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ETHICS IN GOVERNMENT

TODAY - BRIEF DISCUSSION ON SOME OBSERVATIONS ABOUT
ETHICS IN GOVERNMENT ACT FROM EXPERIENCES OF PAST FIVE AND
ONE HALF MONTHS

-AS ATTORNEYS AND INTERESTED, I HOPE YOU WILL TAKE A FEW
MOMENTS TO CONTEMPLATE SUBJECT WITH ME.

THIS ADMINISTRATION IS FIRST TO HAVE TO COME TO GRIPS
AND ESTABLISH PRECEDENTS
FIRST ADMINISTRATION TO GO THROUGH TRANSITION UNDER REQUIREMENTS
OF ETHICS IN GOVERNMENT ACT - THUS, FIRST TO BE ABLE TO
ASSESS IMPACT OF ACT AND ITS REQUIREMENTS ON RECRUITMENT
AND PLACEMENT OF PRESIDENTIAL APPOINTEES.

-ON HEELS OF WATERGATE, AND ONE OF ITS BY-PRODUCTS = SHAKEN
PUBLIC CONFIDENCE

BURT LANCE, ETC.

ONE OF REACTIONS, AMONG OTHERS, ENACTMENT OF ETHICS IN
GOVERNMENT ACT

PRINCIPAL ASPECTS - THREE-FOLD

- 1) INCREASED AND INFLEXIBLE DIVESTITURE REQUIREMENTS
- 2) PUBLIC DISCLOSURE OF FINANCIAL INTERESTS
- 3) POST-EMPLOYMENT RESTRICTIONS - "REVOLVING DOOR"

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

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

CUMULATIVE IMPACTDIVESTITURE:

MUCH WRITTEN ON ISOLATED CASES - INDIVIDUALS COULD NOT
 UNDERTAKE GOVERNMENT SERVICE - REQUIRED DIVESTITURE TOO
 GREAT OR NOT POSSIBLE

OTHERS - HAS OCCURRED

EXAMPLES: BIZARRE-"OLD FAMILY TRUST"

- HOUSING PARTNERSHIP - HUD
- ENERGY DEPARTMENT = BUILDS LIFE - EXPERT
 NOT ENOUGH PRIESTS AND NUNS WITH EXPERIENCE
 TO STAFF DOE

EACH INSTANCE - PUBLIC LOSES VALUABLE PERSON; WAS THERE
 A LIGITIMATE NEED FOR REQUIRED DIVESTITURE?

DIVESTITURE MAY BE REQUIRED IN SOME INSTANCES

NOW IS THE TIME FOR CREATIVE THOUGHT V. THROWING UP HANDS

IS THERE POSSIBLE TAX REFORM LEGISLATION - CURE DEVASTATING
 IMPACT

CAO GAWS/DESIRE TO SERVE V. NEEDS OF FAMILY

PERHAPS THE ANSWER IS DEFERRAL OF CAP, GAINS - AS WITH SALE OF
 RESIDENCE IF DIVESTITURE IS REQUIRED

SHOULD ADD -- NOT ADVOCATING ANY SPECIFIC SOLUTION TODAY,
 TRYING TO IDENTIFY PROBLEM AND ILLUSTRATE NEED FOR CLEVER,
INSIGHT AND THOUGHT

PUBLIC DISCLOSURE OF ASSETS - WHAT IS PROBLEM:

- SOME PHILOSOPHICAL - NOT NECESSARY AND INVASION OF PRIVACY OTHERS SAY
- COST OF DOING BUSINESS
- WHY LOSE SERVICES IF THERE IS AN ALTERNATIVE?

FACE TWO EXTREMES: PUBLIC=RIGHT TO KNOW OR BE ASSURED
PRIVATE-RIGHT TO PRIVACY

WHERE IS PROPER BALANCE?

- IS IT NECESSARY, AS NOW, LIST ALL ASSETS AND SALARIES?
- ENOUGH TO PROVIDE DATA TO CONGRESS/EXECUTIVE BRANCH
CERTIFY AND MONITOR
- IS IT NECESSARY FOR LAWYER TO LIST PUBLICLY-FORMER CLIENTS
- ENOUGH TO REVEAL SO CAN BE MONITORED OR DISCUSSED AT CONFIRMATION HEARINGS
- IS IT NECESSARY TO KNOW \$100,000 IN STOCKS UNRELATED TO JOB - ENOUGH OVER SET AMOUNT?

