



**A Half-Empty Government Can't Govern:
Why Everyone Wants to Fix the Appointments
Process, Why It Never Happens, and How We Can
Get It Done**

William A. Galston and E.J. Dionne, Jr.

On May 6 of this year, British voters failed for the first time in 36 years to give a single party a majority in their country's Parliament. This forced elaborate negotiations in which the Conservative Party, which came in first in the elections, and the second-place Labor Party bid for the affection of the Liberal Democrats, who effectively held the balance of power.

Viewed from an American perspective, the speed with which British politicians got a government up and running is astonishing. Within five days, the Conservatives and Liberal Democrats reached an agreement that made Conservative leader David Cameron Prime Minister. A day later, a full Cabinet was named. Less than two weeks after the election, the entire sub-Cabinet was filled. By contrast, it took almost 6 months from the election for President Obama's full Cabinet to work its way through the confirmation process.

Britain's parliamentary system allows for quick transitions in a way the United States' more cumbersome arrangements for divided power between the executive and legislative branches do not. Constitutionally, a newly-elected president does not even take office until two-and-a-half months after election day. The American approach to building a new government will, of necessity, always be slower than Britain's.

But the United States has taken a system that constitutionally mandates a longer transition of power and made it impossibly unwieldy, often through inadvertence and the accumulation of small decisions. This has created an enormous problem for governing that reached a near crisis point during the country's economic chaos in the early months of the Obama Administration. "Home Alone" was a fine movie, but it should alarm us that the phrase came to be applied to Treasury Secretary Timothy Geithner who, in March of 2009, found himself dealing with the worst financial catastrophe in 70 years without most of his principal deputies in place. There is something badly wrong when one Senate committee clears an appointee for one government job with little difficulty in less than three months while another Senate committee holds up the nomination of his wife for over a year because of a question about her taxes -- even though she and her husband *filed exactly the same joint tax return*. Is there any other democracy in which a single legislator can hold a Cabinet or sub-Cabinet nomination hostage to a bridge or office building in his or her state? Does any other government require nominees to fill out an endless stream of duplicative financial and personal disclosure forms -- and then hold a nominee accountable for missing a receipt for \$12.59? By the 18 month mark of Obama's presidency, a quarter of the key policymaking positions in government were still vacant. And at the time of the midterm elections, close to 20 percent of such positions were unfilled and some of



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Obama's early appointees have already resigned.¹

Most alarming is the fact that comparable problems with our system of naming and confirming nominees have been discussed year after year after year. Wise students of American government have been calling for reform for well over a decade. We thus offer this paper not to recommend a series of brand-new proposals, but to ask why so many thoughtful proposals offered by one distinguished commission and study group after another have gone nowhere — and to suggest ways out of this political impasse.

The failure to fix the process can certainly not be blamed on such commissions, which did their best to offer practical and reasonable reforms. It cannot be blamed on partisanship, since Republicans and Democrats agree that the process is broken and both Republican and Democratic presidents have found themselves frustrated by its workings. Both liberal and conservative policies have suffered in their implementation because of the difficulty presidents face nominating candidates and getting them confirmed. On the left, on the right and in the center, there is frustration over the unintended consequences of our ungainly approach to filling executive branch offices.

Recess appointments have long been seen as a way to circumvent the Senate, and like his predecessors, President Obama has put them to use. He has granted recess appointments to over 20 nominees, including some of his most controversial, such as Donald Berwick, the head of the Centers for Medicare and Medicaid Services, and Craig Becker to lead the National Labor Relations Board.² But the ungainliness of the process has prompted ever-more creative ways to circumvent the Senate and get officials in place rather than in confirmation-purgatory.

Most recently, Obama named Elizabeth Warren as a special advisor so that she could quickly begin developing the new consumer regulatory commission included in the financial overhaul legislation. Her appointment to a White House position allowed her to sidestep a potentially drawn-out confirmation process. Whether or not one agrees with Obama's decision to circumvent confirmation for Warren, the fact that his choice seemed quite rational as an alternative to months of delay in getting a critical new agency up-and-running is a symptom of the confirmation mess.

Another symptom to consider is the widespread impatience with the number of "policy czars" President Obama has named. As the scholar Paul Light has pointed out, what he labeled "czar-itis" is a direct and rational presidential response to the difficulty of winning confirmation for Cabinet and sub-Cabinet appointees. Freed from the need for confirmation, those named as czars inside the

¹ David E. Lewis, "Presidential Appointments in the Obama Administration: An Early Evaluation." Forthcoming in Andrew Dowdle, Dirk van Raemdonck, Robert Maranto, eds., *The Obama Presidency: Change and Continuity*. New York: Routledge (2011).

