

EXECUTIVE “EXPERTISE”?:  
REVIEWING AND RECONSIDERING STATUTORY  
REQUIREMENTS IN EXECUTIVE BRANCH POSITIONS

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ABSTRACT

The nomination of John Ratcliffe to be the Director of National Intelligence resurfaced debates over Congress’s authority to restrict the President’s ability to nominate certain individuals outside of its “advise and consent” role, given that the Director is statutorily required to have “extensive national security expertise.” While the subject of statutory requirements on executive appointments has been reviewed a handful of times, those discussions focused on whether such restrictions are constitutional. This Article, on the other hand, begins where prior discussions have left off: what positions are subject to statutory requirements?

In answering this question, this Article identifies the different positions that impose such requirements as well as their authorizing statutes, focusing on those requirements that relate to one’s background qualifications or expertise to serve in a role. To that end, it catalogues the experience-related requirements that are imposed, namely general “expertise” or specific experiences or educational background. Thereafter, it seeks to synthesize patterns for which roles have general requirements versus which have specific requirements and posits the likeliest explanations as to why Congress has chosen to adopt these patterns—that those positions require the most niche or specialized expertise or are the most critical, thereby heightening the need to have genuine experts fill them. Finding each potential pattern lacking, this Article concludes that expertise requirements are inconsistently dispersed throughout the U.S. Code and questions whether and to what extent the country would be served by rethinking expertise requirements in Executive Branch roles, evaluating several hypothetical modifications to standardize these requirements. Finally, this Article provides a comprehensive appendix of

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approximately 350 statutory roles subject to general or specific expertise requirements, including over sixty that demand Senate confirmation.

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## INTRODUCTION

Given John Ratcliffe’s lack of traditional credentials and experience in intelligence and national security matters—he had never worked in the intelligence community, served in uniform, tried a national security-related case in his prosecutorial role, and he had only briefly served on relevant committees—his nomination to be Director of National Intelligence (DNI) was not well received.<sup>1</sup> But Ratcliffe received extra scrutiny because the DNI post *requires* a nominee to have “extensive national security expertise.”<sup>2</sup> The DNI is the only cabinet member who has a statutory obligation regarding past experience. Oddly enough, Ratcliffe has Herbert Hoover to thank for that requirement.

After his ignominious trouncing at the hands of then-Governor Franklin Delano Roosevelt in the 1932 presidential election, Herbert Hoover did not go quietly into the night. Hoover continued to seek the spotlight and potentially a return to presidential politics.<sup>3</sup> Of the many public roles Hoover sought or accepted after life in the Oval Office, one has a peculiar legacy: the so-called “Hoover Commissions.” “In providing for the two commissions, Congress gave the former President and his aides the task of making recommendations for the streamlining of the Executive [B]ranch of the Government. The official name for both Hoover commissions was the Commission on Organization of the Executive Branch of the Government.”<sup>4</sup> In both commissions, Hoover made many recommendations, the vast majority of which were implemented within

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1. See, e.g., Ted Barrett, Manu Raju, & Jeremy Herb, *GOP Senators Give Tepid Response to Trump’s Pick for Spy Chief*, CNN (July 29, 2019, 8:34 PM), <https://www.cnn.com/2019/07/29/politics/ratcliffe-nomination-republican-reaction/index.html>.

2. 50 U.S.C. § 3023(a)(1).

3. See generally WILLIAM E. LEUCHTENBURG, HERBERT HOOVER 142, 158 (Arthur M. Schlesinger, Jr., & Sean Wilentz eds., 2009); KENNETH WHYTE, HOOVER: AN EXTRAORDINARY LIFE IN EXTRAORDINARY TIMES 514, 544 (2017).

4. *Hoover Commissions Sought Government Reforms*, N.Y. TIMES (Oct. 21, 1964), <https://www.nytimes.com/1964/10/21/archives/hoover-commissions-sought-government-reforms.html>.

several years.<sup>5</sup> One, however, was not. To reduce the dual burden on the Central Intelligence Agency (CIA) Director of overseeing the agency while simultaneously coordinating the country's overall intelligence apparatus, the commission recommended "that the Director of Central Intelligence should employ an Executive Director, or 'chief of staff,' of the Agency" to take over the day-to-day responsibilities of running the CIA.<sup>6</sup>

Fast forward to 2002. The United States was still reeling from the attacks of September 11th. Politicians and pundits alike were questioning how such an attack could occur and debating what structural changes needed to be enacted across the intelligence and law enforcement regimes to prevent another. These questions—and many more—were addressed by the National Commission on Terrorist Attacks Upon the United States, better known as the 9/11 Commission.<sup>7</sup> After more than a year of painstaking work, "the Commission released its public report."<sup>8</sup> One of the Commission's many recommendations, tucked away in Chapter 13 on page 399, reads: "unifying the intelligence community with a new National Intelligence Director."<sup>9</sup> Later that year, the government would enact the Intelligence Reform and Terrorism Prevention Act (IRTPA), adopting many of the Commission's recommendations,<sup>10</sup> including the creation of the Office of the Director of National Intelligence (ODNI), run by the DNI to oversee "the nation's 17 sprawling intelligence agencies."<sup>11</sup> It took nearly sixty years, an unfathomable terrorist attack, and genuine self-reflection, but Hoover's recommendation would ultimately be realized.<sup>12</sup> In fact, it would be surpassed: the DNI was required *by law* to "have extensive national security expertise."<sup>13</sup>

That brings us back to Ratcliffe. To be sure, Ratcliffe's initial nomination, withdrawal,<sup>14</sup> renomination,<sup>15</sup> and confirmation<sup>16</sup> spun a strange

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5. *See id.*

6. COMM'N ON ORG. OF THE EXEC. BRANCH OF THE GOV'T, COMM'N REP. ON INTELLIGENCE ACTIVITIES 38 (1955), <https://www.cia.gov/readingroom/docs/CIA-RDP86B00269R000100020003-5.pdf>.

7. *See* Intelligence Authorization Act for Fiscal Year 2003, Pub. L. No. 107-306, § 602, 116 Stat. 2383, 2408 (2002).

8. NAT'L COMM'N ON TERRORIST ATTACKS UPON THE U.S. (Sept. 20, 2004, 12:00 AM), <https://www.9-11commission.gov/>.

9. THE 9/11 COMMISSION REPORT, NAT'L COMM'N ON TERRORIST ATTACKS UPON THE U.S. 399 (2004).

10. For an excellent and exhaustive history of the entirety of the post-9/11 reforms, see generally MICHAEL ALLEN, *BLINKING RED: CRISIS AND COMPROMISE IN AMERICAN INTELLIGENCE AFTER 9/11* 165 (2013).

11. Garrett M. Graff, *The Danger of John Ratcliffe*, WIRE (July 7, 2019, 6:03 PM), <https://www.wired.com/story/john-ratcliffe-dni-trump-nominee-danger/>.

12. *See History*, OFF. OF THE DIR. OF NAT'L INTEL., <https://www.dni.gov/index.php/who-we-are/history> (last visited Oct. 8, 2021) (citing the ODNI as having roots in the Hoover Commission's recommendation).

13. 50 U.S.C. § 3023(a)(1).

14. *E.g.*, Alex Ward, *John Ratcliffe, Trump's Pick for Top Intel Post, Withdraws Amid Scrutiny over Exaggerated Bio*, VOX (Aug. 2, 2019, 3:15 PM), <https://www.vox.com/2019/8/2/20752023/john-ratcliffe-withdraws-intelligence-director-trump>.

tale, even by the Trump Administration’s standards. The Ratcliffe ordeal not only reinforces how important it is for public servants to excel in their roles, but also raises the question of whether officials’ prior experience is an indicator of their ability to adeptly execute the role for which they were nominated.

Statutory requirements about who may serve in executive roles date back to the founding of this country.<sup>17</sup> Therefore, legal academia has reviewed statutory requirements on executive appointments several times.<sup>18</sup> But these discussions have unanimously focused on a discrete set of arguments regarding the constitutionality (or lack thereof) of such requirements. This Article, on the other hand, begins where prior discussions have left off: what positions have statutory requirements? Said otherwise, notwithstanding substantial arguments that such qualifications are unconstitutional,<sup>19</sup> they remain on the books. This persistence means that this debate is not a theoretical one, and as such, the conversation demands a holistic review and cataloguing of the roles subject to statutory requirements. This Article aims to do just that.

Part I of this Article offers a definition of what “expertise” requirements are and the methodology used to identify positions that contain expertise requirements, which are contained in their entirety in the Appendix. Thereafter, Part I discusses the use of these requirements across our federal code, including the variations within the category, namely a “general” expertise requirement and a “specific” expertise requirement.

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15. @realDonaldTrump, TWITTER (Feb. 28, 2020, 5:24 pm), <https://twitter.com/realDonaldTrump/status/1233518334284289861>. Since this tweet was published, Twitter suspended Donald Trump’s account, and this tweet can no longer be accessed using the Twitter website URL. For access to this tweet using an archival source, see TRUMP TWITTER ARCHIVE V2, <https://www.thetrumparchive.com/?dates=%5B%222020-02-06%22%2C%222020-03-02%22%5D> (last visited Oct. 3, 2021).

16. Martin Matishak, *Senate Confirms Ratcliffe as Trump’s Intelligence Director*, POLITICO (May 21, 2020, 1:41 PM), <https://www.politico.com/news/2020/05/21/senate-confirms-ratcliffe-intelligence-director-273348>.

17. See *infra* note 209.

18. See Common Legis. Encroachments on Exec. Branch Auth., 13 Op. O.L.C. 248, 250 (1989); Richard P. Wulwick & Frank J. Macchiarola, *Congressional Interference with the President’s Power To Appoint*, 24 STETSON L. REV. 625, 634–35 (1995); Michael J. Gerhardt, *Toward a Comprehensive Understanding of the Federal Appointments Process*, 21 HARV. J. L. & PUB. POL’Y 467, 534–35 (1998); Curtis A. Bradley & Eric A. Posner, *Presidential Signing Statements and Executive Power*, 23 CONST. COMMENT. 307, 326 (2006) (describing recent presidential signing statements that object to restrictions on appointments); Note, *Congressional Restrictions on the President’s Appointment Power and the Role of Longstanding Practice in Constitutional Interpretation*, 120 HARV. L. REV. 1914, 1919–21 (2007) [hereinafter *Congressional Restrictions*]; Hanah Metchis Volokh, *The Two Appointments Clauses: Statutory Qualifications for Federal Officers*, 10 U. PA. J. CONST. L. 745, 752, 755 (2008); Matthew A. Samberg, “Established by Law”: *Saving Statutory Limitations on Presidential Appointments from Unconstitutionality*, 85 N.Y.U. L. REV. 1735, 1738 (2010); cf. Adam J. Rappaport, Comment, *The Court of International Trade’s Political Party Diversity Requirement: Unconstitutional Under Any Separation of Powers Theory*, 68 U. CHI. L. REV. 1429, 1430 (2001).

19. There are similarly compelling arguments that these requirements are in fact constitutional.

Next, Part II of this Article analyzes the patterns of when and where expertise requirements are used throughout the federal code. This discussion includes a review of the fields that sport said requirements most frequently, where they are found in hierarchical structures, and when they are found in boards or commissions. Part III seeks to make sense of these patterns by trying to reverse-engineer animating principles that would explain why certain positions are subject to these requirements while others are not. To do so, Part III focuses on the two most likely explanations: that expertise requirements are for positions that demand more niche expertise, or that expertise requirements denote importance where competency is even more vital. In reviewing these two theories, this Article concludes that neither withstands scrutiny.

Upon concluding that expertise requirements are inconsistently dispersed throughout the U.S. Code and lack a coherent reason for what requirements are used in what scenarios, Part IV then questions whether and to what extent the country would be served by rethinking expertise requirements in Executive Branch roles. This question presumes that the requirements are in fact constitutional. This Article then evaluates the virtues and pitfalls of several potential expertise requirements.

#### I. AN “EXPERTISE” REQUIREMENT: WHAT IS IT AND HOW DO WE DEFINE IT

The Executive Branch is, in a word, massive. In 2018, this portion of the government employed 2,646,778 civilians.<sup>20</sup> That is almost eighty-one times more than the number of individuals employed by the Judicial Branch (32,711 employees) and eighty-eight times the Legislative Branch (30,103 employees).<sup>21</sup> Including those in uniform—the 1,401,715 employees who serve as military personnel under the Department of Defense (DOD), the Coast Guard, and the Public Health Service’s Commissioned Corps<sup>22</sup>—the number would be even more staggering.

Of course, the vast number of civilians employed by the Executive Branch hold many different roles. From actuaries to zoologists, there are hundreds of thousands of different jobs across a variety of fields.<sup>23</sup> Indeed, the Bureau for Labor Statistics calculates that the federal government has approximately 350 different categories of occupation, each of which has their own subspecialties and distinctions.<sup>24</sup>

Rather than focusing on one occupation or field, this Article instead focuses on those positions that have particular statutory requirements.

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20. CONG. RSCH. SERV., R43590, FEDERAL WORKFORCE STATISTICS SOURCES: OPM AND OMB 6 (2019).

21. *Id.*

22. *Id.*

23. *Occupational Employment and Wage Statistics: Federal Executive Branch*, U.S. BUREAU OF LAB. STAT., [https://www.bls.gov/oes/2020/may/naics4\\_999100.htm](https://www.bls.gov/oes/2020/may/naics4_999100.htm) (last visited Oct. 8, 2021).

24. *Working for the Federal Government: Part 1*, U.S. BUREAU OF LAB. STAT. (Sept. 2014).

But before such an examination can occur, the methods of analysis and classifications must be detailed. This Part therefore explains how this Article defines the requirements at issue and the methodology used to compile its data.

#### A. Statutory Requirements Broadly

Many different types of restrictions or requirements have been placed on the President’s nominating power. In 1926, Justice Brandeis summarized it as follows:

Congress has, from time to time, restricted the President’s selection by the requirement of citizenship. It has limited the power of nomination by providing that the office may be held only by a resident of the United States; of a state; of a particular state; of a particular district; of a particular territory; of the District of Columbia; of a particular foreign country. It has limited the power of nomination further by prescribing specific professional attainments, or occupational experience. It has, in other cases, prescribed the test of examinations. It has imposed the requirement of age; of sex; of races; of property; and of habitual temperance in the use of intoxicating liquors. Congress has imposed like restrictions on the power of nomination by requiring political representation; or that the selection be made on a nonpartisan basis. It has required, in some cases, that the representation be industrial; in others, that it be geographic. It has at times required that the President’s nominees be taken from, or include representatives from, particular branches or departments of the government. By still other statutes, Congress has confined the President’s selection to a small number of persons to be named by others.<sup>25</sup>

Notwithstanding the near century that has transpired since Brandeis compiled his list,<sup>26</sup> many of these requirements remain on the books. For example, the Director of the Women’s Bureau in the Department of Labor must be a woman.<sup>27</sup> Arguably the most well-known requirement placed on a president’s nomination power is that of political affiliations.<sup>28</sup> Specifically, for boards, commissions, or even courts, Congress limits the number of people from one political party on multi-body commissions in order to manufacture bipartisanship in certain administrative commissions.<sup>29</sup> The constitutionality of these types of

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25. *Myers v. United States*, 272 U.S. 52, 265–74 (1926) (Brandeis, J., dissenting) (internal footnotes omitted).

26. Without the help of a computer, let alone LexisNexis.

27. *See* 29 U.S.C. § 12.

28. *See Congressional Restrictions*, *supra* note 18, at 1925–26.

29. *See, e.g.*, 28 U.S.C. § 251(a) (“The President shall appoint, by and with the advice and consent of the Senate, nine judges who shall constitute a court of record to be known as the United States Court of International Trade. *Not more than five of such judges shall be from the same political party.*”) (emphasis added); *cf.* Russell Spivak & Alex Gazikas, *Paved in Good Intentions: The Venerable Aims and Unique Vulnerabilities of Purportedly Independent Committees*, 105 VA. L. REV. ONLINE 112, 116 (2019).

requirements—particularly those of gender or partisan affiliation—raises constitutional concerns outside of separations-of-powers concerns.<sup>30</sup> All of these constitutional concerns are outside of this Article’s scope but are unquestionably important.

*B. “Expertise” Requirements*

Expertise requirements pertain to one’s professional background, namely that an individual has obtained a certain core competency from certain education, training, or prior professional experience.<sup>31</sup> As explained below, these expertise requirements—a catch-all term to encompass experience, qualifications, or other synonymous terms found across the U.S. Code—come in several forms and deploy different verbiage, but nonetheless speak to competency earned through knowledge.<sup>32</sup>

As demonstrated in the Appendix, there are approximately 350 positions in the Executive Branch that are subject to expertise requirements.<sup>33</sup> While this number may not appear substantial, two points show otherwise.

First, not many federal positions are actually codified in the U.S. Code; rather, most are simply funded and enabled by regulation. The Department of Justice offers a clear window into this phenomenon. There are ninety-three United States Attorneys across the country.<sup>34</sup> One federal statute codifies the position of United States Attorney “for each judicial district,”<sup>35</sup> but does not discuss any Assistant United States Attorneys or support personnel under this one figurehead’s leadership. For example, the Office of the United States Attorney for the District of Columbia, the largest such office in the country, employs “over 330

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30. See, e.g., Donald J. Kochan, *The Unconstitutionality of Class-Based Statutory Limitations on Presidential Nominations: Can A Man Head the Women’s Bureau at the Department of Labor?*, 37 LOY. U. CHI. L. J. 43, 44 (2005). Additionally, the constitutionality of a bipartisan provision in the Delaware Constitution was recently brought before the U.S. Supreme Court under the theory that the requirement violated the First Amendment guarantee of freedom of association by barring someone who did not belong to one of the two major political parties from securing a court appointment. The case was ultimately dismissed for lack of standing. *Carney v. Adams*, 141 S. Ct. 493, 496–97, 503 (2020).

31. HENRY B. HOGUE, CONG. RSCH. SERV., RL33886, STAT. QUALIFICATIONS FOR EXEC. BRANCH POSITIONS 7–8 (2015).

32. This is not to say that professional experiences are the only sources of knowledge. For example, residency requirements can pertain to knowledge gleaned simply by being a part of a community. The same could be said for the Women’s Bureau (i.e. that it would be difficult for a man to lead an organization whose mission is to “develop[] policies and standards and conduct[] inquiries to safeguard the interests of working women; to advocate for their equality and economic security for themselves and their families; and to promote quality work environments[.]” when he, by definition, cannot have confronted the lived experience of a woman in the workplace hindered by sex discrimination or other gendered measures). *About Us*, WOMEN’S BUREAU, U.S. DEP’T OF LAB., <https://www.dol.gov/agencies/wb/about> (last visited Oct. 8, 2021).