WHY PEOPLE OBJECT: PHILOSOPHICAL, BUT MORE

OFFENSIVE - IDENTITY OF PARTNERS IN UNRELATED PRIVATE TRANSACTION

- SPOILING OF CHILDREN
- TARGETS OF THEFT, SOLICITATION, KIDNAPPING

WHERE IS BALANCE?

LINE BETWEEN PUBLIC NEED AND PUBLIC VOYEURISM

I SUGGEST WE ARE BEYOND REASONABLE AT THIS POINT
THE QUESTION IS OR SHOULD BE: WHAT IS REALISTIC?

REVOLVING DOOR: SUBJECT OF EXTENSIVE WRITING - WON'T DWELL
FOR OUR PURPOSES - IMPACTS -

2) CUMULATIVE EFFECT ON RECRUITING

NOT ON SENIOR LEVEL - CABINET

- MID-RANGE=RESTRICT FUTURE=INDIVIDUAL MUST GUAGE IMPACT

IT CAN TIP BALANCE/AND HAS

SOME RESTRICTION IS NECESSARY = HAS BEEN ON BOOKS FOR YEARS

IS THIS NECESSARY; WOULD A WAIVER PROCEDURE BE JUST AS
EFFECTIVE?

IS THERE ANOTHER ALTERNATIVE?

THE RESULTS OF ALL THIS CAN BE SUBTLE AND YET HAVE LONG-RANGE
IMPORTANCE

NOTORIOUS CASES - YOU WILL BE AWARE WHO COULDN'T OR DIDN'T
SERVE

MOSTLY NEVER KNOW - WON'T HEAR

OVER YEARS SUBTLE EFFECT - IF YOUNGER/MID-RANGE NOT

ATTRACTIVE OR FEEL PRICE IS TOO HIGH OR PRECLUDED - YOU

LOSE ABILITY TO CALL UPON THEM LATER IN THEIR LIFE - HIGHER,

MOST RESP. TO WHICH THEY COULD OTHERWISE BRING PRIOR

EXPERIENCE

OTHERS, SPECIALISTS, WILL NEVER BE PRESENT TO PROVIDE,

SEASONED EXPERIENCE, JUDGMENT AND EXPERTISE TO THE PUBLIC

REMEMBER: NOT DEALING WITH STANDARDS OF CONDUCT (ACCEPTANCE OF FAVORS - PREFERENTIAL TREATMENT, ETC.)

WHEN DEALING WITH CONFLICTS OF INTEREST, REALLY DEALING WITH APPEARANCES

IF SOMEONE COMES INTO GOVERNMENT WITH LARCENY IN HIS OR HER HEART, OR IS SUSCEPTIBLE TO ITS LURES, ALL THE DISCLOSURE AND DIVESTITURE LAWS IN THE BOOKS WILL NOT STOP IT.

BEAUTY WILL NOT COME AT CALL OF A LEGISLATURE

LAWS DO NOT INSTILL ETHICS

WE ARE DEALING WITH PROBLEM OF PUBLIC CONFIDENCE

WE ARE DEALING WITH PROBLEM OF NEED TO ATTRACT VERY BEST, MOST COMPETENT, EXPERIENCED.

** AT THE POINT WHERE LAWS DESIGNED TO PROTECT PUBLIC BECOME THE VERY OBSTACLES TO PROVIDING PUBLIC WITH VERY BEST, MOST COMPETENT PEOPLE TO PROVIDE PUBLIC SERVICE, THE LAWS HAVE CEASED TO FULFILL THEIR PURPOSE

--THE PUBLIC IS THEN NOT BEING SERVED BY ITS LAWS

I SAID EARLIER - I WANTED YOU TO CONTEMPLATE THIS SUBJECT WITH ME.

THIS IS NOT PARTISAN PROBLEM/DIRECTOR OF OGE - WORKING TOGETHER

IT IS NOT AN EASY POLITICAL TASK TO CALL FOR REFORM OF
ETHICS LAWS - WHEN YOU ARE OSTENSIBLY CALLING FOR LESS
RESTRICTION

THAT IS NOT WHAT IS CONTEMPLATED, BUT IT COULD BE UNFAIRLY
CONSTRUED

WHAT WE SEEK - RIGHT FORMULA

TO BALANCE - PUBLIC NEED FOR CONFIDENCE

WITH RIGHTS OF INDIVIDUALS WILLING TO DO
PUBLIC SERVICE

WE SEEK NOT THE LOOSENING OF ETHICAL STANDARDS,

BUT REALISTIC VEHICLE TO ACCOMODATE

- PUBLIC'S NEED FOR CONFIDENCE
- INDIVIDUALS RIGHT TO PRIVACY
- PUBLIC'S RIGHT TO HAVE SERVICES OF ITS
MOST TALENTED MEMBERS

YOUR COMMENTS, OBSERVATIONS, INGENUITY, AND SUPPORT WILL
BE APPRECIATED .

