



BENS Expert Panel Review of the Presidential
Appointment with Senate Confirmation (PAS) Process:

Making Senior Government Service More Attractive

May 2015

**Business Executives
for National Security**

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LETTER FROM THE PRESIDENT AND CEO

While serving in the Pentagon, I observed that one of the most difficult challenges facing its leaders was getting the right people into the right senior level positions. When I came to BENS I asked what could be done to improve the candidate search, selection and onboarding process. To that end, a group of senior executives and former government officials reviewed a number of previous, un- or partially implemented recommendations, added some of their own, and endorsed an in-depth examination of ways the Presidential Appointment with Senate Confirmation, or PAS, process could be improved.

The following document describes thirty-one actions that would streamline, accelerate and strengthen the process for individuals to answer the call to serve in government. However, it is the opinion of the BENS Expert Panel that implementing the top ten recommendations would alter significantly the arduous path of the vetting, nomination and confirmation, and onboarding process.

Here are what we recommend as priorities:

- Ensure that the pre-election Presidential transition teams are prepared and large enough to evaluate and rank candidates for the top 50 national security positions at the beginning of an administration
- Increase the capacity and level of professional experience in the Office of Presidential Personnel at the beginning of and during the President's term of office
- Continue the process of eliminating duplication and removing extraneous information in the required application forms
- Establish a system of tiered background investigations
- Convert more presidential appointees to career status SES and Schedule C appointments
- Adjust rules on the allowable duration of Senatorial holds to speed nominations through the confirmation process
- Rationalize and coordinate between the Executive Branch and the Senate a core set of questions on financial disclosure and other forms that will not unduly tax the time and treasure of prospective nominees
- Set criteria for establishing qualified blind trusts and consider this remedy particularly in cases where nominees are seeking mid-career appointments
- Calibrate restrictions on post-government employment
- Prepare PAS nominees to assume leadership positions by establishing a strong executive onboarding program at both the Executive and Agency staff principal levels

Implementing the recommendations in this BENS report, especially those listed above, would make senior government service far more attractive to a broader range of accomplished candidates.



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PREFACE

BENS believes that senior government service can be made more attractive to a broader range of quality candidates if reasonable changes to current vetting and confirmation processes are adopted. A small expert panel of former government officials and BENS members was formed to consider current government processes in contrast to private sector best practices in executive selection and business ethics, and to suggest ways that the federal process might be changed. Our focus is directed at positions in the national security community that require scientific, technical and industrial expertise. The ensuing recommendations, however, could be broadly applicable to the vast majority of appointments in the Departments of Homeland Security and Defense, and elsewhere in the Executive Branch.

BENS undertook this inquiry having observed the process from within government and because a number of BENS' members considered serving but ultimately declined for personal and professional reasons. At the same time, BENS members have extensive managerial experience in the vetting and hiring of corporate executives and the constitution of boards of directors, corporate governance issues and business ethics.

Areas of Inquiry:

Research of the relevant literature, expert opinion and private sector precedents identified a number of areas where change could improve the candidate search and onboarding process. These include:

- **Ability to process large numbers** of potential nominees during Presidential transitions and terms of office
- **Confidentiality and disclosure** criteria for personal background information
- **Financial background data** commonality between the Executive Branch and the Senate committees of jurisdiction
- **Divestiture rules** for financial assets and use of blind trusts
- **Lack of clarity/uniformity** on the “materiality” of information requested
- **Cost to the potential nominee** of preparing required financial information
- **Transferability of vetting information** between government agencies and retention of that information between an individual's periods of government service
- **Onboarding** for executive success

Recommendations in four areas resulted from the inquiry:

- **Improving Efficiency of the Selection Process** (7 recommendations)
 - **Streamlining the Vetting and Confirmation Process** (12 recommendations)
 - **Reducing the Financial Burden of Public Service** (6 recommendations)
 - **Instituting Executive Onboarding Best Practices** (6 recommendations)
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BENS Expert Panel

Observations, suggestions and recommendations emerged from discussions with these BENS members and other experts:

- **Denis A. Bovin**, Chairman & Managing Partner, Palimere Group, LLC
 - **Raymond F. DuBois**, Senior Advisor, Center for Strategic and International Studies
 - **Gordon R. England**, Chairman, V1 Analytical Solutions
 - **Nelson M. Ford**, President & CEO, LMI
 - **Robert A. Goodin**, Partner, Goodin, MacBride, Squeri, Day & Lamprey, LLP
 - **John K. Hurley**, Founder and Managing Partner, Cavalry Asset Management
 - **James B. Mintz**, Founder and President, The Mintz Group
 - **Earl W. Stafford**, Chairman, The Wentworth Group
 - **Thomas F. Stephenson**, Partner, Sequoia Capital
 - **Jeffrey B. Stone**, Director and Co-Founder, APR Energy, LLC
 - **John H. Streicker**, Founder & Chairman, Sentinel Real Estate Corporation
 - **John J. Sullivan**, Partner, Mayer Brown
 - **John W. Thompson**, CEO, Virtual Instruments
 - **Frances F. Townsend**, Senior Vice President, MacAndrews and Forbes Holdings Inc.
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Summary of Recommendations

Candidate Selection

- The pre-election transition team needs to be sufficiently large to evaluate and rank candidates for the top 50 national security positions.
- The new administration should nominate the first 100-150 most time-sensitive positions by March 15 and the remainder of the 400 top positions by June 15.
- The transition team needs to have the capacity to vet hundreds of nominees in the 75 days between the election and inauguration day.
- Review permanent staffing for the Office of Presidential Personnel.
- Increase the capacity and level of professional experience of the White House appointments staff.
- Financial disclosure preparation costs should be a shared expense between the nominee and the administration.
- Perpetuate a primer for what a nominee needs to know before and during the nomination and confirmation process.