33. See *infra* Appendix.

34. *Offices of the United States Attorneys*, U.S. DEP’T OF JUST., <https://www.justice.gov/usao> (last visited Oct. 8, 2021).

35. See 28 U.S.C. § 541(a).

Assistant United States Attorneys and over 330 support personnel.”<sup>36</sup> Even halving that number to approximate the average size of the other ninety-three Offices of the United States Attorney shows how many jobs in the federal government are not specifically prescribed by statute and thus cannot be included in the scope of this Article. This, in turn, demonstrates how substantial it is that approximately 350 positions are subject to statutory expertise requirements.

Second, in some instances, the specific role subject to statutory expertise requirements has multiple iterations thereof. The United States Marshal position is a perfect example. There is one Marshal for every judicial district; therefore, ninety-four individuals hold the title.<sup>37</sup> However, this accounts for only one of the over 350 roles identified.<sup>38</sup>

When considering these two truths about the U.S. Code and the way our government’s hiring is organized, it is safe to say that a significant number of positions have some sort of expertise or experience requirement.

### *C. Methodology for Determining Which Positions Are Classified as Subject to Expertise Requirements*

Before discussing the different types of expertise requirements strewn throughout our federal workforce, it is important to explain my methodology in compiling the positions subject to these requirements.

First, I searched for exemplar entries in the U.S. Code for statutory requirements. The DNI provision was the first thread. 50 U.S.C. § 3023 reads: “Any individual nominated for appointment as Director of National Intelligence shall have extensive national security expertise.”<sup>39</sup> “Expertise,” therefore, was one keyword, signifying one’s knowledge or skill. The same held true for “extensive,” which meant to capture or describe one’s capacity.<sup>40</sup> Thereafter, I searched the U.S. Code for provisions that contained each word, or synonyms thereof, within twenty-five words of one another.

I then turned to another exemplar: the U.S. Marshal. 28 U.S.C. § 561(i) reads:

- (i) Each marshal appointed under this section should have—
  - (1) a minimum of 4 years of command-level law enforcement management duties, including personnel, budget, and accounta-

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36. *About Us*, U.S. ATT’Y’S OFF. D.C., <https://www.justice.gov/usao-dc/about-us> (last visited Oct. 8, 2021).

37. *Facts and Figures 2020*, U.S. MARSHALS, U.S. DEP’T OF JUST., <https://www.usmarshals.gov/duties/factsheets/facts.pdf> (last visited Oct 8, 2021).

38. *See infra* Appendix.

39. 50 U.S.C. § 3023(a)(1).

40. *See id.*

- ble property issues, in a police department, sheriff's office or Federal law enforcement agency;
- (2) experience in coordinating with other law enforcement agencies, particularly at the State and local level;
  - (3) college-level academic experience; *and*
  - (4) experience in or with county, State, and Federal court systems or experience with protection of court personnel, jurors, and witnesses.<sup>41</sup>

Again, I leveraged this statute for additional lessons. I considered the words “should” or “shall” or “must” or “have” within some demarcation of qualifications, either explicit (i.e., education or prior jobs) or implicit (i.e., general knowledge). I also considered the word “experience,”<sup>42</sup> which was meant not just to capture one’s knowledge, but one’s actual professional history as a proxy for one’s ability, competency, and qualifications. I then searched the U.S. Code for entries involving any combination of those terms.

The second set of search strings clearly unearthed the second sentence, but the first sentence unearthed a new line of inquiry: “appointment.” This, dovetailed with the DNI provision’s use of “nominated,” compelled a new set of searches focusing on any place those two words were in close proximity to competency keywords such as “experience,” “expertise,” “knowledge,” and others.

Having performed these three sets of searches, I compiled a dossier of several thousand entries, and the reading commenced.

There were many false positives. Often, the terms would come up in notes placed by the search engine’s editors or in legislative history notes. But such additions were inapposite to the task, which sought to strictly catalogue only those requirements that remain present in the statutes themselves.

One of the most common forms of false positives were qualifications on optional boards. In protecting Neotropical Migratory Birds, for example, 16 U.S.C. § 6106 authorizes the Secretary of the Interior to “convene an advisory group consisting of individuals representing public and private organizations actively involved in the conservation of neotropical migratory birds.”<sup>43</sup> However, because the group is optional—the statutory provides that the Secretary “*may* convene” the group<sup>44</sup>—this advisory group, along with others like it, were excluded from the dataset.

Notwithstanding these false positives, there were other close calls. For example, the National Credit Union Administration “is an independ-

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41. 28 U.S.C. § 561(i) (emphasis added).

42. See 34 U.S.C. § 10132(b) (“The Director shall have had experience in statistical programs.”).

43. 16 U.S.C. § 6106(b)(1).

44. *Id.* (emphasis added).

ent federal agency that insures deposits at federally insured credit unions, protects the members who own credit unions, and charters and regulates federal credit unions.”<sup>45</sup> Its governing board is comprised of three members, each of whom must be confirmed by the Senate.<sup>46</sup> And “[i]n considering appointments to the Board . . . the President shall give consideration to individuals who, by virtue of their education, training, or experience relating to a broad range of financial services, financial services regulation, or financial policy, are especially qualified to serve on the Board.”<sup>47</sup> While not a requirement on its face, the fact that Congress made clear that the Administration is supposed to weigh these factors into the nomination is itself a requirement that bears upon the nomination process.<sup>48</sup> As such, I felt it merited inclusion.

Another difficult question was whether one’s current status as a civilian versus a member of the military ought to constitute an expertise requirement. For example, that one not currently be serving in uniform is, famously, a requirement for the Secretary of Defense.<sup>49</sup> Such a requirement could be the result of a desire to ensure certain priorities. In the case of the Defense Department’s civilian control, University of North Carolina Professor Richard H. Kohn, who spent a career studying civilian-military relationships, observed that:

The point of civilian control [of the military] is to make security subordinate to the larger purposes of a nation, rather than the other way around. The purpose of the military is to defend society, not to define it. While a country may have civilian control of the military without democracy, it cannot have democracy without civilian control.<sup>50</sup>

Therefore, it could be argued that a requirement for civilian status similarly speaks to democratic ideals and priorities.

On the other hand, it must also be said that one’s current occupation—i.e., as a civilian or a servicemember—is also a professional consideration that speaks to the person’s potential approach to a given occupational responsibility. Therefore, it speaks to the way in which an individual would or could serve in a position in the way envisioned by the

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45. *About NCUA*, NAT’L CREDIT UNION ADMIN., <https://www.ncua.gov/about-ncua> (last visited Oct. 8, 2021).

46. 12 U.S.C. § 1752a(b)(1).

47. *Id.* § 1752a(b)(2)(A).

48. *See id.*

49. 10 U.S.C. § 115(a) (“There is a Secretary of Defense, who is the head of the Department of Defense, *appointed from civilian life* by the President.”) (emphasis added).

50. Richard H. Kohn, *An Essay on Civilian Control of the Military*, AM. DIPLOMACY (Mar. 1997), <https://americandiplomacy.web.unc.edu/1997/03/an-essay-on-civilian-control-of-the-military/>.

statute's enactors.<sup>51</sup> After significant debate, such statutes were included in the analysis.

Finally, there was a question of positions where the requirements were made optional via caveated language in the statute. The clearest examples are the secretaries of the military branches. In each enabling provision, Congress made clear that “[t]he Secretary shall, *to the greatest extent practicable*, be appointed from among persons most highly qualified for the position by reason of background and experience, including persons with appropriate management or leadership experience.”<sup>52</sup> Phrases like “to the greatest extent practicable” in essence absolve the President from statutory requirements of certain experience.<sup>53</sup> As a result, roles created pursuant to statutes with this or analogous language were excluded.

In short, while many statutes were facially clear that some expertise was an absolute requirement, the wild variations in verbiage and inconsistency in organizational principles in other statutes did not lend themselves to clear and obvious classification. Unfortunately, the opacity did not end there.

#### D. “General” Versus “Specific” Expertise Requirements

Having categorized a statute as giving rise to an expertise requirement, there is then the question of further categorization and analysis to better understand these rules in practice. There are two obvious categories of experience requirements for a given federal position: general requirements and specific requirements.

##### 1. General Expertise Requirements

Of the statutes that impose an expertise requirement, the majority do so in vague or general terms. There is an unquestionable value in flexible standards; like “chameleons, which reflect the color of their environment,” so too do undefined terms such as “experience” enable a president to appoint someone whose background allows that person to meet the needs of the moment.<sup>54</sup> Once again, the DNI statute provides a useful lodestar.<sup>55</sup> The standard of “extensive . . . expertise” is undeniably gen-

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51. This statement is in no way meant to imply that members of the armed forces are less capable than others. As an officer in the Navy myself, I *certainly* do not suggest that. However, I recognize that military training and service can influence the way one approaches a given problem—particularly one that could involve issues of diplomacy. See *generally* RONAN FARROW, WAR ON PEACE 157 (2018). If Congress specifically seeks to avoid this perspective, one operating under it could be said to be unable to serve in the way Congress envisioned.

52. 10 U.S.C. § 7013(a)(1) (emphasis added) (Secretary of the Army); *id.* § 8013(a)(1) (emphasis added) (Secretary of the Navy); *id.* § 9013(a)(1) (emphasis added) (Secretary of the Air Force).

53. See 10 U.S.C. §§ 7013, 8013, 9013.

54. *Comm’r v. Nat’l Carbide Corp.*, 167 F.2d 304, 306 (2d Cir. 1948).

55. 50 U.S.C. § 3023(a)(1).

eral and, therefore, malleable.<sup>56</sup> The DNI is not alone in requiring a general level of expertise and experience. In fact, the DNI is not the only position created following the 9/11 Commission with such a condition of employment.

While not a primary focus of the 9/11 Commission, the post-mortem discussed the interplay between federal law enforcement agencies and state and local ones. The Commission found that “[s]tate and local law enforcement were not marshaled to augment the FBI’s efforts.”<sup>57</sup> By housing federal law enforcement in either the FBI or the Department of Homeland Security (DHS), municipal officials would have an easier time interfacing with federal counterparts. And this was vital to the security of the nation, the Commission felt, because “[t]here [wa]s a growing role for state and local law enforcement agencies. They need[ed] more training and work with federal agencies so that they c[ould] cooperate more effectively with those federal authorities in identifying terrorist suspects.”<sup>58</sup>

To realize this important goal, Congress “establish[ed] a Department of Homeland Security State, Local, and Regional Fusion Center Initiative to establish partnerships with State, local, and regional fusion centers.”<sup>59</sup> So, too, did Congress create the “Office for State and Local Law Enforcement, [to] be headed by an Assistant Secretary for State and Local Law Enforcement.”<sup>60</sup> Recognizing that this is a unique niche—the intersection of federal and state law enforcement and intelligence sharing—Congress charged that any such person to hold that role “shall have an appropriate background with experience in law enforcement, intelligence, and other counterterrorism functions.”<sup>61</sup>

What constitutes “an appropriate background” is unclear. The legislative history does not say. Could a career academic that studied these issues in excruciating detail constitute such a background? What about a former police officer?

In 2020, Brian Dorow manned the post.<sup>62</sup> Prior to his appointment, Assistant Secretary Dorow was a police officer in the City of Waukesha Police Department from 1994–2004.<sup>63</sup> Following his career in uniform, Dorow served as the Dean of Criminal Justice, Homeland Security and

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56. *Id.*

57. 9-11 COMMISSION REPORT, *supra* note 9, at 265.

58. *Id.* at 390.

59. 6 U.S.C. § 124h(a).

60. *Id.* § 607(b)(1).

61. *Id.* § 607(b)(2).

62. *Leadership*, U.S. DEP’T. OF HOMELAND SEC., <https://www.dhs.gov/leadership> (last visited Oct. 8, 2021).

63. *Brian Dorow’s Biography*, VOTE SMART, <https://votesmart.org/candidate/biography/127113/brian-dorow#.XaJh2udKhE4> (last visited Oct. 8, 2021).

Counter Terrorism for the Waukesha County Technical College for more than a decade.<sup>64</sup>

Broadly speaking, it is reasonable to conclude that Dorow's career made him "well-suited" for the position, in the words of Dorow's former boss at the technical college.<sup>65</sup> More importantly, though, he did seem to have the requisite "appropriate background" as statutorily required.<sup>66</sup> But why he meets those requirements is not immediately clear—would he still be qualified if he had not served as an academic? Or if he were only an academic studying law enforcement interactions and intelligence? The sort of generality in the DHS statute affords flexibility, opening the field to many more candidates that could potentially thrive in the role, depending on myriad factors, including who else is staffed in positions at DHS, the level and types of threats facing the United States, and the state of the relationship between federal and local officials.

The Assistant Secretary for State and Local Law Enforcement and the DNI are far from alone in the general expertise requirement. This general level of expertise required is not so unusual, but it seemingly comes in all shapes and sizes. In some instances, Congress demands "specific expertise," oxymoronic as it is, that can be satisfied in countless ways.<sup>67</sup> Elsewhere, one must be a "recognized leader" in an industry to serve in a post—recognized by whom, though, is untold.<sup>68</sup> Another statute requires one is to have garnered "national recognition for their expertise."<sup>69</sup> For some roles, the individual is to be "eminently qualified."<sup>70</sup> In another group of statutes, relevant experience must be "demonstrated"<sup>71</sup> or "demonstrable."<sup>72</sup>

There is one other general standard that is also worth highlighting: one who "represents" another's interest. For example, one member of the Arctic Research Commission must be "appointed from among indigenous residents of the Arctic who are *representative* of the needs and interests of Arctic residents and who live in areas directly affected by Arctic resource development."<sup>73</sup> The same is true for Take Reduction Teams,

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64. *Id.*

65. Katherine Michalets, *Brian Dorow Takes Job in Washington D.C.*, GMTODAY.COM (July 10, 2018), [http://www.gmtoday.com/news/local\\_stories/2018/03102018-brian-dorow-takes-job-in-washington-dc.asp](http://www.gmtoday.com/news/local_stories/2018/03102018-brian-dorow-takes-job-in-washington-dc.asp).

66. *See id.*

67. *E.g.*, 47 U.S.C. § 1423(b)(A)(v).

68. 42 U.S.C. § 17352.

69. *Id.* § 1395ee(c)(1)(B)(ii).

70. *E.g.*, 33 U.S.C. § 857-14(a).

71. 29 U.S.C. § 2633(a)(1)(C)(ii).

72. 28 U.S.C. § 3103(b)(1).

73. 15 U.S.C. § 4102(b)(1)(B) (emphasis added).

which aim to “prevent the depletion of strategic marine mammal stocks.”<sup>74</sup> By statute:

Members [of such teams] shall include representatives of Federal agencies, each coastal State which has fisheries which interact with the species or stock, appropriate Regional Fishery Management Councils, interstate fisheries commissions, academic and scientific organizations, environmental groups, all commercial and recreational fisheries groups and gear types which incidentally take the species or stock, Alaska Native organizations or Indian tribal organizations, and others as the Secretary deems appropriate.<sup>75</sup>

In these statutes, what constitutes a “representative” is not defined. Nonetheless, similarly crafted statutes were included in this analysis because representation again bears on one’s ability to represent, which speaks to their credentials or experience.<sup>76</sup>

It is unclear why such minute distinctions exist to communicate the same aim. One plausible explanation is that scarcity breeds inconsistency, and because there are only some 350 statutes with requirements, it is simply an overlooked feature. Relatedly, the disparities could just be the result of different drafters from different congressional offices or committees. Another explanation is that each iteration evinces a desire to improve the articulation of what constitutes the requisite experience.

Whatever the reason for this variation, each recurrence seeks the same goal: allowing “for an undefined and expanding future,”<sup>77</sup> while simultaneously making sure that only those competent to serve in a given role in fact do so. But it must also be said that, ironically, it is possible that by being so general, these requirements do not impose any actual limitations in practice.

## 2. Specific Expertise Requirements

While some expertise requirements are nebulous and malleable, others are far more specific and detailed. The archetypal example of a position subject to specific expertise requirement is that of a U.S. Marshal.<sup>78</sup>

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74. *Marine Mammal Take Reduction Plans and Teams*, NAT’L OCEANIC & ATMOSPHERIC ADMIN., <https://www.fisheries.noaa.gov/national/marine-mammal-take-reduction-plans-and-teams> (last visited Oct. 8, 2021).

75. 16 U.S.C. § 1387(f)(6)(C).

76. See 15 U.S.C. § 4102(b)(1)(B).

77. *Hurtado v. California*, 110 U.S. 516, 530–31 (1884).

78. *Careers Qualifications*, U.S. MARSHALS SERV., <https://www.usmarshals.gov/careers/qualifications.html> (last visited Oct. 8, 2021).

The Marshals have an incredibly rich history.<sup>79</sup> Considered the nation's "first federal law enforcement agency," the Marshals can trace their lineage to President George Washington and the Judiciary Act of 1789.<sup>80</sup> Their operational responsibilities have grown over their over-200-year tenure<sup>81</sup> to the point that the post "may be the most dangerous job in America."<sup>82</sup>

In the face of such peril and occupying such diverse lanes, Marshals need "a very particular set of skills."<sup>83</sup> Accordingly, the U.S. government has laid out strict requirements for anyone hoping to earn the position.<sup>84</sup> As recounted *supra*, each of the ninety-four Marshals overseeing their respective federal judicial districts are to have:

- (1) a minimum of 4 years of command-level law enforcement management duties, including personnel, budget, and accountable property issues, in a police department, sheriff's office or Federal law enforcement agency;
- (2) experience in coordinating with other law enforcement agencies, particularly at the State and local level;
- (3) college-level academic experience; and
- (4) experience in or with county, State, and Federal court systems or experience with protection of court personnel, jurors, and witnesses.<sup>85</sup>

Indeed, the Marshals' requisite credentials are among the most stringent, spanning the most types of specific expertise requirements for any given role in the federal government.<sup>86</sup>

Interestingly, however, the Marshals' requirements include what emerged as three subcategories of specific expertise requirements: professional certifications, temporal experience, and narrow yet undefined experience.

The first subcategory is straightforward: one must have earned a certain academic or professional degree, certification, or other credential to be eligible for a position. For example, DHS's Chief Medical Officer

79. Outside of giving rise to two cinematic classics—*The Fugitive* and its less-acclaimed sequel, *U.S. Marshals*—of course. *THE FUGITIVE* (Kopelson Entertainment 1993); *U.S. MARSHALS* (Kopelson Entertainment 1998).

