H.R. 984, THE EXECUTIVE BRANCH REFORM ACT OF 2007 AND H.R. 985, THE WHISTLEBLOWER PROTECTION ENHANCEMENT ACT OF 2007

HEARING

BEFORE THE

COMMITTEE ON OVERSIGHT AND GOVERNMENT REFORM HOUSE OF REPRESENTATIVES

ONE HUNDRED TENTH CONGRESS

FIRST SESSION

ON

H.R. 984

TO PROVIDE FOR REFORM IN THE OPERATIONS OF THE EXECUTIVE BRANCH

AND ON

H.R. 985

TO AMEND TITLE 5, UNITED STATES CODE, TO CLARIFY WHICH DISCLOSURES OF INFORMATION ARE PROTECTED FROM PROHIBITED PERSONNEL PRACTICES; TO REQUIRE A STATEMENT IN NONDISCLOSURE POLICIES, FORMS, AND AGREEMENTS TO THE EFFECT THAT SUCH POLICIES, FORMS, AND AGREEMENTS ARE CONSISTENT WITH CERTAIN DISCLOSURE PROTECTIONS, AND FOR OTHER PURPOSES

FEBRUARY 13, 2007

Serial No. 110–26

Printed for the use of the Committee on Oversight and Government Reform

Available via the World Wide Web: http://www.gpoaccess.gov/congress/index.html
http://www.oversight.house.gov

U.S. GOVERNMENT PRINTING OFFICE

38–583 PDF WASHINGTON : 2007

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H.R. 984, THE EXECUTIVE BRANCH REFORM ACT OF 2007 AND H.R. 985, THE WHISTLEBLOWER PROTECTION ENHANCEMENT ACT OF 2007

TUESDAY, FEBRUARY 13, 2007

HOUSE OF REPRESENTATIVES,
COMMITTEE ON OVERSIGHT AND GOVERNMENT REFORM,
Washington, DC.

The committee met, pursuant to notice, at 10 a.m., in room 2154, Rayburn House Office Building, Hon. Henry A. Waxman (chairman of the committee) presiding.

Present: Representatives Waxman, Cummings, Tierney, Watson, Yarmuth, Braley, McCollum, Cooper, Davis of Virginia, Shays, Platts, Issa, and Sali.

Staff present: Phil Schiliro, chief of staff; Phil Barnett, staff director and chief counsel; Kristin Amerling, general counsel; Karen Lightfoot, communications director and senior policy advisor; Michelle Ash, chief legislative counsel; Mark Stephenson, professional staff member; Earley Green, chief clerk; Teresa Coufal, deputy clerk; Davis Hake, staff assistant; Leneal Scott, information officer; David Marin, minority staff director; Larry Halloran, minority deputy staff director; Jennifer Safavian, minority chief counsel for oversight and investigations; Keith Ausbrook, minority chief counsel; Ellen Brown, minority legislative director and senior policy counsel; Mason Alinger, minority deputy legislative director; John Brosnan, minority senior procurement counsel; Jim Moore, minority counsel; Patrick Lyden, minority parliamentarian & member services coordinator; Benjamin Chance, minority clerk; and Bill Womack, minority legislative director.

Chairman WAXMAN. The meeting of the committee will come to order.

Today the committee holds a hearing on two bills, the executive branch Reform Act and the Whistleblower Protection Enhancement Act. Both of these bills are the product of hard work and close bipartisan cooperation. Both of these measures were also reported out by this committee on near unanimous votes in the last Congress.

Last year when we marked up these bills, I said they were an example of how Congress ought to work. I still feel that way, and I want to thank Ranking Member Davis for all the effort he has put into these measures, and for the truly bipartisan spirit with which he has approached these issues.

The indictments and scandals that have gripped Washington in recent years are proof that our existing laws need to be strengthened. The public wants honesty and accountability in Government and it is our job in the Oversight Committee to take the lead on reform.

At the end of the last Congress, Ranking Member Davis and I released a bipartisan report on Jack Abramoff's contacts with White House officials. Our report offered "an unusually detailed glimpse into a sordid subculture of fraud and attempted influence peddling." We undertook this investigation because we wanted to learn what reforms would protect the integrity and increase the transparency of Government. We were able to reach agreement on a report about Jack Abramoff, because we decided to let the facts speak for themselves and avoid characterizations, inferences and spin. Although we drew somewhat different conclusions from the facts we recounted, we did reach agreement about the need for fundamental reform.

We recognized that changes in the law were needed to bring greater transparency to meetings between the private sector and executive branch officials by requiring all political appointees and senior officials in Federal agencies and the White House to report their contacts with private parties seeking to influence official Government action. Today, we begin this reform process. The executive branch Reform Act, which Ranking Member Davis and I have introduced, is a comprehensive reform measure that would increase transparency in the executive branch by requiring senior Government officials to report significant contacts with lobbyists. It would end the secret meetings between special interests and Government officials that characterize the operation of Vice President Cheney's Energy Task Force, and it would expose the activities of influence peddlers like Jack Abramoff to public scrutiny. That is why this bill may be the most significant open Government legislation since the enactment of the Freedom of Information Act.

Today we will also be considering the Whistleblower Protection Enhancement Act. This important bill would for the first time extend whistleblower protections to national security officials and employees of Federal contractors. It would make key improvements to current law to protect all whistleblowers in Federal Government agencies and it would ensure that Federal scientists who report political interference with their work are protected from retribution.

A key component of accountability is whistleblower protection. Federal employees are on the inside, they see when taxpayer dollars are wasted. They are often the first to see the signals of corrupt or incompetent management; yet without adequate protections, they cannot step forward to blow the whistle. There are many Federal Government workers who deserve whistleblower protection but perhaps none more than national security officials. These are Federal Government employees who have undergone extensive background investigations, obtained security clearances and handled classified information on a routine basis. Our own Government has concluded that they can be trusted to work on the most sensitive law enforcement and intelligence projects. Yet these officials receive no protection when they come forward to identify abuses that are undermining our national security. This bill would

finally give these courageous individuals the protections they deserve.

I am very proud of the leadership role of our committee on a bipartisan basis in taking on these important bills . We are the committee with the authority to reform the ethics laws that govern the executive branch of the Federal Government. We are the committee with the authority to restore the principles of open Government. And we are the committee with the authority to close the revolving door between Federal agencies and the private sector to ban secret meetings between Government officials and lobbyists and to halt procurement abuses. To meet these challenges, we must use our broad oversight power to investigate and expose abuses.

But we should not stop there. We should also use our legislative authority to draft essential reforms. And today we begin in this important legislative process.

[The prepared statement of Hon. Henry A. Waxman and the texts of H.R. 984 and 985 follow:]

Statement of Rep. Henry A. Waxman
House Committee on Oversight and Government Reform
Hearing on H.R. 984, the Executive Branch Reform Act, and H.R. 985, the Whistleblower Protection Enhancement Act

February 13, 2007

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I

110TH CONGRESS
1ST SESSION

H. R. 984

To provide for reform in the operations of the executive branch.

IN THE HOUSE OF REPRESENTATIVES

FEBRUARY 12, 2007

Mr. WAXMAN (for himself and Mr. TOM DAVIS of Virginia) introduced the following bill; which was referred to the Committee on Oversight and Government Reform

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A BILL

To provide for reform in the operations of the executive branch.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE.

This Act may be cited as the "Executive Branch Reform Act of 2007".

SEC. 2. REQUIREMENTS RELATING TO SIGNIFICANT CONTACTS.

(a) IN GENERAL.—The Ethics in Government Act of 1978 (5 U.S.C. App. 4) is amended by adding at the end the following new title:

"TITLE VI—EXECUTIVE BRANCH DISCLOSURE OF SIGNIFICANT CONTACTS

"SEC. 601. RECORDING AND REPORTING BY CERTAIN EXECUTIVE BRANCH OFFICIALS OF SIGNIFICANT CONTACTS MADE TO THOSE OFFICIALS.

"(a) IN GENERAL.—Not later than 30 days after the end of a calendar quarter, each covered executive branch official shall make a record of, and file with the Office of Government Ethics a report on, any significant contacts during the quarter between the covered executive branch official and any private party relating to an official government action. If no such contacts occurred, each such official shall make a record of, and file with the Office a report on, this fact, at the same time.

"(b) CONTENTS OF RECORD AND REPORT.—Each record made, and each report filed, under subsection (a) shall contain—

"(1) the name of the covered executive branch official;

"(2) the name of each private party who had a significant contact with that official; and

"(3) for each private party so named, a summary of the nature of the contact, including—

"(A) the date of the contact;

"(B) the subject matter of the contact and the specific executive branch action to which the contact relates; and

"(C) if the contact was made on behalf of a client, the name of the client.

"(e) WITHHOLDING FOIA-EXEMPT INFORMATION.—This section does not require the filing with the Office of Government Ethics of information that is exempt from public disclosure under section 552(b) of title 5, United States Code (popularly referred to at the "Freedom of Information Act").

"SEC. 602. AUTHORITIES AND RESPONSIBILITIES OF OFFICE OF GOVERNMENT ETHICS.

"(a) IN GENERAL.—The Director of the Office of Government Ethics shall—

"(1) promulgate regulations to implement this title, provide guidance and assistance on the recording and reporting requirements of this title, and develop common standards, rules, and procedures for compliance with this title;

"(2) review, and, where necessary, verify the accuracy, completeness, and timeliness of reports;

"(3) develop filing, coding, and cross-indexing systems to carry out the purpose of this title, including—

"(A) a publicly available list of all private parties who made a significant contact; and

"(B) computerized systems designed to minimize the burden of filing and maximize public access to reports filed under this title;

"(4) make available for public inspection and copying at reasonable times the reports filed under this title;

"(5) retain reports for a period of at least 6 years after they are filed;

"(6) compile and summarize, with respect to each reporting period, the information contained in reports filed with respect to such period in a clear and complete manner;

"(7) notify any covered executive branch official in writing that may be in noncompliance with this title; and

"(8) notify the United States Attorney for the District of Columbia that a covered executive branch official may be in noncompliance with this title, if the covered executive branch official has been notified in writing and has failed to provide an appropriate response within 60 days after notice was given under paragraph (7).

"SEC. 603. PENALTIES.

"(a) VIOLATION.—Whoever violates this title shall be subject to administrative sanctions, up to and including termination of employment.

"(b) DELIBERATE ATTEMPT TO CONCEAL.—Whoever deliberately attempts to conceal a significant contact in violation of this title shall upon proof of such deliberate violation by a preponderance of the evidence, be subject to a civil fine of not more than $50,000, depending on the extent and gravity of the violation.

"SEC. 604. DEFINITIONS.

"In this title:

"(1) COVERED EXECUTIVE BRANCH OFFICIAL.—The term 'covered executive branch official' means—

"(A) any officer or employee serving in a position in level I, II, III, IV, or V of the Executive Schedule, as designated by statute or Executive order;

"(B) any member of the uniformed services whose pay grade is at or above O–7 under section 201 of title 37, United States Code;

"(C) any officer or employee serving in a position of a confidential, policy-determining, policy-making, or policy-advocating character

described in section 7511(b)(2)(B) of title 5, United States Code;

"(D) any noncareer appointee, as defined by section 3132(a)(7) of title 5, United States Code; and

"(E) any officer or employee serving in a position of a confidential, policy-determining, policy-making, or policy advocating character, or any other individual functioning in the capacity of such an officer or employee, in the Executive Office of the President or the Office of the Vice President, but does not include the President or Vice President or the chief of staff of the President or Vice President.

"(2) SIGNIFICANT CONTACT.—

"(A) IN GENERAL.—Except as provided in subparagraph (B), the term 'significant contact' means oral or written communication (including electronic communication) that is made by a private party to a covered executive branch official in which such private party seeks to influence official action by any officer or employee of the executive branch of the United States.

"(B) EXCEPTION.—The term 'significant contact' does not include any communication

that is an exception to the definition of 'lobbying contact'—

"(i) under clauses (i) through (vii) or clauses (ix) through (xix) of subparagraph (B) of paragraph (8) of section 3 of the Lobbying Disclosure Act of 1995 (2 U.S.C. 1602(8)(i)–(vii) or (ix)–(xix)); or

"(ii) with respect to publically available information only, under clause (viii) of subparagraph (B) of paragraph (8) of section 3 of the Lobbying Disclosure Act of 1995 (2 U.S.C. 1602(8)(viii)).

"(3) PRIVATE PARTY.—The term 'private party' means any person or entity, but does not include a Federal, State, or local government official or a person representing such an official.".

(b) EFFECTIVE DATE.—

(1) IN GENERAL.—Title VI of the Ethics in Government Act of 1978, as added by this section, takes effect 1 year after the date of the enactment of this Act, except as provided in paragraph (2).

(2) INITIAL REGULATIONS.—The initial regulations required by section 602 of that Act shall be promulgated—

(A) in draft form, not later than 270 days after the date of the enactment of this Act; and

(B) in final form, not later than 1 year after the date of the enactment of this Act.

SEC. 3. REQUIREMENTS RELATING TO STOPPING THE REVOLVING DOOR.

The Ethics in Government Act of 1978 (5 U.S.C. App. 4) is amended by adding at the end the following new title:

"TITLE VII—STOPPING THE REVOLVING DOOR

"SEC. 701. TWO-YEAR COOLING-OFF PERIOD FOR PERSONS LEAVING GOVERNMENT SERVICE.

"(a) IN GENERAL.—For a period of two years after the termination of his employment, a covered executive branch official—

"(1) shall not engage in any conduct that would be prohibited under subsection (c) of section 207 of title 18, United States Code, if it occurred within one year after the termination of his employment; and

"(2) shall not, if his position is described in subsection (d)(1) of section 207 of title 18, United States Code, engage in any conduct that would be prohibited under subsection (d) of section 207 of

title 18, United States Code, if it occurred within one year after the termination of his employment.

"(b) NO EFFECT ON SECTION 207.—This section does not expand, contract, or otherwise affect the application of any waiver or criminal penalties under section 207 of title 18, United States Code.

"SEC. 702. PROHIBITION ON NEGOTIATION OF FUTURE EMPLOYMENT.

"(a) PROHIBITION.—A covered executive branch official shall not participate in any official matter in which, to the official's knowledge, a person or organization with whom the official is negotiating or has any arrangement concerning prospective employment has a financial interest, unless a waiver has been granted under subsection (b).

"(b) WAIVERS ONLY WHEN EXCEPTIONAL CIRCUMSTANCES EXIST.—A waiver to subsection (a) is not available, and shall not be granted, to any individual except in a case which the Government official responsible for the individual's appointment as a covered executive branch official determines that exceptional circumstances exist. Whenever such a determination is made, the Director of the Office of Government Ethics shall review the circumstances relating to the determination, and the waiver shall not take effect until the date on which the Direc-

tor certifies in writing that exceptional circumstances exist.

"SEC. 703. COOLING-OFF PERIOD FOR CERTAIN PERSONS ENTERING GOVERNMENT SERVICE.

"(a) IN GENERAL.—A covered executive branch official shall not participate in any particular matter involving specific parties that would affect the financial interests of a covered entity.

"(b) WAIVER.—An agency's designated ethics officer may waive the prohibition in subsection (a) with respect to a covered executive branch official of that agency upon a determination that the relationship between the covered executive branch official and the covered entity is not so substantial as to be deemed likely to affect the integrity of the services that the Government may expect from the official. Whenever such a determination is made, the Director of the Office of Government Ethics shall review the circumstances relating to the determination, and the waiver shall not take effect until the date on which the Director approves the determination in writing.

"(c) DEFINITION.—In this section, the term 'covered entity' means an entity—

"(1) in which the official, within the previous 2 years, served as an officer, director, trustee, general partner, or employee; or

"(2) for which the official, within the previous 2 years, worked as a lobbyist, lawyer, or other representative.

"(d) NO EFFECT ON SECTION 208.—This section does not expand, contract, or otherwise affect the application of any criminal penalties under section 208 of title 18, United States Code.

"SEC. 704. PENALTIES.

"Whoever violates section 701, 702, or 703 of this title shall, upon proof of such knowing violation by a preponderance of the evidence, be subject to a civil fine of not more than $100,000, depending on the extent and gravity of the violation.

"SEC. 705. DEFINITION.

"In this title, the term 'covered executive branch official' means—

"(1) any officer or employee serving in a position in level I, II, III, IV, or V of the Executive Schedule, as designated by statute or Executive order;

"(2) any member of the uniformed services whose pay grade is at or above O–7 under section 201 of title 37, United States Code;

"(3) any officer or employee serving in a position of a confidential, policy-determining, policy-

making, or policy-advocating character described in section 7511(b)(2)(B) of title 5, United States Code;

"(4) any noncareer appointee, as defined by section 3132(a)(7) of title 5, United States Code;

"(5) any officer or employee serving in a position of a confidential, policy-determining, policy-making, or policy advocating character, or any other individual functioning in the capacity of such an officer or employee, in the Executive Office of the President or the Office of the Vice President; and

"(6) the Vice President.".

SEC. 4. ADDITIONAL PROVISIONS RELATING TO PROCUREMENT OFFICIALS.

(a) ELIMINATION OF LOOPHOLES THAT ALLOW FORMER FEDERAL OFFICIALS TO ACCEPT COMPENSATION FROM CONTRACTORS OR RELATED ENTITIES.—Section 27(d) of the Office of Federal Procurement Policy Act (41 U.S.C. 423(d)) is amended—

(1) in paragraph (1)—

(A) by striking "or consultant" and inserting "consultant, lawyer, or lobbyist";

(B) by striking "one year" and inserting "two years"; and

(C) in subparagraph (C), by striking "personally made for the Federal agency—" and in-

serting "participated personally and substantially in—"; and

(2) by amending paragraph (2) to read as follows:

"(2) Paragraph (1) shall not prohibit a former official of a Federal agency from accepting compensation from any division or affiliate of a contractor that does not produce the same or similar products or services as the entity of the contractor that is responsible for the contract referred to in subparagraph (A), (B), or (C) of such paragraph if the agency's designated ethics officer determines that—

"(A) the offer of compensation is not a reward for any action described in paragraph (1); and

"(B) acceptance of the compensation is appropriate and will not affect the integrity of the procurement process.".

(b) REQUIREMENT FOR FEDERAL PROCUREMENT OFFICERS TO DISCLOSE JOB OFFERS MADE ON BEHALF OF RELATIVES.—Section 27(c)(1) of such Act (41 U.S.C. 423(c)(1)) is amended by inserting after "that official" the following: "or for a relative of that official (as defined in section 3110 of title 5, United States Code),".

(c) REQUIREMENT ON AWARD OF GOVERNMENT CONTRACTS TO FORMER EMPLOYERS.—Section 27 of such Act (41 U.S.C. 423) is amended by adding at the end the following new subsection:

"(i) PROHIBITION ON INVOLVEMENT BY CERTAIN FORMER CONTRACTOR EMPLOYEES IN PROCUREMENTS.—An employee of the Federal Government who is a former employee of a contractor with the Federal Government shall not be personally and substantially involved with any award of a contract to the employee's former employer, or the administration of such a contract, for the two-year period beginning on the date on which the employee leaves the employment of the contractor.".

(d) REGULATIONS.—Section 27 of such Act (41 U.S.C. 423) is further amended by adding at the end of the following new subsection:

"(j) REGULATIONS.—The Administrator, in consultation with the Director of the Office of Government Ethics, shall—

"(1) promulgate regulations to carry out and ensure the enforcement of this section; and

"(2) monitor and investigate individual and agency compliance with this section.".

SEC. 5. PROHIBITION ON UNAUTHORIZED EXPENDITURE OF FUNDS FOR PUBLICITY OR PROPAGANDA PURPOSES.

(a) PROHIBITION.—Chapter 13 of title 31, United States Code, is amended by adding at the end the following new section:

"§ 1355. Prohibition on unauthorized expenditure of funds for publicity or propaganda purposes

"An officer or employee of the United States Government may not make or authorize an expenditure or obligation of funds for publicity or propaganda purposes within the United States unless authorized by law.".

(b) CLERICAL AMENDMENT.—The table of sections for chapter 13 of such title is amended by adding at the end the following new item:

"1355. Prohibition on unauthorized expenditure of funds for publicity or propaganda purposes.".

SEC. 6. REQUIREMENT FOR DISCLOSURE OF FEDERAL SPONSORSHIP OF ALL FEDERAL ADVERTISING OR OTHER COMMUNICATION MATERIALS.

(a) REQUIREMENT.—Each advertisement or other communication paid for by an Executive agency, either directly or through a contract awarded by the Executive agency, shall include a prominent notice informing the tar-

get audience that the advertisement or other communication is paid for by that Executive agency.

(b) ADVERTISEMENT OR OTHER COMMUNICATION.—In this section, the term "advertisement or other communication" includes—

(1) an advertisement disseminated in any form, including print or by any electronic means; and

(2) a communication by an individual in any form, including speech, print, or by any electronic means.

(c) EXECUTIVE AGENCY.—In this section, the term "Executive agency" has the meaning provided in section 105 of title 5, United States Code.

SEC. 7. ELIMINATION OF "PSEUDO" CLASSIFICATION.

(a) REPORTS ON THE PROLIFERATING USE OF "PSEUDO" CLASSIFICATION DESIGNATIONS.—

(1) REPORT BY FEDERAL AGENCIES.—Not later than six months after the date of the enactment of this Act, each federal agency shall submit to the Archivist of the United States and the congressional committees described in subsection (d) a report describing the use of "pseudo" classification designations.

(2) MATTERS COVERED.—Each such agency shall report on, at a minimum, the following:

(A) The number of "pseudo" classification designation policies used by the agency.

(B) Any existing guidance, instruction, directive, or regulations regarding the agency's use of "pseudo" classification designations.

(C) The number and level of experience and training of Federal agency, office, and contractor personnel authorized to make "pseudo" classification designations.

(D) The cost of placing and maintaining information under each "pseudo" classification designation.

(E) The extent to which information placed under "pseudo" classification designations has subsequently been released under section 552 of title 5, United States Code (popularly known as the Freedom of Information Act).

(F) The extent to which "pseudo" classification designations have been used to withhold from the public information that is not authorized to be withheld by Federal statute, or by an Executive order relating to the classification of national security information.

(G) The statutory provisions described in subsection (c).

(3) REPORT BY THE ARCHIVIST OF THE UNITED STATES.—Not later than 9 months after the date of the enactment of this Act, the Archivist of the United States shall issue to the congressional committees described in subsection (d) a report on the use of "pseudo" classification designations across the executive branch that is based on the information provided by agencies, as well as input from the Director of National Intelligence, Federal agencies, offices, and contractors. All federal agencies, offices, and contractors shall cooperate fully and promptly with all requests by the Archivist in the fulfillment of this paragraph.

(4) NOTICE AND COMMENT.—The Archivist shall provide notice and an opportunity for public comment on the report.

(b) ELIMINATION OF "PSEUDO" CLASSIFICATION DESIGNATIONS.—

(1) REGULATIONS.—Not later than 15 months after the date of the enactment of this Act, the Archivist of the United States shall promulgate regulations banning the use of "pseudo" classification designations.

(2) STANDARDS FOR INFORMATION CONTROL DESIGNATIONS.—If the Archivist determines that there is a need for some agencies to use information control designations to safeguard information prior to review for disclosure, beyond those designations established by statute or by an Executive Order relating to the classification of national security information, the regulations under paragraph (1) shall establish standards for the use of those designations by agencies. Such standards shall address, at a minimum, the following issues:

(A) Standards for utilizing the information control designations in a manner that is narrowly tailored to maximize public access to information.

(B) Procedures for providing specified Federal officials with authority to utilize the information control designations, including training and certification requirements.

(C) Categories of information that may be assigned the information control designations.

(D) The duration of the information control designations and the process by which they will be removed.

(E) Procedures for identifying, marking, dating, and tracking information assigned the information control designations, including the identity of officials making the designations.

(F) Specific limitations and prohibitions against using the information control designations.

(G) Procedures for members of the public to challenge the use of the information control designations.

(H) The manner in which the use of the information control designations relates to the procedures of each agency or office under section 552 of title 5, United States Code.

(3) REGULATION TO CONSTITUTE SOLE AUTHORITY.—A regulation promulgated pursuant to this subsection shall constitute the sole authority by which Federal agencies, offices, or contractors are permitted to control information for the purposes of safeguarding information prior to review for disclosure, other than authority granted by Federal statute or by an Executive order relating to the classification of national security information.

(c) REVIEW OF STATUTORY BARRIERS TO PUBLIC ACCESS INFORMATION.—

(1) REVIEW OF STATUTES.—As part of the report required under subsection (a)(3), the Archivist shall examine existing Federal statutes that allow Federal agencies, offices, or contractors to control, protect, or otherwise withhold information based on security concerns.

(2) RECOMMENDATIONS.—The report shall make recommendations on potential changes to the Federal statutes examined under paragraph (1) that would improve public access to information governed by such statutes.

(d) DEFINITIONS.—In this section:

(1) The term "congressional committees" means the Committees on Government Reform, Judiciary, Homeland Security, and Appropriations of the House of Representatives and the Committees on Homeland Security and Governmental Affairs, Judiciary, and Appropriations of the Senate.

(2) The term "'pseudo' classification designations" means information control designations, including "sensitive but unclassified" and "for official use only", that are not defined by Federal statute, or by an Executive order relating to the classification of national security information, but that are used to manage, direct, or route Government infor-

mation, or control the accessibility of Government information, regardless of its form or format.

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110TH CONGRESS
1ST SESSION

H. R. 985

To amend title 5, United States Code, to clarify which disclosures of information are protected from prohibited personnel practices; to require a statement in nondisclosure policies, forms, and agreements to the effect that such policies, forms, and agreements are consistent with certain disclosure protections, and for other purposes.

IN THE HOUSE OF REPRESENTATIVES

FEBRUARY 12, 2007

Mr. WAXMAN (for himself, Mr. PLATTS, Mr. VAN HOLLEN, and Mr. TOM DAVIS of Virginia) introduced the following bill; which was referred to the Committee on Oversight and Government Reform, and in addition to the Committee on Armed Services, for a period to be subsequently determined by the Speaker, in each case for consideration of such provisions as fall within the jurisdiction of the committee concerned

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A BILL

To amend title 5, United States Code, to clarify which disclosures of information are protected from prohibited personnel practices; to require a statement in nondisclosure policies, forms, and agreements to the effect that such policies, forms, and agreements are consistent with certain disclosure protections, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE; TABLE OF CONTENTS.

(a) SHORT TITLE.—This Act may be cited as the "Whistleblower Protection Enhancement Act of 2007".

(b) TABLE OF CONTENTS.—The table of contents for this Act is as follows:

SEC. 2. CLARIFICATION OF DISCLOSURES COVERED.

Section 2302(b)(8) of title 5, United States Code, is amended—

(1) in subparagraph (A)—

(A) by striking "which the employee or applicant reasonably believes evidences" and inserting ", without restriction as to time, place, form, motive, context, or prior disclosure made to any person by an employee or applicant, including a disclosure made in the ordinary course of an employee's duties, that the em-

ployee or applicant reasonably believes is evidence of"; and

(B) in clause (i), by striking "a violation" and inserting "any violation"; and

(2) in subparagraph (B)—

(A) by striking "which the employee or applicant reasonably believes evidences" and inserting ", without restriction as to time, place, form, motive, context, or prior disclosure made to any person by an employee or applicant, including a disclosure made in the ordinary course of an employee's duties, of information that the employee or applicant reasonably believes is evidence of"; and

(B) in clause (i), by striking "a violation" and inserting "any violation (other than a violation of this section)".

SEC. 3. COVERED DISCLOSURES.

Section 2302(a)(2) of title 5, United States Code, is amended—

(1) in subparagraph (B)(ii), by striking "and" at the end;

(2) in subparagraph (C)(iii), by striking the period at the end and inserting "; and"; and

(3) by adding at the end the following:

"(D) 'disclosure' means a formal or informal communication, but does not include a communication concerning policy decisions that lawfully exercise discretionary authority unless the employee providing the disclosure reasonably believes that the disclosure evidences—

"(i) any violation of any law, rule, or regulation; or

"(ii) gross mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety.".

SEC. 4. REBUTTABLE PRESUMPTION.

Section 2302(b) of title 5, United States Code, is amended by adding at the end the following: "For purposes of paragraph (8), any presumption relating to the performance of a duty by an employee who has authority to take, direct others to take, recommend, or approve any personnel action may be rebutted by substantial evidence. For purposes of paragraph (8), a determination as to whether an employee or applicant reasonably believes that such employee or applicant has disclosed information that evidences any violation of law, rule, regulation, gross mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety shall be made by determining whether a disin-

terested observer with knowledge of the essential facts known to or readily ascertainable by the employee or applicant could reasonably conclude that the actions of the Government evidence such violations, mismanagement, waste, abuse, or danger.".

SEC. 5. NONDISCLOSURE POLICIES, FORMS, AND AGREEMENTS.

(a) PERSONNEL ACTION.—Section 2302(a)(2)(A) of title 5, United States Code, is amended—

(1) in clause (x), by striking "and" at the end;

(2) by redesignating clause (xi) as clause (xii); and

(3) by inserting after clause (x) the following:

"(xi) the implementation or enforcement of any nondisclosure policy, form, or agreement; and".

(b) PROHIBITED PERSONNEL PRACTICE.—Section 2302(b) of title 5, United States Code, is amended—

(1) in paragraph (11), by striking "or" at the end;

(2) by redesignating paragraph (12) as paragraph (14); and

(3) by inserting after paragraph (11) the following:

"(12) implement or enforce any nondisclosure policy, form, or agreement, if such policy, form, or agreement does not contain the following statement: 'These provisions are consistent with and do not supersede, conflict with, or otherwise alter the employee obligations, rights, or liabilities created by Executive Order No. 12958; section 7211 of title 5, United States Code (governing disclosures to Congress); section 1034 of title 10, United States Code (governing disclosures to Congress by members of the military); section 2302(b)(8) of title 5, United States Code (governing disclosures of illegality, waste, fraud, abuse, or public health or safety threats); the Intelligence Identities Protection Act of 1982 (50 U.S.C. 421 and following) (governing disclosures that could expose confidential Government agents); and the statutes which protect against disclosures that could compromise national security, including sections 641, 793, 794, 798, and 952 of title 18, United States Code, and section 4(b) of the Subversive Activities Control Act of 1950 (50 U.S.C. 783(b)). The definitions, requirements, obligations, rights, sanctions, and liabilities created by such Executive order and such statutory provisions are incorporated into this agreement and are controlling.';

"(13) conduct, or cause to be conducted, an investigation, other than any ministerial or nondiscretionary factfinding activities necessary for the agency to perform its mission, of an employee or applicant for employment because of any activity protected under this section; or".

SEC. 6. EXCLUSION OF AGENCIES BY THE PRESIDENT.

Section 2302(a)(2)(C) of title 5, United States Code, is amended by striking clause (ii) and inserting the following:

"(ii)(I) the Federal Bureau of Investigation, the Central Intelligence Agency, the Defense Intelligence Agency, the National Geospatial-Intelligence Agency, or the National Security Agency; or

"(II) as determined by the President, any Executive agency or unit thereof the principal function of which is the conduct of foreign intelligence or counterintelligence activities, if the determination (as that determination relates to a personnel action) is made before that personnel action; or".

SEC. 7. DISCIPLINARY ACTION.

Section 1215(a)(3) of title 5, United States Code, is amended to read as follows:

"(3)(A) A final order of the Board may impose—

"(i) disciplinary action consisting of removal, reduction in grade, debarment from Federal employment for a period not to exceed 5 years, suspension, or reprimand;

"(ii) an assessment of a civil penalty not to exceed $1,000; or

"(iii) any combination of disciplinary actions described under clause (i) and an assessment described under clause (ii).

"(B) In any case in which the Board finds that an employee has committed a prohibited personnel practice under paragraph (8) or (9) of section 2302(b), the Board shall impose disciplinary action if the Board finds that the activity protected under such paragraph (8) or (9) (as the case may be) was the primary motivating factor, unless that employee demonstrates, by a preponderance of the evidence, that the employee would have taken, failed to take, or threatened to take or fail to take the same personnel action, in the absence of such protected activity.".

SEC. 8. GOVERNMENT ACCOUNTABILITY OFFICE STUDY ON REVOCATION OF SECURITY CLEARANCES.

(a) REQUIREMENT.—The Comptroller General shall conduct a study of security clearance revocations, taking effect after 1996, with respect to personnel that filed

claims under chapter 12 of title 5, United States Code, in connection therewith. The study shall consist of an examination of the number of such clearances revoked, the number restored, and the relationship, if any, between the resolution of claims filed under such chapter and the restoration of such clearances.

(b) REPORT.—Not later than 270 days after the date of the enactment of this Act, the Comptroller General shall submit to the Committee on Oversight and Government Reform of the House of Representatives and the Committee on Homeland Security and Governmental Affairs of the Senate a report on the results of the study required by subsection (a).

SEC. 9. ALTERNATIVE RECOURSE.

(a) IN GENERAL.—Section 1221 of title 5, United States Code, is amended by adding at the end the following:

"(k)(1) If, in the case of an employee, former employee, or applicant for employment who seeks corrective action (or on behalf of whom corrective action is sought) from the Merit Systems Protection Board based on an alleged prohibited personnel practice described in section 2302(b)(8), no final order or decision is issued by the Board within 180 days after the date on which a request for such corrective action has been duly submitted (or, in

the event that a final order or decision is issued by the Board, whether within that 180-day period or thereafter, then, within 90 days after such final order or decision is issued, and so long as such employee, former employee, or applicant has not filed a petition for judicial review of such order or decision under subsection (h))—

"(A) such employee, former employee, or applicant may, after providing written notice to the Board, bring an action at law or equity for de novo review in the appropriate United States district court, which shall have jurisdiction over such action without regard to the amount in controversy; and

"(B) in any such action, the court—

"(i) shall apply the standards set forth in subsection (e); and

"(ii) may award any relief which the court considers appropriate, including any relief described in subsection (g).

"(2) For purposes of this subsection, the term 'appropriate United States district court', as used with respect to an alleged prohibited personnel practice, means the United States district court for the district in which the prohibited personnel practice is alleged to have been committed, the judicial district in which the employment records relevant to such practice are maintained and ad-

ministered, or the judicial district in which resides the employee, former employee, or applicant for employment allegedly affected by such practice.

"(3) This subsection applies with respect to any appeal, petition, or other request for corrective action duly submitted to the Board, whether pursuant to section 1214(b)(2), the preceding provisions of this section, section 7513(d), or any otherwise applicable provisions of law, rule, or regulation.".

(b) REVIEW OF MSPB DECISIONS.—Section 7703(b) of such title 5 is amended—

(1) in the first sentence of paragraph (1), by striking "the United States Court of Appeals for the Federal Circuit" and inserting "the appropriate United States court of appeals"; and

(2) by adding at the end the following:

"(3) For purposes of the first sentence of paragraph (1), the term 'appropriate United States court of appeals' means the United States Court of Appeals for the Federal Circuit.".

(c) CONFORMING AMENDMENTS.—

(1) Section 1221(h) of such title 5 is amended by adding at the end the following:

"(3) Judicial review under this subsection shall not be available with respect to any decision or order as to

which the employee, former employee, or applicant has filed a petition for judicial review under subsection (k).".

(2) Section 7703(c) of such title 5 is amended by striking "court." and inserting "court, and in the case of a prohibited personnel practice described in section 2302(b)(8) brought under any provision of law, rule, or regulation described in section 1221(k)(3), the employee or applicant shall have the right to de novo review in accordance with section 1221(k).".

SEC. 10. NATIONAL SECURITY WHISTLEBLOWER RIGHTS.

(a) IN GENERAL.—Chapter 23 of title 5, United States Code, is amended by inserting after section 2303 the following:

"§ 2303a. National security whistleblower rights

"(a) PROHIBITION OF REPRISALS.—

"(1) IN GENERAL.—In addition to any rights provided in section 2303 of this title, title VII of Public Law 105–272, or any other provision of law, an employee, former employee, or applicant for employment in a covered agency may not be discharged, demoted, or otherwise discriminated against (including by denying, suspending, or revoking a security clearance, or by otherwise restricting access to classified or sensitive information) as a re-

prisal for making a disclosure described in paragraph (2).

"(2) DISCLOSURES DESCRIBED.—A disclosure described in this paragraph is any disclosure of covered information which is made—

"(A) by an employee, former employee, or applicant for employment in a covered agency (without restriction as to time, place, form, motive, context, or prior disclosure made to any person by an employee, former employee, or applicant, including a disclosure made in the course of an employee's duties); and

"(B) to an authorized Member of Congress, an authorized official of an Executive agency, an authorized official of the Department of Justice, or the Inspector General of the covered agency in which such employee is employed, such former employee was employed, or such applicant seeks employment.

"(b) INVESTIGATION OF COMPLAINTS.—An employee, former employee, or applicant for employment in a covered agency who believes that such employee, former employee, or applicant has been subjected to a reprisal prohibited by subsection (a) may submit a complaint to the Inspector General and the head of the covered agency.

The Inspector General shall investigate the complaint and, unless the Inspector General determines that the complaint is frivolous, submit a report of the findings of the investigation within 120 days to the employee, former employee, or applicant and to the head of the covered agency.

"(c) REMEDY.—

"(1) Within 180 days of the filing of the complaint, the head of the covered agency shall, taking into consideration the report of the Inspector General under subsection (b) (if any), determine whether the employee, former employee, or applicant has been subjected to a reprisal prohibited by subsection (a), and shall either issue an order denying relief or shall implement corrective action to return the employee, former employee, or applicant, as nearly as possible, to the position he would have held had the reprisal not occurred, including voiding any directive or order denying, suspending, or revoking a security clearance or otherwise restricting access to classified or sensitive information that constituted a reprisal, as well as providing back pay and related benefits, medical costs incurred, travel expenses, and any other reasonable and foreseeable consequential damages including attorney's fees and costs. If the head of the covered agency issues an order denying relief,

he shall issue a report to the employee, former employee, or applicant detailing the reasons for the denial.

"(2)(A) If the head of the covered agency, in the process of implementing corrective action under paragraph (1), voids a directive or order denying, suspending, or revoking a security clearance or otherwise restricting access to classified or sensitive information that constituted a reprisal, the head of the covered agency may re-initiate procedures to issue a directive or order denying, suspending, or revoking a security clearance or otherwise restricting access to classified or sensitive information only if those re-initiated procedures are based exclusively on national security concerns and are unrelated to the actions constituting the original reprisal.

"(B) In any case in which the head of a covered agency re-initiates procedures under subparagraph (A), the head of the covered agency shall issue an unclassified report to its Inspector General and to authorized Members of Congress (with a classified annex, if necessary), detailing the circumstances of the agency's re-initiated procedures and describing the manner in which those procedures are based exclusively on national security concerns and are unre-

lated to the actions constituting the original reprisal. The head of the covered agency shall also provide periodic updates to the Inspector General and authorized Members of Congress detailing any significant actions taken as a result of those procedures, and shall respond promptly to inquiries from authorized Members of Congress regarding the status of those procedures.

"(3) If the head of the covered agency has not made a determination under paragraph (1) within 180 days of the filing of the complaint (or he has issued an order denying relief, in whole or in part, whether within that 180-day period or thereafter, then, within 90 days after such order is issued), the employee, former employee, or applicant for employment may bring an action at law or equity for de novo review to seek any corrective action described in paragraph (1) in the appropriate United States district court (as defined by section 1221(k)(2)), which shall have jurisdiction over such action without regard to the amount in controversy. A petition to review a final decision under this paragraph shall be filed in the United States Court of Appeals for the Federal Circuit.

"(4) An employee, former employee, or applicant adversely affected or aggrieved by an order issued under paragraph (1), or who seeks review of any corrective action determined under paragraph (1), may obtain judicial review of such order or determination in the United States Court of Appeals for the Federal Circuit. No petition seeking such review may be filed more than 60 days after issuance of the order or the determination to implement corrective action by the head of the agency. Review shall conform to chapter 7.

"(5)(A) If, in any action for damages or relief under paragraph (3) or (4), an Executive agency moves to withhold information from discovery based on a claim that disclosure would be inimical to national security by asserting the privilege commonly referred to as the 'state secrets privilege', and if the assertion of such privilege prevents the plaintiff from establishing an element in support of the plaintiff's claim, the court shall resolve the disputed issue of fact or law in favor of the plaintiff, provided that an Inspector General investigation under subsection (b) has resulted in substantial confirmation of that element, or those elements, of the plaintiff's claim.

"(B) In any case in which an Executive agency asserts the privilege commonly referred to as the 'state secrets privilege', whether or not an Inspector General has conducted an investigation under subsection (b), the head of that agency shall, at the same time it asserts the privilege, issue a report to authorized Members of Congress, accompanied by a classified annex if necessary, describing the reasons for the assertion, explaining why the court hearing the matter does not have the ability to maintain the protection of classified information related to the assertion, detailing the steps the agency has taken to arrive at a mutually agreeable settlement with the employee, former employee, or applicant for employment, setting forth the date on which the classified information at issue will be declassified, and providing all relevant information about the underlying substantive matter.

"(d) APPLICABILITY TO NON-COVERED AGENCIES.—An employee, former employee, or applicant for employment in an Executive agency (or element or unit thereof) that is not a covered agency shall, for purposes of any disclosure of covered information (as described in subsection (a)(2)) which consists in whole or in part of classified or sensitive information, be entitled to the same pro-

tections, rights, and remedies under this section as if that Executive agency (or element or unit thereof) were a covered agency.

"(e) CONSTRUCTION.—Nothing in this section may be construed—

"(1) to authorize the discharge of, demotion of, or discrimination against an employee for a disclosure other than a disclosure protected by subsection (a) or (d) of this section or to modify or derogate from a right or remedy otherwise available to an employee, former employee, or applicant for employment; or

"(2) to preempt, modify, limit, or derogate any rights or remedies available to an employee, former employee, or applicant for employment under any other provision of law, rule, or regulation (including the Lloyd-La Follette Act).

No court or administrative agency may require the exhaustion of any right or remedy under this section as a condition for pursuing any other right or remedy otherwise available to an employee, former employee, or applicant under any other provision of law, rule, or regulation (as referred to in paragraph (2)).

"(f) DEFINITIONS.—For purposes of this section—

"(1) the term 'covered information', as used with respect to an employee, former employee, or applicant for employment, means any information (including classified or sensitive information) which the employee, former employee, or applicant reasonably believes evidences—

"(A) any violation of any law, rule, or regulation; or

"(B) gross mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety;

"(2) the term 'covered agency' means—

"(A) the Federal Bureau of Investigation, the Central Intelligence Agency, the Defense Intelligence Agency, the National Geospatial-Intelligence Agency, the National Security Agency, and the National Reconnaissance Office; and

"(B) any other Executive agency, or element or unit thereof, determined by the President under section 2302(a)(2)(C)(ii)(II) to have as its principal function the conduct of foreign intelligence or counterintelligence activities;

"(3) the term 'authorized Member of Congress' means a member of the House Permanent Select

Committee on Intelligence, the Senate Select Committee on Intelligence, the House Committee on Oversight and Government Reform, the Senate Committee on Homeland Security and Governmental Affairs, and the committees of the House of Representatives or the Senate that have oversight over the program about which the covered information is disclosed;

"(4) the term 'authorized official of an Executive agency' shall have such meaning as the Office of Personnel Management shall by regulation prescribe, except that such term shall, with respect to any employee, former employee, or applicant for employment in an agency, include—

"(A) the immediate supervisor of the employee or former employee and each successive supervisor (immediately above such immediate supervisor) within the employee's or former employee's chain of authority (as determined under such regulations); and

"(B) the head, general counsel, and ombudsman of such agency; and

"(5) the term 'authorized official of the Department of Justice' means any employee of the Department of Justice, the duties of whose position include

the investigation, enforcement, or prosecution of any law, rule, or regulation.".

(b) CLERICAL AMENDMENT.—The table of sections for chapter 23 of title 5, United States Code, is amended by inserting after the item relating to section 2303 the following:

"2303a. National security whistleblower rights.".

SEC. 11. ENHANCEMENT OF CONTRACTOR EMPLOYEE WHISTLEBLOWER PROTECTIONS.

(a) CIVILIAN AGENCY CONTRACTS.—Section 315(c) of the Federal Property and Administrative Services Act of 1949 (41 U.S.C. 265(c)) is amended—

(1) in paragraph (1), by striking "If the head" and all that follows through "actions:" and inserting the following: "Not later than 180 days after submission of a complaint under subsection (b), the head of the executive agency concerned shall determine whether the contractor concerned has subjected the complainant to a reprisal prohibited by subsection (a) and shall either issue an order denying relief or shall take one or more of the following actions:"; and

(2) by redesignating paragraph (3) as paragraph (4) and adding after paragraph (2) the following new paragraph (3):

"(3) If the head of an executive agency has not issued an order within 180 days after the submission of a complaint under subsection (b) and there is no showing that such delay is due to the bad faith of the complainant, the complainant shall be deemed to have exhausted his administrative remedies with respect to the complaint, and the complainant may bring an action at law or equity for de novo review to seek compensatory damages and other relief available under this section in the appropriate district court of the United States, which shall have jurisdiction over such an action without regard to the amount in controversy.".

(b) ARMED SERVICES CONTRACTS.—Section 2409(c) of title 10, United States Code, is amended—

(1) in paragraph (1), by striking "If the head" and all that follows through "actions:" and inserting the following: "Not later than 180 days after submission of a complaint under subsection (b), the head of the agency concerned shall determine whether the contractor concerned has subjected the complainant to a reprisal prohibited by subsection (a) and shall either issue an order denying relief or shall take one or more of the following actions:"; and

(2) by redesignating paragraph (3) as paragraph (4) and adding after paragraph (2) the following new paragraph (3):

"(3) If the head of an agency has not issued an order within 180 days after the submission of a complaint under subsection (b) and there is no showing that such delay is due to the bad faith of the complainant, the complainant shall be deemed to have exhausted his administrative remedies with respect to the complaint, and the complainant may bring an action at law or equity for de novo review to seek compensatory damages and other relief available under this section in the appropriate district court of the United States, which shall have jurisdiction over such an action without regard to the amount in controversy.".

SEC. 12. PROHIBITED PERSONNEL PRACTICES AFFECTING THE TRANSPORTATION SECURITY ADMINISTRATION.

(a) IN GENERAL.—Chapter 23 of title 5, United States Code, is amended—

(1) by redesignating sections 2304 and 2305 as sections 2305 and 2306, respectively; and

(2) by inserting after section 2303a (as inserted by section 10) the following:

"§ 2304. Prohibited personnel practices affecting the Transportation Security Administration

"(a) IN GENERAL.—Notwithstanding any other provision of law, any individual holding or applying for a position within the Transportation Security Administration shall be covered by—

"(1) the provisions of section 2302(b)(1), (8), and (9);

"(2) any provision of law implementing section 2302(b)(1), (8), or (9) by providing any right or remedy available to an employee or applicant for employment in the civil service; and

"(3) any rule or regulation prescribed under any provision of law referred to in paragraph (1) or (2).

"(b) RULE OF CONSTRUCTION.—Nothing in this section shall be construed to affect any rights, apart from those described in subsection (a), to which an individual described in subsection (a) might otherwise be entitled under law.

"(c) EFFECTIVE DATE.—This section shall take effect as of the date of the enactment of this section.".

(b) CLERICAL AMENDMENT.—The table of sections for chapter 23 of title 5, United States Code, is amended by striking the items relating to sections 2304 and 2305, respectively, and by inserting the following:

SEC. 13. CLARIFICATION OF WHISTLEBLOWER RIGHTS RELATING TO SCIENTIFIC AND OTHER RESEARCH.

Section 2302 of title 5, United States Code, is amended by adding at the end the following:

"(f) As used in section 2302(b)(8), the term 'abuse of authority' includes—

"(1) any action that compromises the validity or accuracy of federally funded research or analysis; and

"(2) the dissemination of false or misleading scientific, medical, or technical information.".

SEC. 14. EFFECTIVE DATE.

This Act shall take effect 30 days after the date of the enactment of this Act, except as provided in the amendment made by section 12(a)(2).

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Chairman WAXMAN. At this point, I want to recognize the ranking member of the committee, Mr. Davis.

Mr. DAVIS OF VIRGINIA. Thank you, Mr. Chairman. I think it says a great deal about our working relationship that the first legislative hearing under your leadership continues the committee's consideration of two bills that you and I worked together on last year, but were unable to get enacted into law before the session ended. Both proposals are aimed at improving transparency in Government as a way of restoring trust in how the public's business is conducted.

The first bill being discussed today is the executive branch Reform Act. Chairman Waxman and I introduced substantially the same legislation last April, which the committee approved by a vote of 32 to nothing. In addition to other reforms, the legislation would ensure that the behavior of our public servants is above reproach, by requiring executive branch officials to disclose any contacts involving the discussion of pending agency business. In doing so, this legislation attempts to strike that fine balance between reasonable and focused rules of ethical behavior and overly broad restrictions and prohibitions that hamstring agency officials and prevent them from exercising the discretion needed to perform their missions on behalf of our citizens.

I applaud Chairman Waxman's continued focus on this issue. I look forward to working with him to improve this legislation as it moves forward.

The second bill being discussed today is the Whistleblower Protection Enhancement Act. Last year's version of this legislation, sponsored by our colleague, Representative Todd Platts, was reported by this committee on a 34 to 1 vote. In a nutshell, the bill would modernize, clarify and expand Federal employee whistleblower protection laws. The most significant reform would guarantee Federal employees a right to a jury trial in Federal court if the Merit Systems Protection Board does not take action on a claim within 180 days. Recourse for whistleblowers victimized by retaliatory actions in certain national security agencies would also be strengthened.

In addition to the witnesses before us today, I have encouraged affected branch agencies, specifically the Merit Systems Protection Board, the Office of Government Ethics, the Office of Federal Procurement Policy and the Department of Justice to submit comments for the record regarding these proposals. Chairman Waxman, despite the fact that we are scheduled to mark up these bills soon, I hope you will keep the record open long enough for these stakeholders to have their comments included for future reference.

I want to thank you again, and I look forward to hearing from our witnesses.

[The prepared statement of Hon. Tom Davis follows:]

Statement of Rep. Tom Davis
Ranking Member
Committee on Oversight and Government Reform

The Executive Branch Reform Act
and the
Whistleblower Protection Enhancement Act of 2007

February 13, 2007

Thank you, Mr. Chairman. I think it says a great deal about our working relationship that the first legislative hearing under your leadership continues the Committee's consideration of two bills that you and I worked on together last Congress, but were unable to get enacted into law before the session ended. Both proposals are aimed at improving transparency in government as a way of restoring trust in how the public's business is conducted.

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Thank you again and I look forward to hearing from the witnesses.

Chairman WAXMAN. Thank you. I think that is an excellent suggestion. We will keep the record open for 7 days for Members to put in opening statements and for any other submissions that stakeholders may have on this legislation.

I want to call on Members who may wish to deliver an opening statement at this time. But I want to acknowledge the work of Congressman Platts as the chairman of the subcommittee particularly on the Whistleblower Bill and recognize him for any comments he wishes to make. I congratulate you and express the appreciation of all of us for the hard work you put into that legislation.

Mr. PLATTS. Thank you, Mr. Chairman. I appreciate your kind words, and especially appreciate this hearing on two very important pieces of legislation that are very much focused on open and accountable Government. I obviously am especially pleased that we are addressing the Whistleblower Protection Act today and am honored to be serving with you as co-sponsor of the legislation and the planned markup of both of these pieces of legislation tomorrow.

Also I want to recognize Ranking Member Davis for his leadership the past 4 years, working with you on this committee for the good of open and accountable Government and know that through these bipartisan efforts we are going to have success and move these pieces of legislation forward out of committee and hopefully through the House and Senate and to the President's desk. I think that what the American people, when they look to their Government, they may not always agree with every action their Government takes, but if they know it is done in the light of day and in a responsible manner, without undue influence from outside, and where there is wrongdoing, we hold those involved accountable, they will respect their Government. The Whistleblower Protection Act is about ensuring that when there is wrongdoing, waste, fraud, mismanagement, that the public servants know they can come forward and present that information and not be at risk of demotions or other harm to their own careers for doing the right thing for the American people.

So again, my sincere thanks, Mr. Chairman, for your holding this hearing, and determined commitment to moving these issues forward for the good of the American public. Thank you, Mr. Chairman.

Chairman WAXMAN. Thank you very much for your comments.

Anyone else wish to make an opening statement? If not, we will proceed to our hearing.

We are pleased to have three witnesses on our first panel. Dr. James Thurber, the distinguished professor and director of the Center for congressional and Presidential Studies at American University. He is a well-known expert on ethics and lobbying. Fred Wertheimer, president and founder of Democracy 21 is an accomplished and effective advocate of Government ethics and accountability. And Craig Holman, who is representing Public Citizen, has closely studied the problem of revolving door and other challenges to integrity in governance.

It is our practice in this committee to swear in all witnesses. So I would like to ask you, if you would, to please stand and raise your right hands.

[Witnesses sworn.]

Chairman WAXMAN. The record will indicate that each of the witnesses answered in the affirmative.

Dr. Thurber, why don't we start with you?

