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HOUSE POST OFFICE AND CIVIL SERVICE COMMITTEE
SUBCOMMITTEE ON HUMAN RESOURCES

OVERSIGHT HEARING ON THE EFFECTS OF FEDERAL ETHICS RESTRICTIONS ON THE RECRUITMENT AND RETENTION OF FEDERAL EMPLOYEES

June 13, 1989 10:00 a.m. 311 CHOB

WITNESS LIST

Panel 1

Commission on Federal Ethics Law Reform
Judith Bello, Member, R. James Woolsey, Member

The Department of Justice
Joseph Whitley, Acting Associate Attorney General

The Office of Government Ethics
Frank Q. Nebeker, Director

Panel 2

Former Federal Employees
Robert B. Costello, Former Undersecretary for Acquisition, Department of Defense

Dr. Noel W. Hinners, Former Associate Deputy Administrator, NASA

Mr. Leland Page, Former Director of the Office of Automation Service, Airway Facilities Program, FAA

Arthur P. Rosenblum, Former Program Executive Officer, Management Information Systems, U.S. Army

Panel 3

National Commission on the Public Service, Task Force on Public Perceptions of the Public Service
Carolyn Warner, Member of the Commission, Dr. Donald F. Kettl, Associate Professor, Vanderbilt University, Designated Spokesperson for the Task Force

The Administrative Conference of the United States
Marshall J. Breger, Chairman

The General Accounting Office
Bernard Ungar, Director of Federal Human Resource Management Issues, General Government Division

Panel 4

The Senior Executives Association
G. Jerry Shaw, General Counsel

The American Civil Liberties Union
Leslie Harris, Legislative Counsel

THE EFFECTS OF FEDERAL ETHICS RESTRICTIONS ON THE RECRUITMENT AND RETENTION OF FEDERAL EMPLOYEES

HEARING

Before the

SUBCOMMITTEE ON HUMAN RESOURCES

of the

COMMITTEE ON POST OFFICE AND CIVIL SERVICE

June 13, 1989

OPENING STATEMENT

Chairman Paul E. Kanjorski

The recommendations of the President's Commission on Federal Ethics Law Reform, and his subsequent legislative proposal on federal ethics, have fostered a new trend towards further restricting the conduct of federal employees. While there can be no doubt that public servants must be expected to adhere to the highest ethical standards, we must fashion ethical standards to which public servants can reasonably be expected to adhere.

Concerns have been raised that various federal ethics requirements and proposals may act as a disincentive to working for the federal government. For example, in a recent Washington Post article, the Senior Executives Association suggested that hundreds of executives were considering resigning due to the implementation of new rules restricting the pre and post-employment activities of employees working on procurements.

Because of the government's desire to attract and retain the "best and the brightest," it is imperative that we have all the facts before we create more burdens on federal employees and possibly make public service undesirable. We should know, for example, (1) how the Ethics in Government Act, in its ten year existence, has impacted on the recruitment and retention of federal employees, (2) whether there is a body of evidence which at least suggests that there is a need for further restrictions, (3) if there is a need for further restrictions, how they might adversely effect the government's ability to attract and retain qualified personnel, and (4) whether the need for further ethics restrictions justifies the difficulties the government may encounter.

Unfortunately, it appears that up to this point, neither the Administration nor Congress has actively sought this information and that ethics safeguards may be based more upon a desire to enhance general public trust in government, than upon actual problems encountered in the work force.

The purpose of this hearing is to try to answer some of these questions before Congress and the Administration rushes headlong into restricting the activities of existing and future public servants.

TESTIMONY PRESENTED BY
DR. NOEL W. HINNERS
TO THE
HOUSE COMMITTEE ON POST OFFICE AND CIVIL SERVICE
SUBCOMMITTEE ON HUMAN RESOURCES
HEARING ON
"THE EFFECTS OF FEDERAL ETHICS RESTRICTIONS ON THE RECRUITMENT AND RETENTION OF FEDERAL EMPLOYEES"
JUNE 13, 1989

It is a priviledge, Mr. Chairman and members of the subcommittee, to be invited here today to address what I consider to be one of the most pressing issues facing our government: the recruitment and retention of federal employees. Indeed, I do consider it a priviledge, for in how many other countries of the world, and one thinks of recent events in China, would a citizen be invited to critique his government and have no fear of retribution? Additionally, I feel a compulsive sense of responsibility to do what I can to improve a deteriorating federal work environment, for I am a firm believer that only by attracting and retaining at least some of the best will we continue to have a government that is truly responsive and accountable to the people. I speak today as an ex-civil servant and not as an employee of the Martin Marietta Corporation which I joined on May 14, 1989.

I realize that the Hearing is focussed on "The Effects of Federal Ethics Restrictions on the Recruitment and Retention of Federal Employees" and I will address that issue. I ask, however, that you to bear with me as I discuss a number of related items; I do that because I believe that "ethics restrictions" per se are nowhere near the totality of the problem and that disproportionate focus on ethics in this time of soul-searching will cause diversion from what may be more, or at least just as, important aspects of the civil servant's working environment. It is my surmisal that it is the cumulative effect of all these factors over the past decade or so which has led to an increasing disenchantment with Federal service. Those factors include (not in priority order): inadequate resources to do the job, excessive contracting-out, non-competitive pay, regulatory burden, post-employment restrictions, belief in the importance of the job, and public perception of the civil service.

Before discussing the issues, I'll present some personal information which will help put my recent resignation from NASA on May 13, 1989 in context. I came to Washington in 1963, fresh out of

college and eager to work on the Apollo Program. As an employee of an AT&T company called Bellcomm, which was formed to work soley with NASA on the Apollo Program. I worked side-by-side for nine years with many NASA civil servants and was truly impressed with the caliber of folks in NASA. Thus when Bellcomm folded it's tent in 1972, rather than move to New Jersey to the Bell Labs, I chose to join NASA and participate directly in the exciting mission of space exploration. The attraction was indeed about that simple...what could be more challenging and rewarding than to be in a position of helping to determine our Nation's future in space? At that time I knowingly gave up nine year's worth of employment counting towards retirement benefits (one had to have 15 years in the Bell System to get vested). That seemed like a small price to pay in view of the nature of the job with NASA and considering the generally superior retirement benefits of the Civil Service Retirement System (CSRS). At that time, NASA was able to offer me an increase over the salary I was making at Bellcomm, certainly a factor although I dare say that I would have gone for the same salary (such is the luxury of youthful fancy with no kids even approaching college age.)

My NASA career started as Deputy Director and Chief Scientist of Lunar Programs. In 1974 I became Director of Lunar Programs and soon thereafter Associate Administrator for Space Science, a position held until 1979 when I joined the Smithsonian Institution as Director of the National Air and Space Museum. In 1982 I became Director of the NASA Goddard Space Flight Center, remaining there until 1987 when I responded to Dr. Fletcher's request to return to NASA Headquarters as Associate Deputy Administrator (Institution) to help focus, as part of the recovery from the Challenger disaster, on some of the internal institutional management issues (people, facilitities and equipment) in the Agency. In this last capacity, as well as at Goddard, I became painfully aware of the magnitude of the challenges facing us in maintaining an environment conducive to mission success and of the seemingly endless bureaucratic and political impediments to productive management.

The reason I returned to NASA Headquarters in 1987 was that I believed strongly in the mission of NASA and in its people and thought that I could contribute to improving the situation. In that light, I committed to Dr. Fletcher that I would go for two years, i.e., to the summer of 1989 or through the transition to a new NASA Administrator, at which point I expected to resign from NASA to work in either the private industry or academia. Had he not asked

me to return to Headquarters, I probably would have remained at Goddard at most another year before embarking on a new, non-government career. Thus you can see that I had been contemplating a career move for some time; I did not aspire to any other position in NASA or the in theFederal government, in part because of the cumulative effect of a host of frustrations, and as much because I believed that if I were ever going to make a new career I'd best do it before getting too old to be attractive to potential employers in the private sector. Now, although I planned to leave sometime this coming summer, the finality of my decision and the accelerated timing are related directly to the recent fiascos on pay and ethics legislation.