² Ibid

White House can get to work with dispatch on a new president's priorities. Fixing the appointment and confirmation process is the prerequisite for curing "czar-itis."

It is not only the Senate that may be the loser in this scenario, however. The scholar David Lewis argues that because "czars" lack formal authority to decide on everything from budgets to personnel to regulations they must rely on other officials to implement the president's desired policies. Ironically, Lewis says, this may make it more difficult for the president to recruit people to serve in key policymaking positions. Because the czars' authority derives from their access to the president, their existence makes Cabinet secretaries and agency heads middle managers, and many qualified individuals may not be willing to go through a brutal confirmation process and take a significant pay cut only to be second in command. What's more, as the number of czars increases, the less access each of them has to the president, thus diminishing their authority and making it more difficult for the president to implement his policy objectives.

Abuses of the confirmation process, far from strengthening the executive's accountability to the legislative branch, instead call forth ever more creative executive actions to get around Congressional scrutiny. And that creativity has, in turn, led to an executive branch potentially weaker and less able to control and influence the departments and agencies it depends on to implement its policies.

Without any formal Constitutional change, the very structure of the American government is being altered. A confirmation process designed to safeguard Congress' prerogatives has, in important ways, undermined them.

And some of the problems should, in principle, be easily fixed. As Light observed in a New York Times op-ed piece in March, 2009: "At least half of the delays in the presidential appointments process appear to involve bureaucratic red tape and duplication of effort, while a quarter appear to reflect the rising and inappropriate use of personal holds by the senators to extract concessions from the president and fellow legislators."

Light also wrote: "Clogged with bureaucratic sediment and filled with distrust, the appointments pipeline involves a succession of twists and turns that leaves nominees exhausted, embarrassed and confused." It's worth noting that this quotation comes not from the 2009 piece, but from an op-ed article Light offered *eight years earlier* in the Wall Street Journal, in April, 2001.

Or consider this sharp, well-informed analysis of our problem:

Contemporary presidents face two daunting difficulties in filling the top posts in their administrations: the number of appointments is very large, and the appointments process is very slow.

When President Kennedy came to office in 1960, he had 286 positions to fill in the ranks of Secretary, Deputy Secretary, Under Secretary, Assistant Secretary, and Administrator — the principal leadership positions in the executive branch. By the end of the Clinton administration, there were

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914 positions with these titles. Overall in 2001, the new administration of President George W. Bush confronted a total of 3,361 offices to be filled by political appointment.

The time required to fill each of these positions has expanded exponentially in recent decades. . . . In part, this results from the more thorough and professional recruitment procedures employed by recent administrations. But most of the elongation of the appointments process is the consequence of a steady accumulation of inquiries, investigations, and reviews aimed at avoiding political embarrassment. These include extensive vetting, lengthy interviews, background checks, examinations of government computer records, completion of questionnaires and forms composed of hundreds of questions, FBI full-field investigations, public financial disclosure, and conflicts of interest analysis. Much of the process is duplicated when a nomination goes to the Senate and is subjected to the confirmation process.

These observations, as relevant now as they were when they were made, come from the January, 2003 report of the bi-partisan National Commission on The Public Service, commonly known as the Volcker Commission after its chair, Paul Volcker. Again, why were they not fully-embraced and acted upon?

The pithiest description of our confirmation-nomination process came from the scholar G. Calvin Mackenzie, who called it “Nasty and Brutish Without Being Short.” He offered it in the spring of 2001.

We cite this past good work — a very small portion of all the labor and thinking that has gone into curing a problem everyone recognizes — to underscore that this paper is premised on the assumption that what has foiled reform is *not* a shortage of good ideas or a lack of clear thinking. Both have been well-supplied over the years by scholars, legislators and former government officials, and substantial ongoing work in this area has been undertaken by, among others, the Partnership for Public Service, the Center for American Progress, and the Aspen Institute in partnership with the Rockefeller Foundation.

Rather, this paper is offered in support and in tribute to such efforts and in the hope that they might, at long last, be taken seriously by the president and by Congress. Our purpose is twofold: to bring together some of the most practical reforms that have been put forward over the years to speed nominations and confirmations; and to explore whether there are new opportunities to break through the torpor and resistance that has greeted such proposals in the past.