THANKS, HAVE AN ENJOYABLE CONFERENCE.

(Full)

Talk to WH Fellowships Commission

Friday, January 14, 1983

- ° Thank you

- ° Delighted to have chance to speak to friends and fellow "Commissioners" as designated hitter for WH Chief of Staff Jim Baker

- ° Sorry Jim couldn't be here, as he had wanted to be.
[Reason/explanation for Baker absence?] Asked that I convey his apologies

- ° So instead of Chief of Staff, you get "House Lawyer." Sort of trading down -- you should at least get a "special assistant to be named later" thrown into the deal

- ° But also get someone with special concern and involvement in the program that is our common interest -- which is, of course, WH Fellows program

- ° Thinking about this before coming over here today, reflected that for me -- as I suspect is true for many of you -- work on WH Fellowships Comm one of the most satisfying duties I have

° Part has to do with diversity of Commissioners themselves. Candidly, when you think about it, we are a pretty interesting aggregation of people to be sitting on any kind of board together, much less a Gov't agency of sorts. For me, makes our meetings a special treat -- truthfully, despite work of poring over resumes and interviews and the rest, in many ways our meeting last year in making final selections more relaxing and enjoyable than many vacations I've had -- something largely due to this group.

° Part also has to do, of course, with working with Jim Roberts and others on the Commission staff. All learned that they are professional, competent; but most important, committed to the program and care deeply about what they do. We owe them our thanks ...

° Mainly, though, has to do with our work here -- which involves becoming very well acquainted with many highly talented young men and women, as part of introducing some 15 or so to a year of working at highest levels of our Gov't

° All of us understand this, of course, and I hope take some satisfaction from it. But I suspect particularly appreciated by those, like me, who have moved in and out of Gov't service over the years

° In this process, one learns a good deal about what this grand experiment of Founding Fathers is really all about, in practice; one also loses a number of illusions about how the way things work and don't work -- illusions that the Founders probably never suffered from; and one also learns -- it should be said -- that participating in an active, responsible way in the business of self government can be a great deal of fun

° All of this underscores -- in a special, personal way -- value of what WH Fellowships Program seeks to do for those few who make it all the way through the selection process. It is difficult task to make judgments about the talents and characters of so many talented individuals, particularly when one must do so by Committee. But task is worthwhile because I think we really are making contributions not only to development of individuals selected, but to our country and its Gov't

° For the individuals, giving them what can and should be unparalleled learning experience.

° Some things about Gov't you simply can't learn in private sector. Convenience, for example, of having paycheck so small that you can cash it with any cabbie.

- ° Also learn that there really are certain kinds of questions that only Gov't bureaucrats ask of each other. One of my favorites -- early in Administration -- [Mondale letter]

- ° Learn also that you have to play by rules; must respond to these things in spirit in which they're offered; anything else be ignored. Hence [Mondale response; followed by Webster letter]

- ° But you also learn some more valuable things -- things necessary to know if one is to be effective in business of Gov't. One of most important is life in fishbowl, where it is simply true -- however trite may seem to some -- that what is "appearance" often becomes the "reality" with which one must deal if goals are to be accomplished.

- ° Consider, for example, something our office in WH deals with -- Ethics in Gov't Act and high-level Gov't employees

- ° Reaction to Watergate; Bert Lance controversy, etc. Detailed disclosures; strict conflicts of interest rules -- divestitures, recusals; strict rules even about what you can do after you leave Gov't. First Administration to go through transition under Act; our office handles a great deal of this

° Difficult; complicated; often frustrating, for us and appointees. Especially so since one of first things you realize is has little to do with ethics, per se; has almost everything to do with appearance of ethics.

° Problems that occasionally arise rarely have to do with someone who is dishonest or out to line his own pockets; almost always have to do with appearance of conflict or the like, judged by standards of so-called "post-Watergate" era, in which -- among other things -- press is self-consciously adversarial and suspicious

° In short, operating principle not "Honesty is Best Policy" so much as "Caesar's Appointees Must Be Above Suspicion"

° So one learns that Gov't often overreacts to perceived problems; loses sight of Mark Twain warning:

"We should be careful to get out of an experience only the wisdom that is in it -- and stop there; lest we be like the cat that sits down on a hot stove lid. She will never sit down on a hot stove lid again -- and that is well; but also she will never sit down on a cold one anymore."