This is in a sense all prologue but necessary so that you understand a few aspects of my career. First, I have been blessed with working in an exciting field with incredibly dedicated, selfless public servants, ranging from janitors to secretaries to procurement folks to scientists and engineers. Those people are, with few exceptions, giving the U.S. taxpayer excellent value for their investment and most are proud to be NASA employees (note that NASA people tend not to think of themselves as government, particularly during those periods of "bureaucrat bashing" so prevalent in the Carter and Reagan Administrations). I have had fantastic opportunity and responsibility as a civil servant and I can say, without reservation, that I have been proud to work for NASA and for the U.S. Government.

Now I'd like to address the specific problem areas that are part of that cumulative frustration I mentioned above. Let's first deal with the inadequate resources and contracting out, two related issues, and how they affect NASA's ability to successfully implement its approved program.

The shortfall of resources is threefold: administrative budget, personnel ceiling and management authority. The administrative, or operations budget, is that part of the NASA budget called Research and Program Management and included salaries and travel of civil servants, supports the day-to-day operations of the Agency, its Headquarters and field centers, and includes funding for the associated support service contractors. Over the years budget squeezes, program priority, and the recent appropiations realignment have caused the operations to be disproportionately reduced. On the one hand, it is sensible to keep pressure on an operating budget to

assure efficient management. On the other hand, a continuous squeeze can eventually result in inefficiency and that is now where NASA is. For specific example, note that NASA cannot hire the number of civil servants which OMB has authorized for 1989 and 1990, it cannot fund the upgrading of antiquated computerized business and management systems, and it cannot fund the conversion of civil service jobs to contractor jobs mandated by the OMB.

The civil service job conversion is commonly referred to as "contracting out", a process which has been underway in NASA, albeit not by the formal A-76 process, for the past 15 years as NASA has attempted to increase the proportion of engineers in a, until recently, decreasing total workforce. Some of that conversion has been good: there are a number of service-related jobs which do not need to be done by civil servants and there are sometimes real benefits to be had by employing a contractor (it's at times easier to make a contractor respond to management desires via the award-fee process or contract recompetition). On the other side of that coin, it can cost more to contract for certain activities but there is a more insidious aspect: it has gone too far in some work areas. I, and many NASA employees, believe that NASA has an undue and detrimental reliance upon contractors in areas ranging from secretarial services to science program management to engineering support. Not only are some of those contracted positions legitimate government functions, but one increasingly sees a situation in which on-site or near-site contractors are being paid more than the equivalent civil servant (that some of those contractor employees are recently retired NASA employees does not help morale.)

A long-term downside of contracting-out is the erosion of government's ability to manage its contracts. That arises because the government contract managers typically come up through the ranks into management, having served a lengthy spell actually performing the work they eventually manage. As more and more lower level jobs are contracted out, there is less and less opportunity to grow the future government manager. The end point potential is an incompetent government management capability (this is not unlike what can happen at the top-side of management if too many inexperienced political appointees enter a government department, a major issue discussed in the Volker report in which they call for a reduction of the number of political appointees and an increased reliance upon the career civil servant. I hasten to add that the

situation in NASA is unique in that at this time all the top positions are filled, or soon will be, with career folks.)

The solution to the contracting-out problem is in theory straight forward: approve and fund sufficient government employees to conduct the approved programs. I have no doubt that the OMB program staff, working with NASA, can figure out what that right number is and can agree on which functions are inherently governmental. What remains is for the political leadership to realize that blanket contracting-out quotas, designed to satisfy the political goal of smaller size government, may be counter-productive to good government.

Regulatory burden is another item that has aspects of creeping counter-productivity, whether it be in procurement, management, or review and audit. And as usual, it's a matter of degree, for all admit to a need for basic regulatory processes. But, outside of the regulators, you'll also find a clear consensus that government is strangling itself with excessive, burdensome and at times onerous regulation. This is a topic which has received a lot of attention by a number of studies and I can but add my voice noting that the impact on the civil service workforce is real and it is negative.

A few words now on pay. Pay, the dollars in the envelope, is only a piece of the remuneration of any job. The nature of the work, the colleagues, location, benefits, impact or influence, opportunity for advancement, and a host of other factors constitute the total reward and each individual makes his or her own decision on employer based on conscious or subconscious weighting of the factors. When any one factor in an employment environment gets grossly out of whack with the competition, erosion of the workforce results. In government, entry level and senior level pay, especially for technical people, is now sufficiently non-competitive that recruitment and retention are increasingly difficult. This is a real problem which is not going to be evidenced by looking solely at statistics of attrition and hiring. At the entry level, it is a matter of the best people not electing to work for government; at the senior level, it is the most experienced and valuable people who have the option to make non-government employment decisions.

This problem has been addressed quite thoroughly by the Quadrennial Commission and others, and I can give specific examples of NASA instances if desired, but for now let me call to your

attention a factor that may exacerbate the situation. Several years ago, the basic civil service retirement system was changed such that new employees enter government under the Federal Employee Retirement System, or FERS. There are many positive aspects of FERS and it in many ways is closer to private employment systems, including the early vesting of retirement benefits. In contrast to the CSRS, which has the effect of "hooking" an employee after five to ten years of service, FERS gives federal people a new mobility. To the degree that federal employment conditions become undesirable, an increasing number of employees will opt out, and as usual it will be qualitatively selective.

On the issue of ethics ligislation, I have only a few thoughts. First, it is getting impossible for a non-lawyer (and maybe for lawyers) to comprehend the particular significance of the different pieces of ethics legislation. It is just such vaguery in the OFPP section 6 that led me and others to accelerate our departures from NASA rather than risk an adverse interpretation that would severely limit career choices. There is both the near-term risk and long-term in that what is o.k. today may be interpreted as not o.k. years from now.

I personally do not see the need to continue to increasingly complicate the life of civil servants. I can attest that in NASA good ethics were a way of life. We took it seriously and, although we grumbled a bit over the time it took to fill out all the financial disclosure forms, believed 100% that financial disclosure is a key ingredient to assuring compliance.

Nobody can ever guarantee that there will not be a violation of established ethics principals as long as we have human beings in the work place. But to continue to attempt to legislate details of ethical behavior will be counter-productive. I do not want to work for anyone or any organization that is not founded on trust. I believe that most civil servants will honor the trust put in them. When and if it is not, punish the offender but don't pass a legislative cure for every new instance which then complicates life for three million federal employees.

With some trepidation, I point out my perception that the great proportion of governmental ethics violations arise in the political appointee realm, not in the career civil service. But there too one should not legislate to the extent that the most qualified people will

not risk taking a federal job because of a mis-application of ethics principals.

Mr. Chairman and members of the subcommittee, it is time to restore confidence in our government. Simple ethics legislation, full financial disclosure, sensible audit and review, comparable standards for all branches of government (civil servants chafe at the dual standards for Congress and the Executive branches), establishment of trust, competitive pay and top-level Administration and Congressional support for the civil service workforce in combination can make federal careers rewarding and attractive. I thank you for making the effort to improve the situation and offer my continuing support wherever possible.

United States General Accounting Office

GAO

Testimony

For Release
On Delivery
Expected at
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Tuesday
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THE PRESIDENT'S ETHICS PROPOSALS

Statement of
Bernard L. Ungar, Director
Federal Human Resource Management Issues
General Government Division

Before the Subcommittee on Human Resources
Committee on Post Office and Civil Service
House of Representatives

GAO/T-GGD-89-29

Mr. Chairman and Members of the Subcommittee:

I appreciate the opportunity to appear before the Subcommittee to discuss the President's proposals for ethics reform as set forth in H.R. 2337 and S.765, the "Government-wide Ethics Act of 1989." The 97-page bill proposes major revisions to the Ethics in Government Act of 1978 (the Ethics Act) and the conflict of interest statutes (18 U.S.C. 202-209). These revisions cover a broad spectrum of complex issues and incorporate many of the recommendations of the President's Commission on Federal Ethics Law Reform (the Ethics Commission).

We have done extensive work on the administration and enforcement of current ethics laws over many years. My comments will be based largely on that work, plus the work done by the Ethics Commission.

