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1285
CONFLICTS

THE WHITE HOUSE
WASHINGTON
November 13, 1980

MEMORANDUM FOR WHITE HOUSE OFFICE STAFF MEMBERS AND HEADS
OF ALL EXECUTIVE OFFICE OF THE PRESIDENT
ELEMENTS

FROM: LLOYD N. CUTLER

LNC

SUBJECT: Private Job offers and Post-Employment
Conflicts of Interest

As this Administration comes to an end, some staff members may be contemplating private employment or may receive offers or expressions of interest concerning private employment. If so, you should familiarize yourself with restrictions imposed by Federal criminal statutes and standard of conduct regulations that may apply to 1) your discussions about employment with prospective private employers and 2) your subsequent business dealings with the government after you have departed.

This memorandum contains a general outline of pertinent post-employment restrictions. You should consult with counsel if you have questions about their applicability to your specific situation.

The post-employment restrictions contained in the Letter of Commitment you may have signed upon your appointment have been superseded by the post-employment conflict of interest provisions of the Ethics in Government Act of 1978, as amended, which are incorporated in the following summary.

Negotiation for Future Employment

A government* employee ("employee") is generally not barred from seeking other employment while in government, even if the prospective employer has dealings with his agency. However, an employee should disqualify himself from acting on any matter that would directly affect a prospective employer.

Federal law (18 USC 208) specifically prohibits an employee from personally and substantially participating in any particular matter involving a financial interest of any person or organization with whom the employee is negotiating or has an arrangement concerning prospective employment. Executive Order 11222 and regulations carrying out that

*The term "government," as used in this memorandum, refers to the Executive Branch of the U.S. Government, its independent agencies, and the Government of the District of Columbia.

OUTSET - PLEASE DON'T MISTAKE WHAT I'M SAYING

- SOME GOOD, NECESSARY, HELPFUL (DEFINITION OF "BLIND TRUSTEE")
 - NOT DENIGRATING IMPORTANCE OF ETHICS IN GOVERNMENT WORKING IN FIELD FOR OVER TEN YEARS
 - WE ARE SCRUPULOUSLY COMPLYING WITH ACT NOW ON BOOKS, WITH ASSISTANCE OF THOSE IN THIS ROOM
 - AT THIS MOMENT IN HISTORY, YOU AND I ARE IN UNIQUE POSITION TO EVALUATE IMPACT
- MUST SEE THAT UNIQUE EXPERIENCE IS NOT LOST

HOW DOES ACT BUT, WHERE ARE WE NOW? HOW DOES ACT IMPACT ON RECRUITING
ATTRACTIVE CANDIDATES?

FIRST NOTE: CERTAIN TECHNICAL ASPECTS NEED CHANGE
 WON'T BORE, EXCEPT - ACT NEVER CONTEMPLATED TRANSITION
 JERRY-RIG

SECOND NOTE: REALLY DO NOT KNOW WITH PRECISION HOW MANY
 PEOPLE REJECTED OR WERE PRECLUDED FROM PUBLIC SERVICE DUE TO
 ACT

- DID NOT EVEN APPLY
- USED AS AN EXCUSE

DO KNOW IT OCCURRED/NEWSPAPER REPORTER ASKED - HOW PROVE WITHOUT
 DATA - AS MUCH DATA AS CONGRESS DID
DO KNOW CUMULATIVE IMPACT ON ALL REQUIREMENTS, PLUS VOLUMES,
 TIMES - CONSUMING REPORTING REQUIREMENT - INDEED TOOK ITS
 TOLL

influencing its outcome in any way. Examples of particular matters requiring disqualification are listed below:

- Those which specifically focus on the prospective employer, e.g., a recommendation on a CAB ruling concerning an airline represented by a recruiting law firm.
- Those of more general applicability which nevertheless have a direct and predictable effect on the prospective employer, e.g., review of an agency decision to adopt environmental regulations that will impose restrictions on a particular industry of which the prospective employer is a part;
- Although the statute is violated only when a prospective employer has a "financial interest" in a particular matter, the Executive Order aims at avoiding even the appearance of conflict. Accordingly, the employee should disqualify himself whenever a prospective employer has a significant personal or professional interest in the matter. In a matter involving environmental regulations, disqualification would be required if the prospective employer is a public interest organization which has taken part in the regulatory proceeding.

In most instances, the employee will know whether a matter within his official responsibility will directly affect the prospective employer. If he lacks adequate knowledge but suspects a nexus because of the subject matter involved, he should make a good faith effort to obtain additional information by consulting appropriate government officials. If on the basis of this information he is uncertain about whether the nexus is sufficient to require disqualification, he should seek counsel's advice.

3. Making a Record if any Issue of Disqualification Arises.

Written records should be made of how each issue of disqualification is addressed and resolved. Records should be made of the following events:

- Employment-related contacts by or with a prospective employer if there is a potential issue of disqualification.
- Responses made by the employee to a prospective employer's unsolicited expression of interest. If the response is flatly negative, this may be relied upon to permit the employee to continue to participate in a matter as to which disqualification would otherwise be required.

- Conclusions concerning the need for disqualification and consultations with government officials involved in providing information or giving advice.
- Steps taken to insulate himself from a matter for which disqualification is required, for example notifying a superior or an aide of the disqualification and delegating responsibility for the matter to another official.

Post-Employment Activities

A former government employee ("former employee") is generally barred from representing a nongovernment party in matters in which the government has an interest and in which the former employee had been involved while in government. The scope of the prohibition will depend on 1) whether the former employee was a high level "Senior Employee" and/or 2) the former employee's degree of prior involvement in the matter.