° But one also learns that does little good simply to bemoan. Not to say that we don't look for ways to change and improve. But does mean that responsible response is to learn that this is feature of public service in our era; and that the true public servant learns to deal with it in way that won't interfere with his ability to make contribution.

° This one very important lesson, I think, that WH Fellows get chance to learn. One also learns its true as to substantive matters. For example, last year's Executive Orders on intelligence activities.

° Virtual consensus among wide variety of individuals that there had been over-reaction to "disclosures" of few years ago, that balance needed to be restored. Administration carefully studied; long hours, many drafts, many months of work; our office, again, had chance to be involved in this.

° Hopefully, goes without saying to this audience that there was no intent or desire or "plan" to start "domestic spying" or anything of sort; also, the actions President took did nothing like this. But press coverage focused from beginning on precisely this theme -- and this "appearance" become a kind of "reality" with which one had to deal

- ° Thus, saw headlines reading "CIA Doublespeak Masks Proposals for Homespy and Datahide." "Teasers" on network news shows saying "CIA Among Us" -- this as teaser for story that quoted Senator Moynihan of Senate Intelligence Committee saying that important point was Administration had been very sensitive to almost all concerns raised on Capitol Hill on this matter

- ° Again, WH Fellows get chance to learn that this is often the atmosphere in which the most crucial decisions affecting our country are made. And -- while one can comprehend this kind of thing intellectually -- in a very real sense you don't fully understand it -- and hence don't fully understand Gov't -- until you've been through it

- ° Hopefully, WH Fellows also learn, however, that proper response is neither cynicism nor despair. Often tell legal audiences, in discussing these kinds of problems, that the vice of public misunderstanding of much that goes on in law and Gov't is flip side of a virtue -- namely, that the public deeply cares, in this country, about rule of law. Same is true more generally -- public deeply cares about self-gov't, democracy, all the things we all first learned about in civics class long ago.

° At same time, in addition to doing something for Fellows, doing something for Gov't.

° Long history of "citizen soldiers" and "citizens politicians." President deeply committed to this concept -- his own career, in many ways, a demonstration. Reason, in part, for emphasis on private sector initiatives, involvement, volunteer participation, so forth. This program, in many ways, reflects same ideals.

° Need for professional civil servants, of course. Don't mean to malign them at all. But need also for constant influx of talented people from the world of business and world of ideas. Not just that it makes Gov't more efficient, or run better; also keeps Gov't close to people it serves, rather than something distant, separate, run by "them" to affect "us."

° Tradition of individuals willing to put aside private lives, and -- despite costs in money, personal privacy, all the rest -- put talents and energies to work for country is one of our greatest strengths.

° Essential we preserve it -- as Plato said, "The punishment of wise men who refuse to take part in the affairs of government is to live under the government of unwise men."

° I like to think -- as we pore over resumes, interview all these bright young men and women, and do our best to make these well-nigh impossible judgments about which of them merits selection -- that we are helping to preserve that tradition, by seeing to it that some of wise young men and women learn first-hand about this special system under which we are blessed to live.

° Thank you very much

MAILED 8 1983
revised
JOAN

MEMORANDUM

JAN 20 1983

SUBJECT: Formal Advisory Opinion 83 OGE 1
FROM: David R. Scott
Acting Director *David R. Scott*
TO: Designated Agency Ethics Officials

Enclosed is a copy of a recent formal opinion issued by this Office. It addresses the question whether, or under what circumstances, a federal employee's vested rights in a private corporation's pension plan constitute a financial interest under 18 U.S.C. § 208.

A request for an opinion on this issue was received by this Office on August 11, 1982. A notice of that request, including a request for comments, was circulated shortly thereafter to all executive branch Designated Agency Ethics Officials. We received many comments presenting a wide variety of views, and we have taken all comments into consideration in the preparation of this opinion.

It was suggested by some that a government employee having vested rights in a pension plan does not have a financial interest in matters affecting the sponsoring organization if the plan is insured by the Pension Benefit Guaranty Corporation. We could not accept that view. See enclosed opinion at page 4. Nor could we authorize the exemption by general rule or regulation of financial interests held as a result of pension rights, except under very limited circumstances. See opinion n. 4.

Briefly, our conclusions are as follows: A government employee's vested rights in a pension plan give him a financial interest in a particular matter whenever the employee, as a result of such vested rights, is in a position to gain or lose from developments in or resolution of the matter. Whether a financial interest exists in any particular case depends on both the nature of the particular matter and the terms of the pension agreement; determinations must be made on a case by case basis. The typical pension plan is so intertwined with the sponsoring organization that a government employee holding vested rights in the plan will be deemed to have a financial interest in matters affecting the organization, unless the employee can show otherwise. The Office of Legal Counsel, Department of Justice was consulted on and did concur in this opinion.