We have long supported high standards of ethical conduct for all federal officials and employees. At their most important level, ethics standards reflect fundamental values of morality and honesty in the work place on which there is a broad consensus and which permit no compromise. Standards which incorporate these fundamental values must be clearly stated in the law, communicated in an understandable way to all employees, and subjected to vigorous and effective enforcement.

Our work has documented certain areas of vagueness in the law and administrative shortcomings that have created uncertainty and confusion. This makes it difficult to communicate and enforce those standards which reflect basic values of morality and honesty. It also tends to blur the distinction between these fundamental standards and other aspects of ethics administration which do not reflect basic values but may result in imposing substantial burdens and adversely affecting the recruitment and retention of federal employees.

The President's proposals provide a good framework for examining ethics issues and alternatives. We support many of the President's proposals for reform but believe that others require refinement and further discussion. We considered the President's proposals in the context of financial disclosure requirements, current employee restrictions, post-employment restrictions, and administration and enforcement issues.

FINANCIAL DISCLOSURE

We have several comments with respect to the President's proposals in the area of financial disclosure. First, the bill would impose on all three branches of the federal government essentially the same system for reporting and review of financial interests. While consistency in reporting seems desirable, we believe that the review aspect of the bill requires close

scrutiny in terms of the fundamental differences in the three branches. For example, Members of Congress and judges do not function in a hierarchy like that of the executive branch in which supervisors can make decisions about particular financial holdings.

Second, the bill will replace current public reporting of financial interests by category of value with reporting of "the actual value of such interest rounded to the nearest thousand dollars." It is not evident from our work or the Ethics Commission's report that reporting actual values would serve any purpose that outweighs the added burden imposed on filers. Indeed, the Commission recommended retention of reporting by category of value.

Another related issue is the extent to which public reporting, as opposed to confidential reporting, should continue to be required for career officials above the GS-16 level. The Office of Government Ethics (OGE) has recommended that public disclosure be limited to individuals holding elective or appointed positions because there is little public interest in reports filed by career civil servants.

Finally, we note that the President's bill deals only with public financial reporting but does not address consistency in confidential financial reporting among the three branches. We

believe that, like public disclosure, standards for confidential financial disclosure are appropriate for all three branches.

CURRENT EMPLOYEE RESTRICTIONS

The President's proposals would extend to the legislative and judicial branches many of the employment restrictions that are now applicable only to the executive branch. While we have not done much work in this area, more uniform restrictions throughout the government seem desirable in concept. At the same time, we believe it is essential that such restrictions be understandable. Unlike financial disclosure requirements, which are generally well understood, the conflict of interest restrictions have generated confusion. For example, both GAO and the Ethics Commission have pointed to the need to clarify the term "particular matter" used in 18 U.S.C. 208, which prohibits current officers and employees from participating in "particular matters" affecting a personal financial interest.

POST-EMPLOYMENT RESTRICTIONS

We have found post-employment restrictions to be the most vague and confused area of the current ethics system. This probably results, in part, from a lack of a consensus as to what such restrictions should be. Furthermore, because violations of these restrictions can result in criminal sanctions, it is essential

that current and prospective employees be able to understand up front what the restrictions are.

Proposal Lacks Sufficient Specificity

We are particularly concerned with the vagueness of the President's proposal to create a new 2-year post-employment bar against the use and disclosure of certain non-public information. Some of the classes of non-public information to be protected from disclosure under the proposal lack sufficient specificity. For example, we believe that the proposed definitions of trade secret/confidential statistical data and negotiation positions are far too broad and unclear to attach criminal penalties to disclosure.

We also question providing OGE with the authority to designate any information beyond the three proposed categories of non-public information, the disclosure of which would result in criminal penalties, fines, and/or debarment. We believe that any such additional categories should be considered by Congress and established by legislation.

We support the general intent of this proposal to protect the interests of the government by prohibiting employees leaving the government from harmful "side switching" and providing vital non-public information to an outside party dealing with government.

Our concerns are primarily with the need to specifically define the information to be protected and the process for doing so.

DOD Post-Employment Restrictions

The President's proposed bill would make several changes to recently-enacted laws which impose certain post-employment requirements and restrictions on former Department of Defense employees -- 10 U.S.C. 2397, 2397a, 2397b, and 2397c. For example, the bill proposes to repeal section 2397b which prohibits certain post-employment with defense contractors for certain DOD personnel.

The Ethics Commission had recommended revisiting the employment prohibition in section 2397b because it potentially covers so few people yet its precise application is difficult to determine. We question whether section 2397b should be repealed out right. A better approach might be to clarify its meaning.

The President's proposal would also significantly change section 2397c, the requirement that major defense contractors report annually to DOD on former DOD personnel to whom they paid compensation. The proposal would permit DOD to define the elements of the reports to be submitted under section 2397c. However, in the past, DOD asked for little more than job titles which were not a sufficient basis for detecting potential

conflicts of interest. We believe that the amendments by the Congress to require that DOD obtain more detailed information were appropriate and should be retained.

Finally, we note that these post-employment restrictions in 10 U.S.C. 2397-2397c apply only to the Defense Department. We believe the conflict of interest situations addressed in these laws could occur in other agencies and departments of the federal government as well. Thus, if these DOD post-employment restrictions are continued, Congress may wish to consider extending similar post-employment prohibitions to other agencies.

ADMINISTRATION AND ENFORCEMENT

With regard to enforcement, we fully support the President's proposal to establish civil and misdemeanor penalties for violations of the conflict of interest statutes. As we testified last year, this would give more latitude to those responsible for enforcing the ethics requirements. Our work shows that the Department of Justice has prosecuted very few conflict of interest cases under the existing felony statutes. Civil penalties could facilitate enforcement of the conflict of interest laws and possibly have a greater deterrent effect as a practical matter.

Further, we have reported on a variety of problems and concerns associated with OGE's administration of the "compartmentalization" process by which agencies are divided into designated subunits for application of the 1-year "no contact" restrictions. While the bill addresses the White House compartmentalization, it does not sufficiently deal with this issue for other agencies.

We also believe that ethics requirements must be communicated in a straightforward manner through regulations and interpretive rulings that can be understood by the persons they affect. Another useful aid would be a handbook for all officials which explains the ethics rules in lay terms.

One other aspect of the President's proposal which is a great concern to us deals with our access to records authority. Section 208 of the current Ethics Act grants GAO access to all financial disclosure reports filed under the Act--both public and confidential. The President's bill would amend section 208 to limit GAO to "publicly available" reports. It is essential that GAO have full access to both public and confidential financial disclosure reports in order to assist Congress with oversight and, indeed, to carry out the review requirements that the President's bill would impose on GAO. Therefore, we strongly recommend that GAO's access authority under section 208 of the current law be retained.

IMPACT ON RECRUITMENT AND RETENTION

Since 1983, we have issued three reports that address aspects of the impact of current ethics laws on recruitment and retention. In general, we did not find the impact of ethics laws to be a major concern. However, the information in these reports is quite limited and somewhat dated. A variety of changes in ethics laws have been proposed since these studies which might make their results different today. For example, many recent news articles have described employees leaving government early because of certain restrictive provisions in the new procurement policy law.

We believe that this is an issue that merits further study, particularly in relation to SES members and potential presidential appointees. Along these lines, we think it would be particularly appropriate to attempt to determine the extent to which concern about ethics laws may result from a general sense of confusion and a lack of adequate training and education on the part of federal employees.

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That concludes my prepared statement. I will be happy to answer any questions you may have.

FOR RELEASE ON DELIVERY
Expected at 10:00 A.M.
June 13, 1989

STATEMENT OF

FRANK Q. NEBEKER
DIRECTOR
OFFICE OF GOVERNMENT ETHICS

BEFORE
THE SUBCOMMITTEE ON HUMAN RESOURCES
OF
THE HOUSE COMMITTEE ON POST OFFICE AND CIVIL SERVICE

ON
THE EFFECTS OF FEDERAL ETHICS RESTRICTIONS
ON THE
RECRUITMENT AND RETENTION OF FEDERAL EMPLOYEES

MR. CHAIRMAN AND MEMBERS OF THE SUBCOMMITTEE:

I appreciate your invitation to appear before this Subcommittee to present the views of the Office of Government Ethics (OGE) on the effects of federal ethics restrictions on recruitment and retention of federal employees.