Vetting and Confirmation

- A complete inventory and description of all the appointed jobs in government is essential to efficient transition planning.
 - The concept of “privileged nominations” should be considered for expanded classes of presidential appointees.
 - Continue the process of eliminating duplication and removing extraneous information in the required application forms.
 - Fully implement the Congressionally-mandated Smart Form electronic data collection system.
 - Establish a system of tiered background investigations.
 - Increase investigation capacity at the beginning of an administration.
 - Enforce the confidentiality of FBI and other investigatory results.
 - Establish a repository in OPM to retain relevant records from previous government service.
 - Convert more presidential appointees to career status SES and Schedule C appointments.
 - Carefully review lists of Presidential Appointment-Senate Confirmed (PAS) positions to ensure that old, obsolete or superseded positions are removed from the list of PAS candidates.
 - Adjust rules on the allowable duration of senatorial holds to speed the nominations through the confirmation process.
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- Adopt informal timelines on Senate advice and consent of the President’s top 400 nominees: 150 by May 1 and the rest by the August recess.

Financial Burden

- Rationalize and coordinate a core set of questions on financial disclosure and other forms that will not unduly tax the time and treasure of prospective nominees.
- Adopt a qualifying minimum value expressed as a percentage of the nominee’s overall financial portfolio to be used as a cut-off for determining whether the asset is likely to present a conflict of interest.
- Set criteria for establishing qualified blind trusts and consider this remedy particularly in cases where nominees are seeking mid-career appointments.
- If divestiture is required, ensure that the nominee’s proceeds are granted a deferred capital gains tax and allowed reinvestment in certain “permitted property”
- Establish a remedy for potential conflicts of interest for individuals who have earned pensions or have deferred compensation from an entity with whom they may potentially interact while in government service.
- Calibrate restrictions on post-government employment.

Executive Onboarding

Prepare PAS nominees to assume leadership positions by indoctrination in:

- Ethics Standards and Financial Disclosure Rules.
 - Performance and Results.
 - Policy Development, Interagency Deliberations and Implementation.
 - Relationships.
 - Competencies in leadership, negotiation and communications.
 - Career Government Workforce.
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Improving the Efficiency of the Selection Process

Although the presidential appointment process operates continuously throughout a president's administration, the critical juncture comes at the start of a presidential term. For a new administration the process should, of necessity, begin as soon as a candidate receives a political party's nomination for the presidency. That the appointment of a presidential transition coordinator is not a campaign priority, or the concern that such an action would be "presumptuous," competes with the reality that, for continuity in domestic and national security, advance planning is both prudent and necessary.¹

The Pre-Election Presidential Transition Act of 2010² remedied the pre-election conundrum by authorizing the provision of support to eligible candidates for early transition planning. Through the General Services Administration, candidates have access to specified facilities and services that previously were made available only post-election. The 2010 Act also permits, subject to limits, campaign funding of pre-election transition planning as well as authorizing the incumbent administration to establish a transition coordinating mechanism to facilitate the efficient transfer of responsibility to a successor President. These provisions became effective for the first time during the 2012 presidential election, so there is little record of whether they created positive outcomes. On balance, however, they make practical sense—if candidates, their campaigns and the incumbent administration choose to employ the provisions and adequately resource them.

Post-election, the 1964 Presidential Transition Act,³ as amended, provides for additional services and adds government funding beginning the day following the election and up to 30 days after inauguration. The amount of funding is inflation-adjusted based on costs for services and expenses following the most recent presidential transition. The 1964 Act recommends that the President-elect submit the names of candidates for high level national security positions through the level of undersecretary of cabinet departments to the appropriate national security clearance

The 1964 Presidential Transition Act, as amended. . . recommends that the background investigations be carried out "as expeditiously as possible. . . before the date of inauguration."

functions and, further, recommends that the background investigations be carried out "as expeditiously as possible...before the date of inauguration."

The Intelligence Reform and Terrorism Prevention Act of 2004⁴ permits pre-election security clearance investigations for designated major party transition team members. The Pre-Election Presidential Transition Act subsequently extended the clearance provisions to qualified third party candidate transition members and, more importantly, directed that access to classified information be granted "to the fullest

extent practicable” by the day after the date of the general election.

Thus, most of the preliminary process and procedure infrastructure is in place for a rapid and efficient transition on inauguration day. The challenge posed to presidential campaigns and their candidates is to use these provisions of law effectively. Success turns largely on the personnel resources and priority that the candidate dedicates to the transition. Note that the challenge presupposes that no modern candidate will consciously choose to delay transition planning until after the election.

The 2010 Partnership for Public Service report, *Ready to Govern: Improving the Presidential Transition*, cited earlier, is a very instructive read about the transition between the George W. Bush and Barack Obama presidencies. In general, about as smooth a transition as had ever occurred, a number of shortcomings can still be discerned. These are not procedural failings, but rather failures to employ the available protocols and tools efficiently. There are substance and style issues that transition teams should study for future changeovers as well as issues for the incumbent administration and some of the federal agencies to consider.

Recommendations

- **The pre-election transition team needs to be sufficiently large to evaluate and rank candidates for the top 50 national security positions**, including key posts in the Defense, State, Homeland Security, Justice and Treasury Departments. The number 50 would enable nominations down to and including the Assistant Secretary positions in each Department to be named soon after Inauguration Day. (See Appendix). Preliminary public records vetting can be initiated even absent government assistance through private sector resources and corporate headhunters. Further, senior transition team officials should commit to stay on in the Office of Presidential Personnel for at least the first year of an administration for sake of continuity. In recent transitions this rule of good management has rarely been honored.
- **Nominate the first 100-150 positions by March 15 and the rest of 400 top positions by June 15.** The Commission to Reform the Federal Appointments Process⁵ in 2011 noted that “the White House, the FBI, the Office of Government Ethics, and the Senate devote too few people and related resources to expeditiously carry out their responsibilities for vetting people selected for presidential appointments.” The Commission recommended that the new administration nominate the first 100-150 most time-sensitive positions by March 15 and the rest of 400 top positions by June 15.
- To meet the initial demands, **the transition team needs to have the capacity to vet hundreds of nominees in the 75 days between the election and inauguration day.**
- **Review permanent staffing for the Office of Presidential Personnel.** The office is chronically under-resourced, averaging only 20 to 30 career positions during the

course of an administration. At the beginning of an administration it may swell to 200 (including the Office of the Counsel to the President) as it did during the Clinton transition. James Pfiffner, University Professor of Public Policy at George Mason University, notes that political appointees average two and a half years in their job, with 25 percent staying less than 18 months.⁶ Thus, selection and vetting challenges extend throughout a Presidential term (George Bush made almost 1,800 civilian nominations during his second term). Permanent staffing for the Office of Presidential Personnel should be somewhere between the extremes of 20 and 200 if the organization has any chance of staying ahead of the appointments turnover and keeping its selection roster of qualified candidates ahead of the pace of resignations.