80. *History - Oldest Federal Law Enforcement Agency*, U.S. MARSHALS SERV., <https://www.usmarshals.gov/history/oldest.html> (last visited Oct. 8, 2021). The site goes on: "Other federal agencies have mistakenly believed they were the first. However, their claims fall short when researched in proper context." *Id.*

81. *History - Bicentennial of the U.S. Marshals Service*, U.S. MARSHALS SERV., <https://www.usmarshals.gov/history/proclamation.html> (last visited Oct. 8, 2021).

82. Harrison Jacobs, *Inside the Wild World of US Marshals, Who Do One of America's Most Dangerous Jobs*, *BUS. INSIDER* (Nov. 12, 2014, 3:54 PM), <https://www.businessinsider.com/photos-of-us-marshals-2014-11>.

83. *TAKEN* (EuropaCorp 2008).

84. *Careers Qualifications*, *supra* note 78.

85. 28 U.S.C. § 561(i) (emphasis added).

86. So too does the set of requirements for Marshals.

must be a licensed medical physician.<sup>87</sup> Dr. Pritesh Gandhi, M.D., M.P.H., the officeholder at the time of publication, passes this clearly delineated bar.<sup>88</sup> Medicine is not the only realm to sport this type of specific requirement: the Office of Special Counsel in the Merit Systems Protection Board must be an attorney, for example.<sup>89</sup>

The second type of specific expertise requirement is temporal experience, namely that an individual must have spent a specific amount of time practicing or working in a given field. For example, members of the Great Lakes Pilotage Advisory Committee must have at least “5 years practical experience in maritime operations.”<sup>90</sup>

The third and final subcategory, termed in this Article as a “specific-malleable” requirement, is admittedly more amorphous. Marshals are to have experience in “command-level law enforcement management duties, including personnel, budget, and accountable property issues, in a police department, sheriff’s office or Federal law enforcement agency” as well as “experience in or with county, State, and Federal court systems or experience with protection of court personnel, jurors, and witnesses.”<sup>91</sup> To be sure, this remains a malleable standard akin to those deemed “general” requirements. But such particularity demands reclassification. The exact line between this form of a specific-malleable requirement and a general requirement is not necessarily articulable. In Justice Potter Stewart’s famous words: “I shall not today attempt further to define the kinds of material I understand to be embraced within [either] shorthand description; and perhaps I could never succeed in intelligibly doing so. But I know it when I see it.”<sup>92</sup> Thus, some expertise requirements that sound like general standards—i.e., demanding “expertise” in something—have been classified as specific requirements in this exercise.

While rare, both broadly across the U.S. Code and compared to general expertise requirements, specific expertise requirements can still be found in various forms and fashions tucked into a significant number of statutorily created roles in the federal government.

#### *E. Positions Lacking Expertise Requirements*

While making clear that many federal roles are subject to expertise requirements of one form or another, the majority of the millions of federal employees are nonetheless free from congressional restriction of any

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87. 6 U.S.C. § 597(b).

88. See *Pritesh Gandhi, MD, MPH*, U.S. DEP’T OF HOMELAND SEC. (Feb. 9, 2021), <https://www.dhs.gov/person/pritesh-gandhi-md-mp>.

89. 5 U.S.C. § 1211(b).

90. 46 U.S.C. § 9307(b)(1).

91. 28 U.S.C. § 561(i).

92. *Jacobellis v. Ohio*, 378 U.S. 184, 197 (1964) (Stewart, J., concurring).

kind.<sup>93</sup> Importantly, these can be some of the most important positions. Indeed, of the first ten Executive Branch appointees in the presidential line of succession, only one—the Secretary of Defense—sports an expertise requirement.<sup>94</sup> There may be several reasons why.

First, as noted earlier, far fewer jobs are statutorily codified than in fact exist in the federal government. Federal roles, by definition, cannot be subject to statutory qualifications if they are not written in a statute in the first place. Therefore, by raw numbers, it makes sense that many positions do not have statutory requirements.

Second, Congress, of late, is a maddeningly inert body.<sup>95</sup> Indeed, one need only recall the history of the DNI to understand how long it may take for a good idea to come to fruition within the inner workings of the federal government.<sup>96</sup> Congress could thus be purposefully excluding requirements from new posts created in the fear that changing them in the future would demand significant effort. In forgoing codifying any expertise requirements, Congress allows the relevant actors hiring others via administrative procedure to be nimbler and more rapidly reflect the needs of the day.

Finally, some requirements are obvious enough to preclude necessitating statutory codification. Consider a world in which the president nominated an individual who is not a lawyer and never attended law school for the post of Attorney General. Such an outside-the-box nominee may simply be too far from the box altogether. Thus, one could argue that codification for certain appointments would be superfluous.

## II. PATTERN ANALYSIS: WHICH POSITION HAVE WHAT REQUIREMENTS, AND WHY THAT MAY BE

Having reviewed what types of expertise requirements are deployed throughout the federal government, this Article can now try to synthesize any patterns that may exist with regards to which positions are subject to such requirements and reverse-engineer why such patterns may exist. In

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93. See *e.g.*, *Policy, Data, Oversight Classification & Qualifications*, U.S. OFF. OF PERS. MGMT., <https://www.opm.gov/policy-data-oversight/classification-qualifications/general-schedule-qualification-standards/#url=Group-Standards> (last visited Oct. 8, 2021).

94. The nine, in order, are: Secretary of State, Secretary of the Treasury, Attorney General, Secretary of the Interior, Secretary of Agriculture, Secretary of Commerce, Secretary of Labor, Secretary of Health and Human Services, and Secretary of Housing and Urban Development. The Secretary of Defense sits after the Secretary of the Treasury and before the Attorney General. See 3 U.S.C. § 19(d)(1).

95. See *Statistics and Historical Comparison*, GOVTRACK, <https://www.govtrack.us/congress/bills/statistics> (last visited Oct. 8, 2021) (noting the decline in laws passed in more recent Congresses).

96. 50 U.S.C. § 3023; see also *supra* notes 1–11 and accompanying texts. Moreover, one could argue that congresspersons arguably have more pressing needs than debate the requirements of high-ranking government posts whom the Executive Branch is (presumably) vetting, let alone the language thereof, absent a pressing need, as was the case with the DNI.

so doing, this Article can better diagnose if other positions should be subject to these limitations in future Congresses.

When one takes a holistic view of the positions that require expertise, several patterns emerge. First, expertise requirements are concentrated among a handful of fields—though a review of these fields fails to reveal the most likely explanation behind expertise requirements, namely that these fields require more expertise than others.<sup>97</sup> Second, in said fields, deputies or assistants who are charged with narrower operational responsibilities are given expertise requirements related to this narrower portfolio, while their superiors are not.<sup>98</sup> Third, expertise requirements are often found tucked into advisory commissions or boards of directors that counsel or oversee an organization.<sup>99</sup> Congress’s imposition of specific requirements for one or more members implies that they sought to ensure diversity or that certain perspectives were maintained within the group to foster inclusion in a multifaceted field. Having synthesized these patterns, this Part reviews whether a role’s importance is in fact the key to explaining which roles are subject to expertise requirements and which are not.

#### *A. Specific Fields Are More Likely Candidates for Expertise Requirements*

Holistically reviewing the fields in which personnel are bound by statute, many fall into one of several buckets: military and national security, finance, transportation, wildlife and nature, and other scientific pursuits.

In the military and national security realm, Pentagon leadership is subject to expertise requirements in the form of civilian control, as discussed earlier.<sup>100</sup> While civilian control is only mandated at the secretary and deputy levels,<sup>101</sup> top lieutenants in the DOD are subject to requirements with regard to their experience in the field.<sup>102</sup> The Chief Management Officer, the Under Secretary of Defense for Acquisition and Sustainment, the Undersecretary of Defense Comptroller, and the Deputy Under Secretary of Defense for Intelligence and Security are all supposed to have particular knowledge and qualifications in their particular fields.<sup>103</sup> This is true elsewhere in the DOD, too; though the Secretaries of the Army, Navy, and Air Force are not subject to expertise requirements, their Assistant Secretaries and Principal Military Deputies are.<sup>104</sup>

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97. See *supra* notes 39–40, 69–72, 85, 87, 89, 91.

98. See *infra* notes 102, 104.

99. See *supra* notes 69–72.

100. See *supra* notes 49–50 and accompanying text.

101. See 10 U.S.C. § 113(f); *id.* § 132(a).

102. *Id.* § 619(a).

103. See *id.* § 132(a); *id.* § 133b(a); *id.* § 135(a)(2); *id.* § 137a(c)(6).

104. Compare 10 U.S.C. § 7013, with *id.* § 7016 (Army); compare *id.* § 8013, with *id.* § 8016 (Navy); compare *id.* § 9013, with *id.* § 9016 (Air Force).

Importantly, the military sports these requirements in less traditional and obvious roles, too. For example, members of the Defense Task Force on Sexual Harassment and Violence at the Military Service Academies<sup>105</sup> and the Superintendent of the Army National Military Cemeteries<sup>106</sup> are subject to expertise requirements. In short, Congress has decided that those in uniform—or those overseeing aspects of life for those in uniform—are to be experts in their fields in order to serve in many leadership positions.

The field of finance is also rife with expertise requirements of one kind or another. The Chairperson of the Council of Economic Advisors is the most high profile of positions subject to Senate confirmation that also requires expertise of some kind.<sup>107</sup> The Chief Executive Officer, Chief Development Officer, and other members of the Board of Directors for the U.S. International Development Finance Corporation, a wholly owned government corporation whose purpose is to “mobilize and facilitate the participation of private sector capital and skills in the economic development of less developed countries,”<sup>108</sup> are all subject to expertise requirements.<sup>109</sup> Board members for the National Credit Union Administration,<sup>110</sup> the Federal Deposit Insurance Corporation,<sup>111</sup> the Federal Reserve System,<sup>112</sup> the Millennium Challenge Corporation,<sup>113</sup> the Internal Revenue Service Oversight Board,<sup>114</sup> the Financial Stability Oversight Counsel,<sup>115</sup> the National Association of Registered Agents and Brokers Board,<sup>116</sup> and the Financial Oversight and Management Board of Puerto Rico<sup>117</sup> must also be qualified in various ways. The Trade Representative and her Deputy must also be statutorily qualified,<sup>118</sup> as must be myriad positions in the International Development Finance Corporation<sup>119</sup> and the Controller for the Office of Federal Financial Management.<sup>120</sup> The list goes on. Again, Congress clearly envisioned financial roles to require experts.<sup>121</sup>

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105. National Defense Authorization Act for FY2004, 108 Pub. L. No. 136, 117 Stat. 1392, 1466.

106. 10 U.S.C. § 7725(a).

107. *See* 15 U.S.C. § 1023(a)(3).

108. 22 U.S.C. § 9612(b).

109. *Id.* § 9613.

110. 12 U.S.C. § 1752a(b)(2).

111. *Id.* § 1812(a)(1)(C).

112. *Id.* § 241.

113. 22 U.S.C. § 7703(c)(3).

114. 26 U.S.C. § 7802(b)(2)(A).

115. 12 U.S.C. § 5321.

116. 15 U.S.C. § 6754(c).

117. 48 U.S.C. § 2121(f).

118. *See* 19 U.S.C. § 2171.

119. *See, e.g.*, 22 U.S.C. § 9613(b)(2).

120. *See, e.g.*, 31 U.S.C. § 504(b).

121. It is also worth noting that the majority of the positions named in this paragraph are also subject to Senate confirmation, suggesting increased importance on the quality of those nominated by the President.

As stated, military and finance are only two of the five fields in which the majority of these requirements cluster together. The Department of Transportation also finds a substantial number of expertise requirements in its ranks. For example, the Administrator and Deputy Administrator of the Transportation Security Administration are subject to expertise requirements.<sup>122</sup> So are the Administrator and Deputy Administrator of the Federal Aviation Administration<sup>123</sup> as well as the Administrators for the Federal Railroad Administration,<sup>124</sup> the Federal Motor Carrier Safety Administration,<sup>125</sup> and the Pipeline and Hazardous Materials Safety Administration.<sup>126</sup> The Director of the Bureau of Transportation Statistics,<sup>127</sup> members of the Bureau of Transportation Statistics’ Advisory Council,<sup>128</sup> and the Amtrak Board of Directors<sup>129</sup> all have expertise requirements.

Finally, the wildlife and scientific fields more broadly sport at least some expertise requirements. Regarding the former, we see expertise requirements attached to Board Members of the Artic Research Commission,<sup>130</sup> the Hawaii Tropical Forest Recovery Task Force,<sup>131</sup> the Gila Box Riparian National Conservation Area Advisory Committee,<sup>132</sup> the Steens Mountain Advisory Council,<sup>133</sup> Yukon River Salmon Panel,<sup>134</sup> the Forest Foundation,<sup>135</sup> and the Prevention of Wildlife Poaching and Trafficking Technology Advisory Board,<sup>136</sup> among many others. As for broader scientific fields, expertise requirements are abundant in roles across the Food and Drug Administration<sup>137</sup> as well as other science research positions.<sup>138</sup>

*B. In the Fields of Interest, Subordinates Given Narrow Portfolios Are Expected to Be Expert Therein, While Their Superiors Are Not*

In some instances, the subordinates—deputies, assistants, or other-titled leaders of an organization’s subdivisions—are charged with having expertise in the role’s narrower portfolio. One of the most obvious examples of this can be found in the DOD. As noted earlier, the

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122. 49 U.S.C. § 114(b)(1)(B)(ii), (b)(2)(C)(ii).

123. *Id.* § 106(c)(3), (d)(1).

124. *Id.* § 103(d).

125. *Id.* § 113(c).

126. *Id.* § 108(c).

127. *Id.* § 6302(b)(2).

128. *Id.* § 6305(c)(2)(B).

129. *Id.* § 24302(a)(1)(C).

130. 15 U.S.C. § 4102(b)(1)(A).

131. *See* 16 U.S.C. § 4503a(b)(2).

132. *Id.* § 460ddd(j).

133. *See id.* § 460nnn-51(b).

134. *Id.* § 5721(b)(1).

135. *Id.* § 583j(a).

136. *Id.* § 742b(b).

137. *See* 21 U.S.C. § 353; *id.* § 360aa; *id.* § 379dd(d)(1)(C)(iii)(I); *id.* § 379e(b)(5)(D).

138. *See, e.g.,* 7 U.S.C. § 3319k(b)(1); 42 U.S.C. § 16538(d)(2); *id.* § 284(a)(2)(F); *id.* § 6632(b); *id.* § 16537(c); *id.* § 241.

Secretary of Defense is subject only to a civilian status form of an expertise requirement, whereas their deputies and other senior leaders are subject to expertise requirements.<sup>139</sup>

This phenomenon is also found elsewhere in the national and homeland security sphere. This Article already mentioned DHS's Assistant Secretary for State and Local Law Enforcement, who is subject to expertise requirements regarding their experience with local law enforcement interactions, yet the DHS Secretary is subject to no expertise requirements whatsoever.<sup>140</sup>

The security field is not alone in this setup; as detailed *supra*, the Department of Transportation offers a similar template.<sup>141</sup> The Secretary of Transportation is not subject to any expertise requirements, but many who report to the Secretary are, including but not limited to the Administrator and Deputy Administrator of the Transportation Security Administration,<sup>142</sup> the Administrator and Deputy Administrator of the Federal Aviation Administration,<sup>143</sup> the Administrators for the Federal Railroad Administration,<sup>144</sup> the Federal Motor Carrier Safety Administration,<sup>145</sup> and the Pipeline and Hazardous Materials Safety Administration,<sup>146</sup> and the Director of the Bureau of Transportation Statistics.<sup>147</sup>

This structure is all the more pellucid when compared to other fields of interest wherein narrower portfolios do *not* require particular expertise. For example, though the Attorney General, like the Secretary of Transportation, is not subject to any expertise requirements, neither are their Deputy, Associate, nor the double-digit Assistant Attorneys General.<sup>148</sup> One could imagine that the Assistant Attorney General who oversees the National Security Division of the Justice Department would have to have some experience or expertise in the field, but such a requirement is absent from the statute,<sup>149</sup> notwithstanding the aforementioned emphasis on expertise in all matters related to national security.

### C. Representation on Boards and Commissions

As stated above, a specific requirement may be imposed on at least one person in a commission of a panel to ensure diversity of thought. The

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139. See Section II.A and accompanying footnotes.

140. Compare 6 U.S.C. § 607, with *id.* § 112.

141. See 49 U.S.C. § 114.

142. *Id.*

143. *Id.* § 106(b)–(c).

144. *Id.* § 103(d).

145. *Id.* § 113(c).

146. *Id.* § 108(c).

147. *Id.* § 6302(b)(2).

148. See 28 U.S.C. § 503 (Attorney General); *id.* § 504 (Deputy Attorney General); *id.* § 504a (Associate Attorney General); *id.* § 506 (Assistant Attorneys General); *id.* § 507A (Assistant Attorney General for National Security).

149. See 28 U.S.C. § 507A.

chief example of this phenomenon is the Federal Reserve System’s Board of Governors.

The Federal Reserve, or “the Fed,” is “the central bank of the United States, [which] conducts the nation’s monetary policy, supervises and regulates banks, and provides a variety of financial services to the U.S. government and to the nation’s banks.”<sup>150</sup> The Fed is overseen by a Board of Governors, and the “group that makes monetary policy for the Federal Reserve System is the Federal Open Market Committee,”<sup>151</sup> or “FOMC,” which comprises seven board members as well as “five representatives of the Federal Reserve banks.”<sup>152</sup> Thus, “[t]he members of the Board of Governors have a majority (7 out of 12) of the votes on the FOMC.”<sup>153</sup> As such, composition of the Board is crucial; as a corollary, so, too, is obtaining a diversity of viewpoints within the Board.<sup>154</sup>

Board members often cut their teeth as former executives of massive financial firms—indeed, this is the case for multiple current board members<sup>155</sup>—or as academics whose area of interest may not be on the metaphorical little guy.<sup>156</sup> Congress, recognizing the imperative of diversity, thus placed an additional restriction on the Board’s composition: at least one Governor must have “demonstrated primary experience working in or supervising community banks having less than \$10,000,000,000 in total assets.”<sup>157</sup> By ensuring that there is someone sympathetic to the unique challenges and difficulties smaller financial institutions weather, Congress sought to ensure all market entrants have a seat at the table.

The Fed’s Board of Governors is not alone. Indeed, the National Parks Service has similarly adopted this approach and confirmed the

150. *Board of the Governors of the Federal Reserve System*, FED. RSRV. BANK OF N.Y., <https://www.newyorkfed.org/aboutthefed/fedpoint/fed46.html> (last visited Oct. 8, 2021).

