The Heritage Foundation

BACKGROUNDER

No. 3878 | DECEMBER 16, 2024

EDWIN J. MEESE III CENTER FOR LEGAL AND JUDICIAL STUDIES

Occupying Washington: How to Staff the New Administration Without Delay

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KEY TAKEAWAYS

During President Trump's first term, the Senate confirmation process broke down, and the Senate used pro forma sessions to block any recess appointments.

The fact that both houses of Congress will now be controlled by the President's party presents a historic opportunity to break through the confirmation logjam.

The actions described here will help to enable the President to deliver on his ambitious reform agenda.

Executive Summary

By law, roughly 1,200 appointments in the executive branch—including nearly all of the appointments critical to any President's success—require Senate confirmation. Although everyone can agree that the Senate's advice and consent function is central to the Constitution's system of divided powers, few will dispute that the confirmation process has too often been characterized by delay and obstruction. Nomination hearings have frequently resembled civil litigation.

During President Donald Trump's first term in office, many confirmations—even for uncontroversial nominees—were held hostage to cloture votes and precious hours of floor debate. Absent dramatic change in the appointments process, it could be a year or more before President Trump's new

This paper, in its entirety, can be found at **https://report.heritage.org/bg3878**

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Administration is fully staffed and running on all cylinders—an unacceptable delay, frustrating the will of America's voters.

Throughout most of the nation's history, whenever the Senate failed to hold floor votes on nominations, Presidents could use the recess appointments power granted by the Constitution to install their nominees in office on a temporary basis. Since 2007, however, the Senate has employed so-called pro forma sessions to take this constitutional authority away from the President. During his first term, President Trump was denied any opportunity to make recess appointments by the Senate's resort to pro forma sessions.

The fact that both houses of Congress will now be controlled by the President's party presents a historic opportunity for interbranch cooperation to break through this confirmation logjam. These circumstances present an urgent question: Are there actions the new President can take, either on his own or in cooperation with friendly Senate leaders, to jumpstart the staffing of his Administration and achieve faster appointments of key officials in the executive branch?

The answer is a resounding "yes."

First, the President-elect's transition team can continue to simplify and accelerate the vetting of appointees. President Trump can continue to accelerate his selection of candidates for Senate-confirmed offices, including by informally communicating his intentions on more nominations before January 20. The new Senate will convene January 3 and can begin to hold hearings on presumptive nominees before Inauguration Day. In the meantime, background checks—a process overseen by the Director of National Intelligence but ultimately controlled by the President—can be narrowed or eliminated for many nominees, particularly those who have previously held positions of responsibility.

The President can also work with Senate leaders to streamline and prioritize the Senate's confirmation process, from committee review through floor votes. There is every reason to hope that under new leadership, the Senate will apply procedural reforms to accelerate the consideration of nominees. The next Majority Leader, Senator John Thune (R–SD), has already expressed an intent to keep the Senate working on Fridays and limit debate time on nominations.

These are good ideas. Other reforms should include shortening the committees' information requests, eliminating or truncating hearings for many nominations, doing away with cloture votes for executive nominees, voting on multiple nominations *en bloc*, and disposing of floor debates or limiting debate time to a few minutes per side.

Whether or not the Senate succeeds in implementing serious reforms for streamlining confirmation procedures, however, the President should look to secure the agreement of Senate leaders to forgo the use of pro forma sessions. With an end to pro forma sessions, the President could then coordinate with Senate and House leaders to adjourn Congress for 10 days or more in the first weeks of the Administration, thereby enabling him to make proactive use of his recess appointments power and thus fill many key offices without delay while the confirmation process plays out.

These recess appointments could be made with the agreement of Senate leaders and in a manner that respects the Senate's essential advice and consent function. First, the President could pledge to recess-appoint only individuals he has already nominated to the same offices and continue to cooperate fully with the Senate to achieve prompt confirmation of those appointees following the recess appointments. Next, he could pledge to remove from office any recess-appointed officer whose nomination is later withdrawn or rejected by the Senate.

Finally, the President could pledge not to fill Cabinet-level offices with recess appointments, provided the Senate conducts prompt up-or-down votes on his Cabinet nominees, preferably on Inauguration Day or within an agreed-upon time after each nomination is announced. In this way, all or most of the recess appointments would be confined to deputy secretaries and other sub-Cabinet positions. The officers in these positions would serve in a recess-appointed capacity only until confirmed by the Senate.

In addition to being effective, using the recess appointments power in this way would be supported by clear and controlling Supreme Court precedent. In a 2014 case, *NLRB v. Noel Canning*,[1] the Court held that the President may fill vacant offices with recess appointments any time the Senate stands in adjournment for 10 days or more. Even if the adjournment occurs in the middle of a session of Congress, and even if the vacancies arose before the adjournment, it is still constitutional for the President to fill those vacancies. This holding affirmed the political branches' historical understanding of the recess appointments power and more than 100 years of consistent practice by Presidents of both parties.

The Court in *Noel Canning* further recognized that the Constitution empowers the President to work with his allies in Congress to place the Senate into recess even in circumstances when most Senators oppose adjournment.[2] The text of Article II, Section 3 specifies that the President may adjourn Congress to a date of his choosing "in Case of Disagreement between [the House and Senate], with Respect to the Time of Adjournment." No President has exercised this authority, but there is an argument that the

President could declare a "Disagreement" between the two houses over the timing of adjournment if, for example, the House of Representatives passed a concurrent resolution calling for an extended adjournment of both houses and the Senate then voted to reject the same concurrent resolution.

It should be recognized, however, that the proactive use of recess appointments would likely be challenged in court and would present some risk of litigation. *Noel Canning* is binding on the lower courts, but no court has yet considered what might qualify as a "Disagreement" within the meaning of Article II, Section 3. One or more federal courts might disagree with the President's judgment on that question, in which case it is possible that the issue could make its way to the Supreme Court of the United States for resolution on an emergency application.

If the Supreme Court had occasion to take up such a challenge to the validity of recess appointments, there is also a possibility that the current Court might overturn *Noel Canning*. Justice Antonin Scalia disagreed with the majority's central holding in *Noel Canning* and would have held that recess appointments can be made only during intersession recesses of Congress and only to fill vacancies occurring during those recesses. Three members of the current Court—Chief Justice John Roberts and Justices Clarence Thomas and Samuel Alito—joined in Justice Scalia's opinion in *Noel Canning*. Two or more of the four Justices who have come onto the Court since then might be persuaded to the same view.

Nevertheless, the potential legal risk to the new Administration may be limited and manageable. The challenged decisions of recess appointees could be ratified after the fact by Senate-confirmed officers. Moreover, if the Supreme Court were to announce a sudden reversal in the constitutional rules governing recess appointments, there are good reasons to expect that it would look to apply a narrow or deferred legal remedy that was prudently designed to minimize the practical impact of the change in law. Actions taken by the President and Congress in reliance on the traditional understanding affirmed in *Noel Canning* are not likely to be overturned.

Finally, separate from any recess appointments, the President can make robust and systematic use of the Vacancies Reform Act (VRA)[3] to put acting officials in place for many of the remaining sub-Cabinet offices while the nominees for those offices are awaiting Senate confirmation.

The bottom line is that there are ways President Trump, acting both on his own and in close coordination with friendly leadership in Congress, might succeed in getting his chosen appointees in place across the executive branch with minimal delay. Doing so would help to ensure that the new Administration loses no time in carrying out the President-elect's promises of bold reform.

