

# Presidential Appointments and Senate Confirmations: A Guide for Prospective Trump Administration Political Appointees

A Practical Guidance® Article by John B. Bellinger, III, Christopher J. Dodd, John A. Freedman, Amy Jeffress, and James P. Joseph, Arnold & Porter Kaye Scholer LLP



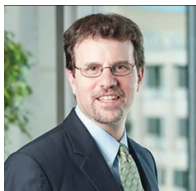
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Starting in January, the incoming Trump administration will have to fill 4,000 political positions in the federal government. More than 1,000 of these positions — including cabinet secretaries and agency heads, deputy secretaries, assistant secretaries, and ambassadors — require Senate confirmation. Other positions in the White House or in departments and agencies are presidential appointments that do not require Senate confirmation. Although it is not clear yet what appointment process the Trump administration will follow, candidates for senior positions in previous administrations (including the first Trump administration) have been required to submit to meticulous scrutiny of their professional, political, financial, and personal backgrounds by the presidential transition team or, after the president takes office, by White House officials before the president announces a nomination or appointment. Although designed to avoid surprises, the transition team/White House review process can be unpredictable. The basic process for reviewing potential presidential appointments in either Republican or Democratic administrations is well-established, but each administration may vary the vetting requirements and can have different expectations of their nominees. The incoming Trump administration has not yet announced a nomination and vetting process. Requirements and expectations can change mid-process as new issues arise, political and legal sensitivities shift, and other nominees come under fire. One trend, however, has proven inevitable: with each new

development, the list of questions for candidates grows longer. In our roles in private practice and in government, Arnold & Porter's lawyers have counseled prospective political appointees and advised or participated in Senate confirmations (one as a U.S. Senator and another as a Senate-confirmed presidential appointee) during the last five administrations, including the first Trump administration. We have found that candidates – at least for the most senior positions – who are counseled on the process and receive legal advice from outside attorneys are better prepared to respond to the intrusive vetting process and avoid mistakes. This Advisory summarizes the process for presidential appointments, including the paperwork nominees must complete before appointment or nomination, the Senate confirmation process, and services that can be provided by outside counsel.

## Step 1: The Paperwork Required

Before the inauguration, President-elect Trump will announce certain senior White House appointments as well as his intent to nominate people to senior cabinet positions. The Trump transition team will vet candidates for these positions. The president will announce appointments and nominations to other senior positions after he takes office. At that point, the White House Counsel's Office and the Office of Presidential Personnel will oversee the vetting of potential candidates. In previous administrations, prior to any presidential announcement, potential appointees have been required to complete numerous official government forms and informal questionnaires that allow government investigators, ethics officials, and transition team/White House nomination staff to assess the candidate's suitability for office. Many of these forms are required by federal law, while others are required by an administration. These forms and questionnaire typically include:

- **Questionnaire for Non-Sensitive Positions (Form SF 85) or Questionnaire for National Security Positions (Form SF 86):** These questionnaires must be completed online and are extremely detailed (Form SF-86 is more than 120 pages). Government background investigators, often the FBI, will use these forms to conduct a background investigation, which will include interviews with friends and associates of the nominee. These interviews must be completed before the nominee is announced by the White House. Both forms require disclosure of detailed information concerning citizenship, prior residential addresses and work history, education, military service, selective service registration, and prior use of illegal drugs. The national security questionnaire is much more

extensive and also requests information regarding family members, foreign contacts, foreign financial interests, foreign travel, police records, mental health care, alcohol use, and past financial difficulties.