This is a subject that, while a very important consideration in maintaining the government's ability to attract and retain the highest quality individual in the federal workforce, is only partially capable of being measured in any meaningful sense and only then after a problem has been recognized. Statutes and regulations which may cause such a problem can, to some degree, be anticipated before they affect the federal workforce and that is the crucial issue I would like to discuss with you today. First, however, let me discuss the lack of statistics in this area.

In terms of recruitment of federal employees, I know of no meaningful way of determining how many or why individuals choose not to apply for federal positions. One simply cannot count a negative. The government could survey each individual whom it actively selected to recruit for a specific position to determine why that individual chose not to accept it, but I believe the resulting information would be position specific and could not be extrapolated into data that would support more general conclusions, especially when attempting to relate it only to conduct restrictions.

With regard to information gathered from individuals leaving federal service, this Office did a limited survey of advice and consent appointees who left government service between September 1980, at the end of an Administration, and January 1983. From the 161 who responded to the survey, 76.4% said that the federal ethics program had no impact on their decision to leave. It is important to remember that while on the one hand this was the period immediately following the imposition of public financial disclosure requirements and more stringent post employment requirements for all of these individuals, but on the other, the individuals were also political appointees who never intended to stay in federal service or who could not remain in their positions even if they had wished.

Most recently we all have seen in the news reports the fact that at least two high level career officials at NASA have publicly laid their decision to leave the government on the recently enacted amendments to the reauthorization act of the Office of Federal Procurement Policy. I know of no government-wide initiative to try to compile data on those individuals in procurement positions who left or who are leaving the government because of that statute.

Be that as it may, all of us probably know of cases where individuals have either decided not to come into government because "ethics" statutes would cause too much of a financial hardship or have decided to leave because of some new pending piece of legislation. Just recently, my Office was contacted by the attorney for a potential Presidential appointee who was trying to determine what it would "cost" the individual to come into government because of divestiture requirements applicable to the type of position he was considering. It became clear that the individual would be required to sell more than a million dollars worth of stock which he had accumulated over a number of years. Because the attorney did not disclose the name of the client, my Office will not necessarily know what the individual's ultimate decision was, nor will we know if the divestiture costs were the only consideration. While this instance is noteworthy because it is an indication that those concerns for "ethics" restrictions do exist, it does not provide the kind of hard data that I'm sure that you are seeking.

As Director of the Office of Government Ethics, I have been called upon to comment on a number of pieces of legislation and to review a number of proposed regulations that attempt to regulate the conduct of federal officials during their service as well as after. These have been and will continue to be referred to here generally as "ethics" statutes and regulations although I do not necessarily believe that is a proper term for all of them. I have on a number of occasions observed that a proposed statute or proposed legislation appeared to be of the nature that would pose substantial hardships to the government in attracting and

retaining the most qualified individuals in the positions that would be affected by the statute or regulation. The standard that I have used to judge the future effect of a statute is this. The government has a legitimate interest in regulating the conduct of its employees and former employees when a governmental process would be harmed by or there would be a reasonable and clear loss of credibility on the part of the public in the governmental processes if they engaged in the conduct. When a proposed regulation or statute exceeds that goal and is intended to restrict conduct where no government processes would reasonably be harmed or the public's confidence in the government reasonably lost, then those restrictions may have as one of its effects the inability of the government to attract or retain individuals in the positions covered by the restrictions.

In my experience, proposed statutes and regulations have this difficulty in three ways. First, they are clearly drafted to cover conduct that is beyond what I believe to be within those legitimate interests of the government which I mentioned above. Second, and less obvious, is the proposed statute or regulation is not precisely drafted and covers much more than the drafters intended to cover. Third, the proposed statute or regulation is so unclear on its face that the extent of the conduct regulated is so vague as to create a chilling effect on conduct otherwise causing no harm to governmental processes or a reasonable public's perception of them. In order to avoid the inappropriate effects of "ethics" statutes on recruitment and retention of the most qualified individuals in federal service, Congress and the Executive branch must always diligently guard against any one or a combination of these three results when drafting restrictions on the conduct of present and former federal officials.

With regard to the previously mentioned resignations of senior NASA employees, this Office became aware of those provisions after they had become law. Upon review, the Office concluded that some provisions would cover conduct that would not affect governmental processes or a reasonable public's perception of the processes, some provisions were drafted so vaguely as to have a very potentially chilling effect upon those who were covered, and some provisions did, this Office believes, cover more conduct than the drafters had intended. In other words, it involved aspects of all three results to be avoided. In addition, the conduct covered by the statute was inconsistent with some present conflict of interest statutes and wholly redundant of one other. (The criminal conflict of interest statutes for all federal officials already in existence cover gifts, negotiating for employment and post employment -- the three main subjects of proscription in that legislation.) Further, by not placing these provisions with the other conflict of interest statutes, it has the real potential for ensnarling those who in good faith attempt to determine proper conduct but inadvertently violate those additional and somewhat inconsistent provisions because it is not

necessarily logical to assume that restrictions on the same type of conduct would be found in disparate titles of the Code. The Office of Government Ethics submitted to the President's Commission on Federal Ethics Law Reform a series of recommendations that covered the gamut of ethics laws. Included was a recommendation that these provisions of the OFPP Act and certain other provisions applying only to procurement officials in the Department of Defense (10 U.S.C. 2397a and 2397b) should be repealed and that those provisions of each which were appropriate and not already addressed in the criminal conflict of interest provisions of ch. 11 of title 18 be incorporated there.

I would note that the President's proposed ethics legislation includes a provision that would repeal the OFPP proscriptions and the title 10 sections discussed above. In addition, it would amend the present criminal conflict of interest statutes to take into consideration provisions in those statutes that were not already fully addressed by the present code.

Again, I can only stress that the strongest, most respected and viable ethics program is designed to address only those issues that the government has a legitimate interest in addressing, that any proposed proscriptions be directed only to protecting government processes and the reasonable public's perception of them. If that is the case, then I do not believe that there will be a problem with recruitment and retention of the best individuals for government positions caused by those restrictions. I have not seen, nor has my Office had any experience that would lead to a conclusion that legitimate and appropriate restrictions have been viewed by individuals as prohibiting them from actions in which they would otherwise engage. The vast majority of federal employees have no wish to abuse government processes or have their own or some colleague's conduct bring the projects on which they work into question.

I have observed that most individuals accept positions within the government not knowing exactly what the "ethics" restrictions are, assuming they will be briefed on those matters as well as a myriad of others once they have begun in a position. They do so because they have no reason to believe that they will be unable to abide by the restrictions, thinking of themselves as ethical individuals. I hope that attitude continues in new federal employees and that they are not surprised to find restrictions that unreasonably affect their conduct as officials or their proper pursuit of advancement within their fields. I believe that too is a goal of a proper ethics program.

Finally, it is my personal belief that the most crucial concern of individuals in considering federal service and in deciding to leave is the salary they will or could ever expect to receive while serving the government. I recognize that one cannot and should not tie high ethics standards to salaries, but I

believe that ethics standards may be frayed by salary levels which are unrealistic and unfair. When that happens and a scandal occurs, the apparent response of many is to toughen the ethics standards even though the conduct was covered by an appropriate restriction. This is done rather than to address the salary issue.

I would be happy to answer any questions the members of the subcommittee might have.

TESTIMONY OF

MARSHALL J. BREGER

Chairman

Administrative Conference of the United States

before the

Subcommittee on Human Resources

Committee on Post Office and Civil Service

United States House of Representatives

On the Effects of Government Ethics Restrictions on the Recruitment and Retention of Federal Employees

June 13, 1989

STATEMENT OF MARSHALL J. BREGER

Mr. Chairman, members of the committee, I am pleased to appear before the Subcommittee to address the general subject of government ethics restrictions and their effects on the recruitment and retention of federal employees. I serve as Chairman of the Administrative Conference of the United States, an independent federal agency established by Congress in 1964 to study and recommend improvements to the administrative process. I am accompanied today by Michael W. Bowers, our Deputy Research Director.

