

FABULOUS FORMLESS DARKNESS

PRESIDENTIAL NOMINEES AND THE MORASS OF INQUIRY

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Highlights

233 Separate Questions. Making a distinction between questions with slight differences in wording on the one hand and those questions with clear differences on the other hand, nominees must answer around 233 separate questions. Nominees must answer about 18 redundant (or identical) questions. They answer another 99 repetitive questions, those covering the same topic but requiring different answers. And they answer an additional 116 unique questions. Thus, by these estimates, nearly 50% of the questions on the four questionnaires have some analogs elsewhere while almost 50% of the questions have no analogs anywhere.

Reducing Questions. Three strategies for reform would ameliorate nominees' burdens without changing the nature of information required of them.

- Institutions could reduce the amount of information required to assess nominees.
- Adopting the most inclusive information would reduce repetitiveness from half to one-third.
- Elimination of the White House Personal Data Statement would reduce repetitiveness to one-quarter.

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The White House wants to know what real estate you now own or the properties now owned by your spouse. It also wants a list of properties you and your spouse have owned in the past six years but don't now.

The FBI wants to know only about properties that you have an *interest in*. Presumably the properties you might have an interest in include more than those you own outright. Drop the spouse and drop the past six years.

The US Office of Government Ethics then wants you to report those real properties that you have sold or bought. Elsewhere you would list real estate assets currently held and any you didn't hold if it had made you at least \$200. Drop the past six years, but add the last two. Skip the properties you own but have not bought recently. Add your spouse to the mix. And then, add any dependent children you have. Then set the values of the transactions within one of 11 ranges.

After answering these three, what else could a nominee face?

Well, the Senate committee wants to return to the White House question of ownership, drop the spouse, drop the dependent children, take the FBI time frame, so drop the past six years, then drop the two years, forget about sales and acquisitions, drop the value ranges. But, add a specific value to each of the properties reported.

Using the best of all possible interpretations, nominees must muster information on real estate property over four forms in three different time periods, designating three separate classes of owners, and sorting on at least two separate types of transactions.

Though he had chaos in mind when he penned the title phrase, the Irish poet W. B. Yeats surely presaged the inquisition presidential appointees face in securing a post. Over the past thirty years, confirming the President's nominees has become an increasingly convoluted fen of Executive and Senate forms, strategic entanglements, and "gotcha politics." According to the 1996 Task Force on Presidential Appointments assembled by the Twentieth Century Fund, the appointments process has discouraged and demoralized many of those who would work in the administration. A recent survey of former appointees from the last three administrations released by the Presidential Appointees Initiative [PAI], funded by the Pew Charitable Trusts, concluded that "a quarter [of those surveyed] were so unhappy with the nomination and confirmation

process that they called it embarrassing, and two-fifths said it was confusing... almost half described it as ‘a necessary evil.’”¹ The PAI study concluded that

the Founders’ model of presidential service is near the breaking point. Not only is the path into presidential service getting longer and more tortuous, it leads to ever-more stressful jobs. Those who survive the appointments process often enter office frustrated and fatigued....²

Both the Century Fund’s Task Force and the Presidential Appointees Initiative report called for finding ways to diminish the blizzard of form filings.

As a prerequisite of that reform agenda, this briefing paper explores the complex of questions required of nominees. It describes, in some detail, the variety of inquiries, identifying the general areas of scrutiny, specific questions and their variants, and the array of relationships between these questions. The analysis demonstrates the degree of commonality in areas of scrutiny and across forms. And it assesses three potential approaches to reform, concluding that two strategies seems most effective.

THE FORMLESS DARKNESS

A single example can illustrate the inquiries nominees must face. This analysis covers four separate forms.³ The first form originates in the White House. Called the “Personal Data Statement” [PDS], it covers some 43 questions (including the “nanny-tax” question) laid out in paragraphs of text. If the White House permits them to go on to the vetting stage, applicants fill out three other forms. The first of these additional questionnaires, the Standard Form (SF) 86 develops information for a national security clearance investigation, commonly called the “FBI background check.” The SF-86 contains two forms: the standard questionnaire and a “supplemental questionnaire” which repackages some previous questions from the SF-86 into broader language often similar though not identical to questions asked on the White House PDS. The second additional questionnaire comes from the U.S. Office of Government Ethics [USOGE]. The SF-278 gathers information for financial disclosure. This form also doubles as an annual financial disclosure report for all federal employees above the rank of GS-15.⁴ For most nominees, the third additional form comes from the Senate committee of jurisdiction.⁵ Having returned each of these four forms, some nominees will receive a fifth questionnaire, another from the Senate committee of jurisdiction, asking for responses to more specific questions. These additional questions typically refer to specific issues before the nominee’s agency.