- **Increase the capacity and professional experience of the White House appointments staff.** An increase in the capacity and professional experience of the staff would also permit new nominees to receive more personal attention and assistance with the clearance process. As it stands, there is little in the way of formal help provided by the Office of Presidential Personnel to nominees to expedite the process.
- **Financial disclosure preparation costs should be a shared expense.** To complete vetting paperwork requirements, many nominees depend on their own lawyers and accountants, which is of course costly. Preparation costs should be a shared expense, with the presidential administration's portion coming either from transition funds at the beginning of an administration or national party funds during the course of a presidential term.
- **Perpetuate a primer for what a nominee needs to know before and during the nomination confirmation process.** Fortunately, the National Academy of Public Administration (NAPA) has published the fourth iteration of its "Survivor's Guide for Presidential Nominees"⁷, an invaluable resource for first-time seekers of a presidential appointment. This endeavor is a perfect candidate for a public-private partnership between good-government groups, like NAPA, and responsible agencies like the Office of Presidential Personnel, the Office of Personnel Management, the Office of Management and Budget, the Office of Government Ethics and the General Services Administration to institutionalize the subject and accord government endorsement of consensus best practices.

Streamlining the Vetting and Confirmation Process

The popular impression that navigating the presidential appointment process is taking longer and longer is statistically true. At the start of their first terms in the Clinton, Bush and Obama administrations about 50 percent of the top 75 national security positions remained vacant on May 1, and 85 percent of the top 500 sub-cabinet posts remained unfilled on that date.⁸

Part of the delay, as noted earlier, is lack of processing capacity on the part of the president's transition teams; however, a growing cause is the complexity and length of the vetting process before a nomination is even made. Anne Joseph O'Connell of the Center for American Progress observes that the nomination process actually accounts for more delay in moving nominees into Presidential appointments than does waiting for Senate confirmation. She notes that "from 1987 to 2005 it took presidents an average of 173 days to nominate non-cabinet agency heads and it took the Senate an average of 63 days to confirm these nominations."⁹ It was even longer for non-cabinet agency deputies: 301 days to nominate; 82 days to confirm.

A common supposition in this digital age of lists would be that keeping track of presidential appointments would be fully computerized and catalogued. Not so: the actual records prove to be less than comprehensive. The Plum Book, which presidential transition teams use to initially staff the government, is the best source of political appointee information. But it has shortcomings. It is compiled only once every four years (and typically released close

to Election Day); doesn't track the length of vacancies; and, it is dependent on accurate agency reporting, which is often not the case.¹⁰ The Government Accountability Office monitors presidential appointment vacancies but only in Senate-confirmed positions (1,215 at the beginning of the Obama administration) and not the additional 4,000-5,000 presidential appointees in the government. The lack of visibility and precision throughout the appointments system contributes to process inefficiencies and increases the time it takes to recognize, vet and recruit new nominees.

The nomination process...accounts for more delay in moving nominees into Presidential appointments than does waiting for Senate confirmation.

Vacancies, delays and complexity in the presidential appointments process spurred Senators Charles E. Schumer and Lamar Alexander, Chair and Ranking Member, respectively, of the Rules Committee to head up a Senate working group study of the appointment process. Their efforts led eventually to the Presidential Appointment Efficiency and Streamlining Act of 2011.¹¹ The legislation's central provisions eliminate the requirement of Senate confirmation for 163 presidentially-appointed executive branch positions across the federal government. It was a sense of the Senate that eliminating confirmation for such non-policymaking or lower level positions would help reverse the growth in the over-

all number of Senate-confirmed positions. It would also free up resources within the White House, Federal Bureau of Investigation (FBI), Office of Government Ethics and the Senate that could instead be focused on vetting, clearing, and confirming nominees for higher level positions—and, thereby, speed up the appointments process for those nominees. The Act also called for work to be done in the areas of streamlining paperwork and accelerating the background investigation and clearance process (more about these later).

The impact on national security and the government’s ability to act in an unforeseen crisis are key reasons to be concerned about presidential appointee vacancies. In November 2013 at least 30 percent of the 53 civilian Defense Department positions were either vacant or being filled by officials in an “acting” capacity according to estimates by Arnold L. Punaro, retired Marine Corps Major General and Chairman of the National Defense Industrial Association.¹² By April 2014, the Department itself reported 69.8 percent of

Senate-confirmed positions filled, with 13 nominated (9 pending Senate vote) and 6 unannounced.¹³ At the Department of Homeland Security the vacancy rate is similarly dire. As last year’s September 11th anniversary passed, the DHS leadership had 17 vacancies out of 44 presidential appointee positions (38.6 percent). At his confirmation hearing in November 2013, Jeh Johnson, the Secretary of Homeland Security, testified that his first priority was not counter-terrorism but to work to fill the remainder of those leadership positions realizing that vacancies have performance consequences.¹⁴

Navigating the appointments process might appear to be just another example of bureaucratic inefficiency and political theater, but it is a serious impediment to good governance and it has national security consequences. This issue is non-partisan—it affects whoever holds the White House—and, thus, calls for rational fixes to ensure that the President has a full team throughout the entire term of the administration.

