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**Barnett
Sivon &
Natter P.C.**
ATTORNEYS at LAW
WASHINGTON, DC

Great Expectations*

Bob Barnett

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Pip, of course, was disappointed when his great expectations turned out to be something less than great, namely, working hard for a sufficient income. Something similar to that will most likely turn out to be the case for the new Administration as the President will be forced to wait for longer than he would like for his team of appointees to be approved by the Senate and begin trying to shape their agencies to his liking. At least if history is any teacher that will be the case.

Most senior presidential appointments must be confirmed

There are over 1,200 appointees available to the President that must be confirmed by the Senate. That process is arduous for most and for those with substantial wealth or extensive business operations, significantly more difficult and time consuming.

Historically, there are rough guides that say that confirmations occurred more rapidly before the Democrats rejected the nomination of Solicitor General Bork for the position of Supreme Court Justice during President Reagan's administration. After that, things became much stickier in the Senate, and the assumption that the president should be permitted to have his own people with him (unless there were serious problems) was destroyed. Of course, historically, one can also find some evidence that as many as 35% of Supreme Court nominees during the 19th century were rejected, so opposition for some spots has always been around.

For those who must be confirmed,¹ it will be essential for them to complete an investigation by the Federal Bureau of Investigation, the Internal Revenue Service, and the Office of Government Ethics, and must fill out the Public Financial Disclosure Report and questionnaires related to his or her background checks. Each of these steps consume substantial amounts of time.

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¹U.S. Const. art. II, § 2. The president "shall nominate and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the Supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided."

For example, a full field investigation by the FBI must cover 7 years in scope at a minimum, and can cover a much lengthier time period if the appointment is particularly significant or something found during the 7 year review prompts further search into earlier years. It includes checks of national agencies, a personal subject interview, employment, self-employment and unemployment coverages, verification of education, residences, former employers and law enforcement agencies, and other matters of potential interest to those senators who must vote to approve or disapprove the nominee. Other questionnaires required to be completed can cover matters as diverse as date and place of birth of in-laws, history of mental health counseling, employment of domestic help, drug and alcohol use, foreign travel and literally hundreds of other questions. It is a daunting assignment, one that requires the nominee to provide massive amounts of historical detail. Failure to answer the questions will result in a further set of questions about why they were not answered, and if they are answered inaccurately, they could lead to felony charges. For those who have been exposed to them, or have simply been interviewed with respect to another person's nomination, the lengths to which questions and the agents go in these investigations is always surprising.

If an individual has had an extensive public life, his or her speeches, writings, comments to the media and other expressions of positions on issues will be requested and perhaps questions concerning any or all of these may be raised. Even for those who have been in private life, the same scan will be made of anything expressed in public, and sometimes third parties will volunteer information that is not in the record that will generate questions about topics raised by those unsolicited comments.

Income and wealth issues are always the source of considerable enquiry. Tax returns will be requested and will be reviewed closely to discern whether political or policy issues can be found in the use of investments, size of income, charitable contributions, gifts, and other money matters. Generally, the greater the wealth and income, or the wealth and income of friends or family of the nominee, the more questions will be asked and more detail will need to be provided. Many will recall the fuss that was raised in the press on the failure of nominees to pay the withholding tax on domestic employees.

These reviews and disclosures have many purposes. The most immediate one, of course, is to provide information to the senators who have to vote to approve or disapprove each nominee. This should not be a routine vote, but should express the feeling of the senator that the nominee can or cannot do the job for which the president plans to appoint him. It is part of the balance of power expressed in the constitution. Practice over the years has moved the bar on just what must be present to permit the senator to approve the nominee. Politics does, of course, rear its head. Even though superbly qualified, a senator may vote against a nominee because his or her position on an issue is contrary to that of the senator and particularly important to the senator, because the leaders of his party have urged the senator to vote against the nominee, because he or she wishes to make it known that his or her vote cannot always be counted upon, etc. The day of assuming a yes vote unless the candidate is a miscreant has long passed.

But the president's party is not required to await the full completion of all of the documents and reviews if it wishes to move ahead anyway. If they wish, they may follow one of the oldest of political rules — if you have the votes, vote. That appears what they plan to do.

There is a risk to the nominee if voting occurs and the president appoints before the information has been produced and reviewed. There are major federal conflict of interest laws, some of which

can result in criminal actions.² Many of those can be avoided once the conflict is revealed, since many of them can be ameliorated with changes in arrangements. Absent a thorough vetting, there is some risk to the nominee that a conflict, easily spotted and corrected during the vetting process, may only be found after the nominee has been appointed and an action representing a conflict has taken place. At that point, it is more difficult to cure.³

For very wealthy persons who have investments in a variety of places, avoiding conflicts in cabinet positions may be difficult. Since the candidates for many key positions in this cabinet-elect include many very wealthy persons, there may be new developments in the conflict of interest laws over the next few years.

