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## **9/11 Commission Recommendations: The Senate Confirmation Process for Presidential Nominees**

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# 9/11 Commission Recommendations: The Senate Confirmation Process for Presidential Nominees

## Summary

On July 22, 2004, the National Commission on Terrorist Attacks Upon the United States, known as the 9/11 Commission, issued its final report, detailing the events up to and including the September 11, 2001 terrorist attacks upon the United States. The report contained 41 recommendations on ways to prevent future catastrophic assaults, including a series of proposals designed to improve the presidential appointments process as it relates to the top national security officials at the beginning of a new administration. On October 6, the Senate passed legislation (S. 2845) to implement many of the changes recommended by the 9/11 Commission. The House on October 8 passed its version of the legislation (H.R. 10). Conferees working out the differences between the two bills reported out a compromise on November 20. Two other measures dealing with the 9/11 Commission's recommendations (S. 2774 and H.R. 5040) were introduced in early September.

The 9/11 Commission recommended that the Senate adopt rules requiring hearings and votes to confirm or reject national security nominees within 30 days of their submission at the start of each new presidential administration. Implicit in the proposal is the assumption that there is a problem with the process for nominating and confirming presidential appointees. Analysis of Senate consideration of the initial nominations by Presidents William J. Clinton and George W. Bush to the posts covered by the recommendation shows that the commission's proposed timetable was not met in 14 of the 49 cases, suggesting this is an issue in a minority of cases.

The Constitution gives the Senate a role in the presidential appointments process, but the parameters of that role have never been clearly defined. The current process is regulated by a mixture of formal rules and informal customs, as well as by political interactions between the President and Senators. Implementing the commission's proposal would presumably require instituting procedures that guarantee committee consideration of each nomination, at least at a hearing, and a final vote on each by the full Senate. Changes of this kind would involve new restrictions on both the power of committee chairs to control the agenda of their committees and the rights of Senators to delay or block nominations through holds and extended debate. These changes would likely also alter the relationship between the legislative and executive branches, weakening the negotiating posture of the Senate in relation to the President, particularly if they were to be extended to additional nominations.

Procedures adequate to implement the commission's recommendation would resemble an expedited procedure, such as those used in resolutions of approval and disapproval of executive actions. Procedural changes of this kind could be achieved by amending the Standing Rules of the Senate, changing the Standing Orders of the Senate, passing a Constitutional Amendment enacting an expedited procedures statute, or reaching a unanimous consent agreement.

This report will be updated as events warrant.

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# 9/11 Commission Recommendations: The Senate Confirmation Process for Presidential Nominees

On July 22, 2004, the National Commission on Terrorist Attacks Upon the United States, also known as the 9/11 Commission, issued its final report, detailing the events up to and including the September 11, 2001 attacks on the United States. The commission made 41 recommendations to Congress and the President on ways to prevent future catastrophic assaults. As a part of its recommendations concerning “Unity of Effort in the Congress,” the 9/11 Commission included a series of proposals designed to improve the presidential appointments process as it relates to the top national security officials during presidential transitions.

Recommendation: Since a catastrophic attack could occur with little or no notice, we should minimize as much as possible the disruption of national security policymaking during the change of administrations by accelerating the process for national security appointments. We think the process could be improved significantly so transitions can work more effectively and allow new officials to assume their new responsibilities as quickly as possible.<sup>1</sup>

In the specific steps needed to implement this recommendation, the 9/11 Commission mentions the Senate confirmation process in a single sentence: “The Senate, in return, should adopt special rules requiring hearings and votes to confirm or reject national security nominees within 30 days of their submission.”<sup>2</sup>

This short proposal appears to require major changes in the way the Senate conducts its part of the process.<sup>3</sup> The 9/11 Commission’s report did not say how to implement or enforce their recommendation. This report addresses these questions and also discusses the rationale for and implementation of the recommendation.

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<sup>1</sup> The National Commission on Terrorist Attacks Upon the United States, *The 9/11 Commission Report: Final Report of the National Commission on Terrorist Attacks Upon the United States* (Washington: GPO, 2004), p. 422: Hereafter the *9/11 Commission Report*.

<sup>2</sup> *The 9/11 Commission Report*, p. 422.

<sup>3</sup> Additional 9/11 Commission recommendations dealing with the presidential appointment process are analyzed in CRS Report RL32588, *9/11 Commission Recommendations: Changes to the Presidential Appointment and Presidential Transition Processes*, by Henry B. Hogue.

## The 9/11 Commission's Proposal

On November 27, 2002, Congress created a commission charged with investigating the September 11, 2001, terrorist attacks on the United States. The National Commission on Terrorist Attacks Upon the United States, also known as the 9/11 Commission, was to

make a full and complete accounting of the circumstances surrounding the attacks, and the extent of the United States' preparedness for, and immediate response to, the attacks; and...investigate and report to the President and Congress on its findings, conclusions, and recommendations for corrective measures that can be taken to prevent acts of terrorism.<sup>4</sup>

The panel's July 22 report was the culmination of a series of hearings and investigations by the panel and its staff into the terrorist attacks. The report included a wide-ranging series of proposals to change intelligence agencies of the executive branch and some committee structures within the legislative branch.

The 9/11 Commission's recommendations on the appointment process are designed to make it quicker and more predictable for a relatively small group of nominees. The proposal is relatively sparse on details, and implementing it would require the Senate to flesh out the plan substantially; however, it is clear that the recommended changes in the Senate's confirmation process would provide a certain up-or-down vote by the full chamber on all National Security Team nominees within a definitive time frame (30 days) after a nomination is made at the start of an administration.

### Congressional Response

On October 6, the Senate passed, by a vote of 96-2, legislation (S. 2845), introduced by Senate Governmental Affairs Committee Chair Susan Collins and Ranking Member Joseph I. Lieberman, that would implement many of the 9/11 Commission's recommendations. As introduced, the bill did not address the 9/11 Commission's proposal to institute a time-frame for Senate consideration of national security nominees at the start of a new presidential administration. During consideration of the measure, Senators adopted by voice vote an amendment that added "sense of the Senate" language to the bill. It states that the "Senate committees to which these nominations are referred should, to the fullest extent possible, complete their consideration of these nominations, and, if such nominations are reported by the committees, the full Senate should vote to confirm or reject these nominations within 30 days of their submission." This is, essentially, an affirmation of the current confirmation process.

The House-passed version of the bill contains a different approach. The bill (an amendment to S. 2845, formerly H.R. 10, which passed by a vote of 282-134) would require that the Office of Personnel Management create a list of all national security positions which require Senate confirmation.

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<sup>4</sup> P.L. 107-306, 116 Stat 2383.

The House provision would not change the current system for the top level of national security appointees, such as the Secretary of Defense, who are Level I employees on the Executive Schedule. The President would choose his nominee and submit their name to the Senate for its advice and consent. The nominee would not be confirmed in the position without Senate action.

For Executive Schedule Level II employees, such as the Deputy Attorney General, and Executive Level III employees, such as an under secretary of State, however, the House provision would require that the Senate act within 30 days of receiving a nomination, or the nomination would go into effect without action by the Senate. Finally, for Level IV and Level V national security employees who currently require Senate confirmation, the House provision would remove that requirement and make them appointed at the discretion of the President.

The House-passed bill does not contain any details about how the Senate would implement the change for Level II and Level III employees, concerning the 30-day deadline, but it is reasonable to assume that the analysis of the 9/11 Commission's recommended 30-day deadline would be applicable (see section "Implementation of the 9/11 Commission's Recommendation").

