



The Appropriate Number of Advice and Consent Positions: An Analysis of the Issue and Proposals for Change

-name redacted-

Analyst in American National Government

March 14, 2005

Congressional Research Service

7-....

www.crs.gov

RL32212

Summary

This report provides background information and analysis of issues concerning possible congressional action to reduce the number of positions to which the President makes appointments with the advice and consent of the Senate (PAS positions). Among other topics, the report discusses the constitutional framework that guides congressional action in this area, identifies potential congressional options, and analyzes associated institutional and political considerations.

The Constitution provides Congress with considerable discretion over which officers of the United States will be in PAS positions, and which may be appointed by the President alone, the courts, or agency heads. At present, more than 2,000 high-level officials across the three branches are appointed by the President with the advice and consent of the Senate. The appointment process includes presidential selection and nomination, Senate consideration, and formal presidential appointment.

In general, the number of PAS positions has grown and the appointment process has gotten longer over the last three decades. It is not clear, however, that the larger number is responsible for the lengthier process. Other factors, such as stricter vetting requirements, also play a role. Proponents of a reduction in the number of PAS positions have suggested that it might lead to an improvement in the efficiency and performance of the Senate confirmation process and to a decrease in the length of the appointment process, but this will probably be the case only if the positions removed from PAS status are those for which appointments consume the most time. Some argue that removing advice and consent requirements from such positions might have undesirable political and institutional consequences for Congress.

A recently enacted provision directs each federal agency head to submit a PAS position reduction plan to the President and Congress. Congress might elect to make these plans the basis for future decisions concerning the reduction of PAS positions. Alternative options for Congress include maintaining the status quo; creating a commission to make recommendations for reductions of PAS positions; establishing a “fast track” procedure for these reductions; reducing the number of positions by category or function; distributing PAS positions in proportion to agency size; and delegating reduction choices to committees of jurisdiction. In lieu of maintaining PAS status for certain positions, Congress might continue to influence the appointment process by legislatively establishing qualifications or notification requirements for appointments to those positions.

Congressional action on PAS positions would involve a number of institutional and political considerations. For example, participation in the appointment process through advice and consent gives Senators influence over the selection of nominees and facilitates obtaining testimony from appointees during oversight hearings. In addition, the confirmation process arguably provides the Senate with leverage during negotiations with the President over unrelated matters. This report will be updated as warranted by events.

Contents

I. Introduction	1
II. The Constitutional Framework for the Appointment of Officers of the United States	3
III. Appointment Methods for Officers of the United States	4
Officers Currently Appointed Through the Advice and Consent Process	5
Other Appointment Methods	6
IV. The Appointment Process for PAS Positions	8
Selection and Nomination	8
Senate Consideration.....	10
Appointment	12
V. Length of the Appointment Process	12
VI. Growth in the Number of PAS Positions	14
VII. Assessment of Expected Benefits of a Reduction in the Number of Advice and Consent Positions.....	15
Improving the Senate Confirmation Process	16
Shortening the Appointment Process	16
Shortening Selection	17
Shortening Senate Consideration.....	18
VIII. Potential Approaches to Determining the Appropriate Number and Distribution of PAS Positions.....	19
Institutional Considerations	19
Political Considerations.....	20
Congress	20
The President	21
Agency Heads.....	21
Interest Groups	21
Options for Congressional Consideration	22
Option 1: Maintain the Status Quo	22
Option 2: Create an Advisory Commission.....	23
Option 3: Establish a Military Base Closure-Type Procedure.....	23
Option 4: Select Categories of Positions for Reduction.....	25
Option 5: Reduce the Number of Positions by Function.....	26
Option 6: Distribute PAS Positions in Proportion to Agency Size	27
Option 7: Delegate Selection of Positions for Reduction to Committees of Jurisdiction	27
Option 8: Establish Restrictions on Appointments to Certain Positions	28
Option 9: Require Notification by President of Some Non-PAS Appointments.....	28
A Comparison of Options.....	29
A Combination of Approaches.....	30

Tables

Table 1. Average Number of Days from Enactment of Organic Legislation to Nomination and Confirmation of Top Officials in the Six Most Recent New Departments	13
---	----

Table 2. Number of Selected Full-Time Executive Branch PAS Positions at Eight Points,
1972-2004..... 14

Contacts

Author Contact Information 31

I. Introduction

Over the past 20 years, a number of commissions and task forces have examined the process by which the President makes appointments to certain positions with the advice and consent of the Senate (PAS positions).¹ These groups have issued reports criticizing, among other things, the length of the process, the level of ethical and political scrutiny to which potential appointees are subjected, the complexity and quantity of the paperwork that appointees are required to complete and submit, and the procedural and political complications associated with some nominations during the Senate confirmation process.² Rigorous studies have associated these perceived shortcomings of the process with longer vacancies, confusion and embarrassment of nominees, and difficulty in attracting a broad range of well-qualified candidates to top policymaking positions.³

These reports and studies have recommended a variety of reforms that might be instituted by Congress, the President, and the Senate.⁴ In addition to procedural remedies to perceived problems, some of these reports have called for a reduction in the overall number of PAS positions. For example, in 1996, the Twentieth Century Fund⁵ Task Force on Presidential Appointments recommended that the number of all positions to which the President makes appointments, including those requiring Senate confirmation, be reduced by a third. The task force further suggested that “[a]ppointments to most advisory commissions and routine promotions of military officers, foreign service officers, [and] public health services officers, except those at the very highest ranks ... cease to be presidential appointments and cease to require Senate confirmation.”⁶ In 2001, as part of a proposal aimed at improving the process for making appointments to PAS positions, the Presidential Appointee Initiative (PAI) at the Brookings Institution also called for a reduction in the number of such positions. Rather than identifying which positions might be shed, the PAI focused on which appointments should

¹ The acronym stands for Presidentially Appointed, Senate-confirmed.

² For an annotated list of many of these reports, see U.S. Congress, Senate Committee on Governmental Affairs, *Presidential Appointment Process: Reports of Commissions That Studied the Staffing of Presidential Administrations: A Summary of Their Conclusions and Recommendations for Reform*, committee print, 107th Cong., 1st sess. (Washington: April 2001). In addition, the 9/11 Commission criticized the length of time taken to put in place President George W. Bush’s national security team after the 2000 election. See U.S. National Commission on Terrorist Attacks Upon the United States, *The 9/11 Commission Report* (Washington: GPO, 2004), pp. 188, 422. (Hereafter cited as *9/11 Commission Report*.)

³ The recommendations resulting from these studies, by the Presidential Appointee Initiative, are summarized in *To Form a Government: A Bipartisan Plan to Improve the Presidential Appointments Process* (Washington: Brookings Institution, 2001). The studies by the Initiative included “detailed empirical analysis of past presidential transitions, the history of the appointments process, and the evolution of the Senate confirmation process; a survey of a representative sample of appointees from the Reagan, [George H.W.] Bush, and Clinton Administrations; and a survey of leading Americans who represent the types of individuals who typically would be considered as candidates for presidential appointments” (p. 4). An archive of the work of the Initiative, which concluded its research on June 30, 2003, may be found at http://www.appointee.brookings.org/pai_hp.htm, visited March 7, 2005.

⁴ The recommendations include identification of nominees early in the presidential transition process; greater control by cabinet heads of the selection of nominees for subordinate positions; full-time White House guidance of nominees during the nomination and confirmation process; easing of nominees’ financial disclosure requirements and conflict-of-interest disclosure requirements; and streamlining and standardization among the White House, FBI, and Senate committees of requirements and forms for background and financial disclosure.

⁵ Now known as the Century Foundation.

⁶ Twentieth Century Fund Task Force on Presidential Appointments, *Obstacle Course: Report of the Twentieth Century Fund Task Force on Presidential Appointments* (New York: The Twentieth Century Fund Press, 1996), p. 9.

continue to come before the Senate. It recommended that “Senate confirmation only be required of appointments of judges, ambassadors, executive-level positions in the departments and agencies, and promotion of officers of the highest rank.” It further suggested a reduction of political appointees by a third, such that PAS positions would be limited to “the assistant secretary level and above in each department and to the top three levels only in independent agencies.”⁷ The *9/11 Commission Report* included a recommendation that the “Senate should not require confirmation of [national security team] executive appointees below Executive Level 3,” which could eliminate advice and consent requirements for, among other positions, most assistant secretaries with national security responsibilities.⁸

One of the co-chairs of the PAI advisory board, former Senator Nancy Kassebaum Baker, elaborated on the expected benefit of a reduction in the number of PAS positions for the conduct of Senate confirmation business:

I am a strong supporter of advice and consent—I think we all are—but the application of the confirmation requirement now extends to many thousands of positions, only a relatively small number of which benefit from the full attention or careful scrutiny of the Senate.

I think this [proposal] would lessen the time that would be taken. By the time one arranges hearings, the paperwork comes through, there are a number of appointments that then take up an enormous amount of time of the hearing committees.

So we think that a simpler, more focused set of confirmation obligations can only yield a more efficient and more consistent performance of the Senate’s confirmation responsibilities.⁹

Other observers have suggested that by reducing the number of PAS positions, the perceived backlog of appointments might be eased.¹⁰ In essence, critics of the presidential appointment process contend that appointments to PAS positions are taking too long, and that a reduction in the number of these positions would lead to a more efficient confirmation process in the Senate and faster appointments to the remaining positions that are subject to advice and consent.

Interest in reforming the PAS appointment process and possibly reducing the number of PAS positions led to the enactment of a provision that directs each agency head to submit an advice and consent position reduction plan, with specified contents, to the President, the Senate Committee on Homeland Security and Governmental Affairs, and the House Committee on Government Reform. During the 107th Congress, Senator Fred Thompson introduced the Presidential Appointments Improvement Act of 2001 (S. 1811), which, among other provisions, would have required such plans.¹¹ The bill was referred to the Committee on Governmental Affairs and subsequently reported to the full Senate, but it was not acted upon by the full Senate during the 107th Congress. Early in the 108th Congress, Senator George Voinovich introduced

⁷ Presidential Appointee Initiative, *To Form a Government: A Bipartisan Plan to Improve the Presidential Appointments Process* (Washington: Brookings Inst., 2001), pp. 12, 16.

⁸ *9/11 Commission Report*, p. 422.

⁹ U.S. Congress, Senate Committee on Governmental Affairs, *The State of the Presidential Appointment Process*, hearings, 107th Cong., 1st sess., April 4-5, 2001 (Washington: GPO, 2002), p. 54.

¹⁰ *Ibid.*, pp. 124, 163.