- **Executive Branch Personnel Public Financial Disclosure Report (OGE Form 278):** The Office of Government Ethics (OGE) – which is the independent agency responsible for administering executive branch ethics policies – uses this form to identify actual or potential conflicts of interest. The form, which will become available to the public (potentially even on the internet) after a nominee takes office, requires disclosure of the nominee's financial assets, income, liabilities, asset transactions, gifts or reimbursements, and employment arrangements and sources of compensation, usually including identities of clients. The nominee must also disclose certain financial information relating to her or his spouse and dependent children. In the event there are actual or potential conflicts, the candidate can negotiate with OGE and the candidate's prospective agency or department to craft appropriate protections against such conflicts, such as divestment of or a blind trust over the candidate's financial assets. Nominees are often required to sell securities that might create conflicts of interest and are required to resign from almost all boards, including non-profit boards, as well as family companies. Nominees are also likely to be asked to sign a separate contractual "ethics pledge" committing to refrain from lobbying the agency for which they have worked for a specified period after leaving government; these pledges, as well as applicable federal ethics statutes, impose significant limitations on post-employment options for officials after they leave government.
  - **White House questionnaire and associated documentation:** In addition to the official government forms, prior administrations have required candidates to complete a questionnaire with detailed information regarding their professional and personal background, memberships, prior writings, speeches, testimony, financial and tax information (including tax returns), and legal and administrative proceedings. These questionnaires vary from administration to administration. Nominees are likely to be asked if they have employed any undocumented aliens and paid all taxes, including for household employees, such as nannies and housekeepers.
  - **List of federal political contributions:** For ambassadorial positions, the nominee must provide a list of all federal political contributions by the nominee and her/his immediate family.
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In addition to reviewing the forms and questionnaires, transition team/White House officials typically will conduct a search for public information concerning the candidate, including anything (such as social media posts or reporting related to controversial clients) that may embarrass the administration or the candidate or otherwise generate controversy. Depending on the position, the nomination staff (usually a White House lawyer) may interview the candidate. Also, depending again on the position and unless the dangers of premature disclosure of the potential appointment dictate increased confidentiality, the nomination staff may interview others associated with the candidate. In previous administrations, the transition team or Office of Presidential Personnel have announced an appointment (for positions not requiring Senate confirmation) or a nomination (for positions that must be approved by the Senate) only after the candidate is approved by the transition team or White House "clearance counsel" and ultimately by the President-elect or President.

## Step 2: Senate Confirmation Process

For presidential appointments requiring Senate confirmation, after nomination by the president, the White House transmits the nomination to the Senate, which then takes the following steps:

- **Committee process:** The Senate will refer each nomination to a committee with relevant jurisdiction over the appointment (e.g., the Senate Foreign Relations Committee for ambassadors and State Department positions, the Finance Committee for Department of the Treasury positions, and the Senate Armed Services Committee for Department of Defense positions).
- **Meetings with senators and staff:** Depending on the seniority of the position or public profile of the candidate, senators and/or committee staff may want to meet with the nominee prior to a confirmation hearing and may ask the nominee about policy positions or background issues. The nominee must prepare carefully for each such meeting to address different concerns raised by each senator and his/her staff, including regarding the nominee's policy perspectives, past statements, and relevant background.
- **Senate questionnaire:** Many Senate committees have their own questionnaires for the confirmation process. The transition team/White House questionnaire likely includes most of the questions in the committee's version, but information may need to be reorganized and answers restructured or expanded upon to ensure that the candidate sufficiently answers each question

posed by the Senate. Committee practice varies, but some committees may make these questionnaires public.

- **Confirmation hearing and vote:** Generally, the committee will have a public hearing on the nomination at which time the nominee will testify and answer questions. The nominee will need to prepare a short written and oral statement and must carefully prepare before testifying. Depending on the position, the committee may consider several nominees during one hearing. The committee also may hear from other individuals supporting or opposing the nomination. After the hearing, individual senators may send the candidate written questions for the record. The committee then will vote on whether to send the nomination to the full Senate.
- **Floor debate and vote:** If the committee votes out the nomination, it will go to the full Senate for consideration. Cabinet-level officials and nominees with controversial backgrounds will receive a recorded vote, while many lower-ranking officials may be approved by unanimous consent without debate.

## Advice of Counsel for Nominees

Experienced counsel can assist a potential nominee with several aspects of the process, including answering accurately the background and disclosure forms, navigating the ethics requirements, testifying in the Senate, and preparing to respond to any negative information.