Enclosure

United States of America
**Office of
Government Ethics**

Office of Personnel Management
Washington, D.C. 20415

83 OGE 1

January 7, 1983

Opinion Issued to a Department's Designated Agency Ethics Official

This is in response to your August 11, 1982, request for a formal advisory opinion on the question "whether, or under what circumstances, a federal employee's vested rights in a private corporation's pension plan constitute a 'financial interest' under 18 U.S.C. § 208, so as to bar the employee's participating in a contract or other particular matter involving that corporation." ¹

Section 208(a) reads as follows:

Except as permitted by subsection (b) hereof [providing for waivers], whoever, being an officer or employee of the executive branch of the United States Government, of any independent agency of the United States, a Federal Reserve Bank director, officer, or employee, or of the District of Columbia, including a special Government employee, participates personally and substantially as a Government officer or employee, through decision, approval, disapproval, recommendation, the rendering of advice, investigation, or otherwise, in a judicial or other proceeding, application, request for a ruling or other determination, contract, claim, controversy, charge, accusation, arrest, or other particular matter in which, to his knowledge, he, his spouse, minor child, partner, organization in which he is serving as officer, director, trustee, partner, or employee, or any person or organization with whom he is negotiating or has any arrangement concerning prospective employment, has a financial interest—

Shall be fined not more than \$10,000, or imprisoned not more than two years, or both.

¹ By letter dated August 18, 1982, you were notified that this Office had reviewed your request and had determined in accordance with 5 C.F.R. §738.305(a)(1) that it was one which the Office would answer with a formal opinion. Shortly thereafter we circulated to all executive branch Designated Agency Ethics Officials a notice of your request, seeking their views on the issue raised. We received many valuable comments, and we have taken them into consideration in the preparation of this opinion.

At the outset it is worthwhile to note that our inquiry under the statute is whether, or under what circumstances, a government employee's vested rights in a private corporation's pension plan give him either a direct or derivative financial interest in a particular matter, rather than when or whether the employee has a financial interest in the corporation.²

A government employee has a financial interest in a particular matter when there is a real possibility that he might gain or lose as a result of developments in or resolution of the matter. Section 208 does not require that the financial interest be substantial. It is not necessary that the potential gain or loss be of any particular magnitude. Nor must the potential gain or loss be probable for the prohibition against official action to apply. All that is required is that there be a real, as opposed to speculative, possibility of benefit or detriment.³

The short answer to your question, then, is that a government employee's vested rights in a private corporation's pension plan give him a financial interest in a particular matter whenever, by virtue of such vested rights, the employee is in a position to gain or lose from developments in or resolution of the matter. Whether a financial interest exists in any particular case will thus depend on both the nature of the particular matter and the

² See, by way of contrast, the predecessor of section 208, which provided:

Whoever, being an officer, agent or member of, or directly or indirectly interested in the pecuniary profits or contracts of any corporation, joint stock company, or association, or of any firm or partnership, or other business entity, is employed or acts as an officer or agent of the United States for the transaction of business with such business entity, shall be fined not more than \$2,000 or imprisoned not more than two years, or both. 18 U.S.C. § 434 (1958).

Under section 434, the appropriate inquiry was whether the government employee had a financial interest in the business entity. United States v. Mississippi Valley Generating Co., 364 U.S. 520 (1961); United States v. Chemical Foundation, Inc., 272 U.S. 1 (1926).

³ Financial interests that are insubstantial, remote, or inconsequential can be dealt with under the waiver provisions of 18 U.S.C. § 208(b), which provides in pertinent part:

Subsection (a) hereof shall not apply (1) if the officer or employee first advises the government official responsible for appointment to his position of the nature and circumstances of the judicial or other proceeding, application, request for a ruling or other determination, contract, claim, controversy, charge, accusation, arrest, or other particular matter and makes full disclosure of the financial interest and receives in advance a written determination made by such official that the interest is not so substantial as to be deemed likely to affect the integrity of the services which the government may expect from such officer or employee, or (2) if, by general rule or regulation published in the Federal Register, the financial interest has been exempted from the requirements of clause (1) hereof as being too remote or too inconsequential to affect the integrity of the government officer's or employee's services.

terms of the pension agreement. Because of the broad range of variables in each of these factors, we have found it impossible to devise a formula that will provide the answer, in advance, to every question that might fall within the scope of your broad inquiry. It is possible, however, to make some general statements about some commonly occurring situations.⁴