1. Restrictions Applicable to All Former Employees.

- Permanent Bar from Representation in matters in Which Former Employee Had Personal and Substantial Involvement (18 USC 207(a)). A former employee is permanently barred from representing anyone before the government, or in proceedings involving the government, in any particular matter involving specific parties and in which he had participated personally and substantially while in government. This prohibition against "switching sides" not only encompasses acting as another's agent or attorney, but any other kind of representation or communication made on behalf of another with the intent to influence the government, e.g., a telephone call to a government official for lobbying purposes. It would not apply to a former employee's involvement in most matters of general applicability and interest, e.g., legislation, rulemaking, formulation of general policies, standards or objectives. Some such matters, of course, have a direct financial effect on particular prospective employers. In such cases, the former employee should review the issue with counsel to determine whether the proposed representation involves a risk of prosecution or criticism.

- Two Year Bar from Representation in Matters Within Former Employee's Official Responsibility (18 USC 207(b)(i)). For two years after government service, a former employee is barred from representing anyone before the government, or in proceedings involving the government, in any particular matter involving specific parties and which was actually pending under the former employee's "official responsibility" in his last year of government service.

2. Restrictions Applicable Only to Former "Senior Employees"

Staff members who receive compensation at a rate comparable to or greater than that fixed for Executive level appointees (\$50,112.50) are "Senior Employees" to whom the following restrictions will apply upon leaving the government.

- Two Year Bar on Assisting in Representing (18 USC 207(b)(ii)). For two years after government service, a former Senior Employee may not assist in the representation of anyone by personal presence at a formal or informal appearance before the government, or in proceedings involving the government, in any particular matter in which he could not act as another's representative because of his actual and substantial participation in the matter. This restriction is not an absolute bar from assisting in a matter in which a former Senior Employee participated while in government. It only prevents rendering assistance "in representing" while personally present at an appearance before a government official. For example, a former Senior Employee could work on a contract with which he was involved while in government and could manage a company, institution, or university where such former employee's decisions determine the manner in which his or her organization will perform under a government contract or grant, so long as he does not accompany others who may represent the institution to meetings with government officials in order to assist them.
- One Year Bar on Contact With Former Agency (18 USC 207(c)). For one year after leaving a government department or agency, a former Senior Employee is barred from representing anyone before his former department or agency in a particular matter which is either pending before or of direct

and substantial interest to the department or agency. The prohibition will apply regardless of whether 1) the former Senior Employee had any prior involvement in the matter while in government and 2) the matter involves specific parties. As in the case of the permanent bar, any kind of representation or communication made on behalf of another with the intent to influence the government is covered. The restriction, however, would not apply to purely social or informational communications, the transmission of filings which do not require government action, personal matters, any expression of personal views where the former employee has no pecuniary interest, and responses to the former agency's request for information.

Former Senior Employees elected to state or local government office or employed full-time by a state or local government agency, an institution of higher education, or a non-profit hospital or medical research organization, are not subject to the above restriction to the extent that the former Senior Employee is acting as the representative of such an entity.

Further advised as to which components of the Executive Office of the President are considered separate agencies for purposes of applying the "no contact" ban.

Prohibition Against Receipt of Compensation
For Certain Representational Services

A former employee is barred from receiving or participating in the receipt of compensation (fee sharing) for representational services performed by anyone in regard to a particular matter, where such representation occurred before any part of the Executive or Legislative Branches while he or she was in government service. Representational services rendered before the courts are not within the scope of this ban. The prohibition might apply, for example, to a former employee who becomes a partner in a law firm. It would be unlawful for the former employee to share in fees received by the firm for representational services rendered before any government department or agency while he was in government service, regardless of his lack of knowledge or prior involvement in the matter. (18 USC 203).

Financial Disclosure Report

All employees who are required to file a Financial Disclosure Report (Standard Form 278) annually, must file a Financial

the employing government agency or department to waive the imputed disqualification of lawyers affiliated with the former government official, if the government body determines that the waiver is not inconsistent with the public interest and if specified screening procedures are followed. In lieu of the screening procedures set forth in the amendments, a government body could adopt its own for waivers relating to matters within its jurisdiction. The Court of Appeals has not yet adopted these proposals.

United States of America
Office of
Government Ethics

Office of Personnel Management
Washington, D.C. 20415

CONFLICTS

NOV 20 1980

MEMORANDUM

SUBJECT: Information on Terminal Financial Disclosure Requirements and
Restrictions on Former Government Employees

FROM: J. Jackson Walter
Director

TO: Departing Presidential Appointees

This memorandum contains an overview of the public financial disclosure requirements and post-employment conflict of interest restrictions applicable to those departing from senior positions within the Federal government. It only highlights certain statutes and should not be relied upon for complete legal guidance. For that, you should consult your own attorney or the Designated Agency Ethics Official at your agency for a detailed explanation of these general rules and the practices of particular departments and agencies.

You have already had occasion to file the public financial disclosure report form (SF 278) distributed by this Office. The provisions of Title II of the Ethics in Government Act of 1978 (Pub. L. 95-521, as amended) [the "Act"] require that a termination report must also be filed within thirty days after leaving employment in a covered position. The termination report must cover:

- (i) the preceding calendar year if the annual May 15 report for that year has not been filed, and
- (ii) the portion of the present calendar year up to the date of termination.

The instructions attached to the form contain detailed rules as to form completion.

Keep in mind that until your actual departure the normally applicable conflict of interest restrictions for those in the Federal government still pertain. For an annotated index to the major aspects of those statutes and rules which affect senior executives, see the memorandum prepared by this Office: "Information on Federal Financial Disclosure Requirements and Conflict of Interest Restrictions." During the period preceding your departure from the Government special care may be required to avoid the appearance of conflict of interest with respect to potential outside employment. Note that pursuant to the provisions of 18 U.S.C. §208(a) you are not permitted to participate personally and substantially in any particular matter in which you have a direct or indirect financial interest. For purposes of this rule, you are considered to have a financial interest in "any person or organization with whom [you are]... negotiating or [have]... any arrangement concerning prospective employment."

