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AN EASY FIX FOR THE APPOINTMENT CRUNCH

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INTRODUCTION

For much of President Obama's first 100 days, Secretary of the Treasury Tim Geithner was like a fireman with a truck and a hose but no team, heroically fighting a financial blaze almost all by himself. Apart from a mini-cabinet of talented counselors there for help and advice, he had no backup—no deputy to represent him at the Banking and Finance Committees, no undersecretary for international affairs to speak to foreign bankers, none of the seven assistant secretaries to be his point-people on currency fluctuations, banking reform, and budgeting. Instead he was left to handle his weighty responsibilities—rescuing the financial system, closing a \$1.7 trillion gap in the budget, coordinating with the Federal Reserve and his foreign counterparts—with his personal energy and his kitchen cabinet.

In a financial crisis, the Treasury Department's troubles are more dangerous for the country than those of other agencies. But they are not unique. When Secretary of Health and Human Services Kathleen Sebelius arrived to begin a once-in-two-decades push for health care reform, she did not have her top officials in place either. Neither did the U.S. trade representative, as he surveyed the most dizzying drop in American exports and imports since World War II and prepares for the high-wire act that is Democratic trade policy.

There is no good reason for this; nor is it a matter of bumbling by the Senate or the administration's personnel team. Instead, Geithner and his Cabinet colleagues—and, because this is a year of financial crisis, the president and the American public as well—fell victim to a well-intentioned confirmation and vetting process gone bonkers. To fix the problem, the Senate and administration should reach a grand bargain, narrowing the scope of appointees subject to Senate confirmation, while reducing the need for the executive branch to depend on counselors outside the normal chain of policy command.

THE PROBLEM: TOO MANY CONFIRMATIONS

First, the Senate is trying to confirm far too many officials. When a new administration arrives, the Senate must evaluate not just 30 or 40 Cabinet secretaries and agency heads, but 41 deputy secretaries, deputy administrators, and deputy directors; 43 undersecretaries; 170 assistant secretaries; and six associate secretaries and associate administrators—not to mention 15 general counsels, 12 deputy undersecretaries, 10 chief financial officers, a chief scientist, a chief counsel, and a chief of protocol, and assorted solicitors and bureau directors.

Vetting even one of them eats up dozens of hours of administration staff time and dozens more hours of Senate investigative time. If all goes smoothly, nominees generally get a perfunctory hearing and a voice-vote, three to six months after the president wanted them on the job.

Second, the administration's need to prepare all these officials for Senate scrutiny makes matters worse, by forcing it to review nominees' personal lives and finances in absurd depth. Press reports find the investigators poring over meaningless old emails and blog posts, asking whether nominees have failed to report donated basketball tickets as "income," and inquiring about whether they have fully paid Social Security tax to occasionally hired dog-walkers and driveway-shovelers. One doubts whether Alexander Hamilton or Abraham Lincoln would have passed tests like this.

By mid-April, not one of the Treasury's upper-level officials had made it. Three putative undersecretaries dropped out, like exhausted and dehydrated marathoners stopping halfway through the course.

The good news is that this problem is easy to solve. The actual constitutional requirements are rather modest and sensible, and a quick two-part reform can fix it—not only for the Obama administration, but for its successors of both parties.

ITS ORIGINS: CONFIRMATION MISSION CREEP

The Senate, to begin with, has a valid constitutional role in overseeing at least major nominations. The clause in question, found in Article II, Section 2 of the Constitution, divides powers of appointment between the president and the Senate and reads as follows:

"[The President] shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the Supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law: but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments."

The language suggests that the Constitution framers wanted special care taken for ambassadors and other representatives of the United States, given their roles as people who speak for the nation to foreign counterparts. They left the rest to future Congresses.

A reasonable reading would view heads of departments as similar to ambassadors: They are administration officials, but they are also men and women who speak for the country to the public and the world. In these cases, the Senate is right to offer the advice and consent the Constitution suggests. More recently, the creation of agency inspectors general (IGs) has added a category of officials who need independence from the agency they serve to be effective. The IGs probably also need Senate confirmation, with its implicit signal that they are independent, and accountable to the general public rather than to agency heads and civil service rules.

The other three hundred officials do not need it. The deputies, undersecretaries, assistants and so on are upper-midlevel officials. Their roles are important—offering advice and expertise to the Cabinet, building relationships with Congress and civil society, and ensuring that the civil service implements policy as it should. As such they are part of the president’s policy team, not the symbols of the administration on particular issues.

THE SOLUTION

The good news is that this problem reflects neither an insoluble partisan divide, nor a difficult constitutional question. The solution is actually simple and straightforward. With three easy steps, the Senate and the administration can (a) help Cabinet secretaries deal with their respective challenges; (b) maintain the balance of power between the branches of government; and (c) ensure that future administrations can avoid this problem while guaranteeing that they have high-quality, reliable officials. The three steps are:

(1) Confirm Fewer Officials. Specifically, the Senate should stop confirming any deputy secretaries, undersecretaries, assistant secretaries, deputy undersecretaries, bureau heads, general counsels, and chief financial officers. It should also draw up a list of miscellaneous officials—the NOAA chief scientist, the State Department chief of protocol, and so on—and stop confirming them. It should take the Obama administration’s picks and approve them all as a group, en bloc. Then it should pass a new law that ends confirmation of these officials permanently, reserving the practice for Cabinet secretaries, heads of independent agencies, and inspectors general. This would preserve the Senate’s constitutional role in confirming genuinely senior administration officials along with those unusual posts who need confirmation to demonstrate independence, and would not touch its role in confirming ambassadors, judges, members of independent commissions, and so on;

(2) Make FBI Clearance the Background Check That Matters. As the Senate pulls back, the administration should concentrate on vetting top officials, not mid-level and upper-middle ones. Deputies and lower-tier appointees should instead simply go to the FBI for the appropriate security clearance investigation. (Top-secret for national security officials, secret and confidential for others as appropriate.) If they pass, they are free of security risk and gross moral failing, and fit to serve. If they fail, find someone else; and

(3) Restore the Chain of Command. Finally, this and future administrations should be able to depend less on officials outside the normal chain of agency command. These advisers tend to proliferate at agencies as the assistant secretaries and undersecretaries grow harder to confirm. If agencies were able to appoint their senior officials in time, administrations would no longer have to make interim arrangements, and Congress could focus on the appointments that matter most.



CONCLUSION

The slow pace of confirmations is not a new problem, of course. At every change of administration since Reagan's, delays in appointments have made for inordinately slow and difficult transitions—and, as pundits complain, the Senate has responded by designating a few new officials for confirmation each time around.

With help from Congress, the Obama administration has moved with impressive dispatch to turn the economy around in time of crisis. Its successor, one hopes, will take over in better times—and will be able to start the game with a full team on the field.

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