Recommendations

- **A complete inventory and description of all the appointed jobs in government is essential to efficient transition planning.** The transition planning of the George W. Bush administration in advance of the 2008 election is widely viewed as a model of thoroughness and efficiency.¹⁵ One thing that made it so was the decision by Josh Bolten, Bush’s Chief of Staff, to prepare a complete inventory and description of all the appointed jobs in government. The list was given to both campaign transition teams well in advance of when the Plum Book became available. Because it was so effective during the Bush-Obama transition, this procedure needs to be institutionalized and, logically, be assigned to the Office of Personnel Management to oversee.
- **The concept of “privileged nominations” should be considered for expanded classes of presidential appointees.** In conjunction with the 2011 Act, the Senate adopted S. Res. 116 which prescribes expedited procedures for Senate consideration of 272 nominees to cabinet agencies, certain bipartisan boards and commissions, advisory councils and independent agencies. Nominations for these positions are

considered “privileged nominations” and are placed in a new section of the Executive Calendar when the nomination is received in the Senate rather than being referred to committee.¹⁶ The nomination remains in this section until ten days after the nominee submits biographical and financial information to the committee of jurisdiction. During this time any Senator may request the nomination be referred to committee. If this does not happen, the nomination is then placed on the Executive Calendar awaiting Senate confirmation. The privileged nomination procedure first took effect in 2012, so experience with its acceptability and effectiveness has yet to be demonstrated. If successful, this procedural action should be considered for expanded classes of presidential appointees based on whether the position has historically required minimal individual floor debate for confirmation. The effect would be to preserve the Senate’s prerogative of advice and consent but to accelerate the nomination process on the Senate calendar.

- **Continue the process of eliminating duplication and removing extraneous information in the required application forms.** The aforementioned Presidential Appointment Efficiency and Streamlining Act (henceforth, the Act) also established the Working Group on Streamlining Paperwork for Executive Nominations to study and report to the President and specified congressional committees on the streamlining of paperwork required for executive nominations and, further, to review the impact of background investigations requirements on the appointments process.
- **The Congressionally-mandated Smart Form electronic data collection system needs to be fully implemented.** The Act also required a detailed plan for the creation and implementation of an electronic system for collecting and distributing background information from nominees for positions that require Senate approval. It envisions an electronic system that will impose less of a burden on potential nominees for positions which require Senate approval, faster delivery of background information, fewer errors of omission, and a single, searchable form (Smart Form) that will be without cost to a nominee, will be easy to use, and will streamline the process of vetting a nominee and tracking information provided by a nominee. The Working Group reported back to the President and Senate committees in November 2012.¹⁷ Their recommendations on eliminating duplication and removing extraneous information in the required forms (specifically, the Public Financial Disclosure Report (SF-278), the Questionnaire for National Security Positions (SF-86), the White House Personal Data Statement, and the Senate Committee questionnaires) are working their way through the administrative change process so the outcomes are not yet known. However it appears that the current administration is no longer using the White House Personal Data Statement. The application on the White House website is quite straightforward.¹⁸ The Smart Form electronic data collection system is also a work in progress. These straightforward reforms need to be implemented in full, certainly in time for the next presidential election cycle.¹⁹

- **The Act’s requirement for a background investigation review was slated to be due on May 7, 2013, but its completion status is unknown and it is not publically available.** The idea, first noted in a Brookings governance study in 2010,²⁰ of tiered background checks proposed by the political scientist Norm Ornstein “from the most stringent for top-level positions through the least detailed for most part-time commissions” makes most sense. That it has not been implemented is attributed to the reluctance to make “judgments as to the importance and sensitivity of hundreds of positions.”²¹ But the appointment system already makes such distinctions, categorizing positions as Executive Level I through V, non-career Senior Executive Service (SES) and Civil Service Category C. There should be some way to cross-walk the appointments categories to the depth of background investigation required, allowing for certain exceptions and stipulating that all national security positions would need to complete at minimum the SF-86.
- **Establish a system of tiered background investigations, and increase the investigation capacity at the beginning of an administration.** Tiering background investigations opens up the potential for resources other than the FBI to be employed. Especially at the beginning of an administration, when the demand is at its peak, the investigative resources of the Office of Personnel Management (OPM) could be used to back up FBI capability. As it stands, OPM conducts over 90 percent of government background checks already.²² OPM contract investigators, many of whom are former government personnel, could be retained by the White House transition team during the first months of an administration.
- **Enforce the confidentiality of FBI and other investigatory results.** A full-field FBI background investigation scoops up everything and makes it available to the Office of Counsel to the President. There is no filter or attempt to corroborate the information contained there-in; therefore, fact and fiction--laudatory or damaging--could be comingled in the report. Significant penalties for improper disclosure need to be in place along with strict controls that bar access to a nominee’s personal disclosure information from all entities other than specifically authorized executive branch and Senate authorities.
- **Establish a repository to retain records from previous government service.** More than a few public officials have breaks in their government service where they return to the private sector and then, subsequently, are nominated for a new government position. Rather than recommencing the vetting process from the beginning, it would greatly speed the review if a repository was established to retain records from the candidate’s previous government service. OPM would be a logical repository. Nominees returning to government service should then be required to report only updated or new information.

- **Convert more presidential appointees to career status SES and Schedule C appointments.** The 1989 National Commission on the Public Service, commonly known as the Volcker Commission in honor of its Chairman, Paul A. Volker, made two assumptions that have been recognized by all subsequent studies of the topic: first, that there were too many appointments; and, second, that the appointments process was needlessly cumbersome.²³ We have touched heavily on the latter, but what about the notion of reducing the number of senate-confirmed positions? As occurred with the removal of 163 positions in the 2011 Act, removal of the Senate confirmation requirement may be appropriate for non-policy making areas where the person is advising a confirmed official. However, Senate prerogatives notwithstanding, the fact is that Senate confirmation has a quality all of its own. If the appointment doesn't require Senate confirmation, there is a loss (perceived or real) of status. According to Nelson Ford, President and CEO of LMI and an official in the George W. Bush administration, "If the Administration is going to try to effect policy, the President needs more than a few leaders that have been through the gauntlet on his team."²⁴
- **Ensure that old, obsolete or superseded positions are removed from the list of PAS candidates.** In today's political climate, further reductions in Senate-confirmed positions are possible but unlikely. It remains for succeeding administrations to carefully review lists of PAS positions to ensure that, as new positions are created in response to changes in presidential programs and departmental reorganizations, old, obsolete or superseded positions are removed.
- **Adjust rules on the allowable duration of senatorial holds.** Because of the difficulty of removing the requirements for Senate confirmation of certain positions, it may be more prudent to adjust the rules on senatorial holds to speed the nominations through the confirmation process. A hold is simply a parliamentary procedure whereby a Senator can delay a floor vote on an issue for an extended period of time. The rules have been amended as recently as 2011 to reveal the name of a Senator placing a hold on a nominee.²⁵ The Rules Committee at the start of the next Congress should consider a further modification to automatically report a nominee out of committee for a floor vote after 30 days if no specific objections have been raised by the Senator imposing the hold. If objections have been specified, holds could be limited to 45 days, which should be enough time for the Senate leadership to resolve with the administration the reason the hold was established in the first place.
- **Impose informal timelines on consideration of the President's top 400 nominees.** The Senate Rules Committee should also consider timelines for scheduling confirmation floor votes once they have been sent out of committee. While the Senate normally confirms the President's cabinet secretaries soon following the inauguration, it should impose informal timelines on advice and consent of the President's top 400 nominees: 150 by May 1 and the rest by the August recess.