¹¹ See also U.S. Congress, Senate Committee on Governmental Affairs, *Presidential Appointments Act of 2002*, report to accompany S. 1811, 107th Cong., 2nd sess., S.Rept. 107-152 (Washington: GPO, 2002).

legislation similar to Senator Thompson's bill from the previous Congress, and Representative Jo Ann Davis introduced a companion bill in the House.¹² The reduction plan provision was incorporated into the Intelligence Reform and Terrorism Prevention Act of 2004, which was enacted on December 17, 2004.¹³ Congress might elect to make these agency plans the basis for future decisions concerning the reduction of PAS positions.

This report provides background information and analysis of issues concerning possible congressional action to reduce PAS positions. The report begins with a discussion of the constitutional framework that guides congressional determinations about appointment authority. The next four parts of the report describe the various executive leadership appointment methods used in the federal government, the PAS appointment process, and trends in the length of the appointment process and the number of PAS positions. This descriptive information is followed by an evaluation of the assertions, discussed above, that a reduction in the number of PAS positions would likely lead to a more efficient confirmation process in the Senate and a faster appointment overall process. The last third of the report identifies potential congressional approaches to reducing the number of PAS positions, and analyzes the institutional and political considerations associated with each of these options.

II. The Constitutional Framework for the Appointment of Officers of the United States

As part of its system of checks and balances, the Constitution provides a general framework for the appointment of officers of the United 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.¹⁴

In a 1976 opinion, the Comptroller General reasoned that this provision indicates that all officers of the United States are to be PAS positions unless Congress affirmatively delegates that authority.¹⁵ In other words, the default appointment process under the Constitution for such officers is presidential appointment with the advice and consent of the Senate. With regard to which positions would be considered "offices" under this clause, the Supreme Court has 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" above.¹⁶

¹² Both S. 765 (108th Cong.), introduced by Sen. Voinovich, and H.R. 1603 (108th Cong.), introduced by Rep. Davis, were entitled the Presidential Appointments Improvement Act of 2003.

¹³ P.L. 108-458, Section 8403(c).

¹⁴ Article II, Section 2, cl. 2.

¹⁵ Comp. Gen. December No. B-183012, 56 Comp. Gen. 137.

¹⁶ *Buckley v. Valeo*, 424 U.S. 1, 126 (1976). For a more detailed discussion of the distinction between officers and employees, see "Officer/Employee," in CRS Report R40856, *The Debate Over Selected Presidential Assistants and* (continued...)

Although the Appointments Clause sets the advice and consent process as the default method for filling offices of the United States, only certain such officers *must* be appointed by that method. At the discretion of Congress, “inferior” officers may be appointed either under the default process or by the President alone, the courts, or agency heads. A clear line between principal and inferior officers has not been established,¹⁷ but guidance of the Justice Department’s Office of Legal Counsel (OLC) in this area suggests that “[i]n determining whether an officer may properly be characterized as inferior, ... the most important issues are the extent of the officer’s discretion to make autonomous policy choices and the location of the powers to supervise and to remove the officer.”¹⁸

Although the distinctions between officers and non-officers and between principal and inferior officers, as currently understood, are imprecise, they provide guidance that might assist Congress in identifying (1) which positions are not offices, and therefore need not be filled in accordance with the Appointments Clause; and (2) which offices are inferior, and therefore may be filled through appointment by the President alone, the courts, or agency heads, at the discretion of Congress. Arguably, many positions that are, at present, filled through the advice and consent process would fall into one of these categories. For each case in either of these categories, Congress might elect to maintain the present arrangement for reasons not related to constitutional requirements, or to provide for a different method of appointment.

III. Appointment Methods for Officers of the United States

As the previous section indicates, under the Constitution, presidential appointment with the advice and consent of the Senate is just one of the ways in which officers of the United States may be appointed. In the executive branch, officers are appointed by the President, with or without Senate confirmation, or by the department or agency head. Some appointments, referred to as political appointments, are made at the discretion of the appointing authority, that is, the President, agency head, or court. Other appointments, referred to as career or competitive appointments, are made through a competitive process.

The executive leadership of the federal bureaucracy consists of between 9,000 and 10,000 individuals. Of that number, approximately 3,500 are political appointees, often supporters of the President or party loyalists, and the balance are career members of the Senior Executive Service (SES). The political positions fall into four categories: PAS, presidential appointments not requiring confirmation (PA positions), noncareer SES, and Schedule C positions. Each of these

(...continued)

Advisors: Appointment, Accountability, and Congressional Oversight, by Barbara Schwemle et al.

¹⁷ In *Morrison v. Olson*, the Supreme Court observed that “[t]he line between ‘inferior’ and ‘principal’ officers is one that is far from clear, and the Framers provided little guidance into where it should be drawn” (487 U.S. 654, 671 (1988)). (The Court found that the independent counsel clearly falls on the inferior side of the line.) In *Silver v. United States Postal Service*, the Court stated that, in making the distinction between principal and inferior offices, “the nature of each government position must be assessed on its own merits” (951 F.2d 1033, 1040 (9th Cir. 1991)).

¹⁸ 20 Op. Off. Legal Counsel 124, 150 (1996). For a more detailed discussion of the distinction between principal and inferior officers, see “Principal Officer/Inferior Officer,” in CRS Report R40856, *The Debate Over Selected Presidential Assistants and Advisors: Appointment, Accountability, and Congressional Oversight*, by Barbara Schwemle et al.

categories is discussed below. If Congress removes a position from PAS status, it may continue the position, or its functions, as another kind of position. Congress may assign appointment authority to the President alone or direct that the position be filled by a member of the SES. If Congress is silent on the matter, agencies may create SES or Schedule C positions to carry out the particular functions.

Officers Currently Appointed Through the Advice and Consent Process¹⁹

Each year the President submits more than 20,000 nominations to the Senate. Although these nominations include those to the highest unelected policymaking positions in the federal government, the great majority are routine armed forces officer appointments. The nominations also include large groups of presidential appointments to positions in the Coast Guard,²⁰ the Foreign Service,²¹ the Public Health Service,²² and the National Oceanic and Atmospheric Administration (NOAA) officer corps.²³ Nominations to positions in these groups are often submitted and considered *en bloc*.

A smaller portion of the submissions to the Senate each year comprises nominations to high-level positions in the executive, legislative, and judicial branches. These include:

- more than 350 full-time positions in the executive departments;
- more than 150 full-time positions on regulatory and other collegial boards and commissions;
- more than 100 full-time positions in independent and other agencies;
- 674 district court judgeships;
- 179 circuit court judgeships;
- 93 U.S. attorney positions;
- 94 U.S. marshal positions;
- more than 150 ambassadors; and
- over 400 part-time positions in the executive branch.

The persons filling these PAS positions are generally considered to be the top policy decision makers in the federal government, having the responsibility to implement statutes. Federal law specifies which positions must be filled this way. The nomination and confirmation process for PAS appointments is discussed below under “IV. The Appointment Process for PAS Positions.”

¹⁹ For listings of PAS positions by Senate committees of jurisdiction, see CRS Report RL30959, *Presidential Appointee Positions Requiring Senate Confirmation and Committees Handling Nominations*, by (name redacted), Maureen Bearden, and (name redacted).

²⁰ See, for example, 14 U.S.C. 271(e).

²¹ 22 U.S.C. 3942.

²² 42 U.S.C. 204.

²³ See, for example, 33 U.S.C. 3026.

Other Appointment Methods

Three other types of appointments are used to staff most of the other policymaking positions in the federal bureaucracy: PA and Schedule C positions, which are political; and SES positions, some of which are political and some of which are career.

Approximately 125 full-time positions government-wide are PA positions.²⁴ PA positions are rare in programmatic agencies; they are generally found in the White House Office and filled by persons who directly staff and advise the President.²⁵ The Department of Homeland Security is an exception in this regard. Under the provisions of the Homeland Security Act, at least six officers in the department are appointed by the President alone.²⁶

The ranks of program managers are most commonly filled by members of the SES.²⁷ The Senior Executive Service includes both career and noncareer positions. Congress sometimes specifies, in statute, that a particular official shall be a career member of the SES,²⁸ but most SES positions are established by the agencies. Career SES appointees are appointed competitively. They have civil service status and have had their executive qualifications reviewed and approved by the Office of Personnel Management (OPM). Noncareer SES appointees are not appointed competitively. Agency heads make noncareer appointments with the authorization of OPM and the approval of the White House Office of Presidential Personnel, and noncareer appointees serve at the pleasure of the appointing official. They occupy top-level supervisory and management positions throughout the executive branch that typically involve developing, promoting, and directing Administration policies. Congress has provided, through statute, a formula for the allocation of SES positions to political appointees, and so indirectly determines their number.²⁹ As of

²⁴ Estimate based on information from U.S. Congress, House Committee on Government Reform, *United States Government Policy and Supporting Positions*, 108th Cong., 2nd sess., Committee Print, November 22, 2004 (Washington: GPO, 2004).

²⁵ Under 3 U.S.C. 105(a)(2), the President may appoint in the White House Office “25 employees at rates not to exceed the rate of basic pay then currently paid for level II of the Executive Schedule” (EX), which is the schedule for presidential appointees requiring Senate confirmation; 25 at the EX III rate or lower; 50 at the “GS-18” rate, which is equivalent to the Senior Executive Service, or lower; and “such number of other employees as he may determine to be appropriate” at the “GS-16” rate or lower. Under 3 U.S.C. 107(a) and (b), he may appoint in the Office of Policy Development “6 employees at rates not to exceed the rate of basic pay then currently paid for level III of the Executive Schedule,” 18 employees at the “GS-18” rate or lower, and “such number of other employees as he may determine to be appropriate” at the “GS-16” rate or lower; and, in the Office of Administration, “5 employees at rates not to exceed the rate of basic pay then currently paid for level III of the Executive Schedule,” and five employees at the “GS-18” rate or lower. Under 3 U.S.C. 106(a)(1), the Vice President may appoint in his office “5 employees at rates not to exceed the rate of basic pay then currently paid for level II of the Executive Schedule,” three employees at the EX III rate (or lower), three employees at the “GS-18” rate (or lower), and “such number of other employees as he may determine to be appropriate” at the “GS-16” rate (or lower). The GS-16, GS-17, and GS-18 levels, as such, no longer exist. Under Section 101(c) of the Federal Employees Pay Comparability Act of 1990 (104 Stat. 1442), all references in statute to these pay rates are considered to refer to pay rates under 5 U.S.C. 5376.

²⁶ P.L. 107-296. Five of these positions were newly created: Assistant Secretary for Information Analysis, Assistant Secretary for Infrastructure Protection, Chief Information Officer, Chief Human Capital Officer, and Officer for Civil Rights and Liberties. The sixth officer, Director of the United States Secret Service, was previously appointed by the Secretary of the Treasury. The Homeland Security Act also established the Chief Financial Officer at DHS as a PA position, but P.L. 108-330 changed it to a PAS position.