151. *Federal Open Market Committee*, FED. RSRV. BANK OF N.Y., <https://www.newyorkfed.org/aboutthefed/fedpoint/fed48.html> (last visited Oct. 8, 2021).

152. 12 U.S.C. § 263(a).

153. *Board of the Governors of the Federal Reserve System*, FED. RSRV. BANK OF N.Y., <https://www.newyorkfed.org/aboutthefed/fedpoint/fed46.html> (last visited Oct. 8, 2021).

154. *Cf.* *Fisher v. Univ. of Tex.*, 570 U.S. 297, 308–09 (2012) (reiterating that prior cases had found that “obtaining the educational benefits of ‘student body diversity is a compelling state interest . . . .’”) (citation omitted); *Wygant v. Jackson Bd. of Ed.*, 476 U.S. 267, 315 (1986) (Stevens, J., dissenting) (“[A]n integrated faculty will be able to provide benefits to the student body that could not be provided by an all-white, or nearly all-white, faculty.”).

155. *See Richard H. Clarida, Vice Chair*, BD. OF GOVERNORS OF THE FED. RSRV. SYS., <https://www.federalreserve.gov/aboutthefed/bios/board/clarida.htm> (last visited Oct. 8, 2021) (noting that Mr. Clarida is a former global strategic advisor and partner at PIMCO, a global wealth management firm); *Randal K. Quarles, Vice Chair for Supervision*, BD. OF GOVERNORS OF THE FED. RSRV. SYS., <https://www.federalreserve.gov/aboutthefed/bios/board/quarles.htm> (last visited Oct. 8, 2021) (noting that Mr. Quarles is a former partner at The Carlyle Group, a world-renowned private equity firm).

156. *Christopher J. Waller*, BD. OF GOVERNORS OF THE FED. RSRV. SYS., <https://www.federalreserve.gov/aboutthefed/bios/board/waller.htm> (last visited Oct. 8, 2021) (“Dr. Waller served as a professor and the Gilbert F. Schaefer Chair of Economics at the University of Notre Dame.”).

157. 12 U.S.C. § 241.

animating principle behind it.<sup>158</sup> Given the competing financial and conservation interests along the Louisiana shoreline, establishing the Jean Lafitte National Historical Park and Preserve in Louisiana was no small feat.<sup>159</sup> To manage these different—and arguably competing—interests Congress established the Delta Region Preservation Commission (DRPC) to oversee commencement.<sup>160</sup> And as laid bare by the National Park Service itself, “widely differing interests and priorities [were] represented on the DRPC. The Commission included members appointed by state and local government, representatives from conservation groups, and one representative from the commercial fishing industry. This diversity ensured that many decisions would be reached only after considerable debate.”<sup>161</sup> One interest that Congress thought important to consider was that of the region’s culture; for that reason, Congress mandated that one member of the Commission “have experience as a folklorist and who is familiar with the cultures of the Mississippi Delta Region.”<sup>162</sup>

Thus, when expertise requirements are deployed in boards or commissions, they apparently aim to ensure a diversity of thought and representation for minority views.

### III. THE TWO LIKELIEST ANIMATING PRINCIPLES—THE ROLE REQUIRES NICHE EXPERTISE AND THE ROLE IS PARTICULARLY IMPORTANT—BOTH FAIL

Having reviewed the different fields and scenarios in which these requirements are deployed, this Article now turns to the question: what, if any, unified principle explains when and how these requirements are doled out? Two potential theories stand out as the likeliest explanations: expertise requirements denote niche expertise or expertise requirements denote importance. Evaluating each explanation, however, proves that neither is likely to explain why these requirements exist.

#### *A. Niche Expertise Is Unlikely the Reason Why Certain Roles Are Subject to Expertise Requirements*

That expertise requirements are found predominantly in certain fields suggests that these categories inherently demand a certain type of additional experience or expertise to be able to serve competently as compared to other fields. However, strong counterarguments suggest that if that is the reason, it is inconsistently deployed.

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158. See generally ROBERT W. BLYTHE, ADMIN. HIST. OF JEAN LAFITTE NAT’L HIST. PARK & PRES. (2018).

159. *Id.*

160. *Id.* at 3, 86, 97–98, 100, 104–05, 107.

161. *Id.* at 107, 123.

162. 16 U.S.C. § 230f(a)(9).

### 1. Why Niche Expertise Could Make Sense as an Animating Principle

Niche expertise makes sense as an animating principle because only a small sliver of Americans actively participates in the organization’s mission.

Consider the military. As of 2020, “there are about 1.3 million active-duty personnel, or less than one-half of 1 percent of the U.S. population.”<sup>163</sup> Even excluding those not eligible to serve—the elderly, youths, and those with disabilities—that is a staggeringly low portion. Given few active participants, coupled with the widening military–civilian divide as more veterans pass away,<sup>164</sup> it makes sense to require, even nominally, that those running different sections of the military (and intelligence community, which supports the military) have a particular level of expertise.<sup>165</sup>

Arguably the best military-specific example of this is the Reserve Forces Policy Board. Per its enacting statute, the “Board shall serve as an independent adviser to the Secretary of Defense to provide advice and recommendations to the Secretary on strategies, policies, and practices designed to improve and enhance the capabilities, efficiency, and effectiveness of the reserve components.”<sup>166</sup> The Board must be comprised of individuals with various backgrounds: an active or retired officer or enlisted military member from the Army National Guard, the Army Reserve, Navy Reserve, Marine Corps Reservists, Air Force Reserve, Air National Guard, and the Coast Guard.<sup>167</sup> So, too, must the Board seat ten citizens each of whom “hav[e] significant knowledge of and experience in policy matters relevant to national security and reserve component matters . . . .”<sup>168</sup> Finally, a flag officer (active or retired) and senior

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163. *Demographics of the U.S. Military*, COUNCIL ON FOREIGN RELS., <https://www.cfr.org/backgrounders/demographics-us-military> (last visited Oct. 8, 2021). To be specific, as of June 2020 when this Article was being drafted, there are approximately 1.33 million members of active-duty military. See MILITARY & CIVILIAN PERSONNEL BY SERVICE/AGENCY BY STATE/COUNTRY, DEP’T OF DEF. (2020).

164. See Jim Garamone, *DOD Official Cites Widening Military-Civilian Gap*, DEP’T OF DEF. (May 16, 2019), <https://www.defense.gov/Explore/News/Article/Article/1850344/dod-official-cites-widening-military-civilian-gap/>.

165. See 10 U.S.C. § 132 (Deputy Secretary of Defense); *id.* § 133b(a) (Under Secretary of Defense for Acquisition and Sustainment); *id.* § 135(a)(2) (Under Secretary of Defense (Comptroller)); *id.* § 137a(c)(6) (Deputy Under Secretary of Defense for Intelligence and Security); *id.* § 7016(b)(4)(B) (Assistant Secretary of the Army); *id.* § 7016(b)(5)(B) (Principal Military Deputy to the Assistant Secretary of the Army); *id.* § 8016(b)(3)(B) (Assistant Secretary of the Navy); *id.* § 9016(b)(3)(B) (Assistant Secretary of the Air Force); *cf.* 50 U.S.C. § 3026(a)(3) (Principal Deputy Director, Directorate of National Intelligence); *id.* § 3517(b)(1) (Inspector General, Central Intelligence Agency).

166. 10 U.S.C. § 10301(b).

167. *Id.* § 10301(c)(2)–(5).

168. *Id.* § 10301(c)(6).

enlisted person (active or retired) must serve on the Board as nonvoting “advisors.”<sup>169</sup>

Reservists will always have competing interests insofar as they straddle the military–civilian line. Active-duty forces undoubtedly have their own difficulties and challenges, but there is also no doubt that reserve forces face analogous ones, such as navigating civilian life and civilian employment with this particular type of “second job,”<sup>170</sup> to which non-serving civilians may (justifiably) be oblivious. Therefore, by requiring that the Board be staffed at least in part by individuals who have themselves navigated these difficulties in their own lives, the Board’s recommendations are more likely to be accepted by our nation’s reserve forces and subsequently engender additional legitimacy.

This argument could also be made using a technical lens in the scientific realm. The Advanced Research Projects Agency-Energy (ARPA-E) proves this point. ARPA-E was created in 2007<sup>171</sup> and is “modeled after the successful Defense Advanced Research Projects Agency (DARPA) in the Department of Defense.”<sup>172</sup> ARPA-E “advances high-potential, high-impact energy technologies that are too early for private-sector investment.”<sup>173</sup> In this sense, the agency is more or less an incubator for highly experimental energy projects.<sup>174</sup> ARPA-E therefore chooses hundreds of projects to fund across myriad realms of emerging energy technologies.<sup>175</sup>

This is a large and complex responsibility. Leaders of ARPA-E must have the technical facility to understand the technologies and their viability while also being financial savvy to understand an investment horizon. For that reason, Congress understandably legislated that ARPA-E’s Director, “by reason of professional background and experience, [be] especially qualified to advise the Secretary on, and manage research programs addressing, matters pertaining to long-term and high-risk technological barriers to the development of energy technologies.”<sup>176</sup>

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169. *Id.* § 10301(c)(7)–(8).

170. The author is himself a Navy Reservist and says this with particular knowledge of the delicate balance—particularly in a demanding civilian role.

171. See America COMPETES Act, Pub. L. No. 110-69, § 5012, 121 Stat. 572, 621 (2007).

172. *Overview*, ADVANCED RSCH. PROJECTS AGENCY-ENERGY, <https://arpa-e.energy.gov/sites/default/files/ARPA-E%20Fact%20Sheet.pdf> (last visited Oct. 3, 2021).

173. *About*, ADVANCED RSCH. PROJECTS AGENCY-ENERGY, <https://arpa-e.energy.gov/?q=arpa-e-site-page/about> (last visited Oct. 3, 2021).

174. *Cf.* Will Kenton, *Incubator Firm*, INVESTOPEDIA <https://www.investopedia.com/terms/i/incubatorfirm.asp> (last visited Oct. 8, 2021) (“An incubator . . . is an organization engaged in the business of fostering early-stage companies through the different developmental phases until the companies have sufficient financial, human, and physical resources to function on their own.”).

175. See *Overview*, *supra* note 172.

176. 42 U.S.C. § 16538(c)(2).

ARPA-E’s Director is not alone. Other directors of organizations that oversee niche, complex issues similarly have this sort of requirement, including the heads of the Agriculture Advanced Research and Development Authority,<sup>177</sup> as well as the Directors of the National Institute of Justice<sup>178</sup> and the Bureau of Justice Statistics.<sup>179</sup> Irrespective of one’s general intellectual capacity, those lacking the technical background in research may be ill-equipped to adequately manage the responsibility at hand.

Or consider the protection of polar bears. These majestic creatures have long been endangered and on the verge of extinction, compelling the signing of the “Agreement Between the Government of the United States of America and the Government of the Russian Federation on the Conservation and Management of the Alaska-Chukotka Polar Bear Population, signed at Washington, D.C., on October 16, 2000.”<sup>180</sup> It is likely the case that there are few experts in polar bear conservation and protection. Thus, it is a good idea to mandate that those who would oversee the Agreement be among these few.<sup>181</sup>

The same could be said about several different areas that the U.S. government oversees, ranging from Dayton Aviation Heritage<sup>182</sup> to the Steens Mountain<sup>183</sup> to the Jean Lafitte National Historical Park and Preserve.<sup>184</sup> Given just how specialized some of these vital missions are, it makes sense to ensure that only experts learned in relevant areas serve in those positions to carry out their mission.<sup>185</sup>

## 2. But If Niche Expertise Is the Driving Force Behind Expertise Requirements, Too Many Roles Fail to Require Them

Unfortunately, “niche expertise” as an explanation is not altogether consistent, as there exist many highly complex, scientific organizations whose leaders do not seem to have expertise requirements. Consider, for example, the Department of Energy, which aims to address the country’s “energy, environmental and nuclear challenges through transformative

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177. 7 U.S.C. § 3319k(b)(3)–(4).

178. 34 U.S.C. § 10122(b).

179. *Id.* § 10132 (b).

180. 16 U.S.C. § 1423(1).

181. *See id.* § 1423d(2).

182. *Id.* § 410ww-21(b).

183. *See id.* § 460nnn-51(b)–(c).

184. *See id.* § 230f(a).

185. An argument can be made that another arguable explanation is that of relative importance of the mission at hand. Said otherwise, there are more expertise requirements in matters of military or financial matters because those are existential concerns. This argument incorrectly assumes that the military and the financial system are of greater import than any other department. Not only is that unlikely true, but even if it were, then there would likely be no expertise requirements in other departments until such provisions were imposed on *all* high-ranking personnel in the Departments of Defense and Treasury (as well as potentially Commerce and Labor).

science and technology solutions.”<sup>186</sup> Technical expertise, particularly in energy-related sciences, would be particularly helpful to oversee the Department. And for that reason, some past secretaries have been criticized for having less-than-adequate scientific backgrounds,<sup>187</sup> while secretaries with extensive expertise have been praised.<sup>188</sup> The same could be said for the Environmental Protection Agency (EPA). The EPA’s mission “is to protect human health and the environment.”<sup>189</sup> Given the scientific nature of this work, one would think that the EPA’s administrator would similarly be well served with a scientific background, yet no such expertise is required.<sup>190</sup>

An even more obvious posting in the field of science in the government’s ranks is also missing an expertise requirement: the Director of the Office of Science and Technology Policy (OSTP).<sup>191</sup> Established in 1976, OSTP “advises the President and others within the Executive Office of the President on the scientific, engineering, and technological aspects of the economy, national security, homeland security, health, foreign relations, and the environment.”<sup>192</sup> Given such a role—particularly in the Biden Administration, where President Biden has elevated the individual in this role to the Cabinet<sup>193</sup>—it would make little sense to appoint someone who is scientifically illiterate. Rather, such a role should demand scientific expertise requirements.

An even more rudimentary argument can be levied, too: if science denotes complexity and a correspondent need for niche expertise, why are some scientific research roles subject to expertise requirements and others are not?

Science is not alone: were niche experience or expertise the true animating principle, one could imagine a host of roles demanding expertise requirements throughout the federal government, as so many issues are

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186. *About Us*, U.S. DEP’T OF ENERGY, <https://www.energy.gov/about-us> (last visited Oct. 8, 2021).

187. *See, e.g.*, Bruce Weber, *James B. Edwards, a Long-Shot as Governor of South Carolina, Dies at 87*, N.Y. TIMES (Dec. 26, 2014), <https://www.nytimes.com/2014/12/27/us/politics/james-b-edwards-a-long-shot-as-governor-of-south-carolina-dies-at-87.html> (noting that former Energy Secretary James B. Edwards “struggled in the post, especially in the first year of his tenure, when he was criticized for his lack of expertise in the field”).

188. *See, e.g.*, Andrew Restuccia, *Senate Greenlights Moniz Nomination*, POLITICO, (May 16, 2013, 2:55 PM), <https://www.politico.com/story/2013/05/ernest-moniz-energy-secretary-senate-confirmation-091498> (noting that then-nominee for Secretary Ernest Moniz, a Professor at the Massachusetts Institute of Technology and expert in the field, “won over conservative and liberal lawmakers alike with his diverse résumé”).

189. *Our Mission and What We Do*, EPA, <https://www.epa.gov/aboutepa/our-mission-and-what-we-do> (last visited Oct. 8, 2021).

190. *See* 5 U.S.C. app. 1 REORG. PLAN 3 1970.

191. *See* 42 U.S.C. § 6612(a).

192. *Office of Science & Technology*, THE WHITE HOUSE, <https://www.whitehouse.gov/ostp/> (last visited Oct. 8, 2021).

193. Carl Zimmer, *Biden to Elevate Science Adviser to His Cabinet*, N.Y. TIMES (Jan. 26, 2021), <https://www.nytimes.com/2021/01/15/science/biden-science-cabinet.html>.

far more nuanced and complex than we often consider. The Office of Refugee Resettlement, for example, which assists in placing young immigrants in foster care, would be well-served by having a leader who has experience in a related field, from child psychology to parental rights to immigration. Put more simply, why must the DNI have “extensive experience” in intelligence matters, but the directors of the seventeen other intelligence organizations across the United States<sup>194</sup> are free from any expertise requirements whatsoever?

One could make a counterargument that these positions are devoid of requirements to enable outside-the-box thinking. To be sure, approaching problems from new angles is a good thing. Famously, Secretary of Defense Robert McNamara and Secretary of State Rex Tillerson were successful businessmen who lacked the traditional experience of their predecessors before being appointed to their cabinet positions. To that end, each was arguably appointed at least in part because they could bring a particular set of skills or acumen garnered from the private sector.

Another counterargument is also viable: traditionally understood “experts” could get bogged down in the minutiae of their roles—such as quibbling over small aspects of a financial model or focusing on one category of budget expenditures—and therein fail to grasp the big picture. Consider an economist whose career has been spent in academia focusing on small businesses—a crucial facet of the economy, but only one aspect. Were the economist to be nominated for Treasury Secretary, one could argue that this individual may have an inordinate focus on this person’s prior academic focus and therefore, approach broader economic problems inappropriately narrowly, failing to consider the broader range of issues. In essence, this second argument holds that, when blinded from expertise, one could lose the forest for the trees.

Neither argument holds water. Regarding the former, even assuming arguendo that it is normatively good to promote outside-the-box thinking,<sup>195</sup> such creativity or ingenuity could still be enabled by general requirements. Tillerson’s appointment, for example, was justified by his foreign “business acumen,”<sup>196</sup> which could be argued is applicable experience for a diplomat,<sup>197</sup> while still helping weed out those who truly lack the core competencies to do the job effectively.<sup>198</sup> With respect to the

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194. *Members of the IC*, OFF. OF THE DIR. OF NAT’L INTEL., <https://www.dni.gov/index.php/what-we-do/members-of-the-ic> (last visited Oct. 8, 2021).

195. A notion with which some may dispute.

196. Nick Wadhams & Jennifer Epstein, *Trump Fires Secretary of State Rex Tillerson, Names CIA’s Mike Pompeo as Replacement*, CHI. TRIB. (Mar. 13, 2018), <https://www.chicagotribune.com/nation-world/ct-rex-tillerson-mike-pompeo-20180313-story.html>.

197. Note that I personally would not advance such an argument, but it was certainly advanced for Tillerson’s nomination.