Reducing the Financial Burden of Public Service

There are significant personal and practical reasons why individuals refrain from seeking public service. Among the most challenging are the financial implications of leaving the private sector for a period of government service, and then returning to it with restrictions on what kind of follow-on employment may be permitted. As a consequence, most executive branch positions lend themselves to be filled either by government service professionals or experienced congressional staff—or private sector executives at the end of their careers.

In order to attract a wider pool of qualified candidates two areas bear scrutiny: in the nomination process, resolving conflicts of interest; and, post-employment, easing restrictions on career choice. The body of law that governs these areas is deep, stretching back more than forty years.²⁶ The principles behind that law go back even further to the mid nineteenth century, before there was either a civil service system or a federal claims court.²⁷ Although no one would argue for lifting the restrictions completely, there should be some consideration for approaching them with an eye toward more contemporary and balanced application.

The disincentive to consider public service begins with the financial disclosure process that precedes nomination. The Public Financial Disclosure Report (OGE278) is available online²⁸ and has 12 pages of instructions and 7 for data entry—with the option to add more. Some sources indicate that a reasonably organized record keeper could complete it all on

their own. However, they go on to caution that “...nominees may rest easier if they pay an accountant to do the numbers, or at least double-check the math.”²⁹ That may be a stretch, one eventually successful nominee—albeit with a fairly complex financial situation—claimed that it cost in excess of \$40,000 to prepare the appropriate documents. While that amount may be atypical, considerable time and effort is required to collect investment income data as well as to meet the minimum disclosure thresholds, which have not been adjusted since the law set them in 1978.

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Another aspect to the financial disclosure issue is resolution of conflicts of interest. For comparison, while Senators and Members of Congress are merely required to disclose their conflicts of interest (the voters being the adjudicators of whether those conflicts are material or not), federal law requires Executive Branch officials, including PAS candidates, to remedy such actual or potential conflicts of interest principally through divestiture, recusal or waiver. However, the Office of Government Ethics is reluctant to grant waivers, and recusals in the form of removing oneself from decisions involving certain entities in which an interest is held has the potential to curtail an official’s ability to fully discharge their fiduciary responsibilities. Consequently, divestiture

is the normal remedy thus creating further financial penalties for candidates considering public service.

Adjudication of conflict of interest issues begins with the candidate's filing of the OGE278 Public Financial Disclosure Report in which he or she must disclose personal holdings, holdings of his/her spouse, and dependent children. The form is reviewed by White House Counsel, then the candidate's Agency Ethics Officer. Finally, the candidate is notified of asset issues that must be resolved. A number of remedies exist:

- **Recusal:** Introduced in 1955 by Second Hoover Commission, it has appointees take oaths promising to recuse themselves from any decision involving a company or financial arrangements in which they hold an interest. Because they tend to restrict an official's freedom of action to execute the full range of potential responsibilities they cannot be used too often.
- **Waivers:** Waivers can be granted if financial interest is inconsequential.
- **Blind Trusts:** Qualified Blind Trusts resolve conflicts of interest and, while attractive, they are cumbersome to set up and costly (to the candidate) to manage.
- **Divestiture:** The 1989 Ethics Reform Act allowed deferred taxation of capital gains so that, proceeds may now be rolled over to an investment approved by OGE.

Each of these remedies should be considered on a case-by-case basis; probably less for recusals than waivers and blind trusts.

A rather perverse conflict of interest occurs when a candidate has earned post-employment or deferred compensation from their

private sector employer. Such remuneration would be considered as creating a beneficial contractual relationship between the individual and the corporate entity and thus would have to be discharged prior to that candidate's acceptance of a government appointment. This obstacle can be a deal-breaker for some individuals and, for others, a costly issue to resolve in order to be able to accept the nomination for government service.

Finally, post-employment restrictions on federal appointees tend toward the severe, particularly with regard to relationships with the Departments and Agencies in which the official served:

- A former employee may be prohibited from having contact with an employee of any Federal agency or court, on behalf of another person or entity, concerning an official matter with which the former employee was involved as a Government employee.³⁰
- A former high-level employee or former political appointee may be prohibited from having contact with an employee of his or her former Federal agency (and perhaps certain officials at other agencies), on behalf of another person or entity, concerning any official matter.³¹
- A former political appointee may be prohibited from lobbying a Government official on behalf of a client for whom he is registered as a lobbyist.³²
- A former employee may be prohibited from sharing in profits earned by others if the money was earned from having contact with the Government on behalf of third parties (e.g., clients) while the former employee was still in Government.³³

- A former employee may be prohibited from accepting compensation from a contractor if the former employee served in a Government position or made a Government decision involving more than \$10,000,000 given to that contractor.³⁴
- A retired member of the uniformed services may not accept employment (or compensation for that employment) from a foreign government unless he or she first obtains approval from the Department of State.³⁵

Such post-employment restrictions are designed to preclude any unprincipled attempt to influence former subordinates or colleagues and make good sense in cases where the matter under consideration is something in which the former official was substantially involved

while in their official capacity. Less clear is the rationale for prohibiting any relationship when the topic postdates the official's period of service or the Department or Agency has assumed new responsibilities that bear no relation to the official's previous purview.