²⁷ For more information on the Senior Executive Service, see CRS Report RS20303, *The Senior Executive Service: Overview and Current Issues*, by (name redacted).

²⁸ For example, 6 U.S.C. 531(d)(2) specifies that the Administrator of the Tax and Trade Bureau in the Department of the Treasury “shall occupy a career-reserved position within the Senior Executive Service.”

²⁹ The number of noncareer appointees in each agency is determined annually by the Office of Personnel Management. (continued...)

September 2004, 6,203 SES positions were filled by career appointees and 691 were filled by noncareer appointees.³⁰

Schedule C positions are created under the authority of Part 6 of Title 5 of the *Code of Federal Regulations*.³¹ Schedule C appointees are excepted from the competitive service, and occupy mostly positions of confidential assistant to higher-level officials, as well as some policy-determining positions, throughout the executive branch. Recent Schedule C appointments include, for example, the Confidential Assistant to the Deputy Assistant Secretary for Export Promotion Services in the Department of Commerce and the Director of Cargo and Trade Policy for Border and Transportation Security in the Department of Homeland Security.³² As of September 2004, 1,526 officials had Schedule C appointments.³³ Most Schedule C appointees are paid at rates at the upper grades of the General Schedule but are lower in the hierarchy than presidential appointees and SES appointees.³⁴ More than 40% of Schedule C appointees were paid at or above the highest grade level as of September 2004.³⁵ An agency must get the approval of OPM in order to establish a Schedule C position. Positions authorized by OPM are revoked automatically when an incumbent leaves office.

The options discussed above include both political and career appointments. Decreasing the number of PAS positions while increasing the number of other political positions might be seen by some as an imperfect solution. Since the mid-1980s, a number of federal government observers, scholars, and elected officials have expressed concerns about the increasing number of political appointments in the federal bureaucracy. In January 2003, for example, the second National Commission on the Public Service, chaired by Paul Volcker, recommended a one-third reduction in such positions.³⁶ In recent years, several legislative initiatives have proposed maintaining or reducing the number of political appointments.³⁷ In the Department of

(...continued)

By law, no more than 10% of total SES positions may be filled by noncareer SES appointees (5 U.S.C. 3134). The proportion of noncareer SES appointees, however, may vary from agency to agency (up to a limit of 25%). OPM, in consultation with the Office of Management and Budget (OMB), allocates SES positions for each agency in each even-numbered calendar year (5 U.S.C. 3133(c)). At any given time, the number of positions allocated will be greater than the number filled.

³⁰ U.S. Office of Personnel Management FedScope, available at <http://www.fedscope.opm.gov/index.htm>, visited March 9, 2005.

³¹ Established under the authority of 5 U.S.C. 3301, 3302.

³² OPM periodically publishes listings of decisions granting authority to make appointments under Schedules A, B, and C. These positions were included on a comprehensive annual list published in U.S. Office of Personnel Management, "Excepted Service; Consolidated Listing of Schedules A, B, and C Exceptions," *Federal Register*, vol. 70, no. 8, January 12, 2005, pp. 2284-2316.

³³ U.S. Office of Personnel Management FedScope, available at <http://www.fedscope.opm.gov/index.htm>, visited March 9, 2005.

³⁴ The General Schedule is the pay and classification system for the majority of the rank and file white-collar staff of the federal government. Pay rates are found through the Office of Personnel Management website, available at <http://www.opm.gov/oca/payrates/index.htm>, visited March 9, 2005.

³⁵ U.S. Office of Personnel Management FedScope, available at <http://www.fedscope.opm.gov/index.htm>, visited March 9, 2005.

³⁶ National Commission on the Public Service, *Urgent Business for America: Revitalizing the Federal Government for the 21st Century* (Washington: National Commission on the Public Service, 2003).

³⁷ In the 104th, 105th, 106th, 107th, and 108th Congresses, legislation was introduced in the House and Senate to limit the number of federal political appointees, in some bills to 2,000, in others to 2,300. None of these bills was reported out of committee.

Transportation annual appropriations measures for nine of the last 13 fiscal years, statutory limits have been placed on the number of such positions.³⁸

The balance between political and career leadership positions reflects the value, in the American government, of both political accountability and neutral managerial competence. Whereas political appointments are typically made by the President and agency heads as a means of pursuing a particular policy agenda, careerists are usually hired under the civil service system on the basis of merit to execute the laws in an unbiased manner. Public administration scholars and practitioners have long recognized that this process of implementing laws is both political and administrative. Managerial expertise is necessary during implementation, but accountability for the way in which the will of elected officials is carried out is also an important component of sound public administration.

If Congress changes the appointment method for some PAS positions, the functions of the positions are likely to be placed, either by Congress, the President, or the agency, in the hands of either a career or political appointee. Since the appointee will no longer need to be confirmed by the Senate, it could be argued that a political official might be less accountable to Congress than a PAS appointee would be. What about careerists? Some have argued that career officials tend to be allied with Congress, while others have suggested that they respond to the political environment as a whole.³⁹ Consequently, Congress might opt to specify that certain functions be carried out by career officials. On the other hand, Congress might elect to provide the Administration with greater management flexibility by allowing more positions to be filled by the President alone or agency heads.

IV. The Appointment Process for PAS Positions

The appointment process consists of three stages—selection and nomination, confirmation, and appointment. The President has the authority to make a nomination to a position requiring confirmation, but, when making his selection, he must consider how it will fare in the confirmation process. The Senate confirms most nominations, but, considering the history of nominations, no President can safely assume that his nominees will be approved routinely. Although the formal appointment process is the province of the President and the Senate, other concerned parties, such as interest groups and other elected officials, may attempt to influence the outcome at various stages by providing information to the decision makers and the media. This is particularly the case for higher profile positions.

Selection and Nomination

A number of steps are involved in the President's selection for most Senate-confirmed appointments. First, with the assistance of the White House Office of Presidential Personnel, the

³⁸ P.L. 108-447, Division H, Section 187 provides an example. The section reads, "None of the funds in this Act shall be available for salaries and expenses of more than 106 political and Presidential appointees in the Department of Transportation: Provided, That none of the personnel covered by this provision may be assigned on temporary detail outside the Department of Transportation."

³⁹ Edward J. Lynch, "No, We Don't Have Too Many Political Appointees," *Government Executive*, vol. 23, April 1991, pp. 54-55; and David M. Cohen, "Amateur Government," *Journal of Public Administration Research and Theory*, vol. 8, October 1998, pp. 450-497.

President selects a candidate for the position. Generally, the candidate then prepares and submits several forms: the “Public Financial Disclosure Report” (Standard Form (SF) 278), the “Questionnaire for National Security Positions” (SF 86), and the White House “Personal Data Statement Questionnaire.” The Office of the Counsel to the President oversees the clearance process, which often 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 candidate is to be appointed. If conflicts are found during the background check, OGE and the agency ethics officer may work with the candidate to mitigate the conflicts. Once the Office of the Counsel has cleared the candidate, the nomination is ready to be submitted to the Senate.

For positions located within a state (U.S. attorney, U.S. marshal, and U.S. district judge), the White House, by custom, normally consults with the Senators from that state (if they are from the same political party as the President) prior to a nomination.⁴⁰ If neither Senator is from the President’s party, he usually consults with party leaders from the state. Occasionally, the President solicits recommendations from Senators of the opposition party because of their positions in the Senate. The White House may also consult with Senators, particularly leaders of the committees of jurisdiction, regarding other nominations. These consultations provide an opportunity for individual Senators to play a role in the recruitment of qualified office holders, and they also provide Senators with valuable political capital. For these reasons, the Senate may be reluctant to give up its role in appointments to these positions.

The selection and vetting stage is often the longest part of the appointment process (see discussion below under “V. Length of the Appointment Process”). There can be lengthy delays, particularly if many candidates are being processed, as they are at the beginning of an Administration, or if conflicts need to be resolved. Candidates for higher-level positions 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). A nominee who is hired as a consultant while awaiting confirmation may serve only in an advisory capacity.

If circumstances permit and conditions are met, the President may give the nominee a temporary appointment under the Vacancies Act⁴¹ or a recess appointment to the position.⁴² Both types of appointment confer upon the appointee the legal authority to carry out the duties of the office. Temporary appointments under the Vacancies Act may last for 210 days after the date of the vacancy. This time restriction may be suspended or extended under certain conditions, however, and temporary appointments may last for more than two years. Recess appointments may last for less than a year or nearly two years, depending on when the appointment is made. Presidents have occasionally used these two types of appointments to circumvent the confirmation process. Such efforts have sometimes had political consequences, however. Senators have, at times, placed

⁴⁰ “Report of the Task Force on the Confirmation Process,” *Congressional Record*, vol. 138 (February 4, 1992), pp. 1348-1352.

⁴¹ 5 U.S.C. 3345-3349d.

⁴² See CRS Report RS21412, *Temporarily Filling Presidentially Appointed, Senate-Confirmed Positions*, by (name red acted).

holds on other nominations or passed more restrictive legislation in response to perceived executive abuses of the appointment process.⁴³

Senate Consideration

In the consideration stage, the Senate determines whether or not to confirm a nomination.⁴⁴ The way the Senate acts on a nomination depends largely on the importance of the position involved, existing political circumstances, and policy implications. Generally, the Senate shows particular interest in the nominee's views and how they are likely to affect public policy.⁴⁵ Nominations are referred to the appropriate committee, where they sometimes receive a hearing. They are then usually reported back to the Senate, where they are taken up and voted upon. Most nominations proceed through the process in a routine, timely fashion. During the 107th Congress, for example, the median⁴⁶ number of days taken to confirm a nomination to a full-time departmental position was 36.⁴⁷ A large portion of the nominations received are military or other officer appointments, and these are typically handled through a routinized process. The Senate routinely confirms, *en bloc*, hundreds of these kinds of nominations at a time. Nominations to policymaking positions can stall, however, or, in effect, die at any point. This is more likely to happen to controversial nominations. Sometimes, however, Senators may block noncontroversial nominations through the use of holds⁴⁸ to gain leverage as part of a strategy to move unrelated legislation or nominations. (See further discussion below under "Shortening the Appointment Process.")

The Senate confirmation process is centered at the committee level. Some committees, such as Armed Services, Judiciary, and Foreign Relations, handle many nominations, while other committees handle relatively few. The rules and procedures of the committees frequently include timetables specifying minimum periods between steps in the process. Committee nomination activity generally includes investigation, hearing, and reporting stages. Action at the committee level tends to be at the discretion of the chair. There is no internal requirement that a committee act on any nomination.