198. *E.g.*, *Top 10 Worst Cabinet Members: Michael Brown - Director of FEMA\*, 2003-2005*, TIME,

latter counterargument, this risk is simply unlikely: that someone would be so bogged down in the weeds of a niche expertise as to inhibit this person's ability to perform the job would almost assuredly be disqualifying. But even if it were to occur, that individual would still likely be able to rise to the occasion and leverage the expertise to perform the entirety of the role.

Ultimately, because these expertise requirements could still be met by appointing non-traditional applicants and concerns of an inappropriately narrow focus will likely go unrealized, that such requirements are not found on some of the most expert or most niche positions suggests that the most likely explanation is that no coherent or consistent organizing principle based on the scarcity of expertise exists.

*B. Similarly, Expertise Requirements Cannot Denote Importance*

Another potential explanation for why some roles sport expertise requirements and others do not is that those in the former category are simply more important and, as such, make it even more vital to ensure those who fill them are competent and capable. But this too is unlikely for several reasons, as demonstrated both by the fields in which these requirements can be found as well as the imposition of requirements on subordinates when fewer are placed on superiors.

In the first instance, it is likely the case that importance can be at least somewhat approximated based on one's succession to the presidency. But of those in line to succeed as president should the commander in chief pass away, only one has an expertise requirement: the Secretary of Defense.<sup>199</sup> What's more, that expertise requirement comes in the form of a civilian status requirement, rather than that the role need be filled by an expert in the field of defense. Therefore, importance, as demonstrated by one's position in the line of succession, is not a coherent justification for what positions are and are not limited by statutory requirements.

Nevertheless, assume, arguendo, that expertise requirements are a broad approximation for importance. One must ask whether, under this assumption, it is possible that we improperly deprioritize positions that lack expertise requirements. In short, yes, it is certainly possible if not likely. Military and national security positions make up the largest portion of Senate-confirmed roles with expertise requirements. While, as explained *supra*, this is very likely a feature of complexity, one could also argue that it is due to what's called "military worship," or the idea of valuing military service above all else.<sup>200</sup> In that same vein, Congress,

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[http://content.time.com/time/specials/packages/article/0,28804,1858691\\_1858690\\_1858688,00.html](http://content.time.com/time/specials/packages/article/0,28804,1858691_1858690_1858688,00.html) (last visited Oct. 8, 2021).

199. See 3 U.S.C. § 19(d)(1); 10 U.S.C. § 113.

200. See, e.g., David French, *Military-Worship Is Bad for the Military*, NAT'L REV. (Nov. 7, 2017, 8:43 PM), <https://www.nationalreview.com/2017/11/military-worship-hurts-military/>. For a

and by extension the American people, may be improperly prioritizing issues of national security over other domestic and international concerns.

Interestingly, this is arguably true irrespective of which party one identifies with. For example, conservatives may argue—and have argued—that religious liberties are under assault and suggest that this issue is fundamental to our national identity.<sup>201</sup> On the other hand, liberals may argue—and have argued—that voting rights are under assault and suggest that this issue is fundamental to our national identity.<sup>202</sup> Both of these issues are considered vital and both are protected via enforcement and prosecution in the Department of Justice’s Civil Rights Division.<sup>203</sup> So why is this position, or any of its superiors within the Justice Department, not subject to an expertise requirement?

The head of the Civil Rights Division is not alone; there are plenty of positions which, based on either political party’s emphasis would be a candidate for increased import, ranging from the Director of the Office of Information and Regulatory Affairs—the individual who oversees the review of all federal regulations<sup>204</sup>—to the Director of the Interior Department’s Bureau of Land Management—the individual who would oversee or bars the expansion of drilling into federal lands.<sup>205</sup>

Another counterargument sounding in hierarchy also levels the idea that expertise requirements are indicative of importance. In short, why would a narrower subordinate role be subject to expertise requirements when the subordinate’s boss—who could override the decisions of that subordinate—is not? It cannot be the case that the subordinate is more important than the superior. Therefore, because superiors often lack the expertise requirements of their subordinates, expertise requirements cannot be considered a signal of a position’s importance.

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fascinating exposition of this phenomenon, see generally BEN FOUNTAIN, BILLY LYNN’S LONG HALFTIME WALK (2012).

201. See, e.g., David French, *Yes, American Religious Liberty Is in Peril*, WALL ST. J. (July 26, 2019, 10:54 AM), <https://www.wsj.com/articles/yes-american-religious-liberty-is-in-peril-11564152873>.

202. See, e.g., Chronicle Editorial Board, *Editorial: Voting Rights Under Assault Across the U.S.*, S.F. CHRON. (Mar. 7, 2021, 4:00 AM), <https://www.sfchronicle.com/opinion/editorials/article/Editorial-Voting-rights-under-assault-across-the-16004634.php>.

203. See *Combating Religious Discrimination and Protecting Religious Freedom*, U.S. DEP’T OF JUST., <https://www.justice.gov/crt/combating-religious-discrimination-and-protecting-religious-freedom-15> (last visited Oct. 8, 2021) (“The Civil Rights Division of the Department of Justice enforces a wide range of laws protecting religious liberty.”); *Voting Section*, U.S. DEP’T OF JUST., <https://www.justice.gov/crt/voting-section> (last visited Oct. 8, 2021) (“The Voting Section [of the Civil Rights Division] enforces the civil provisions of the federal laws that protect the right to vote.”).

204. See generally *Information and Regulatory Affairs*, OFF. OF MGMT. & BUDGET, <https://www.whitehouse.gov/omb/information-regulatory-affairs/> (last visited Oct. 8, 2021).

205. Cf. BUREAU OF LAND MGMT, CHAPTER 5 – DRILLING AND PROD. OPERATIONS 37–38 (2007).

Given that the two most likely explanations—niche expertise and importance—have both been disproven, it is more likely the case that there is no unifying motivation or explanation behind which roles are tagged with such requirements. As such, it is worth questioning whether we ought to reconsider their deployment.

#### IV. GIVEN THE INCONSISTENT USE OF EXPERTISE REQUIREMENTS, SHOULD WE RETHINK THEM?

While inconsistently deployed, only potentially indicative of relative import, and questionably constitutional,<sup>206</sup> expertise requirements appear to be here to stay. Thus, Congress must ask whether they should

206. A word on the constitutional issues at play. There are several arguments that statutory qualifications are unconstitutional, and several counterarguments. One argument against them is founded on the difference between a nomination and an appointment. This is because “[t]he text of the Appointments Clause makes a firm distinction between the power of nomination and the power of appointment.” Volokh, *supra* note 18, at 754. The President’s power to nominate under the Clause is unlimited; they may nominate anyone. *Id.* at 752. Indeed, “[n]o role whatsoever is given either to the Senate or to Congress as a whole in the process of choosing the person who will be nominated for appointment.” Pub. Citizen v. U.S. Dep’t of Just., 491 U.S. 440, 483 (1989) (Kennedy, J., concurring); *see also id.* at 487 (“The President has the sole responsibility for nominating . . . officials . . .”); THE FEDERALIST NO. 76 (Alexander Hamilton) (explaining that the President alone will nominate). Therefore, this argument follows: the Appointments Clause bars Congress from even limiting the pool of individuals from which the President may select her nominee before he or she puts forward a nomination. Another argument holds that the Senate’s constitutional prerogative to “[a]dvise and [c]onsent” to a nominee, can only occur *after* a nomination has been made, meaning they cannot curtail the nomination. Volokh, *supra* note 18, at 756–58; U.S. CONST. art. II, § 2, cl. 2. On the other hand, several arguments militate in favor of the practice. First, precedent often dictates constitutionality determinations. *See, e.g., Nat’l Lab. Rels. Bd. v. Canning*, 573 U.S. 513, 525 (2014) (“[L]ongstanding practice of the government can inform our determination of what the law is.”) (internal quotation marks and citations omitted); *cf. Zivotofsky v. Kerry*, 576 U.S. 1, 23 (2015) (“In separation-of-powers cases this Court has often ‘put significant weight upon historical practice.’”); *McCulloch v. Maryland*, 17 U.S. 316, 401 (1819) (in separation of powers questions, courts should “receive a considerable impression” from longstanding practice). Moreover, the First Congress, replete with the same individuals who had debated and drafted the constitution, “provides ‘contemporaneous and weighty evidence’ of the Constitution’s meaning since many of the Members of the First Congress ‘had taken part in framing that instrument.’” *Bowsher v. Synar*, 478 U.S. 714, 723–24 (1986) (quoting *Marsh v. Chambers*, 463 U.S. 783, 790 (1983)). As such, the fact that this Congress passed the Judiciary Act of 1789 with the qualification that the Attorney General had to have been “learned in [the] law.” The Judiciary Act of 1789 § 35, 1 Stat. 73. The Judiciary Act of 1789 suggests that the Founders did not consider such a qualification an unconstitutional power grab by the legislature. And because our nation has continued and augmented the practice, this should settle the debate.

A second argument can also be made: functionalism.

In general terms, functional approaches (to constitutional questions) examine whether present practices undermine constitutional commitments that should be regarded as central. The text of the Constitution and the intent of its drafters are relevant, but they are not sufficiently helpful in hard cases to be determinative; it is the basic structural principles that play the critical role.

Cass R. Sunstein, *Constitutionalism After the New Deal*, 101 HARV. L. REV. 421, 495 (1987). With this framework in mind, a “[f]unctional analysis would likely” allow statutory qualifications for most offices “because the president would still have considerable latitude to choose nominees from within the set of nominees qualified under the legislative requirements.” Michael J. Gerhardt, *Toward a Comprehensive Understanding of the Federal Appointments Process*, 21 HARV. J. L. & PUB. POL’Y 467, 535 (1998).

Neither the author nor this Article seeks to offer an opinion either way. Rather, given the degree to which these requirements are entrenched in our U.S. Code and the fact that they have recently been *added*, as in the case of the DNI, it appears that they are likely here to stay.

be reexamined and used in a different manner—be it more liberally, more judiciously, or at the same rate but across different positions.

For example, should the nation return to the days in which we require the Attorney General to be an attorney? Or on a narrower note, should it be the case that a United States Attorney be a former prosecutor, even at the state level?<sup>207</sup> Or maybe a defense attorney? What about mandating the chair of the Council of Economic Advisors hold a doctorate—or even a master’s degree—in the field of economics? Should our nation’s ambassadors be required to have served in foreign service? Even more foundationally, should ambassadors be statutorily obligated to pass a proficiency exam in the native language of the nation in which they will be posted?

Guided by these questions, this Part kickstarts this conversation by evaluating the benefits and detriments of three potential ways the government could modify and standardize expertise requirements across the Executive Branch.

#### *A. Applying a General Expertise Requirement to All Political Appointments Requiring Senate Confirmation*

Broadly speaking, expertise qualifications appear to benefit the country when placed on positions subject to the Senate’s advice and consent, as the expertise requirements place one’s qualifications and background squarely at issue for the Senate to address openly. A review of the recent appointments to the DNI position bears this out. However, definitive proof has not been established to demonstrate that the requirement is necessary for the Senate to thoroughly scrutinize a candidate’s qualifications.<sup>208</sup> Ultimately, though, there appears to be little to no harm, meaning the potential benefits derived outweigh nonexistent costs.

##### **1. The Confirmation of President Donald Trump’s DNI Nominees Demonstrate the Potential Benefits**

Consider again the DNI position who must, upon nomination, have “extensive national security expertise.”<sup>209</sup> The first DNI in President Trump’s Administration was former Senator and Ambassador Dan

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207. Cf. Ankush Khardori, *Barr’s New U.S. Attorney Pick has No Idea How to do the Job*, WASH. POST (June 27, 2020), <https://www.washingtonpost.com/outlook/2020/06/27/jay-clayton-secondny/> (observing that former President Trump’s rumored choice to serve as United States Attorney for the Southern District of New York Jay might be unqualified) (“Clayton would easily be the least qualified person to hold the job as U.S. attorney in the Southern District in modern history. For nearly the last 30 years, every U.S. attorney had served a meaningful stint as a federal prosecutor, something Clayton never has.”).

208. See 50 U.S.C. § 3023(a)(1).

209. *Id.*

Coats.<sup>210</sup> After his nomination was announced, Coats's experience was touted. As Quinta Jurecic of *Lawfare Blog* wrote:

The four previous appointed Directors of National Intelligence held significant prior government experience before their service at ODNI, ranging from ambassadorial work to military experience and work elsewhere in the intelligence community. Dan Coats would fit into this pattern: he served in the House of Representatives from 1981 to 1989 and served two and a half terms in the Senate after being appointed to fill the vacant Indiana Senate seat opened by Dan Quayle's election to the Vice Presidency in 1989. In his last Senate term from 2011-2016, he sat on the Senate Intelligence Committee. From 2001 to 2005, he was the U.S. Ambassador to Germany, where he was involved in calming the diplomatic crisis caused by the CIA's mistaken imprisonment and torture of Khaled Masri, a German citizen.<sup>211</sup>

Nonetheless, the potential holes in his resume were discussed in order to assess his capacity to serve as DNI.<sup>212</sup> At Coats's confirmation hearing, Senator Mark Warner, then-Ranking Member of the Senate Select Committee on Intelligence, stated: "You've got a remarkable background, but you will be the first DNI who was not either career military, career intelligence, or a career professional diplomat."<sup>213</sup> Given this void, Senator Warner asked how Coats would "ensure that the intelligence community will continue to provide unvarnished assessments to the President and his Administration."<sup>214</sup> Coats evidently answered sufficiently to mollify any concerns; the Senate confirmed him by a margin of 85–12.<sup>215</sup>

The potential benefits to general experience requirements are similarly represented by the aforementioned nomination of John Ratcliffe. During his hearing, Ratcliffe's experience engendered a distinct line of inquiry.<sup>216</sup> Senator Marco Rubio observed "skepticism that's been raised is about experience and the experience needed to lead this intelligence enterprise."<sup>217</sup> Given this, Senator Rubio asked, "What is it, and what you have done, during your career that you believe prepares you best for the role you now have of overseeing all of these different pillars of our

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210. See Quinta Jurecic, *Trump Selects Dan Coats for Director of National Intelligence*, LAWFARE BLOG (Jan. 6, 2017, 11:38 AM), <https://www.lawfareblog.com/trump-selects-dan-coats-director-national-intelligence>.

211. *Id.*

212. See *Hearing on the Confirmation of the Honorable Daniel Coats to be the Director of National Intelligence Before the S. Select Comm. On Intelligence*, 115th Cong. 2–4 (2017) (statement of Sen. Mark Warner, Ranking Member).

213. *Id.* at 20.

214. *Id.*

215. *Dan Coats Sworn in as National Intelligence Director*, AP NEWS (Mar. 16, 2017), <https://apnews.com/article/960cf021702244838c31567374bed905>.

216. *On the Nomination of John L. Ratcliffe to be Director of National Intelligence: Hearing Before the S. Select Comm. On Intelligence*, 116th Cong. 3–5 (2020) (statement of Sen. Mark Warner, Vice Chairman).

217. *Id.* at 30 (statement of Sen. Marco Rubio).

intelligence capabilities?”<sup>218</sup> This allowed Ratcliffe to convince the committee—and thereafter the Senate, to confirm his nomination—that he had such experience.<sup>219</sup>

The through line between Coats’s and Ratcliffe’s cases is the scrutiny with which the media placed on their respective experience prior to nomination. This, it could be argued, is at least in part because the statute demands such expertise—a fact news periodicals continuously harped on.<sup>220</sup>

## 2. The Confirmation Hearings of President Trump’s Other Cabinet Nominees Suggest That Expertise Requirements May or May Not Be Necessary for the Senate to Scrutinize a Nominee’s Qualifications

Concededly, it has not yet been proven that the Senate places additional emphasis on a nominee solely for the sake of the requirement. To be sure, one can examine the confirmation hearings of other cabinet nominees in the Trump Administration as evidence that no such statutory restriction was required to engender an examination. For example, Senator Elizabeth Warren was among many questioning Betsy DeVos “about [her] qualifications for leading the Nation on higher education,”<sup>221</sup> though the Secretary of Education need not, by statute, be an expert. The same could be said for Senator Ben Cardin’s questions of Rex Tillerson.<sup>222</sup> The list goes on.<sup>223</sup>

218. *Id.* (statement of Sen. Marco Rubio).

219. Sam Manas, *Senate Confirms U.S. Rep. John Ratcliffe of Texas as Director of National Intelligence*, THE TEXAS TRIBUNE (May 21, 2020, 11:00 AM), <https://www.texastribune.org/2020/05/21/john-ratcliffe-texas-confirmed/>.

220. See, e.g., Maggie Haberman, Julian E. Barnes, & Peter Baker, *Dan Coats to Step Down as Intelligence Chief; Trump Picks Loyalist for Job*, N.Y. TIMES (July 28, 2019), <https://www.nytimes.com/2019/07/28/us/politics/dan-coats-intelligence-chief-out.html>.

221. *Nomination of Betsy DeVos to Serve as Secretary of Education Before the S. Comm. on Health, Educ., Lab., and Pensions*, 115th Cong. 45 (2017) (statement of Sen. Elizabeth Warren).

222. *Nomination of Rex W. Tillerson to Serve as Secretary of State Before the S. Comm. on Foreign Rel.’s*, 115th Cong. 14 (2017) (statement of Sen. Ben Cardin) (“[T]hose who suggest that anyone who can run a successful business, can of course, run a government agency do a profound disservice to both. Serving the narrow, market-driven interest of Exxon shareholders, is not the same as serving the national interest of all the American people.”); *id.* at 16 (statement of Sen. Ben Cardin) (“[I]f we take seriously that your tenure and experience at Exxon serves as qualifications for secretary of State, then there’s likewise a serious discussion this committee needs to have about the potential for conflicts of interest that arise, from your long corporate tenure.”).

223. See Press Release, Sen. Patty Murray, *Joined by Fast Food Workers and Advocates, Sen. Murray Slams President Trump’s Labor Pick as “Uniquely Unqualified,”* (Feb. 9, 2017) <https://www.murray.senate.gov/public/index.cfm/mobile/newsreleases?ID=8BADAB2F-ACD1-414B-9130-223EFCC1B66C> (wherein Senator Murry refers to Labor Secretary nominee Andrew Puzder as “uniquely unqualified”); Michael Coleman, *Heinrich, Udall say Perry Unqualified to be Energy Secretary*, ALBUQUERQUE J. (Dec. 13, 2018, 10:28 PM), <https://www.abqjournal.com/907934/heinrich-says-perry-utterly-unqualified-for-energy-chief-post.html> (wherein Senators Heinrich and Udall refer to Energy Secretary nominee Rick Perry as “unqualified”); Associated Press, *Pelosi: Ben Carson is ‘Disturbingly Unqualified’ for Cabinet Position*, BUS. INSIDER (Dec. 5, 2016, 8:56 AM), <https://www.businessinsider.com/pelosi-ben-carson-disturbingly-unqualified-hud-2016-12> (wherein Speaker Pelosi refers to Housing and Urban

This handful of examples could simply be anachronistic and reflective of President Trump's unique approach to building what has been termed an "abolitionist cabinet," filled with individuals who might have been skeptical about the agencies they ran in an effort to reduce their administrative influence,<sup>224</sup> which thus generated substantial skepticism about many nominees' qualifications.