On November 20, House and Senate conferees on the 9/11 legislation reported out a compromise measure. It includes the Senate-passed "sense of the Senate" provision on presidential nominations, not the House-passed language. Last-minute objections prevented either chamber from voting on the compromise measure. Congress may return in early December to consider the bill.<sup>5</sup>

## Scope of the Issue

The National Security Team, as defined by the 9/11 Commission, would include roughly 31 positions from the Defense Department, the Homeland Security Department, the Justice Department, the State Department, and the Central Intelligence Agency. The group extends from the heads of the departments down through and including the Under Secretary positions.<sup>6</sup>

In testimony before the Senate Governmental Affairs Committee on July 30, Commission Chair Thomas Kean told Members that the Senate should "treat these nominations unlike other nominations in that they recognize the speed with which we need those people in place."<sup>7</sup> The report of the 9/11 Commission also pointed out that the time for transition between the Clinton Administration and the Bush Administration was shortened. "The dispute over the election and the 36-day delay cut in half the normal transition period. Given that a presidential election in the United States brings wholesale change in personnel, this loss of time hampered the

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<sup>5</sup> Walter Pincus, "Passage of Intelligence Bill Called Doubtful: Lawmakers Say Bush, Cheney Need to Lobby," *Washington Post*, Nov. 22, 2004, p. A3.

<sup>6</sup> Jonathan Stull, communications assistant, 9/11 Commission, telephone conversation with the author, Aug. 9, 2004.

<sup>7</sup> Transcript of committee hearing on LexisNexis, accessed on Aug. 20, 2004, p. 45.

new administration in identifying, recruiting, clearing and obtaining Senate confirmation of key appointees.”<sup>8</sup>

The commission’s recommendations built on the work of a series of commissions and scholars who have investigated the appointment process generally over the last 20 years. Virtually all of the studies reached a similar conclusion: that it takes too long to get presidential nominations through the appointment process. The Presidential Appointment Initiative, for example, a project of the Brookings Institution, found in 2001 that “there is ample evidence that the process for both nominating and confirming talented citizens to presidential service is failing at its most basic tasks.”<sup>9</sup> That followed a similar study in 1996 called the 20<sup>th</sup> Century Task Force on the Presidential Appointment Process, which called for prohibiting Senators from delaying consideration of nominee by using extended debate, called a filibuster.<sup>10</sup>

“That the nomination and confirmation process is broken is a truism now widely accepted by both Republicans and Democrats,” wrote congressional scholars Norman Ornstein and Thomas Donilon in 2001. “The lag in getting people into office seriously impedes good governance. A new president’s first year — clearly the most important year for accomplishments and the most vulnerable to mistakes — is now routinely impaired by the lack of supporting staff. For executive agencies, leaderless periods mean decisions not made, initiatives not launched, and accountability not upheld.”<sup>11</sup>

## Recent Experience

One of the complaints about the nominations process from scholars and commissions has been that nominations can get bogged down in the Senate confirmation process, sometimes falling victim to parliamentary devices that can prevent a final vote on the nomination from taking place. An analysis of data on how the Clinton Administration and the current Bush Administration were able to fill those offices considered to make up the National Security Team at the beginning of their administrations shows that Senate delay does not tend to be a major problem for this subset of nominees. The Senate did not reject any of the National Security Team nominations in either administration.<sup>12</sup>

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<sup>8</sup> Ibid, p. 198.

<sup>9</sup> U.S. Congress, Senate Committee on Governmental Affairs, *The State of the Presidential Appointment Process*, hearings, 107<sup>th</sup> Cong., 1<sup>st</sup> sess., Apr. 4-5, 2001 (Washington: GPO, 2001), p. 285.

<sup>10</sup> Ibid, p. 188.

<sup>11</sup> Norman Ornstein and Thomas Donilon, “The Confirmation Clog,” *Foreign Affairs*, vol. 79, no. 6 (Nov./Dec. 2000), p. 89.

<sup>12</sup> That is not to say that the Senate never rejects a nominee. During the George H.W. Bush Administration, the Senate rejected the nomination of former Senator John R. Tower to be Secretary of Defense by a vote of 47-53 on Mar. 10, 1989. Also, President Clinton withdrew the nomination of Anthony Lake to be Director of Central Intelligence on Apr. 18,

(continued...)

The amount of time it took nominations to work their way through the Senate varied widely in this small sample, from one day for secretaries of state and defense in both administrations, to 128 days for the Defense Department's Under Secretary for Policy in the Clinton Administration. For both administrations, the Secretary of Defense and the Secretary of State were confirmed on Inauguration Day.

As **Table 1** shows, of the 31 positions in the Bush Administration that would be included in the new deadline, 22 were confirmed ahead of the 30-day schedule, four were holdovers from the Clinton Administration (and did not require reconfirmation) and five nominations took longer than 30 days to win Senate confirmation. The median elapsed days from submission of the nomination until Senate confirmation was 21 days.

As **Table 1** also shows, for all National Security Team nominees, the process of nomination by the President took longer than the process of confirmation by the Senate. In some instances, the delay between the start of the vacancy to the choice of a presidential nomination was two to three times longer than the time from nomination to confirmation.

Of the five nominations that exceeded 30 days for Senate confirmation in the Bush Administration, all were confirmed within 73 days — four of the five were confirmed in less than 60 days. In all five instances, the delay between the start of the vacancy and the choice of nominee was longer than the time between the nomination and confirmation of the nominee.

As **Table 2** shows, the four holdovers from the Clinton Administration had a longer confirmation time during their original consideration by the Senate. The mean time for those nominations was 75 days.

As **Table 3** shows, the Clinton Administration's National Security Team members were also confirmed largely ahead of the 30-day deadline. For the 23 positions covered by the definition,<sup>13</sup> seven were considered by the Senate for more than 30 days. One was a holdover from the previous administration (and did not require reconfirmation), one of those was confirmed at 36 days, another at 44 days, the next after 47 days and another at 51 days. The remaining two nominees had lengthy confirmations — one was 122 days and the final one was 128 days.

**Table 3** also shows, however, that, as with the Bush Administration, the delays by the Clinton Administration in making its appointments were generally longer than the Senate confirmation process. Typically, the time to presidential nomination was significantly longer than the Senate confirmation, sometimes several times as long.

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<sup>12</sup> (...continued)

1997, after three days of contentious confirmation hearings by the Senate Select Committee on Intelligence.

<sup>13</sup> The number of positions for the Clinton Administration is smaller than those for the Bush Administration because the Department of Homeland Security did not exist and the position of Under Secretary of Defense for Intelligence had not been created.



As this information shows, the 9/11 Commission's proposal for an accelerated Senate confirmation process would not have affected 35 of the 49 National Security Team nominations that were in office before the 30-day deadline. A review of the data on the speed with which new administrations have been able to get their National Security Team members in place suggests this is an issue in a minority of cases.

## Advice and Consent

The recommendation of the 9/11 Commission would deal with only a small subset of the presidential nominations considered by the Senate. With respect to the offices included in the National Security Team, however, it would place substantial new conditions on how the Senate carries out its role in confirming presidential nominees. While the Constitution includes the Senate in the confirmation process, it does not spell out how the chamber should fulfill its role of providing advice and consent to a nomination. The extent of legislative and executive control of the process has in many respects remained undetermined.

In response to this Constitutional indeterminacy, some have asserted that the Senate should have a co-equal role with the President in the process.

The Senate's responsibility for confirming presidential nominees, although fixed firmly in the Constitution, remains unsettled in its application. The Senate was not meant to be a passive participant. Delegates to the Philadelphia convention believed that the Senate would be knowledgeable about nominees and capable of voting wisely. Yet, for the most part, it has acted cautiously, uncertain of the scope of its own constitutional power. The source of this uncertainty is not the Constitution. Nowhere in that document, or in its history, is there an obligation on the part of the Senate to approve a nomination. On the contrary, the burden should be on the President to select and submit a nominee with acceptable credentials.<sup>14</sup>

Others have said the Senate should play a lesser role, allowing the President greater leeway in his choices for office than is currently the case. Law professor John C. Eastman told the Senate Rules Committee on June 5, 2003, that

"...the appointment power is located in Article II of the Constitution, which defines the powers of the President, not in Article I, which defines the powers of the legislature. As the Supreme Court itself has noted, by vesting appointment power in Article II, the framers of our Constitution intended to place primary responsibility for appointments in the President. The "advice and consent" role for the Senate, then, was to be narrowly construed."<sup>15</sup>

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<sup>14</sup> Louis Fisher, *Constitutional Conflicts Between Congress and the President* (Lawrence, Kansas: University Press of Kansas, 1997), p. 38.

