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Proposals to Reform the Presidential Appointments Process

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From: O'Melveny & Myers (on behalf of the Partnership for Public Service)
Subject: Proposals to Reform the Presidential Appointments Process

In recent years, a broad bipartisan consensus has developed around the idea that the current Presidential appointments process is in need of reform. Numerous commentators have begun to ask whether the current system, which frequently forces Presidential nominees to endure an onerous, extremely costly, and time-consuming procedure to serve in a position which typically pays only a fraction of their prior income, is significantly harming the ability of Presidents to fill important Executive Branch positions with qualified personnel in a timely manner.¹

Indeed, it has become increasingly clear that the current system damages Presidential Administration in two principal ways. First, the length of time it takes for a Presidential nominee to make it through the appointments process has made it more difficult for Presidents to staff their Administration in a timely fashion, which in turn harms both overall governmental effectiveness and the ability of Presidents to implement their agenda. The amount of time it takes to fill the top jobs in a new Presidential Administration has been rising steadily over the past forty years, leading to both higher vacancy rates and more and more acting or interim officials running federal agencies for lengthy periods of time.² Although such interim officials are often accomplished public servants, they lack the authority to make important decisions; thus, as a practical matter, such interim officials serve as a barrier to Presidents pursuing their major policy initiatives.³ In addition, the increasing delays in the nominations process also mean that departments and agencies are often forced to function without a full complement of senior personnel – a situation which hampers the ability of governmental entities to carry out even basic tasks.

Second, the process for nominating and confirming presidential nominees is so long, cumbersome, and intense, that fewer and fewer choose to consider entering government service in the first place. Duplicative background paperwork, extensive financial disclosure forms, and compliance with the federal government's complex conflict-of-interest laws serve as examples of the tremendous burdens placed on presidential appointees.⁴ As nominations scholar Paul C. Light offers, "the negative views of the process may lead many of the nation's most talented leaders to exit the process even before it begins."⁵ Past and potential presidential appointees alike view the approval process as an almost insurmountable obstacle course that has very little to do with determining whether a candidate is qualified. Rather, most observe that the process is tailored to find a person who will endure the "innocent until nominated" attitude that has predominated. As the National Commission on Public Service chaired by former Federal Reserve Chairman Paul Volcker noted in 1989, "if these trends continue, America will soon be left with a government of the mediocre."

1 For example, when Henry Paulson became Secretary of the Treasury, it is estimated that he was forced to sell over \$500 million in Goldman Sachs stock alone and his annual salary fell from approximately \$35 million to \$183,000.

2 According to testimony of Frank Raines, "[t]he average appointee in the Kennedy administration was confirmed 2.4 months after the inauguration; the average appointee in the Clinton administration was confirmed in 8.5 months." A Bipartisan Plan to Improve the Presidential Appointments Process, 106th Cong. (April 5, 2001) (statement of Franklin D. Raines, Chairman and CEO, Fannie Mae, before the Senate Committee on Governmental Affairs). Furthermore, according to a 2000 survey of appointees who served under Presidents Ronald Reagan, George H.W. Bush, and Bill Clinton, 56 percent of the second-term appointees said the approval process took more than five months, a percentage that rose from 40 percent during the second term of the Reagan administration to 49 percent during the first Bush administration and 70 percent during the Clinton administration. See Paul C. Light, *Recommendations Forestalled or Forgotten? The National Commission on the Public Service and Presidential Appointments*, PUBLIC ADMIN. REV., May-June 2007, at 411-12.

3 See Philip Shenon, *Interim Heads Increasingly Run Federal Agencies*, N.Y. TIMES, Oct. 15, 2007 (describing how these officials do not have the clout to make decisions that comes with a permanent appointment).

4 By one count, a typical nominee must wade through 233 separate questions to complete the necessary background paperwork. See A Bipartisan Plan to Improve the Presidential Appointments Process, 106th Cong. (April 5, 2001) (statement of Franklin D. Raines, Chairman and CEO, Fannie Mae, before the Senate Committee on Governmental Affairs).