Accordingly, if you are negotiating for, or actively pursuing, employment with a particular outside entity (or there is the appearance of such a situation), you should disclose the situation in writing to your supervisor or associate and make arrangements to be insulated from any official business matters which might specifically affect or involve that outside entity. If such a matter comes to your attention in any case, you should abstain from participating in that matter in any manner and make a written record of that disqualification.

Post-employment restrictions on former Federal government employees are contained in Title V of the Act, which is codified as revised 18 U.S.C. §207. This Office has developed detailed regulations in 5 C.F.R. Part 737 which amplify the principles of section 207 and provide examples of typical situations. The four basic restrictions of section 207 are as follows:

Permanent disqualification - subsection (a)

Section 207(a) is a life-time disqualification directed at the former Government employee who participated personally and substantially in a particular matter while employed by the Government and who later "switches sides" by representing another person in regard to the same matter. This provision applies to a former Government employee who acts as an "agent or attorney for, or otherwise represents any other person (except the United States)." To come within the scope of this provision, the former employee must physically appear before a Federal agency or representative in either a formal or informal setting or, with the intent to influence, make any oral or written communication to any such Federal agency or representative.

Two-year disqualification: official responsibility - subsection (b)(i)

The range of transactions and matters covered by subsection (b)(i) is identical to that covered by subsection (a) of section 207. The principal difference between the lifetime and two-year disqualifications is that subsection (a) requires the former employee to have participated directly in the matter during his Government service, while subsection (b)(i) only requires that the matter was "actually pending under his official responsibility within a period of one year prior to the termination of such responsibility."

Two-year disqualification: matters in which participation is personal and substantial - subsection (b)(ii)

This and the following restriction apply to Federal employees who are "Senior Employees." Generally, Senior Employees are Federal officials in positions at Levels I through V of the Executive Schedule, active duty commissioned officers assigned to pay grade 0-9 or above, and those in senior positions designated by the Director, Office of Government Ethics. For a position to be designated it must "involve significant decision-making or supervisory responsibility." Further, the position must be in the Senior Executive Service or have a basic rate of pay at least equal to GS-17, Step 1 (or be at pay grade 0-7 or 0-8). You are already on notice if you are in a Senior Employee position. If you have any question as to whether you are classified as a Senior Employee for purposes of these rules, please consult with the ethics officials of your agency.

Subsection (b)(ii) bars assistance by a former Senior Employee "in representing" another person by "personal presence" at an "appearance" before the United States in connection with any particular Government matter in which he participated personally and substantially. Therefore, this provision differs significantly from section 207(a) and (b)(i) which do not prohibit assistance in representing. Further, section 207(b)(ii) does not apply to assistance in connection with an oral or written communication made with an intent to influence which does not involve an appearance.

One-year restriction: transactions with former agency - subsection (c)

The fourth post-employment disqualification prohibits, for a period of one year after an individual's responsibility as a Senior Employee in a particular agency ends, any formal or informal appearance before, or communication with the intent to influence to, the former agency with respect to any particular matter pending before it or in which it has a direct and substantial interest. This prohibition is much narrower than the ones applied under subsections (a) and (b)(i) which relate to appearances or communications before most Federal government organizations. This aspect significantly narrows the scope and impact of the one-year ban.

While the provisions of section 207 apply personally to you, it is important to note that restrictions imposed by codes of professional conduct may apply to a firm with which you become associated, as well as yourself. For example, the appearance in a matter by a law firm with which a former Government attorney is associated may be precluded by the Code of Professional Responsibility of the American Bar Association (see, e.g., Canons 5 and 9) or that of a state bar association.

The Office of Government Ethics and the ethics officials of each agency throughout the Executive branch are always pleased to consult with former Government officials and those about to leave Government service and their representatives concerning their responsibilities and obligations with respect to post-employment restrictions. Our experience in resolving numerous such issues is often useful in ameliorating the restrictions placed upon individual former officials while fulfilling the requirements of Federal law. Please do not hesitate to call me at (202) 632-2792 if the Office of Government Ethics may provide you with advice and counsel.

United States of America
Office of
Government Ethics

Office of Personnel Management
Washington, D.C. 20415

SEP 3 1982

MEMORANDUM

SUBJECT: Applicability of the Conflict of Interest Statutes to Members of the President's National Security Telecommunications Advisory Committee

FROM: David R. Scott
Acting Director

TO: Fred F. Fielding
Counsel to the President

This is in response to your memorandum request of August 26, 1982, for our opinion on the question whether the conflict of interest statutes, 18 U.S.C. §§ 202-209, will be applicable to the persons who become members of the President's National Security Telecommunications Advisory Committee (hereafter the "Committee"), an entity to be created by the President's issuance of an enabling Executive Order.

Sections 202-209 by their terms impose constraints only on officers or employees of the Government, including part-time or intermittent personnel who are special Government employees (hereafter "SGE's") as defined in 18 U.S.C. § 202(a). The standards for determining whether the members of an advisory committee or the like will be employees or not are set forth in the Federal Personnel Manual, Chapter 735, Appendix C, at pp. 4-5. That portion of the Appendix makes it apparent that a member of an advisory committee may serve in either of two capacities. He may be appointed to provide advice in an individual and independent capacity, in which case he will be an employee of the Government (ordinarily an SGE) and thus subject to the restrictions of §§ 202-209. Alternatively he may be appointed to advance the views of a non-federal organization or group which he represents or for which he is in a position to speak. In that role he will not be an employee of the Government and therefore will not be bound by the conflict of interest statutes.

Here Section 1(a) of the pending Executive Order specifies, among other things, that the Committee shall be composed of no more than 30 members and that they shall "represent elements of the Nation's telecommunications industry." In our opinion the quoted language places the members in the category of industry representatives and consequently removes them from the coverage of §§ 202-209.

The conclusion we have reached is consistent with and based on relevant portions of the National Communications System's Report of July 1982 entitled "Joint Industry-Government Planning for National Security Communications." See subpart I-3, pp. 6-7, and subpart IV-1(a), pp. 31-32, which depict the members of the contemplated Committee as speaking not in an individual and independent role but rather on behalf of their respective corporate or other organizations.