REPETITIVENESS AND REAL PROPERTY

While they complain about several characteristics of the process, nominees regularly and uniformly underscore their frustration with the repetitive nature of questions. Indeed, nominees leave the impression

¹ Paul C. Light and Virginia Thomas, April 2000, *The Merit and Reputation of an Administration: Presidential Appointees on the Appointments Process*, Washington: Presidential Appointees Initiative, page 10.

² *Ibid.*, page 1.

³ Actually, appointees must fill out several additional forms granting permissions for various background and IRS checks but for purposes of analysis these do not represent much of a burden on nominees and no one considers them noxious.

⁴ Below the rank of GS-15, federal employees report on a simplified financial disclosure form, the SF-450.

⁵ Many Senate committees will ask the nominee to fill out a standard questionnaire for the committee and then based on answers to that questionnaire and with the help of policy experts in the General Accounting Office will require answers to a second more tailored questionnaire covering specific policy questions before the agency involved. In addition, appointees to positions as an agency Inspector General will fill out the committee questionnaire from the substantive committee and another questionnaire from the Senate Committee on Governmental Affairs, which has joint jurisdiction over Inspectors General for all agencies.

that the forms contain nothing but repetitive inquiries. While that degree of repetitiveness does *not* exist, the kinds of questions on which nominees must report repetitive information does pose an undue burden. Take for example the questions asked about ownership of real property in the various financial disclosure sections. On its PDS, the White House requires nominees to describe all real estate held in their names or in the name of their spouses during the past six years. Nominees soon discover that the FBI background check requires them to report only those properties in which they currently have an “interest” — they do not report those properties they owned earlier. In addition, nominees need not report properties wholly owned by their spouses.

In preparation for the beginning of the new calendar year, nominees must draft an SF-278 which divides real property into two classes. First nominees must report property they own currently or that they used to own and that produced at least \$200 annual income. Second, nominees must report any transactions that involved real property (in a question that requires nominees to report on a number of other asset types). On both of these questions, the USOGE returns nominees to reporting on their spouses. Further, it adds reporting on properties that involve the nominees’ dependent children. In addition, the USOGE adds a different reporting period that varies depending upon the submission date.⁶ Thus, the USOGE questionnaire misses four years of properties owned and sold that nominees report on in their PDS. The SF-278 then requires nominees to report market values for the properties listed on its first question and the sale price of transactions on its second question.⁷

The Senate committee of jurisdiction (e. g., the Senate Committee Commerce) requires information on property holdings as part of its net worth statement. The Committee’s questionnaire requests information only on properties currently owned and only those owned by the nominees. They require that nominees assess the current market value of each property. In general, the answer provided for these questions correspond roughly to those rendered on the FBI background check, with the addition of market values.

Thus, nominees must muster information on real estate over four forms in at least three different dimensions: three different time periods, three separate subjects (in this case, the nominee’s family members), and sorting on at least two separate types of information (in this case, ownership versus transactions), and further, in two instances, they must attribute special judgements to the information (in this case, they assess market values).

MEASURING REPETITIVENESS

How often does this sort of frustrating repetitiveness present itself? This section assesses the degree to which nominees must muster this kind of varied information. First, it identifies the different levels of repetitiveness. Then it assesses the distribution of repetitiveness over the different categories of inquiry pursued in the questionnaires.

⁶ Submitting their forms at the administration’s beginning (say on January 4, 2001), nominees only report properties owned as of that moment and transactions on the second question that have occurred only in the past two calendar years: 1999 and 2000. See Instructions to SF-278.

⁷ The USOGE uses an eleven-value scale to report price and market values.