5 Light, *supra* note 2, at 413.

Nevertheless, despite the broad consensus that the system is broken, reform efforts have been repeatedly unsuccessful. Time and again, bipartisan plans proposing systematic change to the appointments process have proven unable to make it through the legislative process. In short, the system often appears to be both flawed and incapable of being fixed.

This memorandum proposes a new approach to this problem: foregoing legislative action and instead reforming the appointments process through reforms that require neither formal legislative nor formal regulatory action. As a practical matter, many of the burdens inherent in the current appointments process can be removed or lessened by Executive Order or informal action. We therefore propose the following five specific recommendations for incremental, yet meaningful, change.

First, we recommend the President issue a new Executive Order establishing a tiered clearance process that limits the number of presidential appointees who must receive full field FBI investigations. Second, we recommend the President issue a new Executive Order establishing recusal (instead of divestment) as the default remedy for resolving the financial conflicts of interest of political appointees. Third, we recommend the President issue a new Executive Order requiring that ethics agreements entered into by presidential nominees be standardized across all agencies. Fourth, we recommend the White House issue a Request For Proposals (“RFP”) to acquire a comprehensive electronic data system that would allow appointees to fill out required forms online and permit all personal and financial information to be submitted electronically. Fifth, we recommend the President issue a new Executive Order to the Office of Government Ethics (“OGE”)⁶ and other government agencies providing for a reassessment of how Special Government Employees (“SGEs”) calculate time spent on governmental activity.

In addition, we also recommend approaching OGE early in the process, prior to implementing these reforms, and getting the agency’s input on how best to put such reforms into practice. OGE is and will be the entity charged with managing the appointments process and therefore obtaining its thoughts and acceptance of the proposed reforms is critical to the reforms’ ultimate success.

I. NEED FOR STREAMLINED CLEARANCE PROCEDURES

Problem:

Too many presidential appointees undergo unnecessary and time-consuming FBI full field investigations as part of the clearance process.

As a result of an Eisenhower Administration Executive Order, presidential appointees to sensitive national security positions were made subject to the FBI’s “full field investigation,” a time-consuming process involving extensive interviews of family members, friends, past-employers, and others to compile background information on a nominee.⁷ However, over time, the use of the full field investigation has expanded in haphazard fashion so that now even appointees not serving in sensitive national-security related posts are frequently subject to the full FBI probe. In addition, present clearance procedures make no allowance for individuals who have previously been cleared; thus, as Director of National Intelligence (“DNI”) Michael McConnell recently observed, full field investigations are often conducted on appointees whose past activities have already been thoroughly investigated.⁸

The effect of these clearance procedures is that substantial resources are expended on investigations which provide little to no additional security benefit, but which substantially extend the time it takes to fill many appointed positions. Such delays carry with them significant costs – not only do they deter individuals from entering the appointments process by making the process more onerous and time-consuming, but they also damage overall the effectiveness of government and may jeopardize national security. Earlier this year, the Homeland Security Advisory Council’s Administration Transition Task Force (“ATTF”) found that the United States will be especially vulnerable to a terrorist attack before, during, and shortly after the upcoming Presidential election and transition period. Terrorist attacks in

⁶ Though known as an independent agency, OGE is “an executive agency” whose director serves at the pleasure of the President. See 5 U.S.C. app. § 401 (a)-(b). Thus, the President has the ability, through formal and informal methods, to revise OGE policy.

⁷ Executive Order No. 10,450, 3 C.F.R. 937 (1949-1953), reprinted as amended in 5 U.S.C. § 7311.