1/5/83

WHAT TO DO WHEN THE WHITE HOUSE CALLS

A Short Primer on Entering Public Life in the Eighties

by Fred F. Fielding*

For the corporate executive invited to assume a responsible position in the Federal Government, the opportunity to engage in public service can be an exciting prospect, promising exhilarating challenges, rewarding experiences and a chance to make a contribution to one's country. For members of the prospective appointee's Board of Directors, there will be some regret at losing one of the corporation's key people; but this can be offset by the pride of knowing that the President of the United States shares the Board's judgment of that person's talents and abilities. And, candidly speaking, a Presidential appointment to a major Government post seldom hurts the reputation of either the individual or the company ^(with) which he ~~was~~ *(was formerly associated.)*

If there are exceptions to this last sentence, most of them tend to arise before one takes office. To enter high-level public service today, one must successfully negotiate a maze of legal and other requirements -- and do so while being exposed to levels of public and media scrutiny that can far exceed anything one is likely to encounter in corporate life. With bad luck -- or bad judgment -- the "exciting prospect" of public service can become one of the most frustrating episodes of one's life.

*Fred F. Fielding is the Counsel to the President of the United States.

When a corporate executive is tentatively selected to fill a Government post, it is generally best for both the candidate and his company if one of two things happens. Ideally, of course, the selection will proceed smoothly and swiftly through the clearance, nomination and confirmation process. ^{1/} If this is not to be, however, it is usually preferable that the tentative selection be aborted early and quietly. Here, as elsewhere, the keys to success are knowledge and preparation. To be sure, the best, most qualified and most prepared of candidates for public office may fall victim to the vicissitudes of politics, sometimes in ways that can be neither predicted, anticipated nor averted. But a candidate who understands the process, who knows the problems he must face and the pitfalls he must avoid, is far more likely either to be confirmed without difficulty, or to realize when to withdraw from consideration before it is too late to avoid embarrassment.

This article attempts to provide some guidance in this area, about which very little has ever been written. It is drawn from practical experience of several years (more than a decade, I am reminded), both in the public and private sector, of being involved in the selection and confirmation of close to 1,000 Presidential appointees. Hopefully, the next few pages will give you a better idea of what to do when you or a member of your company receives that telephone call from the White House.

^{1/} Throughout this article, the discussion will assume that the office in question is one that requires Senate confirmation, as is true of most -- but not all (e.g., White House Staff) -- Presidential appointments to full-time positions. However, many of the points discussed are also relevant to important posts for which Senate confirmation is not required, including positions below the Presidential level.

The Appointment Process -- An Overview

The origins of a particular Presidential appointment are often clouded. What might seem to be a spontaneous selection -- as if the Administration had simply plucked from the private sector "the" individual Central Casting would have sent to fill the job -- may in fact be the result of a veritable campaign for the position, carefully planned and orchestrated by the candidate and his friends and associates. Similarly, ^a~~an~~ seemingly "natural choice" may represent a compromise settled on only after one or another leading contender proved unacceptable to this key Senator, Presidential supporter, or critical group of Presidential supporters. Often, a particular appointment will reflect a mix of these or other factors, such that unraveling the various threads of talent search, personal ambition, patronage considerations and all the rest woven into any given selection will frequently prove impossible even for those intimately involved in making the final recommendation to the President.

I mention this because it is important not to lose sight of the fact that this process of staffing the Government is, from start to finish, inevitably an intensely political one, with all the implications for good and ill that this adjective entails. Also, the way a candidate was selected can, at times, become a factor in the effort to get that individual confirmed -- especially if his so-called "objective" qualifications for a post are questioned. By and large, however, the intriguing business of exactly how persons are "selected" for high appointive office is beyond

the scope of this article. Instead, our journey starts at a later point -- when the White House has tentatively identified its choice for a position, and the tasks of personal and financial scrutiny begin in earnest.

(1) White House Review

The scrutiny starts with the White House Office of Presidential Personnel, which also had primary responsibility for the initial task of identifying the candidate. After the mysterious work of personnel selection has tentatively settled on a person who seems qualified for the job, and appears to have no obvious

disqualifying characteristics, the moment arrives when the individual is asked if he is willing to be considered for the post in question. This question will often be followed by, or asked simultaneously with, a preliminary offer of the job. At this point, before the candidate gives an unqualified response -- and, quite frankly, before he should think an unqualified offer has been made -- certain issues must be addressed and resolved both by the candidate and the Administration.

There is little point in tentatively accepting a position when one knows that there is something in his background that disqualifies him from public service, or that -- fairly or not -- will not withstand public scrutiny. A confirmation hearing should not be viewed as an opportunity to gain public absolution for past "sins," and it very rarely proves to be such. In addition, there are often tremendous personal and financial costs associated with public service, which can easily be overlooked in the euphoria

and excitement of being offered a Presidential appointment. If these matters are not faced at this critical, early stage of the appointment process, the chances for later misunderstandings, disappointments and heartaches are greatly enhanced.

It would probably be good to point out here that everything about this process is not gloom and doom. In my experience, for example, a person who may have assumed for years that some item from his or his family's past is disqualifying is often mistaken. Also, a potential problem that a candidate fears will disqualify him if known may in fact be solvable if dealt with early-on, even though it would prove utterly devastating if learned for the first time under the television lights at a confirmation hearing.

The key point I am trying to make is that it is vital for a candidate to put his cards on the table as soon as discussions with the White House reach the serious stage, and utterly foolish for him not to do so. Remember, potential candidates are, after all, "our" people. We want to get them in office, if it is at all possible, and to avoid embarrassment to them (and to the man for whom we work) if for some reason it is not. In short, here, as in most areas of life, one of the earliest lessons of childhood -- "Honesty is the Best Policy" -- turns out to be right.