<sup>15</sup> Testimony of Professor Eastman, in U.S. Congress, Senate Committee on Rules and Administration, *Senate Rule XXII and Proposals to Amend This Rule*, hearings, 108<sup>th</sup> Cong., 1<sup>st</sup> sess., June 5, 2003. The testimony is available online from the committee website at [<http://rules.senate.gov/hearings/2003/060503Eastman.htm>], visited Aug. 20, 2004.

The practice of the Senate, however, has not systematically reflected either of these perspectives. Historically, much of the regular order of business on the nomination and confirmation of presidential appointments has been regulated not by strict, formal rules, but rather by informal customs that can change (and have changed) over the years, as the relative balance of power between the President and the Senate ebbs and flows. It is these traditions which form the process, according to appointments expert Michael J. Gerhardt.

These informal arrangements — those not clearly required or clearly prohibited by the Constitution — have come to define the dynamic in the federal appointments process. The informal arrangements through which the system operates — including senatorial courtesy; logrolling; individual holds, “blue slips”; consultation between presidents, members of Congress, and other interested parties, including judges; interest group lobbying; strategic leaking by administrations, senators and interest groups; manipulation of the press; the media’s effort to influence the news; and nominees’ campaigning — are the sum and substance of the federal appointments process. Studying these arrangements provide even greater illumination than studying Supreme Court decisions or the Constitution itself of how the different branches of the federal government interact on matters of mutual concern.<sup>16</sup>

Under these informal customs, individual Senators have, historically, been deeply involved in the nomination and confirmation process. The procedures and traditions that have developed have tended to protect the autonomy of individual Senators to choose how to fulfill the advice and consent role, rather than to dictate the process for all Senators.<sup>17</sup>

It is this combination — unwritten Senate traditions and the protection of each Senator’s rights — that has led critics of the process to call for changes similar to those proposed by the 9/11 Commission. “[T]he Senate’s confirmation process is entirely consistent with all of its other norms, traditions and rules. Concern for the rights and prerogatives of individual senators gives rise to numerous opportunities for obstruction and delay,” argued political scientists Nolan McCarty and Rose Razaghian.<sup>18</sup>

## The Current Process

With respect to nominations to the National Security Team, the recommendations made by the 9/11 Commission would require some major changes in the way the Senate typically conducts its business. In exchange for a relatively quick and predictable process, Senators as a group and as individuals would relinquish some of their current rights under the Senate’s rules and practices.

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<sup>16</sup> Michael J. Gerhardt, *The Federal Appointments Process: A Constitutional and Historical Analysis* (Durham, NC: Duke University Press, 2000), p. 338.

<sup>17</sup> See CRS Report RL31948, *Evolution of the Senate’s Role in the Nomination and Confirmation Process: A Brief History*, by Betsy Palmer.

<sup>18</sup> Nolan McCarty and Rose Razaghian, “Advice and Consent: Senate Responses to Executive Branch Nominations 1885-1996,” *American Journal of Political Science*, vol. 43, issue 4 (Oct. 1999), p. 1125.

Under current practice, once the President has chosen an individual for a position, the nomination is submitted to the Senate, and referred to the committee with jurisdiction over the agency or office which the nominee would fill. The committee may or may not act on the nomination. If the committee approves the nomination, it goes before the full Senate, which may or may not take up the nomination on the floor. If the Senate does proceed to consider the nomination, it may or may not proceed to a final vote. A final vote of the full Senate is required for a nomination to be confirmed. The President gives to the confirmed nominee a commission with the seal of the United States, and the individual is sworn into office.<sup>19</sup>

Nominations are part of the executive business of the Senate (the other component being ratification of treaties). These are matters that come directly from the President and require the Senate's approval to implement. The Senate treats these items as separate from its legislative business: they are placed on a different calendar (the *Executive Calendar*), and the Senate must be in executive session to consider them. The official record of Senate action on treaties and nominations is known as the *Executive Journal*, while the record of Senate action on legislation and other matters is called the *Senate Journal*.

In practice, the chair of the committee of jurisdiction generally has the discretion whether to move the nominee through his or her committee or not. The action can take the form of a hearing at which the nominee testifies or a markup of the committee to formally approve the nomination and send it on to the full chamber, or both. If the committee reports a nomination, the majority leader may ask unanimous consent, or move, that the Senate enter executive session to take it up. He is not required to take either action. (In principle, any Senator may move to take up a nomination, but in practice the Senate treats this action as the prerogative of the majority leader.) If the Senate agrees to take up the nomination, it may proceed to a final vote, but again, it is not required to do so.

While a nomination is pending before the Senate, any Senator or group of Senators may act to delay or defeat the nomination by extended debate, called a filibuster. The Senate custom of "holds," which can allow a Senator or group of Senators to delay consideration of a measure or matter, has also been used to prevent full Senate consideration of nominations.

While the vast majority of presidential nominees receive Senate action, not all do. Senate rules do not require that a nominee receive consideration. "There is nothing inherent in the appointments process that forces action, as there is, for example in the budget process. If the Congress fails to act on the budget, the unpleasant prospect of a government shutdown looms. This usually inspires action, even if it is not always completed by the first day of the new fiscal year. An

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<sup>19</sup> For more on the role of the executive branch during the appointment process, see CRS Report RL31346, *Presidential Appointments to Full-Time Positions in Executive Departments During the 107<sup>th</sup> Congress, 2001-2002*, by Henry B. Hogue.

appointment carries no similar sense of urgency,” noted political scientist G. Calvin Mackenzie.<sup>20</sup>

In the case of nominees, by contrast, if the Senate does act, there is no established time frame for that action. “The mere fact that the President submits a name for consideration does not obligate the Senate to act promptly,” wrote separation-of-powers scholar Fisher.<sup>21</sup>

## Implementation of the 9/11 Commission’s Recommendation

### Committee Proceedings

The 9/11 Commission’s proposal, and most likely the House-passed provision to S. 2845, would presumably require that Senate committee chairs schedule confirmation hearings on the proposed members of the National Security Team. If hearings were not held on the nominee in a timely fashion or the nomination not reported out after a certain number of days, the nomination would presumably be discharged, either automatically or through a motion to discharge. As a result of this change, a nomination could come before the full Senate for consideration without having had a hearing in the committee of jurisdiction. While some argue that too many nominations are subject to Senate confirmation hearings, it is unlikely that Senators would want to skip such a step in the case of the Secretary of State or Secretary of Defense.

This change would constitute a major change in the established prerogative of committee chairs. The power of committee chairs to control the agenda of their panels is longstanding. Several times in recent years, committee chairs have refused to grant a nominee a hearing, and effectively prevented the Senate from being able to act on the nomination.<sup>22</sup> The Senate can discharge a committee from consideration of a nomination, and frequently does so by unanimous consent when the nominations concerned are non-controversial. When there is opposition, however, the process to discharge the committee from further consideration of the nomination is difficult and subject to filibuster, and has been used rarely.

Responding to concerns that committee chairs were too powerful in their ability to block consideration of legislation, the 1970 Legislative Reorganization Act created a new Senate rule to allow a majority of a committee to call a meeting without the

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<sup>20</sup> G. Calvin Mackenzie, “The State of the Presidential Appointments Process,” in his *Innocent Until Nominated: The Breakdown of the Presidential Appointments Process*, (Brookings Institution Press, 2001), p. 34.

<sup>21</sup> Fisher, *Constitutional Conflicts Between Congress and the President*, p. 27.