These restrictions are further constrained by the ethics guidelines maintained by each individual Department or Agency. Potential PAS nominees should familiarize themselves with the 75-page Ethics Agreement Guide maintained by the Office of Government Ethics.³⁶ As it clearly states, "The ethics agreement is a joint product of the agency, OGE, and the Office of the General Counsel to the President, with input from the PAS nominee....OGE's approval of the language of the ethics agreement is a precondition for certification of the PAS nominee's financial disclosure report."

Recommendations

- **Rationalize and coordinate a core set of questions on financial disclosure and other forms that will not unduly tax the time and treasure of prospective nominees.** The disclosure and potential conflict-of-interest provisions in the PAS nomination process have become ever more onerous over time. The current approach errs significantly and perhaps excessively, on the side of caution. Lost in both instances is the concept of materiality. Is it necessary to know the source and amount of investment income exceeding \$200 or a stock valued at more than \$1,000 as the OGE278 currently requires? Reasonably, a conflict of interest could be determined by the fact of owning an investment in a certain company or property without need to record the owner's exact financial position. Similarly, the totality of forms and questionnaires—including the OGE278, Standard Form 86 Questionnaire for National Security Positions (SF86), Supplement to the Standard Form 86 (86 Supplement), White House Personal Data Statement (WHPDS)³⁷, and various Senate Committee questionnaires (plus certain consent forms, an ethics pledge and a set of fingerprints)—present an array of information, much of it time-consuming and therefore costly to collect, while at the same time—with special consideration of the Senate questionnaires—exhibiting considerable overlap and questionable materiality. The Working Group on Streamlining Paperwork for Executive Nominations, chartered by the Presidential Appointment and Streamlining Act of 2011, did a

good job of pointing out the paperwork overhang of seeking a presidential appointment.³⁸ Their recommendations that White House, the Office of Government Ethics, Senate Committees and the executive branch's Suitability and Security Clearance Performance and Accountability Council (PAC)(which oversees the SF86) rationalize and adopt a core set of questions that will not unduly tax the time and treasure of prospective nominees needs to be seriously considered in time for the next Administration transition in 2017.

- **Adopt a qualifying minimum value expressed as a percentage of the nominee's overall financial portfolio to be used as a cut-off for determining whether the asset is likely to present a conflict of interest** and, thus, needs to be reported. Would a conflict be created, for example, if the value of an asset amounted to only one, two or three percent of an overall portfolio value? Further, in light of the deferred capital gains ruling, Qualified Diversified Trusts might be considered as an alternative. Such an option would allow the candidate to maintain ownership of his/her assets while avoiding a concentration in any one industry or sector that might initiate a conflict of interest.
- **Similarly, Senate committee's should set the limits for establishing qualified blind trusts and consider this remedy particularly in cases where nominees are seeking mid-career appointments** and are at a point in their lives where they are seeking to build wealth to meet future family needs and eventual retirement goals.³⁹
- **If divestiture is required, ensure that the nominee's proceeds are granted deferred capital gains tax and allowed reinvestment in certain "permitted property."** If you are a candidate for a Defense Department appointment, you may have to resign yourself to divestiture as the only option.⁴⁰ The Senate Armed Service Committee steadfastly maintains a strict interpretation on conflict of interest resolutions. Although it does not have a written policy, the committee's preferred remedy is complete divestiture with holdings related to the defense industry.⁴¹ Should that be the case, the Office of Government Ethics has a "Smooth Sales" program through which the Director may issue a Certificate of Divestiture that will allow a nominee to defer the capital gains tax and reinvest the divestiture proceeds in a "permitted property", which is typically US obligations such as Treasury bills, bonds or notes; or, open-end diversified mutual funds.⁴²
- **Establish a remedy for potential conflicts of interest for individuals who have earned pensions or have deferred compensation from an entity with whom they may potentially interact while in government service.** Generally, OGE reasons that most matters in which a government employee participates are unlikely to have an effect on the plan sponsor's "ability or willingness to pay the employee's pension."⁴³ As a matter of course, most agencies will not authorize recusals related to such benefits in an ethics agreement. If otherwise, however, the resolution would

have to be to secure a waiver or, as an option, to calculate the net present value of the benefit and receive a lump sum payment that could then be invested in a permitted property as described above.

- **Calibrate restrictions on post-government employment.** There is strong practical and ethical bias toward keeping the current post-employment restrictions in place. However, with regard to the so-called “revolving door” of post-government employment, that is, going to work for a company or firm that does substantial business with the government, there are compelling reasons to exercise care. The Ethics in Government Act (EIGA) of 1978⁴⁴ is the primary law governing such employment activity. Its main intent is to “prevent...the misuse of inside information and... the use of undue influence by former officials.”⁴⁵ While the government’s intent is to promote ethical and open government, it must exercise care not to unduly interfere with former employees’ personal rights to seek satisfying employment and choice in where to apply their individual skills. The government needs also to recognize that there may be times when it is advantageous to seek out advice and counsel from former employees when in the national interest. Congress has generally avoided further restrictions on post-government employment and should continue to do so in the future. The overriding concern is that further restrictions would exacerbate the difficulty of recruiting and retention of accomplished Americans who aspire to senior civilian positions of trust in government.

Instituting Executive Onboarding Best Practices

Onboarding is not to be confused with employee orientation—it is much, much more. “Onboardees” cannot be left to “figure it out.” Corporate America views executive onboarding as a key enabler of corporate success and strives to ensure that its leadership is prepped and ready to assume the demands of the job as rapidly as possible.

Private sector best practice is to establish comprehensive, thorough onboarding processes focused on providing relevant information in a structured methodology backed up by performance and assessment tools.

These programs consist of defining corporate objectives relative to the candidate’s duties, exploring the core leadership competencies needed for success, establishing goals and accountability mechanisms, then setting clear metrics and evaluation criteria. Executive onboarding is a process of months, with tasks to be performed at various points, e.g., the first week, the first 30 days, 60 days, 90 days and, finally, the first year.