⁸ Lawrence Wright, *The Spymaster: Can Mike McConnell Fix America’s Intelligence Community?*, THE NEW YORKER, Jan. 1, 2008, available at http://www.newyorker.com/reporting/2008/01/21/080121fa_fact_wright. McConnell expressed his critique as follows: “When I agreed to take the D.N.I. post, the first surprise was being told, ‘Fill out the form,’” McConnell continued. “I’ve been cleared for forty years! Then the agent shows up. He wants to know if I am a Communist and do I advocate the violent overthrow of the U.S.” Id.

Spain in 2004 and the United Kingdom in 2007 led the ATTF to highlight the potential vulnerabilities during democratic transition periods, and to conclude, “[n]ot only are we aware that they exist, but our enemies are as well.”⁹

Recommendation:

The President should issue a new Executive Order to establish a tiered clearance procedure to limit the number of presidential appointees who must receive full field investigations, and thereby reduce the delay in the appointments process and the strain on the FBI’s limited resources.

The new Executive Order could adopt a tiered clearance process, based on the type of post to which the individual is nominated and whether he or she has previously been cleared. Full field investigations would continue for those candidates nominated to national security-related and other sensitive positions for the first time, while more streamlined background checks could be conducted for appointees to non-sensitive positions and those with previous clearances who are returning to government from the private sector or who are moving between government posts.¹⁰ Altering the security clearance process to allow for these efficiencies would reduce the time it would take to fill vacant positions and would save time and resources for the FBI, which could be used both to process background checks more quickly and to focus on other pressing matters.

II. NEED FOR ALTERNATIVE METHODS TO RESOLVE FINANCIAL CONFLICTS OF INTEREST

Problem:

Federal statutory financial conflicts of interest are often required to be resolved by divestiture, creating substantial tax and investment costs for nominees.

Federal statute and regulations establish five types of potential conflicts arising out of a presidential nominee’s financial interests that must be resolved either prior to a nominee’s appointment or during the course of the individual’s government service,¹¹ and prescribe a menu of acceptable remedies for resolving these conflicts.¹² Generally, financial conflicts arise where an official decision the appointee is likely to be called to make directly impacts or may appear to impact a personal financial interest of the appointee, or where a financial interest of the appointee may be viewed as affecting the appointee’s impartiality in official decision-making. If a conflict arises, federal law provides five ways by which it may be resolved: divestiture, resignation, waiver, recusal, and the establishment of a qualified blind trust/qualified diversified trust.¹³

However, although there are technically five options available for remedying conflicts, the OGE, the executive agency responsible for applying and interpreting the conflict-of-interest requirements,¹⁴ there appears to be a strong bias in favor of recommending that potential conflicts be resolved by divestiture. It is certainly the case that a number of important federal agencies (e.g., Department of State, OMB, etc.) have generally adopted a “divestiture first” approach to conflict-of-interest issues. For example, the possibility that ownership of shares of a pharmaceutical company might cause a future conflict with embassy negotiations over unpaid bills with a national health service led the State Department to recommend divestiture of the shares; a less intrusive alternative (e.g., recusal from the negotiations) was rejected. Other, more targeted solutions to financial interest conflicts, such as insuring that the nominee be “screened” from information and decision making that might impact such interests, are often denied.

It is, of course, true that divestiture of a financial interest will prevent any prospective conflict involving that interest, and therefore the bias in favor of divestiture avoids the possibility that the ethics process will face future questions, this bureaucratic imperative comes at a severe potential and actual cost to nominees. Forced divestiture has the potential to deter individuals from entering public service because it often costs nominees substantial sums of money – they frequently must dispose of valuable but illiquid assets for pennies on the dollar; must incur significant tax liability unless certain restrictive tax requirements, as interpreted by OGE, can be satisfied; and suffer significant opportunity costs for lost appreciation and future income.

9 HOMELAND SECURITY ADVISORY COUNCIL, REPORT OF THE ADMINISTRATION TRANSITION TASK FORCE 1 (2008), available at http://www.dhs.gov/xlibrary/assets/hnac_ATTf_Report.pdf.