A Broken Confirmation Process

Under the Constitution, the default manner for filling the Cabinet and the executive branch's other offices is through appointment by the President "by and with the Advice and Consent of the Senate."[4] In this process of presidential appointment with Senate confirmation (also known as PAS appointments), the President is granted the sole power of choosing the individuals he will nominate. The Senate "may defeat one choice of the Executive, and oblige him to make another; but they cannot themselves CHOOSE, they can only ratify or reject the choice of the President."[5] The Senate's part is to judge whether the President's nominee is qualified for the job on the merits, not whether, in the estimation of a majority of Senators, some other candidate may be more meritorious.[6]

Consistent with a limited conception of the advice and consent function, for most of our history, the Senate has given the President's nominees prompt up-or-down confirmation votes. Many earlier Presidents saw their Cabinet members confirmed in a matter of hours or days at the most, but in recent decades, the confirmation process has become more complex, and the pace of confirmations has slowed considerably. As of 2023, "it [took] on average twice as long to confirm a nominee as it did during the Reagan Administration."[7]

Moreover, the size of the federal government continues to mushroom and the number of PAS positions has exploded. A new President now is called upon to fill approximately 4,000 "noncareer" (commonly referred to as "political") positions, of which close to 1,200 require Senate confirmation.[8] Among the most important PAS positions are the Cabinet secretaries (who are the heads of the major departments), ambassadors, and other agency heads or top-level appointees who report directly to the President. These direct-reports to the President are known as the "principal officers" of the executive branch. The Constitution prohibits Congress from providing for the appointment of principal officers by any means other than PAS appointment.[9]

For lower-level officers (known as "inferior officers") whose positions are created by law and who report up to the President through a Cabinet secretary or other principal officer, the Constitution allows Congress to provide for appointment by the President alone, by the heads of departments, or by the Judiciary.[10] Congress, in its wisdom, has nevertheless chosen to require Senate confirmation for many of these sub-Cabinet positions, including most deputy secretaries, undersecretaries, assistant secretaries, general counsels, and directors and administrators of sub-agencies or bureaus.[11]

There is a strong case for Congress to reduce dramatically the number of executive PAS positions. In theory, consistent with the Constitution, Congress could allow the President unilaterally to appoint all of the non–principal officers (those in sub-Cabinet-level positions) that currently require Senate confirmation. Doing so would limit the need for Senate confirmation to just the 15 department heads, the members of the independent boards and commissions, and the 194 ambassadors whose appointments must be PAS in accordance with the Appointments Clause of the Constitution.

From time to time, Congress has considered eliminating Senate confirmation for some positions and has enacted legislation to do so on a limited basis.[12] But there is little realistic prospect that Congress would reduce the number of PAS positions down to the constitutional minimum, at least not in the near future. Accordingly, at the outset of his second term, President Trump is faced with the need to fill hundreds of important PAS posts with his chosen appointees as quickly as possible.

Judging by the extraordinary pattern of procedural roadblocks and resistance that greeted President Trump's nominees in his first term, the looming confirmation challenge is daunting. The nonpartisan White House Transition Project determined that 100 days into President Trump's first Administration, just 26 PAS positions had been filled, a confirmation pace "significantly behind his four predecessors."[13] That slow pace was not happenstance, and it was not because President Trump's nominees were particularly controversial or underqualified. It was a deliberate strategy on the part of Democratic Senators.[14]

In a November 2019 speech, then-Attorney General William Barr detailed the Democrats' obstruction on nominations:

> Immediately after President Trump won election, opponents inaugurated what they called "The Resistance," and they rallied around an explicit strategy of using every tool and maneuver available to sabotage the functioning of his Administration.... [I]nstead of viewing themselves as the "loyal opposition," as opposing parties have done in the past, they essentially see themselves as engaged in a war to cripple, by any means necessary, a duly elected government.
>
> A prime example of this is the Senate's unprecedented abuse of the advice-and-consent process. The Senate is free to exercise that power to reject unqualified nominees, but that power was never intended to allow the Senate to systematically oppose and draw out the approval process for every appointee so as to prevent the President from building a functional government.

TABLE 1

Trump's First-Term Confirmations Lagged Behind Those of Other Recent Presidents

Confirmed Executive Branch Nominations

President	Jan. 20	Jan. 29	April 29	Year 1
Bush 43	7	13	34	520
Obama	7	21	67	460
Trump 45	2	4	28	320

Percent of Nominations Confirmed in First Two Years

President	Percent
Bush 43	87%
Obama	85%
Trump 45	61%
Biden	78%

SOURCES:

- Center for Presidential Transition, "Presidentially Appointed Positions," revised April 14, 2021, pp. 1 and 3, https://presidentialtransition.org/wp-content/uploads/sites/6/2020/12/Presidentially-Appointed-Positions.pdf (accessed December 11, 2024).
- Center for Presidential Transition, "The Pace of Appointments and Confirmations to Senate-Confirmed Positions During a President's First Two Years," updated June 2, 2023, p. 2, https://presidentialtransition.org/wp-content/uploads/sites/6/2023/01/Biden-year-2-comparison.pdf (accessed December 11, 2024).

> Yet that is precisely what the Senate minority has done from [President Trump's] very first days in office. As of September of this year, the Senate had been forced to invoke cloture on 236 Trump nominees—each of those representing its own massive consumption of legislative time meant only to delay an inevitable confirmation. How many times was cloture invoked on nominees during President Obama's first term? 17 times. The Second President Bush's first term? Four times. It is reasonable to wonder whether a future President will actually be able to form a functioning administration if his or her party does not hold the Senate.[15]

Table 1 shows how President Trump's confirmation record during his first term in office lagged dramatically behind those of other recent Presidents.

In general, a delay in confirming senior political appointees impacts a Republican President's policy agenda more acutely than a Democrat's because the career bureaucracy tends to lean overwhelmingly in favor of

the Democrats' policy priorities. One clear indicator of that leaning is the fact that in the 2016 election cycle, 95 percent of federal employees' political donations went to Hillary Clinton's campaign.[16] Thus, even pending the confirmation of political leadership, a Democratic Administration can count on agency career staff to help advance the President's policy agenda, whereas for Republican Administrations, the systematic obstruction of confirmations is much more debilitating. That difference is precisely why the Democrats have pursued the strategy of "resistance" identified by Attorney General Barr and why that strategy has been so effective.[17]

In April 2019, frustrated Republicans in the Senate finally acted. They used the so-called nuclear option to reduce post-cloture debate time for sub-Cabinet-level executive branch nominees from 30 hours to two.[18] That change was a significant improvement. Nevertheless, the requirement to hold cloture votes and the allowance of up to two hours of debate—a major commitment of Senate floor time when spread across hundreds of nominees—continue to be major impediments in the confirmation process.