<sup>22</sup> Donna Cassata, “Weld Blows Bitter Kisses As Curtain Comes Down,” *CQ Weekly*, vol. 55, Sept. 20, 1997, p. 2240; Stewart M. Powell, “Clinton threatens to bypass Senate in naming of civil rights nominee,” *Tampa Tribune*, Dec. 13, 1997, p. 4.

approval of the chair.<sup>23</sup> It is rarely used, perhaps because of the inherent political consequences of challenging a committee chair's authority, because the chair retains control over the agenda for any new meeting scheduled, or because the threat is sufficient to bring about action by the chair.

Implementing the 9/11 Commission's proposal would require guaranteeing action on a nominee at the committee level. It would accordingly weaken the power of the chair to use his or her position to block a nomination.

## Floor Consideration

The deadline proposed by the 9/11 Commission and the House also would seem to exclude the possibility of Senators placing holds on these nominees to postpone their consideration for any length of time. It would mean that votes on these specific nominations would have to be protected against being delayed by a filibuster.

Senators have several times refused to allow the Senate to reach a final vote on a nomination, thus permitting a filibuster, or extended debate, to kill that nomination.<sup>24</sup> In other instances, a Senator or a group of Senators has placed a "hold" on a nomination, which can also effectively kill the nominee's chance for confirmation. The system of "holds" is not a formal part of the Senate rules; rather, it is a practice honored by the Senate leadership. If a Senator or a group of Senators tell their leader they want to place a hold on a nomination (or a piece of legislation), the leader may decide to honor that request and not schedule the nomination for floor consideration. The leader also may decide to honor the hold for a specific period of time or not at all. The power of the hold lies in its implicit threat — that if the item is scheduled for floor consideration, the concerned Senator and his or her allies might wage a filibuster and try to prevent a final up or down vote on the matter.<sup>25</sup>

Holds and filibusters are essentially two versions of the negative power of the Senate and its Members — the ability to stop something from happening, whether it be passage of piece of legislation, ratification of a treaty or confirmation of a nomination. The 9/11 Commission's recommendation, which calls for a guaranteed up or down vote on all nominees in the National Security Team, would require altering these traditions. In order to ensure that nominees receive a final vote, it would be necessary to preclude the possibility of a successful filibuster. If the nomination had to be acted upon within 30 days, the hold would lose its power as well — under those rules, a delay of a day, even a week, is unlikely to be detrimental to a nominee's ultimate confirmation.

Many critics argue that Senators should not be able to use these powers to block action on nominations, that it distorts the confirmation process and prevents the full chamber from working its will. "Holds, mentioned nowhere in Senate rules, are antidemocratic and probably unconstitutional (although not likely subject to judicial

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<sup>23</sup> Senate Rule XXVI.

<sup>24</sup> See CRS Report RS20801, *Cloture Attempts on Nominations*, by Richard S. Beth.

<sup>25</sup> See CRS Report 98-712, *"Holds" in the Senate*, by Walter J. Oleszek.

review since the courts tend to be deferential to political questions)... Yet the hold subjects nominations to a single senator's veto," argue Ornstein and Donilon.<sup>26</sup>

Political scientist Christopher J. Deering wrote that the practice of holds has been destructive to the confirmation process. "[M]embers of the Senate of both parties have placed holds on particular individuals. In some cases, the nominee is the target, in other cases merely a pawn, but in either case the use of the nominees as, in effect, hostages has undermined the integrity of the system.... [T]he use of such holds is a serious abuse of the current system."<sup>27</sup>

As political scientist Barbara Sinclair has noted, however, holds are not meaningful unless they are backed up by the threat of filibuster. Therefore, it is the Senate's tradition of unlimited debate on most subjects, including nominations, that is at the heart of this dispute. Sinclair observed:

As long as members are willing to back their holds with actual extended debate, the leaders are faced with an impossible situation when floor time is short. Assuming that the bill is not "must" legislation, calling it up is likely to consume scarce time unproductively, time for which the leaders have multiple and clamorous requests.<sup>28</sup>

Supporters of the Senate's tradition of unlimited debate argue that it is a necessary component of the chamber's procedures. "Advocates of restrictions on debate rest their case on the cliches of democracy, and transform government by a majority from an imperfect device into an eternal principle," wrote Senate historian Lindsay Rogers. "Yet curiously enough, freedom of debate, although sanctioning minority control by *avoidsupois* rather than by argument, has proved to be a valuable safeguard against executive inefficiency and corruption," he concludes.<sup>29</sup>

Senator J.W. Fulbright, in 1957, during Senate debate on a proposal to change its rules to make it easier to invoke cloture and end debate, defended extended debate this way:

The great distinction between the Senate and the other body of Congress is the power of the Senate to examine and to subject approval of measures to delay, in order that the people themselves may be able to understand controversial issues. I hope Senators will not take seriously the argument that democracy is in some way equivalent to majority rule, because there is nothing whatsoever to such an argument. There is nothing in our Constitution which in

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<sup>26</sup> Norman Ornstein and Thomas Donilon, "The Confirmation Clog," p. 96.

<sup>27</sup> Christopher J. Deering, "Damned if You Do and Damned if You Don't," in G. Calvin Mackenzie, ed., *The In-and-Outers: Presidential Appointees and Transient Government in Washington* (Baltimore: Johns Hopkins University Press, 1987), p. 117.

<sup>28</sup> Barbara Sinclair, *The Transformation of the U.S. Senate* (Baltimore: Johns Hopkins University Press, 1989), p. 131.

<sup>29</sup> Lindsay Rogers, *The American Senate* (New York: Johnson Reprint Corporation, 1968), pp. 5, 7.

any respect implies, directly or indirectly, that majority rule should be the rule of the Senate.<sup>30</sup>

Others have argued that the full Senate must be able to act on presidential nominees and not allow one or several Senators to block a confirmation vote. Political scientist Brannon P. Denning put it this way:

The notion of “advice and consent” is mutable. It has evolved from an alleged “rubberstamp” into a right to inquire into the jurisprudential commitments of Supreme Court nominees, to a right to disapprove nominees because a particular senator believes that they are not “ambassadorial quality.” Tools for facilitating “consensus” — said to be the *raison d’être* of most Senate rules and procedures — have, in short order, been fashioned into weapons of minority rule.... [C]ustoms like the “hold” and the prerogative of committee chairs have, lately, been exercised not for the benefit of the Senate as an institution, or even for the benefit of a particular party, but for the benefit of individual senators.<sup>31</sup>

## Implementation Requirements

Rules implementing the requirements outlined above would have the main features of an expedited procedure. Expedited procedures are tools used by the House and Senate that can override the normal parliamentary procedure to ensure relatively quick action on a particular measure or matter. Examples of expedited procedures, also known as “fast track” provisions, include the Defense Base Closure and Realignment Act of 1990 and the Trade Act of 1974, the process by which Congress considers most trade agreements.<sup>32</sup>

Given its call for a deadline-mandated, up or down vote on each nominee in the National Security Team, the most likely way to implement the 9/11 Commission’s recommendation or the House-passed provision of S. 2845 would be for the Senate to create a new expedited procedure that would apply to this specific set of nominations. Expedited procedures have not previously been used in the Senate to consider executive business, so enactment of the 9/11 Commission’s recommendations would be precedent-setting. That would not necessarily, however, be a barrier to using expedited procedures for executive business.

**Necessary Elements.** An expedited procedure reflecting the 9/11 Commission’s recommendation and the House provision would need to include a time limit for action by the committees on nominations referred to them. This provision might require that the committee hold a hearing on the nomination and

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<sup>30</sup> Remarks of Senator J.W.Fulbright, U.S. Senate, *Congressional Record*, vol 103, Jan. 4, 1957, p. 208.

<sup>31</sup> Brannon P. Denning, “Reforming the New Confirmation Process: Replacing “Despise and Resent” with “Advice and Consent,” *Administrative Law Review*, vol. 53, no. 1, p. 27.

<sup>32</sup> See CRS Report 98-888, “Fast-Track” or Expedited Procedures: Their Purposes, Elements and Implications, by Christopher M. Davis.

report it to the full chamber by a set time after receiving it, such as 20 days.<sup>33</sup> An effective expedited procedure would need to include an enforcement mechanism at this stage, so that if the committee did not act, either the nomination would automatically be discharged from committee and placed on the *Executive Calendar*, making it available for consideration by the full chamber, or a motion to do so would be in order.