STATEMENTS OF JAMES A. THURBER, PH.D., DIRECTOR AND DISTINGUISHED PROFESSOR, CENTER FOR CONGRESSIONAL AND PRESIDENTIAL STUDIES, AMERICAN UNIVERSITY; FRED WERTHEIMER, PRESIDENT AND CEO, DEMOCRACY 21; AND CRAIG HOLMAN, PH.D., LEGISLATIVE REPRESENTATIVE, PUBLIC CITIZEN

STATEMENT OF JAMES A. THURBER

Mr. THURBER. Good morning, Mr. Chairman and ranking member, Mr. Davis, members of the committee. I am pleased to accept this invitation to comment on the executive branch act of 2007.

I will be focused on three things, one in particular the problems that exist with respect to lobbying the executive branch and the problems of revolving door in and out of Government and conflict of interest. Second, the current attempt to solve those problems in your bill. But also I will make some recommendations for additional solutions with respect to that.

I would like to summarize my remarks and keep it short. I assume that the remarks will be placed in the record and that I am open to questions later on about those remarks. But the summary is as follows.

I would like to remind you of something that the audience knows. And by the way, I have several students in the audience. I am very pleased about that, because they have taken my ethics and lobbying class and several work on committees on the Hill, they are probably working right now, they cannot come to the meeting. So this is important to me in terms of my mentoring them as well as educating them.

I would like to remind the committee that Congress is only part of the ethics and lobbying problem. In fact, the laws that exist and also the two proposals out of the House and the Senate with respect to lobbying I think do not appropriately focus on the question of where most of the lobbying goes on in Washington, DC. That is not on the Hill, it is with the executive branch. There are 31,000 registered lobbyists. There is some discussion about whether that is accurate or not. But in my opinion, there are probably twice as many people actually in the business of lobbying in Washington, DC, if you take into account people trying to change contracts, expand the scope and size of contracts, influence the request for proposals that come out so that only one company is eligible, really, to bid on that proposal, the total cost of lobbying in Washington in 2005, as registered through the House and the Senate records, was $2.8 billion, $2.8 billion. I think it is probably at least double that if you look at the people lobbying the regulatory process, the contract process, selling things to the Government, expanding contracts in secret.

The public confidence in Congress was at a historic low and a major issue in the 2006 election. But the public confidence in Government was also low. This bill and the problems address in this

bill, in my opinion, address that question of the integrity of our Government generally. I think it goes a long way toward doing that.

The public interest is undermined when a narrow set of public interests meet in secret in Government, and when no-bid contracts for Government projects are awarded to political friends. And also when people who are working in Government leave and immediately work for corporations and make millions of dollars going back to the same organization, not exactly in the same area where they worked, but generally the same organization, like in the Department of Homeland Security. I think that there is little transparency in the Federal contracting process, and even less when it comes to lobbying executive branch officials for contracts. And I think this bill helps to improve transparency.

I think though the bill has an inappropriately limiting definition of lobbying. The 1995 Lobbying Registration Act has a narrow definition of lobbying as to who the people in the executive branch that lobbyists must record, but also what they do. Your act, I think your act would be improved if you referred to those definitions in existing law and also the law that may indeed be changed as a result of actions of the House and the Senate.

I think the best way to eliminate the potential evils of secret meetings is to make them open or at least make them transparent through prompt and accurate reporting of their occurrence, on a quarterly basis, as you have recommended. Again, I think you should adopt similar requirements for those who lobby the Congress as with the executive branch, make them parallel.

Attention should be paid, again, to the hundreds of secret meetings that happen each week between Government executives and lobbyists for private interests who are seeking Federal contracts or contract extensions. This is especially important, because if there is an existing contract and there is a meeting to expand the scope of that contract, that was what the situation was with Duke Cunningham. Or individuals who seek to influence the Federal regulatory process. I think there are many people doing that that are not covered under the 1946 Administrative Procedures Act, and are not registering and have undue influence.

Let's focus on revolving door problems. There is a rapidly revolving door, as we know, between the private sector and K Street. Craig Holman's group has done a great job documenting that. I won't go through the documentation of all the specifics. But what does that do? It creates an unlevel playing field for some well-connected Government contractors when this happens. Since we are contracting out so much work from this Federal Government, Paul Light has documented the contracting out of many basic functions, this is a very important thing to focus on. The revolving door problem between K Street and the executive branch seems to be getting worse. The Reagan administration had 214 top level officials go through the revolving door to areas that they were involved with when they were in Government. Clinton had 268 and this Bush administration so far has had 253 officials leave their top Government offices for lobbying jobs or jobs in the private sector related to their Government responsibilities.

For example, 90 Department of Homeland Security officials have left Government service to become consultants, lobbyists or executives for companies doing business with the Federal Government within a few weeks, including Secretary Tom Ridge. More than two-thirds of the top DHS officials left for the private sector in the Department's first years. It has been a revolving door that has caused management problems at DHS, but also conflict of interest issues on the outside.

The current law, as you know, prohibits Federal Government employees from lobbying their former employers for 1 year. But a loophole created at DHS only prohibits former employees from lobbying certain agencies within DHS, which means that they can still lobby other agencies within the Department immediately after they leave. This loophole was created in 2004 when the top DHS ethics officials got approval from the Office of Government Ethics to divide the Department into seven sections for conflict of interest purposes. You work in one section, you can contact the six other sections and lobby for your client in those sections.

If you look at the special study, the Revolving Door Working Group, which Craig I am sure will talk about later, and therefore I will not summarize it, they have listed at least 12 major illegal actions that are going on as a result of the revolving door, including handing out favors to former clients, writing the specifications for the request for proposal so that they can only be met by a friend or former employee, and other issues like that.

What are the solutions? Well, I think this bill goes a long way toward solving these two problems of transparency in terms of lobbyists meeting with executive branch officials, executive branch officials being required to record that. Some people say that it is too onerous. Every executive branch official has their schedule electronically set. I think that it is reasonable in a democracy to make that transparent as to who is visiting them, what they are talking about, the purpose of it.

But also I would add, by the way, to your bill, where it takes place. It may take place on a golf course. Or it may take place at some resort, not just in their office. We need to know about that, in my opinion.

Solutions. What are the solutions to ending secret meetings and conflicts of interest stemming from the revolving door and in and out of Government? Your bill does a great job. Let me just focus on some items where you should go further.

Chairman WAXMAN. Dr. Thurber, could you try to summarize? The whole testimony is going to be in the record.

Mr. THURBER. Let me just summarize by saying that I think you should look carefully, as I said before, at existing law for the lobbyists, and apply that to the executives in terms of recording. And also focus on enforcement of existing law with respect to the lobbyists. I know it is out of your jurisdiction, but enforcement of the executive branch. I think a lot of people are breaking the law right now in terms of this.

I would also extend the cooling off period to 2 years. And as in your bill, I have mentioned some waivers that you should look at besides the waivers that you have indicated. Waivers are too easy for people to get in many cases, in terms of the revolving door.

Then also shut-down on negotiation of jobs while they are in their position. It is against the law now, shut down those waivers, and I think the bill goes a long way toward that.

Thank you very much. If you have any questions, I would be pleased to answer them.

[The prepared statement of Mr. Thurber follows:]

Testimony of

Dr. James A. Thurber
Distinguished Professor and
Director, Center for Congressional and Presidential Studies
American University
Washington, DC

Before the

United States House of Representatives
Committee on Oversight and Government Reform

Comments on the Executive Branch Reform Act of 2007

Tuesday, February 13, 2007

I would like to thank Chairman Henry Waxman, Ranking Minority Member Tom Davis and Members of the House Committee on Oversight and Government Reform for the invitation to comment on the Executive Branch Reform Act of 2007 and generally on ethics and lobbying in the executive branch.

My name is James A. Thurber, Distinguished Professor and Director and Founder of the Center for Congressional and Presidential Studies at American University in Washington, DC. I teach a graduate seminar on Lobbying and Ethics and founded the Public Affairs and Advocacy Institute (the Lobbying Institute) at AU. I am also currently working with the Committee for Economic Development on a special study entitled, "Making Washington Work" that focuses on lobbying reform. I have served on the American Association of Political Consultants' Board of Directors and their Ethics Committee for the last five years and have published an analysis of the American League of Lobbyists' Code of Ethics. Finally, I assisted the House and Senate Rules Committees in formulating the lobbying and ethics reform in the last Congress.

In the course of my research, publication, teaching and public service, I have studied ethics and lobbying, "revolving door" conflicts of interest,

and contracting conflicts of interest. I have been asked to testify today on the Executive Branch Reform Act of 2007, in particular on sections that address lobbying and the "revolving door" of employment between executive branch top level officials and the private sector. I will set forth some of the major problems with lobbying executive branch officials, the current attempt to solve those problems, and my recommendations for better solutions.

Statement of Problems

Secret meetings between lobbyists and executive branch officials

Public confidence in the integrity of Congress was at a historic low during the 2006 election, but it was alarmingly low for the executive branch, too. The appearance of impropriety exacerbates public trust in government, ultimately causing a decline in civic participation and confidence in our democracy. The public interest is undermined when narrow private interests meet in secret with government officials, and when no-bid contracts for government projects are awarded to political friends. Last week, this committee brought to light many of the problems surrounding federal contracting, including a lack of oversight of the contracting process and contractor conflicts of interest.

There is little transparency in the federal contracting process and even less when it comes to lobbying executive branch officials. Part of the problem is the inappropriately limiting definition of lobbying. The definition should be expanded to include actions to obtain federal contracts or expand the scope of current federal contracts, Requests for Proposals and attempts to exert hidden influence on the Federal regulatory policy.

The best way to eliminate the potential evils of "secret meetings" is to make them open to the public or, if that is not appropriate, make them transparent through prompt and accurate reporting of their occurrence. Recent lobbying reform bills passed in the House and Senate (whose differences I hope will be reconciled soon) made the reporting requirements for registered lobbyists stronger. You should adopt similar requirements for those who lobby the executive branch. One very public and striking example of the lack of transparency in executive branch lobbying was Vice President Cheney's Energy Task Force. Vice President Cheney – himself a former energy industry executive – met with top energy company officials to write the administration's energy plan. Despite repeated requests for transparency, through the disclosure of the names of these private interests and the minutes of the meetings, Government Accountability Office requests, and a court case, those meetings have remained secret. Less attention has been paid to

the hundreds of secret meetings that happen each week between government executives and lobbyists for private interests who are seeking federal contracts or contract extensions, or who are seeking to influence changes in federal rules or regulatory policy.

Revolving door between lobbyists and government

The rapidly revolving door between the private sector, especially K street lobbying firms, and government raises concerns about the integrity of actions by government officials, and it can lead to conflicts of interest for government executives and an "unlevel playing field" for some "well-connected" government contractors. It is common for a former government employee to have privileged access to government officials through a network of friends and colleagues built while serving in government.

The revolving door problem between K Street and the executive branch seems to be getting worse. According to the Center for Responsive Politics, which maintains a "revolving door database," the Reagan administration had 214 top level officials go through the revolving door, the Clinton administration had 268 officials do the same, and as of September 2006, the Bush administration had 253 officials leave their top government offices for lobbying and jobs in the private sector.

According to a *New York Times* investigation, as of June 2006, ninety Department of Homeland Security (DHS) officials had left government service to become consultants, lobbyists, or executives for companies doing business with the federal government within a few weeks – including former secretary Tom Ridge and even the infamous former FEMA director Michael Brown. This is particularly meaningful as the DHS is less than five years old! More than two-thirds of top DHS officials left for the private sector in the department's first years.[1]

Current law prohibits federal government employees from lobbying their former employers for one year, but a loophole created at DHS only prohibits former employees from lobbying certain agencies within DHS – which means they can still lobby other agencies within the department immediately after they leave. This loophole was created in 2004, when the top DHS ethics official got approval from the Office of Government Ethics (OGE) to divide the department into seven sections for conflict of interest purposes.[2] The loopholes created at DHS essentially allow former government officials to turn their government contracts and knowledge into personal profit. This goes against the letter and intent of the one-year ban that is currently in place and represents a serious ethical breech.

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[1] Eric Lipton. "Former Antiterror Officials Find Industry Pays Better" *New York Times*. June 18, 2006.
[2] Elena Herrero-Beaumont. "DHS's Seven Revolving Doors," *Homeland Security: National Imperative or Business as Usual?* Columbia Graduate School of Journalism. July 24, 2006.

It is common for top government employees, career and political, to leave the government for jobs in the private sector. Most political appointees are forced to leave when the White House changes hands. The vast majority of employees will enter or reenter the private sector. They bring with them skills learned and networks of contacts made at their former agencies and these attributes have value to lobbying firms and the clients they represent. It is important to point out that most federal employees who move to the private sector do so with good intentions and have not spent their time in government service unduly influenced by the prospect of future private gain. However, the temptations of future employment in the private sector are there and when acted upon, the public loses.

The Revolving Door Working Group, which includes Public Citizen, Common Cause, and the Project on Government Oversight, compiled a report in 2005 that documented the increase in unethical if not illegal actions by top level government employees, including:

- handing out favors to their former clients;
- awarding contracts to their former employers;
- instituting official acts affecting former clients;
- negotiating future employment with private interests affected by their official actions;

- leaving government service and becoming lobbyists in the same area of responsibility while in government;
- taking advantage of loopholes in certain laws that allow the government procurement official to be hired by a company to whom he awarded contracts;
- expanding the scope and size of a contract without competition and awarding it to friends and companies with close relationships with the government official; and
- writing the specifications for a request for proposal (RFP) so that they can only be met by a friend or former employer.

All of these problems call for rigorous enforcement and reforms of lobbying and revolving door regulations in the executive branch.

Solutions: The Executive Branch Reform Act of 2007

I support the Executive Branch Reform Act and believe that its requirements will bring more transparency to executive branch lobbying and help slow the revolving door in and out of government and thus reduce widespread conflicts of interest between government executives and the private sector. However, I think the bill should go farther in its recommendations.

End Secret Meetings

The bill would end secret meetings between lobbyists and other private parties and executive branch officials by requiring executive branch officials to report these meetings quarterly to the Office of Government Ethics and to make them public.

The bill calls for useful data to improve transparency and the nature of the contact between lobbyists and other private parties and government officials by requiring the following: date of the contact/meetings; subject matter of the contact and executive branch action; and if contact was made for a client, the name of the client. It also requires a searchable computerized database designed to minimize the burden of filing and to maximize public access to reports filed under the act saved for six years. While the searchable database improves transparency and usefulness of the data by Congress, the public, and the media, one crucial piece is missing, and that is the location of the meeting. Are these meetings taking place in government offices, restaurants, conferences, golf courses, or other venues where conflicts may arise?

Like the new reporting requirements recently approved for legislative branch lobbyists, executive branch reports should be filed on a quarterly basis. I agree that there should be sanctions for those who do not meet filing deadlines.

The purpose of these changes in current law is twofold: it brings transparency to the process, and it helps make government executives accountable to the public as the meetings and their participants will be part of a public record.

However, the bill should also require individuals, who meet with and lobby executive branch officials in order to expand the scope of federal contracts or secretly push the executive officials for regulatory changes, to file reports of their lobbying activities.

Enforce existing lobbying registration law in the executive branch

While many executive branch lobbying activities are currently covered under the Lobbying Disclosure Act of 1995 (LDA) (with amendments in 1998), they are often ignored. That act defines lobbyists by contacts made and time spent and requires registration based on money received. A lobbying contact is any oral or written communication to a covered legislative or executive branch official with regard to the formulation, modification, or adoption of federal legislation, rules, regulations, policies or administration of a federal program including federal contract, grant or license. This definition of what is covered is broad and inclusive, but often ignored with respect to executive branch lobbying. The recipient officials in the current law include: President, Vice President,

officers and employees of the Executive Office of the President, officials in a Level IV position of the executive schedule, political appointees serving in a confidential or policy-making position, and senior military officers. Other changes to improve lobbying transparency anticipated in 2007 include quarterly rather than semi-annual reports, an improved publicly accessible report from lobbyists, easy identification of political contributions from lobbyists to Members, and identity of the House and Senate members' offices that are contacted. These improvements to the Lobbying Registration Act should be applied and enforced to executive branch lobbying. The Executive Branch Reform Act of 2007 should use the same definitions of lobbying and those officials who are covered as in the LRA including future changes to that act.

Slow the Revolving door

Your bill extends the period during which government employees cannot engage in lobbying after leaving office and expands the scope of prohibited activities in many of the same ways as do the lobbying reforms passed by the House and Senate for Members and some congressional staff. I agree with the provisions in the bill that change the "cooling off" period from one year to two years for lobbying the government agencies with which the former official was associated. Two years is long enough to help

ensure that there is no impropriety while the official is still in government service, and it is long enough to convey to the public that the revolving door for employment and lobbying is slowing down appropriately.

Government officials are currently generally prohibited from negotiating future employment with private interests who are affected by their official actions. I support closing various loopholes in the current prohibition. While the bill restricts the granting of waivers that allow public officials to negotiate future employment in the private sector, I would go farther and eliminate the waivers all together. I cannot envision a situation where negotiating for a private sector position while a government employee would be necessary or desirable or in the public interest.

I agree with the ban on executives who worked for private contractors from awarding contracts to their former employers when they enter government – this is the least that should be done. In addition, the bill should be stronger in preventing government executives from expanding the scope of contracts, influencing the awarding of non-competitive contracts, and regulating their former industries. In recent years, top officials at the Environmental Protection Agency, National Highway Traffic Safety Administration, and the Interior Department have been put in charge of regulating their old clients and firms, and whether such coziness has resulted

in poorer public policy or not, there is an appearance of impropriety that erodes confidence in government and is not in the public interest.

Close Loopholes in the Current Law

The bill closes some important loopholes on the hiring of government procurement officials by companies to whom they awarded contracts. There is currently a one year ban on government procurement officers awarding these contracts, but it is self-enforcing (see 5CRF2625.502). Waivers are too often given automatically by supervisors. The bill makes those waivers much more difficult to give and receive and strengthens the requirement to monitor recusal agreements by the Office of Government Ethics.

Conclusion

I am convinced that the Executive Branch Reform Act of 2007 will help to restore trust and accountability in government through greater transparency and more rigorous enforcement of lobbying and ethics in the executive branch. The bill strengthens the enforcement of existing laws and ethics rules that cover executive branch officials and lobbyists. The bill enhances disclosure and transparency of executive branch lobbying activities and lobbyists. Public awareness of lobbying activities is essential for our

democratic government to function with the support and trust of the American public.

The bill tightens ethics laws in public service and remedies many conflict of interest problems stemming from loopholes in the revolving door in and out of government and from inadequate disclosure and secret improper influence by lobbyists and private parties over public policy making. It might be impossible and maybe even undesirable to "stop" the revolving door – but we can slow it down, and we can bring transparency to the process by broadening the requirements for all executive branch officials and lobbyists to report their lobbying activities. The bill improves the legal framework regulating revolving door activities by tightening its enforcement.

More accountability in lobbying and government actions generally will come by making the activities of lobbyists and federal executives open to pubic scrutiny and by uniformly enforcing existing laws and closing loopholes in those laws. This proposed bill will meet those objectives. In that way the public trust can be reestablished in government generally and, specifically, in the federal executive branch. Good government is a process, not a discrete event. It is essential that the federal executive branch begin the process to reform lobbying as Congress has done. After all, twenty-six

states have revolving door restrictions for executive branch or senior-level government employees. Some states, including California and New Mexico, have a permanent ban on working for private interests on the exact same issues or contracts that the government officer was responsible for while in government. It is time the Federal Government tightened rules for former government employees.

Throughout my testimony, I have recommended ways to make the law even stronger and I hope you will consider going beyond the provisions of the Act and incorporating my suggestions.

Thank you for listening to my testimony today. I would be pleased to answer any questions related to the Executive Branch Reform Act of 2007 and other questions you might have with respect to my testimony at this time or after this hearing.

Chairman WAXMAN. Thank you very much. We appreciate your testimony.

Mr. Wertheimer, again, to you and all the witnesses who appear today, the prepared statement will be made a part of the record in its entirety. We would like to ask you to stick to around 5 minutes in summary.

STATEMENT OF FRED WERTHEIMER

Mr. WERTHEIMER. Chairman Waxman, Ranking Member Davis and members of the committee, we very much appreciate the opportunity to testify today. At the outset, I would just like to remark that at a time when we all see and face heavy polarization in Congress, it has been very impressive to see this committee deal with these bills in the last Congress and hopefully in this Congress on an almost unanimous bipartisan basis, this bill in particular on a unanimous basis. We very much appreciate the bipartisan leadership that you, Mr. Chairman, and Ranking Member Davis have shown here to help create the context for which this happened; also the leadership that Representative Platts has shown.

This issue is being considered at a time when the public as been deeply concerned about corruption and ethics concerns in Congress. Government integrity reforms matter. People often like to say that you can't legislate morality, and that is probably true. But you can legislate the way people conduct their affairs, you can legislate conduct. And Government integrity reforms have done that, they have been successful in the past. A number of Government integrity reforms over many years in Congress have worked.

The opportunity to enact these kinds of reforms comes in cycles. And it usually comes when problems get out of control, and we are in such a period now. This Congress is off to an excellent start, in our view. The House ethics reforms enacted in January were landmark reforms. The Senate has passed similar reforms. Most of the reform efforts to date have focused on Congress and we are pleased that this committee is focused on reforms that are needed in the executive branch.

The bill this committee reported out last year, as I mentioned, was reported out 32 to nothing, unanimous bipartisan support. We take that to mean that it reflects a consensus view on this committee about the proposals that were contained in that legislation. I would like to just add a few thoughts on three sections of the executive branch reform bill.

The contacts provision would bring sunlight to the process. That is important, and it is valuable. It would provide the public with a much clearer picture of the efforts being undertaken to influence the executive branch. The information according to the legislation would be made available in a searchable data base at the Office of Government Ethics. I would just add and recommend that the committee make clear that that data base should be made available on the Internet to the public, so citizens can get direct access to this information. If the information is not available on the Internet, you greatly limit the ability of people who can go over to OGE and check out the reports and information.

We also very much support the changes being made in the revolving door provisions. We recommend that in addition to increas-

ing the revolving door provision to 2 years, that the committee, as Dr. Thurber said, look to the definitions in the lobbying disclosure bill and include lobbying activities as well as lobbying contacts in the restriction. If you are trying to create a cooling off period between an executive branch official leaving and taking advantage of the contacts, information, etc., that he had while at the executive branch, then lobbying contacts, in our view, is too narrow, and it should go beyond to the definition contained of lobbying activities, planning, strategizing, arranging for a lobbying effort.

We also support and think it is an important addition to cover the reverse revolving door problem. That is a very important issue. The idea of someone coming into executive branch from an organization and immediately turning around and making decisions to provide grants or policy positions to that organization is not defensible. This would really extend this idea, perhaps for the first time. We also support your effort to extend this to Government contractors.

In conclusion, this is good legislation. It is important legislation. It advances the interests of the public in knowing what is going on in the executive branch. It is a good balance in terms of the revolving door provisions which have to be balanced between protecting the integrity of Government decisions and allowing people to come back and forth in Government. We think the committee did a very good job last time, and with the suggestions we made, we very much support this legislation.

Thank you, Mr. Chairman.

[The prepared statement of Mr. Wertheimer follows:]

Testimony of

Fred Wertheimer

President, Democracy 21

On the Executive Branch Reform Act of 2007

Before the

Committee on Oversight and Government Reform

United States House of Representatives

February 13, 2007

Chairman Waxman, Ranking Member Davis and members of the Committee.

Democracy 21 appreciates the opportunity to testify in support of the Executive Branch Reform Act of 2007. It is our understanding that this legislation will be similar to the Executive Branch Reform Act of 2006 and our comments are based on that legislation and the Committee report that accompanied it last year.

Consideration of the issues involved in this legislation comes during a period when the American public has been deeply concerned about corruption and ethics problems in Washington.

For example, exit polls on Election Day made clear that the corruption and ethics scandals in Congress were at the top of voter concerns. According to *CNN* (November 8, 2006):

> When asked which issue was extremely important to their vote, more voters said corruption and ethics in government than any other issue, including the war, according to national exit polls.

Government integrity reforms matter. They can change the way people act and the way business is done in Washington.

Government integrity reforms have worked.

The financial disclosure requirements for members of Congress and Executive Branch officials have served to minimize the cases of federal officeholders using their public office for personal financial gain.

The congressional rules preventing Members from practicing professions for profit, limiting their outside earned income and banning honoraria fees have served to prevent conflicts of interest and the misuse of public office for personal financial gain.

The opportunities to enact basic integrity reforms are often cyclical in nature. They come when government integrity and ethics problems have gotten out-of-control.

We are in such a period.

This Congress is off to an excellent start in beginning to address these problems.

In January, the House by a near unanimous vote passed landmark ethics rules reforms. The Senate followed by passing similarly strong ethics rules and important reforms to the lobbying laws.

The House is expected to consider its own lobbying reform legislation in March and we urge House members to adopt reforms as strong as the Senate- passed measures.

There are other important government integrity reform efforts that will be made in this Congress to establish a professional, nonpartisan ethics enforcement entity to help enforce congressional ethics rules and to reform the campaign finance laws.

While most of the ethics and lobbying reforms passed, to date, in this Congress focus on activities involving Congress, the legislation pending before this Committee appropriately addresses the need for additional government integrity reforms to be adopted dealing with the Executive Branch.

The Committee recognized this last year when it reported the Executive Branch Reform Act of 2006 by a unanimous vote of 32 to 0.

This vote apparently reflected the views of Republicans and Democrats alike on the Committee that this was consensus legislation to strengthen the government integrity rules that apply to Executive Branch officials and to provide the public with relevant information about Executive Branch activities to which they are entitled.

We would like to focus our comments on three sections of this legislation.

First, the legislation amends the Ethics in Government Act to require Executive Branch officials to record and file with the Office of Government Ethics a report on "significant contacts" the official has with any private party relating to an official government action.

According to the Committee report on last year's legislation:

> H.R 5512 would bring transparency to meetings between the private sector and executive branch officials by requiring all political appointees and senior officials in federal agencies and the White House to report the contacts they have with private parties seeking to influence official government action. The reports, which would be filed quarterly and maintained on a searchable database at the Office of Government Ethics, must disclose the dates of meetings, the parties involved, and the subject matter discussed.

This reform would bring sunlight to the process of lobbying Executive Branch officials. It would ensure that the public is informed about the organizations, lobbyists or other persons that are meeting with Executive Branch officials to advocate their views, the clients represented by lobbyists, and the subject of the meetings. It would provide the public with a much clearer picture of the efforts being undertaken to influence Executive Branch decisions.

The legislation before the Committee would require the Director of OGE to make the contact reports available for public inspection and copying. We urge the Committee to improve public access to this information by requiring that the information be made available on the Internet in a fully searchable and sortable database.

The availability of these disclosure reports only in the form of paper copies located in Washington would significantly constrain the ability of the public and the media to have access to the information in a useful and timely manner.

There is no good reason for failing to make these reports available to the public on the Internet so that they can be reviewed by any citizen with access to a computer.

Second, the legislation would extend the "cooling off" period in section 207 of Title 18 from one year to two years. This would prohibit former Executive Branch officials from lobbying their government offices on official matters for two years after leaving government service.

The Committee should also consider expanding the scope of this revolving door provision by restricting the ability of Executive Branch officials to engage in "lobbying activities," not just "lobbying contacts" of their former government offices during the two year period. This additional limitation would prevent officials from designing and supervising efforts to lobby their former agencies.

The legislation also would establish "reverse" revolving door provisions, relating to conflicts that Executive Branch officials have based on their employment prior to entering government service.

According to the Committee report on last year's legislation:

> H.R. 5112 would close the revolving door between the private sector and government by deeming lawyers, lobbyists and executives appointed to high government positions to have a prohibited conflict of interest if they take official actions affecting their former clients or employers within 2 years of entering

> government. No conflict-of-interest waivers could be granted without the approval of the Office of Government Ethics.

This provision addresses the issue of government officials taking government actions that benefit their former employers and clients. This reform is needed to address another side of the revolving door problem — circumstances where lobbyists, contractors and others come into the government from the private sector and then use their official position to benefit their former clients or employers.

The absence of a provision to cover these circumstances has been a missing link in revolving-door requirements for government officials that would be addressed by this legislation.

Third, the legislation would extend the revolving door restrictions to government contractors. According to the Committee report on last year's legislation:

> H.R. 5112 would close the revolving door between contractors and government. For the first time, executives who worked for private contractors would be barred from awarding contracts to their former employers when they enter government. The bill also clarifies the current law governing when government procurement officials could be hired by companies which hold federal contracts.

This provision also represents an important advance by recognizing the potential for conflicts of interest and the appearance of conflicts of interest where Executive Branch officials come to the government from private companies and play a role in awarding contracts to their former employers.

In conclusion, we support the legislation discussed above and believe it willl make necessary and valuable improvements in the ethics and conflict of interest rules that apply to Executive Branch officials.

The decision by the Committee last year to report this legislation unanimously demonstrated overwhelming bipartisan approval for the bill. We urge the Committee to take similar action this year and report the legislation on a bipartisan, consensus basis for timely action on the House floor.

Thanks you again for the opportunity to testify.

Chairman WAXMAN. Thank you very much, Mr. Wertheimer.
Dr. Holman.

STATEMENT OF CRAIG HOLMAN

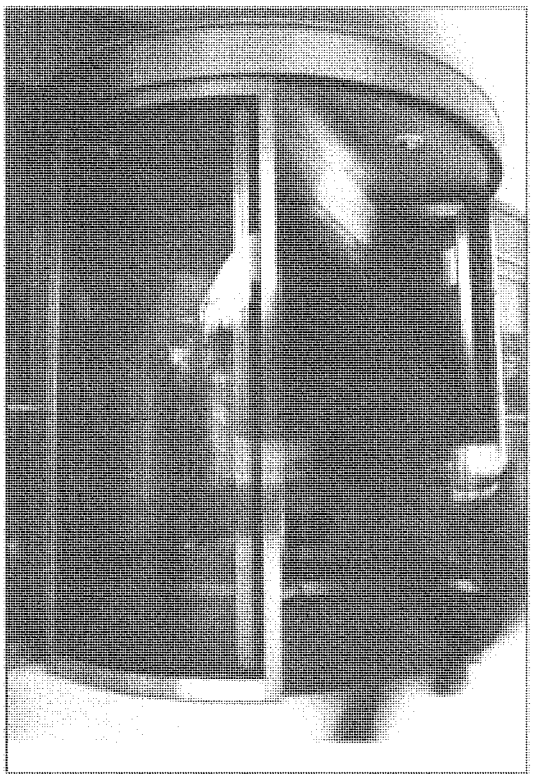
Mr. HOLMAN. Chairman Waxman, Ranking Member Davis, I want to thank you for the opportunity to testify on behalf of Public Citizen and our 100,000 members.

I also want to echo Mr. Wertheimer's praise for the work of this committee when it comes to lobbying and ethics reform. A lot of good work has come out of this committee, and praise is appropriate.

In order to address the wave of scandals that has swept over Washington, DC, the debate, as this committee recognizes, must include lobbying and ethics laws as they relate to the executive branch. As documented in this report, A Matter of Trust, which was put together by a coalition of 15 different civic organizations called the Revolving Door Working Group, we analyzed at least two major issues that need to be addressed when it comes to lobbying and ethics in the executive branch. I ask that this report be entered as part of the record.

Chairman WAXMAN. Without objection, so ordered.

[The information referred to follows:]



A Matter of Trust

HOW THE REVOLVING DOOR UNDERMINES PUBLIC CONFIDENCE IN GOVERNMENT— AND WHAT TO DO ABOUT IT

Revolving Door Working Group October 2005

www.revolvingdoor.info

A Matter of Trust

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"The aim of every political Constitution is or ought to be first to obtain for rulers, men who possess most wisdom to discern, and most virtue to pursue the common good of the society; and in the next place, to take the most effectual precautions for keeping them virtuous, whilst they continue to hold their public trust."

— James Madison, *Federalist Paper* No. 57

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The Revolving Door Working Group (www.revolvingdoor.info)

... committed to increasing public confidence in government

This paper was conceived and distributed by the Revolving Door Working Group, a network founded in 2005 to promote ethics in public service and an arm's length relationship between the federal government and the private sector. The Revolving Door Working Group investigates, exposes and seeks remedies for conflict-of-interest problems such as loopholes in revolving door laws, inadequate disclosure and other issues associated with the improper influence of the regulated community over the regulatory process.

Members of the Revolving Door Working Group have different ideas about how best to counter disproportionate industry influence on the formulation of public policy, and therefore on what measures will most effectively address the concerns raised in this paper about problems with the revolving door. However, the group endorses this paper's recommendations as necessary initial steps toward closing loopholes and tightening ethics laws so as to ensure integrity and fairness in federal government policymaking.

The authors of this paper wish to thank the following individuals who commented on draft versions: Beth Burrows, Charlie Cray, Sarah Diehl, George Draffan, Jane Rissler and Jeff Ruch. The final version, however, does not necessarily reflect all of their suggestions.

Members of the Revolving Door Working Group include:

American Corn Growers Association
Center for Corporate Policy
Center for Environmental Health
Center for Science in the Public Interest
Center of Concern/Agribusiness Accountability Initiative
Common Cause
Corporate Research Project of Good Jobs First
Edmonds Institute
Government Accountability Project
Institute for Agriculture and Trade Policy
Organization for Competitive Markets
Project On Government Oversight
Public Citizen
Public Employees for Environmental Responsibility
Revolt of the Elders

For the names of additional members that signed on after the publication of this report, see www.revolvingdoor.info.

Executive Summary

PUBLIC CONFIDENCE IN THE INTEGRITY OF THE FEDERAL GOVERNMENT is alarmingly low. While numerous factors contribute to this phenomenon, one of the most potent is the widespread belief that government has been taken over by powerful special interests. Such a belief is not unfounded. Special interests—which these days mainly mean large corporations and their trade associations—spend huge sums on campaign contributions and lobbying.

Yet money is not the only way business exercises its influence; it also relies on the movement of certain people into and out of key policymaking posts in the executive and legislative branches. This movement, known as the *revolving door,* increases the likelihood that those making policies are sympathetic to the needs of business—either because they come from that world or they plan to move to the private sector after finishing a stint with government.

The revolving door is not new, but it seems to have become much more common. Recent administrations have appointed unprecedented numbers of key officials from the ranks of corporate executives and business lobbyists. At the same time, record numbers of members of Congress are becoming corporate lobbyists after they leave office, and it has become routine for top executive-branch officials to leave government and go to work for companies they used to regulate. As more and more officials are making policies affecting companies for which they used to work or will soon do so, actual and potential conflicts of interest are proliferating.

It is to address this problem that the Revolving Door Working Group was created and that this report was written. Our aim is twofold: to educate the public about the workings of the revolving door and the inadequacies of the current regulatory framework that governs it; and to propose a set of new measures to strengthen that framework.

This report first sets out to fill the need for a systematic overview of the various forms of the revolving door. These include:

- **THE INDUSTRY-TO-GOVERNMENT REVOLVING DOOR**, through which the appointment of corporate executives and business lobbyists to key posts in federal agencies establishes a pro-business bias in policy formulation and regulatory enforcement. We give some historical background on this practice (sometimes known as the "reverse revolving door") and then detail the growing extent to which it has occurred in recent years in agencies such as the Occupational Safety and Health Administration, the Environment Protection Agency and the Departments of Agriculture, Energy and Defense.

- **THE GOVERNMENT-TO-INDUSTRY REVOLVING DOOR**, through which public officials move to lucrative private-sector positions in which they may use their government experience to unfairly benefit their new employer in matters of federal procurement and regulatory policy. We include brief profiles of some of the most egregious cases of recent years, including that of Darleen Druyun, who was found guilty of manipulating Defense Department procurement decisions to benefit Boeing while she was negotiating a job with the company.

- **THE GOVERNMENT-TO-LOBBYIST REVOLVING DOOR**, through which former lawmakers and executive-branch officials become well-paid advocates and use their inside connections to advance the interests of corporate clients. We look at the statistics on the rush to K Street while also profiling some brazen examples, such as Rep. James Greenwood, who apparently lost interest in a planned investigation of the pharmaceutical industry aftet he received an offer to head the leading biotechnology trade association.

This paper argues that there are at least six important reasons why the public should pay more attention to the revolving door:

- It can provide a vehicle for public servants to use their office for personal or private gain at the expense of the American taxpayer;

- The revolving door casts grave doubts on the integrity of official actions and legislation. A Member of Congress or a government employee could well be influenced in his or her official actions by promises of a future high-paying job from a business that has a pecuniary interest in the official's actions while in government. Even if the official is not unduly influenced by promises of future employment, the *appearance* of undue influence itself casts aspersions on the integrity of the federal government;

- It can provide some government contractors with unfair advantages over their competitors, due to insider knowledge that can be used to the benefit of the contractor, and potentially to the detriment of the public interest;

- The former employee may have privileged access to government officials. Tapping into a closed network friends and colleagues built while in office, a government employee-turned-lobbyist may well have access to power brokers not available to others. In some cases, these networks could involve prior obligations and favors. Former Members of Congress even retain privileged access to the Congressional gym, dining hall and floors of Congress.

- It has resulted in a highly complex but ultimately ineffective framework of ethics and conflict-of-interest regulations. Enforcing those regulations has become a virtual industry within the government, costing significant resources but rarely resulting in sanctions or convictions of those accused of violating the rules. As a result, ethics rules offer little or no deterrent to those who might violate the public trust; and

- The appearance of impropriety exacerbates public distrust in government, ultimately causing a decline in civic participation. It also demoralizes honest government workers who do not use their government jobs as a stepping stone to lucrative employment government contractors or lobbying firms.

After describing the various types of revolving-door conflicts of interest and pointing out the weaknesses in the existing rules framework, the paper proposes a set of policy reforms. These remedies seek to enhance transparency, increase vigilance, and establish mechanisms to reduce impropriety (whether perceived or actual) by establishing appropriate boundaries between public service and the pursuit of private interests. Among the specific proposals are:

- consolidation of ethics oversight entities in the executive branch and in Congress;
- granting the consolidated entities greater oversight and enforcement powers;
- standardization of conflict-of-interest rules throughout the federal government;
- adoption of procedures that would allow the Office of Government Ethics to rule a person ineligible for a certain post if that person's employment background would tend to create frequent conflicts with the rule requiring impartiality on the part of federal employees;
- strengthening of recusal rules that bar appointees from handling matrers involving their former employers in the private sector, including mandatory recusal on matters directly involving one's employers and clients during the 24-month period prior to taking office;
- monitoring of recusal agreements by the Office of Government Ethics;
- prohibiting, for a period of time, senior officials from seeking employment with contractors that may have significantly benefited from policies formulated by those officials;
- restricting the granting of waivers that allow public officials to negotiate future employment in the private sector while still in office;
- extending the period during which officials cannot engage in lobbying after leaving office and expanding the scope of prohibited activities;
- requiring federal officials to enter into a binding ethics "exit plan" when leaving the public sector to clarify what activities will be prohibited;
- revoking the special privileges granted to formet members of Congress while they are serving as lobbyists; and
- improving the reporting and disclosure of recusal agreements, waivers, lobbyist reports and other ethics filings.

The paper's recommendations do not seek to disqualify all private-sector veterans from government service, nor do we suggest that federal officials be completely barred from moving to the business world. Yet there is clearly a need to strengthen the existing regulatory framework covering revolving-door activity and to tighten its enforcement. Doing so will go a long way toward restoring integrity to the federal government.

Introduction:

The Revolving Door and Industry Influence On Public Policy

by PETER O'DRISCOLL, Center of Concern & SCOTT AMEY, Project On Government Oversight

PUBLIC CONFIDENCE IN THE INTEGRITY OF THE FEDERAL GOVERNMENT is alarmingly low, which raises fundamental questions about the effectiveness of our democratic process. According to a CBS News/*New York Times* poll in July 2004, 56 percent of the American people trust the government to do what is right only some of the time.[1] While many factors contribute to this mistrust, the same poll found that 64 percent of respondents believe "government is pretty much run by a few big interests looking out for themselves." Public concerns about corporate influence on public policy predate the parade of accounting scandals that have brought down huge companies over the past four years. In September 2000, well before the Enron case broke, *Business Week* reported that nearly three quarters of the American people believed that corporations had too much control over their lives.[2]

These survey results strongly suggest that the success of efforts to restore public trust in government will hinge on reducing the disproportionate degree to which the private sector (also referenced in this paper as "corporations," "business," "industry" or "trade associations") is able to influence the formulation and implementation of public policy. To this point, debate about breaking the grip of "special interests" on government has focused mostly on the corrosive influence of money on politics, leading to legislation to reform campaign finance. Yet, important as campaign contributions have been in increasing corporate influence on policy, it is now time to address other ways in which companies promote their own interests at the expense of the common good.

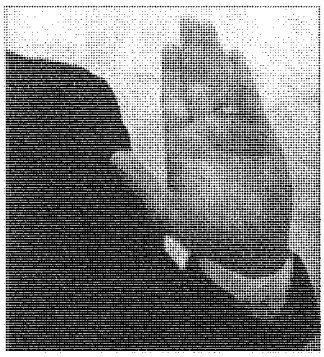
This paper explores various forms of a key mechanism by which corporate interests influence federal decision-making, especially with regard to regulatory policy and procurement choices. The mechanism is the revolving door—the movement of individuals back and forth between the private sector and the public sector. The revolving door takes three forms:

> **THE INDUSTRY-TO-GOVERNMENT REVOLVING DOOR**, through which the appointment of corporate executives and business lobbyists to key posts in federal agencies establishes a pro-business bias in policy formulation and regulatory enforcement;

THE GOVERNMENT-TO-INDUSTRY REVOLVING DOOR, through which public officials move to lucrative private sector positions in which they may use their government experience and contacts to unfairly benefit their new employer in matters of federal procurement and regulatory policy; and

THE GOVERNMENT-TO-LOBBYIST REVOLVING DOOR, through which former lawmakers and executive-branch officials become well-paid advocates and use their inside connections to advance the interests of corporate clients.

All three forms of revolving-door industry access have become so common in recent years that it is often hard to determine where government ends and the private sector begins. This was illustrated several months ago in the case of Philip A. Cooney, a former lawyer and lobbyist for the American Petroleum Institute who went to work for the George W. Bush Administration. First, there was an uproar over the revelation that, while serving as chief of staff of the White House Council on Environmental Quality, Cooney repeatedly revised government scientific reports to obscure the connection between greenhouse-gas emissions and global warming. Cooney soon resigned from the federal government. It came as no surprise that his next position was with Exxon Mobil. This prompted the *New York Times* to editorialize that "it is surely a cause for dismay that the Bush administration has seen fit to embed so many former lobbyists in key policy or regulatory jobs where they can carry out their industry's agenda from within."[3]



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This paper argues that there are at least six important reasons why the public should pay more attention to the revolving door:

- It can provide a vehicle for public servants to use their office for personal or private gain at the expense of the American taxpayer;
- The revolving door casts grave doubts on the integrity of official actions and legislation. A Member of Congress or a government employee could well be influenced in his or her official actions by promises of a future high-paying job from a business that has a pecuniary interest in the official's actions while in government. Even if the official is not unduly influenced by promises of future employment, the *appearance* of undue influence itself casts aspersions on the integrity of the federal government;
- It can provide some government contractors with unfair advantages over their competitors, due to insider knowledge that can be used to the benefit of the contractor, and potentially to the detriment of the public interest;[4]

- The former employee may have privileged access to government officials. Tapping into a closed network of friends and colleagues established while serving in office, a government employee-turned-lobbyist may well have access to power-brokers not available to others. In some cases, these networks could involve prior obligations and favors. Former Members of Congress even retain privileged access to the Congressional gym, dining hall and floors of Congress.

- It has resulted in a highly complex but ultimately ineffective framework of ethics and conflict-of-interest regulations. Enforcing those regulations has become a virtual industry within the government, costing significant resources but rarely resulting in sanctions or convictions of those accused of violating the rules. As a result, ethics rules offer little or no deterrent to those who might violate the public trust; and

- The appearance of impropriety exacerbates public distrust in government, ultimately causing a decline in civic participation. It also demoralizes honest government workers who do not use their government jobs as a stepping stone to lucrative employment with government contractors or lobbying firms.

After describing the various types of revolving-door conflicts of interest and pointing out the weaknesses in the existing rules framework, the paper proposes a set of policy reforms. These remedies seek to enhance transparency, increase vigilance and establish mechanisms to reduce impropriety (whether perceived or actual) by establishing appropriate boundaries between public service and the pursuit of private interests. Among the specific proposals are:

- consolidation of ethics oversight entities in the executive branch and in Congress;

- granting the consolidated entities greater oversight and enforcement powers;

- standardization of conflict-of-interest rules throughout the federal government;

- adoption of procedures that would allow the Office of Government Ethics to rule a person ineligible for a certain post if that person's employment background would tend to create frequent conflicts with the rule requiring impartiality on the part of federal employees;

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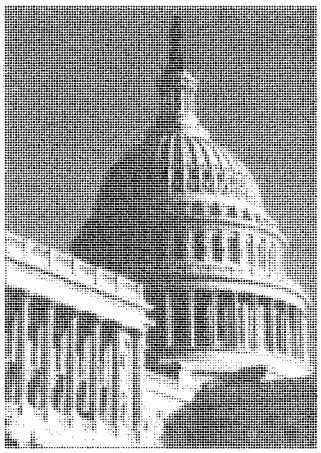
- revoking the special privileges granted to former members of Congress while they are serving as lobbyists; and
- improving the reporting and disclosure of recusal agreements, waivers, lobbyist reports and other ethics filings.

The paper's recommendations do not seek to disqualify all private sector veterans from government service, nor do we suggest that federal officials be completely barred from moving to the business world. Yet there is a need to strengthen the existing regulatory framework covering revolving-door activity and to tighten its enforcement.

Given the strength of industry lobby groups and the continued influence of money on policy formulation, it will take great political courage for lawmakers and policymakers to follow the recommendations proposed in this paper. Those who champion public-interest reforms will risk losing access to corporate money. Over the coming months, the Revolving Door Working Group will be calling on legislators and the executive branch to implement the measures proposed below. The Group's hope is that legislators and policymakers will recognize that the revitalization of public trust in elected, appointed, or career officials and the integrity of government are cornerstones upon which the maintenance of our democratic system depend. For that reason, now is the time to set aside personal and political calculations, and to act instead in the best interests of citizens, taxpayers and the country itself.



This prompted the New York Times to editorialize that "it is surely a cause for dismay that the Bush administration has seen fit to embed so many former lobbyists in key policy or regulatory jobs where they can carry out their industry's agenda from within."

NOTE: *The inclusion of specific names of individuals in this report is by no means an implicit allegation of illegal behavior on their part (except in those instances, which are noted, where guilt has been determined by legal proceedings). We believe, however, that these examples illustrate the extent to which there are at least* potential *conflicts of interest throughout the federal government. The aim of the Revolving Door Working Group is to make such conflicts rarities rather than the norm.*

Chapter 1:

The Industry-to-Government Revolving Door

How the appointment of industry veterans to key posts in federal agencies tends to create a pro-business bias in policy formulation and regulatory enforcement.

by PHILIP MATTERA, Corporate Research Project

THE REVOLVING DOOR—the movement of individuals back and forth between positions in the private sector and in the federal government—takes a variety of forms. We begin with the practice of appointing corporate executives and business lobbyists to positions in the executive branch, where they may be inclined to mold federal policy in ways that benefit their former (and probably future) employers in the private sector. This phenomenon, which has not been widely studied, is usually called the *reverse revolving door*[5] to distinguish it from the more extensively analyzed movement of individuals from the executive branch and Congress into the private sector (addressed in Chapters 2 and 3).

The reverse revolving door raises serious concerns about excessive business influence over broad federal policymaking, especially in Cabinet departments and independent regulatory agencies responsible for corporate oversight. When a federal official is looking forward to a new position in the private sector, he or she may manipulate a contract or regulatory process to benefit a specific future employer. By contrast, a corporate executive or lobbyist joining the government might not only tend to favor a previous private-sector employer but might also be ideologically inclined to shape policy to benefit business in general, as opposed to the broader public interest. This is why the scant literature that does exist on the reverse revolving door is not primarily concerned with matters of individual conflicts of interest or ethics. Instead, the issue tends to be seen in terms of business influence over public policy.[6]

From another perspective, of course, the presence of business veterans in government posts is viewed as a reasonable outcome of the public sector's need to recruit individuals with relevant knowledge and real-world experience. Defenders of the reverse revolving door argue that it would be impossible to

staff specialized agencies such as the Nuclear Regulatory Commission if everyone who had worked for industry were disqualified. That may be so for certain technical jobs, but our concern is with high-level policymaking positions for which business experience is not necessarily a prerequisite.

This paper acknowledges that it may not be feasible to ban all appointments of businesspeople to executive branch posts, but it does raise two important concerns. The first is that the current preponderance of industry veterans (to the exclusion of other qualified candidates) in key positions is giving overall regulatory policy too much of a pro-business tilt. The second is that existing ethics rules (described in the Regulation section below) are not strong enough to guard against conflicts of interest that may arise when individual federal officials make policy that affects their former private-sector employers.

A corporate executive or lobbyist joining the government might not only tend to favor a previous private-sector employer but might also be ideologically inclined to shape policy to benefit business in general, as opposed to the broader public interest.

To set the stage for discussion, this chapter begins with some historical background on the reverse revolving door and an examination of its use during the current administration. This is followed by a review of the limited regulations currently on the books and by analysis of how those rules may be strengthened.

Historical Background

Business and commercial interests have exercised substantial influence over the federal government since the beginning of the Republic. The Founding Fathers, after all, were generally of the propertied class. While the top elected positions in the country—the Ptesidency and Vice Presidency—have been filled by individuals whose professional background tended to be more in the public than in the private sector, those officials have not hesitated, especially in the past hundred years, to appoint individuals with experience in the business world to various key positions in the executive branch. This practice can be traced most easily by looking at the history of Presidential Cabinets.

Examples of Cabinet appointments from the world of big business date back to the late 19th Century. In 1897, for instance, President McKinley named Lyman Gage, an executive of the First National Bank of Chicago, to be Secretary of the Treasury. Two decades later, that same position was given by President Harding to wealthy financier Andrew Mellon. He held the post for more than a decade (serving during the Coolidge and Hoover Administrations as well) and used the position to promote reductions in taxes on business.

Over the past 50 years, the Treasury Secretary has continued to be a post frequently awarded to members of the financial and corporate elite, during both Democratic and Republican administrations. Eisenhower, for example, gave the post to George Humphrey of the steel company M.A. Hanna. Kennedy chose C. Douglas Dillon, who had been with the Wall Street firm Dillon, Read. Reagan's first Treasury Secretary was Donald Regan, head of Merrill Lynch. More recently, George W. Bush twice turned to the corporate sector, first choosing Paul O'Neill of Alcoa and later replacing him with the current Treasury Secretary, John Snow, former chief executive of the railroad company CSX.

In keeping with the notion of a "military-industrial complex," the position of Secretary of Defense is another top Cabinet post that has often been filled by corporate nominees rather than career military candidates. Eisenhower's Secretary of Defense was Charles E. Wilson, the former General Motors president who in his confirmation hearing famously said: "For years I thought what was good for our country was good for General Motors, and vice versa. The difference did not exist." Kennedy's choice for the Defense post was Robert McNamara, who had just been named president of the Ford Motor Co. Reagan's first Defense Secretary was Caspar Weinberger, who had joined the engineering giant Bechtel Corp. a few years earlier after a career in the public sector. Clinton's second Defense Secretary, William Perry, had served as managing director of investment banking firm Hambrecht & Quist in addition to holding posts in the Pentagon. The current Defense Secretary, Donald Rumsfeld, also had spent time in the corporate sector—including stints as chief executive of G.D. Searle and later General Instrument—in addition to his work in previous administrations.

Among other Cabinet positions, the one that has probably been filled most frequently with a business person is, of course, Secretary of Commerce. The latest occupant of that post, Carlos Gutierrez, was previously chief executive of cereal giant Kellogg Co.

Looking at Cabinets as a whole, it was during the Reagan Administration that the overall business presence first became quite pronounced. In addition to Regan and Weinberger, the corporate veterans in Reagan's Cabinet included Secretary of State Alexander Haig, who had become president of United Technologies after his military career. After Haig resigned in 1982, Reagan replaced him with George Shultz, who had headed Bechtel Corp. during the 1970s after two decades as an academic and federal official. Attorney General William French Smith had represented corporate clients at a major Los Angeles law firm. Commerce Secretary Malcolm Baldridge had been chairman of Scovill Inc. Secretary of Transportation Drew Lewis had been a management consultant as well as a major investor in real estate and energy properties. Even the Secretary of Labor, Raymond Donovan, had a business background as an executive of a New Jersey construction company.

The Reagan Administration's recruitment of corporate figures was not limited to the Cabinet level. Key sub-Cabinet positions also went to business veterans.[7] For example, W. Kenneth Davis, who had been an executive at Bechtel, was named Deputy Secretary of Energy. Deputy Agriculture Secretary Richard Lyng had been president of the American Meat Institute trade association, and C.W. McMillan, USDA's Assistant Secretary for Marketing and Inspection Services, had previously been employed as an executive of the National Cattlemen's Association, a beef industry trade group and a precursor to today's National Cattlemen's Beef Association.