Until very recently, if the Senate failed to move on the President's nominations, the President could use the power expressly granted him by the Constitution to fill the needed offices on a temporary basis during the next congressional recess. Article II, Section 2, Clause 3 of the Constitution (the Recess Appointments Clause) provides that "[t]he President shall have Power to fill up all Vacancies that may happen during the Recess of the Senate, by granting Commissions which shall expire at the End of their next Session."[19]

The Founders recognized that for the efficient functioning and continuity of the government, the President would need to be able to fill important federal offices without delay during periods when the Senate is out of town and unavailable to confirm nominees. As Attorney General William Wirt advised in 1823, "The substantial purpose of the constitution was to keep these offices filled; and the powers adequate to this purpose were intended to be conveyed."[20]

In *Federalist* No. 67, Alexander Hamilton described the recess appointments power as "nothing more than a supplement…for the purpose of establishing an auxiliary method of appointment, in cases to which the general method was inadequate."[21] PAS appointment is the preferred method for principal officers under the Constitution because Senate confirmation provides "an excellent check upon a spirit of favoritism in the President," "tend[s] greatly to prevent[] the appointment of unfit characters from State prejudice, from family connection, from personal attachment, or from a view to popularity," and offers "an efficacious source of stability in the administration."[22]

The auxiliary nature of the recess appointments power, however, does not mean that an officer recess-appointed by the President has any less authority or legitimacy than a Senate-confirmed officer. Recess appointees are fully empowered officers, no different from Senate-confirmed appointees except for the duration of their tenure. Recess appointments last between one and two years—until the end of the next succeeding session of Congress.[23]

Two main issues have arisen in interpreting the Recess Appointments Clause. First, which adjournments of the Senate qualify as a "Recess," thus triggering this auxiliary appointment authority? Must it be the recess *sine die* that divides the formal sessions of a Congress (a so-called intersession recess), or may it also include an intrasession recess, such as when the Senate adjourns until a specified date in the middle of a congressional session? Second, which vacant offices may be filled with recess appointments? Must it be only those that become vacant during the recess in question, or may it also include those that were vacant before the Senate went into recess?

The long-standing view of the executive branch, reiterated consistently by Attorneys General and the Office of Legal Counsel (OLC) of the U.S. Department of Justice, is that the clause gives the President the power to fill any vacant PAS position, regardless of when it became vacant, during any intersession recess (no matter how short) or any intrasession recess that is substantial in length (generally meaning an intrasession adjournment lasting at least 10 days).[24]

Acting on this broad interpretation, America's Presidents have made thousands of recess appointments, including appointing thousands of officers during intrasession adjournments of the Senate. Famously, President Theodore Roosevelt filled more than 160 PAS positions with recess appointments during a single momentary intersession recess in December 1903.[25] During their terms in office, President Ronald Reagan made a total of 232 documented recess appointments, President Bill Clinton made 139, and President George W. Bush made 171.[26]

In its 2014 opinion in *NLRB v. Noel Canning*, the Supreme Court affirmed the executive branch's broad interpretation of the Recess Appointments Clause. A five-Justice majority held that the clause gives the President the power to fill any vacant PAS position during any adjournment of the Senate lasting at least 10 days in duration.[27]

Justice Scalia, joined by Chief Justice Roberts and Justices Thomas and Alito, disagreed with the majority's interpretation and would have held that the clause allows Presidents to make recess appointments only during intersession recesses and only to fill vacancies that come into existence during

those same recesses.[28] In the view of these four Justices, recess appointments are an anachronism, needed in the early days of the Republic when transportation over long distances took weeks and Congress's intersession recesses stretched for months but effectively a nullity in today's world.

Although embraced and vindicated by the majority's holding in *Noel Canning*, the broad reading of the Recess Appointments Clause still does not guarantee that Presidents can wield the recess appointments power to defeat a concerted obstruction of the Senate's confirmation process. That is because the Senate has used its technical procedures to avoid adjourning for extended intrasession recesses even when nearly all Senators leave town for weeks on end, thereby blocking the President from making recess appointments.

Since 2007, the Senate has regularly employed so-called pro forma sessions for this purpose. Once every three days, a single Senator goes through the motions of gaveling the Senate in and out of session while the other 99 Senators enjoy an extended break from Senate business far from the Capitol. Each session is perfunctory and lasts only a matter of seconds, but because it preserves the theoretical ability to conduct business by unanimous consent during pro forma sessions, the Senate maintains the position that it stands ready to act on the President's nominations and is not, as a formal matter, in recess.[29]

In 2012, President Barack Obama attempted several recess appointments to the National Labor Relations Board in defiance of this procedural device, but in a second holding in *Noel Canning*, the Supreme Court upheld the Senate's use of pro forma sessions.[30] With the Court's blessing, this device has proven extremely effective. As a result of the Senate's habitual use of pro forma sessions as validated by the Court, President Trump was denied any opportunity to make recess appointments during his first term, and President Joe Biden also has made none.[31]

Accordingly, as long as pro forma sessions continue to be used in the Senate, there is a very real prospect that President Trump will face a continuation of "resistance" and obstruction of nominations in his second Administration. Given the President's need to advance his policy agenda as far as possible within the first 18 to 24 months of his term, the question is therefore pressing: What, if anything, can President Trump do at the outset to staff his new Administration as quickly as possible?

Ways to Break Through the Logjam

There are several actions that the newly elected President can take on his own, starting before Inauguration Day, to accelerate the timing of

confirmation for many of his nominees. There are also reforms (short of reducing the number of PAS positions) that the new Senate can put in place to make confirmations quicker and more efficient—*if* it can muster the political will to do so.

Once in office, there are additional steps President Trump can take in cooperation with friendly leaders in the Senate and the House to revivify his recess appointments authority and make proactive use of recess appointments to install his chosen nominees in office pending completion of their confirmations. Finally, the President can rely on the Vacancies Reform Act to put acting officers in place on a systematic basis in sub-Cabinet positions across the government. Each of these options is discussed below.

Accelerate the Vetting and Naming of Nominees

Delay in the Senate's process is only part of the reason the confirmation process takes such a long time today. According to the Senate Committee on Homeland Security and Governmental Affairs, it is typically the "presidential selection and vetting process that consumes the majority of the time from vacancy to appointment."[32] A Brookings Institution analysis found that even if "the Senate acted on every nomination within a month, the time needed to fill positions would decline by less than 20 percent."[33]

Fortunately, there is much the President can do on the front end to get his nominations up to the Senate sooner, and President-elect Trump appears to be taking positive steps to do so. He is using the transition time effectively to select his senior staff and announce a rapidly growing list of his prospective nominees. This means that the vetting process for nominees, which consists of an FBI background check and an ethics clearance, should be the focus for further gains in efficiency.

FBI Background Checks. In 2018, a national security attorney revealed in *The Wall Street Journal* that "security clearances are being weaponized against the White House by hostile career bureaucrats, thwarting the president's agenda by holding up or blocking appointees." He knew, for example, that in one case, "those weaponizing the security-clearance process include[d] a senior official who remains on the job despite publicly disparaging President Trump as 'unfit' to lead." In this attorney's view, these "unelected partisans are quietly usurping presidential prerogatives through a litany of seemingly small but slowly compounding abuses of bureaucratic power. Their efforts evidence a philosophy that laws and rules are not static boundaries of societal norms, but flexible tools of the administrative state."[34]

President Trump can address this problem by putting less emphasis on potentially biased FBI background checks and instead relying on his own team's vetting procedures bolstered by private vetting efforts.