Today's hearing is especially timely for it appears that events are inexorably moving Congress to make significant revisions to the federal ethics statutes. As I have stated in other testimony, it is important that Congress not act on a piecemeal basis, without an understanding of the whole government ethics system.

The question of the effects of ethics restrictions on the recruitment and retention of federal employees historically has been a concern raised during consideration of reform of the ethics laws. President Bush on January 25 included among his four key principles to guide his Commission on Federal Ethics Law Reform the principle that "[W]e cannot afford to have unreasonably restrictive requirements that discourage able citizens from entering public service."[1]

1. Our Reliance on Outside Expertise and the Positive Value of the "Revolving Door."

Many of the ethics stories of the last year or more have involved the so-called "revolving door." Sometimes the players are on the inside and approaching the door. Sometimes they have just exited. But at the core of the stories is the relationship between government officials and people or entities who may be affected by government decisions. It is understandable, therefore, that some people see stopping the revolving-door as the answer to our ethics problems. Would that it were so easy.

Let us try a thought experiment. Imagine a strongly-enforced curtain separating the government and the private sector or a rule that once a person left government, they could not return to government service. Let's consider what we would lose if that approach were adopted.

First, we would lose what G. Calvin Mackenzie has dubbed our "in-and-outer" system of leadership selection.[2] Every four or eight years this country has an infusion of new leadership -- an exchange of ideas between new policymaking officials and our permanent government. This is not always an easy transition. Some people don't like new policies and change. But I believe this exchange is a fundamental strength of our system and consistent with our democratic ideals.

But there is an even more harmful consequence of stopping the revolving door by making it harder for government officials to leave and work in their area of specialization. At present we do not expect everyone who enters government service to stay there until retirement. Our job structure is a pyramid. The possibilities for advancement are limited, and it is not realistic or desirable to retain civil servants indefinitely at the same pay grade

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[1]The White House, "Remarks by the President to the Ethics Commission During Signing of An Executive Order," Jan. 25, 1989.

[2]G. C. Mackenzie, THE IN-AND-OUTERS: PRESIDENTIAL APPOINTEES AND TRANSIENT GOVERNMENT IN WASHINGTON (Johns Hopkins Univ. Press 1987).

levels. We want to encourage people to spend a portion of their careers in government and then return to the private sector. If unreasonably high barriers to post-government employment in the private sector are erected, people will be deterred from ever seeking public service work.

This was major concern of the Association of the Bar of the City of New York in a report which laid the foundation for the last major substantive revision of our ethics statutes in 1960. That report observed that "no man will accept government appointment . . . if he must abandon the use of his professional skills for several years after leaving government service."[3] It further notes that while some former officials may use knowledge acquired in government against the government, many more will use such knowledge in furtherance of the goals of government:

> In an earlier day, government and the private economy were regarded as opposed or at least completely separate, and no need was recognized for having men outside government with experience gained inside government. With the growth of government and the technological explosion of the twentieth century, such a view has become unthinkable. Today we desperately need a maximum flow of information between the government and the outside, and post-employment restraints tend to build a wall between them.[4]

A third result, noted by Professor Thomas Morgan in a 1979 study for the Administrative Conference, is the possible stifling of independence or critical thinking by government employees who do not have the security of knowing they can find private employment.[5] How many individuals locked into a government career are going to be willing to challenge official positions which they believe are erroneous or unwise? Morgan also predicted that a more complete separation between government officials and private sector professionals would lead to "more rigid attitudes within the agencies and tend to create a Mandarin class less consistent with the democratic ideal."[6]

Our need for private-sector expertise is relevant not only to the "revolving door" issue. One subject the Administrative Conference has been examining is the appropriate ethics restrictions for members of federal advisory committees. Many advisory committees are formed because the agency needs technical expertise that it lacks "in-house." Indeed, it will often be inefficient and probably impossible for government agencies to maintain in-house technical expertise in this time of explosive technological discoveries, tight budgets and changing statutory mandates.

Therefore, the ethics rules for advisory committee members must take into account that many individuals asked to serve on advisory committees -- typically without pay -- naturally will have extensive financial interests in their field of expertise. Unlike our approach to full-time civil servants, we cannot expect government advisers to sever their ties totally with an industry for the privilege of part-time service on an advisory committee. If the rules are too strict, these people will simply say "No thanks" -- or something more emphatic -- to an agency's request that they serve. R. James Woolsey, a member of the Packard Commission and the President's ethics commission, has predicted that this may happen in the defense area

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[3]The Report of the Association of the Bar of New York City, CONFLICT OF INTEREST AND THE FEDERAL SERVICE 224 (Harv. Univ. Press 1960).

[4]Ibid. at 224-25.

[5]Morgan, *Appropriate Limits on Participation by a Former Agency Official in Matters before an Agency*, 1980 DUKE L.J. 1, 54 (1980).

[6]Ibid. at 55.

when the controversial new procurement integrity rules -- which I will discuss later -- go into effect.[7]

Finally, I would note that, despite some well-publicized cases, there appears to be no widespread abuse of the public trust occasioned by individuals entering and leaving government service. Hundreds -- perhaps thousands -- of government officials leave public service each year, or participate as part-time governmental advisers, without any compromise in the integrity of the governmental process.

So I start with the premises that it is in the national interest to continue to draw upon private-sector expertise and that it is not desirable to stop the revolving door. At the same time, we must recognize and deal with those few people who view the revolving door as an opportunity to profit from the use of inside information or the exercise of unfair influence on their former colleagues. Ethics restrictions are essential.

The nature of our ethics restrictions must take account of our democratic system which depends upon the support and confidence of the people. As the importance of the federal government to the national economy has grown in this century, so has the importance of the public's confidence in the integrity of the governmental decisionmaking processes.[8] It is clear that public confidence in the integrity of the government can be eroded by the appearance of conflicts of interest just as surely as it can be by actual wrongdoing. After-the-fact punishment for actual wrongdoing is no longer sufficient.

Restrictions to prevent the appearance of wrongdoing are necessarily anticipatory or prophylactic in nature. This inevitably means that some conduct that is not only not wrong, but which indeed may produce public benefits, may be proscribed in order to foreclose the opportunity for conduct that is wrong. We should be chary of painting too broadly with the prophylactic brush, for it is easy to set ever higher standards for Caesar's wife when you are not a Roman. Severe prophylactic restrictions based on appearance considerations only may unduly burden honest employees and adversely affect our ability to recruit people to serve in the government.

2. Evidence of a Deterrent Effect on Retention and Recruitment of Government Servants.

I want first to address the effects of ethics restrictions on the government's ability to retain its employees. This, as I discuss later, is somewhat easier to establish than effects on the government's ability to recruit employees.

On Retention. In recent times we have seen two instances where proposed new ethics restrictions have directly and dramatically affected the government's retention of its employees.

As passed in 1978, the Ethics in Government Act contained a provision making it a crime for any senior executive branch employee to leave government and within two years to knowingly represent or aid, counsel, advise, consult or assist in the representation of another person in any formal or informal appearance before any government entity in any matter that had been under the senior employee's responsibility while in government.[9]

Before long, agencies began to complain to Congress that valued employees were leaving or threatening to leave the government before the effective date of the Act, and also that people the agencies wanted to hire were refusing job offers because of the impending two-

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[7] See AEROSPACE DAILY, p. 358 (June 1, 1989).

[8] See R. Roberts, WHITE HOUSE ETHICS: THE HISTORY OF THE POLITICS OF CONFLICT OF INTEREST REGULATION 2-3 (Greenwood Press 1988).