10 One of the recommendations made by the ATTF in its recent report is to allow the government to “[p]erform updates rather than completely re-do the clearance history for people already holding clearances.” *Id.*, at 4.

11 The five principal types of conflicts are (1) section 208 conflicts; (2) agency conflicts; (3) appearance-of-impropriety conflicts; (4) extra-governmental compensation conflicts; and (5) extraordinary payment conflicts. See 18 U.S.C. § 208; 5 C.F.R. § 2635.403; 5 C.F.R. § 2635.502; 18 U.S.C. § 209; 5 C.F.R. § 2635.503.

12 5 C.F.R. § 2634.802(a); *see also* 5 U.S.C. App. § 106(b)(3).

13 *Id.*

14 5 U.S.C. App. § 402(b).

Recommendation:

The President should issue an Executive Order stipulating that, where possible, recusal rather than divestment should be the default remedy for resolving financial conflicts of interest.

The costs of resolving conflicts for a nominee may be substantially reduced by an Executive Order requesting OGE and the applicable agencies to apply the least expensive alternative rather than to default to divestiture as its preferred conflict remedy. Although federal statutes and regulations establish what constitutes a conflict and prescribe the possible remedies, in most situations, neither requires a specific remedy be used.¹⁵ A directive requesting OGE and the applicable agencies first to explore the ability of recusal commitments to resolve conflicts before resorting to more costly measures such as divestiture has the potential to reduce substantially the financial costs the conflict resolution process now imposes on nominees.

III. NEED FOR STANDARDIZED ETHICS AGREEMENTS

Problem:

The current ad hoc process and format of ethics agreements imposes on nominees an unnecessarily burdensome, complex and confusing mandate, with which it is difficult to comply.

The final step in the vetting process of Presidential nominees involves the nominee's assent to a conflict resolution plan known as an ethics agreement or ethics undertaking,¹⁶ which is authored by the Designated Agency Ethics Official ("DAEO") at the nominee's future agency after a review of the nominee's Special Form ("SF") 278 and after a complex procedure of consultation and review among officials at relevant government agencies, nominee representatives and, under certain circumstances, company counsel at the entity where the financial interest exists. The DAEO and OGE determine the content and language of the agreement, often leaving little room for appropriate consultation, review and modification. In addition, ethics agreements are frequently drafted and negotiated under severe time constraints, which makes it even more difficult to customize the agreement to a nominee's particular circumstances.

Ethics agreements therefore often impose unnecessarily high costs on nominees, such as requiring divestiture where a lesser remedy may be sufficient, and can cause significant delays in the confirmation process if objections or inaccuracies arise at the last minute. Moreover, the non-uniform nature of agreements renders compliance difficult because remedial measures are not framed in standard language or consistently defined, which makes it possible for the nominee to misconstrue the required actions. Finally, as a result of the current process by which such agreements are generated, ethics agreements can fail to comprehensively address the conflicts raised by information the nominee discloses.

Recommendation:

The President should issue an Executive Order requiring standardization of the form of ethics agreements, which will enable an orderly process, improving their content, and resulting in better nominee compliance.

These problems can be resolved by standardizing the form of ethics agreements across all agencies, in effect creating a "federal ethics agreement", a step which can be accomplished through an Executive Order setting out requirements for all ethics agreements. Just as all agencies now use SF-278 to solicit information from nominees, so too would all agencies use the federal ethics agreement to memorialize a nominee's financial interests and conflict resolution commitments.

The standardized form would consist of a bifurcated format, aiming to the administrative efficiency of a uniform structure with the need to create agreements that reflect a nominee's individual financial circumstances. Part I would most likely be a memorandum containing mandatory language outlining the nominee's obligations under federal conflict of interest law pertaining to financial interests and the available remedies. This language could be updated over time to reflect administration and OGE policy on financial conflicts, but would be uniform across all agreements. This standard language would provide the nominee with a definitive explanation of the nominee's ethics responsibilities, legal conflict identification and remedial obligations.