If the "courtship" between Presidential Personnel and the candidate results in what one might call an "engagement," the potential nominee will be turned over to the tender mercies of the Office of the Counsel to the President. This stage of the process can be described -- to carry on with our metaphor -- as

a combination of getting everything ready for the "wedding," and making sure the "blood test" reveals no problem and we know in advance the answer to the preacher's traditional question giving everyone present a "last chance" to object. Crucial to all parts of the Counsel's duties are various forms that must be completed by the prospective appointee before a nomination will be permitted to go forward.

Some of these forms authorize certain standard checks, such as the FBI investigation described below, or the Internal Revenue Service report on whether our would-be public official is in the habit of paying his taxes on time. Others involve financial disclosure, another topic we will address in more detail. From the White House perspective, however, perhaps the most important is the "Personal Data Statement" questionnaire. This series of nineteen questions, to be completed in writing by the candidate, covers a very broad range of issues, including financial and business relationships; memberships in political, professional, social and other organizations; involvement in civil litigation or criminal investigations; published writings and public testimony; and any controversial incidents and associations. The last question on the form really sums it all up: "Please provide any other information which you regard as pertinent or which could be the possible source of embarrassment to you, or to the President, if publicly known." This information is reviewed on a confidential basis by the Counsel to the President, and he or one of the attorneys on his staff will interview each candidate. Often, follow-up material

will be requested and evaluated before a final judgment is made.

Throughout this White House review stage -- which continues through the FBI investigation and financial review stages about to be described -- our overriding objective is to achieve one of the two preferred results noted at the outset of this article -- i.e., uneventful confirmation or painless withdrawal. The first, of course, is always the desired outcome, and we do everything possible to see to it that problems -- whether they involve potential conflicts of interest or unfortunate incidents from one's past -- are faced and dealt with before a nomination becomes public. If ~~the problems are simply insoluble~~, however, this is the time to ~~leagues find out before one's colleagues and competitors and thousands~~ ~~of strangers are reading all about it in the newspaper.~~

(2) The FBI Background Investigation

Among the forms each tentatively selected candidate must complete are waiver letters authorizing the Federal Bureau of Investigation to do what is called a "full field" background investigation, and a lengthy document, known as "Standard Form 86," that gives the FBI the information it needs to start the investigation. The Form 86 requires detailed information in a number of areas, e.g., all residences since 1937; all jobs and the reasons for leaving each employment; all visits to foreign countries; names and birthdates of all relatives; and so forth. The FBI will then investigate the candidate's background, and prepare a "summary investigation report" that will be reviewed and analyzed by the Counsel to the President and other lawyers on his staff. If the

nomination goes forward, the report will also be available for review by the Chairman and Ranking Minority Member of the Senate Committee considering the nomination, and, in rare circumstances, by other Senators on that Committee.

Though there is something understandably intimidating about the idea of Special Agents of the FBI looking into one's past, and then preparing reports that are reviewed by high-level Washington officials, there is in fact little one need fear about this part of the process. As a matter of procedure, the reports are held very close. In general, they are available only to the law-
each yershin the Counsel's Office, each of whom fully understands the the probl
and to need for special discretion, and to the Senators who must pass on find out
the nomination. ~~They are not available to Senate staff.~~ 9 of size
And, as far as substance goes, the vast majority of FBI reports on potential nominees make very dull reading indeed!

In this area as others, the problems that do arise will often have their roots in lack of candor. The person who puts down on his Form 86 the fact that he was once dismissed from a job, and explains the circumstances involved, is unlikely to face many problems when the ex-employer tells his own side of the story to an FBI agent. The candidate who lies, hoping the FBI will fail to get in touch with the disgruntled former boss, is -- in addition to making a false statement on a form that must be signed under oath -- scuttling his chances for public office by his own hand. Like everyone else, persons in the White House -- and members of the United States Senate -- tend to take past problems

a lot more seriously if one tries to dissemble about them now. The basic rules are simple: err on the side of over-inclusiveness in responding to the questions, and always tell the truth:

(3) Financial Disclosure and the Office of Government Ethics

Each candidate must also complete an exhaustive financial disclosure report. This form, a principal product of the Ethics in Government Act of 1978, requires a nominee to report, for the current and the prior year, all salary and other income detailed by source and amount. It also requires disclosure of all "interests in property" of the nominee, his spouse and dependent children, with a "range of value" given for each holding. Various additional information -- such as outstanding loans; any continuing relationship with outside employers; the identity of each source of "compensation in excess of \$5,000" -- must also be revealed. For lawyers, all major clients must be listed.

Unlike the White House "Personal Data Statement," the financial disclosure report not only is turned over to the Senate, but also is automatically available to the press and public upon request, once it has officially been filed. By law, the form must be filed with the Office of Government Ethics ("OGE") within five days of formal submission of a nomination to the Senate. OGE, along with the "ethics officer" of the department or agency at which the candidate will be working, must review and certify the form, and approve continuance of any financial holding before the nominee, if confirmed, will be permitted to retain it.

-- the first to undergo a full-scale Presidential transition under the 1978 Ethics Act --

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In this Administration, the virtually unvarying practice has been to have the financial disclosure report prepared and reviewed in draft form, both by the Counsel to the President and OGE, before a nomination goes forward and the final version of the form is formally filed and available to the Senate, press and public. This procedure helps insure that the final disclosure report will comply fully with the law, and also helps the White House and OGE focus ahead of time on whatever special financial arrangements -- e.g., divestiture, or creation of a "blind trust" -- may be necessary in a given case. Also, it allows a hard look -- the last one before the nomination and a candidate's private financial affairs become public -- at whether the prospective nominee is financially and otherwise willing and able to make the adjustments the law requires as conditions to assuming the office.