The Intelligence Reform and Terrorism Prevention Act of 2004 provides for FBI background checks to begin during the presidential transition:

> The President-elect should submit to the Federal Bureau of Investigation or other appropriate agency…the names of candidates for high level national security positions through the level of undersecretary of cabinet departments as soon as possible after the date of the general elections held to determine the electors of President and Vice President under section 1 or 2 of title 3, United States Code…. The responsible agency or agencies shall undertake and complete as expeditiously as possible the background investigations necessary to provide appropriate security clearances to the individuals who are candidates described under paragraph (1) before the date of the inauguration of the President-elect as President and the inauguration of the Vice-President-elect as Vice President.[35]

The act includes a "sense of the Senate" that the nominations for national security positions should be submitted to the Senate by Inauguration Day and that the Senate should confirm or reject them within 30 days of submission.[36] In accordance with this law, President-elect Trump's transition team recently reached an agreement with the Justice Department over the conduct of FBI background checks for the transition.[37]

In practice, however, there is no guarantee that the FBI will complete its background checks by Inauguration Day. In fact, given the demonstrated politicization of the FBI, there is reason to believe the opposite is more likely. The Durham Report makes clear that, unfortunately, partisan hostility has played a role in FBI operations. Regarding the Trump Russia probe, Durham found a "clear predisposition" to investigate based on a "prejudice against Trump" and "pronounced hostile feelings" by key investigators.[38] Similarly, House Judiciary Committee Chairman Jim Jordan has accused the FBI Director of bias and suppression of conservatives.[39]

That is why it is critical to note that, contrary to popular belief, FBI background checks for presidential appointees are not required by statute. As a 2012 Senate Committee report explained, "FBI background checks for individuals nominated to a position in the executive branch are not statutorily required but are a matter of presidential practice, with their roots in an executive order issued by President Dwight Eisenhower."[40]

That executive order required that "the appointment of each civilian officer or employee in any department or agency of the Government shall be made subject to investigation."[41] It tasked the heads of agencies and the Office of Personnel Management (OPM) to do the background checks in coordination with the FBI. OPM accordingly issued regulations setting forth sensitivity designations and investigative requirements for each position.[42] As it relates to the protection of national security, the process today is overseen by the Director of National Intelligence.

Because the process is governed by executive order, if it turns out that the FBI's background checks for some or all of his key nominees are not completed by Inauguration Day, President Trump would have authority to amend the executive order to narrow or eliminate the background check requirement for specified individuals who had been thoroughly vetted by the transition team to the satisfaction of the President. For example, he could streamline or eliminate the need for background checks for individual nominees who have served previously in senior positions of responsibility for which they have gone through extensive background vetting. This could serve as a counterweight in the face of evidence suggesting that the federal government's national security bureaucracy has abused its control of security clearances in recent years as a weapon against conservative Administrations.[43]

Ethics Filings. Federal ethics laws require candidates for senior government positions to file financial disclosure forms and make formal arrangements to resolve any financial conflicts of interest they may have in relation to the positions to which they will be appointed. The financial disclosures are reviewed by the ethics counsel at both the White House and the agency where the appointee will serve. The counsels then work with the candidate to craft a signed "ethics agreement" with specific commitments that the candidate will make to divest assets or recuse from agency matters that could pose a conflict.

Although these ethics requirements have often delayed the President's submission of nominations to the Senate, they need not be a bottleneck. Ethics filings and agreements are typically completed before appointment, but they do not have to be. The same statute that requires these ethics disclosures also gives nominees five days after submission of the nomination and recess appointees 30 days after "assuming the position" to file the required ethics materials.[44] For appointees with more complex financial circumstances, the law also permits a "reasonable extension" of the filing requirements for up to 90 days.[45]

Reform the Senate's Confirmation Procedures

There are also steps that friendly leaders in the Senate can take to streamline the confirmation process, and President Trump can be expected to work with the newly elected Majority Leader, Senator Thune, to push for these actions. Senator Thune has already signaled an intention to keep the Senate working on Fridays and to shorten further the floor debate time for President Trump's nominees, both of which should help to achieve speedier confirmations.

This reform begins with the recognition that there is nothing sacrosanct about cloture votes and extended debate times. A majority of the Senate could vote to do away with the cloture process for executive nominations (the so-called nuclear option) and could eliminate floor debates altogether or significantly restrict the time for debate on sub-Cabinet executive nominees—for example, down to five or ten minutes per side. The Senate could also designate more executive positions for "privileged" treatment, eliminating the need for nominees to appear at confirmation hearings in more cases.[46]

Further, the Senate could change its rules to consider and vote on many more executive branch nominations *en bloc*. Under current Senate rules, nominations are considered *seriatim*, which consumes many more hours of floor time. Under current rules, if just 10 lower-level nominations each required the full two hours of post-cloture debate, those nominations alone would consume half of the Senate's floor time for an entire week. Concurrent consideration would be much faster.

Senator Amy Klobuchar (D–MN), the current Chairman of the Senate Rules and Administration Committee, has proposed a rules change to do just that. Her resolution would allow the Majority Leader to call up to 10 nominees, advanced out of the same committee, and consider them all at the same time for a vote (not including circuit court judges and Cabinet secretary nominations).[47]

Agreeing to a resolution to change Senate rules requires only a majority vote. However, the resolution itself is fully debatable and subject to amendment. If the resolution were filibustered, invoking cloture would require the support of two-thirds of the Senators present and voting, which could amount to 67 Senators if the entire body were present for the vote.[48] The same cloture threshold would likely apply to the motion to proceed. This threshold is higher than the usual 60-vote threshold for cloture because measures to amend Senate rules are subject to more stringent requirements.[49]

A more modest version of *en bloc* consideration of nominees could be instituted by the committees of the Senate. For example, committees could batch nominees together on panels, where and as appropriate, for nomination hearings and potentially for markups and committee votes. In addition, individual committees can always reduce considerably the amount of information and materials demanded of nominees in connection with nominations.

Each of these actions would advance the goal of achieving reasonably prompt Senate consideration of the President's nominations.

Make Proactive Recess Appointments

Even with the process improvements and expediting actions described above, confirmations of President Trump's nominees for many of the essential PAS offices below the Cabinet level will almost certainly require more time than the new Administration finds acceptable. One option for addressing this problem could be recess appointments. The President could work cooperatively with Majority Leader Thune and friendly leadership in the Senate and House to make systematic use of his recess appointments power in accordance with the Supreme Court's majority opinion in *Noel Canning*.

Ending Pro Forma Sessions and Working Cooperatively on Recess Appointments. First, President Trump and Senate leaders could come to an immediate agreement that the Senate will presumptively cease holding pro forma sessions as of January 20, 2025.

Second, they could work out a friendly accommodation, acceptable to both President Trump and Senate leaders, that would allow the President to make recess appointments for agreed-to positions on conditions that respect and preserve the Senate's confirmation function. For example, the President could commit not to recess-appoint any members of his Cabinet, provided the Senate holds a final up-or-down vote on the Cabinet nominee within an agreed number of days after the name of the prospective nominee has been communicated to the Senate.

Further, the President could pledge that he would reach advance agreement with Senate leaders on the sub-Cabinet offices that he may wish to fill with recess appointments and that he would recess-appoint to those offices only individuals that he has already nominated to fill the same offices. As part of this understanding, the President would also commit to continued cooperation with the Senate to complete the confirmations of these officers at the earliest opportunity.

Finally, the President could pledge that he would remove from office any recess-appointed officer whose nomination is withdrawn or voted down on the floor by the Senate.

With these accommodations offered by the President, Senate leaders could then agree to follow through on abolishing use of the pro forma sessions as a blocking device. Also, if requested by President Trump, Senate leaders could commit to have the Senate vote on a resolution to adjourn the Senate for a period of at least 10 days at a mutually acceptable time to allow the agreed-to recess appointments to be made per *Noel Canning*.

Forcing an Adjournment. Of course, it is quite possible, if not likely, that a resolution of adjournment would fail to pass the Senate under these circumstances. However, the lack of support for adjournment by a majority of Senators would not necessarily doom the prospect of recess appointments.