Reagan also put people from the business world in charge of the independent agencies specifically charged to regulate business.[8] The pattern was so clear that, in March 1981, investigative reporter Jeff Gerth of the *New York Times* published a piece headlined "Is Business Regulation Now in Friendly Hands?"[9] Gerth noted examples such as John Shad, vice chairman of brokerage house E.F. Hutton, who was named chairman of the Securities and Exchange Commission; Richard Pratt, a lobbyist for the thrift industry, who was named to head the Federal Home Loan Bank Board; Mark Fowler, a corporate lawyer representing broadcasting companies, who was named to head the Federal Communications Commission; and Philip Johnson, a corporate lawyer whose clients included the Chicago Board of Trade, who was named to head the Commodity Futures Trading Commission.

Appointments such as these set the stage for the Reagan Administration's campaign to weaken federal regulation of business. It must be said, however, that this campaign was also advanced by officials who did not come directly from the business world, including Environmental Protection Agency administrator Anne Gorsuch, who had previously been a state legislator in Colorado.

During the George H.W. Bush Administration, the presence of business figures in key regulatory positions was less pronounced. Efforts to weaken regulation were led by Vice President Quayle (who at one time was an executive of his family's publishing company). Quayle used an entity called the White House Council on Competitiveness to spearhead the campaign. In 1991 the Council's executive director, Allan Hubbard, was accused of a conflict of interest because of his financial holdings in corporations that stood to benefit from a deregulatory agenda. One of those companies was an Indiana chemical producer of which Hubbard was a half-owner.[10]

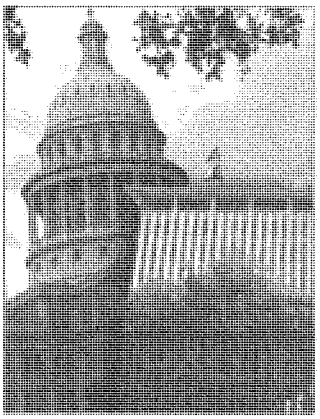
Eisenhower's Secretary of Defense was Charles E. Wilson, the former General Motors president who in his confirmation hearing famously said: "For years I thought what was good for our country was good for General Motors, and vice versa. The difference did not exist."

The Clinton Administration took a less antagonistic approach to regulation, and the people it appointed to key positions, including the heads of OSHA and the EPA, mostly had a public sector background. The person named to the top EPA post, Carol Browner, also had experience working for a public-interest organization.

Yet Clinton's White House and Cabinet were not free from reverse-revolving-door appointments. The first chief of staff, Thomas McLarty, had been an executive with a natutal-gas company in Arkansas. Commerce Secretary Ronald Brown had been a lobbyist with a firm that represented many corporate clients, as did the law firm where U.S. Trade Representative Mickey Kantor worked. Robert Rubin of Goldman Sachs was named economic advisor, and Roger Altman of the investment firm Blackstone Group was chosen to be Deputy Treasury Secretary. In 1995 Rubin took over as Treasury Secretary and continued to promote economic policies seen by many as overly favorable to the bond market. Veterans Affairs Secretary Togo West had worked for Northrop Corporation, and Clinton's last Commerce Secretary, Norman Mineta, had worked for Lockheed Martin.

Bush II: Business Veterans Reach New Levels of Dominance

The practice of reverse-revolving-door appointments has become more frequent during the George W. Bush Administration. The elevation of George W. Bush and Dick Cheney to the two highest posts in the land could itself be seen as a significant case of the reverse revolving door. Bush, after all, spent much of his career as a businessman in the oil & gas industry and then as a part-owner of the Texas Rangers baseball team. He had an M.B.A., to boot. Bush had not risen to great heights in the corporate world before running for governor of Texas, but he had clearly been shaped by that world.



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Cheney, of course, had spent five years as the chief executive of the controversial Halliburton Co. before being chosen as Bush's running mate in 2000. Before that he had held positions with the Nixon and Ford administrations, had represented Wyoming in the House (during which time he was an aggressive advocate of business interests) and had served as the first President Bush's Secretary of Defense. Cheney continued to receive deferred compensation from Halliburton after taking office as Vice President.

It thus came as no surprise that the Bush-Cheney Administration came to be populated by many business veterans. Bush chose as his chief of staff Andrew Card, who had been a vice president of General Motors and a lobbyist for the auto industry (as well as the first President Bush's Transportation Secretary). In addition to selecting Alcoa CEO Paul O'Neill to head Treasury and one-time corporate executive Donald Rumsfeld to run Defense, Bush chose oil & gas executive Donald Evans as Secretary of Commerce and Anthony Principi, an executive with a medical services company, to be Secretary of Veterans Affairs. Secretary of Labor Elaine Chao had been employed by several large banks in addition to her work in the public sector. National Security Advisor (and now Secretary of State) Condoleezza Rice was not a corporate executive but she was on the boards of Chevron (which had named an oil tanker after her) and Charles Schwab.

The same pattern of appointments began to emerge in key regulatory spots. Harvey Pitt, a corporate lawyer with close ties to the securities industry, was named chairman of the Securities and Exchange Commission. J. Howard Beales III, an economist who served as a consultant to R.J. Reynolds Tobacco when its advertising practices were being scrutinized, was appointed the consumer-protection chief of the Federal Trade Commission. Bush chose as his regulation czar (i.e., head of the Office of Information and Regulatory Affairs) John Graham, an academic whose think tank, the Harvard Center for Risk Analysis, has received generous contributions from blue-chip corporations and industry groups because of its critical approach to regulatory policy.

Almost exactly twenty years after the Jeff Gerth article cited above, the New York Times published a similar piece by Katharine Seelye titled "Bush is Choosing Industry Insiders to Fill Several Environmental Positions."[11] This would prove to be the first of several articles and reports issued during the remainder of George W. Bush's first term highlighting business influence over regulatory process brought about, in part, by the reverse revolving door—or what an analysis by the Center for American Progress and OMB Watch labeled "Foxes in the Henhouse."[12]

On Valentine's Day 2003, Rep. George Miller of California issued a report called *A Sweetheart Deal: How the Republicans have Turned the Government Over to Special Interests*. "In case after case," the report stated, "the former lobbyists who work at the Bush Administration continue to court their friends and former employers while jilting the interests of the public."[13] A May 2004 investigation by the *Denver Post* found more than 100 examples of high-level officials in the Bush Administration who were involved in regulating industries they formerly represented as lobbyists, lawyers or company advocates.[14]

Some of the more egregious examples of this phenomenon are the following:

- **DAVID LAURISKI**, chosen as the Labor Department's Assistant Secretary of Mine Safety and Health, previously spent 30 years in the mining industry, during which time he advocated loosening of coal dust standards. Once in office, he issued controversial rules (later blocked by the Senate) that would have reduced coal-dust testing in mines.[15] Lauriski resigned from his position in late 2004 and took a job with a mine-industry consulting company.[16] The *Charleston Gazette* later reported that Lauriski had been negotiating for private-sector jobs as early as six months before leaving office.[17]

- **J. STEVEN GRILES**, named Deputy Secretary of the Interior, was previously a lobbyist for major oil and mining companies and for the National Mining Association. Although Griles signed a recusal agreement in 2001, he reportedly continued to be involved in controversial issues involving former clients such as Yates Petroleum. An Interior Department Inspector General's report cleared Griles of formal ethical violations but suggested that he was operating in an "ethical quagmire."[18] Griles submitted his resignation in December 2004 and later formed a lobbying firm together with former U.S. Representative George Nethercutt and former White House energy advisor Andrew Lundquist.[19]

- **JACQUELINE GLASSMAN**, appointed chief counsel of the National Highway Traffic Safety Administration, previously worked in the general counsel's office of DaimlerChrysler, where among other things she helped defend against charges brought by California officials that the company had recycled defective cars to consumers. At NHTSA she played a key role in the decision to block disclosure of "early warning" information such as detailed model-specific crash data.[20] In 2005 she was named deputy administrator of the agency.[21]

A Closer Look at the Reverse Revolving Door in Five Federal Agencies

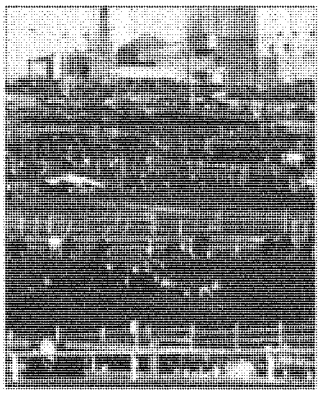
DEPARTMENT OF AGRICULTURE

During the George W. Bush Administration, so many industry people moved into key policymaking positions that an agency once known as the "People's Department" could now better be considered "USDA Inc."[22] Reverse-revolving-door appointments extended as high as Secretary Ann Veneman (since replaced), whose prior career was generally in the public sector but who also once served on the board of biotech company Calgene. Here are other examples of key appointees with industry ties (though some, like Veneman, are no longer in office):

- Secretary Veneman's chief of staff Dale Moore had been executive director for legislative affairs of the National Cattlemen's Beef Association (NCBA), a trade association heavily supported by and aligned with the interests of the big meatpacking companies.
- Veneman's Deputy Chief of Staff, Michael Torrey, had been a vice president at the International Dairy Foods Association.
- Director of Communications Alisa Harrison was formerly executive director of public relations at NCBA.
- Deputy Secretary James Moseley was a partner in Infiniry Pork LLC, a factory farm in Indiana.
- Under Secretary J.B. Penn had been an executive of Sparks Companies, an agribusiness consulting firm.
- Under Secretary Joseph Jen had been director of research at Campbell Soup Company's Campbell Institute of Research and Technology.
- Under Secretaty for Natural Resources and the Environment Mark Rey, whose post involved oversight of the Forest Service, was previously a vice president of the American Forest and Paper Association.
- Deputy Under Secretary Floyd D. Gaibler had been executive director of the National Cheese Institute and the American Butter Institute, which are funded by the dairy industry.
- Deputy Under Secretary Kate Coler had been director of government relations for the Food Marketing Institute.
- Deputy Under Secretary Charles Lambert had spent 15 years working for NCBA.
- Assistant Secretary for Congressional Relations Mary Waters had been a senior director and legislative counsel for ConAgra Foods.

Veneman's successor, Mike Johanns, retained Dale Moore as his chief of staff and made Beth Johnson, a former staffer at NCBA, one of Moore's deputies. The post of Deputy Secretary was given to Charles F. Conner, former president of the Corn Refiners Association.[23]

The widespread presence of meat industry veterans has undoubtedly played in role in the business-friendly/anti-consumer policies followed by the Department on issues such as "mad cow disease" testing, sanitation standards in slaughterhouses and regulation of factory farms. The Clinton Administration's record on food safety was hardly flawless, but the adherence to industry positions on these matters became much more egregious under Bush.



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DEPARTMENT OF ENERGY

In the first George W. Bush Administration, the Energy Department was a leading proponent of the industry-friendly energy policy that had been formulated in 2001 by Vice President Cheney in secret meetings with business representatives. Although the Department was led by a former U.S. Senator, Spencer Abraham, it had its share of industry veterans on staff. These included:

- **FRANCIS S. BLAKE**, the Bush Administration's initial choice for Deputy Secretary of Energy, had been serving as senior vice president of corporate business development at General Electric. He played a key role in formulating the administration's controversial Clear Skies pollution initiative.[24] He left the federal government a year later and returned to the private sector as an executive at Home Depot.[25]

- **DAN BROUILLETTE**, named as Assistant Secretary for Congressional & Intergovernmental Affairs, had been employed as a lobbyist for mining and oil companies and as a Congressional aide.[26] In 2004 he left the Department and later resumed his work as a lobbyist by joining the Washington government affairs office of Ford Motor Co.[27]

- **VICKY BAILEY**, chosen as Assistant Secretary of Policy and International Affairs, was previously president of PSI Energy Inc., the Indiana electric-utility operating unit of Cinergy Corp. Once in office, Bailey helped to formulate the administration's energy plan, which proposed weakening emissions standards on companies such as her former employer.[28] She later became a lobbyist for the firm of Johnston & Associates, whose clients include the Edison Electric Institute.[29]

- **CARL MICHAEL SMITH**, selected as Assistant Secretary for Fossil Energy, had built a career as an independent oil and gas operator, as Oklahoma's secretary of energy and then as a lawyer for energy companies. He had also been a director of the Oklahoma Independent Petroleum Association from 1981 to 1995. In 2004 he left the Department and resumed work as a corporate lawyer, joining an Oklahoma City firm.[30]

ENVIRONMENTAL PROTECTION AGENCY

In an apparent attempt to dispel charges that it would back away from environmental protection, the Bush Administration originally chose Christie Whitman, a moderate Republican who had been governor of New Jersey, to head the EPA. Some of the people appointed to work with her in key positions were, however, from a distinctly pro-business background. Among these were the following:

- **LINDA FISHER**, chosen to be Deputy Administrator (the agency's second highest position), previously spent five years as an executive at pesticide producer Monsanto Co. and had also practiced law at the firm of Latham & Watkins, known for fighting tougher regulatory standards on behalf of powerful industry clients.[31] Fisher left the EPA in 2003 and later took a job with DuPont.[32]

- **JEFFREY HOLMSTEAD**, Assistant Administrator for Air and Radiation, had not been a corporate executive or lobbyist, but he also worked as an attorney at Latham & Watkins. In addition to companies such as Cinergy and American Electric Power, his clients included an industry front group, the Alliance for Constructive Air Policy, which has worked to weaken air pollution rules.[33] In 2004 the *Washington Post* noted that parts of new rules proposed by the Bush Administration on power-plant mercury pollution were lifted verbatim from memos prepared by Latham & Watkins.[34]

- **MARIANNE HORINKO**, chosen as Assistant Administrator for the Office of Solid Waste and Emergency Response, was previously president of Clay Associates, a consulting firm where her clients included the Chemical Manufacturers Association and the Koch Petroleum Group. Earlier in her career, which also included a stint at the EPA during the George H.W. Bush Administration, she was an attorney at the corporate law firm Morgan, Lewis & Bockius, where she counseled companies on matters involving pesticides and hazardous waste.[35] In 2003, after Christie Whitman announced her resignation, Horinko served briefly as the EPA's Acting Administrator. Horinko left the EPA in 2004, reportedly to spend more time with her young children.[36]

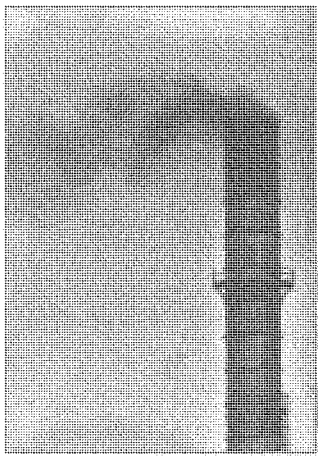
Early in Bush's second term, he named Stephen Johnson, a respected scientist and career agency employee, to head the EPA. This move, which elicited praise from environmentalists and surprise on the part of many observers, was one of the few exceptions that prove the rule: it is very unusual to see someone rise to a key position in a regulatory agency without having come through the reverse revolving door.

OCCUPATIONAL SAFETY & HEALTH ADMINISTRATION

OSHA, like EPA, is one of the agencies frequently cited by business critics of regulation. In 2001 the Bush Administration announced that its choice to head the safety agency was John Henshaw, who had been safety director at Astaris LLC, a joint venture between chemical producers Solutia Inc. (a spinoff of Monsanto Co.) and FMC Corporation. Before that he worked for many years at Solutia and Monsanto.

In November 2001 Henshaw announced that the position of Deputy OSHA administrator was being given to Gary Visscher, former vice president of employee relations for the American Iron and Steel Institute, the trade association for the metals industry.

According to a detailed analysis published by the *Washington Post* in August 2004, Henshaw's tenure was marked by a reduction in the number of staffers devoted to developing new safety standards and by a narrower, more business-friendly approach in those rules that were proposed.[37] Henshaw resigned in December 2004 and later became an advisor to C2 Facility Solutions, which calls itself a "critical asset management software firm."[38] Visscher left around the same time to join the U.S. Chemical Safety and Hazard Investigation Board.[39]



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DEPARTMENT OF DEFENSE

The foregoing examples certainly suggest that the reverse revolving door affects regulatoty policy, but the presence of industry veterans in public office can also influence contracting decisions, with major implications for taxpayers. While Defense Department procurement issues are discussed more fully in the next chapter, several reverse-revolving-door examples are worth noting here:

- **EDWARD C. "PETE" ALDRIDGE JR.** was confirmed as Under Secretary of Defense for Acquisition, Technology, and Logistics in May 2001. In addition to many years at the Pentagon, his prior positions included the presidency of McDonnell Douglas Electronic Systems Co. (now part of Boeing). In 2003 Aldridge approved the contract for Lockheed Martin's controversial F-22 fighter jet. A short time later he retired from the government and was soon named to the board of directors of none other than Lockheed Martin.[40] (For more on Aldridge, see Chapter 2.)
- **MICHAEL W. WYNNE** was made Acting Under Secretary for Acquisition, Technology, and Logistics after Aldridge left the post. Wynne, who had been the Principal Under Secretary under Aldridge, previously served as senior vice president of defense contractor General Dynamics. In August 2005 President Bush nominated Wynne to be Secretary of the Air Force.

Other recent secretaries of the three military departments have also been examples of the reverse revolving door. The man who preceded Wynne as Air Force Secretary, James Roche, was previously an executive with Northrop Grumman and other military contractors. Army Secretary Francis Harvey was previously an executive with Westinghouse Corp. and other companies. Gordon England, who served as Navy Secretary until he was made Acting Deputy Secretary of Defense earlier this year, was previously an executive at General Dynamics. In August 2005 President Bush nominated Donald C. Winter, president of Northrop Grumman Mission Systems, to succeed England.

Regulation

The movement of lobbyists and business executives into positions with Cabinet departments and regulatory agencies is largely free from federal regulation. Employment restrictions focus mostly on the forms of the revolving door that involve movement from the public to the private sector.

The section of the Code of Federal Regulations dealing with Standards of Ethical Conduct for Employees of the Executive Branch (Title 5, Chapter XVI, Part 2635) does, however, have a section on Impartiality in Performing Official Duties that touches partly on the reverse revolving door. Section 2635.501 says that a federal employee must avoid "an appearance of a loss of impartiality in the performance of his official duties." One of the situations in which such an apparent loss of impartiality is said to be possible is the handling of a matter involving a person for whom the federal employee served, within the last year, as "officer, director, trustee, general partner, agent, attorney, consultant, contractor or employee."

There are no provisions in federal law or regulations that would prevent someone from accepting employment with the government because of the possibility that he or she would be called on to handle a matter with a former employer. Instead, the question is whether the federal employee, once in office, should be allowed to handle specific matters relating to the former employer or be disqualified from doing so.

When such situations arise, it is up to the federal employee to determine if there is a potential problem. Having done so, the employee is supposed to consult the ethics official of the agency (or other designated official), who is to decide whether the employee should be disqualified from handling the matter. In doing so, the ethics official is allowed to take into consideration issues such as "the difficulty of reassigning the matter to another employee" (§2635.502). A stricter rule applies when a federal employee received an "extraordinary payment" of more than $10,000 from a former employer prior to entering government service. In that case, the employee is automatically disqualified from handling any matter involving the former employer for a period of two years, though the rule can be waived under certain conditions (§2635.503).

Although industry veterans are not greatly impeded in their eligibility for federal posts, they, like other appointees, are subject to disclosure requirements. Persons appointed to senior positions in the executive branch are required to disclose information about their finances and affiliations on Standard Form 278, which is available to the public upon written request. It is filed after the person takes office, annually while in office and one last time after leaving office. Similar information is required of certain lower-level employees, who are required to file OGE Form 450. However, such filings are not available to the public.

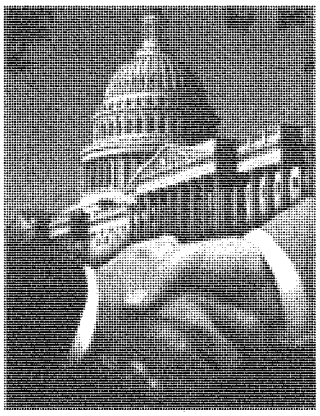
Where the disclosure indicates a financial holding that could result in a conflict of interest, the most common way of handling the matrer is for the employee to enter into a written disqualification agreement on the matter, othetwise known as a recusal. This addresses the prohibition in 18 U.S.C. § 208 barring a federal employee from handling a matter in which the employee or certain relatives have a financial interest. The Office of Government Ethics exercises some degree of oversight of recusal agreements.

Conclusion

The preceding pages constitute a brief overview of the evolution of the reverse revolving door—a phenomenon that seems to have reached unprecedented proportions in recent years. In addition to looking more systemically at the extent to which key appointed officials previously worked as corporate executives and lobbyists, a more thorough analysis would also have to look at the large number of individuals who entered government office after serving as lawyers, consultants and scientists. It is likely that many of those individuals were working for corporate clients or were performing corporate-financed research, suggesting that they would have a pro-business bias. In other words, the magnitude of business influence on policy formulation and industry regulation through reverse-revolving-door appointments is probably much larger than this chapter has described.

Determining the extent to which the reverse revolving door has actually had a distorting effect on public policy is an arduous task. Once a person has assumed public office, it is difficult to prove that a particular decision that benefits business was made out of loyalty to a previous employer or to ingratiate oneself with a potential future employer. What if the decision was based on the official's general view of the world, which happened to have been shaped by time spent working in the corporate sector? If so, is it an ethics issue or simply an ideological one?

While it may not be possible to answer these questions with any certainty, it is clear that a growing number of officials with an industry background have been participating in the formulation of policies that unduly benefit the corporate sector. There is no guarantee that appointees of a different background would have done things differently, but putting some limits on the reverse revolving door would help thwart what seems to be the corporate takeover of regulatory policy and restore greater integrity to the contracting process. After examining two other forms of revolving door industry influence, this paper will offer specific recommendations on how to end these conflicts of interest.



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Chapter 2:

The Government-to-Industry Revolving Door

How the movement of public officials into lucrative private sector roles can compromise government procurement, regulatory policy and the public interest.

by SCOTT AMEY, Project On Government Oversight

LARGE CORPORATIONS FREQUENTLY FIND THEMSELVES dealing with the federal government, especially when it comes to procurement contracts and regulatory compliance. In doing so, they are always looking for ways to influence federal decision making—hence their huge spending on lobbyists and campaign contributions. Yet money and influence are not the only ways companies seek to tilt the playing field in their favor. Business also knows the power of information.

One way to get information is to hire the people who have it. Thus we come to the next form of the revolving door: the movement of public officials into lucrative private sector positions in which they put their inside knowledge of government to work for their new employer. It has become common practice for members of the executive branch to leave their government posts and immediately go to work for companies that have ongoing business with federal agencies.

Defenders of the revolving door hasten to point out that there is nothing inherently improper or illegal when the private sector hires former government officials. Indeed, they argue that the country is better off because those former officials help companies produce goods and services more effectively.

The question, however, is whether the revolving door has a detrimental impact on the effectiveness of federal functions such as contract administration and regulation of business. The concern is that the inside knowledge public officials bring with them when they join the private sector will be used in a way that is contrary to the public interest. Even more serious is the possibility that officials still in office will distort their decision-making to the advantage of prospective employers in the private sector. These are the issues explored in this chapter.

Policy Background

> "Each [executive branch] employee has a responsibility to the United States Government and its citizens to place loyalty to the Constitution, laws and ethical principles above private gain. To ensure that every citizen can have complete confidence in the integrity of the Federal Government, each employee shall respect and adhere to the principles of ethical conduct set forth in this section, as well as the implementing standards contained in this part and in supplemental agency regulations."[41]

This statement of the "basic obligation of public service" in federal law may be straightforward enough for individuals who spend their entire career in the public sector, but it becomes more complicated for those who go through the revolving door to the world of business. The recognition that the federal government needed to address this issue goes back at least to 1965, when President Johnson issued Executive Order (E.O.) 11222, which instructed agencies to establish "standards of ethical conduct for government officers and employees." The purpose of this and other conflict-of-interest and ethics laws was to protect the integrity of the government's system of buying goods and services from contractors. President Johnson stated that "every citizen is entitled to have complete confidence in the integrity of his [or her] government."[42]

It has become common practice for members of the executive branch to leave their government posts and immediately go to work for companies that have ongoing business with federal agencies.

Some changes in revolving door policies arrive with each new administration. One of the most dramatic shifts came in 1993, when President Clinton strengthened conflict-of-interest laws the very same day he took office.[43] By signing E.O. 12834, also known as the "Senior Appointee Pledge," Clinton placed numerous post-employment restrictions on senior executive agency appointees. Specifically, the order extended the one-year ban to five years, prohibiting former employees from lobbying their former agencies after they left office. Additionally, former employees of the Executive Office of the President (EOP) were prohibited from lobbying any other executive agency for which that employee had "personal and substantial responsibility as a senior appointee in the EOP."

What seemed like a noble idea upon taking office was apparently viewed differently by Clinton when his Administration was coming to an end. On December 28, 2000 Clinton revoked the "Senior Appointee Pledge."[44] In protest, Senator Charles Grassley (R-IA) stated: "I hope that President Clinton acts in the remaining days of his presidency to reverse the mistake made by revoking the order against the revolving door....Using the power of the presidency to reverse a policy he put in place to help ensure integrity in government service undermines the public's confidence in political leadership."[45]

The George W. Bush Administration did not pay much attention to the revolving door until the Darleen Druyun-Boeing scandal (see further discussion below) brought the issue to the fore. In January 2004 the White House issued a Memorandum for the Heads of Executive Departments and Agencies, establishing "a new Administration policy concerning waivers for senior Administration appointees who intend to negotiate for outside employment."[46]

The memorandum noted that when high-level Presidential appointees begin to negotiate for a new job outside government, "serious Administration policy interests arise." It stated:

> *To ensure these policy interests are completely considered, effective immediately, agency personnel are prohibited from granting waivers under 18 U.S.C. 208(b)(1) to Senate-confirmed Presidential appointees for the purpose of negotiating for outside employment unless agency personnel have first consulted with the Office of the Counsel to the President* [emphasis in original].

The purpose of this consultation seemed to be mainly for the benefit of the appointee. The memo went on to say:

> Our most senior Presidential appointees deserve the protection afforded by consultation with the White House. White House officials have an administration-wide perspective and often know relevant facts unavailable to agency personnel; thus, they can be of tangible assistance when consulted.

As for the question of how White House lawyers would view the request for a waiver, the memo said:

> The decision to grant a waiver also involves a balancing test. The fulcrum of that balance is a determination of whether or not the appointee's financial interest is "so substantial as to affect the integrity of the appointee's services to the Government" See 5 C.F.R. § 2640.301(a). Because a senior Presidential appointee may be called upon to advise the White House, it is appropriate that White House personnel have the opportunity to assess the substantiality of the senior appointee's financial interest and how it affects the integrity of the appointee's service to the President.

The Bush Administration's policy, however, applies to political appointees only. Many civil service employees are not affected by the administration's new policy and will remain off the radar if they receive an agency conflict-of-interest waiver for post-government employment.[47] Days after the Administration's policy shift, Defense Secretary Donald Rumsfeld ordered the Department of Defense (DoD) to investigate whether senior government officials are complying with agency regulations when they seek contractor jobs.

On October 25, 2004, Deputy Secretary of Defense Paul Wolfowitz issued a memorandum which described three minor changes to DoD conflict-of-interest and ethics regulations, including:

- Annual Certification – requiring certain DoD employees to certify annually that they are aware of the conflict-of-interest and ethics restrictions and that they have not violated those restrictions.
- Annual Ethics Briefing – requiring DoD offices to include training on relevant federal and DoD disqualification and employment restrictions in annual ethics briefings.
- Guidance for Departing Personnel – requiring DoD offices to provide guidance on relevant post-government employment restrictions as part of out-processing procedures for personnel who leave the government.[48]

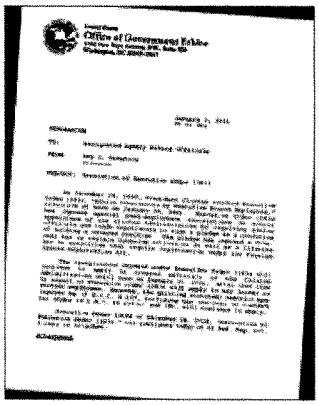
Recently, the Defense Criminal Investigative Service has stated that it will investigate former senior military and civilian defense managers who now work for defense contractors. Moreover, on February 18, 2005, Paul McNulty, U.S. District Attorney for the Eastern District of Virginia, announced the creation of the Procurement Fraud Working Group to investigate defense contractors for conflict-of-interest violations and procurement fraud.[49] McNulty testified before a Senate Armed Services subcommittee that "more procurement means more opportunity for fraud."[50]

Congress has also shown new interest in the revolving door. Senators John McCain (R-AZ), Robert C. Byrd (D-WV) and Russell Feingold (D-WI) have been investigating the issue. Senator McCain played an integral role in obtaining and exposing e-mail that implicated Darleen Druyun. Senators Byrd and Feingold took a step further when they drafted an amendment to the National Defense Authorization Act for Fiscal Year 2005 that would have closed a few of the loopholes in the current revolving door system.[51] Unfortunately, the Byrd-Feingold amendment was not included in the final bill.

However, members of the House Armed Service Committee requested a Government Accountability Office review of the revolving door. The April 2005 report found that:

- DoD has delegated responsibility for training and counseling employees on conflict-of-interest and procurement integrity rules to more than 2,000 ethics counselors in DOD's military services and agencies;
- Those counselors were unable to say if people subject to procurement integrity rules were trained;
- DoD's knowledge of defense contractor efforts to promote ethical standards is limited; and
- A review of one of DoD's largest contractors showed that the company lacked controls to ensure an effective ethics program and the company relied excessively on employees to self-monitor their compliance with post-government employment restrictions.[52]

GAO's review illustrates the problems with the integrity of the procurement process and the impact that the revolving door has on the way government spends hundreds of billions of taxpayer dollars.


Office of Government Ethics

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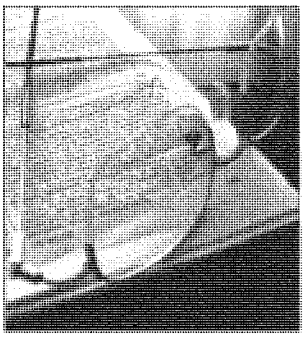
Revolving Door Laws, Regulations and Loopholes

Federal laws concerning conflicts of interest have been implemented piecemeal over the past fifty years, and they have become a tangled mess of statutes and regulations as well as exemptions and waivers (See Appendix A). For instance, some of the statutes and regulations governing executive branch officials are based on the employee's pre- and post-government jobs and salaries. Some agencies place additional limitations on their own employees. In some cases, Presidential orders and agency directives may also govern post-government employment as well.[53] In general, government employees must struggle with a decentralized, multi-layered system of ethics laws and regulations so convoluted that even ethics officers and specially-trained lawyers find it difficult to fathom. Former government employees who try to do the right thing may appear to be as dishonest as those who knowingly violate the law.



"The net result of the accretion of these five statutes subjects DoD officials to a complex, multi-tiered system of incomprehensible and seemingly inconsistent statutory restrictions that are counter-productive to an effective and meaningful ethics training and counseling program."

Major Kathryn Stone, a former Army ethics attorney, reached the following conclusions about the DoD's ethics system back in 1993:

> In recent years, defense contractors and DoD officials have criticized the multiplicity of DoD ethics laws as a labyrinth of confusing and overlapping requirements. Former DoD officials are subject to upwards of five different post-government employment conflict-of-interest laws, each of which applies to different subclasses of persons, restricts different activities, and imposes different administrative procedures.
>
> No reason exists to have different standards for executive branch officers and employees as a whole, DoD procurement officials (who differ depending on the particular statute at issue), retired military officers, and retired regular military officers. *The net result of the accretion of these five statutes subjects DoD officials to a complex, multi-tiered system of incomprehensible and seemingly inconsistent statutory restrictions that are counter-productive to an effective and meaningful ethics training and counseling program.*"[54] (Emphasis added).

Conflict-of-interest and ethics laws and regulations are based on a government employee's involvement with specific transactions (e.g., contracts),[55] representation before an employee's former office,[56] and financial conflicts of interest.[57] Yet there are still several significant loopholes in the system.

The first loophole involves high-ranking government officials who are employed in policy positions in which they develop rules and determine requirements. These policymakers are not restricted from accepting employment with contractors which may have benefited from the policies that these employees helped to formulate. This is especially problematic because senior procurement policymakers, whose decisions can affect many different contracts, are in a better position to influence a contractor's bottom line than an official whose work is limited to a specific contract.

The second loophole is the provision that allows a procurement official to accept compensation from a "division or affiliate" of the contractor as long as that entity "does not produce the same or similar products or services" as the barred contracting division.[58] In other words, a government official can, for example, work for a contractor's missile division if he or she handled contracts with its aircraft division—and therefore avoid the one-year ban on accepting compensation from a contractor during post-government employment pursuant to 41 U.S.C. § 423. The current system does little to stop a contractor from rewarding a government employee for favorable treatment with post-government employment in a different division of the same company. The company in such a circumstance would be doubly rewarded, possibly receiving favorable treatment or insider advice because of the ex-official's ties to his or her former peers. It also creates the opportunity for the former government employee to do work behind the scenes for the other divisions of the company.

A third loophole involves the lack of executive branch rules requiring the reporting and public disclosure of disqualifications or recusal. Executive branch regulations obligate an employee to disqualify him or herself from conflicted matters.[59] The prohibition on prospective employment (18 U.S.C. § 208), however, does not require an employee to file a disclosure or recusal statement when a conflict arises.[60] It is only after multiple layers of regulations that certain agencies mandate that notice of a conflict must be provided to a government employee's supervisor.[61]

Revolving Door Case Studies

DARLEEN DRUYUN AND BOEING. Darleen Druyun has become the poster child for the conflicts of interest created by the revolving door. Druyun supervised, directed and oversaw the management of the Air Force's weapons acquisition program before she moved through the revolving door to become Boeing's Deputy General Manager for Missile Defense Systems. Specifically, Druyun was in charge of overseeing some of the government's largest purchases, including the C-17 cargo plane and the proposal to lease refueling aircraft (also known as tankers)—a proposal that was more costly than actually purchasing the rankers.

E-mail exchanges between Druyun's daughter and Boeing officials revealed how all parties violated the conflict-of-interest and ethics system. On January 6, 2003, when Druyun left the government to work for Boeing, the Project On Government Oversight issued a press release, stating that "Ms. Druyun is now officially an employee of the company whose interests she so ardently championed while she was supposedly representing the interests of the taxpayers."[62] Subsequent disclosures showed that she was negotiating the terms of her Boeing employment while she was handling the Boeing tanker lease, estimated to be worth over $20 billion.[63] On November 24, 2003, Boeing fired Druyun and Chief Financial Officer Michael Sears in connection with potentially illegal discussions of matters involving Boeing that had taken place during the time Druyun was a govetnment employee.

On April 20, 2004, Druyun pleaded guilty to charges of conspiracy to defraud the United States. In her plea, Druyun acknowledged that she had favored Boeing in certain negotiations as a result of her employment negotiations and that other favors had been provided by Boeing to her. Druyun also admitted that Boeing's hiring, at her request, of her future son-in-law and her daughter in 2000, along with her own desire to be employed by Boeing, influenced her decisions–as a government employee–in several matters affecting Boeing. These included: the Boeing tanker deal (which she stated was a "'parting gift to Boeing"), Boeing's $100 million payment to restructure the NATO AWACS program, the selection of Boeing to upgrade the avionics of C-130 aircraft, and the agreement "to a payment of approximately 412 million dollars to Boeing" in connection with the C-17.[64] In October 2004, Druyun was sentenced to nine months in prison, a $5,000 fine, three years of supervised release, and 150 hours of community service.[65]

The Associated Press reported on February 2005, that the Pentagon was investigating eight Air Force contracts handled by Druyun.[66] Those contracts ranged in value from $42 million to $1.5 billion each, with a total value of about $3 billion.[67] That same month, the GAO released two Comptroller General opinions in which it found that Druyun had tainted the process in which Boeing was awarded contracts for the production of the Small Diameter Bomb and for various activities related to the avionics modernization upgrade program for C-130 aircraft.[68] The GAO recommended that both contracts, or the tainted portions therein, be put out for new competition.[69]

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PETE ALDRIDGE AND LOCKHEED MARTIN. Edward C. "Pete" Aldridge formerly served as Undersecretary of Defense for Acquisition, Technology, and Logistics. He was also head of a DoD review board which made the decision to pursue procurement of the Lockheed Martin F/A-22 fighter jet. In January 2003, Aldridge approved the contract for the F/A-22 program.[70] Two months later, he secured a position on the board of directors of Lockheed Martin, the federal government's top contractor and maker of the F/A-22. On March 15, 2004, the General Accounting Office (GAO) released a report documenting that the cost for the F/A-22 program continues to skyrocket, though DoD has failed to justify the need for this aircraft, given current and projected threats.[71]

Adding to the appearance of conflict of interest on Aldridge's resume, President Bush signed an Executive Order on January 27, 2004 establishing the Commission on Implementation of United States Space Exploration Policy and then announced that Aldridge would chair the nine-member Commission. Senator John McCain (R-AZ) spoke out against Aldridge's appointment, asserting that the former top weapons buyer and current Lockheed board member had too many conflicts of interest to serve as a Commission member. Because Lockheed is one of NASA's largest contractors, Aldridge was placed in a position to influence public policies that could benefit the company he served.

DAVID HEEBNER AND GENERAL DYNAMICS. Army Lt. General David K. Heebner was a top assistant to the Army Chief of Staff, Gen. Eric Shinseki, and played a significant role in drumming up support and funding for Shinseki's plan to transform the Army. One of the key elements in Shinseki's transformation "vision" was a plan to move the Army away from tracked armored vehicles toward wheeled light armored vehicles. In October 1999, only three months before Heebner retired, Shinseki's "Army Vision" statement called for an interim armored brigade: "We are prepared to move to an all wheel formation as soon as technology permits." General Dynamics, which manufactures the wheeled Stryker, was the beneficiary of this new vision, essentially putting United Defense, which produced tracked vehicles, out of the running.

General Dynamics formally announced the hiring of Heebner, as Senior Vice President of Planning and Development, on November 20, 1999. That was just one month after Shinseki announced his "vision" and more than a month prior to Heebner's official retirement date of December 31, 1999. The $4 billion Stryker contract was awarded to General Dynamics in November 2000. Heebner was present in Alabama for the April 2002 rollout of the first Stryker and was recognized by Shinseki for his work in the Army on the Stryker project.

BOBBY FLOYD AND LOCKHEED MARTIN. In 1997, Air Force General Bobby O. Floyd led the government's investigation into a fatal HC-130P Hercules plane crash. According to press reports, in October 1998, Floyd was contacted by the plane's manufacturer, Lockheed Martin.[72] He filed a let-

ter of recusal, which disqualified him from taking any official actions involving Lockheed, in November 1998. Despite that recusal, Floyd continued to investigate the crash until March 1999,[73] concluding that his new employer was free from blame.[74] Despite that appearance of impropriety, the Air Force concluded that Floyd did not violate conflict-of-interest or ethics laws.[75] Floyd then joined Lockheed Martin Aircraft & Logistics Centers in May 1999 as Deputy General Manager of the Greenville Aircraft Center. He was promoted to Vice President and General Manager in May 2000, then to President and General Manager of Logistics for the Centers in November 2001.

RICHARD PERLE AND BOEING. Perle served as Assistant Secretary of Defense in the Reagan Administration and was a member of the Defense Policy Board from 1987 to 2004, serving as its Chair from 2001 to 2003. He resigned as Chairman in March 2003, after a conflict-of-interest controversy involving a consulting job he took with the bankrupt telecommunications firm Global Crossing Ltd. During the summer of 2003, Perle expressed his support for the Boeing tanker deal—a deal that would direct billions of dollars to Boeing. His support for the tankers came just 16 months after Boeing committed to invest $20 million with Perle's venture capital firm, Trireme Partners.[76]

A *Washington Post* article described Perle as the "ultimate insider" and discussed his use of the revolving door and the access that it provides.[77] William Happer, a former Energy Department official stated that the revolving door is "an old American tradition, and Richard Perle I think is doing it in an honest way. He's one of hundreds and hundreds who do it."[78] Perle denied that he was hired by any company because of his connection to policymakers. Subsequently, Perle seemed to contradict himself when recounting his role in assisting a company to obtain a foreign contract: "Was [his contact with foreign ambassadors] a result of my influence? Yeah, it was. It was a result of the fact that they, the people I went to, knew me so they took my phone call."[79]

Examples of the Revolving Door in Various Federal Agencies

Former federal officials can be found in key executive and board positions at many of the country's largest corporations and trade associations. Here are some examples involving veterans of several Cabinet departments—Agriculture, Defense and Energy—as well as the EPA.[80]

- **FRANCIS S. BLAKE**, Executive Vice President of Business Development and Corporate Operations for Home Depot and a director of The Southern Company (a "super-regional" energy company), formerly served as Deputy Secretary of Energy.[81]
- **LINDA FISHER**, Vice President and Chief Sustainability Officer for chemical giant DuPont, formerly served in various positions at the EPA, including Deputy Administrator, Assistant Administrator and Chief of Staff.[82]
- **L. VAL GIDDINGS**, Vice President for Food and Agriculture of the Biotechnology Industry Organization, formerly served as the Senior Staff Geneticist, International Team Leader, and Branch Chief for Science and Policy Coordination with the biotechnology products regulatory division of the Animal and Plant Health Inspection Service of the Department of Agriculture.[83]

- **JAMIE S. GORELICK**, a director of defense contractor United Technologies, was formerly Deputy Attorney General and General Counsel of the Department of Defense (as well as a member of the 9-11 Commission and the Defense Science Board).[84]

- **PAUL LONGSWORTH**, who recently joined Fluor Corp. as executive director of environmental/nuclear business development, was formerly deputy administrator at the Energy Department's National Nuclear Security Administration.[85]

- **CHARLES J. (JOE) O'MARA**, President of O'Mara & Associates, an international trade consulting firm, formerly served as Counsel for International Affairs to the Secretary of Agriculture and as Special Trade Negotiator for the agency.[86]

- **DR. JAMES G. ROCHE**, a director of Orbital Sciences Corp., a leading space and rocket company, and a consultant for his former employer, Northrop Grumman, was formerly Secretary of the Air Force.[87]

- **JAMES SCHLESINGER**, a director of British Nuclear Fuel, formerly served as Secretary of Defense, Secretary of Energy, and Director of the Central Intelligence Agency.[88]

- **CHRISTINE TODD WHITMAN**, a director of United Technologies, which aside from being a military contractor is deeply involved in global warming because of its ownership of the air-conditioning company Carrier Corp., formerly served as Administrator of the Environmental Protection Agency.[89]

- **JOHN WILCYNSKI**, Vice President of Corporate Development at British Nuclear Fuels, formerly served as the Department of Energy's Director of the Office of Field Management.[90]

Conclusion

Each of the five foregoing examples illustrates how decisions involving billions of taxpayer dollars have been shaped by those with revolving-door conflicts of interest. In some cases, such as the Druyun affair, it became clear that corruption was involved and laws were broken. In other cases, the culpabiliry is less apparent.

Whether the prospect of lucrative private sector employment actually causes an official to violate his or her public trust or whether there is simply the appearance of a conflict, the revolving door does tend to create problems for integriry in government. The existing laws and regulations thar address this problem are complex but ultimately inadequate. In the conclusion of this paper we offer some recommendations for restoring a greater degree of public confidence in the operations of the public sector.

Chapter 3:

The Government-to-Lobbyist Revolving Door

How former lawmakers and politicians use their inside connections to advance the policy and regulatory interests of their industry clients.

by CRAIG HOLMAN, Public Citizen

THE REVOLVING DOOR FROM THE WHITE HOUSE AND CAPITOL HILL to well-paid lobbying firms (many of which are conveniently housed in the same neighborhood along K Street) has been spinning out of control in recent years. Senior-level staff in the executive and Congressional branches of government and even Members of Congress have shown an increasing inclination to leave public service and then continue to try to shape public policy—as lobbyists acting on behalf of special interests in the private sector.[91] Some of them pass through the revolving door as the result of an election defeat or a change in Administration, but most are enticed by the prospect of collecting a fat paycheck while continuing to play insider politics on Capitol Hill.

Rep. James Greenwood (R-Pa.) made no bones about the reason for his career switch from chair of the House Energy and Commerce Committee's subcommittee on oversight and investigations to head the Biotechnology Industry Organization (BIO), a lobbying association. BIO agreed to pay Greenwood $650,000 a year (plus as much as $200,000 in bonuses) to serve as its chief lobbyist. "This is bittersweet," Greenwood said of his unexpected retirement from Congress. "But at this point in my life, it's more sweet by far."[92]

What was sweet for Greenwood left a sour tasre for many others. BIO had first contacted him about a job in early 2004, only a month or so after he announced his intention to investigate the pharmaceutical industry. The fact that Greenwood, a social worker before he entered politics 24 years earlier, had no background in biotechnology or related fields seemed to make little difference to the trade association.[93] He was sought for his political connections. The public was finally made aware of Greenwood's new career choice in July 2004, when he abruptly canceled an oversight hearing concerning the drug Zoloft,

produced by Pfizer, one of whose executives was serving on the BIO board at the time. "I understand how this could raise an eyebrow," Greenwood said with regard to the Pfizer connection, but he denied there was any conflict of interest: "B following A does not mean that A caused B."[94]

Once comfortably ensconced in the K Street community, Greenwood began expanding the staff of BIO by hiring other refugees from the public sector. As one newspaper account put it: "In the last several months, BIO has raided the offices of Congress, the U.S. Department of Health and Human Services and the Food and Drug Administration to build an executive staff with inside-the-beltway savvy and connections."[95]

Current Government-to-Lobbyist Revolving Door Restrictions

Former government officials who have become lobbyists are subject to limited statutory requirements and ethics regulations. Two different sets of ethics codes apply to the revolving door movement of government officials into private-sector lobbying. The two general categories of ethics restrictions that govern the government-to-lobbyist revolving door include:

- The conflict-of-interest restrictions on the ability of government officials to negotiate future employment while serving in public office.
- The "cooling off period" on lobbying activities by former officials for a specified period of time after leaving public service.

Both principles comprise the overall revolving-door policy, and both are designed to prevent a conflict between the duty of public servants to provide for the common good and the obligation of private lobbyists to promote a special interest. These ethics restrictions are laid out in a web of statutory limits, which apply to all branches of government, and ethics regulations, which are different for the executive branch, the Senate, the House and different salary levels of their respective staff. As such, there is no single revolving-door code that applies to all government officials and employees.

Negotiation of Future Employment

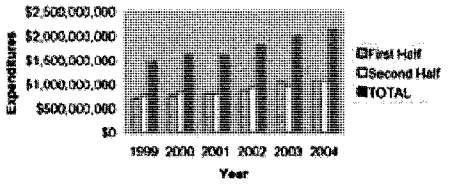
Federal criminal conflict of interest statutes (18 U.S.C. §201) prohibit any public official from soliciting or accepting a "thing of value" in exchange for a legislative favor or other official action–i.e., a bribe. Within this legal framework, the Senate and House, and the Office of Government Ethics for the executive branch, have promulgated ethics regulations to guide their respective officers and employees away from crossing this line.

Ethics rules go a step beyond actual quid pro quo corruption, which is very difficult to prove short of an FBI sting operation, and rely instead upon the standard of the appearance of corruption. Ethics rules prescribe that public officials and employees generally are not to act in such a way as to create the appearance of impropriety in official actions. Each institution fashions its own ethics guidelines to prevent the appearance of conflict of interest that would impugn the integrity of the office.

For officers and employees in the executive branch, federal law (18 U.S.C. §208) generally prohibits government staff from seeking future employment and working on official acts simultaneously, if the official actions may be of significant benefit to the potential employer. Waivers may be granted to this prohibition for a number of reasons, such as when the employee's self-interest is "not so substantial" as to affect the integrity of services provided by the employee, or if the need for the employee's services outweighs the potential for a conflict of interest. The issuance of waivers had routinely been the prerogative of the head of the agency or division for which the employee works. Following several conflict-of-interest controversies, President Bush issued a Memorandum on January 6, 2004, requiring that all such waivers be cleared by the White House General Counsel.

Ethics rules on negotiating future employment are not as strict for members and staff of the Senate, and even less so for the House. Both the Senate and House codes of ethics prohibit members and staff from receiving compensation "by virtue of influence improperly exerted" from their official positions. To this end, the Senate and House rules advise members and staff to recuse themselves from official actions of interest to a prospective employer while job negotiations are underway. But the ethics codes differ from that point on.

Overall Expenditures on Federal Lobbying



Year	First Half	Second Half	TOTAL
1999	697,851,167	770,929,471	1,468,780,638
2000	765,258,147	830,904,077	1,596,162,224
2001	791,022,401	801,966,305	1,593,008,706
2002	858,830,989	925,832,458	1,784,663,447
2003	1,026,381,176	963,106,849	1,991,488,025
2004	1,057,906,157	1,059,145,404	2,117,051,561

Source: Political MoneyLine

Rep. James Greenwood (R-Pa.) made no bones about the reason for his career switch from chair of the House Energy and Commerce Committee's subcommittee on oversight and investigations to head the Biotechnology Industry Organization (BIO), a lobbying association. BIO agreed to pay Greenwood $650,000 a year (plus as much as $200,000 in bonuses) to serve as its chief lobbyist. "This is bittersweet," Greenwood said of his unexpected retirement from Congress. "But at this point in my life, it's more sweet by far."

Senate rules detail recusal guidelines. Under normal circumstances, a Senate employee who delivers his or her resume to a group of fifty prospective employers would not, at this early stage, need to recuse him or herself. Whether recusal would be necessary after the employee met with ten of those prospective employers would depend, of course, upon the results of each meeting. On the other hand, once the employee has directed his or her attention on two or three of the prospective employers for further discussions, recusal is likely necessary. A Senate employee, however, with the supervising Senator's approval, may continue to be involved with issues that may be of interest to the prospective employer during the limited period that the employee remains with the Senate. Generally, each Member must decide for himself or herself, as well as for his or her staff members, what steps would be necessary to avoid not only the conflict which may arise from negotiating or accepting prospective employment, but the appearance of such a conflict as well.[96]

Ethics rules go a step beyond actual quid pro quo corruption, which is very difficult to prove short of an FBI sting operation, and rely instead upon the standard of the appearance of corruption.

House rules are far more general. Members and staff of the House are advised to be particularly careful in how they go about negotiating for future employment, especially when negotiating with someone who could be substantially affected by the performance of official duties. It would be improper to permit the prospect of future employment to influence official actions. Therefore, while it is not specifically required, one should consider recusing oneself from any official activities affecting an outside party with whom job negotiations are under way.[97]

In the Executive branch, Senate and House, negotiations for future employment are commonplace and allegations of impropriety are frequent. No government employee will admit that employment negotiations influenced his or her official actions, and most will deny that they negotiated employment while working on an official action of interest to the prospective employer. Nevertheless, the timing and nature of many recent job changes by public officials–some of which are discussed below–have raised valid suspicions that conflict-of-interest rules are routinely violated through the revolving door.

Post-Government Employment Lobbying Restrictions

Under the Ethics Reform Act of 1989 (18 U.S.C. §207), members and staff of both the executive and legislative branches of the federal government are subject to restrictions on post-government lobbying activities. While any former government official or employee may accept a position as a lobbyist immediately after leaving the public sector, there are some specific constraints on their activities, depending on the nature of their previous public service. These constraints include:

- **ONE YEAR "COOLING-OFF PERIOD" ON LOBBYING.** Generally, former Members of Congress and senior level staff of both the executive and legislative branches are prohibited from making direct lobbying contacts with former colleagues for one year after leaving public service. Specifically, for one year after leaving government office:
  - Former members of the Senate and the House may not directly communicate with any member, officer or employee of either house of Congress with the intent to influence official action.
  - Senior Congressional staff (having made at least 75 percent of a member's salary) may not make direct lobbying contacts to Members of Congress they served, or the members and staff of legislative committees or offices in which they served.
  - Former Members of Congress and senior staff also may not represent, aid or advise a

foreign government or foreign political party with the intent to influence a decision by any federal official in the executive or legislative branches.

- "Very senior" staff of the executive branch, those previously classified within Executive Schedules I and II salary ranges, are prohibited from making direct lobbying contacts with any political employee in the executive branch.
- "Senior" staff of the executive branch, those previously paid at Executive Schedule V and up, are prohibited from making direct lobbying contacts to their former agency or on behalf of a foreign government or foreign political party.
- Any former government employee, regardless of previous salary, may not use confidential information obtained by means of personal and substantial participation in trade or treaty negotiations in representing, aiding or advising anyone other than the United States regarding those negotiations.

- **TWO-YEAR BAN ON "SWITCHING SIDES" BY SUPERVISORY STAFF OF THE EXECUTIVE BRANCH.** Senior staff in the executive branch who served in a supervisory role over an official matter that involved a specific party, such as a government contract, may not make lobbying contacts on the same matter with executive agencies for two years after leaving public service.
- **LIFE-TIME BAN ON "SWITCHING SIDES" BY EXECUTIVE BRANCH PERSONNEL SUBSTANTIALLY AND PERSONALLY INVOLVED IN THE MATTER.** Senior staffers in the executive branch who were substantially and personally involved in an official matter that involved a specific party, such as a government contract, are permanently prohibited from making lobbying contacts on the same matter with executive agencies.