One may question the degree to which various aspects of the current disclosure and related requirements truly advance official integrity and public confidence therein. Personally, I believe that, with little if any cost to achievement of these objectives, some modifications in the scope, detail and rigidity of present law can be made that might lessen the pain -- financial and otherwise -- for qualified individuals who wish to enter public service. Be that as it may, however, very detailed and very public financial disclosure is an integral part of the present appointment process, and is something each prospective nominee must be prepared to face.

(4) Senate Confirmation

Obviously, the Senate confirmation process involves a number

2/ [FN 2 on DHEW page 10A?]

2/ A detailed review of ways in which the transition from private to public life might be made somewhat easier than it is at present would require a separate article. The type of idea worth exploring might include, for example, providing for deferral of capital gains liability for persons required by conflicts-of-interest rules to divest themselves of significant stock holdings.

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of political considerations that are not central to the present inquiry. As to these, an Administration nominee will receive personal and expert guidance and attention from the White House Office of Legislative Affairs.

However, many of the concerns addressed earlier in the appointment process do carry forward into the Senate. As mentioned above, the financial disclosure report will be turned over to the relevant Senate Committee, and the FBI report will be available to its Chairman and Ranking Minority Member. Also, each Committee will have its own rules and procedures, and frequently its own questionnaire, with respect to ethics and related matters. This questionnaire, which will often rehash the data supplied on the general financial disclosure report on file with OGE, may also become public. Finally, there is the confirmation hearing itself, which can be anything from a short "love feast" to a protracted, antagonistic public hearing, in which the procedures and protections of the courtroom are largely inapplicable.

Before leaving the subject of the Senate, a word of caution may be in order for those who think that "politics" is all that "really counts" in getting a nomination confirmed. Politics is important, of course; but the Senate tends to be genuinely concerned about ethical issues as well. If this ^{is} dismissed by the cynical reader, he is simply mistaken. For the unconvinced cynic, let me add that focusing on "conflict of interest" or similar problems is also a perfectly good technique for defeating a nomination one opposes on political or policy grounds. Thus, a candidate whose nomination may be controversial must be especially careful to have his financial house in order.

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As is readily apparent from our overview, today's candidate for high appointive office must survive unprecedented scrutiny of his past private and financial life. Often, hard decisions are presented about how to resolve financial and other issues, and on whether to go forward with the nomination itself. And, lest one forget, the entire process -- from the initial rumors and speculations about one's candidacy through the final stages of Senate confirmation -- is observed and reported upon by the press.

Plainly, this can be a grueling process. But it is often less traumatic in direct proportion to the degree one is prepared for it. There are also a few specific hints that can help.

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Some Hints for the Board of Directors.

The principal issues faced by a nominee's Board of Directors usually involve the various financial aspects of terminating the relationship with the corporate executive about to become public appointee. The specific items discussed below are the most common ones. As will be seen with respect to each, the best general advice is to develop and adopt written policies ahead of time, when no one can accuse the Board of tailoring its decisions to suit the convenience of a former employee who is assuming a powerful Government position.

Severance pay, like many other matters, must be judged in light of Federal criminal law that prohibits supplementing the income of a public official -- before, during, and after service.

Thus, all severance payments must be clearly and exclusively for past services to the private enterprise, rather than being intended to "help out" or "ease the burden" of what is usually a very significant cut in income for the departing executive. The "past service" question is precisely the factual test applied by the Department of Justice in these circumstances.

Roswell Perkins, one of the few persons who has written in this field, posed some 20 years ago the question a Board should ask itself in reviewing a proposed severance payment: "Would we make the same severance payment if the corporate executive were ~~leaving, with no idea of returning, to accept the presidency of a college or of a charitable foundation, or to enter the ministry?~~ ^{less trauma} ~~If the answer is in the affirmative, it is virtually indisputable that there is a legitimate severance payment.~~ ^{for it.}" ³

How can the Board avoid problems and potential public controversy in this area? I have two suggestions. One, adhere to the past practice of the enterprise in dealing with equivalent executives leaving the corporation under like circumstances, or at least under other "non-adversarial" circumstances (i.e., where the severance payment was not intended to "buy the peace" of someone being let go). The better option, however -- if it is available -- is to follow the corporation's written policy, hopefully adopted some years ago in a "neutral" time, for determining severance pay for a departing executive. If the enterprise does not have such a written policy, develop one before the problem

arises. One may even consider having the Office of Government Ethics review the policy, again in a "neutral" time.

As an aside, this policy should address not only departing corporate executives, but also members of the Board itself. Many will recall the questions raised by the press regarding Attorney General William French Smith's severance pay as an outside Director of a corporation. This controversy had its roots in a very understandable and probably not uncommon situation, in which the corporation felt it had not adequately compensated a Board member in the past and sought to do so upon resignation. The Attorney General obviated further debate by returning the payment; but the controversy might have been avoided had the corporation been following a reasonable, pre-existing, written severance policy.

Moving expenses fall into much the same category as severance pay. People moving from the private sector are often surprised to learn that the Government does not pay such expenses, which can be considerable when one moves a family across the country and into the Washington, D.C. housing market. But a prior employer's reimbursement of moving expenses is almost invariably considered a clear attempt at illegal supplementation of Government salary.

These issues, by the way, do not always arise in a corporate context. I recall one appointee who was presented with a gift of several thousand dollars raised by friends and neighbors to help defray the costs of moving. Resolution: The gift was given to charity. It was clearly a gift, rather than anything more sinister, but was also ruled to be attempted supplementation of salary.

Earned bonuses, vested stock rights and the like are, as a general matter, considered legitimate and almost always may be retained. Problems frequently arise, however, when an appointee is leaving before the normal time for awarding these benefits. As a rule of thumb, a Board should again look to past practice as a guide, and should consider instituting a written corporate policy on the subject. Just remember -- the tests will be whether the Board's action reflects an award for past services, and whether the Board is doing something for one going into Government service that it would not do for others.

Deferred payments of a corporation's obligations to a departing executive can be made, if the amount and terms are reasonable.