One way in which federal public service differs from the corporate world is that private companies more often promote from within, whereas nominees for PAS positions frequently come from outside of government. In one sample from the George W. Bush Administration, 55 percent of the PAS appointees had no previous federal government experience. Another difference is that more common in the corporate world is the onboarding of just one executive at a time, i.e., a new CEO or CFO. In government, it is likely that the entire

top tier of officials are appointed near simultaneously. It behooves federal departments and agencies to have a prescribed yet personalized onboarding plan that can accommodate multiple appointees across a range of responsibilities.

Writing for the Political Appointee Project, Paul R. Lawrence, Marc Andersen and Mark A. Abramson noted, “While there are orientation activities by the White House, more is needed. In addition..., ‘on-boarding’ initiatives should be launched in each Department to accommodate the specific orientation needs of its new political executives.”⁴⁶ Brad-

Corporate America Views Executive Onboarding as a Key Enabler of Corporate Success. . .

ley Patterson, who served in the Eisenhower, Nixon and Ford White House’s, is even more emphatic: “...those in the White House Personnel Office who brought you into that universe have a responsibility to help you make that fit.”⁴⁷

OMB encourages Departments and Agencies to establish executive onboarding programs. Further, to establish an alignment between the administration’s and political appointee’s goals and objectives, OMB partners with the White House Office of Presidential Personnel to administer a 1-day President’s Appointee Leadership Program (PALP) for non-career SES and Schedule C appointees.

The Defense Department has tried a number of onboarding approaches. BENS' first encounter with such a program was during the 2001 transition when an extensive, several months-long orientation was conducted for the incoming Service Secretaries and the Under Secretary for Acquisition, Technology and Logistics. When the Defense Business Board reviewed the Pentagon's offerings in 2008, it observed that the Department's success was, at best, uneven, and that it was difficult to complete in the three-to-five weeks that had typically been allotted. The Department of the Navy has established a particularly comprehensive program, although due to the nature of the military hierarchy it deals with a more homoge-

neous cadre of leaders whose experience and tenure make the onboarding process much less complicated than for a political appointee coming from outside government.⁴⁸

A survey conducted in September 2008 by the National Academy of Public Administration and the Partnership for Public Service collected six observations from seasoned presidential appointees that form a sound basis for establishing a robust onboarding program.⁴⁹ Future presidential appointees should insist that their prospective departments and agencies give them the opportunities for training during their first year of service to ensure they have the tools to succeed.

Recommendations

- **Ethics Standards and Financial Disclosure Rules.** In preparation for confirmation hearings, nominees must be made fully cognizant of the ethics rule and be prepared to answer Senatorial questions about personal financial and other potential conflict-of-interest issues.
- **Performance and Results.** Appointees and their supervisors must have a shared sense of achievable standards for performance and agreed upon measures for assessing the organization's ability to meet those standards. Setting these measures during the first 90 days will establish a set of desired outcomes and a gauge for measuring employee performance at some designated future point.
- **Policy Development and Implementation.** Appointees need to become members of the administration's team. To do so requires:
 - Understanding the president's management and policy priorities
 - Knowing how the Executive Branch functions
 - Understanding the Departmental budget process
 - Learning the Department or Agency's process of policy development
- **Relationships.** Developing relationships up and down the chain, in and outside of the Department or Agency, is crucial to success. It is particularly important to cultivate relationships with White House entities, career employee, counterparts throughout the government and relevant congressional committees and staffs.

- **Competencies.** Seeking to improve leadership, negotiation and communication skills through mentoring relationships and training is an ongoing requirement throughout an appointee’s tenure.
- **Career Government Workforce.** Working successfully with the career workforce can fulfill three necessary conditions for effectiveness:
 - Knowledge of the Department or Agency’s policies and processes
 - Garner support for goals of new leaders
 - Understanding the internal culture

Appendix

PAS Nominations- Top 50 for National Security		
Organization	Position	
Executive Office of the President		
<i>Office of Management and Budget</i>	Director	Deputy Director
<i>Office of National Drug Control Policy</i>	Director	
DoD		
<i>Office of SecDef</i>	Secretary of Defense	Under Secretary of Defense, Comptroller
	Deputy Secretary of Defense	Under Secretary, Intelligence
	Under Secretary for Policy	Under Secretary Acquisition, Technology and Logistics
	Director, Operational Tests and Evaluation	Inspector General
	Assistant Secretary Reserve Affairs	General Counsel
	Assistant Secretary Public Affairs	
<i>Dept of Army</i>	Secretary of the Army	General Counsel
	Under Secretary	
<i>Dept of Air Force</i>	Secretary of the Air Force	General Counsel
	Under Secretary	
<i>Dept of Navy</i>	Secretary of the Navy	General Counsel
	Under Secretary	
Dept of Energy		
	Secretary of Energy	Under Secretary
	Deputy Secretary	Under Secretary for Nuclear Security/ Administrator for Nuclear Security
DHS		
	Secretary	Under Secretary for Science and Technology
	Deputy Secretary	Commissioner Customs and Border Protection
	Assistant Secretary for Policy	Assistant Secretary Immigration and Customs Enforcement
	General Counsel	Director Citizenship and Immigration Services
	Under Secretary for National Protection and Programs Directorate	FEMA Administrator
	Under Secretary for Intelligence and Analysis	Assistant Secretary TSA
DoJ		
	Attorney General	DEA Administrator
	Deputy Attorney General	Assistant Attorney General National Security Division
Dept of State		
	Secretary of State	Assistant Secretary Bureau of Intelligence and Research
	Deputy Secretary	Under Secretary for Arms Control and International Security
Dept of Treasury		
	Secretary of Treasury	Under Secretary for Terrorism and Financial crimes
	Deputy Secretary	