[9] Pub. L. No. 95-521, Title V, Sec. 501, 92 Stat. 1864.

year ban on assisting or advising.[10] Congress responded with an amendment to 18 U.S.C. § 207 that essentially nullified the ban.[11]

A recent amendment of the Office of Federal Procurement Policy Act (Pub. L. 100-679, § 6) produced a similar result. Rules implementing Section 6 of the Act -- the procurement integrity provisions written to respond to the "Operation Ill Wind" investigation of defense procurement fraud -- were to become effective May 16, 1989. Numerous top-level officials at NASA, the Department of Defense, the General Services Administration and the Internal Revenue Service announced that they would quit the government before the new rules went into effect.[12] Congress quickly acted to delay the effective date of the new law, and President Bush signed the extension on May 15.[13]

Congressional sponsors have accused the agency officials of overreacting to the new legislation, and I tend to agree that on their face the provisions do not seem that onerous. The OFPPA amendments prohibit former government procurement officials from participating in a contract in which they had been personnally and substantially involved for a period of two years after their involvement with the procurement ended. In addition, the law bars government procurement officials from (1) disclosing proprietary or source selection information to unauthorized persons, (2) discussing future employment with a competing contractor, and (3) soliciting or accepting money, gifts, or other gratuities from a competing contractor during a procurement. The new statute also requires that contractors and contracting officials certify that they are unaware of any violations of the statute, and it establishes stiff civil and criminal penalties for violations.

While we cannot know now the long-term effects of the OFPPA amendments, this experience at least illustrates that the perception of the effects of new ethics restrictions can count almost as much as their specific terms. Because of ambiguity about the provisions (such as when a procurement begins, the trigger for the two-year bar), government employees have decided to not wait and take a chance on erroneously interpreting the law. One of the departing employees, who retired from the Army, stated "There are going to be test cases and none of us want to be involved in that."[14]

More generally, while it is only anecdotal evidence, I want to add that in conversations with many Reagan administration employees about to leave office, their perceptions were that the restrictions on former officials were far more draconian than the actual reach of the statutory language. Provisions that forbid only representation in particular matters that the former employee had worked on, for example, were construed as forbidding use of general knowledge and expertise gained while in government service. So, whatever the cause of this cognitive dissonance, it is clear that perception of the rigor of the ethics laws plays a major role in decisions to accept or stay in government positions.

Interviews with departing officials also illustrate the difficulty of separating out the various factors involved in a government official's the decision to leave the government. The

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[10]See Office of Government Ethics, *Proceedings of the Third Annual Conference* (1982) at page 104.

[11]Pub. L. No. 96-28, 93 Stat. 76 (1979).

[12]NASA alone has lost 14 senior executives and 52 top-level employees since mid-April. See AEROSPACE DAILY, p. 358 (June 1, 1989).

[13]Pub. L. No. 101-28.

[14]CONGRESSIONAL QUARTERLY 1189 (May 20, 1989). See also "New Ethics Law Provokes Resignations," THE WASHINGTON POST, A8, Col.4 (May 23, 1989)(quoting retiring Defense Department undersecretary for acquisition: "I was raised outside Danbury, Connecticut. I have no interest in spending my old age there.")

recent defeat of a bill to raise senior executive salaries plainly contributed to some officials' decisions to leave.[15] James C. Fletcher, former NASA administrator, has suggested that the negative public perception of government service may be another contributing factor.[16] Thus, ethics restrictions often are not the only factor in a person's decision to quit government service.

Let me turn now to the question of the deterrent effects of ethics restrictions on the recruitment of individuals to serve in the government.

On Recruitment. As noted in your letter inviting me to testify, the Administrative Conference considered conducting a study to determine the extent to which prospective government officials are deterred from accepting positions because of the current ethics restrictions. In late 1987 I established a Special Committee on Ethics in Government to identify and recommend solutions to problems related to our system of ethics regulation, and a study of the "sticking points" in the recruitment process seemed like a good way to identify those restrictions most in need of revision.

I should add that considerable anecdotal evidence of the deterrent effect of ethics restrictions already existed. In 1985 the National Academy of Public Administration issued a report on the presidential appointments system that concluded:

> We have concluded that the new rigors of the financial disclosure and conflict of interest laws have assumed a very important role in the appointment process. Their impact is mixed. In some ways, these laws have brought genuine benefits to the American people by eliminating blatant potential conflicts of interest and enhancing opportunities for the identification and prosecution of those who would violate the public trust. On the other hand, these changes have been costly: costly to the government's ability to recruit presidential appointees, costly to the relations between the news media and public officials, and costly in financial sacrifices to a number of honest and dedicated public officials.[17]

The National Academy's study included a survey of over twelve hundred presidential appointees who served during the period from 1964 through 1984.[18] Of the appointees who were required to fill out the executive branch's financial disclosure form (SF 278), 70 percent reported difficulty filling out the form. More significantly, for the period after June 1979 -- the date the Ethics in Government Act became effective -- 30 percent of the respondents reported significant difficulty filling out the form. The National Academy's report

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[15]See FEDERAL COMPUTER WEEK, "Ethics Law Drives Away Procurement Execs," p. 4 (May 8, 1989)(comments of William Walsh and Daniel Capozzoli). See also "2 Top NASA Officials Quit Unexpectedly," THE WASHINGTON POST, A1 (Apr. 25, 1989)(comments of Dr. Noel W. Hinners).

[16]"We have seen some 12 years of bureaucrat bashing from the White House, . . . We see, over and over again, intimations by the Congress that civil servants are not to be trusted. In an environment of that sort, how can we expect the best minds in the land to flock to the challenge of government service?" Ibid.

[17]National Academy of Public Administration, *Leadership in Jeopardy: The Fraying of the Presidential Appointments System.* FINAL REPORT OF THE PRESIDENTIAL APPOINTEE PROJECT 13 (NOV. 1985).

[18]Ibid. at 6.

concluded that the form SF 278 "is a daunting, confusing, excessively detailed hurdle that few presidential appointees are able to negotiate successfully on the first attempt."[19]

I will return later to the subject of financial reporting requirements, but the point made here is that considerable evidence had accumulated which suggested that ethics restrictions might be deterring good people from accepting presidential appointments.[20]

As we considered a study of this matter, we were mindful of possible methodological problems. Perhaps the central difficulty relates to the unstructured and informal personnel recruitment process, and the problem of identifying those candidates seriously being considered for positions and their motivations for dropping out of the process.[21] And because of the political overtones of such a study, we decided not to undertake the study unless we were convinced that it would produce data or findings that would not be open to charges that they were in any way biased. We, therefore, asked Professor William J. Chambliss, Professor and Chair of the Department of Sociology at George Washington University, to determine whether a methodologically-sound study could be done. We reserved a decision to conduct such a study following receipt of Professor Chambliss' preliminary report.

In May of 1988 Professor Chambliss proposed a two-stage research project. The first-stage study was to consist of open-ended interviews with small groups of (1) high-level appointees in the Reagan Administration and (2) people who declined offers of positions in the Reagan Administration. The purpose of these initial interviews was to gain insight into the factors that affected their decisions to accept or not accept a government position so as to design a more systematic and thorough second-stage study.

The second-stage study was to take place after the presidential election and would require close cooperation with the next president's personnel recruiter. First, a standardized questionnaire was to be distributed to all persons contacted about serving in the new administration. Second, the questionnaire would be supplemented by in-depth interviews with a random sample of persons chosen from those who applied for, but refused to accept, government appointments.

Again, the purpose of the survey and interviews was to objectively weight the factors that influenced a person's decision to accept or decline an appointment, including the ethics restrictions, salary, dislocation, public scrutiny and other financial hardships. Of course, the term "ethics restrictions" encompasses several types of requirements and their effects would have to be evaluated separately. Ethics restrictions include (1) the Ethics in Government Act's public financial reporting requirements, (2) the conflict of interest laws, including the post-employment restrictions in 18 U.S.C. § 207 and any agency-specific statutes, and (3) the remedies or cures for potential conflicts of interest (*e.g.*, blind trusts).[22]

We ultimately decided not to undertake the study proposed by Professor Chambliss, as much because of its likely cost as our uncertainty about being able to overcome the

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[19]Ibid. at 13.

[20]See generally R. Roberts, WHITE HOUSE ETHICS: THE HISTORY OF THE POLITICS OF CONFLICT OF INTEREST REGULATION, Chapt. IX (Greenwood Press 1988); REBUILDING THE PUBLIC SERVICE: THE REPORT OF THE NATIONAL COMMISSION ON THE PUBLIC SERVICE 16 (1989).