We divide the proposals into two groups. The first we characterize as the “low hanging fruit” of reform. These are practices that could be put into place with relative ease — many of them by presidential candidates and presidents-elect themselves, without any new legislation or changes in Senate habits. Other ideas in this category raise no issues involving the balance of power between Congress and

the president and should raise no principled objections. These would include creating a “surge capacity” before the beginning of a new president’s term involving a temporary increase in the number of FBI agents, Senate staffers and others involved in vetting so as to avoid backlogs. We also suggest a tiered-system of background checks, with the most stringent reserved only for top-level positions.

The second category involves worthwhile changes that will require a larger appetite for reform and substantial political will. These include, among other ideas, a sharp curtailing of the use of “holds” by individual senators, a reduction in the number of positions requiring Senate confirmation, and mandatory discharge procedures to encourage Senate committees to act with dispatch.

In preparing the ground for this report, we consulted officials from past Republican and Democratic administrations with responsibilities for appointments, scholars and legislators. What struck us most during a day-long roundtable discussion is how little partisan division there is on the core questions, how resolutely practical reformers are trying to be, and how attuned the best thinkers in this area are to seeking ways to overcome the political obstacles to change. We are grateful for their thoughtful contributions and have drawn extensively on their ideas in this report.

If the nomination-confirmation problem has long been recognized, and if so many good ideas have been proposed — we include an Appendix that lists some of the commissions and many studies — what has been missing? We have lacked the political will to break through the inertia. We have mourned the delays in the process in the period after a new president’s election — and then let the problem slip from public attention as administrations slowly filled key posts and as other matters, understandably enough, loomed as so much more urgent. We have failed to act on even the simplest and most easily adopted proposals. Presidents themselves have become complicit in the problem. They have deployed their own vetting processes in ways that greatly delay their own appointments out of an at times crippling anxiety over an admittedly difficult political and media environment in which every nominee’s smallest flaw might be magnified into a major — or, at least, much televised and blogged about — scandal.

But we also believe that reformers need to pay more attention than they have to the political factors that have blocked reform, most of them rooted in competing but thoroughly legitimate concerns. For example, if the public has a legitimate interest in a government up-and-ready to act early in a president’s term, and if a president has a legitimate expectation that he will be able to surround himself with officials of his own choosing, Congress also has a legitimate concern with oversight and accountability. How can reforms protect all these interests at once?

Speed is obviously not the only factor entailed in appointments. Quality, experience, character and competence matter most. How can candidates for president build in enough time before they are elected to properly vet appointees so that they are ready not only to put a government in place with dispatch, but to

put a good and highly qualified government in place?

Ethics rules passed to avoid conflicts-of-interest and self-dealing in government have, in important ways, made our government cleaner and less subject to abuse. We strongly oppose overturning the core ethics laws. But we also think that they can be enforced without the excess of paperwork, the hugely burdensome and duplicative reporting requirements, and the sometimes petty and irrelevant questions posed to potential nominees during the vetting process.

The confirmation process involves power.

The confirmation process involves power. Individual senators will be reluctant to yield the power they wield through “holds.” Presidents may be reluctant to yield power by agreeing to reduce the number of confirmable political positions and rely more on career civil servants. Individual Senate committees may be reluctant to abandon practices particular to themselves in the interests of a more streamlined confirmation process. We would suggest that rather than focusing their efforts entirely on coming up with additional reform proposals that make sense in political isolation, would-be reformers devote more effort to finding ways around or through the political difficulties that have blocked the many, already sensible ideas on the table.

Why might this moment be different from other moments? Why might reforming this process be more possible now than in the past? We offer four reasons for hope.

First, the country barely dodged a bullet in the early months of the Obama presidency. A president confronting the worst economic crisis in decades had to do so while many core positions in his Treasury went unfilled. He also had to deal with two ongoing wars and an ambitious plan to refashion American foreign policy without all of his major foreign policy aides in place. There is no telling if the earlier months of the Obama term might have been more successful if more of the president’s team was in place. What is clear is that we would be foolish to take this risk again.

Second, the very rebellion against “czar-itis” points to the dysfunction of the current system, the contradictions it creates and the way in which efforts to create more accountability to Congress are backfiring. It’s time to reexamine many assumptions.

Third, the last Congress created a reaction against the abuse of Senate filibuster rules. It is not our purpose here to wade into that debate, but only to suggest that the fact that the Senate is at least considering broad reform proposals might create room for less sweeping fixes, notably a repair of how “holds” are used in the nomination process.