Pension plans come in many shapes and sizes, and we readily concede that familiarity with all of the variations is beyond the capacity of this Office. However, we understand that in a typical plan contributions are made by the employer, the employee, or both; the funds are held by trustees, who may or may not be employed by the sponsoring organization; and the funds will be invested, often but not always, in the stock of the sponsoring company. Most plans fall into two major categories: defined contribution plans and defined benefit plans. In the case of defined contribution plans, a separate account is maintained for each participant in the plan, and the amount of benefits paid upon retirement is a function of the amount contributed and investment performance. In the case of defined benefit plans, contributions to the plan are held and invested together, and each participant receives a fixed amount of benefits when he retires. In some cases pension benefits are paid simply by the purchase of an annuity for each participant.⁵

This Office and the Office of Legal Counsel at the Department of Justice have consistently taken the position that when a government employee has vested rights in a pension plan of a corporation, and the pension plan holds stock of the corporation, the employee ordinarily has a financial interest in matters affecting that corporation.⁶ There is unquestionably a real possibility that the employee may gain or lose as a result of the

⁴ Whether or not a financial interest exists depends on a number of factual variables. Therefore, we do not believe it possible to determine in the abstract whether a vested interest in a pension plan is a "financial interest" for purposes of § 208(a). Whether or not a financial interest in a matter held by virtue of vested rights in a pension plan will be "too remote or too inconsequential" to affect the integrity of the government employee's services will also depend on both the nature of the matter and the terms of the plan. Consequently, a waiver by general rule or regulation of all financial interests held as a result of pension rights would not be proper under § 208 (b)(2). However, it may be possible for an agency to determine that financial interests held in a commonly occurring type of particular matter as a result of employee held rights in certain kinds of pensions do meet the criteria for waiver under § 208(b)(2), and we would have no objection to a waiver by general rule or regulation under such circumstances.

⁵ For a thorough treatment of the characteristics and operation of various types of pension plans see D. McGill, *Fundamentals of Private Pensions* (4th ed. 1979).

⁶ See, e.g., February 3, 1978, Memorandum from John M. Harmon, Assistant Attorney General, Office of Legal Counsel to Barbara Allen Babcock, Assistant Attorney General, Civil Division 7-9. See also R. Perkins, *The New Federal Conflict of Interest Law*, 76 Harv. L. Rev. 1113, 1131 (1963) and Association of the Bar of the City of New York, *Conflict of Interest and Federal Service* (Cambridge, Mass.: Harvard University Press, 1960), p. 218.

outcome of the matter, and this is all § 208 requires.⁷ We are also of the view that where a pension fund is controlled by employees of the sponsoring organization, the government employee ordinarily has a financial interest in matters affecting the organization. This is because the employee/trustees are acting as representatives of the sponsoring organization, and their management of the plan may be affected by developments in matters affecting that organization.

In your request for our opinion, you suggested that even where the pension plan holds stock of the sponsoring organization and/or is controlled by employees of the organization, a government employee having vested rights in the plan does not have a financial interest in matters affecting the organization if the plan is insured by the Pension Benefit Guaranty Corporation (PBGC). We do not agree.

Title IV of the Employee Retirement Income Security Act of 1974 (ERISA) established the PBGC to provide termination insurance covering most defined benefit pension plans. Upon termination of a covered plan, the PBGC guarantees the payment of benefits vested under the plan within the limits specified in ERISA. Our review of the statute and our consultations with attorneys at the PBGC and the Department of Labor have led us to conclude that the insurance payments payable under ERISA upon plan termination will often if not always be less than the benefits a participant would receive upon retirement from a viable pension fund.⁸ Consequently, coverage by ERISA does not obviate the real possibility of loss which is sufficient to create a financial interest under 18 U.S.C. § 208. Moreover, the availability of plan termination insurance is not relevant to the possibility that a government employee may benefit from the outcome of matters having a beneficial effect on the organization sponsoring the plan.⁹

⁷ Of course, there may be some flexibility in the phrase "matters affecting the corporation", but virtually all matters affecting a company can affect the value of its stock, and an employee with vested rights in the pension plan will have a financial interest in any such matter. For purposes of § 208(a), neither the value of the employee's vested rights nor the magnitude of the plan's stock holding is of consequence. These factors may, however, be significant for purposes of individual waivers under § 208(b)(1).

It is conceivable that a government employee will have a financial interest in matters affecting other companies the stock of which is held by a pension plan in which he has vested rights. Little attention has been given to this type of situation in the past, perhaps because of § 208's requirement that a financial interest be known in order for the ban on participation to apply. We see no need to focus on the issue here but note that it may present problems in some particularized cases.