If necessary, President Trump could work with Senate and House leaders to precipitate a recess of the Senate using the President's authority to adjourn Congress under Article II, Section 3 of the Constitution (the Adjournment Clause): "[The President] may, on extraordinary Occasions, convene both Houses [of Congress], or either of them, and in Case of Disagreement between them, with Respect to Time of Adjournment…may adjourn them to such Time as he shall think proper[.]"[50] The Court in *Noel Canning* recognized that the Adjournment Clause "gives the President (if he has enough allies in Congress) a way to force a recess" of the Senate in order to make recess appointments.[51] With both houses of Congress controlled by leaders friendly to President Trump, it could be a simple matter for the President to exercise this authority.

Under House and Senate procedures, the steps to do this would be straightforward. First, House leaders could introduce a concurrent resolution providing for the adjournment of both houses to a specified date at least 10 days out and could secure House passage of the concurrent resolution by majority vote.[52] Then Senate leaders could introduce the same concurrent resolution in the Senate and bring it to a vote.[53]

If the concurrent resolution failed to receive majority approval in the Senate, the President could claim a basis for declaring that "a Disagreement between [the Houses] with Respect to Time of Adjournment" exists, thus triggering the President's authority to adjourn Congress for the period of time necessary to make his planned recess appointments. A vote rejecting a resolution of adjournment previously passed by the House would present strong evidence of a disagreement; if the Senate did not hold a vote but delayed consideration of the resolution (perhaps because of motions for amendment), the evidence of a disagreement might be more ambiguous.

Litigation Risk. No President has ever used the adjournment power granted in Article II, Section 3, and recess appointments made in such circumstances could be expected to draw litigation challenges. Challengers could claim standing to sue in court if they had a plausible basis to show personal harm from some action approved by one of the recess appointees.

While the President could argue that he is on sound legal ground in that he is relying on the majority decision in *Noel Canning*, there is a possibility that a lower federal court might take issue with the President's determination that a sufficient disagreement existed between the House and Senate for purposes of triggering the Adjournment Clause. If a lower court were to enjoin an appointment, the case could potentially reach the Supreme Court in short order on an emergency stay application.

If the merits of the President's recess appointments were to come before the Supreme Court in any posture, it must be acknowledged that a majority of the current Justices on the Court might vote to overturn *Noel Canning*. In 2014, Chief Justice Roberts and Justices Thomas and Alito joined in Justice Scalia's concurring opinion, taking issue with the majority and expressing the view that the recess appointments power is an anachronism so narrow in scope as to be nugatory. Three of the Justices who have joined the Court since *Noel Canning* (Justices Neil Gorsuch, Brett Kavanaugh, and Amy Coney Barrett) are admirers of Justice Scalia and might well be attracted to his narrow, text-based reading of the Recess Appointments Clause.

While a ruling from the Supreme Court invalidating the President's recess appointments would be a setback and could prove embarrassing both to the President and to Senate leaders, the practical implications of such a loss at the high court would likely be limited and manageable. The Senate, for example, would continue to process the President's nominations pending the court challenges, and as soon as the Senate had confirmed the President's appointees to be department heads or deputy secretaries in the affected agencies, those confirmed officers could act to ratify the challenged decisions of the recess appointees.

Moreover, should the Supreme Court issue a new opinion reversing its interpretation of the Recess Appointments Clause and overturning the established understanding of the political branches, there is a strong chance that it would craft a narrow remedy or otherwise tailor or defer application of its holding so as to minimize the disruptive effects of its new interpretation.[54] The Court would likely recognize the degree of reliance the President and Senate had placed in *Noel Canning* and could be expected to exercise prudence in ordering a remedy that avoids imposing a harsh and broadscale impact.

If anything, the potential downside risk of court review may be greater for the Senate than for the President. The President would arguably be no worse off if the courts were to strike down his recess appointments since the recess appointments power is essentially a nullity today because of pro forma sessions. On the other hand, if the courts were to affirm the President's use of the Adjournment Clause to force a Senate recess for purposes of making recess appointments, that would be a major legal development giving the President greater potential leverage in future confirmation battles. For that reason, the prospect of a litigation challenge could create an incentive for the Senate to cooperate with the President either on a compromise approach regarding recesses or, at a minimum, on faster confirmations of his nominees.

The Pay Act. It should be recognized that the federal Pay Act, codified in Section 5503 of Title 5 of the U.S. Code, restricts compensation for recess appointees in certain circumstances. Under the act, if the vacancy filled by the recess appointment existed while the Senate was in session, the recess appointee cannot receive compensation while in office unless (1) the vacancy arose within 30 days of the end of the preceding session of the Senate, (2) a nomination for the office was pending before the Senate at the end of the preceding session, or (3) a nomination for the office had been rejected by the Senate within 30 days of the end of the preceding session. Further, if the vacancy arose before the recess of the Senate, a nomination to fill the office must be submitted to the Senate no later than 40 days after the Senate is back in session, or else the appointee cannot continue to receive pay.[55]

The Pay Act's restrictions should not pose an impediment to the President's reliance on recess appointments in the manner discussed here. If in each case, for example, the President recess-appoints only the individuals he had previously nominated to fill the same positions, then the conditions of the Pay Act would be fully satisfied (in all cases, nominations would have been submitted before the recess of the Senate), and the recess appointees could therefore receive compensation for the entire time of their service.

Moreover, even recess appointees who had not yet been nominated to their respective offices before the Senate recess could receive compensation without interruption if (1) the office had become vacant within 30 days before the recess (as would happen if the vacancy occurred with the ordinary transition of power on January 20, 2025, and the Senate recess happened within 30 days thereafter) and (2) the President nominates the appointee to fill the same office within 40 days after the Senate comes back into session.

Use the Vacancies Reform Act

Regardless of whether and how extensively the President and Senate leaders make use of the alternatives described above, the Vacancies Reform Act[56] gives the President supplemental statutory authority to staff many PAS positions with acting officials in lieu of using recess appointments while the confirmation process plays out.

Under the VRA, in certain circumstances and subject to time limits specified in the statute, designated alternative officials are empowered to perform the functions and duties of vacant PAS offices on an acting basis. Pending confirmation of his nominees, President Trump could use the VRA to place loyal acting officials in many of the sub-Cabinet PAS positions that he determines not to fill with recess appointments.

Unless another statute specifically addresses the office in question, the VRA is "the exclusive means" for designating acting officials to perform the functions and duties of Senate-confirmed positions temporarily where the incumbent "dies, resigns, or is otherwise unable to perform the functions and duties of the office."[57] OLC has opined that the statute may be used to put acting officials in positions that have become vacant through the removal of the incumbent officer.[58]

The statute allows three classes of government officials to serve in an acting capacity in vacant PAS offices: (1) the "first assistant" to the office in question, generally meaning the top deputy or a direct-report position designated as the first assistant by statute, regulation, or departmental order; (2) any other Senate-confirmed officer from across the executive branch; or (3) any other employee of the same department or agency who served in his position of employment for at least 90 days out of the 365 days preceding the vacancy and is paid at the GS-15 level or above.[59]

The officials in categories (2) and (3)—a PAS officer or a senior employee of the same department or agency—may become an acting official under the VRA only by express designation of the President.[60] In contrast, the first assistant to the vacant office—category (1)—automatically exercises the functions and duties of the vacant office in an acting capacity as long as the position he or she occupies was the designated first assistant position at the time the PAS office in question became vacant.[61]

These designated officials generally may serve in an acting capacity under the VRA for a total of 210 days from the date of the vacancy. However, the clock stops while a first or second nomination to the position is pending, which can extend the period of acting service for another year or more.[62] The VRA also extends the 210 days by an additional 90 days when a new

President comes into office: For any PAS office that is vacant during the 60 days following the new President's inauguration, the vacancy is deemed to occur 90 days after Inauguration Day or 90 days after the day the office became vacant, whichever is later.[63]

Presumably, when he first comes into office, President Trump will find few existing Senate-confirmed officers and senior career employees of federal departments that he will be comfortable designating to serve as acting officers in important PAS positions. But he can still make immediate use of the VRA by installing his chosen non-Senate-confirmed political appointees in first assistant positions under vacant PAS offices, thus enabling them to become acting officials in those offices automatically under the terms of the VRA.