As part of investigatory work, committees may draw on information provided by the White House as well as information collected by the committees. For example, they have access to documents related to the Public Financial Disclosure Report completed during the nomination stage. Select Senators also may have, with the authorization of the President, access to FBI reports or report summaries. In addition, committees usually collect other personal and financial information from nominees. This process may include completion of standard committee forms

⁴³ See, for example, "Nomination Logjam Cleared," *Congressional Quarterly Weekly Report*, vol. 43, no. 42, October 19, 1985, p. 2111; Darlene Superville, "Congress to Limit 'Acting' Terms," *Associated Press Online*, March 18, 1998.

⁴⁴ For further information, see CRS Report RL31980, *Senate Consideration of Presidential Nominations: Committee and Floor Procedure*, by (name redacted) (Hereafter cited as CRS Report RL31980); and CRS Report RL31948, *Evolution of the Senate's Role in the Nomination and Confirmation Process: A Brief History*, by (name redacted).

⁴⁵ G. Calvin Mackenzie, *The Politics of Presidential Appointments* (New York: The Free Press, 1981), pp. 97-189.

⁴⁶ The median is the middle value in a numerical distribution. In this case, half the confirmations took less time and half took more time.

⁴⁷ CRS Report RL31346, *Presidential Appointments to Full-Time Positions in Executive Departments During the 107th Congress, 2001-2002*, by (name redacted). (Hereafter cited as CRS Report RL31346.)

⁴⁸ 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, coordinated by (name redacted).

as well as follow-up questionnaires tailored to specific nominations. As part of these forms and questionnaires, or during hearings, the Senate usually gains a commitment from the nominee to respond to requests to come before committees of the Senate.⁴⁹

Hearings provide a public forum to discuss a nomination and any issues related to the program or agency for which the nominee would be responsible. Even if confirmation is thought to be a virtual certainty, hearings may provide Senators and the nominee with an opportunity to go on the record with particular views or commitments. Senators may use hearings to explore a nominee's qualifications, articulate a policy perspective, or raise related oversight issues. Some committees hold hearings on nearly all nominations; others hold hearings for only some. A committee may consider the importance of a nomination and the workload and schedule of the committee when determining whether or not to hold a hearing.

The committee may discontinue acting on a nomination at any point—upon referral, after investigation, or after a hearing. If the committee votes to report the nomination back to the full Senate, it has three options. It may report the nomination favorably, unfavorably, or without recommendation. If it elects not 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.⁵⁰

Although the Senate confirms most nominations, some nominations are not confirmed. Rarely, however, does a rejection occur on the Senate floor. Nearly all 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 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.⁵¹ The most recent study of Senate confirmation action, which looked at the period between 1981 and 1992, found that the Senate failed to confirm 9% of all nominations to full-time positions in the executive departments, 11% of nominations to independent agencies, and 22% of nominations to boards and commissions.⁵²

⁴⁹ 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, 108th Cong., 1st sess., June 5, 2003 (Washington: GPO), p. 133.

⁵⁰ For more information, see CRS Report RL31980.

⁵¹ The rule may be found in U.S. Congress, Senate Committee on Rules and Administration, *Senate Manual*, 106th Cong., 1st 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.

⁵² CRS Report 93-464, *Senate Action on Nominations to Policy Positions in the Executive Branch, 1981-1992*, by (name redacted) (archived; no longer available). The study did not include nominations submitted by Presidents Carter and Reagan in the last months of their Administrations, or nominations submitted within a month of the Senate's adjournment at the end of a session. It also excluded nominations to the judiciary, military services, Foreign Service, National Oceanic and Atmospheric Administration Officer Corps, and Public Health Service Officer Corps, as well as nominations to all ambassadorial, U.S. attorney, U.S. marshal, and part-time positions.

Appointment⁵³

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. Under unusual circumstances, he may not sign it at all, thus preventing the appointment. Once the appointee is given the commission and sworn in, he or she has full authority to carry out the responsibilities of the office.

V. Length of the Appointment Process

As discussed in the introduction to this report, some proponents of reducing the number of PAS positions have asserted that, over the last several decades, the appointment process has taken longer, and the number of PAS positions has grown, and that the longer process is due, in part, to the greater number of positions. This section and the next section assess the first two assertions. An assessment of the perceived benefits of reducing the number of PAS positions follows these sections.

Data limitations have precluded CRS from providing a comparison, government-wide, of the length of the entire appointment process across different time periods, but comparisons based on more limited data can be made.⁵⁴ Accurate and comprehensive data concerning the dates on which PAS positions become vacant, which would approximate the starting dates for refilling these positions, are not generally available. One instance in which it is possible to collect this information for many positions,⁵⁵ however, is at the beginning of a new Administration, when many positions are vacated and filled simultaneously. G. Calvin Mackenzie calculated that the average time from inauguration to confirmation for initial PAS appointments grew from 2.38 months at the beginning of John F. Kennedy's presidency to 8.53 months at the beginning of William J. Clinton's presidency.⁵⁶ Because of the inexperience of new presidential staff and the large number of appointments going through the system at the same time, these average times for new Administrations are probably longer than averages of all appointment times would be.

Another instance in which it is possible to collect information about the length of the appointment process for a subset of PAS positions is in the case of initial appointments to newly created departments. In this case, the starting point for filling positions can be set at the time of the enactment of the enabling law. From 1965 to 2004, six new departments were created: Housing and Urban Development (1965); Transportation (1966); Energy (1977); Education (1979); Veterans Affairs (1988); and Homeland Security (2003).⁵⁷ **Table 1** provides a summary of the

⁵³ CRS publishes a number of reports that track nominations by Congress. See, for example, CRS Report RL31868, *U.S. Circuit and District Court Nominations by President George W. Bush During the 107th-109th Congresses*, by (name redacted), Maureen Bearden, and Kevin M. Scott, and CRS Report RL31346.

⁵⁴ Empirical studies of the appointment process have tended to focus on the length of the Senate confirmation process, for which data are readily available.

⁵⁵ Regulatory commission members, inspectors general, ambassadors, U.S. attorneys, and U.S. marshals, among others, were not included.

⁵⁶ Twentieth Century Fund Task Force on Presidential Appointments, *Obstacle Course: Report of the Twentieth Century Fund Task Force on Presidential Appointments* (New York: The Twentieth Century Fund Press, 1996), p. 72.

⁵⁷ In addition, at the time the Department of Education was created, the remainder of the Department of Health, Education, and Welfare became the Department of Health and Human Services.

average length of time taken to nominate and confirm initial appointees to PAS positions in each of these departments. The last column in **Table 1** shows the median numbers of days elapsed from enactment of the organic legislation to Senate confirmation. The latter figures range from a low of 77 days (about 2½ months) to 352 days (nearly a year).

With the exception of the Department of Energy, the median times grew longer from 1965 (140 days) to 2004 (206 days). This is consistent with reports suggesting that, in general, the appointment process has grown longer and more complex over the last 40 years. Often in response to individual incidents, Congress and Presidents have increased scrutiny of potential appointees as insurance against scandals.⁵⁸ In addition to this trend, the length of the process has been affected by particular circumstances. In the case of the Department of Veterans Affairs, for example, the organic legislation was signed into law in the last months of the Reagan presidency and implemented at the beginning of the presidency of George H. W. Bush. The incoming President had no authority to submit a nomination until his inauguration, which was 87 days after the bill-signing. In addition, many tasks, including a multitude of other appointments, confronted the new Administration, and this may have contributed to the relatively lengthy appointment process for the new department.

Table 1 also shows that the time between enactment and nomination generally accounts for a far greater part of the appointment process than the time between nomination and Senate confirmation; the President generally takes much longer to submit a nomination than does the Senate to deliberate on the nomination. This generalization is further supported by a study of departmental appointments in 1981 and 1993. The report looked at the time required to fill PAS positions in the first year of the Reagan and Clinton Administrations. It showed that, on average, the time the Presidents took to submit a nomination accounted for more than 75% of the total time from inauguration to confirmation.⁵⁹ This finding may not apply to nominations in general, since at least two factors characteristic of the beginning of a new Administration should not affect other nominations. A new President has lead time before his inauguration to begin the selection and vetting process. On the other hand, there might be a bottleneck in the vetting process, as the various offices involved attempt to complete the investigation and clearance process for the large numbers of potential nominees typical of the beginning of a new Administration.

Table 1. Average Number of Days from Enactment of Organic Legislation to Nomination and Confirmation of Top Officials in the Six Most Recent New Departments

Department	Days elapsed from enactment to President's submission of a nomination to the Senate		Days elapsed during consideration by the Senate, from nomination to confirmation		Days elapsed from enactment to confirmation (total)	
	Mean	Median	Mean	Median	Mean	Median
Housing and Urban Development (1965)	216	132	7	6	223	140

⁵⁸ See G. Calvin Mackenzie, "The State of the Appointments Process," in his *Innocent Until Nominated: The Breakdown of the Presidential Appointments Process* (Washington: Brookings, 2001), pp. 40-44.

⁵⁹ CRS Report 98-641, *Filling Policy Positions in Executive Departments: Average Time Required Through Confirmation, 1981 and 1993* (archived; no longer available), by (name redacted).

Department	Days elapsed from enactment to President's submission of a nomination to the Senate		Days elapsed during consideration by the Senate, from nomination to confirmation		Days elapsed from enactment to confirmation (total)	
	Mean	Median	Mean	Median	Mean	Median
Transportation (1966)	176	130	25	20	201	163
Energy (1977)	105	45	57	37	162	77
Education (1979)	155	169	34	34	190	203
Veterans Affairs (1988)	337	295	63	72	400	352
Homeland Security (partial) ^a (2002)	113	114	67	62	180	206

Source: Prepared by CRS based on information from the Senate nominations database of the Legislative Information System, available at <http://www.congress.gov/nomis/>, and from various volumes of the *Journal of the Executive Proceedings of the Senate of the United States of America*.

Note: The table shows both the mean and median number of days. The mean is the arithmetic average. In order to calculate the mean number of days elapsed from enactment to nomination, for example, for each department, the entries for all the positions in the department were added, and the sum was divided by the number of positions. The median is the middle number when the “days elapsed” entries for all the positions are arranged numerically. Although the mean is the more familiar kind of average, the median is included because it diminishes the influence of a few extreme entries. For example, if the President submits 10 of 12 nominations within 90 days (three months) and the remaining two within 540 days (18 months), the mean elapsed time would be 165 days, even though most nominations were submitted far sooner than that. The median in this case would be 90 days, which more clearly shows the time, in general, the President took to forward his nominations.

- a. The figures shown for the Department of Homeland Security are for those positions initially filled through the advice and consent process and for which the President submitted a nomination and the Senate acted in the 108th Congress. Previously existing positions for which the incumbent did not need to be reconfirmed were not included. Not all positions established by the Homeland Security Act were filled during the 108th Congress.