Finally, the 2010 elections have produced a much more closely divided Congress with a Senate and a House under the control of opposing parties. In this climate, Congress might at least consider paying more attention to issues that lack ideological energy and also have the virtue of not dividing neatly across left/right or Republican/Democratic lines — reforms with genuine bi-partisan support.

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Indeed, the passage in September of the “Pre-Election Presidential Transition Act of 2010” (subsequently referred to as the transition act) is an early indicator that the Senate is able to unite to pass such reforms. The bill, which cleared the Senate with unanimous consent, includes provisions to encourage and support presidential candidates as well as sitting presidents to begin early and effective transition planning, allowing for important positions within the executive branch to be filled almost immediately upon the inauguration of a new president. Congress should build on this achievement.

We believe appointment and confirmation reform should remain a priority, and it should be undertaken now, before either party can be certain of the partisan affiliation of the next president, or the one after. Reformers largely have the right ideas. Now, they must find creative ways of getting the politics of reform right.

Presidential Appointments: Reframing the Conversation

Political pundits, political scientists, and practitioners agree that the current presidential appointments process is deeply flawed — some would say broken. Among pundits and many nominated victims, the prevailing view is that the fault lies mainly with the legislative branch, and its source is our hyperpolarized party system. Presidents send nominations to the Senate, where they languish, held hostage to quirky “holds” and to the desire of the president’s adversaries to embarrass him and obstruct his agenda. Stuart Eizenstat, who successfully navigated the confirmation process four times during the Clinton administration, speaks forcefully about the “political polarization fostered by a grassroots internet blog and cable-driven highly ideological and partisan politics” that is “simply being mirrored in the appointments process.”³

There is much validity to this view, and no shortage of cases that support it. This, alas, points toward the despairing conclusion that nothing much can be done, absent a radical decline in political polarization and a renewed devotion to the common good on the part of power-maximizing individual senators.

A second well-known view focuses on what Light calls the “thickening” of the federal government — the proliferation of new layers of officials within Cabinet departments and agencies, most of whom are presidential appointees requiring Senate confirmation. As Light pungently puts it, “We are just forcing too many people through a system in the White House and on Capitol Hill that cannot process that many people. Sort of like the oil spill: you can stand on the beach and try to mop it up, or you can try to shut the thing down. And if you’re in mop detail, you’re never going to catch up.”⁴

The evidence for the thickening thesis is undeniable. When Ronald Reagan took office in 1981, he faced the task of filling 295 core policy positions in the

³ Stuart Eizenstat in discussion with the authors, Brookings, (May 2010).

⁴ Paul Light in discussion with the authors, Brookings, (May 2010).

Cabinet departments and executive agencies. Twenty-eight years later, the incoming Obama administration confronted 422 such positions.⁵ A recent White House Transition Project Report documents a total of 1177 full-time presidential appointments, almost all statutory, that require Senate confirmation.⁶ While some of these nearly 1200 positions are part-time advisory positions and appointments to regulatory commissions, the burden of processing them further inundates an already overwhelmed system.

Here again, we encounter a counsel of near-despair. Despite reports and recommendations going back more than a quarter of a century, past efforts to prune back this proliferation have yielded few results. As members of our roundtable pointed out, there are several reasons for this failure. Among them: the Senate jealously safeguards its confirmation powers as a check on the executive, and many senior Cabinet and agency officials regard Senate confirmation as a *sine qua non* for membership in the elite circle of men and women with principal responsibility for the president's agenda.

It is heartening, then, that a different understanding is now gaining ground. While acknowledging the influence of polarization, thickening and Senate prerogatives, the proponents of this third view — they include political scientists, policy experts, and practitioners — stress the ways in which presidents bring many problems on themselves: by starting the process too late in their campaigns; by failing to ensure continuity between the campaign, the transition, and their administration; by asking prospective nominees for excessive amounts of information; and by over-reacting to the high-profile glitches that inevitably occur.

Political scientists and practitioners also underscore the impact of problems rooted more in administrative capacity than in political will. Key choke-points in both the executive and legislative branches are unable to handle the surge of vetting responsibilities generated by the bunching of prospective nominees at the beginning of new administrations.