Even though these appointees will assume their first assistant positions after the vacancy arose, they will accede to the acting role immediately without having to wait 90 days for designation by the President. As OLC has reasoned, the text of the VRA refers to "the first assistant to the office," meaning the position of first assistant, not the particular individual who serves as the first assistant. As long as the first assistant position existed at the time of the vacancy, anyone can be installed as the first assistant at a later point and begin exercising the functions and duties of the vacant PAS office on an acting basis, provided the time limits of the VRA have not been reached.[64]

Most first assistant positions in PAS offices in the executive branch are political appointments and will be vacated on or before Inauguration Day. Any open first assistant position that does not itself require Senate confirmation may be filled on day one with a new political appointee approved by the President. That new appointee will then automatically begin to exercise the functions and duties of the vacant PAS office in an acting capacity.

This action would be more difficult if the first assistant position were occupied by a career employee or designated as career-reserved. In that event, OPM would have to reclassify the position before it could be filled with a political appointee,[65] which is a paperwork matter that could be executed quickly once the President's team is in control of OPM. After that, however, any career employee in the first assistant position would need to be moved to another job to make way for the political appointee, and that could prove to be more complicated if the career employee did not wish to change positions.

In general, a career employee who is a member of the Senior Executive Service (SES) may be involuntarily reassigned to another SES position in the same geographic area on 15 days' written notice.[66] However, federal law

prohibits involuntarily reassigning a career employee within 120 days of the appointment of a new agency head or immediate career supervisor,[67] a moratorium that is designed to provide a "get acquainted" period during which employees can prove themselves to new management.[68]

OPM regulations specify that this moratorium period does not apply if a noncareer (political) deputy is serving as the acting agency head,[69] which may be the case in certain agencies for the period between Inauguration and Senate confirmation of the President's nominated agency head. Even here, however, another SES job would need to be available within the agency; otherwise, OPM would have to authorize the agency to create one.[70] That could be done, provided the number of new SES positions required for this purpose did not exceed the 5 percent cap on additional SES slots that OPM may authorize over an agency's two-year baseline allocation.[71]

At each agency, a key question is who will serve as the acting officer with authorization to sign off on these personnel changes. In certain cases, the President may have recess-appointed the deputy secretary or deputy agency head, as discussed above, and that recess appointee would be the acting head of the department or agency. In most departments and agencies, however, both the secretary or agency head and the deputy secretary or deputy agency head are fully authorized to approve all personnel actions.[72]

The usual practice during transitions is for the outgoing Administration, in consultation with the new Administration, to designate a senior career official (or an acceptable holdover political appointee) within each department and agency to serve as the acting agency head beginning at noon on Inauguration Day. The new Administration will want to take care to ensure that the critical acting official at each department and agency is respected, known to the President's team, and trusted to carry out faithfully the directions of the White House. Otherwise, if a suitable alternative senior career official can be identified, the President may wish to designate that official to serve as the acting deputy secretary or deputy agency head to exercise all appointment and personnel authority pending confirmation or recess appointment of the President's nominees.

Conclusion

If implemented in close coordination with supportive leaders in the Senate, the various measures and actions described above should enable President Trump to succeed in populating his new Administration as quickly and efficiently as possible—certainly far more rapidly than the Senate allowed him to do in his first term. That outcome is critical to the

President's ability to deliver on his reform agenda. The primary beneficiaries of an accelerated appointments process will be the American people, who will see the President they voted for carry out his promised reforms without delay commencing on January 20, 2025.

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Endnotes

1. 573 U.S. 513 (2014).
2. Ibid., at 555; see also ibid. at 614 (Scalia, J., concurring).
3. 5 U.S.C. §§ 3345–3349, https://www.law.cornell.edu/uscode/text/5/3345, https://www.law.cornell.edu/uscode/text/5/3346, https://www.law.cornell.edu/uscode/text/5/3347, https://www.law.cornell.edu/uscode/text/5/3348, https://www.law.cornell.edu/uscode/text/5/3349 (accessed December 11, 20-24).
4. U.S. Const. Art. II, § 2, cl. 2 (the Appointments Clause).
5. Alexander Hamilton, *The Federalist* No. 66, https://avalon.law.yale.edu/18th_century/fed66.asp (accessed December 11, 2024).
6. Ibid.
7. Center for Presidential Transition, "Presidential Transition Guide: Presidential Appointments," https://presidentialtransition.org/transition-resources/presidential-transition-guide/presidential-appointments/ (accessed December 11, 2024).
8. See "What types of political appointments are available in an administration?" in Center for Presidential Transition, "Frequently Asked Questions About the Political Appointment Process," https://presidentialtransition.org/faqs-for-prospective-appointees/ (accessed December 11, 2024).
9. See *United States v. Arthrex*, 594 U.S. 1, 12, 23 (2021); *Edmond v. United States*, 520 U.S. 651 (1997); *Buckley v. Valeo*, 424 U.S. 1, 126 (1976) (per curiam).
10. U.S. Const. Art. II, § 2, cl. 2; *Edmond v. United States*, 520 U.S. at 662–63.
11. Christopher M. Davis and Michael Greene, "Presidential Appointee Positions Requiring Senate Confirmation and Committees Handling Nominations," Congressional Research Service *Report for Members and Committees of Congress* No. RL30959, updated December 28, 2021, https://www.everycrsreport.com/files/2021-12-28_RL30959_6d0d6e63f911075d984705eff1cbef0cedec4fce.pdf (accessed December 11, 2024).
12. See S. 679, Presidential Appointment Efficiency and Streamlining Act of 2011, Public Law No. 112-166, 112th Congress, August 10, 2012, 126 Stat. 1283, https://www.congress.gov/112/statute/STATUTE-126/STATUTE-126-Pg1283.pdf (accessed December 11, 2024), which eliminated the requirement of Senate confirmation for 220 lower-level executive branch positions in various categories.
13. James Pfiffner, *The Office of Presidential Personnel*, White House Transition Project 1997–2021 and University of Missouri, Kinder Institute on Constitutional Democracy, Report No. 2021-26, August 2020, p. 2, https://www.whitehousetransitionproject.org/wp-content/uploads/2020/08/WHTP2021-26-Office-of-Presidential-Personnel.pdf (accessed December 11, 2024).
14. For example, one of the authors (John Malcolm) was nominated as part of a bipartisan slate of nominees to serve on the Board of Directors of the Legal Services Corporation on June 11, 2018. Even though this is a noncontroversial position, the Senate did not act on those nominations for more than a year, confirming the entire slate by voice vote on August 1, 2019.
15. Press release, "Attorney General William P. Barr Delivers the 19th Annual Barbara K. Olson Memorial Lecture at the Federalist Society's 2019 National Lawyers Convention," U.S. Department of Justice, November. 15, 2019, https://www.justice.gov/opa/speech/attorney-general-william-p-barr-delivers-19th-annual-barbara-k-olson-memorial-lecture (accessed December 11, 2024).
16. Jonathan Swan, "Government Workers Shun Trump, Give Big Money to Clinton," *The Hill*, Oct0ber 26, 2016, https://thehill.com/homenews/campaign/302817-government-workers-shun-trump-give-big-money-to-clinton-campaign/ (accessed December 11, 2024).
17. Senate Republicans have never pursued the same concerted strategy of confirmation delays against a Democratic President. When President Biden assumed office, most Republican Senators embraced the traditional, pre-Trump consensus view that "All presidents have a right to their Cabinet" and that nominees should be confirmed as long as they are not extreme. See Burgess Everett, "Republican Senate Signals It Will Confirm Biden Cabinet," *Politico*, November 11, 2020, https://www.politico.com/news/2020/11/20/biden-cabinet-senate-republicans-438459 (accessed December 11, 2024); Jennifer Haberkorn and Eli Stokols, "White House Applies Light Touch to Courting GOP Votes on Cabinet Nominations," *Los Angeles Times*, March 18, 2021, https://www.latimes.com/politics/story/2021-03-18/biden-bipartisan-outreach-cabinet-nominees (accessed December 11, 2024). It should be noted that the average length of time to confirm the Cabinet nominees of Presidents Trump and Biden was approximately the same, but the real effect of the Democrats' resistance efforts was felt in the less high-profile sub-Cabinet PAS positions, which are precisely the positions that are most needed to accomplish the day-to-day work of shepherding policy changes through the bureaucracy. See charts, *infra*, and Carlos Galina, "The U.S. Process for Confirming a Cabinet Takes Longer than Almost All Other Countries," Center for Presidential Transition Blog, May 5, 2021, https://presidentialtransition.org/the-u-s-process-for-confirming-a-cabinet-takes-longer/ (accessed December 11, 2024).
18. Burgess Everett, "Republicans Trigger 'Nuclear Option' to Speed Trump Nominees," *Politico*, April 3, 2019, https://www.politico.com/story/2019/04/03/senate-republicans-trigger-nuclear-option-to-speed-trump-nominees-1253118 (accessed December 11, 2024). This action was not unprecedented; it was the Democrats under Majority Leader Harry Reid that first invoked the nuclear option by approving majority votes for cloture on executive nominations, which was the more significant innovation.
19. U.S. Const. Art. II, § 2, cl. 3.
20. 1 Op. Atty. Gen. 631, 632 (1823).
21. Alexander Hamilton, *The Federalist* No. 67, https://avalon.law.yale.edu/18th_century/fed67.asp (accessed December 11, 2024).