VI. Growth in the Number of PAS Positions

Has the number of PAS positions grown over the past several decades? Most observers agree that it has. Such positions have been counted in a variety of ways. **Table 2** provides one measure of the number of full-time executive branch PAS positions with policymaking responsibilities at eight points over the last three decades. The table shows growth in the number of positions in the 1970s and 1980s, a slight decline in the 1990s, and additional growth between 2000 and 2004. Overall, the number of positions grew approximately 26% between 1972 and 2004.

Table 2. Number of Selected Full-Time Executive Branch PAS Positions at Eight Points, 1972-2004

Year	Number of positions
1972	464
1976	477
1980	536

Year	Number of positions
1984	527
1988	529
1992	581
1996	585
2000	569
2004	586

Source: The numbers for 1972-1992 were taken from research published in Thomas J. Weko, *The Politicizing Presidency: The White House Personnel Office, 1948-1994* (Lawrence, KS: University Press of Kansas, 1995), p. 161. The numbers for 1996, 2000, and 2004 were calculated from the Plum Books of those years. Weko used prior editions of the Plum Book as his source. The official citation for the 2004 edition of the Plum Book is U.S. Congress, House Committee on Government Reform, *United States Government Policy and Supporting Positions*, 108th Cong., 2nd sess., Committee Print, November 22, 2004 (Washington: GPO, 2004).

Note: Table excludes part-time positions, ambassadors, U.S. attorneys, U.S. marshals, and positions in the judicial branch, the legislative branch, the military, National Oceanic and Atmospheric Administration (NOAA), the foreign service, the Coast Guard, and international organizations.

Although a number of new government organizations with PAS positions, including three of the departments discussed above (which had a total of 53 positions at their inception),⁶⁰ were created during this time, most of the growth in the number of PAS positions can be attributed to an incremental increase across many agencies. For example, the Environmental Protection Agency (EPA) had seven PAS positions in 1972 and 14 such positions in 2004. In 1972, none of the positions at the Office of Management and Budget (OMB) was subject to the advice and consent process, while by 2004, six required Senate confirmation.⁶¹ As in the case of OMB, in most cases the creation of new PAS positions probably reflects the importance of the policymaking functions of particular offices and the perceived need for congressional influence in their leadership.

VII. Assessment of Expected Benefits of a Reduction in the Number of Advice and Consent Positions

Proponents of a reduction in the number of PAS positions have suggested that such a reduction would be expected to “yield a more efficient and more consistent performance of the Senate’s confirmation responsibilities”⁶² and to reduce the overall the length of the appointment process.

⁶⁰ Some of these positions had existed in other forms prior to the creation of the new departments.

⁶¹ U.S. Congress, Senate Committee on Post Office and Civil Service, *United States Government Policy and Supporting Positions*, 93rd Cong., 1st sess., Committee Print (Washington: GPO, 1973), and U.S. Congress, House Committee on Government Reform, *United States Government Policy and Supporting Positions*, 108th Cong., 2nd sess., Committee Print, November 22, 2004 (Washington: GPO, 2004).

⁶² U.S. Congress, Senate Committee on Governmental Affairs, *The State of the Presidential Appointment Process*, hearings, 107th Cong., 1st sess., April 4-5, 2001 (Washington: GPO, 2002), p. 54.

Improving the Senate Confirmation Process

Would an improvement in the Senate confirmation process result from a reduction in the number of PAS positions? Nearly all the potential gains in efficiency and performance probably would be found at the committee level, since, unless a nomination is controversial, confirmation on the Senate floor is usually accomplished by unanimous consent with minimal debate.⁶³ To varying degrees, depending on the committee and the nominee, committee activity related to nominations may include review of Federal Bureau of Investigation reports and Executive Personnel Financial Disclosure Reports (SF-278), collection and review of additional financial and personal background information, meetings with nominees, and hearings. Committees usually follow more routinized procedures for lower-level nominations, while spending more time reviewing and investigating high-level nominees more closely. Consequently, if the Senate were to consider only nominations to top policymaking positions, the measured Senate efficiency and performance might not noticeably improve. If Congress changed the appointment method for higher-level PAS positions, however, reduced workload might allow the Senate to execute its confirmation responsibilities more efficiently.

The Senate also might incur costs, however, were the appointment method for higher-level PAS positions to be changed. For example, Senators would lose the opportunity to review and pass on presidential appointees' qualifications and potential conflicts of interest. Senators also would lose the opportunity to use the confirmation process to influence policy. With appointments to PAS positions, they may do this by not confirming a nominee or by extracting a commitment on some action from a nominee during the confirmation process. In addition, Senate committees might have greater difficulty obtaining testimony from appointees who have not been confirmed by the Senate, and the Senate's efficiency and performance in its oversight role might, therefore, decrease. As noted above, the Senate usually gains a commitment from the nominee, during the confirmation process, to respond to requests to come before its committees. If advice and consent requirements were discontinued for some state-level appointments, such as U.S. attorneys and marshals, some Senators, particularly those of the same party as the President, might lose the opportunity to consult with the President on suitable candidates for these positions.

Shortening the Appointment Process

Would a reduction in the number of PAS positions shorten the overall process for appointments to PAS positions? Although the evidence, discussed above, suggests that both the number of PAS positions and the length of the appointment process have grown in the past three decades, it is not clear that the greater number has caused or contributed to a longer appointment process. If Congress were to reduce the number of PAS positions, doing so would, of course, shorten the process for those appointments that no longer needed to go through the confirmation process. It is unclear, however, whether or not the average length of the appointment process would be reduced for the remaining PAS positions. As previously discussed, the process includes three stages: selection and nomination, which, on average, takes the longest period of time; Senate consideration; and appointment, which may take place at the pleasure of the President. The appointment process could be shortened if either the presidential vetting process or Senate consideration, or both, were shortened.

⁶³ For a more detailed discussion of Senate consideration of nominations, see CRS Report RL31980, *Senate Consideration of Presidential Nominations: Committee and Floor Procedure*, by (name redacted).

Shortening Selection

Selecting and investigating the background and finances of potential nominees often takes a considerable amount of time. This process sometimes can be completed quickly for top nominees, such as department secretaries, when greater resources are committed to the task. Completion of the vetting process for most other nominees, however, usually takes longer. If fewer people had to go through the process, it might proceed more quickly for the remaining applicants. If the appointees who were no longer subject to the advice and consent of the Senate still needed to be vetted by the White House, just as many applications would need to go through the pipeline. Consequently, it is unclear that converting some PAS positions to other types of positions would reduce delays at the selection stage of the appointment process.

The Intelligence Reform and Terrorism Prevention Act of 2004 included several provisions that might reduce some appointment process delays in the selection stage. For example, the law directs the Office of Personnel Management (OPM) to provide each major party presidential candidate, soon after his or her nomination, with certain information concerning presidentially appointed positions.⁶⁴ Access to such information allows the potential president to begin the selection process as much as half a year before taking office.

The statute also amended the Presidential Transition Act of 1963 to recommend that the President-elect submit “names of candidates for high level national security positions through the level of undersecretary” for national security clearance as soon as possible after the presidential election and to require expeditious background investigations of these candidates, among other things.⁶⁵ Title III of the act made government-wide changes to the national security clearance process that are designed to consolidate and streamline this function.⁶⁶ Because most presidential appointees are subject to this clearance process, these changes may have an impact on the duration and difficulty of the selection stage of the appointment process.

In addition, the Intelligence Reform and Terrorism Prevention Act contained a provision that requires a report from the Office of Government Ethics (OGE) regarding potential improvements to the financial disclosure process for executive branch employees.⁶⁷ A similar report sent to Congress by the Office of Government Ethics in 2001 recommended changes to the Ethics in Government Act⁶⁸ to “(1) reduce the number of valuation categories; (2) shorten certain reporting time-periods; (3) limit the scope of reporting by raising certain dollar-thresholds; (4) reduce details that are unnecessary for conflicts analysis; and (5) eliminate redundant reporting.”⁶⁹ The findings of the newly mandated report might serve as a basis for legislation that would streamline the financial disclosure process and thereby, on average, shorten the duration of the appointment process.

⁶⁴ P.L. 108-458, Section 8403(b).

⁶⁵ P.L. 108-458, Section 7601(a).

⁶⁶ P.L. 108-458, Title III.

⁶⁷ P.L. 108-458, Section 8403(a).

⁶⁸ 5 U.S.C. App.

⁶⁹ U.S. Office of Government Ethics, *Report on Improvements to the Financial Disclosure Process for Presidential Nominees* (Washington: April 2001), p. 2.

Shortening Senate Consideration

Would a reduction in the number of PAS positions decrease the length of the Senate confirmation process? The most time-consuming activities in this process are the investigatory activities and preparation for hearings. As discussed above, committee investigations include the review of documents and reports collected during the selection and nomination stage, as well as the collection and review of committee-specific personal and financial forms. In some cases, committees prepare, and nominees complete, individually tailored followup questionnaires as well. Preparation for, and scheduling of, hearings may also lengthen the average confirmation time. If the positions removed from PAS status were among those that involve significant investigations or hearings, their removal might result in shorter appointment times, on average. Congress also might opt to address any delays possibly resulting from investigations and the hearing process by increasing committee staffing or reducing the number of nominations that receive hearings.

Although the average length of time that a nomination is pending in the Senate may be related to Senate workload, other factors may play a more significant role. Policy differences, either related or unrelated to particular nominations, may lead Senators to delay or block nominations through the use of holds or other procedures. For example, Senator Hillary Rodham Clinton placed a hold on a nomination in connection with concerns about air quality around Ground Zero after the collapse of the World Trade Center. On the floor of the Senate, she stated:

When Governor Leavitt was nominated for the position of Administrator of the EPA [Environmental Protection Agency], I made it clear to Governor Leavitt, to my colleagues on the Environment and Public Works Committee, and to the public I would put a hold on Governor Leavitt's nomination. At that moment it was the only means available to a single Senator to get the attention of the White House and to demonstrate the seriousness I believed these issues demanded.⁷⁰

Other reasons nominations may be blocked or delayed include retribution for actions by other Senators or the President (“tit-for-tat”), efforts to “trade” confirmation of one nomination for confirmation for another (packaging together several nominations),⁷¹ efforts to gain a policy commitment from a nominee, or a need for more time to gain or review information on a nomination.

In 2004, Congress acted to hasten Senate consideration of a subset of nominations at the beginning of a new Administration. The Intelligence Reform and Terrorism Prevention Act expressed “the sense of the Senate” about a timetable for submission and consideration of high-level national security nominations during transitions. Under this timetable, nominations to such positions should be submitted by the President-elect to the Senate by Inauguration Day, and Senate consideration of all such nominations should be completed within 30 days of submission.⁷²

⁷⁰ Sen. Hillary Rodham Clinton, remarks in the Senate, *Congressional Record*, daily edition, vol. 149, October 27, 2003, p. S13248.