TYPES OF QUESTIONS

Table 1 distributes questions asked of nominees into three repetitiveness categories. To assess repetitiveness, the analysis makes distinctions between questions on the basis of how much common information they require. Those questions which inquire into the same subject without varying the information constitute “identical” questions (e.g., “last name”).⁸ Those which request the same subject but which vary information along at least one dimension constitute “repetitive” questions (e.g., the real property questions in the previous example). And those which seek different information from other questions constitute “non-repetitive” questions (e. g., the “nanny-tax” question asked only on the White House PDS).

Among the four questionnaires, including a representative Senate committee questionnaire, nominees must respond to approximately 233 questions. Nominees must answer about 120 individual questions (those without an analog) on the four forms. They answer approximately another 100 repetitive questions (those with analogs). And they regularly repeat the answers to about 20 identical questions. Thus, by these estimates, nearly half of the questions nominees answer have some analogs elsewhere the other half have no analogs anywhere.

Table 1. Redundant and Singular Questions, all questionnaires

<i>Type of Questions</i>	<i>Number</i>	<i>Percent</i>
<i>Identical across forms</i>	<i>18</i>	<i>8</i>
<i>Repetitive (similar)</i>	<i>99</i>	<i>42</i>
<i>Non-Repetitive</i>	<i>116</i>	<i>50</i>
Totals	233	

THE DISTRIBUTION OF REPETITIVENESS

Table 2 summarizes the distribution of questions across the seven topics used to organize the White House Personal Data Statement. These topics cover personal and family information, profession and education, tax and financial information, domestic help, public activities, legal proceedings, and miscellaneous information. Based on figures reported in Table 2, one quarter of the questions asked nominees cover personal contact information and family background. This large proportion of questions derives primarily from the detailed background information required on the SF-86. Following personal and family information, the bulk of the remaining questions focus on professional and educational achievement or legal entanglements. Since the USOGE form does not cover legal involvement, that this category contains so many questions means that the PDS and the FBI background check place a great deal of emphasis on this topic.

Table 2 also reports the degree to which a topic includes repetitive questions. Given this summary, one result appears misleading. Personal and Family Background has a repetitiveness rate of 36%, yet this category does not really place that level of burden on nominees that others with similar scores might. Since this topic contains almost all of the identical questions (15 of the 18 asked) found across the four forms and the identical questions tend to focus on basic identification and contact information (e. g., name and phone

⁸ Many of these “identical” questions do not appear on all forms. For example, while the title of the position to which the nominee is appointed appears in identical syntax when it does appear, it does not appear on each of the four forms appointees must fill out. Some institutions apparently have no interest in that particular question. Despite the lack of universal usage, the analysis will consider these questions as similar in form as those (e.g., last name) which do appear in identical form across all four forms.

number). These questions, while repetitive, do not constitute the kind of real burden about which nominees complain. In addition, this category also accounts for the largest number of separate questions (39). As one prescription for reducing repetitiveness in this category, then, reformers could only reduce the amount of contact information required of nominees.⁹

The greatest proportion of the burden generated by genuinely repetitive questions occurs on three topics: Professional and Educational Background (64% over 61 questions), Tax and Financial Information (66% of 32 questions), and Legal and Administrative Proceedings (71% of 35 questions). Association with employers and potential conflicts of interest constitutes a classic example of repetitiveness among the professional and educational questions. All four institutions involved in vetting nominees have an interest in describing potential conflicts of interest embedded in the nominee’s professional relationships. Patterns of repetitiveness in reporting conflicts of interest resemble those patterns found in reporting property: multiple reporting periods, multiple subjects, and multiple types of information. Real property, of course, constitutes a classic example of the kinds of repetitiveness found under the rubric of Tax and Financial Information.

The level of repetitiveness under the topic of Legal and Administrative Proceedings seems particularly telling since, as noted, the USOGE does not ask any questions about legal entanglements. The high proportion of repetitive questions in this topic results almost exclusively from the FBI’s tendency to disjoin questions from the PDS into several specialized variations. For example, while the White House asks about arrests, charges, convictions, and litigation all in one question, the FBI asks a series of questions covering separate classes of offenses and case dispositions: felonies, firearms, pending charges on felonies, courts martial, civil investigations, agency procedures, *et cetera*. In addition, the FBI background check changes the time period from that used on the PDS.