An effective expedited procedure also would need to provide some controls regarding Senate floor action. Currently, under Senate precedents, a Member may move to go into executive session to take up a particular nomination without that motion being subject to debate, and thus a filibuster. The nomination itself, however, is subject to debate and, therefore, to filibuster. The expedited procedure would need to foreclose the possibility of filibustering a nomination, probably by placing a limit on the total amount of time the Senate could spend debating the nomination of a member of the National Security Team.

How much debate time would be required could be a tricky question to decide. The Senate spent no floor time debating the two nominations for Under Secretary of State for Public Diplomacy and Public Affairs it has approved during the Bush Administration. That position is included in the 9/11 Commission's definition of the National Security Team. The Senate might, however, want to be sure it includes sufficient debate time to consider other members of the National Security Team, such as Secretary of Defense, Secretary of State or Attorney General.

In general, the Senate does not tend to include in its expedited procedures a provision automatically calling a measure to the floor.<sup>34</sup> Usually, the expedited procedure would make it in order for the majority leader or another Member to bring the matter up. If desired, the expedited provision for National Security Team nominations could include such a provision, requiring that within several days after the end of committee consideration, the Senate take it up. This provision would need to specify when, in the Senate's normal course of daily operations, the nomination would come up. Because this procedure would be designed to apply to nominations, it also would need to provide for a motion that the Senate go into executive session or that the Senate be considered to have gone into executive session at a specified time.

Finally, to implement the 9/11 Commission's recommendation fully, the expedited procedure would need to require an up or down vote at the end of the debate for each nominee included in the National Security Team.

In spite of all the requirements of an expedited procedure, it is possible that the Senate as a body might refuse to act on a particular nomination. The majority leader might simply decline to call it up. It is not apparent how any form of procedure could provide effective recourse in this situation. Expedited procedures in existing statutes

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<sup>33</sup> Those crafting the expedited procedure also would need to decide whether they wanted to measure the time in calendar days or only those days in which the Senate was in session.

<sup>34</sup> CRS Report 98-888, *'Fast-Track' or Expedited Procedures: Their Purposes, Elements, and Implications*, by Christopher M. Davis.



often provide that if Congress does not act on a presidential proposal within a specified time, the proposal goes into effect. Permitting a nomination to be treated as confirmed without affirmative action by the Senate, however, would not likely be acceptable to the Senate, and the validity of such an outcome might well be questioned on constitutional grounds.

## Means of Implementation

The Senate could institute procedures to implement the 9/11 Commission's proposal or the House provision in several ways: by enacting an expedited procedures law, by amending the Senate's standing rules or its standing orders, through adoption of a unanimous consent agreement, or by passage of a constitutional amendment.

**Expedited Procedures Statute.** Language to create an expedited procedure for the National Security Team could be included in a larger bill to implement other elements of the 9/11 Commission's recommendations, such as the creation of a Director of National Intelligence. If the expedited procedures legislation were subject to a filibuster, 60 votes would be required to invoke cloture.<sup>35</sup> Legislation including an expedited procedure, however, could be enacted into law only through the constitutional lawmaking process, requiring action by the House of Representatives and the President as well as by the Senate. This method of implementation raises the question whether the Senate would be willing to involve the House and the President in making changes to the confirmation process, a matter which is bound up in with its own rules and special constitutional prerogatives.

**Amending Senate Rules.** Similar changes also could be implemented by amending the Senate rules. This approach would have the advantage to the Senate of not having to go through the House or be signed by the President; rather, the changes would take effect as soon as the Senate adopted them. The difficulty with this approach is that, if the changes to the rules were opposed by a filibuster, it would take a two-thirds vote of those present, as many as 67 Senators, to invoke cloture and cut off debate, which is a very high threshold to meet.

**Constitutional Amendment.** The Senate also could try to amend the Constitution to redefine the confirmation process along the lines of the 9/11 Commission's recommendations. This approach might be considered less promising because constitutional amendments must be passed by two-thirds of those voting, or as many as 67 votes. In addition, once in place, such a change would be extraordinarily difficult to reverse or modify.

**Unanimous Consent.** The Senate also could try to amend its rules to conform to the 9/11 Commission's recommendations by a unanimous consent agreement. For this approach to succeed, all Senators would have to agree on a plan

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<sup>35</sup> The only item which requires a higher threshold for invoking cloture is a change to the Senate's rules. Any change to the Senate's rules which is filibustered requires the votes of two-thirds of those present and voting (67 if all Senators vote) to invoke cloture. When the Senate lowered the cloture threshold from two-thirds voting to 60, it did not lower it for changes to the rules.

to implement the new confirmation procedure — one objection would prevent the agreement from going into effect. Unanimous consent agreements have been used to structure debate on specific nominations. This agreement, however, would be binding into future Congresses, unless it specified otherwise or was modified by another unanimous consent agreement.

**Standing Order.** Finally, the Senate could try to amend its rules through adoption of a Standing Order, which would take the form of a simple resolution. Such a Standing Order would have effects like those of a rule, but the resolution would require 60 votes for cloture if it was filibustered, not two-thirds of Senators voting. Such a standing order resolution was used for the creation of the Permanent Select Committee on Intelligence (S.Res. 400, 94<sup>th</sup> Congress).

## Implications for the Confirmation Process

### The Balance of Nomination Politics

One impact of the ability of a Senator to filibuster a nominee has been that negotiations over other matters, both with the executive branch and among fellow Senators, have been broadened to include all matter of Senate business, a concept known as linkage. For example, a Senator’s objections to a particular nominee might be disposed of by permitting that Senator to offer an amendment to a bill that is soon to be considered on the Senate floor. Taking nominations out of this equation could shift the balance of power between the executive and legislative branches.

“The appointments process is deeply contentious, and as legislative policymaking has grown more difficult in recent decades, the process has increasingly become a venue for pitched battles over the shape of public policy,” wrote appointments expert Mackenzie. He continued:

More and more, the contentiousness in the appointments process is driven not by questions of the fitness of nominees but by policy disagreements. Senators vote against nominees, and nominations fail, because the appointments process has become a policy battleground... This is not a new phenomenon, this use of the appointments process to wage policy battles. In fact, it has always been a characteristic of the appointments process.<sup>36</sup>

Mackenzie noted that President Andrew Johnson fought with the Senate over several of his nominees to head the national bank and of Roger Taney to be Secretary of the Treasury. What is different now, he said, is the extent to which those connections are made.

Political scientists Nolan McCarty and Rose Razaghian studied more than 100 years of Senate action on nominations. They said: “The thrust of our theory is that the supermajoritarianism of the Senate in general and the confirmation process in particular gives partisan and ideological minorities a strategic opportunity to have an

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<sup>36</sup> Mackenzie, “The State of the Presidential Appointments Process,” pp. 27-28.

impact on public policy by delaying nominations that would pass on a simple majority vote.”<sup>37</sup>

For some, the ability to engage in extended debate on (and effectively block) measures or matters is what empowers the Senate to deal on equal footing with the President in their fights over both nominations and legislation. Political scientist Rogers argued that “For the fact of the matter is, as I hope to show, that, as the much vaunted separation of powers now exists, unrestricted debate in the Senate is the only check upon presidential and party autocracy. The devices that the framers of the Constitution so meticulously set up would be ineffective without the safeguard of senatorial minority action.”<sup>38</sup>

Some also believe that the Senate’s opportunity to play a vigorous role in the nomination and confirmation process is essential to the public’s trust in the process. “Nonetheless, the process of vetting and voting on the president’s candidates for high position is an essential balance wheel in our complicated form of government. It lends legitimacy to the whole structure, and it is worth the occasional loss of a good person,” wrote former judge, and former Member of Congress, Abner Mikva.<sup>39</sup> He continued:

Neither branch *always* chooses good people, as history shows, and frequently the best people don’t get appointed. Learned Hand never made it to the Supreme Court. Nonetheless, political involvement, including confirmation by the very political Senate, offers a reality check on who gets the power to make very important judicial decisions for life. The case is a little less compelling for appointments to the executive branch, but it still can be made. Most of the federal work force come into their positions and are protected in them, by a civil service system based on meritocracy. For those relatively few policy makers whose appointments require Senate confirmation, an extra “look see” is justified.<sup>40</sup>

Others believe that the delaying strategies being employed by some in the Senate detract from that legitimacy.<sup>41</sup>

And some contend that it is not right to use nominations as bargaining chips in legislative negotiations. “The Senate’s constitutional and institutional role of advice and consent is being supplanted by informal, extra-constitutional customs that allow individual senators to effectively veto the President’s nominees — even if only to gain leverage with the executive branch on an unrelated matter,” wrote Denning.<sup>42</sup>

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<sup>37</sup> McCarty, “Advice and Consent: Senate Responses to Executive Branch Nominations 1885-1996,” p. 1126.