⁷¹ See G. Calvin Mackenzie, “The State of the Appointments Process,” p. 33.

⁷² P.L. 108-458, Section 7601(b).

VIII. Potential Approaches to Determining the Appropriate Number and Distribution of PAS Positions

The analysis in the preceding section suggests that a decrease in the number of PAS positions might ease the workload of Senate committees, facilitate a faster average confirmation time, and reduce the overall length of the appointment process. It further suggests that these benefits could be contingent on which positions are converted to another appointment method. The greatest effect could come from the conversion of higher-level positions, just the kind of positions that Congress might be most reluctant to convert.

If Congress elected to reduce the number of PAS positions for these or other reasons, this activity could be considered as part of a larger congressional task: determining the appropriate number and distribution of PAS positions. To a considerable extent, the Constitution gives Congress discretion over the determination of which officers will be subject to the advice and consent of the Senate, and which may be appointed by the President alone, the courts, or agency heads. This determination is likely to have consequences for Congress, the President, agency heads, and other interested parties. Given the potential impact of congressional decisions about the number and distribution of PAS positions, how might Congress go about making these determinations? What institutional and political considerations are relevant in the decision making process? What are some alternative ways for approaching this task?

Institutional Considerations

Although the President's role has evolved into that of chief manager of the federal bureaucracy, Congress has a clear and longstanding role as co-manager of the national administration.⁷³ The role of the Senate in the appointment process is just one of the ways Congress is involved in shaping the organization and activities of federal governmental entities and programs. Congress establishes departments and agencies, and, to whatever degree it chooses, the internal organization of agencies. Congress, through law, also determines the missions of agencies, defines the parameters of personnel systems, provides funding through the appropriations process, and ultimately determines, through the authorization process, whether agencies and programs shall continue in existence. Congress also co-manages the federal bureaucracy through its oversight role. Senators sometimes use confirmation hearings as one venue for conducting oversight.

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. 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,

⁷³ For a detailed discussion of the roles of Congress and the President in federal administration, see (name redacted) *The Politics of Shared Power: Congress and the Executive*, 4th ed. (College Station: Texas A&M University Press, 1998), pp. 68-145. For a discussion of the evolution, during the 20th century, of the role of Congress in federal administration, see David H. Rosenbloom, *Building a Legislative-Centered Public Administration: Congress and the Administrative State, 1946-1999* (Tuscaloosa: The University of Alabama Press, 2000).

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.⁷⁴ 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, 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. Congress could strengthen its oversight ability by stipulating, in law, that all officers with operational responsibilities are obligated to respond to congressional committees of jurisdiction.

Political Considerations

Several participants in the political process, including Congress, the President, agency heads, and interest groups, have a political stake in the arrangements by which the number and distribution of PAS positions are determined.

Congress

Although certain high-level policymaking positions, such as secretary and administrator, are routinely subject to the advice and consent of the Senate, many subordinate PAS positions require confirmation because Congress asserted its constitutional prerogative. That is, some Members of Congress saw a need, at some point, to establish each PAS position as an advice and consent position. Thus, it might be difficult to change the appointment method for such positions if the interest in asserting that prerogative is ongoing.

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. The perception that a reduction in the number of PAS positions might reduce this leverage might add difficulty to the process of changing the appointment method for positions presently filled through the PAS process. It might also be perceived, however, that the reduction in the number of PAS positions would be limited and that the remaining PAS positions might provide Congress with nearly the same level of leverage as now exists.

If the appointment method for some positions were changed, Members of Congress, particularly Senators, might have less influence in the selection of appointees to these positions than they now enjoy. The perception that congressional influence might be diminished in this way might lead to difficulties in selecting PAS positions for reduction. This might be particularly true for state-level

⁷⁴ This practice dates back to the early 1970s, and it grew out of conflict between President Richard Nixon and the Senate regarding the refusal of Secretary of State William P. Rogers and National Security Advisor Henry A. Kissinger to testify, in January 1973, before the Senate Foreign Relations Committee regarding the President's Vietnam War policies. The Senate Democratic Conference, representing the then majority, subsequently adopted a resolution stating, in part, "That a prerequisite to confirmation is the commitment of Presidential appointees to appear and testify before duly constituted Committees of the Senate in response to committee requests." Sen. Mike Mansfield, "Three Resolutions Passed by the Democratic Conference on January 11, 1973," *Congressional Record*, vol. 119, January 16, 1973, p. 1236. See also "Did Kennedy Top Nixon in Withholding Information?" *Congressional Quarterly Weekly Report*, vol. 31, February 10, 1973, p. 294.

positions, such as U.S. attorney, U.S. marshal, and district judge, because of the significant role that home-state Senators often play in their selection.

The President

The President stands to gain if PAS positions are converted into political appointments by him alone or by agency heads. Political appointees of this type, who do not need Senate confirmation, could be more responsive and accountable to the President than they would otherwise be. With their primary allegiance to the President or agency head, they might be more likely to implement energetically the President's management and policy priorities. Such appointees would not have made commitments to the Senate during the confirmation process, nor would they necessarily have developed relationships with Senators and congressional staffers during the appointment process. The Administration would have more latitude in determining if, and under what circumstances, appointees would be permitted to testify before congressional committees. This discretion would not be absolute, however, since Congress would continue to have other points of political leverage, such as the appropriations process.

Agency Heads

Although agency heads are aligned politically with the President, they are likely to prefer, where possible, to have significant leeway in the selection of appointees to positions within their organizations. This would permit them to exercise the greatest control over the implementation of policy and management goals in their agencies. The White House often consults with agency leaders when making appointments to presidentially appointed positions. If PAS positions are to be filled through another appointment method, however, agency heads might benefit most when such positions are converted to noncareer SES positions, to which individuals are appointed by the agency head.

Interest Groups

Various politically active groups seek to influence the selection of federal policymaking officials. The political considerations for these groups are likely to vary depending on several factors. To the degree that a group is more strongly aligned with, and has greater influence with, one party or another, it is likely to prefer that the appointment process be centered where its preferred party is in power. Because of the rights accorded the minority in the Senate and the power of individual Senators, some interest groups might prefer the advice and consent process even if the party with which they are affiliated does not control the chamber. Senate allies could serve to check the appointment power of the President, as the Constitution contemplates. The preference of an interest group for a particular appointment method might be influenced also by the political advantage associated with a certain level of visibility. In some cases, an interest group might prefer the greater visibility of Senate hearings for a nominee, because they might serve to highlight certain policy issues. Furthermore, even if the preferred candidate of the group is not confirmed, rejection in the Senate can sometimes serve to galvanize the supporters of the policies of the rejected nominee. In other cases, however, an interest group might prefer to work "behind the scenes," at the agency level, to support a particular appointment.

Options for Congressional Consideration

Option 1: Maintain the Status Quo

Congress could maintain the current number and distribution of PAS positions. Under this option, the number of PAS positions would not be systematically reduced, and the primary means by which Congress would determine which positions would be subject to advice and consent would be through the legislative process. The present arrangements are firmly grounded in the Constitution and provide institutional and political benefits to Congress, especially the Senate.

Arguably, appointees who are confirmed by the Senate could be more responsive to Congress than those who are not. As noted above, during confirmation, most nominees agree to testify, as requested, before committees of Congress, making such cooperation somewhat easier to obtain than it would be otherwise. In addition, relationships may be built between the nominee and committee staffers or Senators during the confirmation process, relationships that may be helpful in resolving substantive issues arising at a later date. Senators also may obtain, during confirmation, a nominee's commitment to a particular action.

Senators also may use the confirmation process as a vehicle for oversight. Nomination hearings offer an opportunity to review programs in depth. Under the present arrangements, Senators also gain political leverage, through the use of holds, for example, that they can use during negotiations with the President or other Senators. Senators enjoy, as well, significant influence in the appointment of home state officials (e.g., U.S. attorneys, marshals, and district court judges) when the President is of the same party. Finally, continuation of the status quo would avoid the process of selecting positions to be filled through other appointment methods, which might prove politically difficult.

Although continuation of the status quo appears to offer many institutional and political benefits to Senators, there are potential drawbacks for the Senate. As noted at the beginning of this report, commissions and task forces, as well as some Members of Congress, have been calling for changes in the appointment process. The salience of this issue might grow as agencies submit statutorily required PAS position reduction plans.⁷⁵ To the degree that the Senate becomes identified with the problems in this process, it could lose some prestige as an institution. In addition, the committee consideration process, particularly for higher-level nominations, consumes significant time and resources that might be used for other important matters. Each of these drawbacks might be magnified if, as has happened in the past, the number of PAS positions increases.

The status quo has disadvantages for the President as well. The President is held accountable, by the public and Congress, for the day-to-day management of the federal bureaucracy. Sharing appointment power with Congress may hinder the President's ability to carry out management reforms, as well as his political agenda, if his appointees are accountable both to Congress and to him.

⁷⁵ As noted above, the Intelligence Reform and Terrorism Prevention Act of 2004 directs each agency head to submit an advice and consent position reduction plan, with specified contents, to the President, the Senate Committee on Homeland Security and Governmental Affairs, and the House Committee on Government Reform within 180 days of enactment (P.L. 108-458, Section 8403(c)).

Option 2: Create an Advisory Commission

Congress could create an advisory commission to study the number and distribution of PAS positions and make recommendations on an agency-by-agency basis for the reduction (or increase) of positions. Such an advisory commission might study, from a congressional perspective, the PAS position reduction plans provided by agency heads, or it might make an independent assessment without consideration of those plans. Congress then could consider the commission's recommendations and implement them as appropriate. One benefit of this approach is that the subject could be studied outside of the immediate political process, providing for a more objective assessment of how Congress might proceed. In addition, in the short term, Congress might be seen as responding to perceived problems with the appointment process. Furthermore, when the commission reported its findings, Congress would retain control over which, if any, of the recommendations to pursue. Finally, if Congress did not act on the recommendations at the time of their release, the report could remain available and provide a basis for future action to change the appointment process. The existence of a report with recommendations, however, might provide political momentum that would favor congressional action.⁷⁶

There are several drawbacks to this option. One common complaint about the creation of congressional commissions is that their findings are sometimes ignored or marginalized. Congress probably could create a commission more easily than implement its recommendations, because the institutional and political concerns associated with a reduction in positions probably would still exist at the point of implementation. Congress might increase the likelihood of eventual implementation if the commission comprised high-profile members and if it were charged with considering institutional and political issues during its deliberations. One further drawback to this option is that, although the commission would be removed from the immediate political process, it might be vulnerable to outside influence from political leaders and interest groups. This potential drawback might be mitigated by balanced representation of a variety of interested parties, including the President, on the commission.