[21]See Office of Government Ethics, *Proceedings of the Third Annual Conference* (1982) at pages 39-41 (discussion of difficulty of empirical study of deterrent effects of ethics laws).

[22]See J. Walter, *The Ethics in Government Act, Conflict of Interest Laws and Presidential Recruiting*, PUBLIC ADMINISTRATION REVIEW 659 (Nov./Dec. 1981). Mr. Walter, former Director of the U.S. Office of Government Ethics, discusses the relative importance of these various ethics requirements or restrictions.

methodological difficulties involved in the study. Based on prior experience with survey research -- particularly a large-scale study of Federal Trade Commission rulemaking in the late 1970s -- we estimated that the full Chambliss study would require at least two hundred thousand dollars to complete. Interviewers would have to be hired and trained for both the first and second stages of the study; a written questionnaire would have to be designed and pretested; and the results would have to be analyzed using sound statistical techniques. Very likely we would have needed a second expert consultant to perform the required statistical analysis. This high cost would have forced the Conference to forego other projects, including government ethics projects -- which I will describe shortly -- having substantially less uncertainty and a greater chance of bearing fruit within a six-month to two-year time-frame.[23]

The next question, I suppose, is "Does this lack of 'hard' evidence of the extent that ethics restrictions deter people from accepting or staying in government jobs mean that we should not revise our ethics laws until such data are available? I don't think so.

First, experience as well as logic[24] indicates that ethics restrictions do deter some people from entering or staying in the government, although we can't state definitively how many.[25] G. Calvin Mackenzie, who served as staff director of the National Academy of Public Administrations 1985 study, concludes:

> The data are clear. There can be no doubt that the Ethics in Government Act of 1978 has had a widespread impact on the personal finances and private employment status of presidential appointees. It is a complex and demanding law with often costly effects. It is no surprise that most appointees, even those who believe in the salutary effects of financial disclosure and conflict of interest restrictions, have little affection for it.[26]

We know enough to be concerned about the potential deterrent effects of ethics restrictions.

Second, there are many issues that can be addressed without empirical data showing the extent of deterrence. That is, while such data would be relevant, they would not be

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[23]I note that our Special Committee on Ethics in Government, chaired by Fred F. Fielding, convened a day-long working conference on March 1, 1988; the participants included current and former members of Congress, White House counsels, directors of presidential personnel and the the Office of Government Ethics, and academics. This "roundtable" discussion identified several areas for Conference study, including conflict-of-interest rules for members of presidential transition teams, public financial disclosure requirements, and the tax consequences of divestitures of property required to avoid conflicts of interest.

[24]In 1984, before "ethics" became a major issue, Professor Alfred S. Neely IV relied on logic and economic factors to predict what sorts of individuals would find it hard to accept government jobs under our current ethics laws. See A. Neely, ETHICS IN GOVERNMENT LAWS, ARE THEY TOO "ETHICAL"? (AEI Institute for Public Policy Research, Wash. D.C. 1984).

[25]One thing the National Academy of Public Administration conclusively showed is that the tenure of public officials is short. The median length of service for presidential appointees in the past 20 years has been just over two years; only 32 percent stayed for three years. National Academy of Public Administration, *Leadership in Jeopardy: The Fraying of the Presidential Appointments System*, FINAL REPORT OF THE PRESIDENTIAL APPOINTEE PROJECT 4-5.

[26]G. C. Mackenzie, THE IN-AND-OUTERS: PRESIDENTIAL APPOINTEES AND TRANSIENT GOVERNMENT IN WASHINGTON (Johns Hopkins Univ. Press 1987) at page 86. See page 83 - 94 for additional discussion of the NAPA results.

dispositive. The Administrative Conference has tackled several such issues, including (1) the need for a deferral of taxation when persons appointed to government positions are required to divest themselves of property or assets and (2) the Ethics Act's financial reporting requirements. I will describe these proposals in a moment.

Finally, we have to deal with the real world in which there is great public concern over the ethical conduct of government officials. Delay in order to obtain empirical documentation may pose political problems, although you certainly understand the political costs of delay better than I.

Fortunately, a lot of work has been done over the last year or more by the Conference, the President's ethics commission, Congressional committees and subcommittees (and especially members such as Senators Strom Thurmond, John Glenn and Carl Levin and Representative Barney Frank and members of this subcommittee) and other interested groups.

Now let me turn briefly to Administrative Conference proposals which I believe will make it easier for people to accept offers of government employment.

3. Administrative Conference Proposals.

Deferred Taxation for Conflict-of-Interest Divestitures. In June 1988 the Administrative Conference adopted a formal recommendation calling upon Congress to allow individuals who are required to divest property, such as stock holdings, as a condition of accepting a government position to "roll over" their assets into neutral investments without realizing taxable gains.[27] I attach a copy of this recommendation.

This proposal is designed as a remedy for disincentives to public service and frequent recusals (*i.e.*, avoidance of decisionmaking) of government officials which compromise the effective functioning of the governmental processes. As you may know, conflict-of-interest requirements -- and especially the prohibition in 18 U.S.C. § 208 on participation in matters affecting one's financial interests -- frequently require presidential appointees or career civil servants to divest property or else not participate in decisions that might affect those interests. Yet under current law, such divestiture often will result in significant financial losses in the form of taxation of the gains realized as a result of the forced divestiture.

Confronted with this negative tax consequence of divestiture, some people undoubtedly will decline government appointments. Others accept the appointments but then enter into "recusal agreements" by which they agree to not participate in any decision that might affect their financial interests. The public interest can be harmed by election of either of these options. The harm from a qualified person's refusing to accept the job and pay the tax is apparent. But the public interest also may be harmed when an individual selected by the President to make policy decisions cannot participate in those decisions. This is especially so at the highest levels of government where an official's authority is broad -- the case of the Secretary of State comes to mind.

As a remedy, the Conference proposed that Congress amend the tax laws to permit individuals required to divest themselves of property to avoid conflicts of interest to sell their property and place the proceeds in a neutral investment and defer the taxation of the gains. Taxation would not be eliminated by the proposal but simply postponed until the individual ultimately disposes of the proceeds of a reinvestment vehicle.

Of course, care must be taken to restrict the opportunity for a tax-free roll-over of assets only to those situations where there is a genuine need for divestiture to avoid conflicts of interest. The Conference's proposal, therefore, would not allow a government official or nominee to decide on his own whether this option is necessary. Rather, the official or

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[27]ACUS Recommendation 88-4, Deferred Taxation for Conflict-of-Interest Divestitures (to be codified at 1 CFR § 305.88-4.)

nominee would have to be requested or ordered by an independent authority to divest property to avoid a violation of a conflict-of-interest statute. In addition, the person ordering divestiture would have to approve the reinvestment vehicle.

The President's Commission on Federal Ethics Law Reform endorsed the Conference's recommendation, declaring that "divestiture of troublesome assets and reinvestment in neutral holdings is the single most important device we have encountered to eliminate completely or at least mitigate greatly subsequent conflicts of interest. . . . [T]he Commission views enactment of the ACUS proposal as long overdue."[28] Subsequently, the National Commission on the Public Service -- the Volcker Commission -- similarly endorsed the Conference's recommendation in its report, Rebuilding the Public Service.[29]

Most encouragingly, the proposed legislation sent to Congress by President Bush on April 12th included a provision (Section 108) that, if enacted, would implement the Conference's recommendation.[30]

Public Financial Disclosure Requirements. Public financial disclosure is another area where I believe refinements to the ethics laws can be made that will not only lessen the burden on those who respond to the call to government service, but also result in increased effectiveness of our overall ethics system.