22. Alexander Hamilton, *The Federalist* No. 76, https://avalon.law.yale.edu/18th_century/fed76.asp (accessed December 11, 2024).
23. *NLRB v. Noel Canning*, 573 U.S. 513, 534–35 (2014).
24. 25 Op. OLC 182 (2001); 20 Op. OLC 124, 161 (1996); 16 Op. OLC 15 (1992); 13 Op. OLC 271 (1989); 6 Op. OLC 585, 586 (1982); 3 Op. OLC 314, 316 (1979); 41 Op. Atty. Gen. 463 (1960).
25. *Noel Canning*, 573 U.S. at 587–88 (citing Senate Report No. 4389, 58th Congress, 3rd Session, 1905, p. 2).
26. Bruce Drake, Pew Research Center, "Obama Lags His Predecessors in Recess Appointments," Pew Research Center, January 13, 2014, https://www.pewresearch.org/short-reads/2014/01/13/obama-lags-his-predecessors-in-recess-appointments/ (accessed December 11, 2024).
27. 573 U.S. at 538 ("In sum, we conclude that the phrase 'the recess' applies to both intra-session and inter-session recesses. If a Senate recess is so short that it does not require the consent of the House, it is too short to trigger the Recess Appointments Clause. See Art. I, §5, cl. 4. And a recess lasting less than 10 days is presumptively too short as well."); ibid. at 549 ("In light of some linguistic ambiguity, the basic purpose of the Clause, and the historical practice we have described, we conclude that the phrase 'all vacancies' includes vacancies that come into existence while the Senate is in session.").
28. Ibid. at 575, 584, 613 (Scalia, J., concurring).
29. Pro forma sessions are held every three days in compliance with the restriction in Article I, section 5, clause 4 of the Constitution, which states, "Neither House, during the Session of Congress, shall, without the Consent of the other, adjourn for more than three days…."
30. 573 U.S. at 550–53.
31. Chad Pergram, "Reporter's Notebook: The Hitchhiker's Guide to Recess Appointments," Fox News, December 2, 2024, https://www.foxnews.com/politics/hitchhikers-guide-recess-appointments?msockid=19d634a37ae6652f132126db7ee66b78 (accessed December 11, 2024).
32. Senate Report 112-24, *Presidential Appointment Efficiency and Streamlining Act of 2011*, Committee on Homeland Security and Governmental Affairs, U.S. Senate, 112th Congress, 1st Session, June 21, 2011, p. 3, https://www.congress.gov/112/crpt/srpt24/CRPT-112srpt24.pdf (accessed December 11, 2024).
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35. S. 2845, Intelligence Reform and Terrorism Prevention Act of 2004, Public Law No. 108-458, 108th Congress, December 17, 2004, 118 Stat. 3638, § 7601(a), https://www.congress.gov/108/statute/STATUTE-118/STATUTE-118-Pg3638.pdf (accessed December 11, 2024). See also U.S. Office of Personnel Management, *Presidential Transition Guide to Federal Human Resources Management Matters: Election Year 2020*, December 2020, pp. 55–58, https://www.opm.gov/about-us/reports-publications/presidential-transition-guide-2020.pdf (accessed December 11, 2024).
36. S. 2845, § 7601(b).
37. Anders Hagstrom, "Trump Transition Signs Agreement for FBI Background Checks," Fox News, December 4, 2024, https://www.foxnews.com/politics/trump-transition-signs-agreement-fbi-background-checks (accessed December 11, 2024).
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39. Sabrina Eaton, "Jim Jordan Attacks Trump-Appointed FBI Director Christopher Wray, Alleging Bias and Suppression of Conservatives," Cleveland.com, July 12, 2023, https://www.cleveland.com/news/2023/07/jim-jordan-attacks-trump-appointed-fbi-director-christopher-wray-alleging-bias-and-suppression-of-conservatives.html (accessed December 11, 2024).
40. Senate Report 112-24, p. 9.
41. President Dwight D. Eisenhower, Executive Order No. 10450, "Security Requirements for Government Employment," April 27, 1953, *Federal Register*, Vol. 18, No. 82 (April 29, 1953), pp. 2489–2492, https://archives.federalregister.gov/issue_slice/1953/4/29/2489-2493.pdf (accessed December 11, 2024).
42. 5 CFR Part 1400, https://www.law.cornell.edu/cfr/text/5/part-1400 (accessed December 11, 2024).
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44. 5a U.S.C. § 101(a), https://www.law.cornell.edu/uscode/text/5a/compiledact-95-521/title-I/section-101 (accessed December 11, 2024).
45. Ibid. § 101(g)(1). Ethics officials at each agency are also required to ensure that they have enough staff in place to support a presidential transition. 5 CFR § 2638.210(a), https://www.law.cornell.edu/cfr/text/5/2638.210 (December 11, 2024).
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47. S. Res. 219, Amending the Standing Rules of the Senate to Authorize the Majority Leader to Move to Proceed to the En Bloc Consideration of Certain Nominations, 118th Congress, 1st Session, introduced May 18, 2023, https://www.congress.gov/bill/118th-congress/senate-resolution/219/text (accessed December 11, 2024); Justin Papp, "Resolution Would Allow Bulk Senate Confirmation Without UC, *Roll Call*, May 23, 2023, https://rollcall.com/2023/05/23/resolution-would-allow-bulk-senate-confirmation-without-uc/ (accessed December 11, 2024).
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50. U.S. Const. Art. II, § 3.
51. 573 U.S. at 555. In his concurring opinion, Justice Scalia also recognized that the President would have this authority to force an adjournment of the Senate and could use the adjournment to make recess appointments under the majority's broad reading of the Recess Appointments Clause. Ibid. at 614 (Scalia, J., concurring).
52. U.S. House of Representatives, *House Practice: A Guide to the Rules, Precedents, and Procedures of the House*, 2024, § 10, pp. 8–9, https://www.govinfo.gov/content/pkg/GPO-HPRACTICE-118/pdf/GPO-HPRACTICE-118.pdf (accessed December 11, 2024) (citing House *Manual* § 84, providing for such concurrent resolutions of adjournment).
53. Senate Document No. 101-28, *Riddick's Senate Procedure: Precedents and Practices*, 101st Congress, 2nd Session, 1992, p. 9, https://riddick.gpo.gov/documents/Adjournment.pdf (accessed December 11, 2024). A motion to adjourn is not debatable but is amendable, so a determined opposition could attempt to drag out the vote on the concurrent resolution by proposing amendments.
54. See, for example, *Loper Bright Enterprises. v. Raimondo*, 603 U.S. ____, ____ (2024) (overturning the doctrine of *Chevron* deference for agency legal interpretations but without disturbing the holdings of any prior cases that relied on *Chevron* deference); *Collins v. Yellen*, 594 U.S. ____, ____ (2021) (holding that the structure of a federal agency violated separation of powers but refusing to strike down actions taken by the agency); *United States v. Arthrex, Inc.*, 594 U.S. ____, ____ (2021) (curing the constitutional defect in appointment of administrative judges by simply requiring a Senate-confirmed officer to review and approve the judges' decisions); *Teague v. Lane*, 489 U.S. 288, 310 (1989) (holding that judicial decisions announcing new constitutional rules of criminal procedure will not be applied to past criminal convictions in habeas corpus proceedings except in extraordinary circumstances); *Northern Pipeline Constr. Co. v. Marathon Pipe Line Co*., 458 U.S. 50, 88–89 (1982) (plurality opinion) (staying judgment to give Congress an opportunity to fix the constitutional defect in bankruptcy courts).
55. 5 U.S.C. § 5503, https://www.law.cornell.edu/uscode/text/5/5503 (accessed December 11, 2024); see also 3 Op. OLC 314, 317 (1979).
56. 5 U.S.C. §§ 3345–3349a.
57. Ibid. §§ 3345, 3348. Agency heads must report any vacancies, together with information about acting officers and nominations, "to the Comptroller General of the United States and to each House of Congress." Ibid. § 3349(a).
58. See *Guidance on Application of Federal Vacancies Reform Act of 1998*, 23 Op. OLC 60, 61 (1999) (referring to Senate floor debate in which "Senators said, by way of example, that an officer would be 'otherwise unable to perform the functions and duties of the office' if he or she were fired, imprisoned, or sick") (citing "144 Cong. Rec. S12,823 (daily ed. Oct. 21, 1998) (statement of Sen. Thompson); *id.* at S12,824 (statement of Sen. Byrd.")).
59. 5 U.S.C. § 3345(a); 23 Op. OLC at 63; Valerie C. Brannon, "The Vacancies Act: A Legal Overview," Congressional Research Service *Report for Members and Committees of Congress* No. R44997, updated August 1, 2022, p. 10, https://crsreports.congress.gov/product/pdf/R/R44997 (accessed December 11, 2024).
60. 5 U.S.C. § 3345(a)(2) & (3).
61. *Designation of Acting Associate Attorney General*, 25 Op. O.L.C. 177, 179–81 (2001). OLC had previously advised that the first assistant had to be in his position at the time of the vacancy (23 Op. OLC at 63–64) but changed its view in 2001 and now advises that a person appointed to be first assistant after the vacancy will become the acting officer, subject to the time limitations of the VRA, provided the position to which he is appointed existed when the vacancy occurred and was designated as the first assistant position at that time. The General Accounting Office (now Government Accountability Office) concurred in this view. See letter from Victor S. Rezendes, Managing Director, Strategic Issues, U.S. General Accounting Office, to The Honorable Joseph I. Lieberman, Chairman, and The Honorable Fred Thompson, Ranking Minority Member, Committee on Governmental Affairs, U.S. Senate, and The Honorable Dan Burton, Chairman, and The Honorable Henry A. Waxman, Ranking Minority Member, Committee on Government Reform, U.S. House of Representatives, "Subject: Changed Interpretation of Requirements Related to First Assistants Under the Federal Vacancies Reform Act of 1998," December 7, 2001, https://www.gao.gov/assets/gao-02-272r.pdf (accessed December 11, 2024).
62. 5 U.S.C. § 3346.
63. Ibid. § 3349a(b).
64. See note 61, *supra*. Cf. *L.M. vs. Cucinelli*, 442 F. Supp. 3d 1, 26 (D.D.C. 2020) (disapproving acting status of first assistant under the VRA where the first assistant's position was created after the vacancy in question arose and would cease to exist when the PAS office was filled).

