Testimony of

Norman J. Ornstein
Resident Scholar
American Enterprise Institute

on

The State of the Presidential Appointments Process

2 p.m., Wednesday, April 4, 2000
Room 342, Senate Dirksen Building

The presidential appointments process is broken. The process of selecting nominees, vetting them, and confirming them is unconscionably long, overly complex and unnecessarily invasive of individual privacy.

No single institution is responsible for the problem. The administration takes too long to find and vet nominees. The Senate takes too long to confirm nominees. There are overlapping jurisdictions among the many agencies and offices involved in the process. The media and outside interest groups contribute substantially to the problem by adopting a cynical attitude that everybody going into public life has some base motive or can't be trusted to protect the public trust, by obsessing on scandals or hints of scandal, and by emphasizing a "gotcha" mentality about presidential appointees.

In order to better understand how the appointments process needs fixing, let me lay out the problems along a timeline beginning with the pre-election period and continuing through the transition, administration, and post-administration.

Pre-election planning for appointments needs improvement.

Planning for a transition is a substantial job. Taking control of an administration and filling more than 3000 posts cannot be done efficiently without significant pre-election planning. And it is hard to do such planning when most of the candidate's

time and resources are dedicated to winning the election. Planning is also often hampered by the fear that the public will view planning before an election as presumptuous.

For this reason most planning is done secretly. It is often underemphasized. And it is sometimes not coordinated with other players in the campaign, which can lead to conflicts between transition and campaign officials later in the process. The Carter campaign had an extensive transition planning operation run by Jack Watson, but it was wholly separate from the campaign, and the early parts of the Carter transition were marked with conflict between the pre-election planning staff and campaign staff. Similarly, the Clinton transition was not as smooth as it might have been because Mickey Kantor, who had headed the transition planning effort, was opposed by campaign officials, and did not head up the transition as many had expected. The counter example is the Reagan transition where Pendleton James started his planning operation early, but he regularly reported to Edwin Meese on the campaign.

A major task of pre-election planning is to understand the large number of positions to be filled and the qualifications for those positions, and to begin to identify people who might serve in an administration.

The challenge is both to legitimize pre-election planning and to make it a clear priority for presidential candidates. In response to the criticism that such planning is presumptuous, we should remind people of the significant hurdles a new administration faces in taking office and argue that a responsible presidential candidate is one who plans ahead for such a large task.

The pre-election process could benefit from transition funding, the creation of liaisons in the executive branch and the Congress to aid such planning, a role for the parties in such planning, and a study of past experiences of pre-planning.

The selection of nominees must take place in a short period of time.

The transition period and early part of the administration places the greatest demands on the personnel operation. It is important to allow the personnel operation to staff up during the transition and the first year to handle the crush of nominations at the start of an administration.

There are too many full field FBI background checks

By an executive order in the Eisenhower administration, full-field background checks are required for all political appointments requiring Senate confirmation. This requirement slows the process and unnecessarily invades the privacy of nominees. Background checks may be warranted for positions with national security implications or department or agency heads. But there is no reason that an Assistant Secretary of Education should have to undergo such a background check. A full field FBI background check for every PAS position is a relic of the cold war and the contemporary scandal mentality.

Nominees worry about the privacy of their FBI files

Nominees worry that personal details gathered in FBI checks will be made public. Provisions should be made to limit access to raw FBI files and to notify the nominees of the content of their own files and who will have access to them. When Anthony Lake was nominated for National Security Adviser, Congress demanded that every member of the reviewing committee see the FBI report. Similarly, in 1989, John Tower's FBI file was widely disseminated—and leaks, by many accounts, fueled rumors about Tower's personal life that were deeply damaging to his reputation and confirmation chances.

Nominees need a shepherd to help them through the process

Appointees from past administrations complain that they were often ill-informed about the process and their progress through it. Further, many appointees do not have executive branch experience. The Presidential Transition Act of 2000 will help in this regard by allowing transition funds to be spent for orientations. But more can be done. The administration, the Senate, and committees could designate individuals to act as shepherds for nominees, to keep them abreast of developments and provide advice.

The forms are too complicated

Nominees are required to fill out forms that are overly long and

have overlapping or redundant questions. Terry Sullivan of the James A. Baker Institute has calculated that the average nominee is asked 234 Questions. Of those 8% are identical questions and a full 42% ask for the same type of information, but require it in different formats. The obvious solution is to simplify and harmonize the forms. But this recommendation has been around for many years, and there has been little progress. Recognizing the difficulty of getting so many institutions to change their forms, the Transition to Governing Project commissioned a piece of software, which is akin to Turbo Tax for political appointees. The software asks for basic information, sends that information out to all of the forms, and walks the nominee through unique questions. At the end, the nominee can print out all of the forms for submission (the technology is also here for online filing when the government allows it in the future). The software is nearly ready and should be complete as soon as the various institutions make their final decisions on the content of this year's forms.

But even the software faces legal and other obstacles. Most of the forms need to be filed with a paper copy, not online. The goal of reform should be to have simpler, shorter forms that can be filed online.

Incorrect filling out of forms carries criminal penalties

Nominees may face criminal penalties for providing false and misleading information on the forms they must fill out for the administration and Congressional committees, whether intentional or not. The threat of criminal prosecution scares off potential nominees and feeds our investigation culture.

Financial disclosure should be designed to identify conflicts of interest, not to satisfy prurient interest or the whims of various agencies.