- **Assistance with disclosure forms:** The mandatory disclosure forms can be arcane, burdensome, and perilous. Counsel can help the candidate determine how best to respond to the extensive and detailed questions about a candidate's personal and professional background and help collect and review the extensive requests for documents that often accompany the disclosure forms. Counsel can review the disclosures prior to submission to ensure that they are complete and accurate. Qualified tax counsel can help review tax forms before they are submitted to help identify any potential questions. False or incomplete statements (for example, about past drug use or criminal convictions) will disqualify a nominee and can subject the nominee to criminal prosecution.
- **Advising on OGE's ethics rules, negotiating with OGE, and structuring divestitures if necessary:** Candidates with substantial personal wealth or complex finances may need assistance interpreting and complying with conflict of interest rules. It also may take a significant

amount of time to collect the detailed financial information required — for example, tracing through hedge funds and other tiered investments to identify underlying business holdings. Generally, political appointees must divest interests that may conflict with their duties, although blind trusts may sometimes suffice. The timing and circumstances of such divestitures or other arrangements can have significant tax and financial consequences. Counsel can assist in negotiating and structuring any such divestitures or trust arrangements to mitigate the impact.

- **Counsel for the Senate confirmation process:** For nominations requiring Senate confirmation, a candidate must be prepared to submit written and oral statements and to answer questions posed at the confirmation hearing and during any meetings with senators and their staff. A nominee should be prepared to navigate these inquiries and respond to any concerns raised about a nominee's background, policy positions, and past statements or actions.
- **Review and assessment of any adverse information:** For positions requiring Senate confirmation (and potentially for other senior presidential appointments), the candidate may want to conduct, or ask counsel to conduct, "opposition research" to identify information on the public record that could become public after an appointment or after nomination but before a confirmation hearing. Social media posts and even college newspaper articles or yearbook quotations can cause problems for a nominee. This opposition research should be thorough, because — between the administration's nomination staff and Senate committee staff and political opponents — everything that can be found probably will be, at least for more senior nominees. The review also should examine the candidate from all angles, covering issues that may be objectionable not only to foes, but to allies as well. Items that once seemed innocuous can take on a different tone in the context of the partisan confirmation process. In the current political environment, it is prudent to assume that some opponents may distort or take out of context innocent but perhaps exploitable statements or actions by the candidate. A review can identify and allow the candidate to prepare to counter any such vulnerabilities. In addition to items on the public record, private individuals can also bring adverse information to the attention of the White House or Senate committees.

If this vetting identifies any relevant issues, the candidate can assess how best to address them, which could include remedial tax filings, pre-emptive disclosures, outreach, or other actions. Counsel can also advise nominees on potential legal liabilities for tax or other compliance problems. Further, by participating in mock interviews or hearings, the candidate can prepare to discuss the issues candidly and persuasively. Many individuals make enormous personal and financial sacrifices to go into public service. In the current political atmosphere, unfortunately, they also subject their backgrounds to intense public scrutiny and can put their reputations at risk. Working with counsel experienced with the vetting process can help minimize these risks and enable prospective nominees and appointees to reduce the burdens and intrusions. The authors are lawyers in the Washington, D.C. office of Arnold & Porter. John Bellinger served as the Senate-confirmed Legal Adviser for the Department of State and as Senior Associate Counsel to the President in the George W. Bush administration. Christopher Dodd served from 1981 to 2011 as a member of the U.S. Senate, where he was Chairman of the Banking Committee and a senior member of the Foreign Relations Committee. Amy Jeffress served as a senior official in the Department of Justice. Jim Joseph is the co-chair of the firm's tax practice. John Freedman is the firm's Senior Pro Bono Counsel and has vetted appointees for several transition teams.

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John B. Bellinger, III is the co-chair of the firm's Global Law and Public Policy group. A globally recognized expert on international law, he joined the firm in 2009, after serving as the Senate-confirmed Legal Adviser for the Department of State and Senior Associate Counsel to the President and Legal Adviser to the National Security Council (NSC) at the White House in the George W. Bush Administration.

John assists a broad range of U.S. and non-U.S. clients to resolve complex and politically sensitive issues and international legal disputes in the United States and around the world. His clients include corporations, sovereign governments, international organizations, universities, government officials, and private individuals.

### **Christopher J. Dodd, Senior Counsel, Arnold & Porter Kaye Scholer LLP**

Senator Christopher J. Dodd is a member of the firm's Legislative & Public Policy group. His practice focuses on helping clients navigate the complex issues around numerous industries, including financial services, media and entertainment, intellectual property and data privacy, telecommunications, healthcare, national security, trade, and sovereigns. With more than three decades of experience on Capitol Hill, Senator Dodd brings strategic counsel to those seeking to address governmental, political, and business challenges.