Table 2. Repetitive and Non-Repetitive Questions by Topic, Executive Forms

<i>Topic</i>	<i>Non Repetitive</i>	<i>Repetitive</i>	<i>Totals</i>	<i>Percent Repetitive</i>
<i>Personal & Family Background</i>	39	22	60	36
<i>Professional & Educational Background</i>	22	39	61	64
<i>Tax & Financial Information</i>	11	21	32	66
<i>Domestic Help Issue</i>	1	0	1	—
<i>Public & Organizational Activities</i>	2	7	9	78
<i>Legal & Administrative Proceedings</i>	10	25	35	71
<i>Miscellaneous</i>	31	3	34	9
Totals	116	117	233	Avg. 50

⁹ For example, the OGE requires very little contact information on the SF-278. Instead, it relies on the agency to maintain contact with the nominee.

STRATEGIES FOR RESCUING NOMINEES

Ameliorating nominees' burdens rests on reform in three directions: the scope of inquiry, the degree of redundancy, and the strategic institutional imperatives.

REDUCING THE SCOPE OF INQUIRY

Since repetitive questions make up only half of all questions asked of nominees, reform efforts could properly focus on reducing the number of unique questions asked of nominees. Yet, of the 116 odd questions having no counterpart elsewhere, exactly half (58) occur on the FBI background check. More than half of those (37), or one-third of the total number of individual questions, fall within the Personal and Family Background topic. These questions establish a host of background characteristics presumably necessary to trace out an individual's identity, including basic descriptors like "height" and "hair color" and "spouse citizenship." The only questions in this group that might seem superfluous require information on the nominee's previous marriages and the descriptions required of adults who reside with the nominee but not part of the immediate family. In effect, it does not seem likely that trying to reduce the scope of inquiry, by truncating questions, will reduce the burden on nominees, except where authorities are willing to challenge the basic techniques used in carrying out a background investigation.

One possible reform in this area would be to transfer basic background information on a nominee prior to the FBI conducting the investigation. The administration would request a name search on the nominee from the government's files, the results of which would be transferred to the appropriate forms and then the forms are handed the nominee to check, amend, and to complete. Then the background check would begin in earnest. In addition to effectively reducing the burden on nominees, taking this approach would reduce the amount of time the FBI spends retracing its earlier steps in investigating the individual.

REDUCING THE DEGREE OF REDUNDANCY

Without reducing the number of issues covered, reform could accommodate nominees by reducing repetitiveness. Taking this approach increases the number of identical questions, by smoothing the questions asked across forms, and it may involve changing congressional mandates. Among the repeated questions, three-quarters have similarities with other questions but require nominees to significantly reshape their earlier answers. The real property questions described earlier constitute a perfect example. Nominees must answer six separate though similar questions. Settling on a single question, using the USOGE approach, for example, would reduce the number of questions by five (of six) and cut the percentage of repetitiveness in this category by 47%, from 66% to 35%, while reducing the number of questions in this category by almost one-half. Table 3 summarizes the results of taking this approach on the most repetitive topics.

In order to create such a common question, the four institutions could rely on the broadest range of information required on any dimension involved in a topic. Even that strategy would reduce repetitiveness. For example, on the real property example, all institutions could settle on the longer time periods of the White House, the broader definition of subjects used by the FBI, and the broader notion of ownership inherent in the FBI's term "interest." In the end, this reform reduces the burden on nominees by affording them a standard format with which to provide information.

Table 3. Results of Reducing Redundancies

<i>Topic</i>	<i>Non Repetitive</i>	<i>Repetitive</i>	<i>Totals</i>	<i>Reformed Percentage</i>	<i>Prior</i>
<i>Personal & Family Background</i>	39	19	58	33	36
<i>Professional & Educational Background</i>	22	11	33	33	64
<i>Tax & Financial Information</i>	11	6	17	35	66
<i>Domestic Help Issue</i>	1	0	1	—	—
<i>Public & Organizational Activities</i>	2	7	9	78	78
<i>Legal & Administrative Proceedings</i>	10	7	17	41	71
<i>Miscellaneous</i>	31	3	34	9	9
Totals	104	53	157	Avg. 34	Avg. 50

