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CHAPTER 4



Tread Carefully Before You're Confirmed

Some of President Barack Obama's appointees will come straight off the campaign trail. Some will work first as staff or volunteers in the transition. But most will be giving up their regular jobs – in elected offices, law firms, universities, businesses, non-profits, associations and from many other walks of life – to answer the call to public service.

Some may be placed on the payroll of their future department as advisers or consultants pending confirmation. They cannot assume the duties of their future post on an acting basis, but they can perform other work while drawing a salary and other benefits, including health insurance.

There are pros and cons to getting an early start this way. Some may already be working as a paid adviser or consultant when the president nominates them to a full-time job requiring Senate confirmation. Especially if they are coming to Washington from outside government, this may help them learn the ropes and prepare for their new responsibilities. But if they get thrust into the thick of policy discussions and debates inside a department, they could get themselves into hot water with the Senate committee considering their nomination. That is a situation that prudent nominees would do well to avoid.

But financial considerations – including health insurance – may enter into this. If you have left your old job and moved to Washington, you may need to get a spot on the federal payroll as a consultant while you wait for clearance, nomination and confirmation. You became a lame duck on your old job the minute you announced your intention to leave. If you are self-employed or providing professional services, you cannot very well take on new clients or responsibilities knowing full well that you are on your way out the door.



The president will tap some nominees for important sub-Cabinet jobs from among those already serving a rung or two lower in the same department or agency. Normally, when a PAS (Presidential Appointment with Senate confirmation) position becomes vacant, the job can be filled temporarily on an acting basis either by the top deputy or “first assistant,” or by another presidential appointee designated by the president, or by certain senior agency personnel designated by the president. There is a general 210-day limit on serving in an acting PAS capacity.

Nominees can qualify for health benefits, life insurance, and retirement coverage if the administration gives them a noncareer or limited appointment to the Senior Executive Service while they await Senate confirmation. The limited emergency of limited term appointment must be designated as a “provisional appointment” on the SF-50, Notification of Personnel Action.¹⁰

Sometimes the acting official winds up being the one nominated by the White House. That happened to Joel Klein, who held the No. 2 position in the antitrust division at the Justice Department in 1997 when his boss, Anne Bingaman, resigned. Klein, who had also been a deputy counsel in the Clinton White House, said later, “Generally speaking, it was a mistake that had to be made under the circumstances. I would not recommend to anybody to take a position as acting, because inevitably you have to make some tough decisions that are going to make people unhappy with you.”

“There’s a lot of senators and any one or two of them can make problems for you if you take specific actions that can be controversial, but which you have no ability to avoid if you’re acting,” said Klein, who led the antitrust case against Microsoft Corp. Klein made the best of a ticklish situation and it worked out fine. After the White House sent up his nomination, senators were “uniformly cordial, professional,” he said, and four months later they confirmed him, by an 88-12 vote.

William Apgar, a former federal housing commissioner, said he was glad he signed on as a consultant at HUD well before he was nominated to the housing job. Colleagues on the faculty at Harvard University had counseled him not to leave Cambridge or quit his academic job prematurely. “Fortunately, I rejected” that advice, he said. “They said you shouldn’t pick up your family and move until you’ve been confirmed. But that would have been a mistake.

“My sense is: just jump in the pond. It was six months into the second year of a second presidential term when I got the call. It was going to take six or eight months before I got confirmed. Whether I was going to be successful depended on whether I could work well with (HUD Secretary) Andrew Cuomo. I literally didn’t know him,

¹⁰ Office of Personnel Management. “[Transition to a New Presidential Administration.](#)” Appendix E.

and he didn't know me at all. The only way to figure out if I could work with him was to be here, so I came down, was an adviser, and all the things I'd heard about him turned out to be true: a really amazing fellow. And I'd have missed all that sitting up at Harvard waiting for the nomination process to take its course."

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William Reinsch signed on as a consultant before he was nominated to serve as under secretary of commerce for export administration. Reinsch, who had worked for 16 years on Capitol Hill, said, "They make you the highest career civil service grade, a 15, step 10, and they treat you like a career employee." But he never tried to fill the under secretary role until after confirmation. That would have been "presumptuous," said Reinsch.

Todd Dickinson, under secretary of commerce for patents, also came to that department as a consultant and senior adviser to Secretary William Daley. He'd been practicing law in Philadelphia. "My job was basically a political Senior Executive Service job. It gave me the opportunity to learn the system from the inside and begin to work on some of the issues that were important to me and important to the patent commissioner at the time who wanted to delegate them to me. But I didn't have any formal responsibility It allowed me, coming from the private sector, to get my feet wet. There's a lot to learn about the federal government that you don't really know – how it's organized, and how it's managed."