Such arrangements are reviewed on an ad hoc basis. For example, payment of \$150,000 severance pay over two calendar years may be reasonable; payment of a fixed sum each year for four years may smack of supplementation and give rise to renewed questions as to the validity of the severance award itself.

In any event, deferred payments should always be evidenced by a note or other formal instrument, making it clear that the right to the payments is fixed, and that the amount is not subject to fluctuation with the rise or fall of the corporation's fortunes. This also avoids potential charges of conflict of interest based on the theory that the public appointee retains a de facto interest in the financial well-being of his former corporate employer.

Some fringe benefit plans are a statutory exception to the legal prohibition against supplementation. By law, a Government

employee may continue to participate in a "bona fide pension, retirement, group life, health or accident insurance, profit-sharing, stock bonus, or other employee welfare or benefit plan maintained by a former employer." ⁽⁴⁾ However, while this permits a departed executive to continue to be covered by a group health plan, for example, it should be at his own expense. Beyond this, one should seek specific guidance and advice, as retention of some benefits can still create a conflict of interest or otherwise inhibit both the former employee and the corporation in future activities.

Also, if the particular fringe benefit is not considered "bona fide" within the meaning of the statute, or otherwise fails to qualify for the statutory exception, its retention may be deemed an illegal supplementation.

A final note on this subject: When making plans to terminate the relationship with a valued employee about to enter public service, remember to make most, if not all, arrangements contingent on confirmation. At times, even a nomination that seems certain to be made and confirmed without controversy or other difficulty may run aground on the hidden shoals of politics. When this happens, one doesn't want to have to undo a lot of "finalized" termination agreements. Also, making arrangements contingent on confirmation allows the employee continued and legitimate access to corporate facilities (e.g., aircraft) and personnel, without the Board arousing the ire of the company's shareholders.

Some Hints for the Prospective Appointee

It is impossible to set down a complete list of "do's and don'ts" for candidates for appointive office, just as it is impossible to "teach" good judgment by writing an article. However, the items noted below may provide some general guidance, and may also help one avoid some of the more common mistakes.

Today, of course, a fundamental question is what constitutes a "conflict of interest"? By and large, the answer is exactly what common sense and the plain meaning of the words suggest.

Specifically, a conflict of interest will exist whenever a Govern-

ment official has a personal interest (financial or otherwise) in

a matter with which he must deal as part of his official responsi-

bilities. Thus, if one has a continuing financial interest in a

former corporate employer, and is presented with an issue that

may have an impact (direct or indirect) on the fortunes of that

corporation, a conflict exists and either divestiture or "recusal"

(i.e., withdrawal from any part in the decision) will be required.

It is important to remember that interests held by a spouse

or dependent children can also create a potential problem. Like-

wise, as a practical matter it is just as important today to avoid

the appearance of conflict as an actual conflict. Experience has

shown time and again that the former can be equally as embarrass-

ing and newsworthy as the latter. I have heard it suggested, only

half-jokingly, that the rule of thumb to follow is, "Do you want

to read about this in The Washington Post?" And, on a more sub-

stantive note, appearance can have a real impact on public confi-

dence in the integrity of Government.

Although the general concept of "conflict of interest" is fairly straightforward, and much in this area depends on simple good judgment, one should also keep in mind that there are specific Federal statutes -- some of which impose criminal penalties -- and standards of conduct regulations applicable to Federal employees. The regulations in particular can be very detailed, and will vary widely from one department or agency to the next.

We all know the adage that "ignorance of the law is no excuse," and this is especially true when one is about to enter public service and the public spotlight. Good sense and good judgment are ~~could not critically~~ important, but should not be trusted to do the job alone.

~~appointment~~ A serious candidate ~~for an~~ appointment should be sure that he is ~~a matter~~ familiar with ~~applicable~~ laws and regulation. The obvious first ~~abilities.~~ step is assembly of the such materials for review, a task where the assistance of the corporation's General Counsel will be helpful. For convenience, the most important general statutes are listed in the footnote below. ¹ OGE and the "ethics officer" of the department or agency (who is frequently its General Counsel) can point one to the specific regulations relevant to any particular appointive position.

A final point in the conflicts of interest area is that some rules apply even after one leaves Government service. These post-employment restrictions -- some of which apply for life -- are intended to prevent abuse of previous public service for subsequent

³ The key statutes are 18 U.S.C. §§ 201-09 and the Ethics in Government Act of 1978, Pub. L. No. 95-521, 92 Stat. 1836, as amended, much of which is codified at 5 U.S.C. App. I. ⁽⁷⁾

private gain. The White House Counsel's Office gives each prospective appointee a lengthy memorandum on this subject. ⁶¹ This, too, is an area that one may want to review with the corporation's General Counsel or his own lawyer before making an irrevocable commitment to accept an appointment.

Another major problem faced by many potential appointees is dealing with publicity -- especially publicity arising before a formal announcement or nomination has been made by the White House. The filling of any major Government post is always surrounded by a great deal of speculation and rumors about who is being considered,

whose chances have been killed by whom, and so on. Sometimes, an individual will purposely float his own name in the hope of creating favorable momentum and keeping competition away -- a tactic that, in my experience, meets with indifferent success at best.

If one is being seriously considered for an important job, the best advice I can give him and his corporate employers is to keep a low profile and not to jump the gun. There are any number of reasons this is the wiser course. Sometimes, something will come up in the FBI investigation that will cause a name to be dropped from consideration. Alternatively, one may voluntarily withdraw because required financial adjustments are too costly, or because some family problem has developed. In any event, if a nomination does not go forward after an individual has made it publicly known that he is "the" candidate, he not only will suffer considerable embarrassment, but may also be plagued for years by speculation as to the "real" reason the appointment floundered.