Presidential decisions and administrative inadequacies combine to create long delays in submitting completed nominations to the Senate for confirmation. As a result, in each of the past four administrations (including Obama's), the "nomination lag," the average time for sending nominations to the Senate, was between two and three times as long as was the gap between receipt of nominations and confirmation. If the Senate acted on every nomination within a month, the time needed to fill positions would decline by less than 20 percent.

These figures exclude positions for which the executive branch fails to submit a completed nomination. A full year into the Obama administration, for example,

⁵ Anne Joseph O'Connell, "Waiting for Leadership: President Obama's Record in Staffing Key Agency Positions and How to Improve the Appointments Process," Center for American Progress (April 2010).

⁶ Bradley H. Patterson, James P. Pfiffner and David E. Lewis, "The White House Office of Presidential Personnel," White House Transition Project (2009), 5.

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the Senate had received only 326 nominations to fill 422 Senate-confirmed positions in Cabinet departments and executive agencies—77 percent, versus 86 for George W. Bush and 78 percent for Clinton. As a result, the administration managed to fill only 64 percent of the total in that period, versus 86 percent for Reagan, 80 percent for George H.W. Bush, 70 percent for Clinton, and 74 percent for George W. Bush.⁷ (Using a somewhat broader base of 516 positions, The Washington Post found that Obama got only 305, or 59 percent of these positions filled within his first year.)

None of this absolves the Senate – and particularly its opposition party – of its role in delay, and, at times, obstruction. The evidence is clear: the “confirmation lag” – the gap between receiving and acting on nominations—is increasing. It averaged 51.5 days during George H. W. Bush’s first year; during Obama’s that rose to 60.8 days, a figure that is actually understated because it does not include nominees that had not yet been confirmed by March, 2010. (Therefore the confirmation lag for Obama nominees is likely even longer.) Nonetheless, even the understated figures are telling: at the end of George H. W. Bush’s first year, only 8 percent of total nominees were still awaiting confirmation, compared to 20 percent for Obama.⁸

Some members of our convening cautioned against giving too much weight to these statistics. As Calvin Mackenzie put it, “The goal of this process should be to get the best people into government we can get, not speed. There are unnecessary delays, and we ought to focus on them. But it takes time.”⁹ True, but delay is inherently costly. As Anne Joseph O’Connell has written, “Vacancies at federal agencies can undermine government responsiveness and accountability.” She offers a number of telling examples: among them, the fact that it took until Christmas Eve to confirm a permanent head of the National Highway Traffic Safety Administration, which arguably slowed the administration’s response to the Toyota safety fiasco. It took President Obama more than a year to select a nominee for undersecretary of agriculture for food safety, one of the key officials charged with monitoring and maintaining the integrity of our food supply. And when there was an attempt to destroy an American passenger plane bound for Detroit, there was no head of the Transportation Security Administration in place. (Indeed, one was not confirmed until six months after the attempted bombing.)¹⁰

Reforming the Senate confirmation process is thus necessary, but our consultation suggests that even in the absence of such changes, presidents — in their time as candidates, in the interim months as president-elect, and in the period after their inauguration — can do a great deal to improve this situation, without any changes in legislation or political heavy lifting. These measures — the “low-hanging fruit” of reform — are the focus of our first set of recommendations.

⁷ Joseph O’Connell, “Waiting for Leadership,” 8-9.

⁸ *Ibid.*, 10.

⁹ G. Calvin Mackenzie in discussion with the authors, Brookings, May 2010.

¹⁰ Joseph O’Connell, “Waiting for Leadership,” 3, 11.

Improving the Appointments Process: Low-Hanging Fruit

Vital early steps

At the outset, presidential candidates must come to understand both the importance and the complexity of the appointments process. Many candidates, career senators, for example, lack executive experience; others, such as governors from small states, may believe or hope that the process at the federal level is as informal and ad hoc as it is at home. Some may not fully understand how important an effective personnel process will be to implementing their legislative and policy agendas.

By the beginning of the election year at the latest, senior campaign aides and outside experts should walk prospective nominees through the challenging complexity of the federal appointments process and the careful response it requires. These briefings should include case-studies of campaigns widely regarded to have handled this challenge well, along with cautionary notes drawn from those that did not. It should be noted that the recently passed transition act requires the General Services Administration to offer each candidate, upon nomination, briefings, trainings and resources to begin transition planning. While this is a large step forward, campaigns must take further steps to prepare themselves, the most vital of which involve preparations for the task of considering and selecting nominees.