But Dickinson stressed: "Resist the temptation to act like you were in that job at all costs. There are eyes on you all the time You have to be extremely prudent how you operate in that kind of situation."

The experience of Jacques Gansler, under secretary of defense for acquisition and technology, offers more reason for caution. "Don't give up your [old] job if you have one during this time," he advised. Senators upset about White House plans to close some Army depots held up Gansler's nomination for months. He said he felt like a hostage.

Cross, the former Education Department official, said nominees should resist the temptation to sign on early as consultants. "You end up being in a very compromised situation," said Cross. "Inevitably you will get into conversations and even appear to be involved in policy decisions—which is illegal. Word will get back to the Hill that this is going on, and it will be used against you when you do finally get a hearing, if you get one. In every agency, there are people who are connected to various folks on the Hill who are looking for ammunition."

Mary Jo Bane, who was New York's social services commissioner before becoming an assistant secretary of health and human services in the Clinton administration, pushed the envelope by taking part as a consultant in an HHS welfare reform task force before she was confirmed. "That was a little tricky, and I probably pushed the

rules a little more than I should have,” she said. Bane’s advice: “Don’t go down there until you’re formally nominated. It’s a very difficult period.”

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The Office of Personnel Management (OPM) – the main human resources arm for the federal government – addressed many of these issues in its [Presidential Transition Guide to Federal Human Resources Management](#), published in June 2008. That guide states:

Agencies may appoint experts and consultants to positions that primarily require performance of advisory services, rather than performance of operating functions, without regard to competitive civil service requirements [5 U.S.C. 3109]. Agencies may use expert and consultant appointments for individuals who have been nominated by the President, but not yet confirmed.

OPM’s guide notes:

Agencies may pay travel and transportation expenses for travel to and from pre-employment interviews to any individual they consider for employment. Travel expenses to attend confirmation hearings are considered part of the pre-employment interview process. Agencies may also pay the travel expenses of a new appointee from his or her place of residence at the time of selection or assignment to the duty station.

While a president can fill about 700 full-time executive branch positions that require Senate confirmation, there are also several thousand so-called Schedule C political appointments that do not require Senate confirmation. Schedule C jobs can range from mid-level aides and assistants – even stenographers – to senior policy and management positions paid at the highest level of the civil service pay scale – GS-15. The GS-15 jobs started in 2008 at \$115,317; Step 10 paid \$149,000. The president gets to fill up to 10 percent of the more than 7,300 Senior Executive Service positions, the elite rank for top executives in the civil service. The SES pay scale ranged in 2008 from \$114,468 to \$172,200.

The OPM reports that as of September 30, 2008, there were 7329 members of the Senior Executive Service, including 6,541 career appointees and 657 noncareer. The 131 others were individuals on time-limited SES appointments.

During the first year of a new presidential administration, or following the appointment of a new agency head, OPM allows departments and agencies to fill “temporary transitional Schedule C positions” for up to 120 days with the possibility of an extension for 120 more days beyond that. The agency must certify that the position was not created solely or primarily for the purpose of detailing the incum-

bent to the White House and must identify the position and incumbent. Agencies also are allowed to make some Senior Executive Service appointments to limited, 36-month terms. They can terminate these appointments with one day's notice.

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All political appointees, from Cabinet secretaries to Schedule C's, serve at the pleasure of the president and may be asked to resign or be dismissed at any time. "They are not covered by standard civil service removal procedures and generally have no right to appeal terminations, unless they are alleging that such action was taken for prohibited discriminatory reasons," OPM said.

Presidential appointments subject to Senate confirmation (PAS) are effective on the date the president signs the commission document. However, the individual's pay does not begin until the appointee is sworn in and signs the oath of office.

CHAPTER FOUR **KEY POINTS**

- New administrations may put future or current presidential appointees to work as consultants to their future department while they await Senate confirmation.
- Nominees generally cannot serve in an acting capacity in their future job before confirmation. They should not participate in any policy-making discussions or perform any official duties of that job.
- Political appointees, from the highest to the lowest, serve at the discretion, will or pleasure of the president and the agency they work for. They can be asked to resign or be dismissed without notice.
- There are pros and cons to joining an administration before the Senate confirms you. Newcomers may find a consultancy invaluable in getting to know the Cabinet secretary and in learning how a department or agency works. But tread carefully, watch what you say and do, and do not try to exercise power before the Senate confirms you to your position.