Assuming that the newly sworn in president appoints many cabinet officials immediately upon assuming his office, it can be anticipated that they will be moved promptly through the committee and floor process. The bulk of them should be in place within six months of nomination. The Democrats may choose to focus on a couple of appointments and do their best to delay those for lengthy periods, and may attempt to block preliminary waivers that one nominee will need.⁴ Since nominees, other than those to the position of Justice of the Supreme Court are now subject to only a majority vote, the opposition can only delay a short period of time.⁵

Traditionally, once the president gets his cabinet confirmed, along with the crucial dozen or so additional senior positions, their attention, and therefore that of their staff, will turn not to other nominees but to implementing whatever the policy positions of the new president might be.

There are additional presidential appointments that need not be confirmed by the Senate

It is undoubtedly true that there are dozens or hundreds of appointees in the list of 1,200 plus that in reality should not be subject to the approval of the Senate. As important as these jobs may be to the person holding them, they are not so important to the country that the absence of a Senate review and approval would endanger our society. It would, however, take bits and pieces of leverage away from the Senate and from individual senators. Once the Senate knows the president would like to appoint a specific person to a position, that interest becomes a matter for potential leverage by the body or an individual senator who will slow down the process or hold it up with a “hold” to encourage the president to discuss with him or her some other interest the senator has that can be helped by the right action by the president.⁶ Therefore, the list of appointees that must wend their way through the process remains lengthy.

This means, of course, that a number of lower level appointments, lower than cabinet level but still significant positions, will remain unfilled for many months after the president nominates them. It is not unusual that a number of these would not be approved a year after the president has been inaugurated.

²18 U.S.C. § 201 et seq.

³*Issues Regarding the Federal Conflict-of-Interest Statute*

⁴The nominee for Secretary of Defense needs a waiver from the prohibition against persons serving if less than 7 years has elapsed since they last served in active military duty. That would require legislation, and would be subject to a 60 vote filibuster rule.

⁵Previously, 60 votes were needed because a nomination could be filibustered. The rules were changed three years ago by the Democrats, however, so now only a simple majority is needed.

⁶The hold is a matter of senate courtesy, and whether it will be honored now that filibustering nominees is no longer a possibility remains to be seen.

In addition to those that need the approval of the Senate, the president can appoint another 300 or so for what are called presidential appointments. Many of these are with the White House staff, but some are scattered throughout the federal agencies and draw salaries toward the upper end of the civil service pay scale. He can also appoint a large number of non-career senior executive service (SES) employees, although his ability to appoint career SES employees is very limited.⁷

Finally, there are as many as 1,400 Schedule C appointments that the president can fill, another relatively senior position (pay equivalent to the GS 12-15 level), in which the policy position appointed must report to a more senior person such as an SES or a presidential appointee.⁸

So while the president has a great number of possible appointees, once past the more glamorous cabinet and next level positions, the intensity with which the presidents and their staffs pursue filling these positions varies from president to president. In this transition, in which the control of the presidency has changed from one party to another, there may be more interest in filling those quickly. Unless some radical change occurs, however, at the end of this year there will still be hundreds of those positions unfilled.

Can the president govern during the transition period?

Assuming a normal sequence of events, the president should get the overwhelming percentage of his cabinet level appointees approved by June. This will not permit him to govern through his departments, however. Governing requires a band of lawyers, economists, accountants, examiners, policy persons and other skill sets assisting the Secretary, and when the cabinet officers first join the government, they will be surrounded by persons occupying those positions who have either entered government through the opposition party or have invested intellectual capital in resolving questions in a manner that fits the positions of those governing during the past eight years. Ideas of the top of the department will find passage to position papers, laws, regulations, tedious and not easily accomplished in a manner consistent with what many of them have been accustomed to in the private sector. After all, many of them were CEOs of major organizations, and for persons such as that, the bureaucracy in those companies quickly responded as best they could to any request they made. It will be very frustrating.

Until they are able to place their people in some of the crucial positions within each agency, developing policy and implementing it, particularly when it is different from existing policy, will be challenging at best. Certainly, the expectations of the new president and his followers for quick policy changes in government will be slowed by the reality of the appointment process and the limit on the number of persons in the government that the president can appoint.

*Bob Barnett is a partner with the law firm of **Barnett Sivon & Natter, P.C.***

⁷This has led, over time, to the practice of “burrowing in” by many non-career political appointees who convert during the transition to career SES status.

⁸There are about 1.8 million permanent federal employees protected by Civil Service and not on the list of presidential appointees.