The cooling-off period applies only to making "any communication to or appearance before" the restricted government agencies or personnel. As a result, former public officials may conduct all the research, preparation, planning and supervision for lobbying their former agencies or personnel immediately upon leaving public office, so long as they do not make the actual lobbying contact during the cooling-off period. The former official may simply direct other lobbyists to make the contact.

While these revolving door restrictions may appear fairly stringent at first glance, many of the restrictions are easily and routinely sidestepped. Negotiations of future employment while serving as a government official are commonplace, and the potential for conflicts of interest are largely left unmonitored. The post-government cooling-off period is brief and applies only to making lobbying contacts with former government colleagues.

In negotiating future employment as a lobbyist while still serving in an official capacity in government, Members of Congress and senior staff are warned not to be unduly influenced by the prospects of lucrative job offers, but they may nonetheless go ahead and negotiate salaries and employment. Though recusal from participating in official actions where a conflict of interest occurs is suggested in both the Senate and the House, it is not mandated. While recusals by Members of Congress or senior staff members are rare, the hiring of Congressional officials as corporate lobbyists is not.

No one is keeping tabs on who in Congress is negotiating for what employment and, as a result, no one is enforcing the recusal guidelines in any systematic fashion. For the most part, the Senate and House ethics committees are completely in the datk as to who is negotiating future employment and who should recuse themselves from official business, unless of course a scandal is uncovered in the press.

Case Study on Negotiating Future Employment by Executive and Congressional Staff: the Revolving Door Windfall from the Medicare Drug Prescription Bill

In the executive branch, waivers often required for negotiating future employment are routinely granted and rarely, if ever, denied. A freedom of information request by Public Citizen to the Department of Health and Human Services (HHS) found that from January 1, 2000 through November 17, 2004, 37 formal requests for waivers from the conflict-of-interest statutes were made in that department alone. All 37 requests were granted and none denied.[98]

One of the granted waivers sheds light on the Thomas Scully scandal. On May 12, 2003, Scully, chief administrator for the Centers for Medicare and Medicaid Services (CMS), secretly obtained an ethics waiver from Health and Human Services (HHS) Secretary Tommy Thompson, allowing Scully to ignore ethics laws that barred him from negotiating employment with anyone financially affected by his official duties or authority. The waiver allowed Scully ro represent the Bush Administration in negotiations with Congress over the recently-enacted Medicare prescription drug legislation while Scully simultaneously negotiated possible employment with three lobbying firms and two investment firms that had a major stakes in the legislation.

A Public Citizen investigation has revealed that these firms own or represent dozens of health care companies, trade associations, and physicians' organizations with billions of dollars at stake in the new law.[99] The three lobby firms with which Scully negotiated possible employment lobby for at least 30 companies or associations that are affected by the new Medicare law. The two investment firms own substantial stakes in at least 11 companies that are affected by the Medicare changes.

Scully resigned from the CMS on December 16, 2003. Two days later, he announced that he had accepted lucrative contracts with two of the five firms he had been negotiating with while CMS administrator: Alston & Bird, a firm with many health care industry clients, and Welsh, Carson, Anderson & Stowe, an investment firm with investments in health care companies.

Scully is not alone. A slew of senior executive and Congressional staffers cashed in on the Medicare prescription drug law that they helped write and promote. Another study by Public Citizen documented many of the key staff who profited on the prescription drug bill through the revolving door.[100] These included:

- **THOMAS GRISSOM**, director of the Center for Medicare Management, who just a day after the Medicare bill was signed into law, jumped ship to become the top lobbyist for medical device maker Boston Scientific. As a top official at CMS, Grissom was in charge of developing reimbursement policies and regulations for the Medicare fee-for-service program and overseeing Medicare's $240 billion contractor budget.

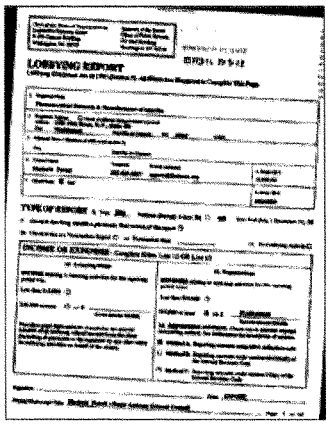
- **DALLAS "ROB" SWEEZY**, director of public and intergovernmental affairs at CMS, who in January 2004 joined National Media Inc., the advertising firm hired by the Bush administration to produce television ads touting the new Medicare law. In May, Sweezy moved over to the lobbying firm Loeffler Jonas and Tuggey, which represents Bristol-Myers Squibb, Purdue Pharma, First Health and PacifiCare.

- **JAMES C. CAPRETTA**, the top official on Medicare policy development at the Office of Management and Budget (OMB), who left the White House in mid-June 2004 to join Wexler & Walker Public Policy Associates. Pharmaceutical companies Amgen, Hoffman-LaRoche and Wyeth are among the firm's clients.

- **JACK HOWARD**, a former deputy director of legislative affairs for President Bush, who now works at Wexler & Walker Public Policy Associates. From 2001 to 2003, Howard promoted the president's agenda in Congress as the second-ranking member of the White House legislative affairs operation. Howard's current clients include Amgen, PacifiCare and Wyeth.

- **DIRKSEN LEHMAN**, who served as the chief White House liaison to the Senate for Medicare, Medicaid and other health care regulations, became a lobbyist for Clark & Weinstock in May 2003. During the Medicare debate, he focused on key Senate committees on behalf of clients such as Aventis Pharmaceuticals, Novartis and the Pharmaceutical Research and Manufacturers of America (PhRMA).

- **ROBERT MARSH**, another White House legislative affairs staffer, who has been connected to White House Chief of Staff Andrew Card since George H.W. Bush's first presidential run in 1979. Marsh left the White House in 2003 to join the OB-C Group, where he has represented the Blue Cross Blue Shield Association and WellPoint.


LOBBYING REPORT

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- **KIRK BLALOCK**, who as deputy director of the White House Office of Public Liaison, regularly strategized with Karl Rove and rallied business support for the president's tax cuts and other issues. Among his clients at Fierce, Isakowitz & Blalock (the firm he joined in 2002) are the Generic Pharmaceutical Association and the Health Insurance Association of America. Blalock is also a leading fundraiser for President Bush.

- **ROBERT WOOD**, former chief of staff for HHS Secretary Tommy Thompson, who was hired by Barbour, Griffith & Rogers in June 2003. Wood directs state affairs at Barbour Griffith, but lobbied Congress on behalf of Bristol-Myers Squibb, GlaxoSmithKline, Pfizer, PhRMA and the United Health Group.

- **LINDA FISHMAN**, who served as the lead Senate staff member for the Medicare conference committee.[101] She since has joined Hogan & Hartson, whose clients include GlaxoSmithKline and PhRMA, as a health policy adviser.[102]

- **COLIN ROSKEY**, who just three days after the signing of the Medicare law, for which he was one of the lead Senate negotiators, left his job as health policy adviser and counsel for the Senate Finance Committee to take a position with Alston & Bird – the same firm that hired former Medicare chief Tom Scully.[103]

- **SARAH WALTER**, who left her position as legislative director and chief health policy adviser for Sen. John Breaux (D-La.), one of the two Democrats who participated in negotiations over the Medicare bill, to take a position with Venn Strategies.[104]

- **JOHN MCMANUS**, who as staff director of the House Ways and Means Committee's health subcommittee, was one of the key architects of the Medicare legislation. However, just two months after the Medicare bill became law, McManus left the House to start his own health care consulting firm, the McManus Group. McManus–who worked as a lobbyist for Eli Lilly from 1994 to 1998–already has lined up an impressive number of big-name clients from throughout the healthcare industry, including PhRMA and Genentech.[105]

- **PATRICK MORRISEY**, who served as the deputy staff director and chief health counsel for the House Energy and Commerce Committee, chaired by Rep. W.J. "Billy" Tauzin (R-La.), was hired in March 2004 by Sidley Austin Brown & Wood, a lobbying firm that represents PhRMA, Genentech and the Biotechnology Industry Organization (BIO).[106]

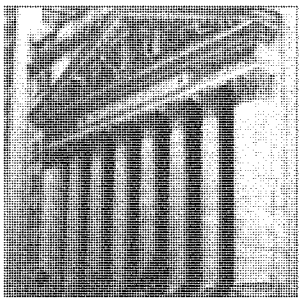
- Morrisey's colleague **JAMES WHITE** left his position as Tauzin's legislative director to join Abbott Laboratories as director of federal government affairs in January 2004.[107] Abbott, the Chicago-based manufacturer of Prevacid, Norvir and other brand-name drugs, spent $3.7 million to lobby the federal government last year.

These new arrivals on K Street joined at least three dozen former Congressional chiefs of staff already lobbying for the drug and managed care industries in 2003. The list includes Cathy Abernathy, former chief of staff for Rep. Bill Thomas (R-CA); Alex Albert, who worked for Sen. Zell Miller (D-GA); Edwin Buckham and Susan B. Hirshmann, two former top staffers for House Majority Whip Tom DeLay (R-TX); David Casragnetti, who headed the office of Sen. Max Baucus (D-MT), the ranking Democrat on the Senate Finance Committee; Dave Gribbin, a former chief of staff for Sen. Dan Coats (R-IN) who worked for Dick Cheney when he was a Wyoming congressman; Kevin McGuiness, who left the office of Sen. Orrin Hatch (R-UT) to open up a lobbying shop with the senator's son; and Daniel Meyer, the ex-chief of staff for former House Speaker Newt Gingrich (R-GA.).

The Medicare prescription drug episode highlights the opportunities granted to government staff who have worked on a major piece of legislation dear to the hearts of wealthy special interests. But the

revolving door from government service to private sector lobbyist extends far beyond any single piece of legislation. It appears to be an increasingly common job transition in recent years.

The Center for Public Integrity surveyed how often the revolving door has turned for the top 100 officers of the executive branch at the end of the Clinton Administration.[108] Tracking the movement of administration secretaries and under-secretaries for each major executive agency, the Center concluded that about a quarter of senior-level administrators left public service for lobbying careers. Another quarter of the administrators accepted positions as directors of private businesses they had once regulated.



The Medicare prescription drug episode highlights the opportunities granted to government staff who have worked on a major piece of legislation dear to the hearts of wealthy special interests.

At least 17 top Clinton staffers have taken lobbying jobs on behalf of corporate or individual clients, including former Deputy Secretary of Treasury Stuart Eizenstat and former Director of White House Legislative Affairs Charles Brain. Another ten joined law firms that actively lobby the federal government, including three former Cabinet members: Agriculture Secretary Dan Glickman, Interior Chief Bruce Babbitt, and Transportation Secretary Rodney Slater.

Most of these officials flew through the revolving door into private sector lobbying immediately upon leaving public service. Clearly, the cooling-off period that prohibits officials from making direct lobbying contacts with their former colleagues has not slowed the revolving door. Businesses and special interest groups find plenty of value in hiring former government officials right out the door, despite the one-year prohibition on making lobbying contacts. The offer of a lucrative salary to these officials while still in public service can influence their actions. Just as importantly, their connections and insider knowledge does not go to waste during the cooling-off period. That knowledge becomes invaluable in crafting a lobbying strategy, knowing who in government needs to be contacted and what appeals may gain their support. During that one-year cooling off period, Members of Congress and committee compositions will generally stay the same, and there is very little turnover in congressional and executive agency staff. Those who passed through the revolving door need only direct others in the lobbying team to make the lobbying contacts—and in doing so convey warm regards from the former officials to their government colleagues.

Making a Living

The revolving door functions even during natural disasters. As billions of federal dollars flow to the Gulf Coast to repair the damage caused by Hurricane Katrina, lobbyists are making sure their corporate clients get a share of the loot. One of the more active of those lobbyists is Joe Allbaugh, former director of the much maligned Federal Emergency Management Agency (and prior to that, George W. Bush's campaign manager during the 2000 election).[109] Before Katrina, Allbaugh was helping clients get reconstruction contracts in Iraq. In 2004 the *National Journal* asked Allbaugh about charges that he was cashing in on his service to the Bush Administration. He responded: "I don't buy the 'revolving door' argument. This is America. We all have a right to make a living."[110] Allbaugh, whose clients include Halliburton Co. (which has already gotten its first Katrina-related contract), appears to be making a very good living these days—so much so that an article in the online magazine *Slate* labeled him a "disaster pimp."[111]

Clearly, the cooling-off period that prohibits officials from making direct lobbying contacts with their former colleagues has not slowed the revolving door. Businesses and special interest groups find plenty of value in hiring former government officials right out the door, despite the one-year prohibition on making lobbying contacts.

The Revolving Door for Members of Congress

Judging from their newly-won salaries in the private sector, perhaps the biggest prize for special interest groups with official business pending before the federal government is to secure the lobbying services of a recently retired Member of Congress. It is not an entirely new phenomenon to see a retiring Member of Congress accept a lobbying job with a firm or special interest group. But this revolving door appears to be turning with much more frequency these days.

Though it is difficult to produce reliable figures for the number of Congressional members-turned-lobbyists prior to the stringent reporting requirements of the Lobbying Disclosure Act (LDA) of 1995, one study cited by Common Cause found that only about 3 percent of Members of Congress left government service in the decade of the 1970s to become lobbyists.[112] A study by Public Citizen that is limited to the election cycles of 1976 and 1978 suggests the figure may be somewhat higher, with about 9 percent of Members of Congress who had retired in that decade still registered to lobby when the reliable reporting requirements of LDA became effective in 1998.[113] The bottom line is that the revolving door for Members of Congress was not as common a means of career change as it is now.

The rate at which members of Congress spin through the revolving door has skyrocketed since then. According to an analysis by Public Citizen, the road from Congress to K Street is now very well traveled, and is the most common career path for Members of Congress. As of July 2005, about 215 former Members of Congress have registered as active lobbyists with the Clerk of the House and the Secretary of the Senate under the requirements of the Lobbying Disclosure Act of 1996. These lobbyists have served in Congress at some point between 1976 and 2004 (most of them having served fairly recently) and have filed lobbyist financial records showing lobbying activity in 2004-05.[114]

The percentage of Members of Congress retiring from public service for reasons other than death, conviction or election to other office and stepping into lobbying has fluctuated each Congressional session in the decade of the 2000s, never dipping below a third and reaching a high of almost half (46 percent) of the retiring Members of Congress in a single election cycle. This marks a dramatic increase over the 1970s.

Significantly, Public Citizen's analysis reveals that the K Street Project is working to the advantage of Republicans. The K Street Project was first developed in 1994 by Republican activist Grover Norquist, Rep. Newt Gingrich (R-GA.) and Rep. Tom DeLay (R-TX) to pressure major lobbying firms to hire Republicans rather than Democrats, thus helping to solidify Republican control over all

aspects of the legislative process in Washington.[115] The revolving-door figures for Members of Congress suggest that the Project has had an impact on Capitol Hill in the most recent decade. The rate of Democrats retiring from Congress and becoming lobbyists has fluctuated over the last few years, ranging from 15.4 percent in 2000, 16.7 percent in 2002 and 38.5 percent in 2004. The rate of Republicans retiring from Congress and becoming lobbyists over the same time period has been substantially higher, from 56.8 percent in 2000, 46.7 percent in 2002 and 47.6 percent in 2004.[116]

Though Republicans currently are enjoying an advantage when it comes to the revolving door, Members of Congress from both parties now have a greater inclination to pursue lobbying careers than in earlier decades. Today's greater propensity for retiring Members of Congress from both parties to join the ranks of K Street comes from a number of new incentives. First of all, despite partisan claims to roll back government outlays, federal government spending today is at an all-time high. More government contracts and federal grants are being awarded than ever before, and spending on social services and infrastructure development has risen dramatically.

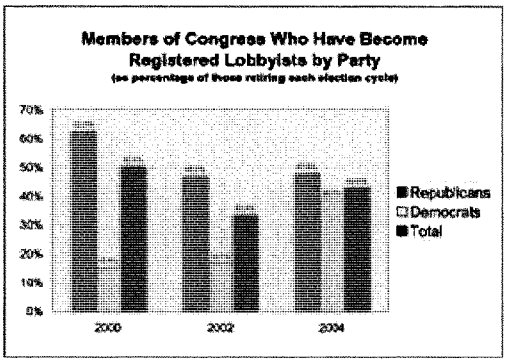
Secondly, government regulations–or lack thereof–touch nearly every sector of business and social life, which is why the amount spent on lobbying the federal government is also at an all-time high. Last but not least, special interest groups today see so much at stake in the legislative and regulatory dealings of the federal government that most lobbyists are paid very handsomely. The closer a lobbyist is to the networks of Congressional power, the more a special interest group is willing to pay. And no one is more intimately involved in these networks than recently retired Members of Congress. As a result, several recent Congressional retirees have attracted multi-million dollar job offers with lobbying firms and associations.

Former Rep. W.J. "Billy" Tauzin (R-La.) is but one example. Once again the Medicare prescription drug bill has come into play. Rep. Tauzin played a central role in drafting and negoriating the legislation. PhRMA, the pharmaceutical industry's premier lobbying association, made the prescription drug bill its top legislative priority. Massive campaign contributions, lobbying expenditures, advertising and public relations efforts were spearheaded by PhRMA to shape the prescription drug bill in ways the industry liked and to stave off measures it didn't. Rep. Tauzin worked closely with PhRMA, the White House, and Republican leaders of Congress to craft the final legislation.

During that period of intense lobbying activity by PhRMA, Rep. Tauzin was considering retiring from Congress and moving into private employment. Less than two months after final passage of the Medicare prescription drug bill, PhRMA offered Rep. Tauzin a contract deal rumored to be worth $2 million to become president of the lobbying association, the largest compensation package for anyone at a trade association. Tauzin decided to take the offer after retiring from Congress in 2004.

The deal raises serious questions as to whether Rep. Tauzin's official actions were tainted by self-interest. The Medicare prescription drug legislation contains key provisions beneficial to the drug industry. It subsidizes private insurers to provide prescription drug coverage to seniors (thereby increasing demand for drugs), bars the Medicare administrator from bargaining for lower drug prices, and effectively prohibits the re-importation of lower-priced drugs from Canada – all key provisions sought by PhRMA.

Fellow Louisianan Sen. John Breaux (D-La.) followed Tauzin into the lucrative lobbying market. Breaux, who had not been expected to retire from the Senate, surprised many by announcing that he would be joining the lobbying firm of Patton Boggs at the end of 2004. In addition to the Patton



With more than a third of today's retiring Members of Congress (except those who have retired due to death or conviction or election to another office), and about half of retiring senior-level officers of the executive branch moving directly from government service into lobbying on behalf of private special interest groups, the revolving door is spinning out of control.

Boggs work (for which Breaux is expected to receive $1 million a year), the former senator also will join a New York investment fund and become senior manager for a New York fund that handles energy projects. These two combined new salaries should put the 32-year veteran of Congress in Tauzin's income bracket.

The Government-to-Lobbyist Revolving Door Is Spinning Out of Control

With more than a third of today's retiring Members of Congress (except those who have retired due to death or conviction or election to another office), and about half of retiring senior-level officers of the executive branch moving directly from government service into lobbying on behalf of private special interest groups, the revolving door is spinning out of control. The number of former government officials serving as private sector lobbyists dwarfs previous trends.

Not only are the ranks of government employees-turned-lobbyists growing, but so are their salaries and benefits. Those with insider knowledge and privileged access to government officials are increasingly valuable to the business community attempting to secure added leverage over the course of public policy. This degree of industry influence on the formulation of policies supposedly designed to protect the common good is not good news for democracy.

Official actions in the name of the public good are often the casualty. Government officials tempted by the prospects of future private sector employment may compromise the public policies upon which they work. And post-government employees working as private sector lobbyists may abuse their insider knowledge or privileged networks of colleagues built while given the trust of public service.

Without a doubt, today's revolving door restrictions designed to protect the integrity of government are not working. Our conclusion lays out some of the changes that are required to protect the integrity of public policy from the special interests that benefit from the government-to-lobbyist revolving door. Before that we take a look at the limitations of the existing regulatory framework.

Chapter 4:

The Existing System For Implementing Lobbying Rules and Revolving Door Policies

by CRAIG HOLMAN, Public Citizen

CURRENTLY, ETHICS LAWS AND REGULATIONS that address the problem of the revolving door are implemented and enforced through a loose confederation of federal offices, each with different levels of jurisdiction. The reason for this arrangement is that the federal ethics system has evolved both through piecemeal legislation that applies throughout the government and through rules and procedures that individual agencies and other parts of government have adopted on their own.[117]

For instance, ethical standards for the House of Representatives are implemented and enforced primarily by the Committee on Standards of Official Conduct.[118] Senate ethics standards fall under the authority of the U.S. Senate Select Committee on Ethics.[119] Overall ethics guidelines for executive-branch employees are developed by the Office of Government Ethics (OGE), but that agency does little in the way of implementation and enforcement, leaving that to individual agencies or even to the individual officials covered by the rules.[120] If legal action is deemed appropriate against violators of the ethics laws and rules in either the legislative or executive branch, the cases are assumed by the Department of Justice's Public Integrity Section.

The resulting hodgepodge makes it difficult for government officials to comply with the current regulatory regime and does not inspire confidence among the public that rigorous ethical standards are being upheld. The conclusion of this paper offers a series of recommendations for fixing the system. In order to put those proposals in context, this chapter describes some of the main problems with the existing state of affairs.

Implementation of the Lobbying Disclosure Act

Section 6 of the Lobbying Disclosure Act (LDA) reads: The Clerk of the House and the Secretary of the Senate shall develop a "computerized systems designed to minimize the burden of filing and max-

imize public access to materials filed under this Act."[121] Yet those offices have so far failed to comply, justifying their position by raising questionable arguments about ambiguities in the law or the absence of necessary authority.

Fortunately, Pam Gavin, Director of Public Records in the Secretary of the Senate's office, has singlehandedly managed to work around the stonewalling to create a partial system for electronic dissemination of lobbyist filings. Despite the absence of specific budgetary allocation, Gavin has devoted the user fees collected for copying of paper records to pay for the posting of PDF (image) files of the lobbyist reports on the Senate's Web site at www.sopr.gov.[122]

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However, these PDF postings lack most of the benefits of a full electronic reporting system. They are not searchable or sortable by bill number, issue area or any category for that matter, other than a most rudimentary search by exact name of the lobbying entity as filed. For example, a search for the lobbying records of the "National Rifle Association" or "NRA" will produce no records at all. The NRA has decided to file its lobbying records under the name "Natl Rifle Association" and only a search for "Natl" will produce the association's records. Apart from abbreviations, if a group misspells its own name in its lobbying filings, its records will only show up on the Senate's Web site under the misspelled name.

The system does not tally information from different reports filed by the same lobbyist, making it impossible to answer questions such as: "How much money has Microsoft spent on lobbying since 1996, and how has this money been divided between the firm and its outside lobbyists?" Nor is it possible to download the data from the various reports into a spreadsheet so that one might do the calculation manually. Instead, a user has to print out each report, enter the data and only then do the calculations. In essence, the lobbying disclosure system on the Senate's Web site is little more than an old-fashioned card catalogue available on the Internet.[123]

The situation is even worse on the House side. The Clerk of the House has made no effort whatsoever to implement the disclosure requirement of Section 6 of the LDA. In fact, Jeff Trandahl, the House Clerk, has even declined to discuss the matter when approached by Public Citizen.[124]

Just as importantly to the integrity, or lack thereof, of the LDA is the presumption by both the Clerk of the House and the Secretary of the Senate that they have no enforcement authority to ensure compliance with the Act. The Senate Office of Public Records and the House Legislative Resource Center oversee the lobbying disclosure filings. The two offices may send "correction" letters to scofflaws who have failed to follow the law. They can refer any violation that is not fixed within 60 days to the Department of Justice, which can issue civil penalties up to $50,000. Until very recently, however, there have been no referrals by the congressional offices to the Department of Justice for noncompliance with the LDA, and the Department of Justice has not pursued a single LDA enforcement case until this year.[125] Bowing to a FOIA request by a reporter, the Department of Justice has acknowledged that it settled three enforcement cases, all in 2005.[126] The number of enforcement cases may grow as public pressure mounts for enforcement of the LDA.

Essentially, compliance with the Lobbying Disclosure Act is voluntary, so there are many scofflaws. In one study, the Center for Public Integrity found that 20 percent of lobbying disclosure records were filed at least three months late; 3,000 reports were filed six months late and 1,700 reports were at least a year overdue.[127]

Enforcement of Lobbying Ethics Rules

In addition to the disclosure requirements under the LDA, lobbyists are also subject to a loosely-knit set of ethics laws and rules on their behavior. Many of these laws and regulations are discussed throughout the chapters of this report and compiled in Appendix B. Monitoring and enforcement of these laws and regulations covering conduct rather than disclosure rest with the ethics committees of the House and the Senate for members of Congress, the Office of Government Ethics for the executive branch, and ultimately the Department of Justice.

House and Senate Ethics Committees

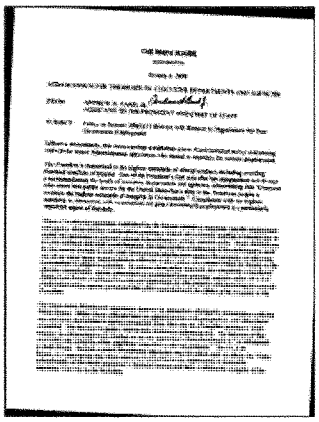
Each House of Congress has its own ethics committee charged with, among other things, enforcement of conflict-of-interest rules and revolving door restrictions for their own members. The Senate in 1964[128] and the House in 1967[129] established, for the first time, standing committees on ethics, designed to enforce conflict-of-interest rules, gift restrictions and codes of conduct governing how members relate to lobbyists.

In the House, the ethics committee is formally known as the Committee on Standards of Official Conduct. In the Senate, it is known as the Select Committee on Ethics. Both committees are evenly divided between Republican and Democratic members. The ethics committees have the authority to investigate alleged violations of ethics rules, issue reprimands or fines for violations, recommend expulsion to the full House or Senate, and refer serious criminal violations to the Department of Justice for prosecution.

By their very structure and composition, the congressional ethics committees are designed primarily to provide advice and education about ethics rules rather than enforcement against violations. First of all, the committees are run exclusively by members of Congress and staffed by congressional staffers. Secondly, committee membership is done at the pleasure of party leaders in the House and the Senate. Finally, the ethics rules themselves are formulated by the congressional leadership and ratified, sometimes without knowing what the proposed rules are, by the majority members of Congress.

Office of Government Ethics

The Office of Government Ethics was established by the Ethics in Government Act of 1978. It was created as an independent agency to monitor and enforce the new ethics laws for the executive branch and to promulgate implementing regulations. Even though OGE assumed stewardship over the ethics laws, the Act preserved a considerable level of independence among each executive branch agency to create its own ethics code and to interpret and administer ethics laws



If we are to address the grave problems of the revolving door and other ethics issues, not only must the laws and regulations be amended, but we must also change the mechanisms for implementation and enforcement of these standards of law.

for its employees.[130] The Ethics in Government Act directed OGE to review financial disclosure forms of presidential appointees, provide ethics training to executive branch officials and oversee the implementation of ethics rules by each agency. The Ethics Act also required OGE to provide an advisory service and to publish its opinions.[131]

As an ethics enforcement agency, OGE is better structured than the congressional ethics committees in that most of its employees are career public servants rather than political appointees. The Director, however, is appointed by the president for a five-year term. It currently has a staff of more than 80 employees. The agency thus enjoys a certain level of professionalism and independence from political operatives in the executive branch and party leaders.

Nevertheless, OGE is far from an ideal agency. Perhaps its greatest weakness is that it has been conceived as a "partner" with all other executive branch agencies in developing, interpreting and enforcing ethics laws and regulations. OGE is designed as an entity that provides guidance and advice to other executive branch agencies rather as a monitor that routinely determines and implements ethics codes for the executive branch. OGE also does not usually enforce the ethics code for other agencies, preferring instead to give that authority to dozens of ethics officers appointed within each executive branch agency. And, as noted above, any cases requiring prosecution are referred to the Justice Department's Public Integrity Section.

For example, while OGE has developed guidelines for granting waivers for employees from the conflict-of-interest laws governing future employment, these are only guidelines. Each executive branch agency promulgates its own waiver procedures, whicb are then interpreted and enforced by the specific ethics officer appointed within that executive office. As a result, there is no one set of procedures for seeking and receiving waivers from conflict-of-interest laws, and each set of waiver procedures is interpreted differently by different offices. The resulting inconsistencies prompted the White House in 2004 to step in and issue an executive order requiring that all waivers be reviewed by the White House counsel.[132]

Moreover, OGE has neglected to establish itself as an effective public information source. Though the agency compiles and scrutinizes previous employment records for scores of executive branch appointees and employees, it makes little effort to make these records available to the public. Such information usually becomes available as part of public congressional hearings in high-profile cases or through Freedom of Information Act requests. OGE also does not act as a clearinghouse for waivers and other actions initiated in individual agencies.

Finally, the attitude of "partnership" with the various executive branch offices on which OGE is based has created a culture of "insider relations" with other executive branch offices. OGE tends to view itself as an ally of the other executive offices whose purpose often is to do the bidding for the executive branch. This culture can have profound consequences for the integrity of federal ethics laws. For example, at the request of the White House and congressional leaders, OGE has proposed radically scaling back personal financial disclosures for public officers, despite objections from several public interest groups.[133]

At the request of executive branch officials, OGE has also reclassified what constitutes an "office" to narrow the application of the revolving door restriction. Instead of a former officer of HHS being subject to the one-year cooling off period for lobbying HHS, that officer is now only precluded from lobbying the particular entity within HHS in which he or she had served.[134]

For the most part, the Office of Government Ethics appears to be serving the interests of executive branch officials, not the public and not the Ethics in Government Act. It has no interest in centralizing records and disclosing information to the public, and the agency has developed a too-cozy relationship with executive branch officials.

Ethics and Lobbying Laws Are Implemented and Enforced by a Disparate Range of Offices in Both the Congressional and Executive Branches

Not only are ethics and lobbying laws and rules a loose patchwork of disparate and inconsistent regulations between and within the branches of government, but they are also very poorly enforced. Congressional lobbying rules are implemented and enforced by at least four different agencies: the Clerk of the House, the Secretary of the Senate, the House Ethics Committee and the Senate Ethics Committee. Lobbying rules for executive branch officials, though overseen by a single agency, are in fact interpreted, implemented and enforced by dozens of executive offices with little or no coordination and recordkeeping among them.

With no standardization and little public disclosure, regulating the conduct and disclosure of lobbying activities—especially abuses of the revolving door between public service and private interests—becomes a Herculean task. Violations of the law often are interpreted away or the rules are simply changed to suit government officials.

If we are to address the grave problems of the revolving door and other ethics issues, not only must the laws and regulations be amended, but we must also change the mechanisms for implementation and enforcement of these standards of law. These matters are taken up in the concluding chapter of this paper.

Conclusion:

Recommendations for Reducing Revolving Door Conflicts of Interest

How to better enforce existing rules and eliminate loopholes.

by SCOTT AMEY, Project On Government Oversight; CRAIG HOLMAN, Public Citizen; and PHILIP MATTERA, Corporate Research Project

THROUGH CASE STUDIES AND ANALYSIS, this report set out to illustrate the degree to which revolving-door appointments throughout the federal government create the appearance of impropriety and conflict of interest as well as actual ethical problems.

The reforms required to root out this problem will not be easy to implement, given the influence of wealthy corporations and trade associations that resist the disclosure and transparency requirements that underpin all of the report's recommendations. But public pressure, skillfully applied, could force the executive and legislative branches of government to act for the common good by simplifying ethics rules and increasing transparency through disclosure requirements. In this concluding chapter, the report lays out a set of reforms to address the problem of the revolving door.

The first of the proposals covers the revolving doot problem in general, and the others address the particular forms of the phenomenon described in the preceding chapters.

Standardization of Revolving Door and Conflict-of-Interest Laws and Regulations

A lack of regulatory consistency across the federal government is a key reason for lax enforcement of the conflict-of-interest laws and regulations that are already on the books. Ethics issues should be overseen by a single independent agency that not only implements the laws passed by Congress but

also enforces them diligently. For separation-of-power reasons, there would probably have to be different agencies for Congress and rhe executive branch, but each one should be:

- staffed by career professionals;
- vested with the authority to promulgate implementing rules and regulations, conduct investigations, subpoena witnesses, and issue civil penalties for violations;
- provided reasonable independence from the immediate control of those whom they regulate; and
- empowered as the central agency for implementation, monitoring, enforcement and public disclosure of its charges.

The congressional entity should take over the responsibilities of the Senate and House ethics committees as well as the lobbying disclosure responsibilities of the Clerk of the House and the Secretary of the Senate. It should be staffed and directed by career officials who are not Members of Congress. The agency should also be afforded a budget that is approved once every two sessions of Congress in order to better insulate the agency from congressional retaliation.

At the executive level, the OGE should continue to serve as the principle agency overseeing the executive branch, but it should be strengrhened in order ro ensure that conflict-of-interest standards are consistently applied. OGE must be granted some enforcement authority, particularly over civil violations, and should not be viewed as a "partner" sharing ethics responsibilities with other executive branch agencies. It must be empowered as the central ethics agency for the entire executive branch, responsible for the promulgation of rules and regulations, monitoring their implementation, and enforcing compliance. It should also serve as the central repository for all rules and compliance actions, and function as the executive branch's public outreach clearinghouse for ethics. This would also include the new rules proposed below.

Several states provide models for implementation and enforcement of lobbying and ethics laws through independent ethics agencies, selected on a non-partisan and rotating basis, with multiple-year budget aurhorizarions to prorect against retaliations by a hostile legislature or governor. See Appendix B for more details.

> **To summarize: The functions of the Congressional ethics committees and the offices handling lobbyist disclosure should be combined in a single, independent agency covering the legislative branch. At the same time, the Office of Government Ethics should be given greater oversight and enforcement responsibilities and should be responsible for standardizing ethics procedures throughout the executive branch.**

Proposed Reforms Covering the Industry-to-Government Revolving Door

The appointment of corporate executives and industry lobbyists to policymaking posts in the federal government poses two different issues. First, there are the individual conflict-of-interest considerations. Such appointees may continue to have a financial interest in a former employer or may intend

to return to that firm (or another company in the same industry) after leaving government service. In either case, there is the risk that the appointee, once in office, will attempt to shape federal policy in a way that benefits his or her specific former employer or that industry in general.

Second, there is the broader question of whether the appointment of many individuals from the corporate sector to key regulatory or contract oversight positions will give policy too much of a pro-business tilt. This has been a growing problem in recent years, given the larger number of corporate veterans appointed by the Bush Administration to important posts throughout the executive branch.

As tempting as it may be to propose an outright ban on the appointment of corporate executives and industry lobbyists to policymaking posts in regulatory agencies, we recognize that a blanket prohibition is not politically feasible. Also, it would prevent the appointment of desirable corporate candidates, such as an executive who did a good job overseeing environmental remediation. Instead, we propose to strengthen existing safeguards meant to prevent specific conflicts of interest.

Employment eligibility standards

There are currently no government-wide restrictions on the appointment of corporate lobbyists or executives to positions in which they might oversee contracts, regulations and other polices that significantly affect the interests of a former employer. Existing federal rules focus instead on the obligations of such persons to divest themselves of investments that might create a financial conflict of interest (or place such investments in a blind trust) and to refrain from participating in an official capacity in any matter in which "any person whose interests are imputed to [them]" has a financial interest that will be affected.[134]

In addition, there are rules saying that federal employees must avoid "an appearance of a loss of impartiality in the performance of his official duties." One of the situations in which such an apparent loss of impartiality is said to be possible is the handling of a matter involving a person for whom the federal employee served, within the last year, as "officer, director, trustee, general partner, agent, attorney, consultant, contractor or employee."

An appointee is supposed to deal with such situations mainly by recusing him- or herself from specific matters.[136] That is suitable when the potential conflicts are an occasional matter, but it becomes more problematic when an appointee must frequently handle matters involving a former employer—which is more likely to happen, for example, when an executive is appointed to a policymaking post in an agency that regulates the company where that official used to work. Repeated recusals (also known as disqualifications) may address the conflict-of-interest issue, yet like repeated absenteeism they can interfere with job performance.

In theory, persons expected to frequently disqualify themselves from matters that come before the government should not be considered as candidates in the first place, though the White House officials choosing the appointees do not appear to apply this standard.

What is needed is a system of screening under which OGE would review the extent to which a proposed appointee would likely face potential conflicts involving his or her private-sector activity. In that screening process, OGE should have the power to block appointments of individuals—at least

among those senior officials currently required to file financial disclosure reports—who would be expected to engage in frequent recusals because of an apparent loss of impartiality related to a recent (within two years) former employer.

To summarize: OGE should review all senior-level appointees to determine whether a prior position in the private sector would make that person ineligible because of the likelihood of frequent conflicts with the impartiality rule.

Strengthening recusal requirements

An appointee who passes the pre-employment screening (by virtue of not having excessive possibilities for conflicts involving prior employment) may still face some situations in which recusal will be necessary. The current system for handling those recusals is too lax. It is left to the appointee (or his or her immediate boss) to make a subjective determination as to whether the potential for a violation of the impartiality rule exists. We recommend a stricter standard:

Recusal should be mandatory for all matters directly involving an appointee's former employers and clients during the 24-month period prior to taking office.

Recordkeeping for recusals also needs to be improved. Currently, in most cases, appointees need not file a report of their recusals outside their own agency. We recommend that:

The employment histories and financial disclosure records of all political appointees and Senior Executive Service employees, as well as any recusal reports or waivers, should be filed with OGE and made publicly available on OGE's web site.

Finally, there is the question of enforcement of recusal agreements. Currently, OGE does not actively enforce recusals, either itself or by referral to the Department of Justice. OGE should review the agreements on a regular basis and should routinely refer instances of possible violation to the Justice Department.

Recusal agreements should be monitoring by OGE on a regular basis, and violations should be referred to the Department of Justice.

Ethics Certification

Adherence to the rules regarding recusals and related matters should be ongoing during an appointee's term of office.

All Senior Executive Service Employees should be required to certify each year that they have read and are aware of conflict-of-interest and ethics restrictions appropriate to their position and that they have not violated those restrictions with respect to their official duties in the previous year.

Proposed Reforms Covering the Government-to-Industry Revolving Door

Government employees are often unaware of or are confused by post-government employment restrictions. Both public trust in government and the private sector's ability to effectively deal with government officials would be enhanced by clearer standards concerning restrictions on post-government employment. The rules should be more stringent as well.

First, senior officials should be held to a high standard to avoid the possibility that their decision-making is influenced by future employment possibilities. For this reason, they should be barred for a period of time for taking a job with companies that significantly benefit from policies formulated by those officials. While it may be impractical to apply this to all companies (given the wide impact of certain economic policies, for example), it can be enforced with regard to specific contractors.

There is also a need to close the loophole that allows officials to take a job with a company they had authority over, as long as the post is with another part of the corporation. It is naïve to think that the official's inside knowledge and contacts will not somehow be exploited by the company. At the same time, the widespread use of waivers, which undermine the limited restrictions that already exist, has to be brought under control.

We also recommend that officials leaving government be required to sign binding "exit plans" that would remove any ambiguity about what they can and cannot do once they are back in the private sector.

In sum, the key recommendations are as follows:

- **Prohibit, for a specified period of time, political appointees and Senior Executive Service policymakers from being able to seek employment from contractors that may have significantly benefited from the policies they formulated;**
- **Close the loophole in the current law that allows government employees to take a job with a department or division of a corporation or contractor that is connected (financially or through a corporate parent or other business relationship) to the division or department of a business that they regulated or otherwise had authority over; and**
- **Create a system to better regulate Members of Congress as well as their senior staff. Currently, Members of Congress and senior staff are merely warned against improprieties and advised to recuse themselves from issues of concern to prospective employers.**
- **Restrict the granting of waivers relating to the rules on negotiating post-government employment to exceptional situations—and make those few waivers available to the public in electronic form.**
- **Require government officials to enter into a binding revolving-door exit plan that sets forth the programs and projects from which the former employee is banned from working. Like financial disclosure statements, these reports should be filed with the Office of Government Ethics and available to the public.**

- **Require recently retired government officials and their new private sector employers to file revolving-door reports attesting that the former government employee has complied with his or her revolving door exit plan.**

Proposed Reforms Covering the Government-to-Lobbyist Revolving Door

Currently, all former members of Congress, their senior staff and senior employees of the executive branch are subject to a one-year cooling-off period during which they must refrain from making lobbying contacts. However, these same officials may immediately conduct all other lobbying activities in most instances upon retirement from public service, including the research, preparation, strategizing and supervising of lobbying activities for a business, as long as the former public servant does not actually pick up the phone and make contact with covered government officials.

The cooling-off period needs to be longer, lasting at least a full two-year Congressional cycle. In addition, the scope of prohibited lobbying activities should be expanded. It is not enough to prohibit direct lobbying contacts. Former officials should also be prohibited from planning and preparing lobbying strategies and supervising other lobbyists involved in attempting to influence legislation or public policy among covered government officials. Nor should officials who leave government be free to lobby another part of the federal government during that same cooling-off period.

Former Members of Congress presently retain special Congressional privileges, such as special access to the floor of Congress and the Congressional gym. Such privileges not available to the general public should be suspended for any former Member of Congress; at the very least, such privileges should be suspended while the former Member serves as a lobbyist.

To summarize: restrictions on lobbying by former Members of Congress and their staff should be strengthened by:

- **extending the cooling-off period for at least one full Congressional session (two years);**
- **expanding the scope of prohibited activities to include the preparation, strategizing and supervision of lobbying activity designed to facilitate making a lobbying contact; and**
- **revoking the special privileges given to former Members of Congress if they are serving as lobbyists.**

Similar enhancements to revolving-door rules are needed for executive branch officials who become lobbyists, including the extended cooling-off period and the widening of the scope of prohibited activities. In addition, the executive-branch rules should create a special category of "procurement lobbying" relating to efforts by businesses and special-interest groups to influence federal purchasing decisions. Given that contracting is such an important function of the executive branch—and given the strong potential for corruption in this area—it makes sense that this form of lobbying should be highlighted for disclosure purposes.

To summarize: restrictions on lobbying by former senior officials in the executive branch should be strengthened by:

- **extending the "cooling off" period for at least one full Congressional session (two years);**
- **expanding the scope of prohibited activities to include the preparation, strategizing and supervision of lobbying activity designed to facilitate making a lobbying contact; and**
- **creating a special category of "procurement lobbying," which includes any attempt to influence procurement decisions, subject to reporting and disclosure.**

Increase transparency by establishing fully searchable, sortable and downloadable internet databases for disclosure of lobbying activity

This report strongly recommends that both existing and future ethics filings throughout the federal government be made available to the public at no cost through internet-based, searchable, sortable and downloadable on-line databases. The maintenance of such databases is key to establishing government accountability. As discussed in Chapter 4, the current Congressional system for disseminating lobbyist data is a case study in how not to handle public disclosure.

The following is a compilation of the various datasets that should be included in a comprehensive federal revolving-door database:

Existing data collection

- Lobbyist disclosure data submitted to the House and the Senate
- Financial disclosures made by those appointees required to file Standard Form 278

Proposed data collection

- Recusals/disqualifications filed by federal officials on matters involving former employers
- Annual ethics certifications by Senior Executive Service Employees
- Waivers granted to federal employees to negotiate future employment in the private sector
- Revolving-door exit plans for federal officials leaving government for the private sector
- Compliance reports on revolving-door regulations by former federal officials now in the private sector and by their new employers.

THE REVOLVING DOOR WORKING GROUP calls on lawmakers and federal officials to take immediate steps to implement this combination of reforms to address the three types of revolving-door conflicts of interest and to strengthen oversight and enforcement of ethics rules. While such measures will require significant political courage, they will go a long way toward restoring public confidence in the federal government. And as any politician knows, good government is essentially a matter of trust.

Appendix A:

Federal Revolving Door & Ethics Restrictions

Source: SCOTT AMEY, Project On Government Oversight

STATUTES

5 U.S.C. §§ 7321-7326 — THE HATCH ACT
Prohibits federal executive branch employees, including special government employees (i.e., advisory committee members) who are working on federal government business, from engaging in unauthorized political activity while on duty. Government employees in violation of the Hatch Act can be removed or suspended from federal employment.

18 U.S.C. § 201 — BRIBERY OF PUBLIC OFFICIALS AND WITNESSES
Bans bribery of government officials and witnesses who appear before either House of Congress, or any agency, commission, or officer authorized by the laws of the United States.

18 U.S.C. § 202 — DEFINITIONS
Defines "special Government employee," "official responsibility," "officer," "employee," "Member of Congress," "executive branch," "judicial branch," and "legislative branch."

18 U.S.C. § 203 — COMPENSATION TO MEMBERS OF CONGRESS, OFFICERS, AND OTHERS IN MATTERS AFFECTING THE GOVERNMENT
Prohibits federal employees, including special government employees from acting as a compensated representative for privare entities before an agency or court of the executive or judicial branches of government. Violations are subject to the penalties under 18 U.S.C. § 216.

18 U.S.C. § 204 — PRACTICE IN UNITED STATES COURT OF FEDERAL CLAIMS OR THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT BY MEMBERS OF CONGRESS
Provides that the penalties of 18 U.S.C. § 216 apply to a Member of Congress or Member of Congress Elect who, practices in the United Stares Court of Federal Claims or the United States Court of Appeals for the Federal Circuit.

18 U.S.C. § 205 — ACTIVITIES OF OFFICERS AND EMPLOYEES IN CLAIMS AGAINST AND OTHER MATTERS AFFECTING THE GOVERNMENT

Prohibits federal employees, including special government employees, from acting as a representative for private entities before an agency or court of the executive or judicial branches of government other than in the proper discharge of his or her official duties. Violations are subject to the penalties under 18 U.S.C. § 216.

18 U.S.C. § 206 — EXEMPTION OF RETIRED OFFICERS OF THE UNIFORMED SERVICES

"Sections 203 and 205 of this title shall not apply to a retired officer of the uniformed services of the United States while not on active duty and not otherwise an officer or employee of the United States, or to any person specially excepted by Act of Congress."

18 U.S.C. § 207 — RESTRICTIONS ON FORMER OFFICERS, EMPLOYEES, AND ELECTED OFFICIALS OF THE EXECUTIVE AND LEGISLATIVE BRANCHES

Provides a permanent, two-year, or one-year "cooling off" period from "representational activities" by former Executive Branch officials, Members of Congress, senior Congressional staffers, and others. Former government officials are not limited in going to work for a private contractor, but are limited in the type of work they can perform for them. Violations are subject to the penalties under 18 U.S.C. § 216.

18 U.S.C. § 208 — ACTS AFFECTING A PERSONAL FINANCIAL INTEREST

Generally, an executive branch or independent agency employee cannot participate in matters that affect his/her financial interests, as well as the financial interests of his/her spouse, minor children, partnerships, any organization in which he/she serves as an officer, director, trustee, or employee, or an entity that he/she is negotiating or with which he/she has an arrangement concerning prospective employment. Violations are subject to the penalties under 18 U.S.C. § 216.

18 U.S.C. § 209 — SALARY OF GOVERNMENT OFFICIALS AND EMPLOYEES PAYABLE ONLY BY UNITED STATES

Prohibits government employees from receiving and anyone from supplementing salary, or any contribution to or supplementation of salary, as compensation for his services as a government employee. Violations are subject to the penalties under 18 U.S.C. § 216.

18 U.S.C. § 210 — OFFER TO PROCURE APPOINTIVE PUBLIC OFFICE

Bans offering anything of value in consideration for the use or promise of use of influence to procure appointive office. Penalties include a fine, imprisoned not more than one year, or both.

18 U.S.C. § 211 — ACCEPTANCE OR SOLICITATION TO OBTAIN APPOINTIVE PUBLIC OFFICE

Bars accepting anything of value to obtain public office for another. Penalties include a fine, imprisoned not more than one year, or both.

18 U.S.C. § 212 — OFFER OF LOAN OR GRATUITY TO FINANCIAL INSTITUTION EXAMINER

Disallows loans or gratuities paid to any examiner or assistant examiner who examines or has authority to examine specified banks, branches, agencies, organizations, corporations, or institutions. Penalties include a fine, imprisoned not more than one year, or both.

18 U.S.C. § 213 — ACCEPTANCE OF LOAN OR GRATUITY BY FINANCIAL INSTITUTION EXAMINER

Forbids the acceptance of loans or gratuities offered pursuant to 18 U.S.C. § 212. Penalties include a fine, imprisoned not more than one year, or both.

18 U.S.C. § 214 — OFFER FOR PROCUREMENT OF FEDERAL RESERVE BANK LOAN AND DISCOUNT OF COMMERCIAL PAPER
Prohibits offering or paying anything of value to receive certain bank loans. Penalties include a fine, imprisoned not more than one year, or both.

18 U.S.C. § 215 — RECEIPT OF COMMISSIONS OR GIFTS FOR PROCURING LOANS
Bans persons from corruptly giving or soliciting anything of value for procuring loans. Penalties include up to a $1 million fine, imprisoned not more than thirty years, or both.

18 U.S.C. § 216 — PENALTIES AND INJUNCTIONS
Provides the criminal and civil penalties for violations of 18 U.S.C. §§ 203, 204, 205, 207, 208, or 209.

18 U.S.C. § 218 — VOIDING TRANSACTIONS IN VIOLATION OF CHAPTER; RECOVERY BY THE UNITED STATES
The government may void or rescind any transactions resulting in a conviction under 18 U.S.C. §§ 201-225. The government may also recover, in addition to any penalty prescribed by law or in a contract, the amount expended, the thing transferred or delivered on its behalf, or the reasonable value thereof.

18 U.S.C. § 219 — OFFICERS AND EMPLOYEES ACTING AS AGENTS OF FOREIGN PRINCIPALS
Bans federal employees from acting as an agent or lobbyist of a foreign principal required to register under the Foreign Agents Registration Act or the Lobbying Disclosure Act of 1995, unless certified by OMB.

18 U.S.C. § 1905 — DISCLOSURE OF CONFIDENTIAL INFORMATION (TRADE SECRETS ACT)
Criminalizes the disclosure of confidential information.

18 U.S.C. § 1913 — LOBBYING WITH APPROPRIATED FUNDS
Prohibits executive branch officials from using appropriated funds to directly or indirectly encourage or direct any person or organization to lobby one or more Members of Congress on any legislation or appropriation. See also P.L. 108-447, Div. F, Title V., § 503 (2005) (prohibiting the use of federal money for propaganda).

41 U.S.C. § 423 — RESTRICTIONS ON DISCLOSING AND OBTAINING CONTRACTOR BID OR PROPOSAL INFORMATION OR SOURCE SELECTION INFORMATION
Also known as the Procurement Integrity Act (PIA), this statute regulates federal employees who are involved in buying goods and services in excess of $100,000 as well as a federal employee contacts or is contacted by a government contractor about post-government employment.

ADDITIONAL LAWS: 5 U.S.C. § 3110 Employment of relatives — restrictions; 5 U.S.C. § 3326 Appointments of retired members of the armed forces to positions in the Department of Defense; 5 U.S.C. § 4111 Acceptance of contributions, awards, and other payments; 5 U.S.C. § 7351 Gifts to superiors; 5 U.S.C. § 7353 Gifts to Federal employees; 10 U.S.C. § 1033 Participation in management of specified non-Federal entities — authorized activities; 10 U.S.C. § 1060 Military service of retired members with newly democratic nations — consent of Congress; 10 U.S.C. § 1588 Authority to accept certain voluntary services; 10 U.S.C. § 1589 Participation in management of specified non-Federal entities — authorized activities; 10 U.S.C. § 10212 Gratuitous services of officers: authority to accept; 31 U.S.C. § 1342 Limitation on voluntary services; 31 U.S.C. §§ 1344, 1349 Use of government vehicles and adverse actions; 31 U.S.C. § 1348 Telephone installation and charges; 31 U.S.C. § 1353 Acceptance of travel and related expenses from non-Federal sources; 37 U.S.C. § 908 Employment of reserves and retired members by foreign governments.