Option 3: Establish a Military Base Closure-Type Procedure

Congress could establish an expedited, or "fast-track," procedure to facilitate the selection of PAS positions for reduction.⁷⁷ Such a procedure could be modeled on the one established by law, during the 1980s and 1990s, for military base closure and realignment.⁷⁸ This process was used several times in the 1990s, and a new round of base closures in 2005 was authorized by the FY2002 defense authorization act.⁷⁹

⁷⁶ See, for example, (name redacted), *Discharging Congress: Government by Commission* (Westport Conn.: Praeger, 2002), p. 11.

⁷⁷ For further information on expedited procedures, see CRS Report 98-888, "*Fast-Track*" or *Expedited Procedures: Their Purposes, Elements, and Implications*, by (name redacted), and CRS Report RL30599, *Expedited Procedures in the House: Variations Enacted Into Law*, by (name redacted).

⁷⁸ See U.S. Congress, House, *Constitution, Jefferson's Manual, and Rules of the House of Representatives of the United States*, H. Doc. 107-284, 107th Congress, 2nd sess. (Washington: GPO, 2003), pp. 1168-1176. The use of expedited procedures to select military bases for closure is discussed in CRS Report 97-305, *Military Base Closures: A Historical Review from 1988 to 1995*, by (name redacted) and (name redacted). See also CRS Report RL32216, *Military Base Closures: Implementing the 2005 Round*, by (name redacted).

⁷⁹ P.L. 107-107, Section 3001- 3003; 10 U.S.C. 2687 note.

The current process involves the Secretary of Defense, the President, Congress, and a commission whose members are appointed by the President with the advice and consent of the Senate. Some of the nominees are recommended by the Speaker of the House, the House minority leader, and the Senate majority and minority leaders. The process, in brief, begins with the submission to congressional defense committees, by the Secretary, of proposed and then final criteria to be used by the secretary in forming recommendations regarding closure or realignment. These criteria become final unless Congress disapproves. The Secretary then submits recommendations, based on these criteria, to the commission. Following this, the commission modifies the recommendations and submits them to the President, who can either approve the recommendations, as drafted, and transmit them to Congress, or not approve them and explain his reasons to the commission and Congress. Under the latter circumstance, the commission then sends the President revised recommendations for his approval, and transmission to Congress, or his rejection. The only way Congress can block implementation of the recommendations at this point is to pass a joint resolution of disapproval within 45 days of receiving them. During that 45-day period, constraints on congressional activity included time limits on committee consideration, time limits on debate, and a prohibition on amendments.⁸⁰

If Congress were to develop a similar procedure for reducing the number of PAS positions, it might include provisions specifying, among other things, the following:

- the role of the Administration in the process;
- the structure, role, and authority of a commission;
- the role of congressional committees;
- the role of agencies, including the role, if any, of statutorily mandated PAS position reduction plans;
- limits on debate and amendments; and
- time limits on various portions of the process.

If Congress were to pursue this option, the procedure that was established would need to provide for legislative adoption of any recommended changes, since advice and consent requirements, unlike military bases, are set in statute.

Expedited procedures have sometimes proven effective in accomplishing goals that are politically difficult but important to Congress. The specifics of expedited procedures vary, but while they generally include a role for the President and for Congress, the provisions usually limit the ability of Members to block the process once it is underway. Nonetheless, Congress as a whole retains the power, in the end, to defeat objectionable legislative proposals.

Some observers of Congress argue that the slow, deliberative, and selective nature of the legislative process acts as a check against hasty and unwise laws. Most expedited procedures limit Members' rights to debate and amend legislation and thereby sidestep two of the hallmarks of congressional process. In addition to frustrating Members' ability to address their individual concerns, it could be argued that these limitations close off an important avenue of legislative

⁸⁰ A joint resolution requires passage in both houses and the approval of the President, and has the force of law. Congress may override a presidential veto of a joint resolution by a two-thirds vote of both chambers.

refinement. In particular, this option would give the Senate less control over the process than it now has or than it probably would have under some other options.

Option 4: Select Categories of Positions for Reduction

Congress could opt to use categories, such as military, foreign service, and public health officer positions, judgeships, ambassadorships, and executive-level positions, when selecting which offices to continue as PAS positions. This is essentially the approach suggested by the Presidential Appointee Initiative in one of its recommendations:

The Congress should enact legislation providing that Senate confirmation only be required of appointments of judges, ambassadors, executive-level positions in the departments and agencies, and promotions of officers to the highest rank (0-10) in each of the service branches.⁸¹

In testimony before the Senate Committee on Governmental Affairs, former Director of the White House Office of Presidential Personnel Robert J. Nash also recommended categories for reduction:

I also think we should consider reducing the number of part-time board and commission members who are confirmed by the Senate. ... Examples could include the National Endowment for the Humanities and agencies that don't have security, national defense, those kinds of responsibilities.⁸²

This method has been used before. For example, collectors of internal revenue,⁸³ collectors of customs,⁸⁴ and postmasters⁸⁵ were all converted from PAS positions to competitive service positions during reorganizations of the agencies within which they resided. Two of these three reorganizations were accomplished through presidential reorganization authority, which is currently dormant.⁸⁶

⁸¹ Presidential Appointee Initiative, *To Form a Government: A Bipartisan Plan to Improve the Presidential Appointments Process* (Washington: Brookings, 2001), p. 12.

⁸² U.S. Congress, Senate Committee on Governmental Affairs, *The State of the Presidential Appointment Process*, hearings, 107th Cong., 1st sess., April 4-5, 2001 (Washington: GPO, 2002), p. 15.

⁸³ Prior to 1952, a number of positions in the Bureau of Internal Revenue, including some 64 collectors of internal revenue, were advice and consent positions. Following a series of scandals, President Harry S Truman submitted to Congress a reorganization plan abolishing these positions and establishing new positions under the classified civil service. Under the Reorganization Act of 1949, a resolution of disapproval from either house of Congress would have defeated the plan. Such resolutions failed to pass in both the House and the Senate, and the plan went into effect on March 14, 1952. Under the reorganization plan, only the commissioner of internal revenue continued to be a PAS position.

⁸⁴ In 1952, President Truman submitted a reorganization plan for the Bureau of Customs, but it was disapproved by the Senate and did not go into effect. In 1965, President Lyndon B. Johnson submitted a similar plan to Congress, and, with neither the House nor the Senate passing a resolution of disapproval, the plan went into effect on May 26, 1965. Under the reorganization plan, 53 PAS positions were eliminated, and all positions in the bureau were put into the civil service. The functions of the abolished positions were redelegated by the Secretary of the Treasury.

⁸⁵ Prior to 1970, postmasters throughout the United States were appointed by the President with the advice and consent of the Senate. As part of the Postal Reorganization Act that year, Congress established that the Postmaster General would appoint postmasters in the competitive civil service. The goal of this change was to establish merit-based management for the newly reorganized Postal Service. In addition, the change removed appointments to several thousand lower-level positions from the purview of the Senate.

⁸⁶ The President's reorganization authority, which was codified at 5 U.S.C. 901-912, lapsed in 1984 and has not been (continued...)

The Constitution uses categories—“Ambassadors, other public Ministers and Consuls, Judges of the supreme Court”⁸⁷—to specify which positions must be filled through appointment by the President with the advice and consent of the Senate. Congress might elect, for example, to remove categorically from PAS status all military, Coast Guard, foreign service, public health, or NOAA officer appointments and promotions below the top ranks. Removing any one of these categories would greatly reduce the number of PAS positions but probably lead to little loss of political and institutional benefit. Such an action might have symbolic, as well as real, impact, and might build political momentum for further changes. In addition, it might lead to greater efficiency in carrying out promotions at agencies and in the armed forces. Retaining top officer positions in PAS status arguably could provide Congress with more focused, and, therefore, meaningful, control and accountability than it has at present.

Because of routinized approaches to these categories of nominations, which are usually considered *en bloc*, this option may be least likely to have any impact on the issues of concern to commissions and task forces—namely, that the appointment process is too long and inefficient. In addition, some officer corps and other appointees may value Senate confirmation as a matter of tradition or prestige, and the use of alternative methods for such appointments might have a negative impact on morale.

Option 5: Reduce the Number of Positions by Function

Congress could elect to reduce the number of PAS positions according to the functions of the positions. For example, assistant secretaries for policy might continue to be PAS positions, while assistant secretaries for public affairs could be appointed by departmental secretaries. Under the assumption that, in general, officers in programmatic positions exercise more policymaking discretion than those in non-programmatic positions, Congress might opt to require advice and consent for the former and not the latter.

Some would argue, however, that there are few purely non-policymaking, apolitical functions at the leadership levels of agencies. For example, an argument could be made that general counsels are staff positions that involve providing neutral legal advice. From this point of view, agency heads should be entitled to appoint neutral, competent senior executives to such positions. But in some cases, general counsels may have considerable influence in the policy arena. For example, offices of general counsel are often involved preparing legislation, commenting on legislation to OMB, conducting regulatory and legislative clearance, defending the agency against legal challenges, helping to draft agency testimony, and briefing those who deliver it, all of which involve policymaking discretion. Approaches of general counsels range from providing information about whether or not action is legal to “devis[ing] plans that will achieve the objective, identifying risks and developing options for pursuing and obtaining policy goals.”⁸⁸

(...continued)

renewed since. See CRS Report RL30876, *The President’s Reorganization Authority: Review and Analysis*, by (name redacted).

⁸⁷ Article II, Section 2, cl. 2.

⁸⁸ John H. Trattner, *The 2000 Prune Book* (Washington: Brookings Institution Press, 2000), p. 72.

Option 6: Distribute PAS Positions in Proportion to Agency Size

Congress also could approach the effort to reduce the number of PAS positions by attempting to distribute PAS positions in relation to the size of each agency. Under this approach, those departments with a greater number of career employees and non-PAS political appointees⁸⁹ would have a greater number of PAS positions. The logic behind this option is that Congress, as co-manager of the federal bureaucracy, should have a proportional number of accountable appointees throughout the agencies, analogous to the span of control in traditional management hierarchies. At present, the distribution of PAS positions across agencies varies widely. For example, as of January 2003, the Department of Education employed 269 people for every full-time PAS position, while the Department of Defense ratio was 13,151 to one.⁹⁰

To the degree that PAS appointees are more accountable to Congress, this option might help to make accountability across the agencies more uniform. It appears to be a rational approach to administering the federal government, if Congress sees itself as a co-manager of the bureaucracy. This method has potential drawbacks as well, however. First, Members may have particular policy areas of greater concern than others, and may prefer to have more PAS appointees in these areas. In addition, the interest in strong oversight and accountability might be stronger in some areas than others. Some arenas may be seen as more the province of the President, and, therefore, Congress may expect less direct accountability. It should also be noted that this approach might be more likely to result in an increase in the number of PAS positions. Members might see the need for greater numbers of PAS positions to mitigate high ratios and be reluctant to give up such positions where lower ratios already exist. Finally, the workload for Senate committees with jurisdiction over large departments, such as the Armed Services Committee, could be greatly increased.