Similar reductions in repetitiveness result by reducing the number of different questions requiring information on professional relationships. At least 10 separate questions ask about connections between the nominee and corporations and other institutions. Like those questions on property, these questions differ from one another by varying the time periods or the type of organizations involved, the level of connection to the organization necessary to report, the level of compensation triggering a report, *et cetera*. Reform in this topic could reduce the number of questions from ten to, say, three on conflict of interest.¹⁰ Other changes in this topic would lower the number of questions concerning educational attainment, plans for post government compensation, and foreign representation. Consolidation among these groups would result in a further reduction from eight questions to three. In all, then, reformulation in this topic could lower the level of repetitiveness from 64% to 33%.

Under the last topic with serious repetitiveness, Legal and Administrative Proceedings, reformulation could eliminate all but seven repetitive questions. That would reduce the repetitiveness in the topic from 71% to 41%. Overall, reformulating questions in the Executive Branch forms would reduce repetitiveness from almost half of all questions to around one-third. By normal standards, that reduction would constitute an improvement of 32%, a very substantial improvement.

The difficulty of this reform approach rests on the fact that the questions generated by both the FBI in SF-86 and the USOGE in SF-278 have substantial institutional justification. In the former, the FBI can rely on expertise about the nature of the investigative process to suggest that it has a need to generate sufficient amounts of data on topics to discover security risks. In the latter, the SF-278 has a substantial statutory basis for its inquiries. Change in those areas bound up with SF-278 inquiries requires generating changes in statute.

TAKING STRATEGIC IMPERATIVES SERIOUSLY

Under one further reform strategy, one of the four institutions would unilaterally surrender control over information. That institution could rely, then, on the information gathered by the others. And it could guarantee a significant reduction in information requirements on nominees and repetitiveness by acting unilaterally.

¹⁰ The reduced number would include a single question on the SF-86 outlining the nominee’s employment history and two separate questions distinguishing between employment related relationships and advisor relationships.

The White House has the best opportunity to take this reform approach on two accounts. First, since it initiates the process, it can afford to limit its own information requirements by securing the information delivered to the other agencies. Instead of offering its own form, the White House could rely on the fact that it can see how applicants fill out their SF-86 and draft their SF-278 as part of the initial negotiations process conducted pursuant to identifying eventual nominees. Based on those drafts, then, the White House would determine if it would carry through with its intent to nominate thereby triggering the appointment vetting process. Since almost all of the PDS questions repeat on other forms, this strategy would reduce repetitiveness to around 28%, slightly more than the more complicated strategy outlined earlier.

For its own deliberations, the White House would not lose any relevant information. Except for the “nanny-question,” the PDS provides information secured on other forms. In addition, the PDS does not obtain information on any “decision criteria” unique to White House concerns and so eliminating the form would not adversely affect White House considerations.

CONSIDERING THE SENATE FORMS

Except for a few questions requiring the nominee to list publications and honors, Senate committee questionnaires differ from the Executive branch in two important respects. First, the Senate committee questionnaires attempt to commit nominees to resolving “constitutional” conflicts in the Senate’s favor. For example, committee questionnaires regularly require nominees to commit to reporting to the Senate on policy decisions that vary from legislative policy. No amount of reform will likely reduce the interest of the Senate in committing nominees to follow committee dictates on policy differences.

Second, many of the Senate committees require more detailed financial information, in the form of “net worth” statements, than that required on the financial disclosure questions of the Executive Branch questionnaires. On this issue, clearly the issues has become the necessity of requiring information about net worth when that information does not clearly indicate the kinds of relationships typically understood to create conflicts of interest.

THE RELATIVE EASE OF REFORM

To extract nominees from the formless darkness of the appointments questionnaires actually requires few changes in the requirements for information from nominees. As indicated earlier, streamlining information across forms, taking the highest and broadest levels of variation as the focus, greatly reduces the level of repetitiveness without severely curtailing the information provided by nominees. Thus, without attempting to assess what the government actually needs to know in order to select the president’s team, without assessing the appropriate decision criteria, the government can make significant improvements and thereby begin to reverse the unwholesome atmosphere for potential appointees.