<sup>38</sup> Rogers, *The American Senate*, p. 164.

<sup>39</sup> Abner J. Mikva, “Lawful Pursuits,” *Legal Times*, Apr. 14, 1997, p. 31.

<sup>40</sup> Mikva, “Lawful Pursuits,” p. 32.

<sup>41</sup> G. Calvin Mackenzie, “The State of the Presidential Appointment Process,” p. 26.

<sup>42</sup> Denning, “Reforming the New Confirmation Process: Replacing “Despise and Resent” (continued...)

## Changing Politics Rather Than Rules

Any change to the confirmation process of the kind proposed by the 9/11 Commission would almost certainly also influence the balance of power between the executive and the legislative branches. The ability to block a final vote on a nomination has become a critical element in the Senate's power relationship with the President, both for its action, or inaction, on the nomination itself and, frequently, for a Senator or group of Senators to gain leverage in negotiations on other matters. A vote deadline, for example, could still lead to a defeat, so requiring a vote could lead to more presidential defeats or to pressure to go along with the President so as to not hand him a defeat.

Political scientist Burdett Loomis observed that trying to change the Senate's rules may not be an effective plan. "Is there any indication that the Senate might smooth the way for future nominees? Given the profound changes in the chamber over the past twenty-five years — the greater latitude allowed individual members and the intense partisanship that dominates much decision-making — it seems unlikely that reformers would profit much from attempting to reshape Senate procedures."<sup>43</sup> Instead, he argued, "Striving to "govern together" by bridging the separate institutions may be valuable than seeking to change an institution that has proved highly resistant to structural reforms."<sup>44</sup>

If the history of the confirmation process is more about practices than rules, perhaps it would be useful to consider informal changes in the dynamics that undergird the process. Instead of setting up timetables for action, this approach would build upon a view that the problem is not procedural, but political.

Political scientist Christopher J. Deering wrote that politics has always been a part of the process. "The relationship between the executive and legislative branches has been and remains essentially political. That should not change. The Senate's role in the review of executive personnel is but one example of that political relationship. The Senate's role in the confirmation process was designed not to eliminate politics but to make possible the use of politics as a safeguard. From the outset the political motivations of the two branches were to be a protection against tyranny."<sup>45</sup>

"The one enduring characteristic of the process is that it is as deeply and intensely political now as it has always been,"<sup>46</sup> agreed Mackenzie. The process is

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<sup>42</sup> (...continued)  
with "Advice and Consent," p. 41.

<sup>43</sup> Burdett Loomis, "The Senate: An "Obstacle Course" for Executive Appointments?" in *Innocent Until Nominated: The Breakdown of the Presidential Appointments Process*, G. Calvin Mackenzie, ed. (Washington: Brookings Institution Press, 2001), p. 170.

<sup>44</sup> Loomis, "The Senate: An "Obstacle Course" for Executive Appointments?" p. 171.

<sup>45</sup> Deering, "Damned if You Do and Damned if You Don't," pp. 118-119.

<sup>46</sup> Mackenzie, "The State of the Presidential Appointments Process," p. 27.

political, he asserted, because its results can have a major impact on policy-making, and therefore, politics.

Conflict occurs in the appointment process for a very simple reason. Appointments matter. Were that not the case, presidential administrations would not have several dozen White House aides devoting full time to appointment decisions; Senate committees would not hold hundreds of hours of confirmation hearings; interest groups, agencies, political parties and members of the House would not spend their time and resources trying to shape appointments decisions. Yet they do all these things, and they do them because they think it makes a difference who gets appointed to serve in particular federal offices.<sup>47</sup>

As a result, when the process has worked, it frequently was because the two branches of government found a way to make it work. “The appointment power operates in a framework of studied ambiguity, its limits established for the most part not by court decisions but by imaginative accommodations between the executive and legislative branches,” wrote separation-of-powers scholar Fisher.<sup>48</sup>

## Broader Implications

The 9/11 Commission’s proposal provides an occasion for the Senate to evaluate the larger question of its confirmation process and its role in the presidential appointment process. Adoption of the recommendation, for example, could open the door to consideration of ever more nominations through expedited procedures. What would a new process mean for other presidential nominations, particularly those to the judiciary?

For several years, the Senate has been debating the proper role of the President and Senators in the nomination and confirmation of the nation’s federal judges. During the Clinton Administration, critics charged that the Judiciary Committee was not acting on all the nominations it needed to. During the Bush Administration, the controversy has been over the use of the filibuster to block a final vote on a judicial nominee.<sup>49</sup>

Before the 9/11 Commission released its recommendations, Senator Arlen Specter had introduced a resolution that would establish a “protocol” for the confirmation of federal judges. His plan (S.Res. 327) would establish timetables for action at both the committee and Senate floor stages, and it would effectively prohibit filibusters of judicial nominations. President George W. Bush on October 30, 2002, proposed a similar plan for the Senate’s confirmation process.<sup>50</sup>

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<sup>47</sup> G. Calvin Mackenzie, *The Politics of Presidential Appointments* (New York: Free Press, 1981), p. xix.

<sup>48</sup> Fisher, *Constitutional Conflicts Between Congress and the President*, p. 48.

<sup>49</sup> Helen Dewar, “Senate Democrats Block 3 More Bush Judicial Nominees,” *Washington Post*, July 23, 2004, p. A5; Jennifer A. Dlouhy, “Parties Use Judicial Standoff to Play to Core Constituents,” *CQ Weekly*, Oct. 19, 2002, p. 2722.

<sup>50</sup> See CRS Report RS21506, *Implications for the Senate of President Bush’s Proposal on* (continued...)

S.Res. 138, introduced by Senate Majority Leader Bill Frist on June 26, 2003, would set up a diminishing threshold for invoking cloture on presidential nominations that are subject to Senate approval. The threshold necessary for invoking cloture would drop each time the Senate voted on a cloture motion on a particular nominee until it reached 51 Senators, a majority of the chamber.

Given the interest already expressed, some Senators might want to expand the 9/11 Commission's recommendations to include a broader number of presidential nominees. The 30-day timetable would likely have to be adjusted to allow the Senate to complete its work on a larger number of nominations.

On the one hand, this action could put in place a definitive system for the consideration of presidential nominees — it could bring order and predictability to the entire process. On the other hand, it might rush the process for some nominees and make it more difficult for Senators to defeat a nomination they oppose.

## Alternative Approaches

**Existing Rules.** Instead of, or in addition to, instituting new procedures to expedite action, the Senate might exercise more control over threatened filibusters against nominations by enforcing more stringently its existing rules. Under current procedures, debate on nominations and treaties is in some respects easier to limit than on legislative matters. First, the motion to proceed to consider a nomination may be offered in a non-debatable form, whereas the motion to proceed to consider legislation is usually debatable. Second, the “Two Speech Rule” of the Senate limits each Senator to two speeches per day on any given question. With respect to legislative matters, this rule is not a viable deterrent to extended debate, for each new amendment is viewed as a new question on which each Senator may speak two more times. On un-amendable matters, such as nominations, the Two Speech Rule could more effectively be used as a procedure to limit debate indirectly.