Regulations

(The following Parts include additional subparts and sections)

5 C.F.R. PART 2634 — Executive branch financial disclosure, qualified trusts, and certificates of divestiture

5 C.F.R. PART 2635 — Standards of ethical conduct for employees of the executive branch

5 C.F.R. PART 2636 — Limitations on outside earned income, employment and affiliations for certain non-career employees

5 C.F.R. PART 2637 — Regulations concerning post employment conflict of interest (apply to employees who left federal service before January 1, 1991)

5 C.F.R. PART 2638 — Office of Government Ethics and executive agency ethics program responsibilities

5 C.F.R. PART 2640 — Interpretation, exemptions and waiver guidance concerning 18 U.S.C. § 208 (Acts affecting a personal financial interest)

5 C.F.R. PART 2641 — Post-employment conflict of interest restrictions

48 C.F.R. PART 3 — Federal Acquisition Regulation: Improper Business Practices and Personal Conflicts of Interest

Agency Supplemental Regulations

Department of the Treasury — 5 C.F.R. Part 3101
Federal Deposit Insurance Corporation — 5 C.F.R. Part 3201
Department of Energy — 5 C.F.R. Part 3301
Federal Energy Regulatory Commission — 5 C.F.R. Part 3401
Department of the Interior — 5 C.F.R. Part 3501
Department of Defense — 5 C.F.R. Part 3601; see also DoD 5500.7-R
Department of Justice — 5 C.F.R. Part 3801
Federal Communications Commission — 5 C.F.R. Parts 3901 & 3902
Farm Credit System Insurance Corporation — 5 C.F.R. Part 4001
Farm Credit Administration — 5 C.F.R. Part 4101
Overseas Private Investment Corporation — C.F.R. Part 4301
Office of Personnel Management — 5 C.F.R. Part 4501
Interstate Commerce Commission — 5 C.F.R. Part 5001
Commodity Futures Trading Commission — 5 C.F.R. Part 5101
Department of Labor — 5 C.F.R. Part 5201
National Science Foundation — 5 C.F.R. Part 5301
Department of Health and Human Services — 5 C.F.R. Part 5501
Postal Rate Commission — 5 C.F.R. Part 5601
Federal Trade Commission — 5 C.F.R. Part 5701
Nuclear Regulatory Commission — 5 C.F.R. Part 5801
Department of Transportation — 5 C.F.R. Part 6001
Export-Import Bank of the United States — 5 C.F.R. Part 6201
Department of Education — 5 C.F.R. Part 6301
Environmental Protection Agency — 5 C.F.R. Part 6401
National Endowment for the Arts — 5 C.F.R. Part 6501
National Endowment for the Humanities — 5 C.F.R. Part 6601
General Services Administration — 5 C.F.R. Part 6701
Board of Governors of the Federal Reserve System — 5 C.F.R. Part 6801

National Aeronautics and Space Administration — 5 C.F.R. Part 6901
United States Postal Service — 5 C.F.R. Part 7001
National Labor Relations Board — 5 C.F.R. Part 7101
Equal Employment Opportunity Commission — 5 C.F.R. Part 7201
Inter-American Foundation — 5 C.F.R. Part 7301
Department of Housing and Urban Development — 5 C.F.R. Part 7501
National Archives and Records Administration — 5 C.F.R. Part 7601
Institute of Museum and Library Services — 5 C.F.R. Part 7701
Tennessee Valley Authority — 5 C.F.R. Part 7901
Consumer Product Safety Commission — 5 C.F.R. Part 8101
Department of Agriculture — 5 C.F.R. Part 8301
Federal Mine Safety and Health Review Commission — 5 C.F.R. Part 8401
Federal Retirement Thrift Investment Board — 5 C.F.R. Part 8601
Office of Management and Budget — 5 C.F.R. Part 8701

Executive Orders

EXECUTIVE ORDER 13184 OF DECEMBER 28, 2000 - REVOCATION OF EXECUTIVE ORDER 12834

Signed by President Clinton therein revoking the commitments under E.O. 12834 placed on employees and former employees.

EXECUTIVE ORDER 12834 OF JANUARY 20, 1993 - ETHICS COMMITMENTS BY EXECUTIVE BRANCH APPOINTEES

Signed by President Clinton and known as the "Senior Appointee Pledge." This order extended the one-year ban to five-years, prohibiting former employees from lobbying their former agencies after they left office. Additional restrictions were placed on employees of the Executive Office of the President (EOP) and trade negotiators.

EXECUTIVE ORDER 12731 OF OCTOBER 17, 1990 - PRINCIPLES OF ETHICAL CONDUCT FOR GOVERNMENT OFFICERS AND EMPLOYEES

Signed by President Bush ordering the restated many of the principles in E.O. 12674

EXECUTIVE ORDER 12674 OF APRIL 12, 1989 - PRINCIPLES OF ETHICAL CONDUCT FOR GOVERNMENT OFFICERS AND EMPLOYEES

Signed by President Bush to establish fair and exacting standards of ethical conduct for all executive btanch employees. This order established standard of ethical conduct, placed limitations on outside earned income, granted authority to the Office of Government Ethics, and permitted agencies to supplement executive branch-wide regulations of the Office of Government Ethics.

EXECUTIVE ORDER 11222 OF MAY 8, 1965 - PRESCRIBING STANDARDS OF ETHICAL CONDUCT FOR GOVERNMENT OFFICERS AND EMPLOYEES

Signed by President Johnson to restore citizens' right to have complete confidence in the integrity of the federal government. Prohibited bribery, nepotism, using one's office for private gain, conflicts of interest, misuse of federal property, and provided restrictions for special government employees.

Other White House Action

Andrew H. Card, Jr., Assistant to the President and Chief of Staff, Memorandum for the Heads of Executive Departments and Agencies, Policy on Section 208(b)(1) Waivers with Respect to Negotiations for Post-Government Employment, Jan. 6, 2004.

Major Legislation

OFFICE OF GOVERNMENT ETHICS AUTHORIZATION ACT OF 1996, PUB. L. 104-179, 110 STAT. 1566 (AUG. 6, 1996)
Amended the Ethics in Government Act of 1978, thereby modifying post-employment restrictions on certain senior and very senior personnel the level of pay applicable with respect to certain senior personnel of the executive branch and independent agencies.

PUB. L. 104–106, DIV. D, TITLE XLIII, § 4304(B)(1), 110 STAT. 664 (FEB. 10, 1996)
Repealed 10 U.S.C. §§ 2397-2397c, which forced DoD to kept statistics of former civilian and military employees hired by private contractors and thereby ending any transparency of DoD's revolving door.

ETHICS REFORM ACT OF 1989, PUB. L. 101-194, 202, 103 STAT. 1716, AT 1724 (NOV. 30, 1989)
Amended the federal criminal code to revise provisions regarding former officers or employees of the executive branch or the District of Columbia attempting to influence the federal government or the District.

OGE RE-AUTHORIZATION ACT OF 1988, PUB. L. 100-598, 102 STAT. 3031 (NOV. 3, 1988)
Amended the Ethics in Government Act of 1978 to authorize appropriations for OGE for FY 1989 and the five fiscal years thereafter, created OGE as an independent agency within the executive branch rather than under the jurisdiction of OPM, among other procedural requirements.

ETHICS IN GOVERNMENT ACT OF 1978, PUB. L. 95-521, 92 STAT. 1824 (OCT. 26, 1978)
Established the appointment of a special prosecutor to investigate and prosecute violations of criminal laws by high-level officials of the executive branch and specified presidential campaign officials. Created, within the Department of Justice, an Office of Government Crimes to have jurisdiction over crimes committed by Federal officials, lobbying, and conflict of interests.

PUB. L. 87-849, 76 STAT. 1119 (OCT. 23, 1962)
Strengthened criminal laws related to bribery, corruption in government, and conflicts of interest.

Appendix B:

Revolving Door Restrictions by State

Source: Craig Holman, Legislative Representative, Public Citizen (February 2005)

Generally, a revolving door policy prohibits a former officeholder or government employee from lobbying the same agency or the same official actions for a reasonable cooling-off period after leaving public office. Many states (21) have some form of revolving-door policy that restricts lobbying activity for one year or less. Nine states impose a two-year ban on lobbying by some or all of its officials. A few states, such as California and New Mexico, impose a permanent ban for working on identical official actions or contracts that the government officer was personally and substantially involved in while in public service.

Some states (4) apply revolving door restrictions only to the legislative branch, some (4) apply the restrictions only to the executive branch, but most (21) apply the restrictions to both branches of government. More than half the states (26 in all) also apply some form of revolving door restrictions to senior-level government employees. Texas applies its revolving door policy only to executive directors of agencies rather than elected officials. Another 20 states have no revolving door policy at all.

PROHIBITION APPLIES TO LEGISLATIVE OFFICEHOLDERS ONLY (4 STATES)

Alaska (1 year restriction) [§24-45-121(c)]
Hawaii (1 year restriction) [§84-18][137]
Kansas (1 year restriction) [§46-233(b)(c)]
Maryland (through next legislative session) [§15-504]

PROHIBITION APPLIES TO EXECUTIVE OFFICEHOLDERS ONLY (4 STATES)

Nevada (1 year restriction) [§281.236]
North Carolina (6 month restriction) [to be codified]
West Virginia (6 month restriction) [§6B-2-5]
Wisconsin (1 year restriction) [§19.45(8)(b)]

PROHIBITION APPLIES TO BOTH LEGISLATIVE AND EXECUTIVE OFFICEHOLDERS (21 STATES)

Alabama (2 year restriction) [§36-25-13]

Arizona (1 year restriction) [§38-504(a)(b)]
California (1 year restriction) [§87406]
Connecticut (1 year restriction) [§§2-16a, 1-84b]
Florida (2 year restriction) [§112.313(9)]
Iowa (2 year restriction) [§§68B.5A, 68B.7]
Kentucky (1 year for executive official, 2 years for legislator) [§§6.757, 11A.040]
Louisiana (2 year restriction) [§15:1121]
Massachusetts (1 year restriction) [§268A][138]
Mississippi (1 year restriction) [§25-4-105][139]
Missouri (1 year restriction) [§105.454(5)]
New Jersey (2 year restriction) [§§52:13d-17, 52:13d-17.2][140]
New Mexico (1 year restriction) [§10-16-8]
New York (2 year restriction) [§73(8)(a)]
Ohio (1 year restriction) [§102.03(A)][141]
Pennsylvania (1 year restriction) [§1103(g)]
Rhode Island (1 year restriction) [§36-14-5]
South Carolina (1 year restriction) [§8-13-755][142]
South Dakota (1 year restriction) [§2-12-8.2]
Virginia (1 year restriction) [§2.2-3104][143]
Washington (1 year restriction) [§42.50.090, 42.52.080][144]

PROHIBITION ALSO APPLIES TO STAFF IN A DECISION-MAKING CAPACITY (26 STATES)

Alabama (2 year restriction) [§36-25-13]
Arizona (1 year restriction) [§38-504(a)(b)]
California (1 year restriction) [§87406]
Connecticut (1 year restriction) [§§2-16a, 1-84b]
Florida (2 year restriction) [§112.313(9)]
Hawaii (1 year restriction for legislative official only) [§84-18]
Iowa (2 year restriction) [§§68B.5A, 68B.7]
Kentucky (1 year restriction for executive official only) [§11A.040]
Louisiana (2 year restriction) [§15:1121]
Massachusetts (1 year restriction) [§268A][145]
Mississippi (1 year restriction) [§25-4-105][146]
Missouri (1 year restriction) [§105.454(5)]
Nevada (1 year restriction for executive official only) [§281.236]
New Jersey (2 year restriction) [§§52:13d-17, 52:13d-17.2][147]
New Mexico (1 year restriction) [§10-16-8]
New York (2 year restriction) [§73(8)(a)]
Ohio (1 year restriction) [§102.03(A)][148]
Pennsylvania (1 year restriction) [§1103(g)]
Rhode Island (1 year restriction) [§36-14-5]
South Carolina (1 year restriction) [§8-13-755][149]
South Dakota (1 year restriction) [§2-12-8.2]
Texas (2 year restriction for executive directors only) [§572.051]
Virginia (1 year restriction) [§2.2-3104][150]
Washington (1 year restriction) [§42.50.090, 42.52.080][151]
West Virginia (6 month restriction for executive official only) [§6B-2-5]
Wisconsin (1 year restriction for executive official only) [§19.45(8)(b)]

NO REVOLVING DOOR POLICY (20 STATES)

Arkansas, Colorado, Delaware, Georgia, Idaho, Illinois, Indiana, Maine, Michigan, Minnesota, Montana,[152] Nebraska, New Hampshire, North Dakota, Oklahoma, Oregon, Tennessee, Utah, Vermont, and Wyoming.

Endnotes

Introduction: The Revolving Door and Industry Influence on Public Policy

1 CBS News/*New York Times* Poll, July 11-15, 2004; online at http://www.pollingreport.com/institut.htm.

2 Aaron Bernstein, "Too Much Corporate Power?" *Business Week*, September 11, 2000, p.145.

3 "Lobbying From Within" (editorial), *New York Times*, June 17, 2005, p.A26.

4 An unfair advantage can extend beyond the narrow legal definition in 48 C.F.R. § 9.505(b) (2004), which states: "[A]n unfair competitive advantage exists where a contractor competing for award for any Federal contract possesses: 1. Proprietary information that was obtained from a Government official without proper authorization; or 2. Source selection information (as defined in 2.101) that is relevant to the contract but is not available to all competitors, and such information would assist the contractor in obraining the contract."

Chapter 1: The Industry-to-Government Revolving Door

5 In theory, the election of a corporate executive or lobbyist to Congress—for example, Jon Corzine's move from Goldman Sachs to the Senate—could also be considered a case of the reverse revolving door. This chapter, however, will focus on appointed officials in the executive branch, rather than elected officials. We are also not addressing the issue of an appointee's holdings of corporate securities, whicb might make even an official who had not been a business executive or lobbyist more inclined to promote corporate-friendly policies.

6 The presence in government posts not only of corporate executives but also other members of a broader "power elite" was the focus of power-restructure researchers such as G. William Domhoff, author of the 1967 book Who Rules America?

7 For an exhaustive look at both Cabinet and sub-Cabinet appointments in the Reagan Administration, see: Ronald Brownstein and Nina Easton, *Reagan's Ruling Class: Portraits of the President's Top 100 Officials*. Washington, DC: Presidential Accountability Group, 1982.

8 Even by the early 1970s there was evidence that industry veterans were occupying many posts in key regulatory agencies. See: Common Cause, *Serving Two Masters: A Common Cause Study of Conflicts of Interest in the Executive Branch*. Washington, DC: October 1976. This report found, for example, rhat nearly two-thirds of senior personnel in the Nuclear Regulatory Commission had previously been employed by private entities holdings licenses, permits or contracts from the Commission (pp.26-27).

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Chapter 3: The Government-to-Lobbyist Revolving Door

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Chapter 4: The Existing System for Implementing Lobbying Rules and Revolving Door Policies

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123 During congressional hearings on LDA when the law was being considered, Congress understood the significance of the public disclosure requirements of Section 6. Congress was debating the issue of which governmental agency should be responsible for carrying out the disclosure requirements, including the mandate for a modern computerized disclosure system. Neither the Office of Governmental Ethics nor the Justice Department wanted the task of serving as the lobbyist filing and disclosure agency for LDA. As Stephen Potts, Director of the Office of Governmental Ethics testified in 1993: "We do not currently have the experience or equipment contemplated in the legislation for computer services necessary to handle this volume of lobbyists' reports, nor to service the volume of requests for information likely to result because of the high visibility of the issue of lobbyists' registrations." The Federal Election Commission (FEC), however, was willing to carry out the mandate of public disclosure of lobbyist financial reports.

Scott Thomas, Chair of the FEC, testified that the elections agency was quite prepared to take over the filing and disclosure responsibilities of the Act. Thomas observed that: "All these functional activities (disclosure requirements) are requirements for regularing campaign finance, and we already have developed the type of staff expertise, procedures, physical plant, and information technology necessary to meet these core elements of the bill....This parallel is recognized in the bill in section 6 which requires the proposed Department of Justice Office of Lobbying Registration and Public Disclosure to set up computer systems 'compatible with computer sysrems developed and maintained by the Federal Election Commission ... [so] that information filed in the two systems can be readily cross-referenced.' It srrikes us easier for all parties concerned if all interested parties can deal with one agency with familiar faces and consistent rules and procedures."

In the end, the filing and disclosure responsibilities were given to the House Clerk and the Senate Secretary. Since that time, the FEC has developed a stellar electronic reporting system of campaign finance reports that is searchable, sortable and downloadable, which minimizes the burden on filers and maximizes public access to the records. See Craig Holman, "Origins, Evolution and Structure of the Lobbying Disclosure Act"; online at www.citizen.org (May 4, 2005).

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Conclusion

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Appendix B

137 Hawaii – restriction applies only to involvement in any contract funded while serving in office.

138 Massachusetts – restriction applies only to issues upon which the official worked during the last two years while in office.

139 Mississippi – restriction only applies to contracts upon which the officials worked while serving in office.

140 New Jersey – restriction applies to officials working on behalf of the casino industry for two years after leaving office. Lifetime ban for officials lobbying on behalf of prior actions affecting a business in which the former official owns 10% interest or more.

141 Ohio – restriction applies to legislative officials lobbying the legislature; executive officials lobbying issues upon which they had worked while in office.

142 South Carolina – restriction applies only to issues upon which the official worked while serving in office.

143 Virginia – restriction applies only to issues upon which the official worked while serving in office.

144 Washington – restriction only applies to contracts upon which the officials worked in the last two years while serving in office.

145 Massachusetts – restriction applies only to issues upon which the official worked during the last two years while in office.

146 Mississippi – restriction only applies to contracts upon which the officials worked while serving in office.

147 New Jersey – testriction applies to officials working on behalf of the casino industry for two yeats after leaving office. Lifetime ban for officials lobbying on behalf of prior actions affecting a business in which the former official owns 10% interest or more.

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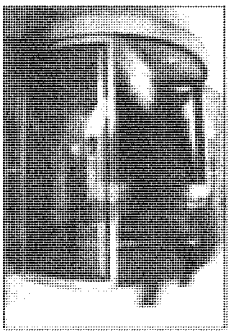
149 South Carolina – restriction applies only to issues upon which the official worked while serving in office.

150 Virginia – restriction applies only to issues upon which the official worked while serving in office

151 Washington – restriction only applies to contracts upon which the officials worked in the last two years while serving in office.

152 Montana – former public employees may not "take direct advantage, unavailable to others, of matters with which the officer or employee was directly involved..."



REVOLVING DOOR WORKING GROUP

...committed to increasing public confidence in government

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Mr. HOLMAN. One of the first issues which both the witnesses here brought up already is the revolving door. The term revolving door is when corporations or other special interests develop a very close relationship with Government through the moving of key individuals back and forth between the private sector and the public sector. Efforts to regulate the revolving door, the current efforts, have fallen short on at least three different reasons.

First, the recusal requirements for former private sector employees who are now public officials with oversight over their same businesses are very weak, often allowing a newly appointed official to take actions that affect their former employers. In many instances, recusal is merely advised. It is not mandatory. It is up to the official him or herself to determine whether or not an actual conflict of interest exists and the conflict can be easily waived by the ethics officer of that particular division.

One of the second problems is, thought there is a 1-year cooling off period prohibiting procurement officers from taking jobs with companies that they have issued contracts to, it applies only to divisions within the same company, not the company itself. And third, while Federal law prohibits former covered officials from making direct lobbying contacts for 1 year, it does not apply to lobbying activities as defined by the LDA. Lobbying activities includes engaging, organizing, strategizing, overseeing the entire lobbying drive itself. And that is not subject to the cooling off period, which allows former officials to immediately spin through the revolving door and become lobbyists, registered lobbyists or conducting lobbying activity.

The executive branch Reform Act goes a long way toward helping address these problems in the executive branch. First of all, it strengthens recusal requirements, which is excellent. Third, it prohibits negotiating future employments by public officials with companies that have business pending before them. And third, it does extend the revolving door lobbying contact prohibition from 1 year to 2 years.

Public Citizen encourages the committee to consider some strengthening amendments beyond that. Most importantly, extend the scope of the revolving door prohibition to include a very narrow definition of lobbying activities: those activities that are done specifically at the time with the intent to facilitate a lobbying contact. That should be included within the cooling off period. Second, the cooling off period for former procurement officers should apply company-wide, and not just to divisions within the company.

The second issue that I want to briefly touch upon is ethics oversight in the executive branch. The Office of Government Ethics is charged with ethics oversight, and they are a very professional organization, a very well trained agency. The problem is, they have three structural flaws by statutes. One is they are only advisory agency. They have no actual authority to do much other than advise and try to educate and train the other executive branch officials.

Second, responsibility for ethics is dispersed among more than 6,000 ethics officers within the various agencies of the executive branch. They are the ones who are actually making the decisions on ethics. There is no oversight, there is no uniform interpretation

and application of the ethics rules. And third, OGE does not serve as a clearinghouse for public records. As a matter of fact, they don't even have a public reading room to go there and peruse, for the public to peruse through these records. The executive branch Reform Act does a lot to help strengthen oversight. It does provide a systematic record of lobbying contacts and it strengthens the waiver process for conflict of interest.

But I would like to also recommend that some fundamental restructuring needs to be done with OGE. They need to be made not an advisory agency but an actual watchdog agency that has the authority to promulgate rules and regulations and monitor compliance. No one else is doing this. Second, they must be made into a central clearinghouse for public records. There is nowhere to go to find out what is going on when it comes to ethics and contracting in the executive branch. There is no Web site, there is no library. OGE would be perfectly situated to be that central clearinghouse.

Thank you.

[The prepared statement of Mr. Holman follows:]

Public Citizen 35 YEARS
Protecting Health, Safety & Democracy
Auto Safety Group • Congress Watch • Energy Program • Global Trade Watch • Health Research Group • Litigation Group
Joan Claybrook, President

Testimony of Craig Holman
Legislative Representative, Public Citizen

Before the House Committee on Oversight and Government Reform
On the Subject of the Executive Branch Reform Act of 2007

Feb. 13, 2007

Chairman Waxman and Ranking Member Davis, I thank you for the opportunity to testify today on behalf of Public Citizen and our 100,000 members.

The lobbying reform debate has thus far largely focused on the lobbying and ethics laws as they relate to Congress. But the debate should go beyond the reporting requirements of the Lobbying Disclosure Act (LDA). It should also include an assessment of the ethical behavior of executive branch officials who become lobbyists, as well as the monitoring and enforcement of executive branch regulations under the Ethics Reform Act.

As documented in *A Matter of Trust*, a report by a coalition of 15 civic organizations, including Public Citizen, known as the Revolving Door Working Group, several issues need to be addressed when it comes to lobbying and ethics reform and the executive branch. I ask that this report be entered into the record as part of my testimony.

Public trust in the integrity of the federal government is alarmingly low. According to polls by CBS News/New York Times,[1] The Gallup Poll[2] and others, the level of trust in the executive branch has reached new lows for the past decade. Both the award of government contracts and formulation of public policy by the executive branch appear to most Americans to be driven by corporate special interests and their paid lobbyists.

This public cynicism is fueled largely by two major lobbying and ethics problems in the executive branch.

The first is the increasingly pernicious problem of a rapidly rotating "revolving door" – defined as the spinning of executive branch officials between public service and the industries they are charged with regulating.

The second issue is inconsistent, and often ineffectual, oversight to ensure compliance with high ethical standards by those running the federal government. Enforcement responsibility for ethics rules

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1 Sebastian Mallaby, "The Decline of Trust," *Washington Post* (Oct. 30, 2006).
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are spread across many agencies within the executive branch, meaning that no single office or agency – such as the Office of Government Ethics (OGE) – is in charge. There is no place in the federal government, nor is there even a Web site, where the public can examine employment and financial records of public officials, investigate which companies were awarded government contracts, or find out who is spinning through the revolving door.

The Executive Branch Reform Act of 2007 offers very constructive lobbying and ethics reforms for the executive branch to slow the revolving door and shine sunlight on the lobbying and ethics of public officials and former public officials.

KEEP THE REVOLVING DOOR FROM SPINNING OUT-OF-CONTROL

Generally, the term "revolving door" is used to describe a system in which corporations and other special interests develop a close relationship with government officials through the movement of key individuals back and forth between the private sector and the public sector. There are three distinct forms of the revolving door:

Industry-to-Government Revolving Door: Appointment of private-sector executives and lobbyists,to posts within government that oversee their former industry or employer creates the potential for bias in policy formulation and regulatory enforcement.

Government-to-Industry Revolving Door: Movement of public officials to lucrative private sector positions in which they may use their public trust (while still in office) and government experience (after leaving public office) to unfairly benefit a new employer in matters of federal procurement, enforcement or regulatory policy.

Government-to-Lobbyist Revolving Door: Movement of former lawmakers and executive-branch officials to jobs as well-paid advocates, often on behalf of the same special interests that previously had business pending before them, who use inside connections to advance the interests of clients.

These revolving doors threaten the integrity of government in at least three ways:

- Business and special interest groups may "capture" a federal regulatory agency by getting their own personnel appointed to key government posts.
- Public officials may be influenced in official actions by the implicit or explicit promise of a lucrative job in the private sector with an entity seeking a government contract or to shape public policy.
- Public officials-turned-lobbyists will have access to lawmakers that is not available to others, access that can be sold to the highest bidder among industries seeking to lobby.

Even if public officials are not in fact influenced by these revolving doors, the appearance of undue influence that these arrangements create casts aspersions on the integrity of government.

Federal law currently requires a one-year "cooling-off" period, in which public officials who leave government are not permitted to lobby former colleagues in government. Additional conflict-of-interest laws and regulations extend similar cooling-off periods to procurement officers to prevent

them from immediately accepting a job with companies that applied for government contracts in their purview.

Specifically, the "very senior" staff of the executive branch – *i.e.*,, those previously classified within Executive Schedules I and II salary ranges – are prohibited from appearing as a paid lobbyist before any political employee in the executive branch for one year. "Senior" executive branch staff – those previously paid at Executive Schedule V and up – cannot, for one year, appear as lobbyists before their former agency or represent or advise a foreign government or foreign political party as to lobbying.

Today's revolving door policy has three very significant weaknesses. First, the recusal requirements are weak, loosely interpreted and poorly enforced, often allowing a public official to take official actions affecting a former employer. Executive branch regulations advise federal employees to avoid "an appearance of a loss of impartiality in the performance of . . . official duties."

One situation in which there is an apparent loss of impartiality is if the employee handles a matter involving a person for whom the federal employee was, within the last year, an "officer, director, trustee, general partner, agent, attorney, consultant, contractor or employee."[3] Yet even in such a case, while the regulations advise recusal, they do not require it. Furthermore, it is the responsibility of every public official to determine when and if there is a potential problem. Even if the official determines a problem does exist, the ethics officer for the agency may overlook the conflict if reassigning official duties is problematic.

Second, the cooling-off period that applies to government contracting is so narrow that former procurement officers can immediately accept a job with the same companies that they issued contracts to while in public service. There is a ban on employment in the specific division of a company if that division was part of the official's contracting authority, but this ban does not extend to employment in the company as a whole. That loophole allowed Darleen Druyun to land a well-paid position at Boeing after overseeing the company's bids on weapons programs for many years in her capacity as a Pentagon procurement official.[4]

Third, while federal law prohibits former covered officials from making direct "lobbying contacts" with former colleagues, it permits them to engage in other lobbying activity. Former officials are not prohibited from developing lobbying strategy, organizing the lobbying team or supervising the lobbying effort during the cooling-off period. They merely are prohibited from picking up the telephone to call a former colleague.

In fact, departing officials frequently join lobbying firms or register as lobbyists immediately upon leaving government service. The Center for Public Integrity surveyed how quickly, and how often, the revolving door turned for the top 100 officers of the executive branch at the end of the Clinton Administration. Tracking the movement of administration secretaries and under-secretaries for each major executive agency, the Center concluded that about a quarter of senior level administrators left public service for lobbying careers. More recently, the Center identified 42 former agency heads that registered as lobbyists between 1998 and 2004.[5]

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[3] 5 C.F.R. 2635.502

[4] Project on Government Oversight, The Politics of Contracting (June 29, 2004).

[5] Elizabeth Brown, More than 2,000 Spin Through the Revolving Door (Center for Public Integrity, 2005).

A recent case in point is as follows. The firm of McKenna, Long and Aldridge began registering former Sen. Zell Miller (R.-GA) as a lobbyist on behalf of clients as early as September 2005, less than a year after Miller left Congress. The lobbyist disclosure reports are too vague to determine whether Miller made lobbying contacts with his former colleagues, or conducted lobbying activities to facilitate those contacts, by the case highlights the failure of the current revolving door restrictions. Public Citizen sent a letter to Speaker Nancy Pelosi (D-Cal.) and Senate Majority Leader Harry Reid (D-Nev.) detailing the incident.[6]

Clearly, the revolving door is spinning out-of-control. The Executive Branch Reform Act of 2007 would dramatically reduce revolving door abuse by:

- Require that former executives and lobbyists who enter government recuse themselves from official actions that specifically affect former employers for two years after leaving their employ.
- Prohibit government officials from negotiating future employment with private businesses that are affected by their official actions, unless waived under exceptional circumstances.
- Prohibit former procurement officers from serving as a "consultant, lawyer or lobbyist" for a contractor under their purview for two years after leaving public service.
- Prohibit former government officials-turned-lobbyists from making lobbying contacts with their former colleagues for two years, rather than the current one year cooling off period.
- Clear all waivers of conflict-of-interest regulations through a single agency – the Office of Government Ethics – and make the request and approval or denial a matter of public record.

Public Citizen encourages the committee to consider some additional protections against revolving door abuse. These include:

- Expand the scope of revolving door restrictions to prohibit former public officials from conducting paid lobbying activity – narrowly defined as activity intended to facilitate a lobbying contact at the time it is being done – during the cooling-off period.
- Apply the cooling-off period company-wide by closing the loophole that allows former government procurement staff to work in the same company that they oversaw as a government employee in a different department or division.
- Keep public records for a reasonable period of time in the Office of Government Ethics, including the employment histories of covered public officials and private-sector career histories of former covered officials.

STRENGTHEN OVERSIGHT BY THE OFFICE OF GOVERNMENT ETHICS

The Office of Government Ethics is executive branch agency charged with ethics oversight. Although the agency is staffed by well-trained, professional ethics officers, the agency's efforts are hampered by three basic structural flaws that are imposed by statute:

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[6] Joan Claybrook and Laura MacCleery, Letter to Speaker Pelosi and Majority Leader Reid regarding lobbying by former Sen. Zell Miller (Feb. 7, 2007).

- OGE acts more as an advisory partner within the executive branch rather than an enforcement watchdog.
- Responsibility for implementation of the executive branch ethics laws and regulations is widely dispersed among the various executive agencies.
- OGE has not been an effective clearinghouse for public records on ethics matters, which are not now readily available to Congress or the public.

Congress should address each of these shortcomings. OGE was created as an independent agency to monitor and implement the ethics laws for the executive branch. The Ethics Reform Act directs OGE to review the financial disclosure forms of presidential appointees, provide ethics training to executive branch officials and oversee the implementation of ethics rules by the agencies. The Ethics Act also requires OGE to provide an advisory service for employees and to publish its opinions.

OGE relies heavily on career professionals to manage the agency and thus is better suited to carry out a mandate for ethics enforcement than are the congressional ethics committees. The Director of OGE is appointed by the president for a five-year term and has a staff of about 80 employees. The agency thus enjoys an appropriate level of professionalism and independence from political operatives in the executive branch and from party leaders.

Nevertheless, OGE is weak and falls far short on its assignment to assure the independence of federal decision-makers. OGE's primary flaw is that it lacks enforcement authority. It acts primarily as an advisory "partner," offering guidelines and ethics training to the executive branch, rather than as a watchdog that determines and implements ethics codes for the executive branch. Its core responsibilities are essentially diffused throughout the federal government, undermining its mission. Its rules are subject to interpretation – and dilution – by the ethics officers of each separate executive branch agency.

Some ethics officers for the various executive branch agencies, according to a study by the Department of Interior Inspector General, lack adequate ethics training.[7] OGE has no statutory authority to impose specific standards for ethics training, as it should have. Moreover, cases that require prosecution are referred to the Justice Department's Office of Public Integrity, rather than being handled by OGE.

This lack of authoritative oversight creates inconsistencies in the implementation of rules from agency to agency. While the OGE does develop guidelines for waivers of conflict-of-interest laws, these are merely guidelines. Each executive agency promulgates its own waiver procedures, which are subsequently interpreted and enforced by the ethics officer from that agency. As a result, there is no single set of procedures to secure a waiver from conflict-of-interest laws, and each set of waiver procedures is interpreted differently by different offices.

As a result of this fuzziness in the core mission of the agency, waivers appear to be routinely granted and rarely, if ever, denied. A Freedom of Information Act (FOIA) request by Public Citizen to the Department of Health and Human Services (HHS) found that from January 1, 2000, through November

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[7] U.S. Department of Interior, Office of Inspector General, Report of Investigations, PI-SI-02-0053-1 (2004).

17, 2004, at least 37 formal requests for waivers from the conflict-of-interest statutes were made. One hundred percent –all 37 – of the requests were granted.[8]

One of the granted waivers sheds light on the serious defects of oversight by the OGE. On May 12, 2003, Thomas Scully, who was then the chief administrator for the Centers for Medicare and Medicaid Services, obtained an ethics waiver from HHS Secretary Tommy Thompson. The waiver allowed Scully to ignore ethics laws that would otherwise bar him from negotiating employment with anyone financially affected by his official duties or authority. The waiver allowed Scully to represent the Bush Administration in negotiations with Congress over the Medicare prescription drug legislation then under consideration, while Scully simultaneously negotiated possible employment with three lobbying firms and two investment firms with major stakes in the legislation. The employment negotiations and the waiver were not revealed to the public or to Congress while the highly controversial legislation was being debated.

Another troubling aspect of the lack of ethics oversight in the executive branch is the absence of a central clearinghouse for information. Although OGE compiles and scrutinizes previous employment records for scores of executive branch appointees and employees, it does not compile these records, nor does it make them available to the public. A FOIA request must be filed with each individual agency to obtain these public records.

The same lack of transparency also hinders disclosure of ethics waivers. There is no OGE Web site with the public records pertaining to prior employment, personal financial statements, conflict-of-interest waivers or, most troublingly, enforcement actions. There is not even a reading room at OGE that would allow the public to peruse these records.

The Executive Branch Reform Act of 2007 helps to strengthen the role of OGE as an oversight agency by:

- Requiring OGE to promulgate rules and procedures to record lobbying contacts with covered officials.
- Establishing OGE as a central clearinghouse for information on lobbying contacts, and requiring that these be made available to the public in a searchable computerized database.
- Requiring that all conflict-of-interest waivers relating to employment be approved by OGE.

Public Citizen further recommends additional improvements regarding ethics enforcement in both the executive branch and in Congress, where the same solution is apt. Congress should create an independent, professional ethics agency with the legal authority and tools to carry out its mandate. This means that OGE should be:

- Given strong enforcement authority with the ability to promulgate rules and regulations that bind all executive branch agencies, conduct investigations, subpoena witnesses, and issue civil penalties for violations.

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[8] Craig Holman, FOIA request regarding waivers from conflict of interest employment restrictions, to the Department of Health and Human Services, Jan. 1, 2000 through Nov. 17, 2004. The letter is on file with the author.

- Required to serve as the central clearinghouse of all public records relevant to ethics in the executive branch and to place this information on its Web site, including records of waivers from conflicts-of-interest that are requested and granted, personal financial statements of appointees, and the career histories of senior executive branch staff who enter and leave public service.

When it comes to ethics problems, the executive branch shares much of the blame for the collapse of public confidence in our government. Two simple but significant steps would go a long way towards restoring public confidence in government. The revolving door must be slowed, and OGE must assume the role of a genuine watchdog over governmental ethics rather than merely as an advisory partner-in-colleague with the executive branch.

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Chairman WAXMAN. Thank you very much.

I want to thank the three of you for your presentation and your suggestions. I think we all look at them very carefully.

Last Congress, when we introduced this bill, we also looked at the contacts that Jack Abramoff and his lobbying team had with the executive branch. We found that there were 485 instances of lobbying contacts that Mr. Abramoff or his associates had with White House officials. These included 185 meetings over meals and drinks, many at expensive restaurants throughout Washington. There were also 82 meetings, phone calls or other interactions with the Office of Senior Advisor to the President, Carl Rove, and 17 such contacts with the White House Office of Political Affairs. That is one thing we found.

Second, we found that there was no record of any of these contacts, and when Scott McClelland, the White House spokesman, was asked about Mr. Abramoff's White House contacts, he asserted "there were only a couple of holiday receptions that he attended, and a few staff-level meetings on top of that." We reviewed the lobby disclosure forms and they provided almost no information. All they said was that members of Mr. Abramoff's team contacted the Executive Office of the President on behalf of certain clients. We had to launch a 7-month investigation simply to understand the number of times Mr. Abramoff and his lobbying team contacted the White House and the issues they were lobbying on.

I feel, and I gather from your testimony you also feel that we need to strengthen current law which is inadequate, insufficient. We need more disclosure about the interactions between lobbyists and executive branch officials.

But some people have said to me, if you have to keep a log of all of these contacts, and it is on the golf course, it is a social reception, people may forget and therefore be attacked as having violated the ethics rules. Does that bother you? What kind of burden will that put on people to keep track of all these casual interactions, which may well be very much a lobbying contact but unexpected, not a set meeting? Dr. Thurber.

Mr. THURBER. It doesn't bother me. In fact, the Abramoff contacts in oral and written communication right now should have indicated the time spent as well as the amount of money spent as well as the subject matter. And it should have included where, according to the law. And that is with respect to the formulation, modification or adoption of Federal legislation and rules, regulations, policies or administration of a Federal program including Federal contract, grant or license.

I want to emphasize that, because there is a whole lot of lobbying going on with contracts in Washington. I have said this before, I think we need to make that transparent. I think that this is a reasonable thing to ask a public official to do in our democracy. It will bring trust and it will bring more transparency so we can ferret out problems.

That is one of the obligations of public service, in my opinion, is to let people know what you are doing. And if it is on a golf course, so be it.

Chairman WAXMAN. Mr. Wertheimer.

Mr. WERTHEIMER. Obviously it is easier to keep track of this information when it is happening in offices. Executive branch officials are going to have schedules of who they met with often. I don't think it is a hindrance to cover other activities. I think every executive branch official should be on notice that if something starts to come up, they can just cut it off and say, I am not here to discuss this. This is not the time or place.

Now, I would also just note for the committee's information that in other aspects of lobbying disclosure laws like, for example, the requirement that lobbying organizations report how much money they have spent in a quarter, the concept of good faith estimate has been used there. That is a little trickier when you are dealing with specific meetings. You could, if you wanted to, try to devise some type of protection there against inadvertent problems for meetings that don't take place in the office.

For us, we are comfortable with the provision the way it is. But we also point out that there are other ways of both imposing this requirement while leaving a little room for inadvertent mistakes.

Chairman WAXMAN. Thank you very much.

Dr. Holman, did you want to comment on that?

Mr. HOLMAN. It is an excellent proposal, as long as it is implemented exactly the way it is intended. The straw man argument that is imposed against reporting of lobbying contacts is some of the examples that you were bringing up, that if I walk through the hallway here as a registered lobbyist and I accidentally run into covered officials, I have to start reporting that I ran into covered officials.

That is not the intent of this, or even at social events, quite frankly. That is not the intent of this sort of lobbying contact disclosure. The intent is to use the definition of lobbying contacts and lobbying activity as defined in the LDA. That is having a contact and a discussion that is specifically designed to promote a particular legislative issue, an actual lobbying contact. It is not burden at all to require lobbyists, and speaking as a lobbyist, to require us to record, or public officials to record contacts we have had with covered officials for lobbying purposes.

I know everyone I run into who I am lobbying. It is no problem for me to record this. And it should not be any problem for anyone else.

I would probably limit it to oral and in-person contacts, as opposed to written contacts. A lot of organizations will send out these fax blasts and stuff. I don't think that is what is intended to be included in that provision.

Chairman WAXMAN. Thank you.

Mr. Davis.

Mr. DAVIS OF VIRGINIA. Thank you. We have gotten some comments from the Office of Personnel Management, and I wonder if you could address them. One of the concerns is a concern of this committee, too, but OPM has recently predicted that a peak of Federal retirements will occur between 2008 and 2010 and that the loss of so many individuals with a deep, ingrained institutional knowledge of their agency has the potential to cause a lapse or pause of service delivery.

The concern is if you were to extend the time from 1 year to 2 years that this would in fact hasten many of these individuals leaving. Their comment is, although these provisions are intended to address recent unethical conduct of Government procurement officials, the provisions may have the unintended effect of harming the career prospects of the overwhelming number of honest, experienced Government employees and encourage such individuals to leave Government service early.

They note that a January 2006 report by the Office of Government Ethics to the President and Congress noted numerous concerns about the impact of laws restricting post-Government employment, including a statement from the National Academy of Science that "The laws restricting post-Government employment have become the biggest disincentive to public service." How do we balance this? I would be very interested in your comments.

Mr. WERTHEIMER. I think the legislation does balance it. The committee report starts off, and you mentioned this, I believe, Mr. Davis, this is a balancing act. You are trying to both protect the integrity of Government decisions and the ability of the public to have confidence that those decisions are being made in their interest with the ability of people to enter and leave the Government.

However, Government service is a privilege. It is not an obligation. When you make a judgment or if you are serving in that position, part of your responsibilities is to do it in ways that protect ultimately the ability of citizens to be confident in how their Government is functioning. The problem raised about, this will affect people potentially prematurely leaving, is a problem that exists at any time that you would make this kind of decision. We think a 2-year period is fair and appropriate. And as you know, there have been longer periods proposed in the past.

So I just, I don't think that argument holds up here. People have to adjust and keep in mind when they join the Government that they are working for the Government under a set of rules that are important for the interests of citizens. I don't think that argument holds up.

Mr. DAVIS OF VIRGINIA. Before you comment, Doctor, let me just throw out this. We sit here trying to recruit very high level professional and technical people. We held a hearing here last week where the Coast Guard got up and said, we outsource because we don't have the in-house capabilities, we can't find the capabilities of getting people in to do some of these high level jobs. And of course, once you outsource it, you lose any kind of control whatsoever. So that is part of the balancing as we look through this in terms of seeing what unintended consequences could result.

Dr. Thurber.

Mr. THURBER. As part of that, just to comment on that, and it has always been this way, it might be with respect to salaries and the fact that contractors pay or think tanks or whoever pays a much higher salary sometimes for people to do the jobs that are needed inside, so people do not want to leave when they have the opportunity to do it through a contract.

I just want to point out that when individuals at a certain level leave Government, they have under the law the obligation to report back to the Office of Government Ethics. They have an ethics offi-

cer for the rest of their life, their professional life now. And the ones that have a lot of integrity continue to ask, is this OK, is this OK.

That is where most of these people are in terms of their own personal ethics. It is the ones that are on the edge that this is about. I think it deals with that.

The same could be said about staff members on Capitol Hill. The comment is that, well, if there is an extension of the 2-year cooling off period, many very fine staff members will leave. I don't think that is a problem. People are in this for public service, they know full well that they are not going to cash in and leave and work exactly on the issues that they were working on on the Hill or in the executive branch. I don't see this as a problem. I think you have balance in the bill.

Mr. HOLMAN. May I add a quick comment to this? I understand it is a balancing act. No one who's pushing for a stronger revolving door restriction is seeking to make anyone unemployable, or to impede employment.

But imagine what is being asked here. The balancing act is in regards to the conflict of interest. A procurement officer, for instance, certainly can go to work for the certain industry in which they may have had regulation over. The conflict of interest is when it involves a specific company in which they had oversight of a contract.

What is being asked by saying, this is an inconvenience, is saying that we should get rid of the policy that prohibits a procurement officer from getting a job with the same company in which they are negotiating a contract or awarding a contract. That conflict of interest is just too grave, and we have seen it abused too often to pretend it doesn't exist.

Chairman WAXMAN. Thank you very much.

Mr. Tierney.

Mr. TIERNEY. Mr. Chairman, I have no questions of the panel. Thank you.

Chairman WAXMAN. Then let's go to Mr. Yarmuth.

Mr. YARMUTH. Thank you, Mr. Chairman. I appreciate the remarks of all the panel.

I have a question about the reporting requirements. I will play devil's advocate for a second. Coming from a media background, I was a journalist for some period of time before entering Congress. I strongly support all transparency initiatives.

Is there a risk here by requiring things, reporting of contacts when anybody trying to influence Government policy, that we are, we would be essentially creating suspicion of something that is a perfectly legitimate activity? When the Congress dealt with problems involving lobbying of Congress, we talked about gifts and trips and improper inducements. We didn't talk about contacts, because we are contacted every day. That is part of our job, to talk to people trying to influence public policy.

So if a public citizen came to lobby me, for instance, and I report that, it is perfectly legitimate, that is what Government is about and lobbying is about, and we are not ready to outlaw lobbying and wouldn't presume to do so. But is there a risk that we are creating

some kind of negative connotation to the actual act of lobbying by enforcing reporting requirements of all contacts?

Mr. THURBER. Under first amendment rights, you had the right to be a reporter and citizens have the right to organize and petition Government for grievances. I think that it is a legitimate activity in this democracy and most citizens know that when they get involved with groups. I think that more transparency but also enforcement of existing law just helps improve trust in Government. And it doesn't create suspicion.

If there is suspicion about a particular activity, then it should be brought out and the media and others should look at it and make a judgment. I don't see this as a problem of creating more suspicion in the administration of programs.

Mr. WERTHEIMER. I would say sure, there is a risk. But the risk is outweighed by the value of transparency. And the transparency problem is a particular problem for the executive branch. I am not just talking about this particular executive branch. We do live in a time where part of the basic concern among citizens is whether people with influence have too much influence and it comes at their expense. I think the process can and will adjust to understanding that people meet with executive branch officials. When question arise out of those meetings, either they will be tied to legitimate concerns or not. And in the end, I just think we have come to a point where we need this kind of transparency for the interest of the public and the executive branch.

So while I don't discount the question you are raising, I do think it is outweighed by the gains that will occur.

Mr. HOLMAN. First of all, I couldn't imagine it being a black mark on anyone's record to be lobbied by Public Citizen. But if it is, the suspicion already exists. And the suspicion is because there are no public records of this. So most Americans believe there is this black hole going on here on Capitol Hill in which lobbyists are manipulating lawmakers and lawmakers are trying to manipulate lobbyists, and it is something going on here in which most Americans will respond to public surveys saying, the Federal Government is being run by lobbyists and special interests and it does not take into consideration my interests. So that suspension is already here, it is already widespread.

If we are going to try to address that type of suspicion, disclosure is the best very first step to take.

Mr. YARMUTH. Well, the followup, and I think I know the answer, but I would like to get it on the record anyway, is why would then we not impose the same requirement on ourselves?

Mr. WERTHEIMER. I think it is something you should consider.

Mr. YARMUTH. Be careful what you ask for, right?

Mr. WERTHEIMER. Yes. And it is an issue faced with respect to the lobbying disclosure bill that will come forward probably next month in the House.

Now, there is an apples and oranges here. You do have to analyze the situations in terms of their own facts. As I think you may have mentioned, you are dealing with constituents all the time. The process in the House is not the same as the executive branch. You have to take recorded votes. You are out with a lot of policy positions. Whatever concerns people may have, the process in Con-

gress is a far more open process than the executive branch decisionmaking process.

On the other hand, there is a question of whether the contacts between people who are being paid to influence Congress should be disclosed, disclosed by the lobbyists, the lobbying organizations. There are various ways of doing that, and there are ways of balancing that. It might be, for example, that if a lobbying organization or a lobbyist contacts your office in a corridor, that ought to be listed, that every single report contact doesn't necessarily have to be listed.

You do have to analyze that problem, in my view, in terms of the Congress, and not just assume it is the same. But it is something that ought to be seriously considered here.

Mr. THURBER. I agree with Fred. I was asked that question before the Senate Rules Committee and the House Rules Committee. I think that it would not be too onerous for you to, as members, record that with respect to paid lobbyists that fit under the Lobby Registration Act. Not all contacts with all kinds of people.

By the way, in terms of transparency, you might look at the transparency in this act with respect to lobbying the executive branch in the same way that Sarbanes-Oxley brings transparency and credibility to the accounting with respect to major corporations. I have worked with the Committee on Economic Development as a business-oriented think tank and they feel that "Sarbanes-Oxley should be applied" in some ways to the lobbying activity. They want even more transparency and recording. That is from a bunch of CEOs from major corporations.

Mr. YARMUTH. Thank you.

Mr. HOLMAN. Just very briefly, if I could——

Chairman WAXMAN. Every question does not have to be answered by every witness, and we have other Members waiting. So if the gentleman will wait and see, maybe you can respond to another question.

Mr. Platts, do you want to ask anything of this panel?

Mr. PLATTS. No questions, Mr. Chairman. I just appreciate all three of our witnesses for their efforts, not just here today in supporting the efforts of a more open and accountable Government, but in their organizations over the course of many years. We appreciate your good work.

Chairman WAXMAN. Thank you, Mr. Platts.

Ms. Watson.

Ms. WATSON. No questions, thank you, Mr. Chairman.

Chairman WAXMAN. Mr. Braley.

Mr. BRALEY. Thank you, Mr. Chairman, Ranking Member Davis.

I believe, Dr. Holman, you were the one who raised the issue of recusals in your testimony, is that correct?

Mr. HOLMAN. Yes.

Mr. BRALEY. And as I understand it, the existing practice is that the agency head or official in question has a self-determination on an appropriate circumstance under which a recusal might be necessary?

Mr. HOLMAN. That is correct.

Mr. BRALEY. Is there no means available for any outside interested party to raise the issue of recusal based upon some of the

same concerns that we have been talking about here today and is that addressed at all under the new legislation that is being considered?

Mr. HOLMAN. As the procedure currently exists, it is the public official's responsibility at first to make any determination whether or not a conflict of interest does arise. There is no mechanism in which there are other avenues for outside persons to try to claim that recusal should have been granted, other than of course trying to go through the press and creating that kind of problem. There is no internal mechanism.

This legislation goes a step further by requiring recusal where such a conflict of interest would exist. It does not in itself establish a procedure in which there would be alternative means of determining that. But merely by the fact of requiring a recusal, the ethics officers are going to be compelled to develop procedures in which it isn't left up to the public official to determine whether a conflict of interest exists.

So at that point, I would suspect the regulations, it would be developed.

Mr. BRALEY. Has Public Citizen, or any other group, to your knowledge, come up with recommended language on how such a procedure could effectively be implemented when such a procedure has existed for many, many years in the judicial system to raise issues of recusal regarding a particular judge that gives parties that opportunity to do so in an environment that is orderly and allows their concerns to be raised?

Mr. HOLMAN. The general procedure that Public Citizen has argued for dealing with the recusal problem is to ensure that there is oversight by a single entity or a single agency. It has to be a determination and a promulgation of rules and regulations set up by an oversight group including over judges. But in the case of the executive branch, we would leave it up to the determination of the Office of Government Ethics to formulate how that sort of recusal process would operate.

The important thing is that it is the responsibility of a single office as opposed to what currently exists where you have literally 6,000 different ethics officers for all the different agencies and departments left with the responsibility to determine what is going on. That is where we have basically chaos when it comes to ethics and ethic oversight. A single agency would help address that problem.

Mr. BRALEY. I am going to address this to the entire panel. Under the section dealing with stopping the revolving door and the prohibition on negotiation of future employment, one of the exceptions provides for waivers under exceptional circumstances. I am just trying to get my head around this concept and ask if you can describe for me potential areas where exceptional circumstances might exist to justify such a waiver?

Mr. THURBER. I was troubled with that. I cannot define that. I would do away with all waivers. Maybe my colleagues could help. But I would just do away with all of them in terms of negotiation for future employment.

Mr. WERTHEIMER. I don't think any of us know the genesis of that provision. And so it is hard to comment on why it is needed

or what specifics it is intended to address. Someone had something in mind in the drafting of that provision. But it does raise the question you raised, what are exceptional circumstances.

Mr. HOLMAN. There is always the conceivable situation in which work has been done by a public official and has to be completed in the next week or 2 weeks or something. So the situation is so immediate that someone else could not possibly step into the shoes. I would imagine that was what was in mind by the exceptional circumstances, although I would really, really strongly urge that any such exceptional circumstances be exceedingly rare in granting any kind of waiver.

Mr. BRALEY. Thank you. I yield back the balance of my time.

Chairman WAXMAN. Thank you very much, Mr. Braley.

Mr. Shays, do you have any questions of this group?

Mr. SHAYS. Mr. Chairman, because I was not here, do you have any other members who can ask questions? Well, then, I would just make the statement, I am happy you are doing this issue, and apologize to our witnesses. I happen to believe one of the best protections of abuse in our Government is to have a strong whistleblower statute. It was one of the things that my subcommittee spent a lot of time on, now Mr. Tierney's committee, spent a lot of time dealing with, is how we protect people who are aware of things that are not happening properly and put an end to it.

Chairman WAXMAN. Thank you very much.

I want to thank the three of you for your testimony. We will certainly look at the recommendations you offered us to improve the legislation. Thank you very much.

We have four witnesses on our second panel. Dr. William Weaver is a distinguished professor at the University of Texas, and is here representing the National Security Whistle Blowers Coalition. NSWBC was created to advocate for an enhanced whistleblower protection for national security, Federal and contractor employees. Nick Schwellenbach is an investigator on the Project on Government Oversight [POGO]. It is known for its expertise in Government oversight and accountability. Tom Devine is the legal director of the Government Accountability Project. GAP, perhaps longer than any other organization, has been advocating for the restoration of Federal employee whistleblower protections. Mark Zaid is an attorney with the law firm of Krieger and Zaid, and has represented numerous whistleblowers. He is a noted expert on the State Secret Privilege issue.

We are pleased to welcome each of you to our hearing today. Your prepared statements are going to be made part of the record in its entirety. What we would like to ask you to do is to summarize in around 5 minutes. But it is our practice to swear in all witnesses that appear before this committee. So if you would please stand and raise your right hands, I would like to administer the oath.

[Witnesses sworn.]

Chairman WAXMAN. The record will indicate that each of the witnesses answered in the affirmative. Dr. Weaver, why don't we start with you?