Some forms ask for the appointee's assets, other for the appointee's spouse's assets, still others include dependent children. Various forms also have different valuation methods and different categories of assets, with no particular rhyme or reason other than the arbitrary judgments of agency drafters . While we should maintain financial disclosure and divestment rules that promote a high standard of ethical behavior, they need not require information that is merely to satisfy the prurient, nor should they require unnecessarily duplicative or

conflicting reporting requirements

Stock options are not adequately handled by current law.

While changes have been made in the past decade to allow appointees to divest themselves of stocks and other assets without bearing all of the disadvantageous tax consequences, no such provision has been made for stock options. As stock options have become a more common form of corporate compensation, the lack of rules for option divestment may deter good people from serving in government.

Senate holds

Over the past forty years, the appointments process has lengthened considerably. Both the selection and nomination process in the White House and the confirmation process in the Senate are longer. One significant development in the Senate is the increasing use of holds. Holds have been used not merely to delay nominations, but to kill them. And holds are often used as bargaining chips for other priorities. Nominees are taken hostage with a hold until a deal can be struck for legislation, sometimes in a wholly unrelated arena. Holds should be public, limited in time, and limited to concerns about the specific nominee held.

In certain departments there are unnecessary political positions

Many study groups have recommended reducing the number of political appointees and the number who require Senate confirmation. There are two potential benefits to such a reduction. First, more managers do not necessarily lead to more efficient government or more control from the top. Second, the increasing number of appointees is partially to blame for the backlog of appointments. But as the balance between career and political positions varies widely from agency to agency, reductions would be best after a serious consideration of political and career positions agency by agency.

Post-Employment Restrictions

Part of an effective appointments process is the ability to recruit talented, knowledgeable people from business, labor, universities, think thanks, and other organizations. Restrictions

on post-employment lobbying are appropriate as cooling off period to lessen conflicts of interest. But overly onerous post employment restrictions scare promising candidates away from government service. President Clinton's recently rescinded five year ban for senior official is an example of taking the restrictions too far. Take for example, an aviation lawyer who is willing to take a pay cut to serve in government at the Transportation Department. If that person is subject to a one or two-year ban, he or she might reasonably expect to return to practicing aviation law after government service. But if there is a five-year ban, he or she might as well look for another career. Post employment restrictions generally strike a reasonable balance between attracting the best people to government service and limiting conflicts of interest, but a review of these laws and simplification where possible would help attract better people into public service.

Compensation issues

Part of an effective appointments process is attracting good people to government service. Compensation is only one area that affects recruitment, but it deserves serious consideration.

While the list of problems associated with the appointments process is long, addressing even a few of them will have a beneficial effect on the process and on the climate in Washington. The general perception that people who serve in government must subject themselves to harsh treatment is perhaps the greatest problem facing the appointments process. But reform in a few areas might begin to turn around that sentiment.

Recommendations

1. Implement a common electronic nominations form – Simplify and harmonize the existing forms by removing redundant and unnecessary questions. Allow forms to be filed on line. A nominee for a Senate-confirmed position at the State Department is asked to fill out three separate background forms and a financial disclosure form for the Office of Government Ethics. This multiplicity of forms is common to all executive departments. Most of the required information is redundant, much of it irrelevant. The forms should be harmonized. In addition, as mentioned above, the Transition to Governing Project of the American Enterprise Institute and the Brookings Institution has commissioned a piece of software to help

nominees fill out forms online. This software should be the first step in simpler forms that can be filed electronically.

2. *Decriminalize the appointments process* – A misstatement on a nominee's financial disclosure form may be subject to criminal prosecution. Decriminalize the appointments process by having the Office of Government Ethics enforce the disclosure and post-employment statutes as civil or regulatory matters.

3. *Streamline the FBI background check*. FBI checks should only be performed for the heads of departments or agencies and for positions related to national security. It should be possible to develop a sliding scale of background checks from a simple expedited computer scan to the full field investigation, and apply different levels to different categories of nominee. A president-elect should be able to submit a list of potential top appointees to sensitive positions to the FBI just after the election to have their FBI checks begin immediately, even before they have been formally nominated for specific positions.

4. *Protect FBI files* – access should be limited to the chair and ranking member of the relevant Senate committee. The FBI usually does not edit or judge the information it gathers in its full field investigations. As a result, FBI files contain both accurate and inaccurate information, both legitimate well-sourced facts and hearsay.

5. *Change the "hold" custom in the Senate*. Holds should be not be secret, and they should be limited in time. The hold is not a rule, but an informal practice. The legitimate purpose for a hold is for Senators to delay consideration of a nomination or a piece of legislation in order to collect more information on the subject. It is meant to prevent the Senate from rushing through a nomination without notice to the members. We should limit the hold to no longer than one week, and we should make it known which Senator seeks the hold.

6. *Enact other Senate procedural reforms*. The Senate should schedule hearings and votes for nominees on an expedited basis. An executive nomination should be scheduled for a vote no more than twenty days after it comes out of committee. Committees should use their authority to waive hearings for lower level appointees. The Senate should meet in executive session when reviewing a candidate's personal or other

sensitive matters.

7. Reduce the number of political appointees. The appointments process is much longer than it once was, in part, because of the growing number of political appointees. More appointees do not necessarily lead to greater White House control of the agencies, in fact, the increasing number of layers may make the political appointees more inefficient.

8. Stop the legal assault on the executive branch. Congress should repeal Clinton v. Jones, which held that Paula Jones could bring a civil action for sexual harassment against the president while he was in office. In its decision, the Court asked Congress to review its decision. Civil litigation can be used as a political tactic. And the threat of high legal bills and ethical taint discourages good people from coming into government service.

Committee Members | Subcommittees | Hearings | Key Legislation | Jurisdiction
Press Statements | Current Issues | 1997 Special Investigation | Video of Select Hearings | Sites of Interest