Under current interpretations, however, the two-speech rule has proved to be an ineffective deterrent against extended debates on nominations because it has been interpreted to apply to the calendar day. On each new calendar day every Senator is able once again to make two speeches on the pending nominee. As a result, since the late 1980's, the Senate has rarely sought to enforce this rule. A reinterpretation of the rule in its application to nominations could make it more effective.

Given such an interpretation, it would be easier for Senate leaders to overcome filibusters against a nominee by forcing opposing Senators to speak at length. In modern practice, most filibusters feature delay by means other than debate (quorum calls or agreements to turn to other items of business). In effect, the threat of a filibuster is treated as though the Senate is being prevented, through extended debate, from reaching a final conclusion on the measure or matter at hand. Keeping the Senate in continuous executive business session for consideration of a nomination

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<sup>50</sup> (...continued)

*Judicial Nominations*, by Betsy Palmer.

could make it more difficult for Senators to sustain a true filibuster, and, perhaps, reduce the incidence of filibuster threats.

**Expiring Nominations.** Another approach might be to place a time limit on a presidential nomination. While such a requirement might seem counterintuitive, it would prevent an endless delay in filling the position in question. If the Senate did not act on a nomination after a defined period of time, say 60 days, it would automatically be returned to the President. While the President would have the ability to renominate the individual in question, if he so chose, he could also take the opportunity to reconsider his choice without the politically sensitive problem of asking a nominee to step aside.

**Table 1. Initial Appointments by President George W. Bush to Top Positions at the Departments of Defense, Homeland Security, Justice, and State, and the Central Intelligence Agency**

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



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Position Title	Senate Committee of Jurisdiction	First Confirmed Nomination to the Position by President George W. Bush	Date Nomination Received in the Senate	Confirmation Date	Days Elapsed from Inauguration, Enactment, <sup>a</sup> or Vacancy <sup>b</sup> to Nomination	Days Elapsed from Nomination to Confirmation	Days from Inauguration, Enactment, <sup>a</sup> or Vacancy <sup>b</sup> to Confirmation
Under Secretary - Border and Transportation Security	Commerce, Science and Transportation	Asa Hutchinson <sup>e</sup>	01/10/03	01/23/03	46	13	59
Under Secretary - Emergency Preparedness and Response	Governmental Affairs	Michael D. Brown <sup>f</sup>	na	na	na	na	na
Under Secretary - Information Analysis and Infrastructure Protection	Intelligence	Frank Libutti	04/28/03	06/23/03	154	56	210
Under Secretary - Management	Governmental Affairs	Janet Hale <sup>e</sup>	01/21/03	03/06/03	57	44	101
Under Secretary - Science and Technology	Commerce, Science and Transportation	Charles E. McQueary	02/14/03	03/19/03	81	33	114
<b>Department of Justice</b>							
Attorney General	Judiciary	John Ashcroft	01/29/01	02/01/01	9	3	12
Deputy Attorney General	Judiciary	Larry D. Thompson	03/22/01	05/10/01	61	49	110
Director - Federal Bureau of Investigation (FBI)	Judiciary	Robert S. Mueller, III	07/18/01	08/02/01	23	15	38
<b>Department of State</b>							
Secretary	Foreign Relations	Colin L. Powell <sup>e</sup>	01/20/01	01/20/01	1	1	1
Deputy Secretary	Foreign Relations	Richard L. Armitage	03/08/01	03/23/01	47	15	62
Under Secretary - Economic, Business, and Agricultural Affairs	Foreign Relations	Alan Larson (Holdover)	na	na	na	na	na

## CRS-23

Position Title	Senate Committee of Jurisdiction	First Confirmed Nomination to the Position by President George W. Bush	Date Nomination Received in the Senate	Confirmation Date	Days Elapsed from Inauguration, Enactment, <sup>a</sup> or Vacancy <sup>b</sup> to Nomination	Days Elapsed from Nomination to Confirmation	Days from Inauguration, Enactment, <sup>a</sup> or Vacancy <sup>b</sup> to Confirmation
Under Secretary - Global Affairs	Foreign Relations	Paula J. Dobriansky	04/04/01	04/26/01	74	22	96
Under Secretary - Arms Control and International Security	Foreign Relations	John R. Bolton	03/08/01	03/23/01	47	15	62
Under Secretary - Management	Foreign Relations	Grant S. Green, Jr.	03/08/01	03/28/01	47	20	67
Under Secretary - Political Affairs	Foreign Relations	Marc I. Grossman	03/08/01	03/23/01	47	15	62
Under Secretary - Public Diplomacy and Public Affairs	Foreign Relations	Charlotte L. Beers <sup>g</sup>	06/29/01	09/26/01	160	58	218
<b>Central Intelligence Agency</b>							
Director of Central Intelligence	Intelligence	George J. Tenet (holdover)	na	na	na	na	na
Deputy Director of Central Intelligence	Intelligence	John E. McLaughlin (holdover)	na	na	na	na	na
Deputy Director of Central Intelligence - Community Management	Intelligence	Joan A. Dempsey (holdover)	na	na	na	na	na
<b>Median elapsed days</b>					55	21	96
<b>Mean elapsed days</b>					65	26	90

**Source:** This table was created by Henry B. Hogue, Analyst in American National Government, CRS, Aug. 18, 2004.

a. The Homeland Security Act of 2002 (P.L. 107-296), which created the Department of Homeland Security, was signed into law on 11/ 25/02. The position of Under Secretary of Defense for Intelligence was created by P.L. 107-314, sec. 901(a), enacted 12/02/02.

- b. Vacancy information for Mueller's predecessor, Louis J. Freeh, is from the FBI's history page, available at [<http://www.fbi.gov/libref/directors/freeh.htm>].
- c. Although the first day the new President submitted nominations to the Senate was Inauguration Day, Senate committees held hearings on some top nominations before that time and the Senate was therefore ready to confirm them on the same day they were nominated.
- d. This position was created by P.L. 107-314, sec. 901(a), enacted 12/02/02.
- e. On Jan. 27, 2003, President Bush announced his intention to designate England, Hutchinson, Hale, and one other individual as acting officials in their intended positions. (U.S. President (George W. Bush), "Digest of Other White House Announcements," *Weekly Compilation of Presidential Documents*, vol. 39, Jan. 27, 2003, p. 145.) These actions were taken under Sec. 1511(c)(1) of the act. (Information received from Department of Homeland Security, Office of the Deputy Secretary, via telephone conversation, Jan. 28, 2003.) England, Hutchinson, and Hale were later confirmed as shown.
- f. According to DHS sources, Brown was appointed under Sec. 1511(c)(2) of the act, which provides that reconfirmation by the Senate is not required by the law for "any officer whose agency is transferred to the Department pursuant to this act and whose duties following such transfer are germane to those performed before such transfer." (Information received from Department of Homeland Security, Office of Legislative Affairs, via telephone conversation, Mar. 12, 2003.) He was previously nominated to be deputy director of the Federal Emergency Management Agency (FEMA) on 03/21/02 and confirmed on 08/01/02.
- g. Technically Beers was nominated twice. She was first nominated on 06/29/01 and this nomination was returned to the President on 08/03/01 at the beginning of a 31-day Senate recess under the provisions of Senate Rule XXXI, paragraph 6 of the Standing Rules of the Senate. She was nominated again on 09/04/01. The 31 days of the Senate recess are not included in the calculations, in this row, of days elapsed.