STATEMENTS OF WILLIAM G. WEAVER, PH.D., ASSOCIATE PROFESSOR, UNIVERSITY OF TEXAS AT EL PASO; NICK SCHWELLENBACH, INVESTIGATOR, PROJECT ON GOVERNMENT OVERSIGHT; THOMAS DEVINE, LEGAL DIRECTOR, GOVERNMENT ACCOUNTABILITY PROJECT; AND MARK S. ZAID, ATTORNEY, KRIEGER AND ZAID, PLLC

STATEMENT OF WILLIAM G. WEAVER

Mr. WEAVER. Thank you, sir. I will be brief.

National security for the last 60 years, at least as it has been employed by the President of the United States, has been ever-expanding and less subject to oversight and many other areas, the executive branch. It has crystallized into a prerogative, really, rather even more that a constitutional right or privilege.

And it has gone from statute, the first statute or the first Executive order that concerned classification of material under Franklin Roosevelt in 1940 was based solely on statutory authorization and then it has gone in the 1960's and 1970's from statutory authorization to constitutional right under Article 2. And then now it is being forwarded, the power of the President, to segment off information from public disclosure or disclosure to Congress based on something that is even beyond a constitutional privilege, which is a right under a theory of the unitary executive, where the President of the United States is first in line ahead of Congress and the Judiciary in the protection of the United States and the public's business.

Congress has made no such progress. The engine of national security has converted the Presidency, the institution of the Presidency, into a 21st century institution. But Congress, at least when it concerns national security, has been a 20th century institution attempting to check the power of a 21st century Presidency.

Secrecy is now a central axis of the executive branch. It is spread to cover many areas that historically have not been subject to secrecy. There are agencies now such as Health and Human Services, Environmental Protection Agency, Department of Agriculture, which have original classification authority which did not have original classification authority until this administration.

And we have seen the use of national security exemption under FOIA in ways that it was probably never intended to be used. Most recently I filed a lawsuit against the DEA under FOIA, and for the first time, as far as I can tell, the DEA is refusing to give part of the information requested on the basis of exemption one, which is the national security exemption under the Freedom of Information Act. In that case, there is no national security matters involved. It was simply a case of criminal nature, where the ICE, Immigrations and Customs Enforcement, was running an informant who, with ICE's foreknowledge, committed up to 12 homicides in Juarez, Mexico.

So national security is being more clearly used to cover up embarrassment rather than protect the Nation from attack or from divulging information that would help our enemies.

You guys play for the Article One team. And for recent years, Congress has been batting for the Article Two team to some degree. This legislation that has been introduced by the chairman and by

other members of the committee is an excellent step in the right direction. There are a number of very good aspects to the legislation, the Whistleblower Protection Enhancement Act Of 2007, first as the extension of protections to intelligence and counter-intelligence employees, which has not happened before. Historically, those agencies have been exempted from giving protection.

Second, the statute prohibits denying, suspending or revoking a security clearance in reprisal for whistleblowing. This is a direct and welcome challenge to one of the main tools intelligence and counter-intelligence agencies employ against whistleblowers. People are held hostage by their jobs, their security clearances, and have to choose between their careers and their conscience.

Likewise, the time requirements that are in the statute are very good, because they help move along the process which historically has been plagued by delay. And finally, the extension of protection to employees in non-covered agencies who are seeking to disclose wrongdoing that requires divulgence of classified or sensitive material is also an excellent provision of the statute. All in all, it's a very good statute, which the NSWBC happily supports.

Unfortunately, there are several things in the statute that are problematic. First is that what is an authorized Member of Congress to receive information that is classified. The term authorized will be interpreted by the executive agencies to mean those Members of Congress who have been cleared to receive the information from the whistleblower.

In the past, there have been problems that have arisen because the executive branch believes that it has plenary control over classified information and therefore it is within the executive branch's purview to determine who is authorized. Recently, in a NSA whistleblower case, the NSA whistleblower was told that he could not divulge information even to the House Permanent Select Committee on Intelligence or the SSCI, because they had not been cleared. They were not authorized to receive that information. So authorized Member of Congress creates one difficulty, perhaps.

The second matter is that all circuits review should be in the legislation. It shouldn't be solely confined to the Federal circuit, I believe, because the Federal circuit has been unfriendly, to say the least, to whistleblowers.

Finally, the State Secrets Privilege, the way the bill attempts to handle it, it allows for resolution in favor of the plaintiff of any particular issue or element that is challenged in a lawsuit by the State Secrets Privilege. But it doesn't seem to deal with cases where the Government says that the whole lawsuit should be thrown out, because the State Secrets Privilege requires dismissal, because the very nature of the suit is secret. So we have suggested in our testimony language from the National Whistleblowers Center and language from us, the National Security Whistle Blower Coalition, to fix that problem.

[The prepared statement of Mr. Weaver follows:]

House Committee on Oversight and Government Reform

Whistleblower Protection Enhancement Act of 2007

Testimony of William G. Weaver, J.D., Ph.D.

Senior Advisor, National Security Whistleblowers Coalition

Associate Professor University of Texas at El Paso*

Inst. for Policy and Econ. Development and Dept. of Political Science

February 13, 2007

The term "whistleblower" is connected in the public's mind to words and phrases used to villainize those who disclose information to the detriment of an organization or betray their associates. "Informants," "snitches," "rats," "tattle-tales," "stool pigeons," "back stabbers," "squealers," "traitors," "turncoats," "double crossers," "narcs," and "finks" all turn on their organizations, associates, or their groups by exposing embarrassing information or evidence of crime. Sometimes the words are doubled up for added emphasis, as in "ratfink" or "back-stabbing traitor." Sometimes simply the names of historical figures instantiate the ideas of organizational apostasy and traitorous acts: "Brutus," "Judas," "Quisling," "Benedict Arnold."

The emotion behind the terms describing those who turn against and undercut their organizations, whether those organizations are as large as a culture or as small as a street gang, is often a combination of loathing and disgust. These informers divest themselves of trust, community, and friends to expose the truth. But the pejorative terms mentioned above originate in the perspectives of those within the organization, those who feel or fear the consequences of the betrayal and have little interest in understanding or plumbing the reasons for the acts. Against these impulses, Americans are famous for transforming "betrayal" of the group into heroism when the well-being of society is served.

Americans frequently deify the person who pursues truth or right against the perverse and illegal actions of a group. In film and literature, those who stand up against the group are usually portrayed as heroic and courageous and emblematic of the ideal citizen. In Serpico, The Insider, Silkwood, and The Pentagon Papers people of rare

courage turn against their corrupt organizations for the benefit of society. Thomas More, Peter Zenger, Jane Addams, John Scopes, Sojourner Truth, Zero Mostel and many others have been immortalized for risking their well-being in the service of truth; in the service of all in society rather than for the few in an organization.

Whistleblowers are those who "commit the truth" to their detriment and for the benefit of society. Whistleblowing is a metaphorical suicide, hence the term "committing the truth." But the effects are anything but metaphorical. If death is a passing to a new life, so too usually is whistleblowing. Their sacrifice for society costs them their careers, skills, friends, families, wealth, and sometimes their sanity. To those who understand sacrifice, the term "whistleblower" connotes rectitude, courageousness, justice, and self sacrifice, while to agency managers whistleblowers are "traitors" or "disgruntled employees." Getting past the term is a job in-and-of-itself, for it imports both negative and positive connotations and spawns ambivalence. Our political leaders, at least, must get past that hurdle and see the reality, see the people, see the pain, see the heroism, and see the patriotism of whistleblowers. Whistleblowers are brutalized by their own government, by other public servants with less fidelity to the United States and its people than to the masters they serve and their career ambitions.

The very people appointed to protect whistleblowers historically have no loyalty to the truth or to the good of society. The Office of Special Counsel, ostensibly the chief mechanism of protection for whistleblowers, is a hopeless failure. From the beginning it has been controlled by the desires of executive agencies and presidents and has never had the objective distance to perform its functions as intended by Congress. Early in OSC's history, one Special Counsel referred to whistleblowers as "severed heads," "uninformed, disgruntled or disaffected," "carrying bags and walking up and down Constitution Avenue," "blackmailers," and "malcontents."[1] That ill-perception continues to this day. I have heard whistleblowers referred to as the "undead," people "staggering toward the graveyard," "dead men (or women) walking."

References to death in describing whistleblowers are ubiquitous. Whistleblowers are isolated, shunned, and "killed" within their organizations. Their friends are warned not to interact with them and management exerts its control over a whistleblower's

[1] Westlaw 131 Cong. Rec.H 6407-02

colleagues by threat and intimidation that they will suffer the same fate as the whistleblower if they do not conform to agency desires. The whistleblower is a spectacle inside the organization, an object lesson put on display but disconnected from organizational functions; he or she becomes an "undead" warning to others not to commit the truth. But if this is what happens to the "average" whistleblower, the fate of the national security whistleblower is even worse.

NATIONAL SECURITY WHISTLEBLOWERS

National security whistleblowers are at even greater danger and with less protection than whistleblowers in other settings. At least in the non-national security setting the federal whistleblower has access to some process and may resort to publication and news media, fully consult counsel, and access evidence relevant to his or her case. But national security employees are ensconced in secrecy. They are hemmed in by security clearances and access, threats of criminal prosecution, and non-disclosure and pre-publication review agreements.

The term "national security" has become talismanic, parting the courts and Congress like Moses did the Red Sea. But the term has become a hopelessly ill-defined, ever-expanding tool of executive branch avoidance of accountability. Sidney W. Souers, the first Director of Central Intelligence, wrote that "'national security' can perhaps best be understood as a point of view rather than a distinct area of governmental responsibility."[2] But it is a "point of view" that Congress has left solely to the President and executive agencies. "National security" has been an engine of modernization and transformation for the presidency, but Congress has not seen a concomitant evolution of its power. Accordingly, concerning national security, Congress remains a 20th Century institution attempting to check the power of a 21st Century presidency.

Over the last several decades, Congress has acquiesced to or helped create new institutional structures in the executive branch under the banner of "national security" without assuring that these changes are subject to effective oversight. These failures merely continue a long-standing habit of Congress to flee from matters of national

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[2] "Policy Formulation for National Security," *The American Political Science Review* 43, No. 3, June (1949): 534-543, at 535.

security. In the first executive order to direct classification procedures concerning national security information, President Franklin Roosevelt drew only on statutory authority.[3] Later presidents relied on their constitutional powers for classification authority, and today President George W. Bush relies on a theory of inherent presidential authority and a unitary theory of the presidency that puts the president before the Congress and the judiciary in constitutional importance.

Now presidents claim that they have plenary, unshared power over classification of information and over the control of access to that information. Congress has all but capitulated to this claim. With the expansion of secrecy and the national security state, this means that the power of the executive branch is aggrandized at the expense of Congress and the courts. Secrecy has become a central axis of executive branch policy and original classification power has been extended by President Bush to agencies historically without such authority. The Environmental Protection Agency, Department of Agriculture, and Health and Human Services, for example, now have original classification power. Such expansion of secrecy is paired with an equal reduction in congressional capacity for oversight.

Ironically, congressional efforts originally intended to exercise accountability over national security agencies are turned against their original intentions. Most notably, the select committees on intelligence, designed for oversight of executive branch activity, are often complicit in efforts by agencies to keep embarrassing matters, criminal activity, and constitutional violations not only from the public but from the rest of Congress. Since Congress has refused to challenge presidents over their claims of unfettered control of classification and access, the oversight function of Congress depends on the largesse of the executive branch. Surely, this is not what the Constitution requires or needs.

One of the few, and often the only, means for Congress to learn about the cloistered world of national security operations is through the whistleblower. Congress relies on whistleblowers to aid in its oversight functions, but has done little to keep those whistleblowers from being torn apart by the system in which they work. As secret government expands, the need for national security whistleblowers increases proportionally. If Congress will claim no power to exercise control over national security,

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[3] Executive Order 8381 (1940).

then the least it must do is to encourage those to come forward who are aware of criminal acts, waste, gross incompetence and abuse by agencies. This encouragement can only come in the form of protection against agency retaliation through the creation of credible and efficient means of repair available to the whistleblower. It is dramatic to say, but true, that with developing technology and the amount of injury a few determined people can wreak on our society our survival may well depend on whistleblowers who come forward to help expose serious deficiencies with respect to the security of this nation.

Presently, national security whistleblowers face insurmountable obstacles to righting the wrongs they suffer:

- They may not communicate openly with their attorneys, since most or all of the relevant evidence concerning their cases will be classified
- They will generally not have access to documents necessary to prove elements of their cases, and whatever information whistleblowers may recall will not be allowed into evidence
- The state secrets privilege is used to shut down admission of evidence and to terminate legal action
- Exemption One under the Freedom of Information Act is used to prevent litigants from gaining access to crucial evidence via FOIA
- Non-disclosure agreements are used to threaten and intimidate whistleblowers who file complaints or wish to discuss their cases with the media
- Pre-publication review is used to excise material from writings; ofttimes not for national security concerns but for fear of embarrassment or disclosure of criminal acts
- National security whistleblowers are threatened with criminal prosecution for disclosing classified material, and since material may be classified retroactively a whistleblower can never be sure that the unclassified utterance he or she makes today will not be classified tomorrow. The moving line of classification is controlled at will by executive agencies.
- Computers and other personal property of whistleblowers, their counsel, and even reporters writing about such cases are subject to seizure on the flimsiest of justifications

• Even if a whistleblower gets a case to court, he or she is likely to face a judge who prostrates him or herself before the claim that the case cannot go forward for reasons of "national security"

WHISTLEBLOWER PROTECTION ENHANCEMENT ACT OF 2007

The proposed legislation as it regards national security whistleblowers is a welcome foray into what is normally an area of unchecked, unaccountable executive power. The legislation is a commendable effort by Chairman Waxman and members of this Committee. It is notable for several reasons.

First, the extension of whistleblower protection to employees in intelligence and counter-intelligence agencies and civilian contractors would substantially aid Congress in its ability to discover and inspect questionable activity in the operations of agencies and the awarding and execution of government contracts. Particularly noteworthy is that demotion, discharge, and other discriminatory acts by agencies in retaliation for national security whistleblower disclosures would be prohibited. Heretofore, intelligence and counter-intelligence agencies have been exempted from complying with statutory whistleblower protection.

Second, the statute prohibits "denying, suspending, or revoking a security clearance" in reprisal for whistleblowing and requires agency action against employees' security clearances to be based solely in legitimate concerns for national security. This is a direct and welcome challenge to one of the main tools intelligence and counter-intelligence agencies employ against whistleblowers.

Likewise, the time requirements for inspectors general and administrators to investigate, report on, and accept or deny complaints of retaliation will help prevent the excessive delay that presently plagues the handling of whistleblower claims.

Finally, the extension of protection to employees in non-covered agencies seeking to disclose wrongdoing that requires divulgence of classified or sensitive information is an important means of preserving Congress' power to inspect, evaluate, and oversee agency conduct.

Despite the virtues described above, the statute has substantial weaknesses that should be remedied before it is introduced. The expansion of the number of committees

and congressional members "authorized" to receive classified information from whistleblowers is a significant move in the right direction. But protection against reprisal for disclosing covered information "to an authorized Member of Congress" is a hollow promise at best and a siren lure to catastrophe at worst. Since Congress has not challenged executive branch power to control access and dissemination of national security information, just what constitutes an "authorized Member of Congress" is wholly at presidential discretion either before or after the fact of disclosure. In any particular case, the president or affected agency may conclude that no member of Congress has the requisite authorization to receive information that would aid Congress in its constitutionally mandated duties of oversight.

Since classified information comes with numerous control caveats and dissemination limitations, it is insufficient to meet the floating standard of "authorized" that a Member of Congress receiving the disclosure merely have a security clearance. An agency may after the fact simply assert that the disclosure was unauthorized and retaliate against the whistleblower. Or, in more ominous fashion, the agency may threaten would-be whistleblowers, intimidating them into silence. Such intimidation frequently frustrates congressional efforts to get at the truth of executive branch misbehavior.

This issue recently arose in respect to the National Security Agency. In a letter to a former NSA intelligence officer and whistleblower, Renee Seymour, Director of NSA Special Access Programs Central Office, wrote that "neither the staff nor the members of the HPSCI or SSCI are cleared to receive the information covered by the SAPs." The letter contained an implicit threat of criminal prosecution if the former employee did not yield in his attempts to make disclosures to members of Congress. There is simply nothing to prevent agency determinations that disclosures will be or have been made to "unauthorized" members of Congress. In this regard, it would be well for the statute to clearly set out Congress' constitutional power to receive information necessary to its oversight functions. It would also be wise if the statute contained a guarantee of immunity against criminal prosecution for the disclosing employee. Language in the statute should direct that, "No covered employee under this provision shall be criminally charged or prosecuted for any disclosure, or attempted disclosure of covered information to a Member of Congress."

Second, the Federal Circuit has had sole jurisdiction over whistleblower appeals, and it has been no friend to whistleblowers. The proposed legislation does not address this problem. As it is now, a single set of judges control a discrete area of law. The leavening effects of all-circuit review would surface continuities and disagreements in law across jurisdictions, providing a richer environment for law to move to agreement through the participation of many skilled judges.

Third, our friends at the National Whistleblower Center rightly point out a problem with the proposed language concerning the state secrets privilege. The draft statute states that, "if the assertion of [the state secrets] privilege prevents the plaintiff from establishing an element in support of the plaintiff's claim, the court shall resolve the disputed issue of fact or law in favor of the plaintiff." This language does not seem to address those cases where the government moves for dismissal of the entire case based on the state secrets privilege. The government may seek dismissal of the action under the mosaic theory, as it did in Sibel Edmonds' case and many other cases. As Mr. David Colapinto of the NWC puts it, "in other words, the language does not address how the government will likely attempt to use the privilege; the government will likely argue that the scope of the privilege is much broader than an element or elements of the plaintiff's claim. For example, what if the government argues dismissal is required to protect the revelation of state secrets privileged information that would be encompassed by the government's affirmative defense, or the plaintiff's rebuttal to the defense." Therefore, one of two possible additions should be made to the proposed statute. The first is suggested by the NWC and the second by the NSWBC:

> 1) "An executive branch agency may not move to dismiss a claim under this provision based on any assertion of privilege, but may request and obtain special procedures from the court in order to protect classified or secret information."

Or

> 2) "If a court finds under this provision that a defendant agency's assertion of privilege is properly raised, and that privilege would otherwise warrant dismissal of the action, then judgment shall be made in favor of the plaintiff."

*The opinions expressed here are those of William G. Weaver and the National Security Whistleblower's Coalition and are not to be construed as reflecting the opinions or policy of the University of Texas at El Paso or any of its component units or personnel.

Chairman WAXMAN. Thank you very much, Dr. Weaver.
Mr. Schwellenbach.

STATEMENT OF NICK SCHWELLENBACH

Mr. SCHWELLENBACH. Chairman Waxman, Ranking Member Davis and other members of the committee, thank you for inviting me to testify today in support of the Whistleblower Protection Enhancement Act of 2007. I am Nick Schwellenbach of the Project on Government Oversight, an independent non-profit that investigates and exposes corruption and other misconduct in order to achieve a more accountable Federal Government.

POGO is also part of the Make it Safe Coalition, a coalition of groups that work with whistleblowers and seek to improve their protection from retaliation. I am also on the steering committee of openthegovernment.org, a bipartisan coalition of groups that seek to reduce excessive Government secrecy. I would like to thank Waxman, Platts and Shays for their leadership on this issue.

I would also like to congratulate your committee's efforts to put teeth into the Whistleblower Protection Act. These efforts lay the groundwork for effective Government accountability. This is an important hearing and whistleblower protections need to be greatly improved if the executive branch, regardless of who is in the White House, is to be held accountable by the legislative, as our Nation's founders intended.

While whistleblower protections are commonly viewed as rights for Federal employees, they are more than that. Whistleblower protections also protect Congress's rights, the right to know the actions of the Executive, to oversee implementation of law, and to fulfill its constitutional obligations as a separate and co-equal branch of Government.

The free flow of information from Government employees to Congress enables the Congress to fulfill its duty of overseeing the Executive, as I stated before. But the Executive, as my colleague Bill Weaver has just mentioned, has been increasingly assertive in telling Congress that it does not have the right to receive information, especially from disclosures made outside of official channels.

In the realm of national security, the Executive has long argued that it has exclusive control over classified information and that its employees may not provide this information to Congress without approval. But the Executive has gone even further by advancing the constitutionally questionable unitary executive doctrine in a dangerously expansive and overreaching interpretation of executive privilege.

In 2003, a highly publicized and troubling event concerned the silencing of Centers for Medicare and Medicaid Services' chief actuary, Richard S. Foster, on the cost of the Medicare prescription drug plan. Foster was threatened with termination for speaking to Congress. Both the CRS and GAO issued legal opinions finding that the effort to silence Foster was an unlawful violation of the Lloyd LaFollette Act of 1912. In order to assert its unassailable right to oversee the Government, Congress has since 1988 approved so-called anti-gag provisions and annual appropriations bills that prohibit managers from silencing whistleblowers. Recently, many air marshals at the Federal Air Marshal Service have told

us about a troubling trend of management retaliating against them for their communications with Congress. One air marshal, P. Jeffrey Black, made disclosures which sparked a major House Judiciary Committee investigation last year.

And another case, which we should all being paying attention to, occurred over 10 years ago. Richard Barlow, a Defense Department analyst, who was unraveling the AQConn network in the late 1980's, had a security clearance revoked for simply suggesting that Congress be informed that Pakistan was peddling nuclear wares across the globe. He was then fired. He did not go to Congress initially, he just suggested the idea of doing so, because there was a law which made arms sales to nations that were engaged in nuclear proliferation illegal.

We are pleased that the legislation before you makes these agency policies which silence employee communications with Congress illegal, but more should be done to ensure enforcement, which they have never been enforced, these anti-gag statutes. Passed in 1989, the Whistleblower Protection Act was intended to provide a mechanism for civil service employees to challenge retaliation and disclose waste, fraud and abuse. But despite the rights the act provides on paper, it has suffered from a series of crippling judicial rulings that are inconsistent with congressional intent and the clear language of the act.

The Federal Circuit Court of Appeals currently is the only court that can hear an appeal from the Merit Systems Protection Board. And it is clear from the Federal Circuit's hostile rulings and the 2 to 177 track record against whistleblowers that it is time to end its monopoly on jurisdiction.

More significantly, the act has failed because the agencies tasked with implementing the promise of whistleblower protections, the Office of Special Counsel and the MSPB, have been utter failures since their founding. We defer to our colleague, Tom Devine, from GAP, to speak more in-depth on this issue.

This bill will undo the crippling judicial decisions, but it keeps jurisdiction in the Federal circuit's hands. We also urge the committee to provide judicial review by all circuits, thus ending the Federal circuit court's decades-long monopoly and ensuring that vigorous judicial opinions are rendered from U.S. district courts nationwide.

We are also pleased that your bill extends protections to TSA screeners, FBI and intelligence agency employees. These are true post-9/11 reforms, long overdue. Also overdue are whistleblower protections for Government contractor employees. Spending on Government contractors has doubled in recent years from $219 billion in 2000 to roughly $382 billion in 2005. A recent New York Times article noted "Contractors Sit Next to Federal Contractors at Nearly Every Agency." Far more people work under contracts than are directly employed by the Government.

Also, we are pleased that the legislation provides for a GAO study on security clearance revocations, which are currently not covered by the Whistleblower Protection Act. With that, I would like to finish my testimony. Thanks.

[The prepared statement of Mr. Schwellenbach follows:]

Testimony of
Nick Schwellenbach, Investigator
Project On Government Oversight (POGO)
before the
House Oversight and Government Reform Committee

"Examining the Executive Branch Reform Act of 2007
and the
Whistleblower Protection Enhancement Act of 2007"

February 13, 2007

Chairman Waxman, Ranking Member Davis, and other members of the committee, thank you for inviting me to testify today in support of the "Whistleblower Protection Enhancement Act of 2007." I am Nick Schwellenbach with the Project On Government Oversight (POGO), an independent nonprofit that investigates and exposes corruption and other misconduct in order to achieve a more accountable federal government. I am also on the steering committee of OpenTheGovernment.org, a bi-partisan coalition of organizations that seeks to reduce excessive government secrecy and supports whistleblower protections.

During POGO's 25-year history, we have worked with whistleblowers and government officials to shed light on government activities and systemic problems that harm the public. During that period, we estimate that the organization's work with whistleblowers has resulted in $80 billion in savings to the taxpayer.

In recent years, our organization's accomplishments include improving security standards at the nation's nuclear facilities, strengthening protections against government contractor waste and fraud, preventing cases of excessive government secrecy, recovering millions of dollars in unpaid fees for drilling on federal land, and helping to climinate wasteful spending. Without exception, our organization's accomplishments would not have been possible without the assistance and expert guidance of government insiders and whistleblowers.

First, I would like to congratulate the committee's bi-partisan efforts to put teeth into the Whistleblower Protection Act (WPA). Your efforts are an inspiration to all of Congress and are laying the groundwork for effective government accountability. This is an important hearing,

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and whistleblower protections need to be greatly improved if the Executive Branch—regardless of who is in the White House—is to be held accountable by the Legislative Branch, as our nation's founders intended.

While whistleblower protections are commonly viewed as rights for federal employees, they are more than that. Whistleblower protections also protect Congress' rights—the right to know the actions of the Executive Branch, to oversee implementation of law, and to fulfill its constitutional obligations as a separate and co-equal branch of government.

Since 9/11, many Americans have recognized that whistleblowers are crucial to our nation's security, safety, and success. Meanwhile, the number of government employees raising concerns and seeking protection from retaliation by their bosses has dramatically increased.

According to a 2004 study by the Government Accountability Office (GAO), civilian whistleblowers have come forward in greater numbers since 9/11 – almost 50% more have sought protection annually from one key whistleblower protection agency, the U.S. Office of Special Counsel (OSC). According to that report, "officials stated that the large increase was prompted, in part, by the terrorist events of September 11, 2001, after which the agency received more cases involving allegations of substantial and specific dangers to public health and safety and national security concerns."[1]

These brave, conscientious federal employees mistakenly believed that a safe harbor existed for them and that the issues they raised would be addressed.

Under Assault: Communication with Congress

The free flow of information from government employees to Congress enables the Congress to fulfill its duty of overseeing the Executive Branch. Congress' right to information from the Executive Branch is recognized as "clear and unassailable"[2]: The Supreme Court has called that right "inherent" in legislative oversight or investigations and "essential" to Congress' function as a legislative body.[3]

In fact, Congress has a long history of successfully rooting out waste, fraud, and abuse in the Executive Branch by receiving whistleblower disclosures. But the Executive Branch has been increasingly aggressive in asserting that Congress does not have the right to receive information,

[1] GAO, "U.S. OSC: Strategy for Reducing Persistent Backlog of Cases Should be Provided to Congress," March 2004. http://www.gao.gov/new.items/d0436.pdf
Retrieved April 27, 2005.

[2] CRS, Memorandum, "Agency Prohibiting a Federal Officer from Providing Accurate Cost Information to the United States Congress," April 26, 2004.
http://www.pogo.org/m/gp/wbr2005/AppendixD.pdf

[3] CRS, Memorandum, "Agency Prohibiting a Federal Officer from Providing Accurate Cost Information to the United States Congress," April 26, 2004.
http://www.pogo.org/m/gp/wbr2005/AppendixD.pdf

particularly disclosures made outside of official channels. Hundreds of years of experience have shown that government agencies seek to hide rather than address their shortcomings.

Particularly in the realm of national security, the Executive Branch has argued that it has exclusive control over classified information and that its employees may not provide this information to Congress without approval. For example, the Clinton-era Office of Legal Counsel in the Justice Department maintained that a Senate bill to give intelligence community whistleblowers the right to directly disclose wrongdoing to Congress was "unconstitutional because it would deprive the President of the opportunity to determine how, when, and under what circumstances certain classified information should be disclosed to Members of Congress—no matter how such a disclosure might affect his ability to perform his constitutionally assigned duties."[4]

Recently, however, the Executive has gone even further by advancing the constitutionally questionable unitary executive doctrine. This doctrine argues for aggressive Executive interpretation of what the law is and for sole Executive authority over many areas where Congress also shares constitutional responsibility. The Executive has also articulated a dangerously expansive and overreaching interpretation of executive privilege, a doctrine which the Executive Branch invokes to resist Congressional requests for documents. Although the Bush Administration has been the first to explicitly cite the unitary executive doctrine by name -- which it has done dozens of times in signing statements and other documents—it has only expanded on a trend that was greatly advanced by prior Administrations. As former Bush Administration official James F. Blumstein wrote in a *Duke Law Review* article, the Clinton administration accepted and perfected "the Unitarian premises of the Reagan and Bush Administrations."[5]

The Constitutional basis for Congress' authority to access Executive Branch information is rooted explicitly and implicitly in Article I provisions, which grant to Congress: the power of the purse; the power to organize the Executive Branch; the power to make all laws for "carrying into Execution" Congress' own enumerated powers as well as those of the Executive; the power to confirm officers of the United States; the power of investigation and inquiry; and the impeachment and removal power. There are numerous laws Congress has passed and the President has signed which only augment Congress' authority to receive and request information from the Executive Branch.

In 2003 and 2004, a highly publicized and troubling event concerned the silencing of the Centers for Medicare and Medicaid Services Chief Actuary Richard S. Foster on the cost of the Medicare prescription drug plan. According to the GAO, Thomas A. Scully, the former Administrator of the Centers for Medicare and Medicaid Services, threatened "to terminate his [Foster's]

[4] Deputy Assistant Attorney General Randolph Moss. "Whistleblower Protections for Classified Information." Written Statement Before the U.S. House of Representatives Permanent Select Committee on Intelligence. May 20, 1998. Available at: http://www.usdoj.gov/olc/whistle_housetestimony_olc.htm . Retrieved January 15, 2007.

[5] James F. Blumstein. "Regulatory Review by the Executive Office of the President: An Overview and Policy Analysis of Current Issues." Duke Law Journal. Vol. 51, No. 851. December, 2001. pg. 874.

employment if Mr. Foster provided various cost estimates of the then-pending prescription drug legislation to members of Congress and their staff." Both the Congressional Research Service (CRS) and the GAO issued legal opinions finding that the effort to silence Foster was an unlawful violation of the Lloyd-La Follette Act of 1912, which was passed by Congress in response to executive order "gag rules" from Presidents Theodore Roosevelt and Howard Taft.[6]

A May 2004 memo by Justice Department Office of Legal Counsel (OLC) defends the attempt to muzzle Foster arguing that virtually all information could be withheld from Congress based on executive privilege and the unitary executive. The OLC made this argument without any authoritative legal citations. The latest version of the Congressional Oversight Manual, produced by several CRS experts, states that:

> In OLC's view, under the precepts of executive privilege and the unitary executive, Congress may not bypass the procedures the President establishes to authorize disclosure to Congress of classified, privileged, or even non-privileged information by vesting lower-level officers or employees with a right to disclose such information without presidential authorization. Thus, OLC has declared that, "right of disclosure" statutes "unconstitutionally limit the ability of the President and his appointees to supervise and control the work of subordinate officers and employees of the Executive Branch."[7]

Increasingly in this Administration, secrecy has been used to prevent Congress from keeping the Executive accountable. According to a *New York Times* articles:

> In Congress, where objections to secrecy usually come from the party opposed to the president, the complaints are bipartisan. Senator Patrick J. Leahy, the Vermont Democrat first elected in 1974, said, "Since I've been here, I have never known an administration that is more difficult to get information from." Senator Charles E. Grassley, Republican of Iowa, said things were getting worse, and "it seems like in the last month or two I've been running into more and more stonewalls."[8]

In order to assert its unassailable right to oversee the government, Congress has, since 1988, approved provisions in annual appropriations bills that prohibit managers from silencing government whistleblowers. Known as "anti-gag statutes," the provisions prohibit government agencies from spending funds to prevent employees from public communication, including with

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[6] GAO, "Department of Health and Human Services – Chief Actuary's Communications with Congress B-302911," September 7, 2004. http://www.gao.gov/decisions/appro/302911.htm
Retrieved October 6, 2004; and CRS, "Memorandum: Agency Prohibiting a Federal Officer from Providing Accurate Cost Information to the United States Congress," April 26, 2004.

[7] Frederick M. Kaiser, Walter J. Oleszek, Morton Rosenberg and Todd B. Tatelman. Congressional Oversight Manual. CRS. January 3, 2007: pg. 45. Available at: http://www.fas.org/sgp/crs/misc/RL30240.pdf .

[8] Adam Clymer. "Government Openness at Issue As Bush Holds On to Records," *New York Times*. January 3, 2003. Available at: http://foi.missouri.edu/bushinfopolicies/govtopenness.html Retrieved January 11, 2007.

Congress. For example, agencies are not allowed to spend funds to force employees to sign nondisclosure agreements, unless those agreements include information on employee free speech rights. These free speech rights are protected under both the WPA and the Lloyd-La Follette Act. But these protections have not gone far enough.

Despite the clarity of the WPA and Lloyd-La Follette and the courts' interpretation of congressional powers, several extraordinary abuses have taken place in recent years. One example concerned the Office of Management and Budget's (OMB) response to an investigation by Senator Grassley into a Department of Energy program to compensate nuclear workers who became ill as a result of the production and testing of nuclear weapons. According to Al Kamen's February 6, 2004, "In the Loop" column in *The Washington Post*, Beverly Cook, an assistant secretary in the Department, issued an email to employees that stated:

"No information is to be given to OMB, the press *or to congressional offices* without my direct approval regardless of the subject matter."[9] (emphasis added)

This email violated the free speech rights of government employees to communicate with Congress and the public. Unfortunately, the "anti-gag statute" is subject to annual approval by the Congress. Whistleblower advocates have warned that the statute's year-to-year existence makes the protections it provides fleeting. Nor has this statute ever been enforced.

Recently, many air marshals at the Federal Air Marshal Service have told us about a troubling trend of management retaliating against them for their communication with Congress. One air marshal, P. Jeffrey Black, made disclosures which sparked a major House Judiciary Committee investigation last year.

We are, however, pleased that the legislation before you permanently makes agency policies to silence employee communication with Congress illegal. But more should be done to ensure enforcement.

Retaliation Against Whistleblowers: Limited Recourse

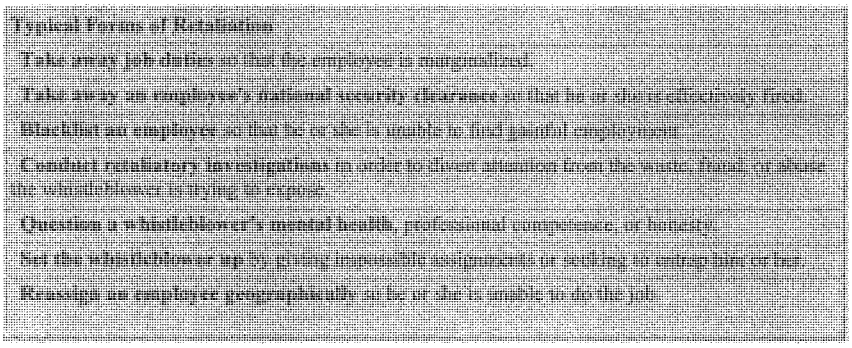
One person challenging the bureaucracy of an entire government agency is a David-versus-Goliath struggle. In terms of raw power, the agency holds all the cards. Time and again, employers have abused this power to silence whistleblowers.

Over the years, Congress has authorized, in a piecemeal fashion, a variety of whistleblower "protection" programs throughout the federal government including for national and homeland security employees. However, many of these provisions only authorize investigations to determine whether a whistleblower's allegations are true or not. They do not create sustainable mechanisms for overturning retaliation against whistleblowers or for disciplining managers who have sought to silence truth-tellers. The clear message sent to government employees is that

[9] Al Kamen, "Buck Slips," *Washington Post*, February 6, 2004. p A23.
http://www.washingtonpost.com/ac2/wp-dyn/A17168-2004Feb5?language=printer

wrongdoers in positions of power are unassailable and whistleblowing is quixotic at best.

This view was confirmed in a 1993 study by the federal MSPB, the government agency which hears WPA (WPA) claims. That study was the most recent by the agency to assess what motivates employees to blow the whistle. In response to the question about "why observers chose not to report illegal or wasteful activities," three of the top four reasons concerned fear of retaliation.[10]



In more recent studies, the MSPB has found that retaliation against federal employees has remained a significant problem. In the Board's most recent survey in 2000, seven percent (or one out of 14) of all federal employees responded that they had been retaliated against in the previous two years for "Making a disclosure concerning health and safety dangers, unlawful behavior, and/or fraud, waste, and abuse." According to the survey, retaliation rates quickly escalate when formal disclosures are made. Fully 44% of survey respondents who made a formal disclosure experienced retaliation, compared to just 4% that had not made a formal disclosure.[11]

The recourse for whistleblowers experiencing retaliation is severely limited. For example, many of the investigations authorized by Congress are conducted by the agency under investigation, which institutionally has little incentive to acknowledge whistleblower complaints. Inspectors General (IG) within each agency are most often called upon to conduct these investigations. *The Art of Anonymous Activism*, a how-to book for whistleblowers, outlines the shortcomings of IGs:

"While the IG touts itself as independent, that is not really the case. At small agencies, the agency head appoints the IG. For larger agencies, the IG is nominated by the President and

[10] MSPB Report, "Whistleblowing in the Federal Government: An Update," October 1993.

[11] MSPB Report, "The Federal Workforce for the 21st Century: Results of the Merit Principles Survey 2000," September 2003.

confirmed by the Senate. The IG reports to the head of the agency and serves at the pleasure of the President. In other words, if an IG is upsetting the Administration's apple cart, he or she can be instantly removed.

"The IG's performance appraisal comes from the agency head, who also controls issuance of awards and financial bonuses to the IG. As a consequence, many IG offices are quite political in the selection of cases for investigation and the manner in which its findings are cast."[12]

In addition, it is not unusual for the employee who has reported misconduct to be exposed and to even become the target of an investigation conducted by an IG or other agency official. In some cases, management starts an investigation in order to discredit and harass employees who are deemed troublesome.

More importantly, such investigations fail to provide whistleblowers with a hearing by a truly independent court or administrative body that can hold agencies accountable for retaliation. Time and again, whistleblower attorneys and advocates have found that verifying a whistleblower's allegations is not enough: Managers who retaliate against whistleblowers may continue to do so unless ordered to stop.

Broken: The WPA

Originally passed in 1989, the WPA (WPA) was intended to provide a mechanism for civil service employees to challenge retaliation and disclose waste, fraud, and abuse. The WPA, unlike many other whistleblower provisions, allows employees to seek intervention by an outside independent agency, the OSC; access to an administrative legal proceeding to hear their case at the MSPB; and, ultimately, access to a court to hear appeals of the case.

Despite the rights the Act provides on paper, it has suffered from a series of crippling judicial rulings that are inconsistent with Congressional intent and the clear language of the Act. The Federal Circuit Court of Appeals currently is the only court that can hear an appeal from MSPB. Yet, the Court's rulings have rendered the Act useless, producing a dismal record of failure for whistleblowers and making the law a black hole.

The Federal Circuit's stranglehold on WPA cases is inconsistent with all circuits review afforded under other federal whistleblower protection statutes, such as the Sarbanes-Oxley law which covers employees at publicly-traded companies. It is also inconsistent with the normal appellate option available to employees alleging other forms of discrimination. Research by the Government Accountability Project documents that only two whistleblower cases have prevailed on the merits before this court since 1994, compared to 177 cases that have lost.

Congress has revisited hostile Federal Circuit rulings three times. As Senator Charles Grassley (R-IA), one of the deans of whistleblower protection in Congress, has said: "This is also three

[12] *The Art of Anonymous Activism*, published by the Government Accountability Project, Public Employees for Environmental Responsibility, and Project On Government Oversight, 2002, p. 20.

strikes for the Federal Circuit's monopoly authority to interpret, and repeatedly veto, this law. It is time to end the broken record syndrome."[13]

More significantly, the Act has failed because the agencies tasked with implementing the promise of whistleblower protections – the OSC and the MSPB – have been utter failures since their founding. Although periodically a whistleblower has been helped and supported by the system, the overwhelming majority of whistleblowers have not been.

In recent years, the head of the OSC himself has come under increasing scrutiny for allegedly retaliating against whistleblowers inside the agency and violating a host of prohibited personnel practices which he is tasked with enforcing. The Office of Personnel Management (OPM) Inspector General is currently investigating these allegations. However, political appointees at the OSC have repeatedly attempted to intimidate witnesses and interfere with the independence of the OPM investigation. I have here a letter from our attorney, Debra Katz, as well as emails from OSC managers to its staff, both of which I ask to be introduced into the record. Katz represents POGO, GAP, other groups, and OSC employees in a complaint which has been filed with the President's Council on Integrity and Efficiency.

The administrative legal proceedings of the MSPB have simply not provided whistleblowers a fair chance to challenge unethical retaliation. We defer to our colleague Tom Devine from GAP to speak more in depth on this issue.

The bill will also undo the crippling judicial decisions and provide for judicial review by all circuits, thus ending the Federal Circuit Court's decades-long monopoly and ensuring that vigorous judicial opinions are rendered from U.S. District Courts nationwide. We're also are pleased that the legislation takes some steps toward addressing the myriad problems underlying MSPB's and OSC's failure. We look forward to further documenting and understanding these problems and working with the Committee on the reauthorization for both agencies which is due this year.

Separate But Unequal: FBI Whistleblowers

Since the creation of whistleblower protections in the 1978 Civil Service Reform Act, the Federal Bureau of Investigation (FBI) has operated under a situation which can only be called separate and unequal. The Bureau persuaded Congress to exempt it from protections extended to all other civil service employees. However, Congress did require the Attorney General "to prescribe regulations to ensure that such [whistleblower] reprisal not be taken," and required the President of the United States to enforce those regulations.[14] Congress also mandated that FBI whistleblower protections be "consistent with the applicable provisions of" the WPA.[15]

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[13] "Senators Try to Curb Federal Circuit," *Legal Times*, September 3, 2001, p. 6.

[14] 28 C.F.R §27 Regulations for Whistleblower Protection for FBI Employees.
http://www.fas.org/sgp/news/1999/11/fbiwhist.html
Retrieved April 27, 2005.

[15] Title 5 U.S. Code Section 2303, "Prohibited Personnel Practices in the Federal Bureau of Investigation."

The FBI managed to disregard Congress' order until 1997. In April 1997, because of the highly-publicized case of FBI crime-lab whistleblower Dr. Frederic Whitehurst, President Bill Clinton issued a "Memorandum for the Attorney General" which directed that the Attorney General "establish appropriate processes" to implement the WPA for FBI employees.[16]

However, the regulations, which were finalized in 1999, failed to meet the standards provided under the WPA. While FBI whistleblowers were afforded the right to have their alleged reprisals investigated by the FBI Office of Professional Responsibility and to appeal their reprisal cases to the Deputy Attorney General, other significant rights were left out.[17] FBI whistleblowers were not given the right other civil service employees have for an independent third party such as the MSPB or the courts to hear and adjudicate their appeal, or even for the OSC to investigate and prosecute. They also were not afforded the right to have their cases investigated by the Department of Justice's Inspector General (DOJ IG), unless the Deputy Attorney General or Attorney General approved.[18]

Left Behind: Intelligence Agencies

Employees working at intelligence agencies have been excluded from protections under the WPA, including "the Central Intelligence Agency, Defense Intelligence Agency, National Security Agency, and certain other intelligence agencies excluded by the President."[19]

Through the Intelligence Community WPA of 1998, Congress asserted that it had the right to receive classified information from whistleblowers working for intelligence agencies in the case of "serious or flagrant" problems. However, Congress failed to provide legal protections for the whistleblower. In 2006, Acting Defense Department Inspector General Thomas Gimble called the Intelligence Community WPA a "misnomer" in testimony before this Committee's National Security Subcommittee. The Act basically only allows an Inspector General to investigate whistleblower retaliation. This option was already available prior to the Act and, as a result, the protections are an empty promise at best.

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[16] Testimony of Stephen M. Kohn, attorney for Dr. Frederick Whitehurst before the Senate Judiciary Committee, May 12, 1997. http://www.globalsecurity.org/security/library/congress/1997_h/h970513w.htm
Retrieved April 26, 2005.

[17] 28 C.F.R §27 Regulations for Whistleblower Protection for FBI Employees.
http://www.fas.org/sgp/news/1999/11/fbiwhist.html
Retrieved April 27, 2005.

[18] Department of Justice Inspector General Special Report, "A Review of the FBI's Response to John Roberts' Statements on 60 Minutes ," February 2003. http://www.usdoj.gov/oig/special/0302/index.htm
Retrieved October 1, 2004.

[19] OSC, "The Role of the U.S. OSC," http://www.osc.gov/documents/pubs/oscrole.pdf
Retrieved April 27, 2005.

This bill now before you would create a legal remedy for intelligence community whistleblowers for the first time.

Left Behind: Baggage Screeners

Also denied protections are the 45,000 Transportation Security Administration (TSA) airport baggage screeners, comprising one-fourth of the Department of Homeland Security's total personnel. Post-9/11, the public and Congress were justifiably concerned about the quality of our baggage screening proeess. When TSA was moved into the Department of Homeland Security, leaders in Congress believed that the screeners it employs would receive protections under the WPA.[20]

However, due to an unforeseen loophole, the full promise of these protections has not yet been met. Prior to moving into the Department of Homeland Security, TSA reached an agreement that allows for an independent investigation and report of findings to be conducted by the OSC.[21] This agreement allows the OSC to make non-binding recommendations to the TSA for ending retaliation. This agreement is hollow. Unlike under the WPA, neither the OSC nor the screeners are able to go to the MSPB or the court to have the investigative findings enforced.

On May 6, 2004, the OSC urged the MSPB to extend WPA protections to airport screeners, arguing that the 2002 Homeland Security Act was the controlling legal authority rather than the 2001 law creating the Transportation Security Administration. Special Counsel Scott Bloch stated: "When Congress created the Department of Homeland Security, they made it clear that whistleblower protection is an integral part of protecting homeland security. Providing full whistleblower protections to screeners will help ensure that Congress's goals in establishing DHS are realized."[22] The Board disagreed in an August 2004 ruling, saying that "Board jurisdiction over Screeners... is not found in the HSA [Homeland Security Act]."[23] As a result,

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[20] Jason Peckenpaugh, "Homeland Security employees will retain whistleblower rights," Govexec.com, November 20, 2002.
http://www.govexec.com/dailyfed/1102/112002p1.htm
Retrieved April 27, 2005.

[21] "Memorandum of Understanding Between the U. S. OSC (OSC) and the Transportation Security Administration (TSA) Regarding Whistleblower Protections for TSA Security Screeners," May 28, 2002.
http://www.osc.gov/documents/tsa/tsa_mou.htm
Retrieved April 27, 2005.

[22] U.S. OSC, "OSC Files Friend of Court Brief Supporting Full Whistleblower Protections for Transportation Security Administration Screeners," May 24, 2004.
http://www.osc.gov/documents/press/2004/pr04_08.htm
Retrieved October 1, 2004.

[23] MSPB ruling, *Schott, Jiggetts, Younger v. Department of Homeland Security*, August 12, 2004.
http://www.mspb.gov/decisions/2004/schott_dc030807w1.html
Retrieved April 27, 2005.

only Congress can take action to extend to screeners the same protections that all other Department of Homeland Security employees enjoy.

Your bill extends protections to TSA screeners, FBI, and intelligence agency employees—true post-9/11 reforms long overdue.

Left Behind: Government Contractor Employees

Spending on government contractors has doubled in recent years, going from $219 billion in 2000 to roughly $382 billion in 2005.[24] A recent *New York Times* article noted: "They [contractors] sit next to federal employees at nearly every agency; far more people work under contracts than are directly employed by the government."[25] In Iraq, Katrina-devastated communities, and on the U.S. borders, contractors have become an extension of the government's reach and power.

Yet, the activities of these contractors are largely shielded from public scrutiny because citizens and journalists are deprived of the ability to use the Freedom of Information Act to learn more about the activities these companies conduct under the auspices of the government. In fact, citizens are largely unable to determine who the contractors hire as subcontractors and for what prices. A variety of scandals have raised important questions for the Congress and the public about the accountability frameworks which protect the taxpayer from contractor profiteering and other illegal or unethical activities. Contractor scandals have plagued almost every major front of government spending -- from the Abu Ghraib prison scandal[26], to the bribing of Representative Randall "Duke" Cunningham by defense contractor MZM[27], to the numerous cases of contractor overcharging on Katrina reconstruction projects. Many of these scandals likely would not have come to light without the courageous efforts of conscientious individuals who stepped forward.

As these experiences have shown, government contractors have a significant capacity to impact U.S. national and homeland security. Providing contractor employees with whistleblower rights makes sense and will ensure that they have some tools to challenge intimidation and harassment. POGO is extremely pleased to note that the legislation provides the first meaningful whistleblower protections to employees of government contractors.

National Security Clearance Retaliation

Revocation of an employee's national security clearance has become the weapon of choice for those managers who retaliate. An employee whose security clearance is yanked can be fired

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[24] Federal Procurement Data System "Trending Analysis Report Since Fiscal Year 2000" http://www.fpdsng.com/downloads/top_requests/FPDSNG5YearViewOnTotals.xls

[25] http://www.nytimes.com/2007/02/04/washington/04contract.html

[26] http://www4.army.mil/ocpa/reports/ar15-6/index.html

[27] [http://pogoblog.typepad.com/pogo/files/uscnnghm112805plea.pdf

without recourse. The 2002 story of whistleblower Linda Lewis illustrates how unaccountable and unfair the process for addressing security clearance retaliation has become. According to the Government Accountability Project:

> Lewis is not allowed to appear before the judges who will make a decision on her clearance. A single USDA official will decide how much, if any, of her defense is to be allowed into the official record for review by the unidentified judges. Rounding out this Kafkaesque scenario, Lewis is required to present her defense in writing before she learns the details of the charges – if they are ever revealed to her.[28]

The Department of Defense Inspector General deserves credit for a new initiative launched in January of 2005 that recognizes the problem of national security clearance retaliation. The initiative allows the IG to investigate this kind of retaliation and make recommendations to the Department of Defense Secretary.[29]

We are pleased that this legislation directs the GAO to conduct a study on revocation of security clearances.

Executive Weapon Against Accountability: The State Secrets Privilege

An area of particular concern that this bill addresses is the increased unqualified and unchecked use of the state secrets privilege in cases involving whistleblowers. The state secrets privilege may be invoked by the Executive Branch in legal proceedings to assert that information must be protected for national security reasons. Courts have been overly deferential to the Executive Branch in matters of national security and when the Executive asserts state secrets, cases are almost always immediately shut down. It is a *de facto* "get of jail free" card. Fortunately, the abuse of the state secrets privilege to hide government wrongdoing is beginning to receive more critical attention.

Congress' own separation of powers expert at the Law Library of Congress, Louis Fisher, recently published a book on the subject and on the precedent-setting *U.S. v. Reynolds* case.[30] He explains that, in 1953, the Supreme Court upheld the right of the government to withhold from three widows the accident report about a B-29 crash that killed their husbands. The government claimed there was secret information in the report and the Court, without reviewing it, agreed it

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[28] Martin Edwin Andersen, "Rally for USDA National Security Whistleblower Linda Lewis," Government Accountability Project, June 18, 2002. http://www.whistleblower.org/article.php?did=207&scid=80 Retrieved April 27, 2005.

[29] Miles, Donna, "DoD Expands Existing Whistleblower Protections," American Forces Informative Service, April 18, 2005.
http://www.defenselink.mil/news/Apr2005/20050418_649.html
Retrieved April 27, 2005.

[30] Louis Fisher. *In the Name of National Security: Unchecked Presidential Power and the* Reynolds *Case.* Lawrence: University Press of Kansas, 2006.

should be withheld. Fifty years later the report surfaced on a website—it had no secret information.

In addition, several national security whistleblowers whose cases have been publicized in recent years—notably that of former FBI translator and National Security Whistleblowers Coalition founder Sibel Edmonds—were essentially stymied by the government's invocation of the state secrets privilege.

Though there are some difficulties in quantifying use of the state secrets privilege, the most thorough count was made last year by University of Texas-El Paso government professor and National Security Whistleblower Coalition senior advisor William Weaver and Reporters Committee for Freedom of the Press legal fellow Susan Burgess.

According to their analysis last year, in the half-century since *Reynolds*, the state secrets privilege has been successfully asserted by the executive branch 67 times, with some 15 additional assertions by the present administration currently under court review. Only in 15 of those cases did federal courts insist upon *in camera* inspection (where the judge reviews the documents in question in his private quarters) of the underlying documents which the executive claimed were state secrets. Before 2006, the courts rejected the government's assertion only four times, and those rejections were based on procedural grounds rather than a substantive review of the Executive's claim. Twice last year, federal courts rejected the government's assertion based on a substantive analysis.

Even Wake Forest University Law Professor Robert M. Chesney, who disputes the claim that use of the state secrets privilege is increasing, concludes that reforms to how courts deal with assertions of the privilege may be appropriate, particularly "where the legality of government conduct is itself in issue"[31]–exactly the kind of cases whistleblowers, such as Sibel Edmonds, bring to court.