¹⁵ See, e.g., 18 U.S.C. § 208; see also 5 U.S.C. App. § 106.

¹⁶ See 5 C.F.R. § 2634.802(a).

Part II of the standardized agreement would consist of several schedules, each of which pertained to one of the remedies available to resolve conflicts. For example, Schedule A would describe the entities and matters that would require the nominee's recusal, Schedule B would describe the nominee's divestiture obligations, Schedule C would describe the organizational positions from which the nominee would resign, etc. The schedules would allow for customizing the agreement to incorporate a nominee's particular financial interests and record the nominee's specific conflict resolution commitments

This revised format for the ethics agreement would render the nominee's remedial commitments in an easily comprehensible form and would then provide a "check-list" which the nominee and the agency could use to ensure compliance. Moreover, the schedules would permit the nominee and the DAEO to agree more easily upon which remedy to use to resolve various conflicts, because revisions would generally require moving items from one schedule to the other, or simply modifying applicable schedules, rather than drafting entirely new language to describe the remedial action, which in turn would be time consuming and jeopardize uniformity. In addition, schedules could be digitally configured to incorporate information on financial interests and board memberships the nominee previously identified on the SF-278, thereby ensuring the alignment and completeness of the ethics agreement and streamlining the conflicts identification and resolution process.¹⁷

IV. NEED FOR TECHNICAL IMPROVEMENTS TO REDUCE DUPLICATIVE PAPERWORK

Problem:

Requiring nominees to fill out multiple forms that ask the same questions is unnecessary, time-consuming, and prone to error.

At present, Presidential appointees must complete and file many different disclosure forms, several of which must be signed under penalty of perjury. Many of these forms request, in significant part, identical information, which therefore means that nominees must devote many hours – and often incur substantial legal bills – complying with duplicative requests from the disparate parties involved in the confirmation process: the White House, the FBI, the applicable department, and the Senate in the case of a PAS nominee. Forcing nominees to engage in such duplicative efforts is not only wasteful and pointless, but it also increases the prospect of a failed appointment, as even an inadvertent discrepancy has the potential to derail a nomination.

Recommendation:

The White House should build a comprehensive data system that would enable electronic filing and significantly streamline the appointments process.

The White House should develop a cohesive, secure electronic data entry system that could significantly streamline the information gathering process. An electronic database could allow a nominee to input that information once and then have that information sent to all interested parties. Furthermore, to ensure that each stakeholder retains the capacity to seek specific information, such a database could also be configured so as to allow each stakeholder in the appointments process to supplement the general questionnaire with additional questions, with the answers to those additional questions only being made available to the requesting stakeholder.

Creating such a shared database would provide for substantial efficiencies without impacting on the government's capacity to obtain disclosures from prospective officials. Such a database could also be a boon in the event an individual is reappointed; all of the information as of the initial appointment would already be available. However, for such a system to work, the OGE must permit electronic filing of forms, such as the SF-278. At present, OGE affirmatively prohibits electronic filing; thus, creating a shared database would also require a directive to OGE to permit such a measure.

¹⁷ This standardized format is largely consistent with the OGE's recent efforts to improve the ethics agreement formulation process by publishing its Guide to Drafting Ethics Agreements for PAS Nominees. See OFFICE OF GOVERNMENT ETHICS, GUIDE TO DRAFTING ETHICS AGREEMENTS FOR PAS NOMINEES 2 (2008), available at www.usoge.gov/pages/forms_pubs_otherdocs/fpo_files/other_docs/ethics_agreement_guide_0208.doc.

Conclusion

We believe these five recommendations are modest, yet effective steps President Bush can take to help reform the appointments process before he leaves office. Please let us know if you would like to discuss any of these suggestions in more detail. We would welcome such an opportunity and are available to assist in any way possible. Thank you for your consideration.



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