**Table 2. Appointment Information for Four William J. Clinton Appointees Who Continued in Office Under President George W. Bush**

Position Title	Senate Committee of Jurisdiction	Most Recent Appointee to the Position (Confirmed)	Approximate Date of Vacancy <sup>a</sup>	Date Nomination Received in the Senate	Confirmation Date	Days Elapsed from Vacancy to Nomination	Days Elapsed from Nomination to Confirmation	Days Elapsed from Vacancy to Confirmation
<b>Department of State</b>								
Under Secretary - Economic, Business, and Agricultural Affairs	Foreign Relations	Alan Larson	07/17/99	10/08/99	11/18/99	83	41	124
<b>Central Intelligence Agency</b>								
Director of Central Intelligence	Intelligence	George J. Tenet	12/13/96	04/21/97	07/10/97	129	80	209
Deputy Director of Central Intelligence	Intelligence	John E. McLaughlin <sup>b</sup>	06/27/00	07/13/00	10/18/00	16	58	74
Deputy Director of Central Intelligence - Community Management	Intelligence	Joan A. Dempsey <sup>c</sup>	10/11/96	11/07/97	05/22/98	392	122	514
<b>Mean elapsed days</b>						155	75	230

**Source:** This table was created by Henry B. Hogue, Analyst in American National Government, CRS, Aug. 18, 2004.

- a. Information on the departure date for Larson's predecessor, Stuart Eizenstat, is from Office of Personnel Management (OPM) records. The departure date for Tenet's predecessor, John M. Deutch, is noted in R. Jeffrey Smith, "Having Lifted the CIA's Veil, Deutch Sums Up: I Told You So," *The Washington Post*, Dec. 26, 1996, p. A25. John Gordon, who preceded McLaughlin, reportedly took a new position as of 06/27/00, but his precise date of departure from the CIA could not be determined (Associated Press Online, "Clinton Names New No. 2 at CIA, June 29, 2000). Dempsey was the first person to hold the position of Deputy Director of Central Intelligence for Community Management, which was created by P.L. 104-293, sec. 805, enacted 10/11/96.
- b. The Senate adjourned on 07/27/00 and reconvened on 09/05/00. The 39 days of that recess are not included in the calculations, in this row, of days elapsed.
- c. The Senate adjourned on 11/13/97 at the end of the 1<sup>st</sup> session of the 105<sup>th</sup> Congress and reconvened on 01/27/98. The 74 days between the 1<sup>st</sup> and 2<sup>nd</sup> sessions of the 105<sup>th</sup> Congress are not included in the calculations, in this row, of days elapsed.

**Table 3. Initial Appointments by President William J. Clinton to Top Positions at the Departments of Defense, Justice, and State, and the Central Intelligence Agency**

Position Title	Senate Committee of Jurisdiction	First Confirmed Nomination to the Position by President William J. Clinton	Date Nomination Received in the Senate <sup>a</sup>	Confirmation Date	Days Elapsed from Inauguration, Enactment, or Vacancy to Nomination	Days Elapsed from Nomination to Confirmation	Days from Inauguration, Enactment, or Vacancy to Confirmation
<b>Department of Defense</b>							
Secretary	Armed Services	Les Aspin	01/20/93	01/20/93	1	1	1
Deputy Secretary	Armed Services	William J. Perry	02/24/93	03/05/93	35	9	44
Under Secretary for Acquisition	Armed Services	John M. Deutch	03/25/93	04/01/93	64	7	71
Comptroller	Armed Services	John J. Hamre <sup>b</sup>	08/04/93	10/25/93	196	51	247
Under Secretary - Policy	Armed Services	Frank Wisner	02/23/93	07/01/93	34	128	162
Under Secretary - Personnel and Readiness <sup>c</sup>	Armed Services	Edwin Dorn	01/27/94	03/15/94	58	47	105
Secretary of the Air Force	Armed Services	Sheila E. Widnall	07/22/93	08/05/93	183	14	197
Secretary of the Army	Armed Services	Togo D. West Jr.	11/05/93	11/20/93	289	15	304
Secretary of the Navy	Armed Services	John H. Dalton	07/01/93	07/21/93	162	20	182
<b>Department of Justice</b>							
Attorney General	Judiciary	Janet Reno	02/26/93	03/11/93	37	13	50
Deputy Attorney General	Judiciary	Phillip Heymann	05/07/93	05/28/93	107	21	128
Director - Federal Bureau of Investigation (FBI)	Judiciary	Louis J. Freeh <sup>d</sup>	07/20/93	08/06/93	1	17	18

Position Title	Senate Committee of Jurisdiction	First Confirmed Nomination to the Position by President William J. Clinton	Date Nomination Received in the Senate <sup>a</sup>	Confirmation Date	Days Elapsed from Inauguration, Enactment, or Vacancy to Nomination	Days Elapsed from Nomination to Confirmation	Days from Inauguration, Enactment, or Vacancy to Confirmation
<b>Department of State</b>							
Secretary	Foreign Relations	Warren Christopher	01/20/93	01/20/93	1	1	1
Deputy Secretary	Foreign Relations	Clifton R. Wharton	01/20/93	01/26/93	1	6	6
Under Secretary - Economic and Agricultural Affairs	Foreign Relations	Joan E. Spero	03/16/93	03/31/93	55	15	70
Under Secretary - Global Affairs <sup>e</sup>	Foreign Relations	Timothy E. Wirth	03/08/93	04/21/93	47	44	91
Under Secretary - International Security Affairs	Foreign Relations	Lynn E. Davis	03/05/93	03/31/93	44	26	70
Under Secretary - Management	Foreign Relations	J. Brian Atwood	03/05/93	03/31/93	44	26	70
Under Secretary - Political Affairs	Foreign Relations	Peter Tarnoff	02/26/93	03/10/93	37	12	49
Under Secretary - Public Diplomacy and Public Affairs <sup>f</sup>	Foreign Relations	Evelyn Simonowitz Lieberman	06/24/99	07/30/99	246	36	282
<b>Central Intelligence Agency</b>							
Director of Central Intelligence	Intelligence	R. James Woolsey	01/20/93	02/03/93	1	14	14
Deputy Director of Central Intelligence	Intelligence	William O. Studeman <sup>g</sup>	02/21/92	04/08/92	38	47	85
Deputy Director of Central Intelligence - Community Management <sup>h</sup>	Intelligence	Joan A. Dempsey	11/07/97	05/22/98	392	122	514
<b>Median elapsed days</b>					44	17	71
<b>Mean elapsed days</b>					90	30	120

**Source:** This table was created by the author with extensive assistance from Henry B. Hogue, Analyst in American National Government, CRS.

- a. Although the first day the new President submitted nominations to the Senate was Inauguration Day, Senate committees held hearings on some top nominations before that time and the Senate was therefore ready to confirm them on the same day they were nominated.
- b. The Senate adjourned on 08/7/93 and reconvened on 09/07/93. The 30 days of that recess are not included in the calculations, in this row, of days elapsed.
- c. This position was created by P.L. 103-160, sec. 903, enacted 11/30/93.
- d. Freeh's predecessor, William S. Sessions, was fired by President Clinton on July 19, 1993. Ana Puga, "Clinton fires FBI's Sessions, expected to name N.Y. judge," *The Boston Globe*, July 20, 1993, p. 1.
- e. Wirth was confirmed into the position of counselor at the Department of State. After a reorganization, the name of the position became under secretary of State for global affairs. John M. Goshko, "State Department Reorganizes Ranks; As Many as 40 Deputy Assistant Secretary Job Will Disappear," *The Washington Post*, Feb. 6, 1993, p. A8.
- f. This position was created by P.L. 105-277, sec. 1313, enacted 10/21/98.
- g. Studeman was a holdover from the previous Bush Administration. Studeman's predecessor, Richard J. Kerr, resigned on Jan. 14, 1992. Elaine Sciolino, "No. 2 C.I.A. Official Quits Post," *The New York Times*, Jan. 14, 1992.
- h. This position was created by P.L. 104-293, sec. 805, enacted on 10/11/96. The Senate adjourned on 11/13/97 at the end of the 1<sup>st</sup> session of the 105<sup>th</sup> Congress and reconvened on 01/27/98. The 74 days between the 1<sup>st</sup> and 2<sup>nd</sup> sessions of the 105<sup>th</sup> Congress are not included in the calculations, in this row, of days elapsed.