Louis Fisher cites John Henry Wigmore, who, in his classic 1940 treatise on evidence, recognized that a state secrets privilege exists. However, when Wigmore asked who should determine the necessity for secrecy – the executive or the judiciary – he concluded it must be the court:

> Shall every subordinate in the department have access to the secret, and not the presiding officer of justice? Cannot the constitutionally coordinate body of government share the confidence? . . . The truth cannot be escaped that a Court which abdicates its inherent function of determining the facts upon which the admissibility of evidence depends will furnish to bureaucratic officials too ample opportunities for abusing the privilege . . . Both principle and policy demand that the determination of the privilege shall be for the Court.[32]

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[31] Robert M. Chesney. "State Secrets and the Limits of National Security Litigation." *George Washington Law Review*. 2007. http://papers.ssrn.com/sol3/papers.cfm?abstract_id=946676 .

[32] John Henry Wigmore. *Treatise on the Anglo-American System of Evidence in Trials at Common Law*. 1940.

There are tools courts can utilize to independently review Executive Branch assertions of state secrets. Meredith Fuchs, the National Security Archive's General Counsel, has suggested several, including utilizing the so-called "Vaughn Index," *in camera* inspections of documents by the judge, and the use of a "Special Master"–someone skilled in classification of national security documents.

In *Vaughn v. Rosen*, according to Fuchs, the *Vaughn* court required the government to detail its secrecy claims by requiring it to: 1) submit a "relatively detailed analysis" of the material withheld; 2) that the analysis be provided "in manageable segments"; and 3) that the analysis include "an indexing system [that] would subdivide the document under consideration into manageable parts cross-referenced to the relevant portion of the Government's justification."

Fuchs wrote that "These measures would, in the court's view, ensure 'adequate adversary testing' by providing opposing counsel access to the information included in the agency's detailed and indexed justification and by in camera inspection, guided by the detailed affidavit and using special masters appointed by the court whenever the burden proved to be especially onerous."[33]

The bill's language, which requires a ruling in favor of the employee when the state secrets privilege is invoked and an employee's concerns have been substantiated by an agency's Inspector General, is a positive step. But it should not prevent courts from seeking to independently review the assertion of state secrets. The reality is that, despite the high quality work by many Offices of Inspector General, the integrity of OIG investigations are sometimes compromised. A case in point: The scandalous reign of NASA IG Robert Cobb. Among numerous improprieties, Department of Housing and Urban Development investigators found that:

> ...Cobb lunched, drank, played golf and traveled with former NASA Administrator Sean O'Keefe, another White House appointee. E-mails from Cobb showed he frequently consulted with top NASA officials on investigations, raising questions about his independence.
>
> ...HUD investigators heard testimony from other witnesses that suggested O'Keefe's and Cobb's association went beyond the traditional arm's-length relationship between agency heads and inspectors general. E-mail traffic between Cobb, O'Keefe and former NASA General Counsel Paul Pastorek indicated Cobb consulted with them on audits and investigations.[34]

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[33] Meredith Fuchs. "Judging Secrets: The Role Courts Should Play in Preventing Unnecessary Secrecy." *Administrative Law Review*. Vol. 58. No. 1. Winter 2006.

[34] Michael Cabbage. "Complaints fuel probe of NASA inspector." *Orlando Sentinel*. November 20, 2006. http://www.mercurynews.com/mld/mercurynews/news/politics/16057238.htm

An executive branch agency should not be able to dismiss a claim in one step based on any assertion of privilege, but should request and obtain special procedures from the court in order to protect classified or secret information.

State secrets privilege abuses add to the list of tools the Executive Branch has at its disposal for silencing whistleblowers and avoiding accountability. This tool cannot be a blank check. Congress and the Courts have a responsibility to ensure that it is not.

Chairman Waxman, Ranking Member Davis and members of the Committee, thank you for the opportunity to present POGO's views on the legislation before you. This legislation is revolutionary step forward for the rights of government and contractor truth tellers and for Congress.

Chairman WAXMAN. Thanks for your testimony.
Mr. Devine.

STATEMENT OF THOMAS DEVINE

Mr. DEVINE. Thank you for inviting this testimony, Mr. Chairman.

This committee is close to approving a global gold standard for public employee freedom of expression and a breakthrough for Government accountability. Quick passage also will be a signal that new congressional leadership is serious about two basic commitments to taxpayers: oversight that ends a pattern of secret Government and structural reform to help challenge a culture of corruption.

Over the last 30 years, the Government Accountability Project has formally or informally helped over 4,000 whistleblowers to commit the truth and survive professionally while making a difference. This testimony shares and is illustrated by painful lessons we have learned from their experience. We couldn't avoid getting practical insights into which whistleblower systems are genuine reforms that work in practice and which are illusory.

Along with POGO, GAP is a founding member of the Make it Safe Coalition, a non-partisan network of organizations that specialize in homeland security, medical care, natural disasters, scientific freedom, consumer hazards, corruption and Government contracting and procurement. At the beginning of this month, we held a day-long summit on whistleblower rates, and this testimony seeks to reflect the across the board consensus that we achieved there.

There can be no credible debate about how much this law matters. Whistleblowers risk their professional survival to challenge abuses of power that betray the public trust. It is freedom of speech when it matters, unlike the freedom to yell at a referee in a sports stadium or engage in political satire in late night television. Whistleblowers risk everything to defend the public against abuses of power. They represent the human factor that is the Achilles heel of bureaucratic corruption. They are the lifeblood for any credible anti-corruption campaign which will degenerate into empty, lifeless magnets for cynicism without safe channels to protect those who bear witness. That is the prerequisite for a meaningful congressional oversight, as demonstrated by this committee's January hearings on climate change censorship.

Creating safe channels for whistleblowers will determine whether Congress learns about only the tips or uncovers the icebergs in nearly ever major investigation of the next 2 years. Let me give you just a few examples on this.

That FDA scientist, Dr. David Graham, successfully exposed the dangers from painkillers, like Vioxx, which caused over 50,000 unnecessary fatal heart attacks in our country. The drug was removed. Climate change whistleblowers like Rick Piltz, exposed how oil industry lobbyists were hired by the White House to rewrite the research conclusions of America's top scientists. Gary Aguirre exposed the Securities and Exchange cover-ups of vulnerability to massive corruption in hedge funds that could threaten a new wave of Enron type scandals. Frank Terreri from the Air Marshal Serv-

ice exposed and successfully challenged keystone bureaucratic practices that repeatedly blew the cover of the air marshals we depend on to stop the next skyjacking. Air Marshal Robert MacLean's public protest stopped the Transportation Security Administration from pulling all marshals from sensitive flights when they had blown their money on pork barrel projects, and so they couldn't afford it any more.

Mr. Richard Conrad has exposed uncontrolled maintenance and repairs on F18s out at the North Island Naval Aviation Depot near San Diego. That could explain why those planes keep crashing. Whistleblowers don't give up, either. Former FAA manager Gabe Bruno is still challenging that agency's failure to honestly test more than 1,000 mechanics for commercial and civilian aircraft who had received fraudulent certifications.

There also shouldn't be any questions this bill is long overdue. Our easiest consensus is the Whistleblower Protection Act has become a disastrous trap which creates far more reprisal victims than it helps. And it has become would-be whistleblowers' best reason to look the other way or become silent observers. Your legislation deals with both of the causes for that disappointing result after a three-time unanimous mandate from Congress for the opposite. One is structural loopholes in the law, and the other is a system of due process, which doesn't have any enforcement teeth. You directly address both of those problems.

Mr. Chairman, I would be glad to go into a number of examples of why the current system has failed, and particularly the Federal Circuit Court of Appeals which has been the Achilles heel of the law for all three passages. In fact, there shouldn't be any delusion, unless we restore normal appellate review. Three will not be the charm for the Whistleblower Protection Act, and this committee will be reconvening in about 5 years.

The key now however is to pass the law and to have quick, expeditious results. Until that happens, whistleblowers are defenseless. Every month that we delay means more reprisal victims who can't defend themselves when they defend the public.

Most anti-corruption measures are very costly in terms of our rights and in terms of money. But whistleblower protection fights corruption by strengthening our freedoms. And it doesn't cost anything to listen.

[The prepared statement of Mr. Devine follows:]

TESTIMONY OF THOMAS DEVINE AND ADAM MILES,
GOVERNMENT ACCOUNTABILITY PROJECT

before the

HOUSE OVERSIGHT AND GOVERNMENT REFORM COMMITTEE

On

the Whistleblower Protection Enhancement Act

February 13, 2007

Thank you for inviting this testimony on legislation to put protection back in the Whistleblower Protection Act. Although a work in progress, this committee is close to approving a global gold standard for public employee free speech rights, and a breakthrough for government accountability. Quick passage restoration of genuine whistleblower rights also would be a signal that new Congressional leadership is serious about two basic taxpayer commitments – oversight that ends a pattern of secret government, and structural reform to help end a culture of corruption.

My name is Tom Devine, and I serve as legal director of the Government Accountability Project ("GAP"), a nonprofit, nonpartisan, public interest organization that assists whistleblowers, those employees who exercise free speech rights to challenge abuses of power that betray the public trust. GAP has led or been on the front lines of campaigns to enact or defend nearly all modern whistleblower laws passed by Congress, including the Whistleblower Protection Act of 1989 and 1994 amendments. Our work for corporate whistleblower protection rights includes those in the Sarbanes-Oxley law for publicly-traded corporations, the Energy Policy Act for the nuclear power and weapons industries, and AIR 21 for airlines employees, among others. We teamed up with professors from American University Law School to author a model whistleblower law approved by the Organization of American States (OAS) to implement at its Inter American Convention against Corruption. In 2004 we led the successful campaign for the United Nations to issue a whistleblower policy that protects public freedom of expression for the first time at Intergovernmental Organizations, and are in the advanced stages to finalize similar reforms at the World Bank and African Development Bank. GAP has published numerous books, such as The Whistleblower's Survival Guide: Courage

Without Martyrdom, and law review articles analyzing and monitoring the track records of whistleblower rights legislation. See "Devine, *The Whistleblower Protection Act of 1989: Foundation for the Modern Law of Employment Dissent*, 51 Administrative Law Review, 531 (1999); Vaughn, Devine and Henderson, *The Whistleblower Statute Prepared for the Organization of American States and the Global Legal Revolution Protecting Whistleblowers*, 35 Geo. Wash. Intl. L. Rev. 857 (2003).

Over the last 30 years we have formally or informally helped over 4,000 whistleblowers to "commit the truth" and survive professionally while making a difference. This testimony shares and is illustrated by painful lessons we have learned from their experiences. We could not avoid gaining practical insight into which whistleblower systems are genuine reforms that work in practice, and which are illusory.

Along with the Project on Government Oversight, GAP also is a founding member of the Make it Safe Coalition, a non-partisan network whose members pursue a wide variety of missions that span defense, homeland security, medical care, natural disasters, scientific freedom, consumer hazards, and corruption in government contracting and procurement. We are united in the cause of protecting those in government who honor their duties to serve and warn the public. Last fall 43 citizen organizations in the coalition pressed for passage of Senate-approved whistleblower reforms in the defense authorization bill. At the beginning of this month, the coalition held a day long summit on the state of whistleblower rights. This testimony seeks to reflect the coalition's across-the-board consensus on the need for and structure to achieve reform.

MAKING A DIFFERENCE

There can be no credible debate about how much this law matters. Whistleblowers risk their professional survival to challenges abuses of power that betray the public trust. This is freedom of speech when it counts, unlike the freedoms akin to yelling at the referee in a sports stadium, or late night television satire of politicians and pundits. It not only encompasses the freedom to protest, but the freedom to warn, so that avoidable disasters can be prevented or minimized. It also encompasses the freedom to challenge conventional wisdom, such as outdated or politically-slanted scientific paradigms. In every context, they are those who keep society from being stagnant and are the pioneers for change.

Both for law enforcement and congressional oversight, whistleblowers represent the human factor that is the Achilles' heel of bureaucratic corruption. They also serve as the life blood for credible anti-corruption campaigns, which can degenerate into empty, lifeless magnets for cynicism without safe channels for those who bear witness.

Their importance for congressional oversight cannot be overemphasized, as demonstrated by this committee's January hearings on climate change censorship. Creating safe channels will determine whether Congress learns about only the tips, or uncovers the icebergs, in nearly every major investigation over the next two years.

Whistleblowers are poised to bear witness as the public's eyes and ears to learn the truth about issues vital to our families, our bank accounts, and our national security. Consider examples of what they've accomplished recently without any meaningful rights:

* FDA scientist Dr. David Graham successfully exposed the dangers of pain killers like Vioxx, which caused over 50,000 fatal heart attacks in the United States. The

drug was finally withdrawn after his studies were confirmed. Today at the Energy and Commerce Committee three whistleblowers are testifying about government reliance on fraudulent data to approve Ketek, another high risk prescription drug.

* Climate change whistleblowers such as Rick Piltz of the White House Climate Change Science Program exposed how political appointees such as an oil industry lobbyist rewrote the research conclusions of America's top scientists. Scientists like NASA's Dr. James Hansen refused to cooperate with censorship of their warnings about global warming; namely that we have less than a decade to change business as usual, or Mother Nature will turn the world on its head. It appears the country has heard the whistleblowers' wake up call.

* Gary Aguirre exposed Securities and Exchange Commission cover-ups of vulnerability to massive corruption in hedge funds that could threaten a new wave of post-Enron financial victims.

A host of national security whistleblowers, modern Paul Reveres, have made a record of systematic pre-9/11 warnings that the terrorists were coming and that we were not prepared. Tragically, they were systematically ignored. They keep warning: inside the bureaucracy, few lessons have been learned and America is little safer beyond appearances. They have paid a severe price. Consider the experiences of six national security and public safety whistleblowers assisted by GAP's national security director Adam Miles over the last two years.

Frank Terreri was one of the first federal law enforcement officers to sign up for the Federal Air Marshal Service, out of a sense of patriotic duty after the September 11 tragedy. His experience illustrates the need for provisions in the legislation that codify protection against retaliatory investigations, as well as a remedy for the anti-gag statute. For over two years, he made recommendations to better meet post-9/11 aviation security demands. On behalf of 1,500 other air marshals, he suggested improvements to bizarre and ill-conceived operational procedures that compromised marshals' on-flight anonymity, such as a formal dress code that required them to wear a coat and tie even on

flights to Florida or the Southwest. The procedures required undercover agents to display their security credentials in front of other passengers before boarding first, and always to sit in the same seats. Disregarding normal law enforcement practices, the agency had all the agents maintain their undercover locations in the same hotel chains, one of which then publicly advertised them as its "Employees of the month."

Instead of addressing Terreri's security concerns, air marshal managers attacked the messenger. First, they sent a team of supervisors to his home, took away his duty weapon and credentials, and placed him on indefinite administrative leave. Then headquarters initiated a series of at least four uninterrupted retaliatory investigations. At one point, Terreri was being investigated simultaneously for sending an alleged "improper email to a co-worker," for "improper use of business cards," association with an organization critical of the air marshal service, and for somehow "breaching security" by protesting the agency's own security breaches. All of these charges were eventually deemed "unfounded" by DHS investigators, but the air marshal service didn't bother to tell Terreri and didn't take him off of administrative "desk duty" until the day after the ACLU filed a law suit on his behalf.

Air Marshal Robert MacLean's experience demonstrates the ongoing, critical need to codify the anti-gag statute. He blew the whistle on an indefensible proposed cost saving measure from Headquarters that would have removed air marshal coverage on long-distance flights like those used by the 9/11 hijackers. After numerous unsuccessful efforts to challenge the policy change through his chain of command, Mr. MacLean took his concerns to the media. An MSNBC news story led to the immediate rescission of the

misguided policy. Unfortunately, three years later the agency fired Mr. MacLean, specifically because of his whistleblowing disclosure, without any prior warning or notice. In terminating Mr. MacLean, the TSA cited an "unauthorized disclosure of Sensitive Security Information." The alleged misconduct was entirely an *ex post facto* offense. There had been no markings or notice of its restricted status when Mr. McClean spoke out. This rationale violates the WPA and the anti-gag statute on its face. The agency, more intent on silencing dissent than following the law, hasn't backed off.

The ongoing treadmill for one of last year's witnesses, Mike German, illustrates the necessity to close the WPA's FBI loophole. Not long ago, Mr. German was a rising star in the FBI's counter-terror program. As an undercover agent, he twice successfully infiltrated domestic terrorist organizations, resolved pending bombing investigations, and prevented potential acts of terrorism by helping to obtain criminal convictions of several would-be terrorists. But, in 2002, Mr. German found serious problems with the Tampa Division's handling of a counter-terror investigation, including a violation of Title III wiretapping regulations. When Mr. German reported this misconduct, his supervisor asked him to ignore it. Alarmed, he reported the violation up his chain of command, as directed by FBI policy.

Rather than address the problems, Tampa Division officials began a large-scale effort to backdate and falsify official FBI records to hide their mishandling of the terror investigation. They were so unconcerned about the internal investigation they actually used white-out to falsify the records. Meanwhile, the Unit Chief of the Undercover Unit at FBI Headquarters told his staff that Mr. German would never work undercover again,

because he blew the whistle. The FBI's Inspection Division then opened a "broad" investigation into the Tampa mishaps that in reality was a transparent effort to dig up dirt on Mr. German. They found nothing, but the message was clear enough. With no opportunity to resume his successful counterterrorism career, and with no protection from continuing retaliation, Mr. German was compelled to resign from the FBI in June 2004.

His case typifies the failure of the FBI's "separate, but equal" whistleblower protection program. A Justice Department IG report confirms that the FBI retaliated against Mr. German for reporting misconduct, but it intentionally obscures the extent of the retaliation, and holds just one FBI supervisor accountable. The IG's findings are now being considered internally by the Justice Department's Office of Attorney Recruitment and Management (OARM), an adversarial proceeding in which Mr. German will be required to produce evidence entirely within the control of the Department of Justice. Mr. German now finds himself in an adversarial position with the Inspector General – his supposed institutional "protector" – and OARM has ruled that he is not entitled to use the very documents he provided to the IG almost four years ago. There is almost no hope that Mr. German will prevail in this kangaroo court proceeding.

Another whistleblower's five-decade career in public service is in danger, because of his efforts to ensure that critical components on high performance Naval Aircraft are repaired according to military specifications. It illustrates why protection for carrying out job duties is essential. Mr. Richard Conrad, who served honorably in Vietnam and is now an electronic mechanic at the North Island Naval Aviation Depot, knew his unit could not guarantee the reliability or the safety of the parts they produced for F/A-18s because

Depot management failed to provide them with the torque tools needed for proper repair and overhaul of certain components. The Secretary of the Navy formally substantiated Mr. Conrad's key allegations, and the Depot took some immediate, although incomplete, corrective action.

But nothing has been done to protect Mr. Conrad. In response to his disclosures, he was transferred to the night shift in a unit at the Depot that doesn't do any repairs at night. He has received an average of some 10 minutes work per eight hour shift for the last 14 months, and spends the majority of the time reading books – on the taxpayer's dime.

Former FAA manager Gabe Bruno challenged lax oversight of the newly-formed AirTran Airways, which was created after the tragic 1996 ValuJet accident that killed all 110 on board. His experience highlights the need to protect job duties, and to ban retaliatory investigations. He was determined not to repeat the mistakes that led to that tragedy, and raised his concerns repeatedly with supervisors. In response, they initiated a "security investigation" and demoted Mr. Bruno from his management position. The lengthy, slanderous investigation ultimately led to Mr. Bruno's termination after 26 years of outstanding government service with no prior disciplinary record.

The flying public was the loser. Following Mr. Bruno's demotion and reassignment, FAA Southern Region managers abruptly canceled a mechanic re-examination program that he had designed and implemented to assure properly qualified mechanics were working on commercial and cargo aircraft. The re-exam program was necessary, because the FAA-contracted "Designated Mechanic Examiner" was convicted on federal criminal charges and sent to prison for fraudulently certifying over 2,000

airline mechanics. Individuals from around the country, and the world, had sought out this FAA-financed "examiner" to pay a negotiated rate and receive an Airframe and Powerplant Certificate without proper testing. After the conviction, Mr. Bruno's follow-up re-exam program, which required a hands-on demonstration of competence, resulted in 75% of St. George-certified mechanics failing when subjected to honest tests. The FAA's arbitrary cancellation of the program left over 1,000 mechanics with fraudulent credentials throughout the aviation system, including at major commercial airlines.

Mr. Bruno worked through the Office of Special Counsel to reinstitute his testing program, but after two years Special Counsel Scott Bloch endorsed a disingenuous FAA re-testing program that skips the hands-on, practical tests necessary to determine competence. The FAA's nearly-completed re-exam program consists of an oral and written test only. In effect, this decriminalizes the same scenario – incomplete testing – that previously had led to prison time for the contractor. The FAA recently conceded that it does not know how many of these fraudulently certified mechanics are currently working at major commercial airlines, or even within the FAA.

National security whistleblower Mike Maxwell was forced to resign from his position as Director of the Office of Security and Investigations (internal affairs) for the US Citizenship and Immigration Services (USCIS) after the agency cut his salary by 25 percent, placed him under investigation, gagged him from communicating with congressional oversight offices, and threatened to remove his security clearance. His experience highlights five provisions of this reform – security clearance due process rights, classified disclosures to Congress, protection for carrying out job duties, the anti-gag statute and retaliatory investigations.

What had Mr. Maxwell done to spark this treatment? Quite simply, he had a job that required him to blow the whistle, often after investigating disclosures from other USCIS whistleblowers. In order to carry out his duties, he reported repeatedly to USCIS leadership about the security breakdowns within USCIS. For example, he had to handle a backlog of 2,771 complaints of alleged USCIS employee misconduct -- including 528 criminal allegations and allegations of foreign intelligence operatives working as USCIS contractors abroad -- with a staff of six investigators. He challenged agency leadership's refusal to permit investigations of political appointees, involving allegations as serious as espionage and links to identified terrorist operations. And, he challenged backlog-clearing measures at USCIS that forced adjudicators to make key immigration decisions, ranging from green cards to residency, without seeing law enforcement files from criminal and terrorist databases.

These examples are not aberrations or a reflection of recent political trends. They are consistent with a pattern of steadily making a difference over the last 20 years challenging corruption or abuses of power. We can thank whistleblowers for --

* increasing the government's civil recoveries of fraud in government contracts by over ten times, from $27 million in 1985 to over one billion in three of the last four years, totaling over $18 billion total since reviving the False Claims Act. That law allows whistleblowers to file lawsuits challenging fraud in government contracts.

* overhauling the FBI's crime laboratory, after exposing consistently unreliable results which compromised major prosecutions including the World Trade Center and Oklahoma bombings.

* sparking a top-down removal of top management at the U.S. Department of Justice ("DOJ"), after revealing systematic corruption in DOJ's program to train police forces of other nations how to investigate and prosecute government corruption. Examples included leaks of classified documents as political patronage; overpriced "sweetheart" contracts to unqualified political supporters; cost overruns of up to ten times to obtain research already available for an anti-corruption law enforcement training conference; and use of the government's visa power to bring highly suspect Russian

women, such as one previously arrested for prostitution during dinner with a top DOJ official in Moscow, to work for Justice Department management.

* convincing Congress to cancel "Brilliant Pebbles," the trillion dollar plan for a next generation of America's Star Wars anti-ballistic missile defense system, after proving that contractors were being paid six-seven times for the same research cosmetically camouflaged by new titles and cover pages; that tests results claiming success had been a fraud; and that the future space-based interceptors would burn up in the earth's atmosphere hundreds of miles above peak height for targeted nuclear missiles.

* reducing from four days to four hours the amount of time racially-profiled minority women going through U.S. Customs could be stopped on suspicion of drug smuggling, strip-searched and held incommunicado for hospital laboratory tests, without access to a lawyer or even permission to contact family, in the absence of any evidence that they had engaged in wrongdoing.

* exposing accurate data about possible public exposure to radiation around the Hanford, Washington nuclear waste reservation, where Department of Energy contractors had admitted an inability to account for 5,000 gallons of radioactive wastes but the true figure was 440 billion gallons.

* inspiring a public, political and investor backlash that forced conversion from nuclear to coal energy for a power plant that was 97% complete but had been constructed in systematic violation of nuclear safety laws, such as fraudulent substitution of junkyard scrap metal for top-priced, state of the art quality nuclear grade steel, which endangered citizens while charging them for the safest materials money could buy.

* imposing a new cleanup after the Three Mile Island nuclear power accident, after exposure how systematic illegality risked triggering a complete meltdown that could have forced long-term evacuation of Philadelphia, New York City and Washington, D.C. To illustrate, the corporation planned to remove the reactor vessel head with a polar crane whose breaks and electrical system had been totally destroyed in the partial meltdown but had not been tested after repairs to see if it would hold weight. The reactor vessel head was 170 tons of radioactive rubble left from the core after the first accident.

* bearing witness with testimony that led to cancellation of toxic incinerators dumping poisons like dioxin, arsenic, mercury and heavy metals into public areas such as church and school yards. This practice of making a profit by poisoning the public had been sustained through falsified records that fraudulently reported all pollution was within legal limits.

* forcing abandonment of plans to replace government meat inspection with corporate "honor systems" for products with the federal seal of approval as wholesome – plans that could have made food poisoning outbreaks the rule rather than the exception.

NECESSITY FOR STRUCTURAL CHANGE

From the perspective of government watchdogs in every sector, the last six years have been Dark Ages of secrecy sustained by repression. It is about to get a lot worse. The ugliness of retaliation depends on how much those in power feel threatened – kind of a bureaucratic "wounded rat" instinct. That means the dangers will be unprecedented over the next two years for those who work with Congress. Unfortunately, until Congress acts they are defenseless.

The Make it Safe Coalition's easiest consensus was that the Whistleblower Protection Act has become a disastrous trap which creates far more reprisal victims than it helps. This is a painful conclusion for me to accept personally, since the WPA is like my professional baby. I spent four years devoted to its unanimous passage in 1989, and another two years for unanimous 1994 amendments strengthening the law, which then was the strongest free speech law in history on paper. But reality belied the paper rights, and my baby grew up to be Frankenstein. Instead of creating safe channels, it degenerated into an efficient mechanism to finish off whistleblowers by rubber-stamping retaliation with an official legal endorsement of any harassment they challenge. It has become would-be whistleblowers' best reason to look the other way or become silent observers.

How did this happen, after two unanimous congressional mandates for exactly the opposite vision? There have been two causes for the law's frustration. The first is structural loopholes such as lack of protection for FBI and intelligence agency whistleblowers since 1978, and lack of protection against common forms of fatal retaliation such as security clearance removal. The second is a Trojan horse due process

system to enforce rights in the WPA. Every time Congress has addressed whistleblower rights it has skipped those two issues. That is why the legislative mandates of 1978, 1989 and 1994 have failed. This legislation finally gets serious about the twin cornerstones for the law to be worth taking seriously: seamless coverage and normal access to court.

A year ago GAP testified on the need for national security whistleblower reform (attached as Exhibit 1). This submission will not repeat that contribution for the record. We were gratified that, despite shrill administration objections, this committee unanimously approved the model to protect national security whistleblowers that is being perfected in this legislation.

This committee has not held hearings, however, on the due process breakdown of enforcement for rights that Congress intended to provide through unqualified statutory language. The structural cause for this breakdown has two halves. First is the Merit Systems Protection Board, where whistleblowers receive a so-called day in court through truncated administrative hearings. The second is the Federal Circuit Court of Appeals, which has a monopoly of appellate review for the administrative rulings. With token exceptions, the track record for each is a long-ingrained pattern of obsessively hostile judicial activism for the law they are charged with enforcing.

The MSPB should be the reprisal victim's chance for justice. Unfortunately, that always has been a fantasy for whistleblowers. In its first 2,000 cases from 1979-88, the Board only ruled in favor of whistleblowers four times on the merits. Since June 1999, the track record is 2-53. Since the new MSPB chair assumed office in May 2003, the record is 0-33. That means the civil service system has not recognized a single victim of illegal whistleblower retaliation during one of the most secretive, internally repressive

cycles of executive branch history. And throughout its history, the Board never has found retaliation in a high stakes whistleblowing case with national consequences. But those are exactly the scenarios when protection for whistleblowers is most needed.

The reason should be no surprise. First, hearings are conducted by Administrative Judges without any judicial independence from political pressure. As a rule, they not only avoid politically significant conflict, they run away from it. To illustrate, several years ago Senators Grassley and Durbin conducted a bi-partisan investigation and held hearings that confirmed charges by Pentagon auditors of a multi-million ghost procurement scheme for non-existent purchases. The exposure led to criminal prosecutions and jail time. The auditors were fired and sought justice at the MSPB. The AJ screened out all whistleblowing issues except for their disclosures of far less significant improprieties at a drunken office Christmas party. Even then, the auditors lost.

Second, the Board is not structured or funded for complex, high stakes conflicts that can require lengthy proceedings. As one AJ remarked after the first five weeks of a trial where the dissent challenged alleged government collusion with multi-million dollar corporate fraud, "Mr. Devine, if you bring any more of these cases the Board will have to seek a supplemental appropriation. It's like a snake trying to swallow an elephant. We're not designed for this."

In short, the WPA's due process structure at best only can handle relatively narrow, small scale whistleblowing disputes. That is the overwhelming scenario for litigation, and very important for individual justice. But the law's potential rests on its capacity to protect those challenging the most significant government abuses of power

with the widest national impact. Realistically, a minor league forum cannot and will not provide justice for those challenging major league government breakdowns.

The second cause for the administrative breakdown has been beyond the Board's control. The Board is limited by impossible case law precedents from the Federal Circuit Court of Appeals, which since its 1982 creation has abused a monopoly of appellate review at the circuit level. Monopolies are always dangerous. In this case, the Federal Circuit's activism has gone beyond ignoring Congress' 1978, 1989 and 1994 unanimous mandates for whistleblower protection. Three times this one court has rewritten it to mean the opposite. Until there is normal appellate review to translate the congressional mandate, this and any other legislation will fail.

This conclusion is not a theory. It reflects nearly a quarter century, and a dismally consistent track record. From its 1982 creation until passage of 1989 passage of the WPA, the Federal Circuit only ruled in whistleblowers' favor twice. The Act was passed largely to overrule its hostile precedents and restore the law's original boundaries. Congress unanimously strengthened the law in 1994, for the same reasons. Each time Congress reasoned that the existing due process structure could work with more precise statutory language as guidance.

That approach has not worked. Since Congress unanimously strengthened the law in October 1994, the court's track record has been 2-177 against whistleblowers in decisions on the merits. A legal memorandum summarizing each of those decisions is attached as Exhibit 2. It is almost as if there is a legal test of wills between Congress and this court to set the legal boundaries for whistleblower rights.

The Federal Circuit's activism has created a successful, double-barreled assault against the WPA through – 1) nearly all-encompassing loopholes, and 2) creation of new impossible legal tests a whistleblower must overcome for protection. Each is examined below.

Loopholes

Here judicial activism not only has rendered the law nearly irrelevant, but exposes the unrestrained nature of judicial defiance to Congress. During the 1980's the Federal Circuit created so many loopholes in protected speech that Congress changed protection from "a" to "any" lawful, significant whistleblowing disclosure in the 1989 WPA. The Federal Circuit continued to create new loopholes, however, so in the legislative history for the 1994 amendments Congress provided unqualified guidance. "Perhaps the most troubling precedents involve the ... inability to understand that 'any' means 'any.'" H.R. Rep. No. 103-769, at 18. As the late Representative Frank McCloskey emphasized in the only legislative history summarizing the composite House Senate compromise,

> It also is not possible to further clarify the clear statutory language in [section] 2302(b)(8)A) that protection for 'any' whistleblowing disclosure evidencing a reasonable belief of specified misconduct truly means 'any.' A protected disclosure may be made as part of an employee's job duties, may concern policy or individual misconduct, and may be oral or written and to any audience inside or outside the agency, without restriction to time, place, motive or context.

145 Cong. Rec. 29,353 (1994).

The Court promptly responded in 1995 with the first in a series of precedents that successfully translated "any" to mean "almost never":

Preparations for a reasonable disclosure. *Horton v. Navy*, 66 F.3d 279 (Fed. Cir. 1995). "Any" does not include disclosures to co-workers, possible wrongdoers, and supervisors (later modified to supervisors without authority for corrective action). This

cancels the most common outlet for disclosing concerns, which all federal employees are trained to share with their supervisors. It reinforces isolation, and prevents the whistleblower from engaging in the quality control to make fair disclosures evidencing a reasonable belief, the standard in 5 USC 2302(b)(8) to qualify for protection.

Disclosures while carrying out job duties. *Willis v. USDA*, 141 F.3d 1139 (Fed. Cir. 1998). This decision exempted the Act from protecting politically unpopular enforcement decisions, or challenging regulatory violations if that is part of an employee's job duties. It predates by eight years last year's controversial Supreme Court decision in *Garcetti v. Ceballos*, 547 U.S. __, 126 S. Ct. 1951 (2006). Contrast the court-created restriction with Congress' vision, expressed in the Senate report for the civil Service Reform Act of 1978.

> What is needed is a means to protect the Pentagon employee who discloses billions of dollars in cost overruns, the GSA employee who discloses widespread fraud, and the nuclear engineer who questions the safety of certain nuclear plants.

S. Rep. No. 969, 95th Cong., 2d. Sess. 8, reprinted in USCCAN 2725 *et seq.* There is no room for doubt: the reason Congress passed the whistleblower law was exactly what the Federal Circuit erased: the right for government employees to be public servants instead of bureaucrats on the job, even when professionally dangerous.

Protection only for the pioneer whistleblower. *Meeuwissen v. Interior*, 234 F.3d 9 (Fed. Cir.2000). This decision revived a 1995 precedent in *Fiorillo v. Department of Justice*, 795 F.2d 1544 (1986) that Congress specifically targeted when it changed

protection from "a" to "any" otherwise valid disclosure.[1] It means that anyone speaking out against wrongdoing, after the Christopher Columbus for a scandal, proceeds at his or her own risk. This means there is no protection for those who corroborate the pioneer whistleblower's charges and there is no protection against ingrained corruption. *See Ferdik v. Department of Defense*, 158 Fed.Appx. 286 (Fed. Cir. 2005) (Disclosures that a non-U.S. citizen had been illegally employed for twelve years were not protected, because the misconduct already constituted public knowledge since "almost the entire school knew that the employment was a statutory violation.")

A bizarre application of this loophole doctrine occurred in *Allgood v. MSPB,* 13 Fed. Appx. 976 (Fed. Cir. 2001). In that case an Administrative Judge protested that the Board engaged in mismanagement and abuse of authority by opening an investigation and reassigning another Administrative Judge before the results were received that could validate these actions. The Federal Circuit applied the loophole, *because the supposed wrongdoers at the Board already were aware of their own alleged misconduct.* This would turn *Meeuwissen* into an all-encompassing loophole, except for pathological wrongdoers who are not cognizant of their own actions.

Whistleblowing disclosure included in a grievance or EEO case: *Garcia v. Department of Homeland Security*, 437 F.3d 1322 (Fed. Cir. 2006); *Green v. Treasury*, 13 Fed., Appx. 985 (Fed. Cir. 2001). These frequently are the context that uninformed

[1] *See* S. Rep. No 100-413, at 12-13: After citing and rejecting *Fiorillo*, the Committee instructed, "For example, it is inappropriate for disclosures to be protected only if they are made for certain purposes or to certain employees or only if the employee is the first to raise the issue. S. 508 emphasizes this point by changing the phrase 'a' disclosure to 'any' disclosure in the statutory definition. This is simply to stress that *any* disclosure is protected (if it meets the reasonable belief test and is not required to be kept confidential)." (emphasis in original)

employees use to blow the whistle, particularly the grievance setting. They have no protection in these scenarios.

Illegality too trivial or inadvertent: *Schoenrogge v. Department of Justice,* 148 Fed.Appx. 941 (Fed. Cir. 2005) (alleged use of immigration detainees to perform menial labor, falsification of billing and legal records, paying contractors and maintenance staff for time not working); *Buckley v. Social Security Admin.,* 120 Fed.Appx. 360 (Fed. Cir. 2005) (alleged irreparable harm to litigation from mishandling a government's attorney's case while on vacation, rejected as illustrative of "mundane workplace conflicts and miscues") *Gernert v. Army*, 34 Fed. Appx. 759 (Fed. Cir. 2002) (supervisor's use of phone and government time for personal business); *Langer v. Treasury*, 265 F.3d 1259 (Fed. Cir. 2001) (violation of mandatory controls for protection of confidential grand jury information); *Herman v. DOJ*, 193 F.3d 1375 (Fed. Cir. 1999) (Chief psychologist at VA hospital's disclosure challenging lack of institutionalized suicide watch, and copying of confidential patient information).

As seen above, "triviality" is in the eye of the beholder, and these cases show the wisdom of language expanding protected speech for disclosures of "a" violation of law to "any" violation. In these cases, "triviality" has been intertwined with "inadvertent" as a reason to disqualify WPA coverage. That judicially-created exception may be even more destructive of merit system principles. The difference between "inadvertent" and "intentional" misconduct is merely the difference between civil and criminal liability. Employees shouldn't be fair game for reprisal, merely because the government breakdown they try to correct was unintentional. The loophole further illustrates the benefits of specific legislative language protecting disclosures of "any" *illegality*.

Disclosure too vague or generalized. *Chianelli v. EPA*, 8 Fed. Appx. 971 (Fed. Circ. 2001) This was the basis to disqualify an EPA endangered species/groundwater specialist's disclosure of failure to meet requirements in funding for two state pesticide prevention programs; and expenditure of $35 million without enforcing requirement for prior groundwater pesticide treatment plans.

Substantiated whistleblowing allegations, if the employee had authority to correct the alleged misconduct. *Gores v. DVA*, 132 F.3d 50 (Fed. Cir. 1997) This amazing precedent is a precursor of *White's* judicially-created burdens beyond the statutory "reasonable belief" test. The decision means it is not enough to be right. To have protection, the employee also must be helpless. A manager who imposes possibly significant and/or controversial corrective action cannot say anything about it until after a fait accompli. Otherwise, s/he has no merit system rights to challenge subsequent retaliation, and proceeds at his or her own risk by honoring normal principles for responsible decision making.

Waiting too long. *Watson v. DOJ*, 64 F.3d 1524 (Fed. Cir. 1995) The court held that a Border Patrol agent's disclosure wasn't protected and he would have been fired anyway for waiting too long (12.5 hours overnight) to report another agent's shooting and unmarked burial of an unarmed Mexican after implied death threat by the shooter if silence were broken.

Supporting testimony. *Eisenger v. MSPB*, 194 F.3d 1339 (Fed. Cir. 1999) The court rejected protection for supporting testimony to confirm a pioneer witness' charges of document destruction. This case precedes *Meeuwissen* and illustrates the worst case scenario for the "Christopher Columbus" loophole.

Blamed for making a disclosure. Cordero v. MSPB, 194 F.3d 1338 (Fed. Cir. 1999) An employee is not entitled to whistleblower protection if merely suspected of making the disclosure. The employee must prove he or she actually did it. This decision overturns longstanding Board precedent that protects those harassed due to suspicion (even if mistaken). The reason for that doctrine is the severe chilling and isolating effect of allowing open season on anyone accused of whistleblowing or leaks, even if the disclosure of concealed misconduct itself qualifies for protection. It contradicts prior Board case law. *Juffer v. USIA,* 80 MSPR 81, 86 (1998). It also is contradictory to consistent interpretation of other whistleblower statutes.

Nongovernment illegality. *Smith v. HUD*, 185 F.3d 883 (Fed. Cir. 1999). This loophole also is addressed by the switch from "a" to "any" illegality. The exception is highly destructive of the merit system, because a common reason for harassment is catching the wrong (politically protected) crook or special interest. It allows agencies to take preemptive strikes at the birth of a cover up to remove and discredit potential whistleblowers who may challenge it.

"Irrefragable proof"

One provision in the Civil Service Reform Act of 1978 that Congress did not modify was the threshold requirement for protection against retaliation -- disclosing information that the employee "reasonably believes evidences" listed misconduct. The reason was simple: the standard worked, because it was functional and fair. To summarize some 20 years of case law, until 1999 whistleblowers could be confident of

eligibility for protection if their information would qualify as evidence in the record used to justify exercise of government authority.

Unfortunately, the Federal Circuit decided to judicially amend the reasonable belief test. In *LaChance v. White,* 174 F.3d 1378, 1381 (Fed. Cir. 1999), it eliminated all realistic prospects that anyone qualifies for whistleblower protection unless the specifically targeted wrongdoer confesses. The circumstances are startling, because the agency ended up agreeing with the whistleblower's concerns. John White made allegations concerning the misuse of funds in a duplicative education project. An independent management review validated his claims, resulting in the Air Force Secretary's decision to cancel the program. Unfortunately, the local official held a grudge, stripped Mr. White of his duties and exiled him to a temporary metal office in the desert outside the Nevada military base. Mr. White filed a claim against this official's retaliation and won his case three times before the MSPB. However, in 1999 the Federal Circuit sent the case back with its third remand in nine years, ruling he had not demonstrated that his disclosure evidenced a reasonable belief.

Since the Air Force conceded the validity of Mr. White's concerns, the Court's conclusion flunks the laugh test. The Federal Circuit circumvented previous interpretations of "reasonable belief" by ruling that an employee must first overcome the presumption of government regularity: "public officers perform their duties correctly, fairly, in good faith and in accordance with the law and governing regulation." The court then added that this presumption stands unless there is "irrefragable proof to the contrary'" (citations omitted). The black magic word was "irrefragable." Webster's Fourth New Collegiate Dictionary defines the term as "undeniable, incontestable,

incontrovertible, incapable of being overthrown." This creates a tougher standard to qualify for protection under the whistleblower law than it is to put a criminal in jail. An irrefragable proof standard allows for almost any individual's denial to overturn a federal employee's rights under the WPA.

GAP joined this case as an amicus because of the implications it had for all subsequent whistleblower decisions. If the Court could rule that John White's disclosures did not qualify him for whistleblower protection, no one could plausibly qualify for whistleblower protection. It appears that was the court's objective. Since 1999 our organization has been obliged to warn all who inquire that if they spend thousands of dollars and years of struggle to pursue their rights, and if they survive the gauntlet of loopholes, they inevitably will earn a formal legal ruling endorsing the harassment they received. The court could not have created a stronger incentive for federal workers to be silent observers and to look the other way in the face of wrongdoing. This decision direct conflicted with the January 20, 2002 Executive Order signed by then newly-inaugurated President Bush stating that federal employees have a mandatory ethical duty to disclose fraud, waste, abuse and corruption.

After a remand and four more years of legal proceedings, the Federal Circuit upheld its original decision. *White v. Department of Air Force*, 391 F.3d 1377 (Fed.Cir. 2004). In the process, it replaced the "irrefragable proof" standard with an equivalent but more diplomatic test -- "a conclusion that the agency erred is not debatable among reasonable people." *Id.*, at 1382. To illustrate what that means, Mr. White then lost because the Air Force hired a consultant to provide "expert" testimony at the hearing that disagreed with Mr. White (as well as the Air Force's own independent management

review and the Secretary). The court did limit this "son of irrefragable" decision's scope to cases where a whistleblower discloses gross mismanagement. Legislative history through the committee report and floor speeches should not leave any doubt that the bill's ban on rebuttable presumptions and definition of "reasonably believes" apply to all protected speech categories, without any loophole that functionally eliminates protection for those challenging gross mismanagement.

If Congress expects the fourth time to be the charm for this law, the Federal Circuit's record is irrefragable proof for the necessity to restore normal appellate review.

A GENUINE LEGISLATIVE REFORM

Justice Brandeis once declared, "If corruption is a social disease, sunlight is the best disinfectant." By that standard, this is outstanding good government legislation. If the final version includes normal appellate review, it will upgrade federal workers from the lowest common denominator in modern U.S. whistleblower laws, to the world's strongest free speech shield for government employees. This claim is not just supportive rhetoric. GAP has researched and summarized a global best practices index for whistleblower protection laws. (Attached as Exhibit 3) By those criteria, this legislation would upgrade U.S. law to substantial compliance with ten evaluation criteria currently failing out of twenty.[2] In general, the legislation achieves this result by overturning twelve years of hostile case law, closing the coverage gaps for national security and contractor whistleblowers, and providing enforcement teeth through normal due process

[2] Our recommendations address other areas for separate legislation, such as the informal support intended to be available from the Office of Special Counsel.

rights. While the final provisions have not yet been released, we understand that the legislation as proposed for committee review would --

* Codify the legislative history for "any" protected disclosure, meaning the WPA applies to all lawful communication of misconduct. This restores "no loopholes" protection and cancels the effect of *Garcetti v. Ceballos* on federal workers.

* Restore the unqualified, original "reasonable belief" standard established in the 1978 Civil Service Reform Act for whistleblowers to qualify for protection.

* Provide whistleblowers with access to district court for de novo jury trials if the Merit Systems Protection Board fails to issue a ruling within 180 days, providing whistleblowers with the same court access as with EEO anti-discrimination law.

* End the Federal Circuit Court of Appeals monopoly on appellate review of the Whistleblower Protection Act through restoring "all circuits" review, as in the original Civil Service Reform Act of 1978.

* Close the loophole that has existed since 1978 and provide WPA coverage to employees of the FBI and intelligence agencies.

* Restore independent due process review of security clearance determinations for whistleblower reprisal, unavailable since a 1985 Supreme Court decision.

* Provide whistleblower rights to government contractor employees, helping create accountability for government spending that has increased from $207 billion in 2000 to over $400 billion last year, according to published reports last week.

* Restore intended civil service and whistleblower rights for some 40,000 Transportation Security Administration baggage screeners on the front lines of homeland security.

* Make permanent and provide a remedy for the anti-gag statute – a rider in the Treasury Postal Appropriations bill for the past 17 years – that bans illegal agency gag orders. The anti-gag statute neutralizes hybrid secrecy categories like "classifiable," "sensitive but unclassified," "sensitive security information" and other new labels that lock in prior restraint secrecy status, enforced by threat of criminal prosecution for unclassified whistleblowing disclosures by national security whistleblowers.

* Take initial steps to prevent the states secrets privilege from canceling a whistleblower's day in court.

* Specifically shield scientific research from political censorship, repression or distortion.

* Codify protection against retaliatory investigations, giving whistleblowers a chance to end reprisals by challenging preliminary "fact-finding" charades.

* Protect whistleblowers who disclose classified information to Members of Congress on relevant oversight committees or their staff.

* Strengthen the Office of Special Counsel's authority to seek disciplinary sanctions against managers who retaliate.

* Authorize the Special Counsel to file friend of the court briefs.

RECOMMENDATIONS

A. Minor Repairs

We recognize that this legislation reflects a unanimous committee consensus from the last Congress. We also appreciate, respect and agree with the committee's top priority to act without delay. Realistically that precludes significant changes from last year's bill. Our research since the last Congress, however, has confirmed the need for two significant but technical amendments that are consistent with last year's bill. Without changing the meaning, they would reinforce and expand its intended impact.

1. "Clear and convincing evidence" definition. Congress already has defined or is now addressing two of three tests for relief under the WPA -- "reasonable belief," and "contributing factor." For the administrative process to function as intended, Congress also must define the "clear and convincing evidence" burden of proof for an agency's affirmative defense that it would have taken the same action on independent grounds in the absence of protected conduct. This normally tough standard has become the primary basis cited to rule against whistleblowers. That is because the Board discarded long-standing judicial and administrative norms, substituting three factors -- 1) the merits of an agency's stated independent justification for acting against a

whistleblower; 2) whether there was a motive to retaliate; and 3) whether the action reflects discriminatory treatment compared to that afforded employees who have not engaged in protected conduct. In practice, Board AJ's exercise discretion in any given case for how many of these criteria an agency must demonstrate, and by what level of proof for each factor. We recommend that the Committee adopt a definition consistent with Supreme Court precedent, and grounded in case law ranging from remedial employment legislation to the myriad of contexts in *Black's Law Dictionary*: "evidence indicating that the thing to be proved is highly probable or reasonably certain." The legislative history should specify that each criteria used to apply the definition must conform to these terms.

2. Displaced whistleblowers. Another loophole deprives whistleblowers of access to WPA coverage if they make their disclosures in litigation, whether it is their own disclosure or as a witness. This deprives them of access of Independent Rights of Action due process access, and stronger burdens of proof than if they made the same disclosure on television. Those who refuse to violate the law are similarly deprived despite the increased peril. These exclusions from normal whistleblower protection rights are arbitrary. Indeed, administrative or judicial testimony under oath should have the strongest shield in searching for "the whole truth." An amendment should end the second class legal treatment for their already-protected activity.

3. Scientific freedom. The legislation eliminates any confusion that the Act protects government scientists against abuse of authority from obstructing, censoring or tampering with their research. The Union of Concerned Scientists and GAP believe, however, that this provision should be its own prohibited personnel practice, instead of

merely a subset tfor another protected speech category. The latter structure would proactively ban attacks on the integrity of scientific research, instead of just shielding whistleblowers who disclose it.

B. Deference to Senate Legislation.

The Senate's counterpart legislation, S. 274, has provisions that cover two scenarios which could frustrate the goals of this bill but were not addressed in last year's House version. Each should be non-controversial, but each could be essential to avoid this reform being circumvented for many whistleblowers. If both bills make it to conference, we recommend that the House accept these Senate reforms.

1. Critical Infrastructure Information. This broad hybrid secrecy category is not covered by the anti-gag statute, because it is derived from legislation. Taken literally, it could cancel out nearly any disclosure otherwise shielded by the Whistleblower Protection Act. This is not the law's intended result, as recognized by Department of Homeland Security's regulations disclaiming that authority. For the same reasons Congress is acting to codify the anti-gag statute, the DHS boundaries should be codified as well.

2. Restoring whistleblowers' right to present their cases at hearings. An almost surreal exercise of administrative law judicial economy has deprived whistleblowers of the right to present their cases when they qualify for a hearing. The Board routinely skips the whistleblower's side of the story and goes straight to the agency's affirmative defense of independent justification. If the agency prevails, as now routinely occurs with the Board's unique "clear and convincing evidence" test, the case is over and there is no need to hear from the whistleblower. That means reprisal victims never get to make a public

record or even present their side of the story, including what they blew the whistle to challenge and how they were harassed. They only earn the right for the agency to pile on further. This denial of due process is inexcusable. The Senate addressed the procedural breakdown by a provision preventing an agency from presenting an affirmative defense until the employee has demonstrated a prima facie case of retaliation.

C. Next steps:

Realistically it is not possible for this legislation to cover all the flaws in whistleblower law, without first building the record for objectives and problems not considered in the bill. We recommend that Congress consider and build the record for the following ongoing conceptual problems, or further structural loopholes in current law.

1. The Office of Special Counsel. Under Special Counsel Scott Bloch, this agency has become a caricature and an object of contempt among the constituencies it supposedly serves. The agency charged with defending the merit system from repressive secrecy illegally gags its own employees, engages in ugly retaliation against its staff, and is engaging in heavy handed obstruction of justice tactics to intimidate its own employees from testifying in a President's Council on Integrity and Efficiency investigation of its OSC misconduct. The Office of Special Counsel should be targeted for intensive oversight, to determine whether the institution can be salvaged or should be abolished.

2. Making a difference. MSPB studies have confirmed for decades that many more whistleblowers remain silent observers because they don't think their efforts will matter than those who are fearful of retaliation. The channels for whistleblowers to make a difference are largely unchanged since their 1978 creation, however. There is a similar need and opportunity for this Committee to thoroughly examine and overhaul the whistleblower disclosure channels, as it is doing with protection against retaliation.

3. Protection for Library of Congress and General Accountability Office employees. Last year, Lou Fisher, the legendary Congressional Research Service author, faced retaliation and was transferred out of the CRS after writing a report that demonstrated increased retaliation against national security whistleblowers since 9/11. Like the many GAO employees who have described internal intimidation, he had no WPA or other third party legal rights to defend himself. Congress should act to protect its own sources of information.

4. Peer review as a listed personnel action. While hospital peer review is an important safeguard for patient care, it has no checks and balances and is too often used

by hospital administrators as the medical equivalent of security clearance reviews. Like national security agencies that retaliate against whistleblowers, hospitals have unique and unchecked ability to retaliate against physicians that challenge inadequate patient care at their institutions. Like security clearance proceedings, physician peer reviews are conducted secretly and bypass the normal procedural rights available to the accused in a normal setting. This should be addressed in the same way as psychiatric fitness for duty examinations were in 1994, and security clearance determinations are under this legislation. While medical judgments could not be reviewed, the WPA should be available to determine if the peer review was initiated in reprisal for protected whistleblowing.

5. Apply normal whistleblower rights to employees at federal banking agencies. Since 1989 employees at the FDIC and other federal agencies with federal banking responsibilities have been able to file cases in court, but without access to jury trials. That distinction has meant the difference between night and day in terms of track records, compared to EEO law and more modern employment statutes adopting that model. The playing field should be leveled for whistleblowers at banking agencies By fiving them access to juries.

6. Protection for all funded by the taxpayers. This bill's protection for contractors should be expanded to cover all employees paid with taxpayer funds. Consistent with the False Claims Act, conventional contractor protection should extend to entities receiving research grants or other federal funds.

7. MSPB pre-hearing due process standards. The Board does not honor normal rules of civil or administrative procedure in approving witnesses or pre-trial discovery to prepare for a hearing. It will not be a credible administrative forum until these deficiencies are addressed.

8. Expert witness fees. Unlike other remedial employment laws, the Board has interpreted the WPA to exclude recovery for expert witness fees. They can be essential for a whistleblower to prevail in any case involving professional or technical judgments. There is no rational basis for this arbitrary financial barrier to a fair hearing.