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6/ The post-employment restrictions applicable to former Government employees are set forth in 18 U.S.C. § 207, which was dramatically broadened by the Ethics in Government Act of 1978. Although the full story is fairly complicated (as is often the case with laws of this sort), the four basic prohibitions can be summarized as follows:

First, the former Government employee is barred for life from acting as a representative in any particular matter involving specific parties in which he previously personally and substantially participated during Government service.

Second, there is a two-year restriction on acting as a representative in any particular matter for which the employee had official responsibility during his last year of Government service.

Third, ~~certain~~ Senior Government Employees are under a two-year restriction after leaving Government service against assisting in representation by making a personal appearance before a Government agency in connection with any matter in which the former Senior Employee could not act as an actual representative.

Fourth, there is a one-year prohibition (also known as the "cooling-off period") against acting as a representative in any matter pending before one's former Government agency.

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In addition, one must remember -- to return to our earlier "courtship" analogy -- that for every appointee there is usually more than one "disappointed suitor." Premature disclosure may give a competitor whose ambitions exceed his honor the chance to lobby against an appointment, which may include attempts to create controversy about the tentatively selected candidate. People do take competition for public office seriously -- in some cases, much too seriously. As any history buff knows, President James A. Garfield was actually assassinated by a "disappointed office seeker"! Obviously, one's life won't be on the line; but talking expose too much and too early could expose one's character and reputation to unfair attack.

the timing. The bottom line is that the timing, planning and execution of public announcement of a nomination should be left to the professionals. It is the President's prerogative to control the timing and impact of his own appointments, and he and his advisers are much better placed than most nominees to know when and how a selection should be made public. The candidate should limit his discussions about the job to his immediate family, to those within the corporation who need to be alerted to the possibility, and to very close friends whose discretion one trusts implicitly. In short, both the candidate and his Board of Directors should deal with the prospective appointment on a "need to know" basis.

A closely related problem involves dealing with controversy, which sometimes develops during the clearance or the confirmation process. When this happens, it is important to remain calm and

objective. The candidate has been requested to make full disclosure to the White House of any potential problems. If he has done so and the White House has made a decision to go forward, he can expect the full support of the Administration both in the press and on Capitol Hill. If a candidate has held back critical information, however, there will obviously be a reevaluation. Like ~~the situation~~ ^(most people) ~~in the recent metal advertisements~~, we don't like "surprises."

Here, as in dealing with publicity, it is best to trust the professionals, rather than relying on one's own judgment in what is a difficult and probably an unfamiliar arena. The judgment ~~calls are often hard~~, and sometimes must be based not only on what seems "fair" but also on what is "politically realistic."

But remember, a nomination means that we believe our candidate is right for the position; and once the nomination has been made, the President's reputation is on the line along with the candidate's. In short, for reasons of substance, policy, loyalty and all the rest, we do not lightly back away even from our nominees who become controversial, as long as they have played straight with us.

One can also help himself in the midst of controversy by remembering that a story can only run for a few days, unless there are additional facts to be reported. One should not keep a story "alive" by his own statements, unless it is vital to get the other side in print to put the controversy in proper perspective. Again, trust the judgment of the professionals. The Washington press corps is comprised of highly skilled reporters, for whom the novice is no match. Their job is to find the news; but it is not the candidate's job to create it.

In light these issues, the question often arises, "Should one retain professional assistance?" As to legal, personal and financial matters, the answer will vary. If a candidate has a relatively simple financial picture about which no controversy is likely to arise in the confirmation process, outside assistance is probably unnecessary. The White House and Executive Branch officials who assist appointees are experienced specialists, and will almost always be able to handle any questions that may come up. Likewise, they are fully prepared and equipped to deal with most "political" aspects of a nomination.

However, if the financial arrangements may be complex or controversial is likely, one should seriously consider retaining the services of a professional. This is important because one will need to be especially careful that forms are properly completed, facts are correctly assembled, "blind trusts" or other arrangements comply with all legal requirements, and so forth. Also, professional assistance in these areas frees the candidate to study substantive briefing materials and handle personal matters. In addition, the professional can serve as a liaison with accountants, the White House, Senate staff, OGE and even the media, without the candidate's becoming bogged-down in decisions and details about complex financial and legal matters. And, as a practical matter, the candidate with a complicated financial picture or controversial appointment must remember that the first obligation of the Counsel to the President's Office is to its client, the President. Ordinarily, this does not lead to any problem, as the goals are

the candidate facing difficult financial and other decisions may find it worthwhile -- and comforting -- to have his own counsel in all deliberations.

The question "Who to choose?" can be more difficult to answer. Washington is full of lawyers. A recent report stated that one of every eight employed adults in the Nation's capital is an attorney; the next highest percentage is found in New York City, where the figure is one in 272. This does not mean, however, that all D.C. lawyers know their way around town. Seek the advice of those you know and trust in Washington, and choose judiciously.

Conclusion

Looking back on these pages, I am somewhat concerned -- as I often am after speaking on this subject -- that I am discouraging talented people from entering public service.

Obviously, that is not my purpose. Rather, I am convinced that those who are most successful in the transition from private enterprise to public service are those best prepared for what that transition entails. Armed with that knowledge, they are almost always better equipped to avoid problems that, in addition to making the appointment process itself more painful, can lessen their substantive effectiveness in office. The person who fears the burdens of entering public life might also be encouraged to know that hundreds of appointees over the last two years have successfully faced the challenges described in this article.

From a larger perspective, it is important to remember that our Nation has a tradition of "citizen soldiers" and "citizen

public servants" -- individuals who have been willing to put aside their private lives and, notwithstanding the costs in money, personal privacy and all the rest, put their talents and energies to work for the country that has so richly blessed us all. This is often done not for personal gain or fame, but out of the sincerest sense of duty.

It is essential that this tradition, which is one of America's greatest strengths, be preserved -- for the observation of Plato some twenty-three centuries ago is no less true today: "The punishment of wise men who refuse to take part in the affairs of government is to live under the government of unwise men."

Conclusion

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