The Ethics in Government Act's executive branch financial reporting requirements apply not only to top-level policy officials but also to thousands of career civil servants paid at the GS-16 level and above. This law has produced the Standard Form 278 mentioned above and referred to in the National Academy of Public Administration's report as a "pale green monstrosity."[31] In fairness to the Office of Personnel Management and the Office of Government Ethics, it is generally recognized that the complexity of this form derives from statutory requirements and that those offices in fact have done an admirable job designing a form to implement the statute.[32]

The Conference has been studying and considering recommendations for improving the Act's financial reporting requirements over the past year or so, and later this week the Conference as a whole will debate a proposed recommendation on this subject developed by our Special Committee on Ethics in Government.[33] While urging a general review to simplify the language of the statute, the Special Committee has recommended numerous specific changes to the coverage and methods of reporting assets and liabilities. The recommendations include giving the Office of Government Ethics greater flexibility in granting extensions and exemptions from the Act's requirements; parity in the threshold amount for reporting assets and liabilities; exclusion from reporting income from assets that

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[28]To Serve With Honor: Report of the President's Commission on Federal Ethics Law Reform 3, 27 (Mar. 1989).

[29]Rebuilding the Public Service: The Report of the National Commission on the Public Service 16 (1989).

[30]See also S. 765, "Governmentwide Ethics Act of 1989, § 108 101st Cong., 1st. Sess. (introduced by Senator Thurmond).

[31]National Academy of Public Administration, *Leadership in Jeopardy: The Fraying of the Presidential Appointments System*, supra note 17 at 13.

[32]See *Ethics in Government: Proceedings of a Working Conference*, reprinted in ACUS Sourcebook on Government Ethics for Presidential Appointees, Tab 2 at p. 29.

[33]See Notice and Request for Comments on the Special Committee's Proposed Recommendation on Public Financial Disclosure by Executive Branch Officials, 54 Fed. Reg. 12921 (Mar. 29, 1989).

otherwise are reported; broader reporting categories; and higher thresholds and categories of reporting for reimbursements and gifts. The Special Committee's proposed recommendations are based on an analysis of the statute by Professor Thomas P. Morgan of Emory University School of Law.[34]

Again, these recommendations have yet to be acted upon by the Conference as a whole. I will gladly keep you informed of any subsequent Conference action on this subject.

4. The Danger of Overemphasizing Regulation at the Expense of Alternatives to Improve Government Ethics.

Let me conclude with some general remarks about ethics restrictions and their reform.

I am concerned that there is a general tendency of policymakers to respond to government officials' ethical lapses by enacting new rules or reporting requirements while paying insufficient attention to alternative ways to improve government ethics. They are pressured to act by the press and public opinion, and the easiest, quickest and most visible way to act is to propose new regulations designed to prevent even the appearance of a conflict of interest.

But, as we have found with government regulation generally, regulations have costs. The costs often are diffused and not easily quantifiable, but they are real nevertheless. And prophylactic regulations based on appearance considerations usually impose costs and burdens on the overwhelmingly majority of honest government employees. At the same time, few ethics restrictions are ever removed. This results in a constant "ratcheting up" of federal ethics restrictions.[35]

Certainly there is need for continued review and, where appropriate, a strengthening of our ethics laws. But I suggest that the need for strengthening our ethics laws does not always mean a new set of rules is required. Indeed, there is a danger that we will create an "ethics

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[34] T. Morgan, A FUNCTIONAL APPROACH TO PUBLIC FINANCIAL DISCLOSURE BY FEDERAL OFFICIALS: REPORT TO THE ADMINISTRATIVE CONFERENCE OF THE UNITED STATES (May 1989).

[35] Bayless Manning, who served as the staff director of the Association of the Bar of the City of New York's influential study of the ethics law in the late 1950's warned of the dangers of ever-escalating conflict of interest standards:

> [T]hough it seems to be little recognized in our age of dwindling privacy, a question of human dignity is eventually brought into issue as regulations pile up in the name of Morality.
>
> A man of the stature to assume high public office should not be presumed to be a crook or a weakling or a fool. His conduct may in time convince us that he is one or more of the three, but the conclusion should not be presumed. . . . . Restraints on conflicts of interest are prior restraints, said to be prophylactic in character. But prior restraints are an objectionable way to approach the problem of good conduct in a free society. It has never been doubted that we could reduce the incidence of crime if we were willing to use enough prophylaxis--preventive arrest, unwarned house search, probationary check-ups, confiscation of arms, house-bugging and other such techniques. We choose not to resort to such measures because we prefer, by the hierarchy of values in a democratic society, to tolerate a higher level of crime by the few rather than force the millions to lead police-ridden lives. Eventually the same principle comes to bear in the case of official conflict of interest restraints. The bite of this kind of prior restraint is mild, of course, and in a sense optional; any man who objects may avoid it by not serving in government office. But that is not enough of an answer. We *want* men to serve the government. . . . .

B. Manning, *The Purity Potlatch: An Essay on Conflicts of Interest, American Government, and Moral Escalation*, 24 Federal Bar Journal 239, 253-54 (1964).

maze" that is so complex that no one will understand the underlying ethical principles. I worry that our ethics law will soon resemble our tax law, where in addition to the Internal Revenue Code, we have a dozen volumes of Treasury Regulations not to mention revenue bulletins and rulings of various sorts.

Let me again use public financial reporting to illustrate this danger. I think it true that virtually all of the review of government officials' financial disclosure forms is confined to determining whether on their face the forms reveal actual or potential conflicts of interest. However, no serious attempt is made to systematically confirm of the accuracy of the information reported on the form. True, the forms can be obtained by the public. And under the "sunlight is the best disinfectant" theory, it is reasonable to assume that government officials will engage in a certain amount of self-policing when they fill out the form. But unless one holds a position that makes him a truly public figure, the chances of anyone conducting an independent investigation of an individual's finances are slight indeed.[36]

Consequently, a large proportion of our government ethics resources now are being spent pushing the disclosure papers of basically honest federal employees, instead of investigating actual abuses of government office.

But there is another aspect of this overemphasis on regulation and reporting requirements: all too often attention is focused on the failure of an official to properly comply with these prophylactic regulatory requirements, rather than on true ethical considerations, namely whether the official has in fact done anything wrong! We have seen this over and over again.

Therefore, I am pleased to see that the President's proposed Governmentwide Ethics Act of 1989 goes beyond proposing changes in our regulations and contains numerous provisions designed to strengthen ethics enforcement. For example, Title III would amend 18 U.S.C. § 203 to authorize civil penalties, in addition to misdemeanor and felony sanctions, for violations of ethics laws. The bill also would authorize the Attorney General to seek injunctions against conduct that would violate various ethics laws. A wider range of penalties is likely to lead to increased enforcement of existing ethics laws. Currently the Department of Justice is often reluctant to prosecute violations of ethics standards where the evidence of public harm is slight and the only penalty is a criminal one.[37]

In addition, I believe more attention needs to be given to ethics education. More needs to be done in the way of both entrance and exit counseling of senior government officials. Entering officials currently receive memoranda, handbooks and the regulations which, unfortunately, can be too easily be ignored or forgotten in the press of conducting the government's business. More personal training and counseling is required. While I am not sure whether it should be required by statute, I am convinced that more resources need to be dedicated to this vital function.

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[36]The Office of Government Ethics has known for years that the public rarely requests to see the financial reports of career government officials. Consequently they have recommended, on cost-benefit grounds, narrowing the category of individuals subject to the public reporting requirement.

[37]A report prepared for the Conference's March 1, 1988 working conference concluded:

> While some violations of [18 U.S.C. § 207] are addressed appropriately within the current criminal framework, there is a class of violations of the statute which may not be sufficiently egregious to warrant use of criminal process. In such cases, Justice Department prosecutors--wary of the difficulty of winning convictions before skeptical juries--understandably are very reluctant to institute criminal proceedings.

Issues and Options Paper No. 4A at page 42.

Finally, we must be mindful when considering amendments to the conflict-of-interest statutes, that laws can only do so much. To a certain extent, we have become a society governed too much by legal standards. To quote Alexander Solzhenitsyn: "A society based on the letter of the law and never reaching any higher fails to take advantage of the full range of human possibilities."[38] Law and penalties are necessary, but we also need to strive to create a cultural climate that fosters ethical behavior both by government officials and by society at large.

I thank you for the opportunity to address this most important topic.

[38]A. Solzhenitsyn, *A World Split Apart*, in SOLZENITSYN AT HARVARD 3 (R. Berman ed. 1980).