- Start early — by the middle of the election year at the latest. (Some successful campaigns have begun as much as a year before that.)
- Remove the political stigma from early planning. The transition act includes a provision to educate the campaigns, press and public on the importance of early transition activities. Nonetheless, it's easy to imagine that charges of arrogance and “measuring the drapes” would persist if early transition and personnel efforts became public. One solution is for the campaigns to negotiate a truce, acknowledging the urgency of this planning process and pledging not to attack each other for engaging in it. The transition act is certainly the first step toward institutionalizing and depoliticizing this process. We offer more proposals in this area later.
- Candidates should give their designated heads of the personnel process unchallenged authority over the appointments planning process and make that fact clear to all other parts of their campaign. As both Jimmy Carter and Bill Clinton learned, struggles for control can lead to consequential confusion and delay.

- Candidates should make it clear to their designated personnel heads that they are expected to remain in that position during the transition and for at least the first year of the administration. In turn, the heads of personnel should require the same commitment from their key deputies. Continuity of leadership in the personnel process is a necessary condition for success.
- During the transition, the president-elect and the personnel office should aim to select and vet nominees for all key positions, at senior sub-Cabinet as well as Cabinet levels. It is important to have these nominations teed up early, before the White House Counsels' office and Senate committees get bogged down with their ongoing substantive responsibilities.
- In consultation with the personnel office, the president-elect should establish numerical goals and timetables for key dates during the first year: the first hundred days, six months, and the end of the calendar year. All relevant parts of the Executive Office of the President should be informed of this plan and understand the high priority the president has accorded it.

Steps the outgoing administration should take

In the appointments process as in so much else, it takes two to tango. While there is much that presidents-elect can do during the transition, they need help from their predecessors. Many observers credit George W. Bush with having created the best hand-off in history to an incoming administration of the opposite party, but as Senator Ted Kaufman and his co-sponsors on the transition act recognized, "not every incumbent administration has made or can be expected to make transition planning the priority it was made by the Bush Administration."¹¹ The transition act authorized appropriations for all of the following activities, which were undertaken by Bush and which we recommend future presidents repeat. Here are the key elements.¹²

- Early in 2008, President Bush instructed his chief of staff, Josh Bolten, to make 2008-2009 "the best transition possible regardless of who was going to win." Both the president and the chief of staff effectively communicated this commitment to the Cabinet and other senior officials. As a result, the Obama and McCain transition teams were

¹¹ Press Release, "Senate Passes Kaufman Bill to Improve Presidential Transfers of Power," (September 24, 2010).

¹² This overview of Bush's transition activities is based on "Ready to Govern: Improving the Presidential Transition," Partnership for Public Service (January 2010), 6-8.

treated equally: all materials and briefing given to one were offered to the other as well.

- To institutionalize this commitment, President Bush issued an executive order creating a White House Presidential Transition Coordinating Council, which met regularly to plan for the smoothest possible transfer of power.
- In April, Bolten told Clay Johnson, OMB's deputy director for management, to take charge of preparing the agencies for the transition. The president's Management Council (deputy secretaries of Cabinet departments plus chief operating officers from major agencies) then ensured that by mid-October, senior career officials would be designated and prepared to fill major positions on a temporary basis until the incoming administration was able to fill them.
- Before the election, the White House helped expedite security clearances for key advisors and transition officials of both campaigns.
- According to Bolten, the Bush White House prepared a "complete inventory and description of all the appointed jobs in government" that was given to the transition directors of the two campaigns.
- With the agreement and cooperation of both campaigns, the White House facilitated the design and creation of a new presidential personnel computer system to replace the much older system it had been using. The plan was to create a seamless interface between the systems the campaigns were using and the system one of them would inherit on Inauguration Day.

Two other steps would also help incoming administrations carry out their personnel business more effectively.

- The Office of Personnel Management should take the lead in creating an online database of basic information for all presidentially appointed positions, divided into two categories: those that require Senate confirmation and those that do not.
- Though it is currently common practice, outgoing presidents should continue to request and receive formal letters of resignation from all appointees, to be effective no later than the new president's inauguration.

Speeding the vetting process

It takes too long to complete the vetting process for prospective nominees, slowing

the formal submission of their names to the Senate. And in far too many instances, the Senate's additional background checks take too long as well. Participants in the Brookings roundtable agreed on a number of policies that would substantially improve this process and would generate at most modest political difficulties.