⁸ See McGill, supra note 4, chapter 21 and the relevant statutory provisions (codified at 29 U.S.C. § 1301 et seq.) and regulations (29 C.F.R. Chapter XXVI).

⁹ We emphasize that our analysis does not by any means foreclose a showing in a particular case that the availability of insurance coupled with particular pension plan terms viewed in connection with a particular matter would result in a showing of no financial interest under § 208 (a) or a waivable interest under § 208 (b)(1). See pp. 2-3 supra.

Even where the pension plan under consideration neither holds stock of the sponsoring organization nor is controlled by organization employees, the determination whether a financial interest in a matter exists, and if so whether it is waivable, must be made on a case by case basis. Where an annuity purchased for a government employee under a pension plan has been fully paid for, he will ordinarily not have a financial interest in matters affecting the sponsoring organization. However, he may under some circumstances have a financial interest in matters affecting the company responsible for making the annuity payments. In the case of a defined contribution plan, where contributions are no longer being made on behalf of the government employee and his account is held by an independent trustee, it seems that the possibility that the employee might gain or lose as a result of matters affecting the sponsoring organization is purely speculative and thus not cognizable under § 208(a). Where, on the other hand, the government employee's vested rights are in a defined benefit plan, matters affecting the sponsoring company may well affect the company's ability to maintain adequate funding levels or to pay benefits when due with the result that the government employee has a financial interest in such matters under § 208(a). The provisions of ERISA do not change our conclusion, although the availability of insurance may, along with other factors, be relevant to a decision whether a waiver is appropriate under § 208(b)(1).

In sum, we recognize that making case by case determinations regarding financial interests that arise from pension plan participation may occasionally burden your agency and others. Nonetheless, we are constrained to conclude that such determinations are required. It has been our experience that the typical pension plan is so intertwined with the sponsoring organization that a government employee holding vested rights in the plan must be deemed to have a financial interest in matters affecting the organization. We feel that the burden is properly on the government employee participating in a pension plan to show otherwise.

In accordance with the provisions of 5 C.F.R. § 738.308(a)(2) we have consulted with the Office of Legal Counsel of the Department of Justice prior to issuing this formal advisory opinion. We are authorized to state that the Office of Legal Counsel agrees with our analysis and conclusions.

Sincerely,

David R. Scott
Acting Director

DIRECTORS & BOARDS

Volume 7 Number 3

Spring 1983

*file -
conflicts*

What to Do When the White House Calls

What Makes a Company Excellent?

The Case for Financial Restructuring

Business Leaders Audit Government Productivity

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What to Do When the White House Calls

*A guide to negotiating the legal,
financial and political maze of a Presidential appointment.
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 formerly associated.



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But 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.

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, the selection will proceed smoothly and swiftly through the clearance, nomination and confirmation process. (This 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.) If swift confirmation 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 avert-

ed. 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.

I will attempt to provide some guidance in this area, about which very little has ever been written. My advice 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, I 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.

When the scrutiny begins

By and large, the intriguing business of exactly how persons are "selected" for high appointive office is beyond the scope of this article (see sidebar on the appointment process). 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.

Taking the "blood test"

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 de-

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scribed 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 I will address in more detail.

The most important form

From the White House perspective, however, perhaps the most important is the "Personal Data Statement" questionnaire. This series of 19 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 — uneventful confirmation or painless withdrawal. The first 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 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

No Formula in Selection Process

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 seemingly "natural choice" may represent a compromise settled on only after one or another leading contender proved unacceptable to this key Senator, or to that

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.

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.

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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 lawyers in the Counsel's Office, each of whom fully understands the need for special discretion, and to the Senators who must pass on the nomination. And as far as substance goes, the vast majority of FBI reports on potential nominees make very dull reading indeed!

Scuttling their own chances

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 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 chil-

dren, with a "range of value" given for each holding. Various additional information, such as outstanding loans, any continuing relationship with outside employers, or the identity of each source of "compensation in excess of \$5,000," must also be revealed. For lawyers, all major clients must be listed.

Focus on special financial arrangements

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.

In this Administration — the first to undergo a full-scale Presidential transition under the 1978 Ethics Act — 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

The press raised questions regarding Attorney General William French Smith's severance pay as an outside director of a corporation.

enter public service. 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. Right now, 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 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 is 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 statement 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.

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.

