organization and  
Management



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