There are, for example, a number of steps the president can take on his own, most through executive order. They include:

- simplifying the cumbersome personal data statement;
- for previously vetted candidates, starting background checks, not from scratch, but where the previous checks left off;
- making more extensive and effective use of private-sector headhunters to propose candidates for top positions; and
- supplementing the FBI's capacity by using the Office of Personnel Management for nominees' background checks. As Clay Johnson argues, "The largest investigative agency and capacity in the federal government is OPM. They do the background check for . . . almost every security clearance. So the . . . background checks that include access to the most sensitive information in our world [are] done by OPM. They have 8500 background check people; probably 500 to 750 of them are plenty qualified to do an FBI-caliber background check. So why isn't OPM used by the White House? The reason is, that's just not the way it's ever been done."¹³

Norman Ornstein outlined another important proposal—namely, establishing a tiered system of background checks, from the most stringent for top-level positions through the least detailed for most part-time commissions. In principle, this could be done through executive order. In practice, previous administrations, including George W. Bush's, have declined to go down this road, perhaps, Ornstein suggests, because it would require the administration to make a series of judgments as to the importance and potential sensitivity of hundreds of positions. If so, he concludes, the legislative route might offer better prospects, even though legally it is not necessary.

This brings us to measures for improving the vetting process that certainly would require Senate cooperation or formal legislation but that might well enjoy bipartisan support. They include:

- simplifying the SF-86 form (clearance information) and the SF-278 form (financial disclosure information);
- providing "surge capacity" — additional temporary personnel needed to process the flood of early nominations and background inquiries —

¹³ Clay Johnson III in discussion with the authors, Brookings, (May 2010).

in the Presidential Personnel Office, FBI, and relevant Senate staff. In the case of the FBI, not enough retired agents are hired during the transition period to undertake background checks, and the White House has never been demanding enough about the pace at which these checks should be completed.

- Authorizing an expansion of the White House personnel operation to create a permanent staff of professionals, overseen and supplemented by presidential appointees. The permanent staff would administer the personnel software and online information about positions requiring presidential appointments, work on an equal basis with all qualifying presidential campaigns, and serve as the ongoing institutional memory for incoming administrations, much as career officials at OMB now do so effectively for presidential appointees.

Improving the Appointments Process: Heavy Lifting

Up to this point, we have focused on steps presidents can take on their own, or for which they can reasonably expect congressional support. For the most part, these steps are addressed to the kinds of delays in the appointments process that reflect either inattention or lack of capacity. But as we've seen, there are two other significant kinds of obstacles — political polarization and the thickening of government. Addressing these will be far more difficult.

One suggestion might seem straightforward and uncontroversial — namely, instituting uniform forms for all Senate committees of jurisdiction over nominees. But committees guard their prerogatives jealously and regard their distinctive forms as necessary to elicit the specific information each of them requires. Past pushes for uniformity have come to naught, and it's not clear why this should change now. Yet this single change would substantially simplify what has become a Byzantine system. Senate committee chairs should commit themselves to achieving this reform. Better still would be a single form agreed upon between the White House and the Senate.

Or consider efforts to speed confirmation votes by eliminating or restricting the “holds” that individual senators can place, anonymously and without public justification, on nominees. It is hard to defend such a practice, but some senators do, citing the tradition of an institution in which each individual is an empowered agent. And it offers individual senators a chance to use nominees as hostages and bargaining chips to attain policy objectives otherwise out of reach. While some reform seems possible — at least, enforcing rules requiring senators to disclose their holds — eliminating this practice altogether is not now in the cards. Again, however, the current system is indefensible and some modification is essential.

Other far-reaching proposals include mandatory discharge procedures

providing that if a committee does not act within (say) 30 or 45 days of receiving a nominee with a full package of required information, that nomination would become eligible for consideration by the full Senate. Bolder still would be what some have called “confirmation by rule”: nominees below a certain threshold of rank or significance would be deemed confirmed by default if the Senate did not act within a specific period. While this would entail a major surrender of Senate prerogatives, which would be possible only if a majority of senators agreed, there is a strong case that maintaining authority over third-tier appointments just isn’t worth the time and trouble.

Thinning government by reducing the number of Senate-confirmable positions raises even more complex issues — even if, again, there are few persuasive reasons for forcing so many appointees through an increasingly cumbersome and, at times, dysfunctional process. There was a consensus among members of the Brookings session that this effort could not succeed unless the president takes the lead. And because the Senate sees this as reducing its power vis-à-vis the executive branch, the president would have to offer serious concessions to achieve this reform. The president might, for example, offer to convert a number of positions from “at will” appointments to fixed terms, which would restrict the president’s ability to control the executive branch. Another would be to move specialized categories of appointees, such as inspectors-general, to career status. And in return for switching positions from presidential appointment/Senate confirmation to presidential appointment only, the president could offer to allow these reclassified appointees to be called to testify before congressional committees, just as confirmed appointees must do now. But such a negotiation can succeed only if a president makes a serious commitment to undertake it.