Some hints for the board

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 a 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? If the answer is in the affirmative, it is virtually indisputable that there is a legitimate severance payment."¹

¹Perkins, *The New Federal Conflict-of-Interest Law*, 76 HARV. L. REV. 1113, 1139 (1963).

If a nomination runs into difficulty, you don't want to have to undo a "finalized" termination agreement.

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 "nonadversarial" circumstances (i.e., where the severance payment was not intended to "buy the peace" of someone being let go). The better option, 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

The Washington press corps is comprised of highly skilled reporters, for whom the novice is no match.

From Boardroom to Cabinet Room

The following is a partial list of Reagan appointees and the posts they held with major corporations before entering government service:

Malcolm Baldrige, Secretary of Commerce
Chief Executive Officer, Scovill Inc.

Richard D. DeLauer, Under Secretary of Defense for Research and Engineering
Executive Vice President, TRW Inc.

Guy W. Fiske, Deputy Secretary of Commerce
Executive Vice President and Director, General Dynamics Corp.

Robert W. Mehle Jr., Assistant Secretary of the Treasury for Domestic Finance
Senior Vice President, Dean Witter Reynolds Inc.

Craig A. Nalen, President, Overseas Private Investment Corporation
Chairman of the Griswold Companies; formerly, Chairman, President and Director, STP Corp.

Donald T. Regan, Secretary of the Treasury
Chairman and Chief Executive Officer, Merrill Lynch and Co. Inc.

John S. R. Shad, Chairman of the Securities Exchange Commission
Vice Chairman of the Board, E. F. Hutton Group Inc.

George P. Shultz, Secretary of State
President and Director, Bechtel Corp.

W. Paul Thayer, Deputy Secretary of Defense
Chairman and Chief Executive Officer, LTV Corp.

Caspar W. Weinberger, Secretary of Defense
General Counsel, Vice President and Director, Bechtel Corp.

This list is illustrative, not exhaustive. Also, a number of Presidential appointees to full-time positions whose principal private occupations were in other fields — e.g., law — served as directors of major corporations. In addition, a number of chairmen, chief executive officers, presidents and other senior corporate officials from different companies serve as Presidential appointees to various part-time government advisory boards and commissions.

Floating your own name is a tactic that meets with indifferent success at best.

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.

Test of board's action

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 institute 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 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 ex-

ception 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." 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.

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 rousing the ire of the company's shareholders.

Hints for the appointee

Now for some advice to the prospective appointee. It is impossible to set down a complete list of "dos 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 provide 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 government official has a personal interest (financial or otherwise) in a matter with which he must deal as part of his official responsibilities. 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. Likewise, as a practical matter it is just as important today to avoid the appearance of conflict. Experience has shown time and again that this can be equally as embarrassing and newsworthy as an actual conflict. 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*?" On a more substantive note, appearance can have a real impact on public confidence 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 simple federal statutes — some of which impose criminal penalties — and standards of conduct regulations applicable to federal employees. The regulations 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 critically important, but should not be trusted to do the job alone.

A serious candidate for an appointment should be sure that he is familiar with applicable laws and regulation. The obvious first step is assembly of such materials for review, a task where

Should You Retain Your Own Counsel?

In light of the issues involved in the appointment process, 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 are complex or controversy is likely, the candidate 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.

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 our goals and the candidate's are mutual; but 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.

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The candidate may find it worthwhile and comforting to have his own legal counsel in all deliberations.

People are often surprised to learn the Government does not pay moving expenses.

the assistance of the corporation's general counsel will be helpful. The most important general statutes are listed in the footnote below.² OGE and the "ethics officer" of the department or agency 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 private gain. The White House Counsel's Office gives each prospective appointee a lengthy memorandum on this subject (see sidebar). 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.

Floating one's own name

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 filing of any major Government post is always surrounded by a great deal of speculation and rumors about who is being considered, who is on the "short list," 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 why this is the wiser course.

Sometimes, something will come up in the FBI investigation that will cause a name to be dropped from consideration. Or 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.

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

²The key statutes are 18 U.S.C. §§207-09 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.

Life After the White House: Four Prohibitions

The postemployment 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.

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 too much and too early could expose your character and reputation to unfair attack.

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.

Remain calm and objective

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 most people, we don't like "surprises."

Here, as in dealing with publicity, it is best to trust the professionals, rather than relying on one's good judgment in what is a difficult and probably 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 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.

Best prepared fare the best

Looking back on what I have written, I am 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 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.

It is essential that this tradition, which is one of America's greatest strengths, be preserved. The observation of Plato some 23 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." ■

The confirmation hearing itself can be anything from a short "love feast" to a protracted, antagonistic public hearing.