65. U.S. Office of Personnel Management, *Presidential Transition Guide to Federal Human Resources Management Matters: Election Year 2020*, p. 13.
66. 5 U.S.C. § 3395(a)(2), https://www.law.cornell.edu/uscode/text/5/3395 (accessed December 11, 2024).
67. 5 U.S.C. § 3395(e).
68. U.S. Office of Personnel Management, *Guide to the Senior Executive Service*, March 2017, p. 11, https://www.opm.gov/policy-data-oversight/senior-executive-service/reference-materials/guidesesservices.pdf (accessed December 11, 2024).
69. 5 CFR § 317.901(c)(5), https://www.law.cornell.edu/cfr/text/5/317.901 (accessed December 11, 2024) ("The prohibition in this paragraph on involuntary reassignments may be applied by an agency, at its discretion...when a noncareer appointee in a deputy position is acting as the agency head or in a vacant supervisory position.").
70. U.S. Office of Personnel Management, *Presidential Transition Guide to Federal Human Resources Management Matters: Election Year 2020*, p. 13.
71. 5 U.S.C. § 3133, https://www.law.cornell.edu/cfr/text/5/317.901 (accessed December 11, 2024).
72. The delegation of personnel authority to the deputy secretary or deputy agency head is done differently in different departments and agencies, sometimes by express statute, sometimes by rule, and often by secretarial order, departmental manual, or other approved directive. See 5 U.S.C. 302(b), https://www.law.cornell.edu/uscode/text/5/302 (accessed December 11, 2024) ("[T]he head of an agency may delegate to subordinate officials the authority vested in him—(1) by law to take final action on matters pertaining to the employment, direction, and general administration of personnel under his agency.").