This argument also focuses solely on some of the sexier nominations in recent memory—those who received above-the-fold media coverage. But nominations of other officials that require such expertise whose names may not garner banner headlines suggest that such coverage and inquiry is not standard, meaning the statutory requirement may in fact play an outsized role in the confirmation process.

In 2018, for example, Dr. Steven Dillingham was nominated by President Trump to be the Director of the Census Bureau. At that time, there was an active controversy as to whether Secretary of Commerce Wilbur Ross was permitted to include a citizenship question on the 2020 census.<sup>225</sup> Recognizing this reality, Senator Ron Johnson, the Chairman of the Committee on Homeland Security and Governmental Affairs, stated outright at Dr. Dillingham's nomination that "rather than argue about an issue that will be fully litigated in the courts, it is my sincere hope that this hearing will focus on whether or not Dr. Dillingham is qualified to lead the Census Bureau."<sup>226</sup> Senator Claire McCaskill, then the Ranking Member of the Committee, concurred, stating that she "agree[d] that the decision today on Mr. Dillingham is on his qualifications and not what has occurred over the last year."<sup>227</sup>

In that light, Dr. Dillingham's opening statement included his relevant experiences:

My public service includes directing two Federal statistical agencies and several research offices. I also have been [a] manager for large and small businesses, non-profits, and universities. My work has ranged from enforcing whistleblower protections to analyzing pro-

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Development Secretary nominee Ben Carson as "disturbingly unqualified"); Oliver Milman, *Donald Trump Picks Climate Change Sceptic Scott Pruitt to Lead EPA*, THE GUARDIAN (Dec. 8, 2016, 3:03 PM), <https://www.theguardian.com/us-news/2016/dec/07/trump-scott-pruitt-environmental-protection-agency> (wherein New York Attorney General Eric Schneiderman refers to EPA Administrator nominee Scott Pruitt as an "unqualified choice").

224. See William McGurn, *Donald Trump's Abolitionist Cabinet*, WALL ST. J. (Feb. 13, 2017, 07:27 PM), <https://www.wsj.com/articles/donald-trumps-abolitionist-cabinet-1487031300>.

225. See *Nominations of Hon. Steven Dillingham and Michael M. Kubayanda: Hearing Before the S. Comm. on Homeland Sec. and Governmental Aff.'s*, 115th Cong. 2-3 (2018) [hereinafter *Dillingham & Kubayanda Hearings*] (statement of Sen. Ron Johnson, Chairman); see also Hansi Lo Wang, *How The 2020 Census Citizenship Question Ended Up in Court*, NAT'L PUB. RAD. (Nov. 4, 2018, 10:14 AM), <https://www.npr.org/2018/11/04/661932989/how-the-2020-census-citizenship-question-ended-up-in-court>.

226. *Dillingham & Kubayanda Hearings*, *supra* note 225, at 2 (statement of Sen. Ron Johnson, Chairman).

227. *Id.* at 7 (statement of Sen. Claire McCaskill, Ranking Member).

gram results. Historically, the talents of Bureau Directors have served them well. If confirmed, mine should also.<sup>228</sup>

Essentially, Dr. Dillingham addressed these requirements head on to satisfy the Committee.

Take an even less publicized position: Deputy Under Secretary of Defense for Acquisition and Sustainment, an individual who “shall be appointed from among persons who have an extensive system development, engineering, production, or management background and experience with managing complex programs.”<sup>229</sup> In his confirmation to the post in August 2018, Alan R. Shaffer, the nominee for the post, spent a significant amount of his opening statement addressing his qualifications, stating that one of the two questions he should address is “[w]hy am I qualified?”<sup>230</sup> This was particularly true because, as Shaffer acknowledged, he “ha[d] not been an acquisition PEO or Commanded a logistics depot”—posts that would have been logical stepping stones to the Pentagon role.<sup>231</sup> Senator Thom Tillis then pointedly asked how Shaffer’s experiences would help him solve a particular issue, to which Shaffer detailed an experience of his related to that issue and how he planned to use those lessons in the case at issue.<sup>232</sup> Nominees without these sorts of statutory requirements may not have been so subjected to this line of inquiry.

These hearings and inquiries are proof that statutory requirements increased the discussion of a nominee’s qualifications as compared to positions without the statutory requirements. Unfortunately, such a study would be nothing short of unwieldy given the sheer volume of unique factors that would need to be controlled. And yet, it seems to be the case that nominees and senators alike, at minimum, seek to address one’s qualifications when they are squarely at issue via the statute—a net positive for senators and, therefore, the American public, in evaluating the competency of a nominee.

### 3. No Harm, No Foul

The final portion of this equation is whether statutory requirements harm the American public by foreclosing the nomination of an otherwise superlative candidate. Once again sidestepping constitutional issues,<sup>233</sup> there is almost certainly no harm in including the requirement for Senate-confirmed positions.

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228. *Id.* at 9 (statement of Steven D. Dillingham).

229. 10 U.S.C. § 133a(b).

230. *Nominations of Alan R. Shaffer, Verona B. Daigle, Hon. Robert H. McMahon, Dr. E. Casey Wardynski, Alex A. Beehler: Hearing Before S. Comm. on Armed Serv.’s*, 115 Cong. 1–2 (2018) (opening statement of Alan R. Shaffer).

231. *Id.*

232. *Id.* at 59–60 (statement of Sen. Thom Tillis).

233. See Volokh, *supra* note 18, at 745–46.

Theoretically, one could assert that putting such a requirement places an improper weight on experience rather than policy positions for a nomination. But this suggestion misses the mark: Senate confirmation hearings are controlled by the senators asking the questions, and if they choose to ask *only* policy questions, that is certainly their prerogative, in which case this theoretical harm has not been doled out.

Another counterargument could assert that widespread adoption of these restrictions would harm the country by restricting the President's ability to nominate whomever. This, too, cannot carry water. In recent memory, three presidents have nominated a cabinet member in seeming violation of a statutory restriction.<sup>234</sup> These members were Ambassador Charlene Barshefsky, General James Mattis, and General Lloyd Austin.<sup>235</sup> In each instance, Congress deemed them qualified notwithstanding the requirement and confirmed them to their posts.<sup>236</sup>

In sum, there is little if any cognizable harm in extending requirements more broadly irrespective of type. As such, extending these requirements can only lead to positive outcomes, even recognizing that their value is uncertain.

### *B. Why a Uniform, Blanket College Requirement Is a Bad Idea*

A second consideration is to mandate that all statutorily created positions require a postsecondary degree of some kind, whether that is an associate degree, bachelor's degree, or more. Notwithstanding the proven, multifaceted benefits of a college education, such a requirement would likely do more harm than good for two reasons. First, one can absolutely succeed in today's society absent a college degree—indeed, many have—and thus succeed in an appointed role. Second, it would be unfair to place such a requirement when college is exceptionally costly and may not offer a positive return on investment.

#### 1. The Advantages of a College Degree

Undoubtedly, a college education offers several tremendous benefits. From a purely economic standpoint:

A college degree is still the surest way to increase wage potential. . . . According to a report on the value of college majors conducted by the Center on Education and the Workforce at Georgetown University, “people who earn bachelor's degrees and work full-time can expect to earn 84 percent more than their peers with a high school diploma over their lifetime.” The Chronicle of Higher Educa-

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234. *Id.*; KATHLEEN J. MCINNIS, CONG. RSCH. SERV., R44725, THE POSITION OF SECRETARY OF DEFENSE: STATUTORY RESTRICTIONS AND CIVILIAN-MILITARY RELATIONS 2 (2017).

235. Volokh, *supra* note 18, at 745–46; MCINNIS, *supra* note 234, at 2.

236. Volokh, *supra* note 18, at 745–46; MCINNIS, *supra* note 234, at 2.

tion estimates this earnings gap to be more than \$32,000 per year, resulting in a lifetime total of nearly \$1.4 million.<sup>237</sup>

There is reason to think this gap between college-educated laborers and non-college-educated laborers will persist, if not grow. As one op-ed author observed, “with the rise of artificial intelligence and the consistent call for multi-talented and flexible critical thinkers in our workplaces, college is—and will increasingly be—the best way to prepare for an uncertain future.”<sup>238</sup> One recent study from Bain & Company observes that in the coming years, “automation may eliminate 20% to 25% of current jobs.”<sup>239</sup> Bain & Company qualified its observation: “The benefits of automation will likely flow to about 20% of workers—primarily highly compensated, highly skilled workers—as well as to the owners of capital,” suggesting that those with college degrees may well be able to take advantage of the changing labor landscape rather than suffer from it.<sup>240</sup>

There are also exceptional nonfinancial reasons why college may be beneficial. The Bain & Company study also notes:

Between 1990 and 2015, the life expectancy for a 25-year-old in the US with a college degree or higher increased from 79 years to 84 years; for a 25-year-old American with only a high school degree, it increased marginally from 76 years to 79 years; for those without a high school degree, it actually declined from 74 years to 73 years. By 2030, the life-expectancy gap between an American with a college degree or higher vs. one without a high school degree is expected to widen even further, to 16 years.<sup>241</sup>

Finally, those who attend college are afforded interpersonal growth opportunities. From community colleges to elite universities, time in college affords students the opportunity to meet new people, face new challenges, explore new worlds, and expand their horizons.

## 2. Success and Expertise Can Be Derived Absent a College Education

For many reasons, an individual may be competent to serve in any number of roles absent a college degree. As the *New York Times* observed in February 2015 when Governor Scott Walker and Senator Rand

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237. Mark A. Heckler, *The Importance of a College Education*, CHI. TRIB. (Sept. 11, 2018, 2:30 PM), <https://www.chicagotribune.com/suburbs/post-tribune/opinion/ct-ptb-heckler-guest-column-st-0912-story.html>.

238. *Id.*

239. Karen Harris, Austin Kimson, & Andrew Schwedel, *Labor 2030: The Collision of Demographics, Automation and Inequality*, BAIN & CO. (Feb. 7, 2018), <https://www.bain.com/insights/labor-2030-the-collision-of-demographics-automation-and-inequality/>.

240. *Id.*

241. *Id.* Notably, this may well introduce confounding variables, i.e., wealth is a predictor of life expectancy rather than college, but that college attendance is highly correlated with wealth. Nonetheless, this is a troubling statistic.

Paul, two individuals who lack college degrees,<sup>242</sup> were frontrunners for the Republican presidential nomination:

Some of the great American successes are men and women without college degrees: Bill Gates of Microsoft, Steven P. Jobs of Apple and Larry Ellison of Oracle. The same goes for leading entertainers such as Clint Eastwood, Julia Roberts and George Clooney. Add to the list of distinguished nongraduates Walter Cronkite, who was a longtime anchor for “CBS Evening News,” and today’s leading anchorman Brian Williams.

Ted Turner, who revolutionized broadcast journalism when he started the Cable News Network, revels in telling how he was kicked out of Brown University for hosting a woman in his room. The university had the good sense to give him an honorary degree years later.<sup>243</sup>

To be sure, few would suggest that Gates is unqualified, for example, to run the White House OSTP because he dropped out of college.<sup>244</sup>

This is not only true in the realm of technology where college dropouts, at least anecdotally, appear to be most successful.<sup>245</sup> Consider the legal community. President Franklin Delano Roosevelt could never have appointed Robert Jackson—“[a] piercing intellect and the greatest writer in the history of the [Supreme] [C]ourt”—to his post as Solicitor General were college degrees, let alone postgraduate legal degrees, required.<sup>246</sup> This post paved the way for Jackson’s place as one of the greatest Justices in our nation’s history.<sup>247</sup>

Because success, experience, and expertise are eminently achievable in certain fields absent traditional educational certifications, having the specific expertise requirement of such a certification seems unnecessary as compared to a general expertise requirement, which could be met with educational credentials or other qualifications.<sup>248</sup>

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242. Albert R. Hunt, *Running for Office Without Higher Education*, N.Y. TIMES (Feb. 1, 2015), <https://www.nytimes.com/2015/02/02/us/politics/running-for-high-office-without-higher-education.html> (“[Dr. Paul] never completed his undergraduate degree at Baylor University, but he scored so high on his medical school entrance exams that he was admitted to the Duke University School of Medicine.”).

243. *Id.*

244. Even if it was Harvard.

245. See Abigail Johnson Hess, *10 Ultra-Successful Millionaire and Billionaire College Dropouts*, CNBC (May 10, 2017, 2:53 PM), <https://www.cnbc.com/2017/05/10/10-ultra-successful-millionaire-and-billionaire-college-dropouts.html> (citing nine of ten “ultra-successful millionaire and billionaire college dropouts” as having founded technology-driven companies).

246. Cass R. Sunstein, *Home-Run Hitters of the Supreme Court*, BLOOMBERG VIEW (Sept. 23, 2014, 3:03 PM), <http://www.bloombergview.com/articles/2014-04-01/home-run-hitters-of-the-supreme-court>.

247. *Id.*

248. This argument admittedly has less force in highly technical medical roles, where medical training likely takes an increased role in one’s competency to perform the job.

### 3. College’s High Cost Could Create a Wealth Barrier for Service in Government Positions

Aside from the fact that one can be a competent expert outside of traditional collegiate credentials, there is another problem with requiring this particular credential: college is, generally speaking, exceptionally expensive. Indeed, from January 1998 to December 2019, the Consumer Price Index has risen 188% for college tuition—the second highest of any classified goods, trailing only behind hospital services—compared to a 59.6% overall rise throughout the time.<sup>249</sup> Another study found that from the late 1980s to 2018, adjusting for inflation, the cost of an undergraduate degree has raised by 129% at a private college or university and 213% at public colleges or universities.<sup>250</sup> In order to accommodate these costs, students are forced to take out exceptional amounts of student loans, which deflates the actual return on investment in a college education and reinforces wealth inequality,<sup>251</sup> including racial wealth inequality.<sup>252</sup>

Given college’s rising costs, diminishing return on investment and negative externalities of systemic inequality, it seems counterproductive to demand that individuals participate in this system in order to qualify for a role that they may otherwise be qualified for in the form of non-college experience or expertise.

#### *C. Applying the Trade Representative’s Prior Representation Limitation Across All Political Appointees*

A final consideration is the widespread application of the requirement imposed on the nominee for the United States Trade Representative. Arguably one of the most interesting requirements in the entire government, 19 U.S.C. § 2171(b)(4) reads: “A person who has directly represented, aided, or advised a foreign entity (as defined by section 207(f)(3) of title 18) in any trade negotiation, or trade dispute, with the United States may not be appointed as United States Trade Representative or as a Deputy United States Trade Representative.”<sup>253</sup>

249. Mark J. Perry, *Chart of the Day . . . or Century?*, CARPE DIEM: AEI (Jan. 14, 2020), <https://www.aei.org/carpe-diem/chart-of-the-day-or-century-3/>.

250. Shannon Insler, *Do Millennials Have It Better or Worse Than Generations Past?*, STUDENT LOAN HERO (May 30, 2018), <https://studentloanhero.com/featured/millennials-have-better-worse-than-generations-past/>.

251. See generally Fabian T. Pfeffer, *Growing Wealth Gaps in Education*, 55 DEMOGRAPHY 1033, 1048–49 (2018); see also Josh Freedman, *Why American Colleges Are Becoming a Force for Inequality*, THE ATLANTIC (May 16, 2013), <https://www.theatlantic.com/business/archive/2013/05/why-american-colleges-are-becoming-a-force-for-inequality/275923/>.

252. Jen Mishory, Mark Huelsman, & Suzanne Kahn, *How Student Debt and the Racial Wealth Gap Reinforce Each Other*, CENTURY FOUND. (Sept. 9, 2019), <https://tcf.org/content/report/bridging-progressive-policy-debates-student-debt-racial-wealth-gap-reinforce/?agreed=1>.

253. 19 U.S.C. § 2171(b)(4).

This restriction is certainly sensible: when sending in a negotiator—particularly one who will be negotiating deals at the scale of the Trade Representative—a country should be *absolutely certain* of its representative's allegiance.

This restriction arose in the case of Charlene Barshefsky, President Bill Clinton's nominee for United States Trade Representative in 1996, who had previously worked for the Canadian government.<sup>254</sup> "Clinton decided to nominate her anyway and petitioned Congress to make an exception to the statutory requirement. Congress did so, passing a private bill specifically allowing the appointment of Charlene Barshefsky, by name, and then confirming her nomination."<sup>255</sup>

Nonetheless, the animating principle of this remains pertinent throughout the U.S. government. A federal official of any stripe, serving in any role, should be devoid of significant ties to other nations, as any sort of bias can impede one's judgment—not just in negotiation matters, but in other sorts of biases. Imagine if the Secretary of Defense had previously advised France on its national security efforts, including its military industry; could they be even the slightest bit vulnerable when evaluating a bid from Airbus? If the answer is yes, this restriction would be worthwhile.

Those who would oppose this sort of requirement would likely suggest that one should not be penalized for their prior work, particularly in private industry. But the counterexample of Barshefsky is important. Her prior representation did not ultimately hinder her, but instead afforded the Congress a second opportunity to scrutinize this experience and ensure that no bias could permeate her decision-making and thus affect her competency or capacity. Therefore, there is no compelling reason to withhold such an expertise requirement on other vital politically appointed roles throughout the government.

#### CONCLUSION

As this Article first set out to demonstrate, experience requirements may not be pervasive across the federal government, but neither are they rare. Having catalogued the roles subject to different sorts of requirements, this Article synthesized several potential patterns to explain where and why these expertise requirements emerge—namely niche expertise, smaller portfolios of responsibility, the protection of minority voices, and expertise requirements as a proxy for importance.

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254. Volokh, *supra* note 18, at 746 n.4; see also Paul Blustein, *Clinton Expected To Name Barshefsky to Trade Post*, WASH. POST E1 (1996) ("Barshefsky advised the Canadian government in its dispute with the United States over softwood lumber.").

255. *Id.* (internal footnotes omitted).

Given the general inconsistency with which these requirements are doled out, it is time to reevaluate which roles deserve what requirements, including potentially imposing new and tougher demands across the board. In the hopes of kickstarting this conversation, this Article offered a handful of potential strategies—two worth adopting, one not. With any luck, the discussion will continue, and this country will continue to ensure that only those truly competent and capable are asked and confirmed to lead.