It’s not hard to identify other steps that would be essential for the success of any broad effort to change the appointment process through legislation. The political parties would have to be on board with a free-standing of reforms negotiated with both caucuses. The bill would have to move at the beginning of a congress before rising partisan rancor and the press of other business obtruded. And the surrounding environment would have to be supportive. At a minimum, liberal and conservative opinion-leaders would have to converge on a common position. The ex-presidents of both parties could be mobilized as evidence of broad-based support. It might even be necessary to appoint a new “Hoover Commission” — with prestige comparable to the 9/11 Commission — to send a credible signal that certain changes are above party and in the national interest.

We don’t know how far such a push would get. But one thing is clear: we won’t ever know unless leaders from both parties emerge who are prepared to give it both high priority and unwavering support.

A New Politics for Confirmation Reform

Washington is all too familiar with problems that do not get solved or at least

A Half-Empty Government Can’t Govern: Why Everyone Wants to Fix the Appointments Process, Why It Never Happens, and How We Can Get It Done

ameliorated because deep partisan and ideological divisions make consensus impossible. It's true that partisan divisions have slowed the confirmation process. It's also true that the desire to score political points combined with the current media environment have made presidents more skittish about appointees, prospective appointees themselves more reluctant to commit to public service and all players in the process more reluctant to give potential opponents the benefit of the doubt.

Nonetheless, the problems with the confirmation process are widely recognized. Solutions to the problem do not have an ideological coloration. As we learned in our own consultations, there is broad agreement across the lines of party and ideology that the system is broken — and remarkably broad agreement about potential solutions.

We would urge that those who take on the seemingly thankless task of fixing this process (including future commissions) concentrate their energies less on coming up with new ideas than in thinking through how to overcome these political obstacles. Participants in our own consultations offered examples of creative political approaches. For example, Clay Johnson suggested that the problem be redefined by establishing a series of clear goals. He suggested that a new president might define what he considers to be the 100 most time-sensitive positions in his administration and that the administration and the Senate commit to make every effort to fill these positions by a fixed time, perhaps by April of the first year of a president's term. The agreement would also involve a set of rolling commitments — that the next 200 be filled within, say, two further months and so on. Johnson's point is well-taken: Establishing clear and specific goals is more likely to lead to action than a broad but general commitment to reforming the whole process. In light of the Obama Treasury experience during the economic crisis, there should be a central emphasis on filling both Treasury and State Department positions essential to the nation's security, including its economic security.

As we have already suggested, the Senate and Congress as a whole does have a legitimate interest in accountability. But too much of the burden for achieving accountability is now placed upon the confirmation process. Presidents can reassure Congress of its right to testimony from occupants of presidentially appointed positions removed from the rolls of those requiring confirmation. When it passes laws creating new positions, Congress does not always have to insist that the nominees in all cases should require Senate confirmation. Or it can make a practice of removing old positions from the category requiring confirmation when it adds new ones. Presidents can consider using more civil servants in what are now categorized as "political" positions but that often require specific forms of expertise that are already available in the government.

In a climate where reform of the Senate, including the filibuster, is now on the agenda, it ought to be politically possible to make at least modest fixes in the use of holds, particularly secret holds.

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Solutions to the problem do not have an ideological coloration.

And a clearance process created for the period of the Cold War can be revisited so as to create a tiered system for vetting. Just as there are different levels of clearance for government documents, so can there be different levels of vetting.

We reiterate this particular list of ideas simply to illustrate our hope that thinking in this area can become as shrewd about solving political problems as it has already become wise and creative in offering fixes. We suggest that rather than rail against obstacles or denounce the fact that various players in the process have their own narrow power and political interests, reformers accept that such political factors are inevitably part of a democracy. Reformers need to work with them, or around them.

Among the democracies, the United States has created — without intending to — what is almost certainly the most ungainly process of filling a government with qualified people. We would not design the system this way if we started from scratch, yet we cannot start from scratch. But neither can we leave the system as it is. With a dose of political shrewdness and creativity, we can make the system far better.

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Appendix

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