Option 7: Delegate Selection of Positions for Reduction to Committees of Jurisdiction

Congress might ask congressional committees, which are likely to have the closest experience with particular positions, to suggest which PAS positions would be appropriate to appoint through another method. This approach could provide more focused congressional control over the reduction process. It would place the first step in the decision making process where it is likely to serve Congress's institutional interests. Committees are familiar with oversight and accountability needs and might be most able to assess where less direct control through the confirmation process might be workable. In addition, proponents of a reduction in the number of PAS positions might be more likely to get cooperation on the Senate floor if committees have had significant input into their areas of greatest concern.

This option has several potential drawbacks, however. First, committees do not have an incentive to suggest significant reductions in the number of PAS positions. It could be argued that they

⁸⁹ This includes presidential appointments not requiring Senate confirmation, and Schedule C and noncareer SES appointments, as described above.

⁹⁰ The Department of Education had 4,572 employees and 17 PAS positions, while the Department of Defense had 670,724 employees and 51 PAS positions. Employment statistics are from U.S. Office of Personnel Management, *Federal Civilian Workforce Statistics: Employment and Trends as of January 2003* (Washington, August 2003), p. 13. PAS position information is from CRS Report RL31346, *Presidential Appointments to Full-Time Positions in Executive Departments During the 107th Congress, 2001-2002*, by (name redacted).

would be giving up some authority, while the only benefit might be a possible reduction in workload. Second, this approach has no explicit avenue of input for the President. An approach that is rational from the point of view of congressional committees might not yield an outcome that is rational from the point of view of the President's priorities or management goals. Finally, it could prove difficult to determine a target number of positions to convert for each committee, and it might, therefore, be difficult to provide committees with specific targets. Some committees have jurisdiction over many appointments; others, few.

Option 8: Establish Restrictions on Appointments to Certain Positions

Congress could change the appointment method for a number of PAS positions and then restrict the President's appointment authority for some of those positions. For example, Congress could specify, in statute, qualifications required for the holders of certain positions. Current law includes a number of examples of such requirements, including the provisions for appointment of the controller at the head of the Office of Federal Financial Management:

The Controller shall be appointed from among individuals who possess - (1) demonstrated ability and practical experience in accounting, financial management, and financial systems; and (2) extensive practical experience in financial management in large governmental or business entities.⁹¹

Alternatively, Congress could specify a process for determining the appropriate qualifications for the position. Either approach could allow Congress to retain some control over the qualities of the appointed individual while reducing the number of PAS positions.

Another way for Congress to restrict the President's appointment power might be to specify that he must appoint from among nominees submitted to him by particular organizations or offices. For example, the 11 members of the Nuclear Waste Technical Review Board "shall be appointed by the President ... from among [the not less than 22] persons nominated by the National Academy of Sciences." The nominees, in turn, must meet a number of qualifications, including being "eminent in a field of science or engineering."⁹²

To the degree that Congress's concern is to influence the qualifications of PAS appointees and prevent unqualified people from being appointed, this option offers a possible way of doing so without going through the advice and consent process. The option does not address other institutional and political concerns, however, including the potential loss of political leverage, oversight, and accountability.

Option 9: Require Notification by President of Some Non-PAS Appointments

Congress could reduce the number of PAS positions and require that the President notify appropriate Members of Congress (e.g., leaders in each chamber, relevant committee chairs) upon appointment of an individual to some or all of these positions. The notification could be required to include the qualifications of the appointee and the reasons for his or her selection. A notification period also could be specified. This requirement would be similar to present statutory requirements for removal of incumbents from certain positions. For example, the *U.S. Code*

⁹¹ 31 U.S.C. 504(b).

⁹² 42 U.S.C. 10262(b).

provides that if the President dismisses the Director of the Mint, “the President shall send a message to the Senate giving the reasons for removal.”⁹³ This option might mitigate the loss of congressional authority with regard to certain positions. It would provide Congress with an intermediate level of involvement in the appointment process for certain positions. Although Senators might lose the opportunity to evaluate qualifications before the appointment and the political leverage associated with the confirmation process for the particular position, this approach could maintain a greater level of accountability from the President for his appointment choices than would be the case if no notification were required.

A Comparison of Options

The options delineated above reflect different approaches to congressional determination of the number and distribution of PAS positions in the federal bureaucracy. Each balances the range of institutional and political considerations differently. The first option, maintaining the status quo, is the default option. Since it continues the present appointment arrangements, it probably offers the least institutional and political risk for Members, particularly Senators. This choice may have political consequences, however, if observers blame Congress, particularly the Senate, for a lengthening appointment process for increasing numbers of important positions. Already, commissions, such as those mentioned above, have drawn attention to perceived shortcomings in the appointment process for positions subject to Senate confirmation. As noted above, the submission of PAS position reduction plans by agency heads, as required by the Intelligence Reform and Terrorism Prevention Act, might increase the salience of this issue. If political momentum for changes to the appointment process grows in the future, Congress might, at some point, have less political control over the reform agenda than it now has. For this reason, Congress might benefit politically from a reduction in the number of PAS positions, even if the benefits to the appointment process of such a reduction are not clear. It is unclear to what degree such benefits might offset the potential political drawbacks.

If Congress opts to reduce the number of PAS positions, a functional or proportional distribution approach might best protect its institutional interests. A functional approach would allow Congress to maintain a greater role in, and give closer attention to, higher-priority functions. A proportional distribution approach might lead to more uniform accountability to Congress across departments and agencies. Alternatively, it could be argued that committees with oversight responsibilities are in the best position to determine where Congress needs the most accountability, and that their recommendations should be given the greatest weight in a reduction process. Any perceived loss of senatorial authority resulting from reductions under these methods might be mitigated by the establishment of restrictions or notification procedures for certain positions no longer subject to advice and consent requirements. The adoption of an expedited procedure might afford Congress the least control over the process and serve its institutional interests least well.

The institutional interests of the President, as manager-in-chief, may be best served when positions involve political appointments without the advice and consent of the Senate, and have no associated qualifications or other restrictions. Political appointees who are not confirmed by the Senate might be more responsive to the President than they would be if they were approved by the Senate as well. Increased allegiance from such appointees might strengthen the President’s

⁹³ 31 U.S.C. 304(b)(1).

ability to “take Care that the Laws be faithfully executed.”⁹⁴ From this perspective, any of the options that convert PAS positions to positions involving political appointments not subject to advice and consent would be preferable to the status quo. The establishment of an expedited procedure might be the most preferred option, if the President were accorded a significant role in selecting which positions should no longer require Senate confirmation of nominees.

Two of the options identified above address potential political challenges associated with PAS position reductions. First, the reduction process might be centered in the committees, so that committees would suggest lists of positions for consideration. Committees might be best able to suggest which PAS positions could be converted to non-PAS status at the lowest political cost. Nonetheless, it might prove too politically difficult, in this way, to select a significant number of positions for conversion, since Senate committees have a vested interest in continuing to participate in the confirmation of appointees to positions within their jurisdiction. Alternatively, the political difficulties associated with selecting PAS positions for reduction could be circumvented by centering the selection process outside Congress in a commission, with or without an expedited procedure. Although this method might be the most politically feasible option, it arguably might have significant institutional costs, as discussed above.

If Members of Congress envision the reduction of the number of PAS positions as a first step toward comprehensive reform of the appointment process, the magnitude of the reduction might not be as important as it would be if such a reduction were viewed as an end in itself. Even if the reduction achieved did not significantly improve the functioning of the Senate or reduce the length of the appointment process, it might establish a coalition of proponents of reform who could work together for further changes. Such an achievement also could serve to provide a precedent and momentum for further PAS position reductions or reform of various parts of the vetting process.

A Combination of Approaches

When institutional and political factors are considered, Congress might choose to develop a process that combines several of the options above. For example, the initial process might involve a group of representatives from various congressional committees, so that political considerations could be incorporated. The process might begin with a categorization of the pool of PAS positions into principal officers and inferior officers. The former group would be exempt from the remainder of the process, for constitutional reasons. The remaining pool might be further categorized in other ways. It could be divided into routine and non-routine or full-time and part-time appointments, for example. These groups of positions could be further assessed along functional lines to see if there is common agreement that certain functions do not require the closest attention of Congress. Positions also could be assessed by department and agency to determine whether Congress would be weakened as an institution by a decrease in the number of PAS positions in a particular organization. In some cases, the statutorily required PAS position reduction plans or further specified study by a commission or task force might assist Congress in its determinations. If such a process proved to be politically untenable, Congress might opt to create an expedited procedure for the reduction of positions. For some of the positions with changed appointment methods, Congress might establish statutory qualifications or other restrictions on the President’s appointment authority. In addition, or instead, Congress might

⁹⁴ U.S. Constitution, Art. I, Section 3.

establish appointment notification requirements for newly converted positions. This is just one example of the way the options discussed above might be combined.

Whatever additional legislative action it might elect to pursue with regard to determining the number and distribution of PAS positions in the federal bureaucracy, Congress might include a sunset provision so that appointment provisions would revert to their pre-existing status after some period of time unless Congress acted to make the changes permanent. If some Members were uncertain about the impact of certain changes, this provision could provide a trial period to allow Congress to assess whether the benefits of the changes outweighed any drawbacks.

Author Contact Information

(name redacted)
Analyst in American National Government
[redacted]@crs.loc.gov, 7-....

EveryCRSReport.com

The Congressional Research Service (CRS) is a federal legislative branch agency, housed inside the Library of Congress, charged with providing the United States Congress non-partisan advice on issues that may come before Congress.

EveryCRSReport.com republishes CRS reports that are available to all Congressional staff. The reports are not classified, and Members of Congress routinely make individual reports available to the public.

Prior to our republication, we redacted names, phone numbers and email addresses of analysts who produced the reports. We also added this page to the report. We have not intentionally made any other changes to any report published on EveryCRSReport.com.

CRS reports, as a work of the United States government, are not subject to copyright protection in the United States. Any CRS report may be reproduced and distributed in its entirety without permission from CRS. However, as a CRS report may include copyrighted images or material from a third party, you may need to obtain permission of the copyright holder if you wish to copy or otherwise use copyrighted material.

Information in a CRS report should not be relied upon for purposes other than public understanding of information that has been provided by CRS to members of Congress in connection with CRS' institutional role.

EveryCRSReport.com is not a government website and is not affiliated with CRS. We do not claim copyright on any CRS report we have republished.