## APPENDIX

A comprehensive list of approximately 350 statutory roles subject to general or specific expertise requirements, including over sixty that demand Senate confirmation.

Position	Statute	Specific or General Expertise Required?	Senate Confirmation? (Y/N)
President, Overseas Private Investment Corporation	2 U.S.C. § 2193	General	Y
Executive Vice President, Overseas Private Investment Corporation	2 U.S.C. § 2193	General	Y
Member, Overseas Private Investment Corporation Board of Directors	2 U.S.C. § 2193	General	Y
Office of Special Counsel, Merit Systems Protection Board	5 U.S.C. § 1211	Specific	Y
Board Member, Federal Retirement Thrift Investment Board	5 U.S.C. § 8472	General	Y
Director, Bureau of Citizenship and Immigration Services	6 U.S.C. § 271	General	Y
Administrator, Federal Emergency Management Agency	6 U.S.C. § 313	General	Y
Under Secretary of Agriculture for Food Safety	7 U.S.C. § 6981	General	Y
Member, Commission on 21st Century Production Agriculture	7 U.S.C. § 7312	General	Y
Secretary of Defense	10 U.S.C. § 113	Specific	Y
Deputy Secretary of Defense	10 U.S.C. § 132	General	Y
Chief Management Officer, Department of Defense	10 U.S.C. § 132a	General	Y
Deputy Under Secretary of Defense for Acquisition and Sustainment	10 U.S.C. § 133b	Specific	Y
Under Secretary of Defense (Comptroller)	10 U.S.C. § 135	General	Y
Deputy Under Secretary of Defense for Intelligence and Security	10 U.S.C. § 137a	General	Y
Assistant Secretary of the Army	10 U.S.C. § 7016	General	Y
Principal Military Deputy to the Assistant Secretary of the Army	10 U.S.C. § 7016	General	Y

Position	Statute	Specific or General Expertise Required?	Senate Confirmation? (Y/N)
Assistant Secretary of the Navy	10 U.S.C. § 8016	General	Y
Assistant Secretary of the Air Force	10 U.S.C. § 9016	General	Y
Member, Federal Housing Administration Advisory Board	12 U.S.C. § 1708	General	Y
Member, National Credit Union Administration Board	12 U.S.C. § 1752a	General	Y
Board Member, Federal Deposit Insurance Corporation	12 U.S.C. § 1812	General	Y
Particular <sup>256</sup> Governor, Federal Reserve System Board of Governors	12 U.S.C. § 241	Specific	Y
Member, Financial Stability Oversight Council	12 U.S.C. § 5321	General	Y
Director, Census Bureau	13 U.S.C. § 21	General	Y
Chairperson, Council of Economic Advisors	15 U.S.C. § 1023	General	Y
Member, National Association of Registered Agents and Brokers Board of Directors (Insurance)	15 U.S.C. § 6754	General	Y
Member, Tennessee Valley Authority Board of Directors	16 U.S.C. § 831a	Specific	Y
United States Trade Representative <sup>257</sup>	19 U.S.C. § 2171	Specific	Y
Deputy United States Trade Representative	19 U.S.C. § 2171	Specific	Y
Commissioner, United States International Trade Commission	19 U.S.C. § 1330	General	Y
Member, National Museum and Library Services Board	20 U.S.C. § 9105a	General	Y
Trustee, World Bank AIDS Trust Fund	22 U.S.C. § 6821	General	Y
Member, Millennium Challenge Corporation Board of Directors	22 U.S.C. § 7703	General	Y

256. The modifier "Particular" denotes that only one of several individuals has a particular expertise requirement. For example, in this instance of the seven members of the Board of Governors of the Federal Reserve System, at least one Governor must have "demonstrated primary experience working in or supervising community banks having less than \$10,000,000,000 in total assets"; the other Governors need not have this experience. 12 U.S.C. § 241.

257. The United States Trade Representative's experiential qualifications are in fact experiential insofar as particular experience can be disqualifying. Specifically, "[a] person who has directly represented, aided, or advised a foreign entity (as defined by section 207(f)(3) of title 18, United States Code) in any trade negotiation, or trade dispute, with the United States may not be appointed as United States Trade Representative or as a Deputy United States Trade Representative." 19 U.S.C. § 2171(b)(4).

Position	Statute	Specific or General Expertise Required?	Senate Confirmation? (Y/N)
Management Positions, International Development Finance Corporation	22 U.S.C. § 9613	General	Y
Secretary of Indian Schools	25 U.S.C. § 272	General	Y
Member, Internal Revenue Service Oversight Board	26 U.S.C. § 7802	General	Y
United States Marshall	28 U.S.C. § 561	Specific	Y
Commissioner, Rehabilitation Services Administration, Department of Education	29 U.S.C. § 702	General	Y
Director, United States Bureau of Mines	30 U.S.C. § 1	General	Y
Executive Director, National Critical Materials Council	30 U.S.C. § 1807	General	Y
Controller, Office of Federal Financial Management	31 U.S.C. § 504	General	Y
Under Secretary of Commerce for Intellectual Property and Director of the United States Patent and Trademark Office	35 U.S.C. § 3	General	Y
Commissioner, Postal Regulatory Commission	39 U.S.C. § 502	General	Y
Member, Public Buildings Reform Board	40 U.S.C. § 1303	General	Y
Member, Corporation for National and Community Service Board of Directors	42 U.S.C. § 12651a	General	Y
Director, Advanced Research Projects Agency—Energy	42 U.S.C. § 16538	General	Y
Board Member, International Clean Energy Foundation	42 U.S.C. § 17352	General	Y
Privacy and Civil Liberties Oversight Board	42 U.S.C. § 2000ee	General	Y
Surgeon General	42 U.S.C. § 205	Specific	Y
Inspector General, Nuclear Regulatory Commission	42 U.S.C. § 2286k	General	Y
Administrator, Energy Research and Development Administration	42 U.S.C. § 5812	General	Y
Deputy Administrator, Energy Research and Development Administration	42 U.S.C. § 5812	General	Y
Member, Financial Oversight and Management Board of Puerto Rico	48 U.S.C. § 2121	General	Y
Administrator, Federal Railroad Administration	49 U.S.C. § 103	General	Y

Position	Statute	Specific or General Expertise Required?	Senate Confirmation? (Y/N)
Administrator, Federal Aviation Administration	49 U.S.C. § 106	General	Y
Administrator, Pipeline and Hazardous Materials Safety Administration, Department of Transportation	49 U.S.C. § 108	General	Y
Administrator, Federal Motor Carrier Safety Administration	49 U.S.C. § 113	General	Y
Administrator, Transportation Security Administration	49 U.S.C. § 114	General	Y
Member, Amtrak Board of Directors	49 U.S.C. § 24302	General	Y
Director, Directorate of National Intelligence	50 U.S.C. § 3023	General	Y
Principal Deputy Director, Directorate of National Intelligence	50 U.S.C. § 3026	General	Y
Inspector General, Central Intelligence Agency	50 U.S.C. § 3517	General	Y
Director, National Park Service	54 U.S.C. § 100302	General	Y
Board Member, Board of Directors of the Office of Congressional Workplace Rights	2 U.S.C. § 1381	Specific	N
Deputy Architect of the Capitol, Chief Operating Officer	2 U.S.C. § 1805	General	N
Member, Curatorial Advisory Board	2 U.S.C. § 2108	General	N
Evaluation Officer, Assorted Agencies	5 U.S.C. § 313	General	N
Member, Advisory Committee on Data for Evidence Building	5 U.S.C. § 315	Specific	N
Member, Administrative Conference of the United States	5 U.S.C. § 593	Specific	N
Executive Director, Federal Employees' Retirement System	5 U.S.C. § 8474	General	N
Citizenship and Immigration Services Ombudsman, Department of Homeland Security	6 U.S.C. § 272	General	N
Surface Transportation Security Inspector, Department of Homeland Security	6 U.S.C. § 1113	General	N
Regional Administrator, Federal Emergency Management Agency	6 U.S.C. § 317	General	N
Assistant Secretary for State and Local Law Enforcement, Department of Homeland Security	6 U.S.C. § 607	General	N
Chief Medical Officer, Department of Homeland Security	6 U.S.C. § 597	Specific	N
Crop Market Price Reviewer	7 U.S.C. § 1508	Specific	N

Position	Statute	Specific or General Expertise Required?	Senate Confirmation? (Y/N)
Board Member, National Sheep Industry Improvement Center	7 U.S.C. § 1627b	Specific	N
Director, Agriculture Advanced Research and Development Authority	7 U.S.C. § 3319k	General	N
Director, Office of Agricultural Environmental Quality, Department of Agriculture	7 U.S.C. § 5402	General	N
Member, Edward R. Madigan United States Agricultural Export Excellence Award Board of Evaluators	7 U.S.C. § 5678	General	N
Member, National Genetics Resources Program Advisory Council	7 U.S.C. § 5843	General	N
Member, Foundation for Food and Agriculture Research Board	7 U.S.C. § 5939	General	N
Member, National Organic Standards Board	7 U.S.C. § 6518	Specific	N
Member, Urban Agriculture and Innovative Production Advisory Committee	7 U.S.C. § 6923	Specific	N
Director, National Appeals Division	7 U.S.C. § 6992	General	N
Member, Reserve Forces Policy Board	10 U.S.C. § 10301	Specific	N
TRICARE Regional Director	10 U.S.C. § 1073	Specific	N
Various Positions, Pharmacy and Therapeutics Committee	10 U.S.C. § 1074g	General	N
Secretary of Defense Delivery Unit, Department of Defense	10 U.S.C. § 131	General	N
Deputy Chief Management Officer of a Military Department	10 U.S.C. § 132a	General	N
Deputy Chief Financial Officer	10 U.S.C. § 135	General	N
Member, Defense Task Force on Domestic Violence	10 U.S.C. § 1562	General	N
Member, Defense Cost Accounting Standards Board	10 U.S.C. § 190	General	N
Director, Office of Corrosion Policy and Oversight, Department of Defense	10 U.S.C. § 2228	General	N
Intellectual Property Matters Expert, Department of Defense	10 U.S.C. § 2322	General	N
Member, Advisory Panel on Bids and Proposals	10 U.S.C. § 2372a	General	N
Member, Advisory Committee on the Prohibiting the Sale or Rental of Sexually Explicit	10 U.S.C. § 2495b	General	N
Principal Military Deputy to the Assistant Secretary of the Army	10 U.S.C. § 7016	General	N

Position	Statute	Specific or General Expertise Required?	Senate Confirmation? (Y/N)
Member, Defense Task Force on Sexual Harassment and Violence at the Military Service Academies	10 U.S.C. § 7431	General	N
Superintendent, Army National Military Cemeteries	10 U.S.C. § 7725	General	N
Principal Military Deputy to the Assistant Secretary of the Navy	10 U.S.C. § 8016	General	N
President, Naval Postgraduate School	10 U.S.C. § 8542	Specific	N
Principal Military Deputy to the Assistant Secretary of the Air Force	10 U.S.C. § 9016	General	N
Member, Military Justice Review Panel	10 U.S.C. § 946	General	N
Member, Civil Air Patrol Board of Governors	10 U.S.C. § 9497	General	N
Member, Board of Directors for Federal Home Loan Banks	12 U.S.C. § 1427	Specific	N
Member, National Consumer Cooperative Bank	12 U.S.C. § 3013	Specific	N
Assistants to Federal Reserve Agent	12 U.S.C. § 306	Specific	N
Resident Council, Resident Homeownership Program	12 U.S.C. § 4116	General	N
Various Coast Guard Prevention and Response Workforces	14 U.S.C. § 312	Specific	N
Member, Toxicological Advisory Board	15 U.S.C. § 1275	Specific	N
Director, Chesapeake Bay Office, National Oceanic and Atmospheric Administration	15 U.S.C. § 1511d	General	N
Member, National Academy for Fire Prevention and Control Board of Visitors	15 U.S.C. § 2206	General	N
Member, Committee on Fire Training and Education, National Academy for Fire Prevention and Control	15 U.S.C. § 2206	General	N
Various Management Roles, Research Program on Security of Computer Systems	15 U.S.C. § 278h	Specific	N
Member, Arctic Research Commission	15 U.S.C. § 4102	Specific	N
Member, Competitiveness Policy Council	15 U.S.C. § 4804	General	N
Particular Member, Municipal Securities Rulemaking Board	15 U.S.C. § 78o-4	General	N
Environmental Information Services Working Group, National Oceanic and Atmospheric Administration Science Advisory Board	15 U.S.C. § 8541	General	N

Position	Statute	Specific or General Expertise Required?	Senate Confirmation? (Y/N)
Take Reduction Team, Marine Mammals Incidental to Commercial Fishing Operations	16 U.S.C. § 1387	Specific	N
Commissioners, Commission of Polar Bears	16 U.S.C. § 1423d	General	N
Member, Advisory Committee on the Designation and Management of National Marine Sanctuaries	16 U.S.C. § 1445a	General	N
Board Member, Regional Marine Research Boards	16 U.S.C. § 1447b	General	N
Member, North Pacific and Bering Sea Fisheries Advisory Body	16 U.S.C. § 1823	General	N
Regional Fishery Management Council Member	16 U.S.C. § 1852	General	N
Member, Delta Region Preservation Commission	16 U.S.C. § 230f	Specific	N
Commissioner, Commission for Pacific Salmon Fishing	16 U.S.C. § 3632	General	N
Member, National Fish and Seafood Promotional Council	16 U.S.C. § 4004	General	N
Executive Director, National Fish and Seafood Promotional Council	16 U.S.C. § 4005	General	N
Member, Paterson Great Falls National Historical Park Advisory Commission	16 U.S.C. § 410lll	General	N
Member, Advisory Commission of the San Francisco Maritime National Historical Park	16 U.S.C. § 410nn-3	General	N
Commissioner, Natchez National Historical Park Advisory Commission	16 U.S.C. § 410oo-5	General	N
Commissioner, Coltsville National Historical Park Advisory Commission	16 U.S.C. § 410qqq	General	N
Member, Dayton Aviation Heritage Commission	16 U.S.C. § 410ww-21	General	N
Martin Luther King, Junior, National Historic Site Advisory Commission	16 U.S.C. § 410www-3	Specific	N
Member, Gettysburg National Military Park Advisory Commission	16 U.S.C. § 430g-8	General	N
Member, Hawaii Tropical Forest Recovery Task Force, Institute of Pacific Islands Forestry	16 U.S.C. § 4503a	General	N
Member, Jefferson National Expansion Memorial Commission	16 U.S.C. § 450jj-6	General	N
Member, Presidio Trust Board of Directors	16 U.S.C. § 460bb	General	N
Member, Gila Box Riparian National Conservation Area Advisory Committee	16 U.S.C. § 460ddd	General	N
Member, San Rafael Swell Recreation Area Advisory Council	16 U.S.C. § 460ddd-2	General	N

Position	Statute	Specific or General Expertise Required?	Senate Confirmation? (Y/N)
Member, Steens Mountain Advisory Council	16 U.S.C. § 460nnn-51	Both	N
Member, Yukon River Salmon Panel	16 U.S.C. § 5721	General	N
Board Member, Forest Foundation	16 U.S.C. § 583j-1	General	N
Board Member, Prevention of Wildlife Poaching and Trafficking Technology Advisory Board	16 U.S.C. § 742b	General	N
Representative, Great Lakes Fish and Wildlife Restoration Proposal Review Committee	16 U.S.C. § 941c	General	N
Commissioners, International Commission for the Conservation of Atlantic Tunas	16 U.S.C. § 971a	General	N
Copyright Royalty Judge	17 U.S.C. § 802	Specific	N
Commissioner, National Gambling Impact Study Commission	18 U.S.C. § 1955	General	N
Commissioner, Trade Deficit Review Commission	19 U.S.C. § 2213	General	N
Member, Cultural Property Advisory Committee	19 U.S.C. § 2605	General	N
Member, Advisory Committee on International Exchange Rate Policy	19 U.S.C. § 4422	General	N
Member, National Advisory Committee on Institutional Quality and Integrity, Department of Education	20 U.S.C. § 1011c	General	N
Member, Advisory Committee on Student Financial Assistance	20 U.S.C. § 1098	General	N
Member, American Folklife Center Board of Trustees, Library of Congress	20 U.S.C. § 2103	General	N
Coordinator for the Outlying Areas, Department of Education	20 U.S.C. § 3427	General	N
Member, National Afro-American History and Culture Commission	20 U.S.C. § 3702	General	N
Various Positions, National Gallery of Art Board of Trustees	20 U.S.C. § 74	General	N
Chairperson, JFK Center for the Performing Arts Board of Directors	20 U.S.C. § 76k	General	N
Secretary, JFK Center for the Performing Arts Board of Directors	20 U.S.C. § 76k	General	N
Deputy Director, Office of Library Services, Institute of Museum and Library Services	20 U.S.C. § 9104	Specific	N
Member, National Assessment Governing Board	20 U.S.C. § 9621	Specific	N

Position	Statute	Specific or General Expertise Required?	Senate Confirmation? (Y/N)
Board Member, National Center for Research in Advanced Information and Digital Technologies Board of Directors	20 U.S.C. § 9631	General	N
Member, Food Safety Commission	21 U.S.C. § 341	General	N
Commission on Dietary Supplement Labels	21 U.S.C. § 343	General	N
Special Office for Assignment, Office of the Commissioner of Food and Drugs	21 U.S.C. § 353	General	N
Member, Review Group, Food and Drug Administration	21 U.S.C. § 360aa	General	N
Panelist, Panels for the Classification of Devices Intended for Human Use, Department of Health and Human Services	21 U.S.C. § 360c	General	N
Various Positions, Reagan-Udall Foundation for the Food and Drug Administration	21 U.S.C. § 379dd	General	N
Advisory, Listing and Certification of Color Additives for Foods, Drugs, Devices, and Cosmetics	21 U.S.C. § 379e	General	N
Various Staffers, Office of Pediatric Therapeutics	21 U.S.C. § 393a	General	N
Member, U.S. Holocaust Assets Commission	22 U.S.C. § 1621	General	N
Director, Office of Travel Promotion	22 U.S.C. § 2123	General	N
Member, Rural Tourism Development Foundation	22 U.S.C. § 2124c	General	N
Member, Corporation for Travel Promotion Board of Directors	22 U.S.C. § 2131	General	N
Director, Support Office, United States Agency for International Development	22 U.S.C. § 2211a	General	N
Member, Helping to Enhance the Livelihood of People (HELP) Around the Globe Commission	22 U.S.C. § 2394b	General	N
Commissioner, International Financial Institution Advisory Commission	22 U.S.C. § 262r	General	N
Science and Technology Adviser to the Secretary of State	22 U.S.C. § 2651a	General	N
Member, Foreign Service Board of Examiners	22 U.S.C. § 3931	General	N
Member, US Institute of Peace Board of Directors	22 U.S.C. § 4605	General	N
Individual in Charge, Visa and Passport Security Program, Department of State	22 U.S.C. § 4807	General	N
Member, Business and Agriculture Advisory Council	22 U.S.C. § 5822	General	N