End Notes

- ¹ See “Ready to Govern: Improving the Presidential Transition,” Partnership for Public Service, January 2010. http://ourpublicservice.org/OPS/programs/ready_to_govern.shtml
- ² PL 111-283; 124 Stat. 3045.
- ³ PL 88-277, § 5; 78 Stat. 153, 156.
- ⁴ PL 108-458.
- ⁵ Under the auspices of the Aspen Institute, the Commission was co-chaired by former US Senator Chuck Robb, former Senate Majority Leader Bill Frist, former Director of the Presidential Personnel Office Clay Johnson, and former White House Chief of Staff Mack McLarty. <http://www.politicalappointeeproject.org/commentary/federal-appointments-process-problem-and-our-proposed-solutions>
- ⁶ <http://politicalappointeeproject.org/commentary/appointments-and-managing-executive-branch>
- ⁷ <http://www.napawash.org/wp-content/uploads/2013/05/SurvivorsGuide2013.pdf>
- ⁸ <http://memostoleaders.org/administrative-leadership>
- ⁹ Let’s Get It Started, Anne Joseph O’Connell, Center for American Progress, January 2009. <http://american-progress.org/issues/open-government/report/2009/01/15/5462/lets-get-it-started/>
- ¹⁰ Appointments, Vacancies and Government IT: Reforming Personnel Data Systems, John Hudak, Center for Effective Public Management at Brookings, June 2014. <http://www.brookings.edu/research/papers/2014/06/12-appointments-vacancies-government-it-reforming-personnel-data-systems-hudak>
- ¹¹ P.L. 112-166.
- ¹² <http://www.nationaldefensemagazine.org/blog/Lists/Posts/Post.aspx?ID=1345>
- ¹³ <http://odam.defense.gov/Portals/43/Documents/OMP/Library/DoD%20PAS%20Status%20-%20Current.pdf>
- ¹⁴ <http://bigstory.ap.org/article/dhs-nominee-would-focus-leadership-vacancies>
- ¹⁵ See “Ready to Govern: Improving the Presidential Transition,” Partnership for Public Service, January 2010. http://ourpublicservice.org/OPS/programs/ready_to_govern.shtml
- ¹⁶ “Presidential Appointments, the Senate’s Confirmation Process, and Changes Made in the 112th Congress”, Maeve P. Carey, Congressional Research Service, October 9, 2012. <http://www.fas.org/sgp/crs/misc/R41872.pdf>
- ¹⁷ <http://whitehoustransitionproject.org/resources/briefing/appointments/Report%20of%20S679%20Working%20Group-Final.pdf>
- ¹⁸ https://apply.whitehouse.gov/sites/apply.whitehouse.gov/files/apply_whitehouse_gov_2012_1205.pdf
- ¹⁹ For example, “A Survivor’s Guide for Presidential Nominees,” referenced earlier in this report, still refers to completion of the White House Personal Data Statement (Chapter 8), which reinforces our recommendation that a public-private joint partnership on this type of information would add consistency and clarity to the effort.
- ²⁰ A Half-Empty Government Can’t Govern: Why Everyone Wants to Fix the Appointments Process, Why It Never Happens, and How We Can Get It Done, Galston, William A. and E.J. Dionne, Jr., Governance Studies at Brookings, December 14, 2010. <http://www.brookings.edu/research/papers/2010/12/14-appointments-galston-dionne>
- ²¹ Ibid., p. 13.
- ²² <http://www.opm.gov/investigations/background-investigations/>
- ²³ “The Volcker Commission Eighteen Years Later,” Paul C. Light, Public Administration Review, May-June 2007.
- ²⁴ Private e-mail correspondence, February 20, 2014.
- ²⁵ <http://politicaldictionary.com/words/senate-hold/>
- ²⁶ The criminal conflict of interest statutes are found in Sections 203, 205, 207, 208 and 209 of title 18 U.S.C.
- ²⁷ The Civil Service Act of 1883 created the Civil Service Commission; the Claims Court was created in 1955.
- ²⁸ <http://www.oge.gov/Forms-Library/OGE-Form-278--Public-Financial-Disclosure-Report/>
- ²⁹ <http://www.napawash.org/wp-content/uploads/2013/05/SurvivorsGuide2013.pdf>, pg. 59.
- ³⁰ 18 U.S.C. § 207

End Notes (cont'd)

- ³¹ 18 U.S.C. § 207; Executive Order 13490 (the Ethics Pledge).
- ³² Executive Order 13490 (the Ethics Pledge).
- ³³ 18 U.S.C. § 203.
- ³⁴ 41 U.S.C. § 2104 (formerly 41 U.S.C. § 423).
- ³⁵ The Emoluments Clause of the U.S. Constitution.
- ³⁶ http://www.govexec.com/media/gbc/docs/pdfs_edit/092314e1.pdf
- ³⁷ The current Administration does not use the WHPDS.
- ³⁸ <http://whitehousetransitionproject.org/resources/briefing/appointments/Report%20of%20S679%20Working%20Group-Final.pdf>
- ³⁹ <http://www.oge.gov/Financial-Disclosure/Public-Financial-Disclosure-278/Helpful-Resources/Model-Qualified-Blind-and-Diversified-Trust-Documents/>
- ⁴⁰ However, if appointee's investment in a stock or security is less than \$15,000 or less than \$50,000 in a mutual fund, they do not have to divest or recuse themselves from matters involving the investment. See "QUIZ: Do You Know How to Be an Ethical Political Appointee", Government Executive, September 23, 2014.
- ⁴¹ The Defense Science Board Task Force, Human Resources Strategy, February 2000.
- ⁴² <http://www.oge.gov/OGE-Advisories/Legal-Advisories/Attachment-to-DO-99-019--Smooth-Sales-%E2%80%94-A-Beginner-s-Guide-to-Certificates-of-Divestiture/>
- ⁴³ OGE Informal Advisory Memorandum 99 x 6, April 14, 1999.
- ⁴⁴ Codified in Title 18 U.S.C., Sect. 207.
- ⁴⁵ Office of Government Ethics, "Report to the President and Congressional Committees on the Conflict of Interest Laws Relating to executive Branch Appointments", January 2006, p. 12.
- ⁴⁶ <http://politicalappointeeproject.org/commentary/what-we-have-learned-about-political-appointees>
- ⁴⁷ <http://politicalappointeeproject.org/commentary/incoming-sub-cabinet-you%E2%80%99ve-been-nominated-confirmed-and-sworn-%E2%80%94-you-are-new-washington>
- ⁴⁸ <http://www.opm.gov/wiki/uploads/docs/Wiki/OPM/training/Navy%20Executive%20Onboarding%20Plan%20Template.pdf>
- ⁴⁹ <http://politicalappointeeproject.org/sites/default/files/learningcurve.pdf>
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