Senator Dodd joined the firm after a long and distinguished career in the United States Senate, representing the State of Connecticut. He also served three terms in the U.S. House of Representatives, representing Connecticut's 2nd District. During his tenure as Senator, he was Chairman of the Senate Committee on Banking, Housing, and Urban Affairs and served on the Committees on Foreign Relations and Health, Education, Labor, and Pensions, among others. He was a principal author of numerous bills that became law, including the Dodd-Frank Wall Street Reform and Consumer Protection Act, the Terrorism Risk Insurance Act, the Private Securities Litigation Reform Act, the Class Action Fairness Act of 2005, the Family and Medical Leave Act, the Child Care Act, and the Help America Vote Act, among others, and he was deeply involved in the passage of the Affordable Care Act.

### **John A. Freedman, Senior Pro Bono Counsel, Arnold & Porter Kaye Scholer LLP**

John Freedman is Arnold & Porter's Senior Pro Bono Counsel and devotes his practice to litigating significant civil rights matters in trial and appellate courts. During his tenure at the firm, Mr. Freedman has always maintained a significant pro bono practice. In recent years, he has led teams that successfully challenged the proposed addition of a citizenship question to the decennial census, the proposed rescission of the Deferred Action for Childhood Arrivals (DACA), and the use of a criminal background employment screen by Washington Metro. He was also a member of the trial team in the successful challenge to Pennsylvania's gerrymandered congressional map.

Prior to assuming his current position in 2020, Mr. Freedman was a partner in Arnold & Porter's litigation group, where his practice focused on complex commercial litigation, government investigations, white-collar criminal matters, and parallel proceedings involving simultaneous civil litigation and government investigations. Mr. Freedman's litigation experience includes representing corporations, accounting firms and accountants, broker-dealers, investment advisers, corporate boards and committees, and individual corporate officers and directors in securities fraud litigation and investigations; representing clients in shareholder derivative and other fiduciary duty litigation; defending corporations in antitrust class actions and merger litigation; and other commercial litigation, including real estate, contract disputes, intellectual property, false advertising, civil rights, employment, and other commercial matters in federal and state courts, as well as in arbitrations.

### **Amy Jeffress, Partner, Arnold & Porter Kaye Scholer LLP**

Amy Jeffress co-chairs the firm's White Collar Defense & Investigations practice. Amy represents clients in criminal defense, national security, and compliance matters. She conducts internal investigations and advises companies and individuals on export enforcement, FCPA, classified information, the Foreign Agents Registration Act (FARA), and mutual legal assistance and other international law enforcement issues, including extradition and INTERPOL notices.

Before joining the firm, Amy served as the Justice Department (DOJ) Attaché to the U.S. Embassy in London, where she coordinated cooperation between U.S. and UK authorities on criminal matters. She previously served as Counselor to the Attorney General, advising the Attorney General and senior Department leadership and interfacing regularly with the White House and National Security Council, the intelligence community, and other agencies on national security investigations and prosecutions and international matters.

Amy tried more than 40 cases during her 13 years as a federal prosecutor with the U.S. Attorney's Office for the District of Columbia. She served as Chief of the National Security Section, conducting and supervising investigations and prosecutions of international and domestic terrorism, espionage, export control violations, and other crimes related to national security.

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James Joseph, the co-chair of the firm's Tax practice, represents clients on tax planning and litigation matters. Mr. Joseph represents tax-exempt organizations (including public charities, private foundations, and international nongovernmental organizations) in structuring and implementing complex charitable programs and business ventures. He provides advice to corporations and individual donors on charitable, advocacy-related, and political giving. Mr. Joseph also works with the firm's legislative team to monitor and provide advice on legislative and regulatory tax proposals. On tax controversy matters, he has represented corporations, partnerships, tax-exempt organizations, and individuals in Internal Revenue Service (IRS) audits, proceedings before the IRS Appeals Office, state-level audits and administrative hearings, and litigations in the US Tax Court and in federal district and appellate courts.

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