Position	Statute	Specific or General Expertise Required?	Senate Confirmation? (Y/N)
Member, Democracy Corps Board of Directors	22 U.S.C. § 5841	General	N
Special Envoy to Promote Religious Freedom of Religious Minorities in the Near East and South Central Asia	22 U.S.C. § 6411	General	N
Member, World Bank AIDS Trust Fund Advisory Board	22 U.S.C. § 6824	General	N
Staff Member, Congressional-Executive Commission on the People's Republic of China	22 U.S.C. § 6918	General	N
Member, United States-China Economic and Security Review Commission	22 U.S.C. § 7002	General	N
Member, United States International Development Finance Corporation Board of Directors	22 U.S.C. § 9621	General	N
Administrators and Ombudsmen, Armed Forces Retirement Home Facilities	24 U.S.C. § 417	General	N
Member, Commission on Indian and Native Alaskan Health Care	25 U.S.C. § 1671	General	N
Member, Indian Law and Order Commission; Tribal Advisory Committee	25 U.S.C. § 2812	General	N
Member, Tribal Safety of Dams Committee	25 U.S.C. § 3805	General	N
Special Trustee for American Indians	25 U.S.C. § 4043	General	N
Member, American Indian Trust Fund Management Reform Advisory Board of Directors	25 U.S.C. § 4046	Specific	N
National Taxpayer Advocate, Internal Revenue Service	26 U.S.C. § 7803	Specific	N
Chief of Appeals, Internal Revenue Service	26 U.S.C. § 7803	General	N
Receiver, Federal Debt Collection	28 U.S.C. § 3103	General	N
Member, Judicial Conference of the United States Advisory Panels	28 U.S.C. § 331	General	N
Member, Commission on Medical Leave, Department of Labor	29 U.S.C. § 2633	Specific	N
Member, National Advisory Committee on Occupational Safety and Health	29 U.S.C. § 656	General	N
Member, Maritime Occupational Safety and Health Advisory Committee	29 U.S.C. § 656	General	N
Director, National Institute on Disability, Independent Living, and Rehabilitation Research	29 U.S.C. § 762	General	N
Member, National Council on Disability	29 U.S.C. § 780	General	N
Member, Advisory Council on Coal Research	30 U.S.C. § 1315	General	N

Position	Statute	Specific or General Expertise Required?	Senate Confirmation? (Y/N)
Panelist, Marine Mineral Resources Research Competitive Review Panel	30 U.S.C. § 1903	General	N
Administrative Personnel and Inspector, Mine Safety and Health	30 U.S.C. § 954	Specific	N
Member, Citizens Coinage Advisory Committee	31 U.S.C. § 5135	General	N
Chief Financial Officer, Various Agencies	31 U.S.C. § 901	General	N
Deputy Chief Financial Officer, Various Agencies	31 U.S.C. § 903	General	N
Member, Contract Appeals Board	31 U.S.C. § 702	Specific	N
Director, National Sea Grant College Program	33 U.S.C. § 1123	General	N
Independent Expert, Vegetation Management Policy	33 U.S.C. § 701n	General	N
Member, NOAA Committee	33 U.S.C. § 857-14	General	N
Member, Commission on Ocean Policy	33 U.S.C. § 857-19	General	N
Member, Interagency Ocean Policy Committee	33 U.S.C. § 857-19	General	N
Director, National Institute of Justice	34 U.S.C. § 10122	General	N
Director, Bureau of Justice Statistics	34 U.S.C. § 10132	General	N
Member, Charles Grassley Juvenile Justice and Delinquency Prevention Program Advisory Group	34 U.S.C. § 11133	General	N
Member, Review Panel on Prison Rape	34 U.S.C. § 30303	General	N
Member, National Prison Rape Elimination Commission	34 U.S.C. § 30306	General	N
Staffer, Morgan P. Hardiman Child Abduction and Serial Murder Investigative Resources Center	34 U.S.C. § 41502	General	N
Member, Federal Law Enforcement Congressional Badge of Bravery Board	34 U.S.C. § 50313	General	N
Member, State and Local Law Enforcement Congressional Badge of Bravery Board	34 U.S.C. § 50323	General	N
Commissioner for Patents, United States Patent and Trademark Office	35 U.S.C. § 3	General	N
Commissioner for Trademarks, United States Patent and Trademark Office	35 U.S.C. § 3	General	N
Member, Patent Trial and Appeal Board	35 U.S.C. § 6	General	N
Board Member, Radiation Dose Reconstruction Program of Department of Defense Advisory Board	38 U.S.C. § 1154	Specific	N
Member, Professional Certification and Licensure Advisory Committee	38 U.S.C. § 3689	General	N

Position	Statute	Specific or General Expertise Required?	Senate Confirmation? (Y/N)
Member, Veterans' Claims Adjudication Commission	38 U.S.C. § 5101	General	N
Various Positions, Office of the Under Secretary for Health	38 U.S.C. § 7306	Specific	N
Director, Office of Research Oversight, Veterans Health Administration	38 U.S.C. § 7307	General	N
Member, Committee on Care of Severely Chronically Mentally Ill Veterans	38 U.S.C. § 7321	General	N
Member, Committee on Care of Veterans with Traumatic Brain Injury	38 U.S.C. § 7321A	General	N
Member, Research Corporations to be Established under the Veterans Health Administration Board of Directors	38 U.S.C. § 7363	General	N
Member, Advisory Committee on the Readjustment of Veterans	38 U.S.C. § 545	General	N
Member, Technology Modernization Board	40 U.S.C. § 11301	General	N
Agency Senior Real Property Officer <sup>258</sup>	40 U.S.C. § 121	General	N
Executive Director, Federal Real Property Council	40 U.S.C. § 623	General	N
Member, Federal Acquisition Security Council	41 U.S.C. § 1322	General	N
Member, Cost Accounting Standards Board	41 U.S.C. § 1501	General	N
Member, Civilian Board of Contract Appeals	41 U.S.C. § 7105	Specific	N
Member, Tennessee Valley Authority Board of Directors	41 U.S.C. § 7105	Specific	N
Member, Armed Services Board of Contract Appeals	41 U.S.C. § 7105	Specific	N
Member, Postal Service Board of Contract Appeals	41 U.S.C. § 7105	Specific	N
Member, Advisory Council on Alzheimer's Research, Care, and Services	42 U.S.C. § 11225	Specific	N
Commissioner, Commission on Affordable Housing and Health Facility Needs for Seniors in the 21st Century	42 U.S.C. § 12701	General	N
Member, Advisory Council on Public Welfare	42 U.S.C. § 1314	General	N
Member, Advisory Board on Welfare Indicators	42 U.S.C. § 1314a	General	N
Chief Actuary, Centers for Medicare & Medicaid Services	42 U.S.C. § 1317	General	N

258. While the Agency Senior Real Property Officer position was created by Executive Order, subsequent statutes relied upon the position. As such, it was included in this chart notwithstanding that positions requiring expertise created by Executive Order were otherwise omitted.

Position	Statute	Specific or General Expertise Required?	Senate Confirmation? (Y/N)
Program Manager, Ticket to Work and Self-Sufficiency Program	42 U.S.C. § 1320b-19	General	N
Member, National Commission on Children	42 U.S.C. § 1320b-9	Specific	N
Board Member, Patient-Centered Outcomes Research Institute Board of Directors	42 U.S.C. § 1320e	General	N
Member, Task Force for Improved Energy Efficiency	42 U.S.C. § 13458	General	N
Member, Medicare Payment Advisory Commission	42 U.S.C. § 1395b-6	General	N
Medicare Beneficiary Ombudsman, Department of Health and Human Services	42 U.S.C. § 1395b-9	General	N
Administrative Positions, Medicare Prescription Drug and Medicare Advantage Programs	42 U.S.C. § 1395b-9	General	N
Member, Technical Advisory Committee, Council for Technology and Innovation	42 U.S.C. § 1395ee	General	N
Member, Medicaid and CHIP Payment and Access Commission (MACPAC)	42 U.S.C. § 1396	General	N
Members, Advisory Board on Elder Abuse, Neglect, and Exploitation	42 U.S.C. § 1397k-1	General	N
Member, Medal of Valor Board	42 U.S.C. § 15202	Specific	N
Advisory Committee, Establishment of Advanced Energy Technology Transfer Centers	42 U.S.C. § 16197	General	N
Technology Transfer Coordinator, Department of Energy	42 U.S.C. § 16391	General	N
Distinguished Scientist, Department of Energy	42 U.S.C. § 16537	General	N
Director, Commercial High-Performance Green Buildings	42 U.S.C. § 17081	General	N
Member, Smart Grid Advisory Committee and Smart Grid Task Force	42 U.S.C. § 17383	General	N
Member, National Advisory Council on Maternal, Infant, and Fetal Nutrition	42 U.S.C. § 1786	General	N
Member, Silvio O. Conte Senior Biomedical Research and Biomedical Product Assessment Service	42 U.S.C. § 237	General	N
Member, National Commission on Sleep Disorders Research	42 U.S.C. § 241	General	N
Commissioner, National Commission on Sleep Disorder Research	42 U.S.C. § 241	General	N
Commissioner, Commission on Systemic Interoperability	42 U.S.C. § 242b	General	N
Member, National Center on Birth Defects and Developmental Disabilities Advisory Committee	42 U.S.C. § 247b-4	General	N

Position	Statute	Specific or General Expertise Required?	Senate Confirmation? (Y/N)
Member, C.W. Bill Young Cell Transplantation Program Advisory Council	42 U.S.C. § 274k	General	N
Member, National Foundation for the Centers for Disease Control and Prevention Board of Directors	42 U.S.C. § 280e-11	General	N
Particular Member (Physician), Advisory Committee on the National ALS Registry	42 U.S.C. § 280g-7	Specific	N
Member, Advisory Committee on Young Women's Breast Health and Cancer	42 U.S.C. § 280m	General	N
Various Directors, National Research Institutes	42 U.S.C. § 284	General	N
Associate Director, National Cancer Institute	42 U.S.C. § 285a-5	General	N
Associate Director for Prevention, Eunice Kennedy Shriver National Institute of Child Health and Human Development	42 U.S.C. § 285g-3	General	N
Associate Director for Prevention, National Institute on Alcohol Abuse and Alcoholism	42 U.S.C. § 285n-1	General	N
Associate Director for Prevention, National Institute on Drug Abuse	42 U.S.C. § 285o-1	General	N
Associate Director for Prevention, National Institute of Mental Health	42 U.S.C. § 285p-1	General	N
Advisory Counsel, National Institute on Minority Health and Health Disparities	42 U.S.C. § 285t	General	N
Board Member, Cures Acceleration Network Review Board	42 U.S.C. § 287a	General	N
Member, Office of Research on Women's Health Advisory Committee	42 U.S.C. § 287d	Specific	N
Assistant Secretary, Substance Abuse and Mental Health Services Administration	42 U.S.C. § 290aa	Specific	N
Chief Medical Officer, Substance Abuse and Mental Health Services Administration	42 U.S.C. § 290aa	Specific	N
Appointed Member, Advisory Council for Substance Abuse and Mental Health Services Administration	42 U.S.C. § 290aa-1	Specific	N
Appointed Member, Advisory Council for Center for Substance Abuse Treatment	42 U.S.C. § 290aa-1	Specific	N
Appointed Member, Advisory Council for Center for Substance Abuse Prevention	42 U.S.C. § 290aa-1	Specific	N
Appointed Member, Advisory Council for Center for Mental Health Services	42 U.S.C. § 290aa-1	Specific	N

Position	Statute	Specific or General Expertise Required?	Senate Confirmation? (Y/N)
Director, Center for Behavioral Health Statistics and Quality, Substance Abuse and Mental Health Services Administration	42 U.S.C. § 290aa-4	General	N
Director, Center for Substance Abuse Treatment	42 U.S.C. § 290bb	General	N
Director, Center for Substance Abuse Prevention	42 U.S.C. § 290bb-21	General	N
Director, Center for Mental Health Services	42 U.S.C. § 290bb-31	General	N
Member, National Health Care Workforce Commission	42 U.S.C. § 294g	General	N
Participant, Study on Board and Care Facility Quality, National Academy of Sciences	42 U.S.C. § 3001	Specific	N
Member, Advisory Commission on Childhood Vaccines	42 U.S.C. § 300aa-19	Specific	N
Member, National Advisory Committee on Children and Disasters	42 U.S.C. § 300hh-10b	General	N
Member, Consumer Advisory Council, Office of Consumer Affairs	42 U.S.C. § 3501	General	N
Member, Flood Insurance Interagency Task Force	42 U.S.C. § 4011	General	N
Member, Technical Mapping Advisory Council	42 U.S.C. § 4101	General	N
Member, Technical Mapping Advisory Council, Federal Emergency Management Agency	42 U.S.C. § 4101a	General	N
Commissioner, Advisory Commission on Intergovernmental Relations	42 U.S.C. § 4273	General	N
Member, Child Abuse Prevention Peer Review Panel	42 U.S.C. § 5105	General	N
Appointed Member, President's Council of Advisors on Science and Technology	42 U.S.C. § 6601	General	N
Member, President's Committee on Science and Technology	42 U.S.C. § 6632	General	N
Member, Hazardous Waste Electronic Manifest System Advisory Board	42 U.S.C. § 6939	Specific	N
Member, Hazardous Waste Electronic Manifest System Advisory Board	42 U.S.C. § 6939g	General	N
Director, Science, Engineering, and Mathematics Education	42 U.S.C. § 7381a	General	N
Board of Directors, Mickey Leland National Urban Air Toxics Research Center	42 U.S.C. § 7412	General	N
Member, Scientific Advisory Panel, Risk Assessment and Management Commission, Mickey Leland National Urban Air Toxics Research Center	42 U.S.C. § 7412	General	N

Position	Statute	Specific or General Expertise Required?	Senate Confirmation? (Y/N)
Chief Actuary, Social Security Administration	42 U.S.C. § 902	General	N
Member, Expert Panel, National Head Start Impact Research	42 U.S.C. § 9844	General	N
Member, Bureau of Land Management Foundation Board of Directors	43 U.S.C. § 1748c	General	N
Member, Advisory Committee on the Records of Congress	44 U.S.C. § 2702	General	N
Chief Data Officers, Various Agencies	44 U.S.C. § 3520	General	N
Member, National Railroad Retirement Investment Trust Board of Trustees	45 U.S.C. § 231n	General	N
Member, National Chemical Transportation Safety Advisory Committee	46 U.S.C. § 15101	General	N
Member, National Commercial Fishing Safety Advisory Committee	46 U.S.C. § 15102	General	N
Member, National Merchant Marine Personnel Advisory Committee	46 U.S.C. § 15103	Specific	N
Member, National Merchant Mariner Medical Advisory Committee	46 U.S.C. § 15104	Specific	N
Member, National Boating Safety Advisory Committee	46 U.S.C. § 15105	General	N
Member, National Offshore Safety Advisory Committee	46 U.S.C. § 15106	General	N
Member, National Navigation Safety Advisory Committee	46 U.S.C. § 15107	General	N
Member, National Towing Safety Advisory Committee	46 U.S.C. § 15108	General	N
Member, Maritime Security Advisory Committee	46 U.S.C. § 70112	General	N
Member, Great Lakes Pilotage Advisory Committee	46 U.S.C. § 9307	Specific	N
Member, Technical Advisory Board for First Responder Interoperability, Federal Communications Commission	47 U.S.C. § 1423	General	N
Member, First Responder Network Authority Board	47 U.S.C. § 1424	General	N
Member, Advisory Council on Children's Educational Television	47 U.S.C. § 394	Specific	N
Member, Video Programming and Emergency Access Advisory Committee	47 U.S.C. § 613	General	N
Member, President's National Security Telecommunications Advisory Committee	47 U.S.C. § 901	General	N
Revitalization Coordinator, Financial Oversight and Management Board	48 U.S.C. § 2212	General	N

Position	Statute	Specific or General Expertise Required?	Senate Confirmation? (Y/N)
Deputy Administrator, Federal Aviation Administration	49 U.S.C. § 106	General	N
Member, Special Board of Inquiry on Air Transportation Safety, National Transportation Safety Board	49 U.S.C. § 1112	General	N
Deputy Administrator, Transportation Security Administration	49 U.S.C. § 114	General	N
Member, National Driver Register Advisory Committee	49 U.S.C. § 30306	General	N
Member, Lithium Battery Safety Working Group	49 U.S.C. § 44701	General	N
Member, Weapons and Explosives Detection Study Panel	49 U.S.C. § 44913	General	N
Member, Various Subcommittees of Aviation Security Advisory Committee	49 U.S.C. § 44946	General	N
Director, National Deployment Office	49 U.S.C. § 44948	General	N
Various Members, Technical Safety Standards Committees	49 U.S.C. § 60115	Specific	N
Director, Bureau of Transportation Statistics	49 U.S.C. § 6302	General	N
Member, Advisory Council on Transportation Statistics	49 U.S.C. § 6305	Specific	N
Member, United States-Canada Alaska Rail Commission	49 U.S.C. Subt. V, Pt. E, Ch.281 [Notes]	General	N
Director, Management Organization to Destroy Existing Stockpile of Lethal Chemical Agents and Munitions	50 U.S.C. § 1521	General	N
Member, National Security Education Board	50 U.S.C. § 1903	General	N
Commissioner, Commission to Assess the Organization of the Federal Government to Combat the Proliferation of Weapons of Mass Destruction	50 U.S.C. § 2351	General	N
Director of Science and Technology, Office of the Director of National Intelligence	50 U.S.C. § 3030	General	N
Member, Advisory Committees for Strategic Raw Materials	50 U.S.C. § 98h-1	General	N
Member, Space Grant Review Panel, National Space Grant College and Fellowship Program	51 U.S.C. § 40308	General	N
Member, Election Assistance Commission	52 U.S.C. § 20923	General	N
Member, National Park System Advisory Board	54 U.S.C. § 102303	Specific	N
Executive Director, National Center for Preservation Technology and Training	54 U.S.C. § 305302	General	N