9. Compensatory damages. Unlike EEO and corporate whistleblower law, whistleblowers are not entitled to compensatory damages when they prevail. Again, this discriminatory standard is arbitrary and should be erased.

The top priority for this legislation is to act on it quickly. Every day that Congress delays, employees will have to continue risking professional suicide to cooperate with congressional oversight. This committee is doing more than its share, but that has been the case for four years. The reform isn't law already, because in 2004 and 2006 House

leadership has refused to permit a vote on this committee's work. If the new leadership is committed to serious reforms that reflect informed choices, it will schedule a prompt vote this time. If that occurs, in a few months those who defend the public finally will have a fair chance to defend themselves.

Chairman WAXMAN. Thank you very much, Mr. Devine.
Mr. Zaid.

STATEMENT OF MARK ZAID

Mr. ZAID. Good morning, Mr. Chairman, members of this committee. It is with pleasure that I testify once again before this distinguished committee.

I have been requested to specifically focus on the State Secrets Privilege [SSP] that I will call it, I applaud this committee for taking on this topic. You are, to my knowledge, in fact, the first congressional committee in decades and perhaps ever to ever directly focus on this privilege. The privilege is routinely exploited by the executive branch and understandably so. The judicial branch, despite flowery rhetoric, has abdicated its responsibility for oversight and the legislative branch has been historically silent.

Fortunately, the latter situation, as evidenced by this hearing, is no longer. Let me state at the outset that I support the passage of the current language in this bill about the privilege, although admittedly, any favorable substantive impact it might have is likely too difficult to measure. But the importance of the legislation is that it very clearly opens the door for the first time in history for true congressional involvement in oversight. In particular, to allow for the application of the most important type of test when it comes to executive branch claims of classification. That is one of smell.

I know all too well the implications of litigating cases involving national security disputes and classified information. Oftentimes, my clients' very identity or relationship to the U.S. Government is a highly classified secret. I am frequently in the trenches fighting with Federal agencies concerning access to classified information. Over the years, I have handled or have been consulted on a number of SSP cases. I am generally aware in those cases of much of the information that is classified. Sometimes I know the exact information that is classified, but other times, I know little to none of what is involved.

I do appreciate, and I think this is important to note, the nature of properly classified information. There are many secrets, as many of you know, that absolutely need to be protected. The disclosure of some of the information that I have been privy to over the years could easily cause serious damage to the national security interests of the United States and could lead to the loss of life, including that of my own clients. And I take that prospect very seriously.

The problem is that excessive over-classification is rampant and at times purposefully abused. Secrecy was designed to serve as a shield to protect the disclosure of certain harmful or sensitive information. In the context of civil litigation, it is quite the opposite. There it is, the equivalent of a two-handed sword that in one fell swing, at the outset of a battle, decapitates the enemy. The sword is the privilege and the enemy is fair judicial due process.

Since the privilege was created in 1953 by the Supreme Court in *United States* v. *Reynolds,* courts routinely remind the executive branch that its assertion is not to be lightly invoked. And as routinely as that reminder occurs, the executive branch routinely ignores it. Moreover, rarely does a Federal judge do anything other than accept carte blanche whatever an agency head states in a

classified declaration submitted for review in camera and ex parte. There is no role based on current law for the plaintiff's attorney even when we do have security clearances to actually review that declaration or comment on it. Essentially, it is the defendant in the role of a batter telling the pitcher to throw the pitch that he wants to guarantee that he could hit a home run.

In the majority of the privilege cases that I am familiar with, the court never even gets to the point where the specific classified documents are in question. It is only the one-sided, self-serving classified declaration that is reviewed and serves as the basis for the court's decision. Indeed, there is no case that I am personally aware of where the judge even verbally posed substantive questions or requested clarifying information in writing based on what was contained int eh classified declaration.

Yet we know from the *Reynolds* case that a Federal agency will mislead and arguably lie to a court in order to protect itself. The mis-use of the classification system, especially in the context of judicial proceedings, is destructive to the fundamental tenets of our Constitution. But the courts repeatedly hold that it is generally not within their purview to intervene on national security matters.

Frankly, I rejected the notion that Federal judges neither have the authority nor can exercise the expertise regarding classification decisions. I would submit that Congress agrees with me, due to its role in creating such statutes as the Freedom of Information Act and the Classified Information Procedures Act, both of which allow for judges to explicitly exercise authority in the national security realm.

Regrettably, in 2005, 2006, the Supreme Court had an opportunity to ensure that this hearing never occurred. It had two cases pending for certiorari, it had two others pending at the circuit courts of appeals and at least one other at the district court. And in briefs that I filed that made it very well known to the court that this was happening, that the first time in 50 years they had an opportunity to clarify the ambiguity, and in each of the cases, they declined without comment to even rule.

Instead of making that decision, they didn't follow their own admonition in *Reynolds* that judicial control over the evidence in a case cannot be abdicated to the caprice of executive officers. To put the consequences of the privilege in some sort of understandable perspective, I find it distressing that foreign criminal terrorist defendants receive more rights to ensure that they and their counsel have access to classified information than do U.S. nationals who place their lives on the line to fight against foreign criminal terrorists. The absurdity and irony of this irreconcilable discrepancy must not go unnoticed any longer.

In my written statement, I go through some history that I won't repeat here. I will very briefly just point out some legislative suggestions for reform and then I can expand on any in the Q&A.

The only way that this privilege is ever going to be modified is legislatively. It is not going to happen judicially. You have some options. You can create a special Article Three court or an Article One administrative entity or modify existing entities, such as the Pfizer court or the MSPB. You could adopt statutory language that would impose clear requirements on judges to take certain steps

before they dismiss a case in its entirety based on the privilege. You could ensure proper education and training of Federal judges, so that they understand what is the nature of classification and how to protect classified information.

Certainly in the interim, an easy thing to do is to task CRS to draft proposed statutory language to address concerns of the executive branch and consider expanding the jurisdiction of the entities I mentioned, or task the GAO to conduct a thorough examination of the historical invocation of the privilege and objectively analyze some of the prior examples of classified declarations to see if what was submitted back when meets the test back at that time or at least now.

All these suggestions are going to require some significant work. I am happy to work with the committee in drafting that, especially since some of these suggestions will require the involvement of other committees where it actually might be their primary jurisdiction. I appreciate the opportunity and thank you.

[The prepared statement of Mr. Zaid follows:]

FORMAL WRITTEN TESTIMONY OF MARK S. ZAID, ESQUIRE*

DELIVERED BEFORE THE
COMMITTEE ON OVERSIGHT AND GOVERNMENT REFORM,
U.S. HOUSE OF REPRESENTATIVES

"Whistleblower Protection Enhancement Act of 2007"

TUESDAY, FEBRUARY 13, 2007

Good morning Mr. Chairman, Members of the Committee, it is with pleasure that I testify once again before this distinguished Committee. Today's hearing is an extremely important topic, especially as it directly relates to creating due process protections for those who make great sacrifices in order to support the national security interests of the United States.

While I routinely represent federal whistleblowers and can comment if requested on the broader legislative purpose of today's hearing, I have been requested to specifically focus on the provisions of the "Whistleblower Protection Enhancement Act of 2007", HR ___, that pertain to the state secrets privilege (SSP). I applaud this Committee for taking on this challenge. You are, to my knowledge, the first Congressional Committee in decades – and perhaps ever – to directly focus on the manifestation and application of the

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* Managing Partner, Mark S. Zaid, P.C., 1920 N Street, N.W., Suite 300, Washington, D.C. 20006. Tel. No. 202-454-2809. E-mail: ZaidMS@aol.com. A short biography is attached at Exhibit "1". Most relevant is the fact that I am one of but a small handful of litigators across the country who routinely handles national security matters in administrative and litigative proceedings. I teach the D.C. Bar CLE courses on the Freedom of Information Act (which includes litigation Exemption One national security challenges) and security clearance challenges, and I have also testified numerous times before Congress to include such topics as national security whistleblowers, security clearances and federal government polygraph programs. *See e.g.*, *"Can You Clear Me Now?: Weighing "Foreign Influence" Factors in Security Clearance Investigations"*, Committee on Government Reform, U.S. House of Representatives, July 13, 2006; *"National Security Whistleblowers in the post-9/11 Era: Lost in a Labyrinth and Facing Subtle Retaliation"*, Subcommittee on National Security, Emerging Threats, and International Relations, Committee on Government Reform, U.S. House of Representatives, February 14, 2006; *"Issues Surrounding the Use of Polygraphs"*, testimony before the Committee on Judiciary, U.S. Senate, Washington, D.C., April 25, 2001. The views expressed herein reflect the opinion of only myself and should not be attributed or ascribed to any organization with which I may be affiliated.

SSP.[1] The SSP is routinely exploited by the Executive Branch, and understandably so. The Judicial Branch, despite flowerily rhetoric, has abdicated its responsibility for oversight and the Legislative Branch has been historically silent. Fortunately the latter situation, as evidenced by this very hearing, is no longer.

Let me state at the outset that I support the passage of the current provision, although admittedly any favorable substantive impact it might have is likely too difficult to assess or measure. But the importance of the legislation is the broader result in that it very clearly opens the door for the first time in history for true congressional involvement and oversight, in particular to allow for the application of the most important type of test when it comes to Executive Branch claims of classification – one of smell.

I know all too well the implications of litigating cases involving national security disputes and classified information. Oftentimes my clients' very identity or relationship to the United States Government is a highly classified secret. I am frequently in the trenches fighting with federal agencies concerning access to classified information in order to pursue my clients' claims. I am not talking about circumstances where the contents of the documents are unknown and I am seeking to have them declassified for use in proceedings but rather using information learned from authorized access to presently classified information, as well as expanding that access.[2]

Over the years I have handled or have been consulted on a number of cases where the SSP was raised. Often I am generally aware of a substantial amount of the classified information at issue in any of the SSP or other national security lawsuits I handle. Sometimes I know exactly what is at issue. Other times, of course, I know little to nothing of what is involved.

I say this in order to point out that, contrary to perhaps what some of my legal adversaries in the Government all too casually try to argue in their court filings, I do appreciate the nature of properly classified information. There are many secrets that absolutely need to be protected. The disclosure of some of the information that I have been privy to over the years could easily cause serious damage to the national security interests of the United States and could lead to the loss of life including that of my clients. I take that prospect very seriously. The problem is that excessive overclassification is rampant and at times purposefully abused. This is no longer

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[1] The last time Congress apparently substantively considered matters relating to the SSP was in the early 1970s when it contemplated including a SSP provision in the newly proposed Federal Rules of Evidence. Hearings on Proposed Rules of Evidence Before the Special Subcomm. On Reform of Federal Criminal Laws of the House Comm. On the Judiciary, 93rd Cong., 1st Sess. 181-85 (1973). Ultimately no provision was included.

[2] *See e.g. Stillman v. Dep't of Defense et al.*, 209 F. Supp. 2d 185 (D.D.C. 2002), *rev'd on other grounds*, 319 F.3d 546 (D.C. Cir. 2003)(First Amendment prepublication dispute involving counsel's access to classified information).

conjecture as it has been admitted to by senior officials of our Government.[3] The SSP is a perfect example.

CURRENT USE OF THE STATE SECRETS PRIVILEGE IS AN ANATHEMA TO OUR CONSITUTIONAL SYSTEM

Secrecy was designed to serve as a shield to protect the disclosure of certain harmful or sensitive information. In the context of civil litigation it is quite the opposite. In that venue it is the equivalent of a two-handed sword with the sharpest blade that in one fell swing at the outset of the battle decapitates its enemy. The sword is the SSP, one of the most powerful of tools available to the Executive Branch. And the enemy is fair judicial due process.

Since the formal creation of the SSP in 1953 by the Supreme Court in *United States v. Reynolds*,[4] courts routinely remind the Executive Branch that the assertion of the SSP is "not to be lightly invoked."[5] As routinely as that reminder occurs, the Executive Branch routinely ignores it. Indeed, as we engage in the first legislative discussion of the privilege in decades, it should not go unnoticed that we have no public understanding whatsoever as to the thought process that goes into play when an Executive agency decides to invoke the state secrets privilege. Likewise, we have absolutely no public understanding as to the thought process that comes into play with respect to analysis by the Department of Justice in deciding whether the invocation is legally sound.

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[3] *See e.g.*, "*Too Many Secrets: Overclassification as a Barrier to Critical Information Sharing,*" Hearings Before SubComm. On Nat'l Security, Emerging Threats and Int'l Relations, Comm. On Gov't Reform, U.S. House of Representatives, August 24, 2004, Testimony of Carol Haave, Under Secretary of Defense for Intelligence, U.S. Department of Defense (50% of information is overclassified) & Testimony of J. William Leonard, Director, Information Security Oversight Office, National Archives & Records Administration (more than 50% of information classified should not be), available at *http://www.fas.org/sgp/congress/2004/082404transcript.html*. *See also* Statement of Senator Ron Wyden (D-Or)(noting that Governor Thomas Kean, Chairman 9/11 Commission, had stated that "well over half of the documents that he saw that were marked 'classified' didn't warrant being classified." "*The Nomination of Mike McConnell to be Director of National Intelligence*," Hearing Before the Senate Select Committee on Intelligence, February 1, 2007, available at *http://www.fas.org/irp/congress/2007_hr /020107dni.pdf*; Erwin Griswold, "Secrets Not Worth Keeping: The Courts and Classified Information," *Washington Post*, February 15, 1989 (former Solicitor General who argued *Pentagon Papers* case for Government noted massive overclassification exists primarily to hide governmental embarrassment).

[4] 345 U.S. 1 (1953).

[5] *Id.* at 7.

I would wholeheartedly encourage the Committee to solicit views and perspectives from the different agencies that historically invoke the privilege as well as attorneys with the Department of Justice to attain an understanding of how the process works internally. Indeed, public testimony should be required from the Executive Branch in a follow-up hearing so that true transparency can occur as part of this important discussion. Though perhaps more sensitive, serious consideration should be accorded to having former, or even current, federal judges testify to better understand the limitations they feel are imposed upon them in SSP or similar cases and how best to overcome those problems.

Disappointingly, rarely does a federal judge do anything other than accept carte blanche whatever the head of the Executive Department states in a classified declaration submitted for review *in camera* and *ex parte*. There is no role, based on current law, for plaintiff's counsel in this review process. Essentially it is the defendant in the role of a batter calling for whatever preferred pitch he wants the pitcher to throw in order to guarantee hitting a home run.

In the majority of cases that I am familiar with that involve claims against Executive agencies for misconduct or wrongdoing the court never even gets to the point where specific classified documents that might comprise the evidence are in question. It is only the one-sided, self-serving, classified declaration that leads to a favorable decision for the government that is reviewed and serves as the basis for the court's decision. There is no case I am personally aware of where a district judge has verbally posed substantive questions or requested clarifying information in writing based on what was contained in the classified declarations. The contents of the declarations are adopted wholesale.

Yet we know from the *Reynolds* case that an Executive Agency will not hesitate to mislead, and arguably, lie to a court in order to protect itself from embarrassment or the revelations of potentially unlawful conduct.[6] The misuse of the classification system,

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[6] The actual "classified" accident report that was at the heart of the *Reynolds* lawsuit was discovered on the Internet in 2000 among declassified files by one of the daughters of those killed in the 1948 plane crash that sparked the litigation. The claim by the Government at the time that release of the report would reveal sensitive, classified operations of the flight was completely erroneous. For information about the potential fraud that was perpetrated by the Government in this case and the dangers that emanate from this claim, *see e.g.*, LOUIS FISHER, IN THE NAME OF NATIONAL SECURITY: UNCHECKED PRESIDENTIAL POWER AND THE *REYNOLDS* CASE (Univ. Press of Kansas, 2006); "*Government's Ugly Secret*", Los Angles Times, Apr. 21, 2004, at B14; "*The Secret of the B-29*", Los Angeles Times, Apr. 18-19, 2004, at 1; "*A 1953 case echoes in high court: The administration asks that fraud-on-court allegations be dismissed*", National Law Journal, June 10, 2003, at 5; "*The secret's out: 17th century doctrine invoked to challenge 1953 ruling based on Air Force's national security claim in fatal crash*", Miami Daily Business Review , Mar. 11, 2003. *See also Hirabayashi v. United States*, 828 F.2d 591, 597 (9th Cir. 1987)(granting corum nobis relief as Dep't of War suppressed crucial report from initial court review).

especially in the context of judicial proceedings, is destructive to the fundamental tenets of our Constitution.[7]

Courts repeatedly hold that it is generally not within their purview to intervene on national security matters. I reject the notion that federal judges neither have the authority nor can exercise expertise regarding classification decisions. I would submit that Congress agrees with that premise due to its role in creating such statutes as the Freedom of Information Act and the Classified Information Procedures Act. The former is especially pertinent. This Legislative Branch, in 1974, specifically granted the courts explicit authority to overrule FOIA Exemption One national security assertions.[8] Despite the confidence that this Branch of Government determined existed, its sister branch refuses to accept the job. Nothing less than specific instructions from the Congress will apparently modify the courts' way of thinking.

And yet times have certainly changed over the years. Courts more frequently handle cases – whether those be criminal or civil – where classified information is at stake. And the Foreign Surveillance Act (FISA) court, in particular, obviously addresses some of the most sensitive, classified issues that exist today. Certainly those judges who sit on the FSIA court did not, at least initially, possess any greater skills or insight as to how to handle national security decisions than their colleagues assigned to other federal courts. To my knowledge there is no special qualification to serve on the FSIA court. But they do, and they render national security decisions. The real issue is transparency, or the lack thereof.

The problem with the SSP is that, in my personal opinion, federal judges are clearly concerned that a decision they issue will have dire consequences later on for which they shall be blamed. That is, should they order the disclosure of classified information during a civil proceeding and that information is somehow leaked, even inadvertently, the perceived fault will ultimately lie with the court. That concern does not exist with the FSIA court.

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[7] "[T]oo much classification ... unnecessarily obstructs effective information sharing and impedes an informed citizenry, the hallmark of our democratic form of government. In the final analysis, inappropriate classification activity of any nature undermines the integrity of the entire process and diminishes the effectiveness of this critical national security tool. Consequently, inappropriate classification or declassification puts today's most sensitive secrets at needless increased risk," Hearings before U.S. House of Representatives, Comm. On Gov't Reform, Subcomm. On Nat'l Security, Emerging Threats and Int'l Relations, Mar 14, 2006 (statement by J. William Leonard, Director, Information Security Oversight Office, National Archives & Records Administration).

[8] In amending FOIA in 1974, Congress explicitly rejected the Supreme Court's decision in *EPA v. Mink*, 410 U.S. 73 (1973), which had limited the court's role in assessing security classifications under FOIA, and also overrode President Ford's veto. The 1974 Amendments explicitly empower courts to make a *de novo* determination of the propriety of a federal agency's classification decision. *Halkin v. Helms*, 598 F.2d 1, 16 (D.C.Cir. 1978).

Regrettably, this legislative hearing might not have been necessary if the Supreme Court had exercised its discretion in 2005-2006 when it was provided a prime opportunity to weigh in on this delicate issue for the first time since it issued *Reynolds* a half-century ago. In late 2005, it had two certiorari petitions simultaneously pending regarding SSP cases, as well as two others at the Circuit Court of Appeals level and at least one known case at the district court level.[9] All of the lower court cases were on their path towards the Supreme Court as well. Never before, to my knowledge, were so many SSP cases pending at one time, especially at such high levels. Yet, without even a comment, the Supreme Court turned away each of the cases that reached it. It chose to leave in place the ambiguity or hypocrisy that exists between its own admonition in *Reynolds* that "[j]udicial control over the evidence in a case cannot be abdicated to the caprice of executive officers" and the application of SSP in the practical reality of today.[10]

To put the consequences of the SSP in some sort of understandable perspective, I personally find it distressing that foreign criminal terrorist defendants receive more rights to ensure that they and their counsel have access to classified information than do U.S. nationals who place their lives on the line to fight against foreign criminal terrorists.[11] I am all for the application of full constitutional protection to any individual who finds themselves within the grasp of the U.S. criminal justice system but the absurdity and irony of this irreconcilable discrepancy must not go unnoticed any longer.[12]

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[9] Both *Edmonds v. Dep't of Justice*, 323 F. Supp. 2d 65 (D.D.C. 2004), *aff'd*, 161 Fed. Appx. 6 (D.C. Cir.), *cert. denied*, 126 S. Ct. 734 (2005) and *Sterling v. Tenet*, 416 F.3d 338 (4th Cir. 2005), *cert. denied, Sterling v. Goss,* 126 S. Ct. 1052 (2006),were pending certiorari consideration at the same time. The petition in *Herring v. United States*, 424 F.3d 384 (3d Cir. 2005), *cert. denied*, 126 S. Ct. 1909 (May 1, 2006)(*Herring*, while not directly an SSP case, involved fraud claims arising from the original *Reynolds* litigation) was filed within weeks and was specifically acknowledged in the *Sterling* petition to be forthcoming. The petitions were denied certiorari on November 28, 2005, January 9, 2006, and May 1, 2006, respectively. The Court was also alerted to the fact that SSP cases were presenting being litigated in the D.C. Circuit Court of Appeals (*Horn v. Drug Enforcement Administration* – currently under seal) and the Eastern District of New York (*Arar v. Ashcroft*, 414 F. Supp. 2d 250 (E.D.N.Y. 2006)).

[10] *Reynolds*, 345 U.S. at 9-10.

[11] There is no legal or factual distinction with respect to how courts and litigants can adequately protect alleged classified information in civil or criminal proceedings. The alleged concerns regarding the unauthorized release of classified information are identical.

[12] *See United States v. Moussaoui*, 382 F.3d 453, 475-476 (4th Cir. 2004)("Executive's interest in protecting classified information does not overcome a defendant's right to present his case" in CIPA proceedings).

BRIEF HISTORY AND LEGAL ANALYSIS
OF THE STATE SECRETS PRIVILEGE[13]

The Founding Fathers of our country created a tri-partite system of government for very important reasons, primary among them the need to ensure checks and balances and prevent the abuse of power.[14]

The SSP is a Cold War judicially created privilege. Though its creation stems from a ruling of the United States Supreme Court, it has primarily been the Courts of Appeals and district courts that have shaped, interpreted and implemented the privilege since 1953. There are now numerous cases that demonstrate the avoidable inequities that follow abdication of responsibility by federal judges who fail to seriously challenge *ex parte, in camera* assertions by Executive Branch officials or shirk their authority to pursue available protective mechanisms to allow litigation that has the possibility of seemingly touching upon classified information.

As noted above, the Supreme Court created the SSP in its 1953 *Reynolds* decision.[15] There the United States Air Force successfully dismissed tort claims that sought to allegedly expose classified information concerning a B-29 bomber that had been testing secret electronic equipment and had crashed in 1948 killing nine people.[16] The rules surrounding the SSP appeared simple enough. Following the invocation of the SSP, courts must first ensure that the individual asserting the formal privilege is the head of the department with control over the information and that he has personally considered the matter.[17] This has become nothing more than a pro forma requirement.

The SSP was historically designed to be "a common law evidentiary rule that allows the government to withhold information from discovery when disclosure would be

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[13] For recent indepth discussions of the SSP, *see e.g.*, Robert M. Chesney, "State Secrets and the Limits of National Security Litigation," Geo. Wash. L. Rev. (forthcoming 2007), copy available at *http://papers.ssrn.com/sol3/papers.cfm?abstract_id=946676*; LOUIS FISHER, *supra* note 6; William G. Weaver & Robert M. Pallitto, *State Secrets and Executive Power*, 120 POL.SCI. Q. 85 (2005).

[14] *See Mistretta v. United States*, 488 U.S. 361, 380 (1989)(it was "the central judgment of the Framers of the Constitution that, within our political scheme, the separation of governmental powers into three coordinate Branches is essential to the preservation of liberty").

[15] 345 U.S. 1.

[16] *Id.* at 7-8.

[17] *Id.*

inimical to national security."[18] Yet, over the years, the privilege has been judicially expanded by lower courts to permit the exploitation by the government to seek complete dismissal of a lawsuit even before filing an Answer. This has raised at least some expressed concerns within the judiciary.

> Dismissal of a suit, and the consequent denial of a forum without giving the plaintiff [his] day in court, however, is indeed draconian. "[D]enial of the forum provided under the Constitution for the resolution of disputes, U.S. Const. art. III, § 2, is a drastic remedy that has rarely been invoked."[19]

In SSP cases the Government will typically submit two declarations from the relevant agency department head. One declaration will be filed for public review and the other – due to its alleged classification – will be provided to the Court, should it choose to review it, *in camera, ex parte*. Typically the public declaration will offer little, if any, substantive statement that reasonably explains the basis for the invocation of the privilege.

A common example of the most substantive statement contained in a public declaration would declare in conclusory fashion that the case needs to be dismissed because the "sensitivity of the information over which I claim this privilege is sufficiently critical to the ability of the CIA to perform its intelligence collection mission, and to the safety of its officers in vulnerable positions throughout the world... [and] by litigating this case, there is the possibility of disclosure of both 'Secret' and 'Top Secret' classified information."[20] Whether to the untrained or trained legal eye it is obvious that such a statement offers absolutely no information upon which to craft any rationale challenge.

If an agency formally invokes the privilege, according to Supreme Court jurisprudence, the district court then must undertake a serious and substantive review of the government's claims:

> [T]he more compelling a litigant's showing of need for the information in question, the deeper "the court should probe in satisfying itself that the occasion for invoking the privilege is appropriate." ... [T]he more plausible and substantial the government's allegations of danger to national security, in the context of all the circumstances surrounding the

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[18] *Zuckerbraun v. General Dynamics Corp.*, 935 F.2d 544, 546 (2d Cir. 1991), *citing In re U.S.*, 872 F.2d 472, 474 (D.C.Cir.), *cert. denied*, 110 S. Ct. 398 (1989).

[19] *Fitzgerald v. Penthouse Int'l, Ltd.*, 776 F.2d 1236, 1242 (4th Cir. 1985).

[20] *See* Declaration and Formal Claim of State Secrets Privilege and Statutory Privilege by George J. Tenet, Director of Central Intelligence at ¶7 (dated August 18, 2003), filed in *Sterling v. Tenet et al.*, Civil Action No. 01-8073 (S.D.N.Y.).

> case, the more deferential should be the judge's inquiry into the foundations and scope of the claim.[21]

In fact, the qualifying language is "[w]hen *properly* invoked, the state secrets privilege is absolute."[22] Therefore, I would submit that courts must undertake a balancing inquiry and probe the basis for the invocation before the privilege is deemed applicable and absolute. This is not the same as balancing the needs between the litigant to use the information and the government's desire to exclude it.[23] The court's inquiry is into the legitimacy of the government's invocation of the privilege, its application to the facts in the particular case and an investigation into whether disclosure would reasonably cause damage to national security interests.

However, it is not the extent to which a balancing of interests is undertaken that has become the focal point of a court's assessment of the invocation of the privilege but whether or not any substantive review or challenge occurs at all. The Supreme Court wanted to ensure that "[m]ere compliance with the formal requirement, however, is not enough."[24] "To some degree at least, the validity of the government's assertion must be judicially assessed."[25] "Once the privilege has been formally claimed, the court must balance the 'executive's expertise in assessing privilege on the grounds of military or diplomatic security' against the mandate that a court 'not merely unthinkingly ratify the executive's assertion of absolute privilege, lest it inappropriately abandon its important judicial role.'"[26]

Thus, "[j]udicial control over the evidence in a case cannot be abdicated to the caprice of executive officers."[27] "Without judicial control over the assertion of the privilege, the danger exists that the state secrets privilege will be asserted more frequently

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[21] *Reynolds*, 345 U.S. at 10.

[22] *Ellsberg v. Mitchell*, 709 F.2d 51, 57 (D.C.Cir. 1983), *cert. denied*, 465 U.S. 1038 (1984)(emphasis added).

[23] *Cf. Northrop Corp. v. McDonnell Douglas Corp.*, 751 F.2d 395, 399 (D.C.Cir. 1984)(a "party's need for the information is not a factor in considering whether the privilege will apply").

[24] *In re U.S.*, 872 F.2d at 475.

[25] *Molerio v. Federal Bureau of Investigation*, 749 F.2d 815, 822 (D.C.Cir. 1984).

[26] *Virtual Defense and Development International v. Republic of Moldova*, 133 F.Supp.2d 9, 23 (D.D.C. 2001), *quoting In re U.S.*, 872 F.2d at 475-476.

[27] *Reynolds*, 345 U.S. at 9-10.

and sweepingly than necessary leaving individual litigants without recourse."[28] Although "utmost deference" is to be accorded to the executive's expertise,[29] the government must show, and the court must separately confirm, that "the information poses a reasonable danger to secrets of state."[30]

One important area of inquiry for courts is whether the invocation is too broad.[31] In recent years there are a few, but unfortunately growing, number of cases where a plaintiffs' complaint is dismissed from the outset before an Answer is filed and without any opportunity for discovery. It is in these types of cases, in particular, where criticism can be levied against the courts for not applying a reasonable balancing test.[32]

Before the last decade most courts had found such an extreme remedy to be too distasteful and an anathema to our historical notions of liberty and due process. For example, in *In re U.S.* the government sought dismissal based on the state secrets privilege in a case that alleged illegal activities of the Federal Bureau of Investigation.[33] The district court denied the government's attempt to dismiss the case without answering the Complaint.[34]

In fact, it would appear that the Supreme Court intended the typical state secrets case to pertain to matters of discovery, not the entire case from the outset. Some courts try to follow that lead and undertake an effort to at least provide the plaintiff an opportunity to pursue his/her claim in good faith even if ultimately the case is dismissed.[35] This effort,

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[28] *NSN International Industry v. E.I. DuPont De Nemours*, 140 F.R.D. 275, 278 (S.D.N.Y. 1991), *citing Ellsberg*, 709 F.2d at 57.

[29] *United States v. Nixon*, 418 U.S. 683, 710 (1974).

[30] *Halkin v. Helms*, 690 F.2d 977, 990 (D.C.Cir. 1982).

[31] *Black v.* CIA, 62 F.3d 1115, 1119 (8th Cir. 1995).

[32] *See e.g. Edmonds v. Dep't of Justice*, 323 F.Supp.2d 65 (D.D.C. 2004); *Tilden v. Tenet*, 140 F.Supp.2d 623 (E.D.Va. 2000); *Doe et al. v. CIA et al.*, 2007 U.S. Dist. LEXIS 201 (S.D.N.Y. Jan. 4, 2007); *Sterling v. Tenet,* Civil Action No. 03-329, (E.D.Va. Mar. 3, 2004).

[33] *Id.* 872 F.2d at 473-74.

[34] *Id.* at 474.

[35] *See e.g., Molerio*, 749 F.2d at 822-26 (affirming dismissal on ground of privilege after FBI answered complaint and complied with discovery requests); *Ellsberg*, 709 F.2d at 70 (reversing dismissal); *Halkin*, 690 F.2d at 984, 1009 (affirming dismissal after parties had fought "the bulk of their dispute on the battlefield of discovery"); *Halkin v. Helms*, 598 F.2d 1, 5 (D.C.Cir. 1978)(affirming partial dismissal and reversing decision rejecting privilege that was certified as interlocutory appeal). *See also Reynolds*, 345 U.S. at 11-12

unfortunately, rarely, if ever, occurs in cases where the Government itself is accused of misconduct or unlawful actions.

What is so frustrating when dealing with SSP cases is that the courts seem willing in other cases to challenge Executive Branch national security decisions. The degree of deference to be extended to the Executive Branch on matters of national security is frequently the topic of judicial discussion and the War on Terror brought the debate to the forefront. In *Hamdi et al. v. Rumsfeld et al.*, the Supreme Court was "called upon to consider the legality of the Government's detention of a United States citizen on United States soil as an 'enemy combatant' and to address the process that is constitutionally owed to one who seeks to challenge his classification as such."[36] The Fourth Circuit had held that the detention was legally authorized and that no further opportunity was available to challenge the status label assigned by the Executive Branch.[37] Though arising from a criminal context, the relevance of the *Hamdi* proceedings derives most notably from the discussion of the appropriate level of deference that is to be extended to the Government's security and intelligence interests.

On appeal the Fourth Circuit had ruled that the district court's actions had failed to extend the appropriate deference.[38] It also believed that separation of powers principles prohibited a federal court from "delv[ing] further into Hamdi's status and capture."[39] The Supreme Court rejected this rationale.

> While we accord the greatest respect and consideration to the judgments of military authorities in matters relating to actual prosecution of war, and recognize that the scope of that discretion necessarily is wide, it does not infringe on the core role of the military for the courts to exercise their own time-honored and constitutionally mandated roles of reviewing and resolving claims like those presented here.[40]

(remanded for further proceedings without privileged material); *DTM Research, LLC v. AT & T Corp.*, 245 F.3d 327 (4th Cir. 2001)(quashing of subpoena that threatened state secrets did not foreclose possibility of fair trial and did not warrant dismissal); *Northrop Corp.*, 751 F.2d at 400-02 (remanded for further proceedings without privileged material).

[36] 542 U.S. 507 (2004).

[37] *Id.* at 510.

[38] *Id.* at 512, *citing Hamdi et al. v. Rumsfeld et al.*, 296 F.3d 278, 279 (4th Cir. 2002).

[39] *Hamdi*, 542 U.S. at 515, *quoting Hamdi et al. v. Rumsfeld et al.*, 316 F.3d 450, 473 (4th Cir. 2003).

[40] *Hamdi*, 542 U.S. at 535.

Moreover, the Supreme Court noted, "*any process* in which the Executive's factual assertions go wholly unchallenged or are simply presumed correct without any opportunity for the alleged combatant to demonstrate otherwise falls constitutionally short."[41] But this is exactly what typically occurs in most SSP cases. The district court proceedings in *Sterling v. Tenet*, which was a racial discrimination cases against the Central Intelligence Agency, illustrate the problem. The district court judge made it clear that the court was not "an intelligence agency."[42] He also opined that:

> it is not the place of the Court to oversee the classification of documents and information, to examine or question the rationale of why officials classified this information at the level it is, or to redetermine whether information is truly "Secret" or "Top Secret." *The only time in which a court should deny the privilege is if, after an examination of the agency head's declaration of his reasoning behind asserting the privilege, it is transparently obvious that the agency is engaging in an abuse of the privilege.*[43]

This mistaken perception of not only the Court's authority but its responsibility was echoed during oral arguments.

> MR. ZAID: And there's a distinction here as to what we're arguing on with respect to the government's motion and then secondarily this issue. Because I see them as very separate issues. One is whether or not this case, just after the complaint filed, is to be dismissed outright. The second is whether we can proceed forward and on a case-by-case basis meaning document by document or information by information and categories, whatever. You decide whether state secrets privilege could attach or statutory privilege could attach to certain information.
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> THE COURT: Wait a minute. You re saying that under your theory then I would have to contradict the director's declaration and decide for myself in a vacuum what would be admitted, what would not be admitted and what affects national security and what would not affect national security?
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> MR. ZAID: Well, I think you have the authority to do that.
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> THE COURT: Well, maybe I do. But I don't think that comports with my understanding of Reynolds and some of the other state secrets cases.[44]

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[41] *Id.* at 537 (emphasis added).

[42] *Sterling v. Tenet,* Civil Action No. 03-329, slip op. at 11 (E.D.Va. Mar. 3, 2004).

[43] *Id.* (emphasis added)

[44] *Sterling v. Tenet,* Civil Action No. 03-329, Tr. at 26 (E.D.Va. Mar. 3, 2004).

The Court later stated:

> I have -- and *I' m not hesitant to express some sense that the Court really does not have a way to do anything more than to look at the declaration and make a judgment whether it qualifies under the state secrets privilege.* I don't think I need to reach the other issues involved about the substance of Mr. Sterling complaint.[45]

This applied rationale is entirely erroneous and is rampant within the judicial system. It is a fundamental constitutional and statutory role of a federal district judge to assess the propriety of an agency's classification decision. Moreover, there is absolutely no legal basis upon which the district court could impose this new "obvious transparency" requirement in order to determine an agency's abuse of the privilege. Ultimately the district court became nothing other than a "rubber stamp". Given the fact that the court repeatedly noted it was not an intelligence agency, could not second-guess CIA determinations, would not examine or question agency rationale, and did not possess the proper expertise, then there is simply no way for any federal judge that shares these views to even understand, much less substantively review, an agency's classified declaration for examples of obvious abuse.[46]

"While judges should acknowledge, their limitation in areas where they lack expertise, the difficult task in assessing a claim of 'state secrets' privilege calls for a particularly judicial expertise balancing the government's need for secrecy against the rights of individuals."[47] However, the Supreme Court has made it clear in another national security context:

> We cannot accept the Government's argument that internal security matters are too subtle and complex for judicial evaluation. Courts regularly deal with the most difficult issues of our society. There is no reason to believe that federal judges will be insensitive to or uncomprehending of the issues involved in domestic security cases.[48]

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[45] *Id.* at 46.

[46] A similar sentiment was expressed by the Southern District of New York in dismissing my most recent SSP case. *Doe et al. v. CIA et al.,* 2007 U.S. Dist. LEXIS 201 (S.D.N.Y. Jan. 4, 2007). Even though significant First Amendment right to counsel issues were raised, to include the CIA impeding my ability to represent my clients, the Court made it clear in its decision (as well as in prior court appearances) that nothing I could argue, whether it was classified or not (and I had authorized access), would be sufficient to challenge the CIA's assertions in its classified declaration. The contents of the declaration, which the Court had made no effort to question, would prevail every time.

[47] *Halkin*, 598 F.2d at 15.

[48] *United States v. United States District Court (Keith)*, 407 U.S. 297, 320 (1972).

"Although the judicial competence factor arguably has more force when made in the foreign rather than domestic security context, the response of *Keith* to the analogous argument is nevertheless pertinent to any claim that foreign security involves decisions and information beyond the scope of judicial expertise and experience."[49]

In the system of law that I operate under I believe it is the duty and obligation of district courts to make every conceivable attempt to fashion procedures that would allow SSP cases to proceed. In fact, there are numerous safeguards that could be successfully implemented. District courts have the authority to "fashion appropriate procedures to protect against disclosure."[50] "Only when no amount of effort and care on the part of the court and the parties will safeguard privileged material is dismissal warranted."[51]

In *Sterling* the district court was frustrated by the "unique bind" it was placed in by the CIA's invocation of the state secrets privilege. Part of the problem was the district court's misunderstanding of the classification nature of much of the information at issue or the simple ability to devise protective procedures. For example, it noted:

> Virtually all of Plaintiff's duties as an Operations Officer are classified. The location of Plaintiff's workplace is classified. All of Plaintiff's supervisors and most of his co-workers names are classified (hence Defendants John Does #1-10). The basic duties that a Court would ask a jury to perform as fact finder, such as to examine what Plaintiff's duties were, and to compare these duties to similarly situated Operations Officers, are impossible to achieve because all of this information is classified.[52]

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[49] *Zweibon v. Mitchell*, 516 F.2d 594, 641 (D.C.Cir. 1975)(en banc).

[50] *Fitzgerald*, 776 F.2d at 1243. *See generally* Comment, *Keeping Secrets from the Jury: New Options for Safeguarding State Secrets*, 47 Fordham L.Rev. 94, 109-113 (1978) (discussing options short of dismissal for the protection of state secrets); J. Zagel, *The State Secrets Privilege*, 50 Minn. L.Rev. 875, 885-88 (1966) (discussing procedures to protect secrets yet allow cases to go forward); *Cf.* Classified Information Procedures Act, 18 U.S.C. App. (1980)(procedures for the use of classified information in criminal trials).

[51] *Fitzgerald*, 776 F.2 at 1244.

[52] The district court further noted that the only way a jury could hear Sterling's case would be to "choose jurors who have the applicable security clearances. Because the whole point of a jury in the American judicial system is to randomly choose citizens regardless of race, sex, economic status – or other intangibles, such as one's eligibility for a security clearance – this is an impossible goal to reach." *Sterling,* Civil Action No. 03-329, slip op. at 9. It would be a small, though valuable, price to pay for individuals who face SSP cases to waive their jury rights, if it even exists in their case, in exchange for the ability to have their day in court. Sterling's case was dismissed despite his willingness to waive his right to a jury of his peers.

However, these observations were simply either untrue or exaggerated. It was our position that Sterling's duties as an Operations Officer could easily be discussed in an unclassified manner and that his workplace location was not classified. In any event, the specific location was irrelevant. In CIA cases it is routine to simply refer to a work location as either Domestic Location "A" or Overseas Location "B". The parties know the true location, as does the Court, and it may not even be relevant to the claims. The same applies to names of CIA officials, who can be identified by initials or pseudonyms.[53]

The Supreme Court has directly addressed the issue of dealing with the CIA's concerns that civil litigation may reveal classified information. In fact, *Webster v. Doe*,[54] arguably suggests that lower courts should not dismiss a complaint without at first allowing the plaintiff an opportunity to pursue discovery. Although *Webster* did not involve the state secrets privilege, the issue was whether or not a federal court can adjudicate a claim against the CIA in light of the fact the CIA and its missions are enveloped nearly completely in secrecy. The Court outright rejected the CIA's attempt to shield itself from the civil litigation process when it ruled:

> the District Court has the latitude to control any discovery process which may be instituted so as to balance respondent's need for access to proof that would support a colorable constitutional claim against the extraordinary needs of the CIA for confidentiality and the protection of its methods, sources, and mission.[55]

Even the Fourth Circuit, historically the most conservative court in the United States, explicitly recognized that "there may be a case where an *in camera* hearing or other special procedure is necessary to properly determine whether the invocation of the state secrets privilege makes it impossible to go forward."[56] That being said, I am unaware of

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[53] Additionally, any depositions could be taken at secure facilities before a cleared court reporter. Copies of transcripts and other discovery responses that may contain classified information would be maintained by the relevant agency, but would be available to the district court for full examination at the appropriate time.

[54] 486 U.S. 592 (1988).

[55] *Id.* at 604.

[56] *Wen Ho Lee*, 2003 WL 21267827, at *13 (4th Cir. June 3, 2003). As part of my representation of Sterling I was in possession of a significant amount of allegedly "classified" facts. The district court could have taken the opportunity to hear *in camera* evidence to further assist it in deciding whether the state secrets privilege was appropriate. Indeed, I even suggested that we could submit in advance interrogatories, document production requests and deposition notices, along with a description of what information would be expected, to enable the district court to truly assess the applicability of the privilege. This suggestion was rejected.

any case in almost fifty years where such a method was actually employed by a court handling a SSP case.[57]

Far more common is the language in *Tilden* where the court ruled "there are no safeguards that this Court could take that would adequately protect the state secrets in question."[58] Yet the Supreme Court contradictorily noted,

> We have no reason to doubt that courts faced with these sensitive matters will pay proper heed both to the matters of national security that might arise in an individual's case and to the constitutional limitations safeguarding essential liberties that remain vibrant even in times of security concerns.[59]

Several district courts, in resolving challenges pertaining to the Guantanamo Bay detentions in the aftermath of the Supreme Court's opinion in *Hamdi*, have already implemented similar if not identical safeguard protections that could function in any number of SSP cases. Judge Kollar-Kotelly of the U.S. District Court for the District of Columbia noted that:

> Counsel would be required to have a security clearance at the level appropriate for the level of knowledge the Government believes is possessed by the detainee, and would be prohibited from sharing with the detainee any classified material learned from other sources. The Court pointed out that the Government's decision to grant an individual attorney a security clearance amounts to a determination that the attorney can be trusted with information at that level of clearance. Furthermore, any attorney granted the clearance would receive appropriate training with respect to the handling of classified information, commensurate with the

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[57] The last time a court apparently permitted such an occurrence – even going beyond what the Fourth Circuit was considering – was *Halpern v. United States*, 258 F.2d 36 (2d Cir. 1958) where an *in camera* trial was held sufficient to address the government's concerns so long as a jury was waived.

[58] 140 F.Supp.2d at 627. In support of this mistaken premise, the district court relied on several prior circuit court pronouncements. *See Bowles v. United States*, 950 F. 2d 154 (4th Cir. 1991)(dismissal warranted because "no amount of effort or care will safeguard the privileged information"); *Fitzgerald*, 776 F. 2d at 1243 (dismissal of defamation action warranted "because there was simply no way [the] case could be tried without comprising sensitive military secrets"); *Molerio*, 749 F.2d at 815 (dismissal of Title VII lawsuit warranted because without disclosure of state secrets, insufficient evidence of discrimination existed). It is also worth noting that this is the same district court that offered the conclusory statement that "the security of our nation's secrets is too important to be left to the good will and trust of even a member of the Bar of this Court." *Tilden*, 140 F.Supp. at 627.

[59] *Hamdi*, 124 S.Ct. at 2652.

> level of clearance granted and the type of classified material to which the attorney would be expected to have access. The Court also indicated that there are significant statutory sanctions relating to the misuse or disclosure of classified information. *see, e.g.*, 18 U.S.C. § 793 (addressing sanctions for gathering, transmitting or losing defense information); 18 U.S.C. § 798 (addressing sanctions for disclosure of classified information). Finally, the Court's framework presupposes full compliance by Petitioners' counsel.[60]

District Judge Green, who is coordinating all the Guantanamo Bay cases within the U.S. District Court for the District of Columbia, issued a lengthy decision detailing with precision all the steps that will be taken by the court and counsel "to prevent the unauthorized disclosure or dissemination of classified national security information and other protected information...."[61] Again, there is absolutely no difference between protecting and safeguarding classified information in a criminal versus civil matter.

The procedures that Judge Green set in place are routine in nature, and generally apply to the majority of the Intelligence Community cases I handle. There is no reason why these procedures cannot be implemented and adapted in SSP cases. They include, but are not limited to:

- Counsel submitting all writings requesting access to classified information to a security officer for review.[62]
- The Government arranging for an appropriately approved secure area for the use of counsel to work with classified information. All information shall be stored and maintained in the secure area.[63]
- Allowing counsel to challenge the Government's assertions that there does not exist a "need to know" the sought-after classified information.[64]
- Ensuring counsel understands the serious ramifications, to include civil and criminal penalties, which could occur were violations to occur.[65]

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[60] *Odah et al. v. United States of America*, 346 F. Supp. 2d 1 (D.D.C. 2004).

[61] *In re Guantanamo Detainee Cases*, 344 F. Supp. 2d 174 (D.D.C. 2004).

[62] *Id.* at 179.

[63] *Id.* at 178.

[64] *Id.* at 180.

[65] *Id.* at 176, 183.

It has been my experience that many judges will initially inquire about the application or relevance of the Classified Information Procedures Act (CIPA),[66] which is a statute applicable to criminal proceedings only. In my opinion CIPA does offer guidance to judges in civil proceedings to the extent it demonstrates that courts are the proper authority to render relevancy determinations or "need-to-know" decisions in clearance parlance.[67] But the statute itself offers little guidance on how to deal with a civil privilege given the significant differences that exist between the types of cases. Even where in CIPA cases the court orders the release of the classified information the Executive Branch still has the prerogative to say "no". The consequence in doing so is to dismiss the criminal indictment, thus falling victim to "greymail", but the significance is that the decision for disclosure rests with the Executive Branch and not ultimately the court. Thus if the Executive Branch decides to move forward with disclosure it was the one that rendered an affirmative decision in doing so thereby, on some levels, relieving the court of a greater burden of perceived responsibility.

Perhaps the corollary to reach from CIPA is that if in a civil proceeding the court determines that sufficient security precautions can be taken or at least should be attempted, the Executive Branch retains the right to decline participation but suffers the consequences of having to concede whatever factual element that particular evidence applies to in the case.

At a minimum it would seem a matter of course that Executive Branch agencies should be required to demonstrate that every element of each cause of action asserted against it in a lawsuit is properly subject to the SSP. Too often are entire cases subsumed in the application of the privilege when it is absolutely clear that this is a perverse and inappropriate broad ruling. The case of Sibel Edmonds is a perfect example.[68] Ms. Edmonds' lawsuit against the FBI included claims of violations of the First Amendment and the Privacy Act. Though it was clearly spelled out to the court that these claims,

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[66] 18 U.S.C. app. 3 (2006).

[67] The CIA explicitly acknowledged that "it is the Court's decision ... to determine whether requested material is relevant to matters being addressed in litigation." Declaration and Formal Claim of State Secrets Privilege and Statutory Privilege by George J. Tenet, Director of Central Intelligence, February 10, 2000, submitted in *Barlow v. United States,* Congressional Reference No. 98-887X, at 9, as quoted in FISHER, *supra* note 6, at 247. The CIA now routinely argues to the contrary in cases I have litigated.

[68] I served as Ms. Edmonds' legal counsel from March 2004 – November 2005 and was intimately involved in the proceedings from the district court to Supreme Court.

especially the Privacy Act, could easily be carved out of the case, those arguments were completely rejected.[69]

Finally, in recent years much ado has been made about the perceived proliferation of the current Bush Administration's proclivity to invoke the state secrets privilege.[70] While the numbers on paper certainly reflect an increase in use, this issue, while certainly interesting, is of little practical value with respect to the SSP itself. For one thing, the number of cases and new invocations are not truly significant. But more importantly there are numerous external factors that have contributed to this increase that simply cannot be ignored. That includes an increase in federal employees working in the national security arena, the occurrence of 9/11, a greater willingness of federal employees to publicly challenge actions purportedly taken against them by their agency and, ironically, attorneys like myself who will not hesitate to litigate alleged wrongful conduct even if it requires *pro bono* efforts.

Yes, this Administration is far more aggressively secretive than its immediate predecessor. I think few people would disagree with that sentiment. So, yes, the situation is worse today than it was in prior years. But that doesn't mean that the situation was all rosy during the Clinton administration. It was not. There are positive aspects that emanated from the Clinton period and there are positive aspects from the Bush presidency.

On the other hand, I can point to negative aspects in both as well. I have been handling these types of cases since virtually the establishment of my law practice here in Washington, D.C. in 1993. There have always been significant roadblocks preventing those within the Intelligence Community from pursuing claims against their agencies. That there are now, say, 20 instead of 15 roadblocks makes little practical difference. The invocation of the SSP is not a partisan political issue. However, the biggest difference I would say between the Administrations really stems from the judges that have been appointed. That is where the Bush Administration has ensured that cases that involve SSP will likely never proceed beyond the filing of a Complaint because the deference, or more appropriately the abdication of responsibility, accorded to Executive Branch agencies is far more likely.

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[69] *Edmonds*, 323 F.Supp.2d at 80-81. For example, Ms. Edmonds claimed that the FBI violated the Privacy Act by revealing privileged personal information from her systems of records to the media without consent. In proving such a claim all that was needed to be done was to confirm the disclosure to the media and the lack of written consent. None of the substantive work Ms. Edmonds performed for the FBI would have been at issue. The veracity of her allegations against the FBI was irrelevant to the facts surrounding the alleged violation of the Privacy Act. Yet the courts at all levels declined to separate the allegations and robbed Ms. Edmonds of any chance to even try to pursue her claims.

[70] *Cf.* Weaver, *supra* note 12, to Chesney, *supra* note 12 (reflecting discussion of significance of rise in SSP cases over the years).

LEGISLATIVE RECOMMENDATIONS

Having dealt with the privilege for years and tried, without success, every conceivable litigation tactic I can devise to attain judicial modification to or clarification of the SSP, it is crystal clear to me that any real viable reform of the SSP will only emanate from Congress.

Therefore, I strongly recommend that Congress consider the implementation of one or more of the following steps in order to ensure the constitutional balance that typically exists in our judicial system also applies to SSP cases. These recommendations include considering (one or more of which are not necessarily to be considered exclusive from one another):

- Creating a special Article III court or Article I administrative entity (or modification of existing courts or entities) to hear certain designated classified cases utilizing safeguarding procedures such as *in camera* hearings, special facility locations, cleared counsel and court staff, etc.;

- Adoption of statutory language that would impose clear requirements on federal judges to, prior to dismissing an SSP case, attempt discovery and implement safeguard procedures to prevent the disclosure of classified information, utilize independent classification experts either as advocates for the plaintiffs (such as where the individual counsel is not permitted or authorized to review the classified information) or as an educator to the court, require federal agencies to justify application of the SSP to each element of a plaintiff's claim or, under certain circumstances, consider granting judgment to a plaintiff where an agency precludes use of classified information judicially designated as relevant by the court;

- Ensuring proper education and training of federal judges with respect to understanding proper classification/declassification and the protection of classified information;

- Tasking the Congressional Research Service to draft proposed statutory language to address concerns expressed regarding the SSP which would include, but not be limited to, reviewing the history of the Foreign Surveillance Intelligence Act court and the Merit System Protection Board to explore expanding their jurisdiction; or

- Tasking the GAO to conduct a thorough examination of the historical invocation of the state secrets privilege and objectively analyze the appropriateness of at least a select – even random – sample of classified declarations that agencies have provided to federal courts to justify application of the privilege. If such a tasking were issues, no federal agency should be considered exempt from review.

CONCLUSIONS

To be sure, the changes I propose require additional work and thought. In fact, some of the proposals I have discussed will necessarily need to be considered by other Committees of competent, and for some issues primary, jurisdiction. But I am more than willing to work with this Committee to explore all possible options.

In the interim, the legislation before you is a step forward. It is not far enough, but it is in the right direction.

I would be happy to answer any questions you might have.

Chairman WAXMAN. Thank you very much. I want to thank each of the witnesses for your presentation.

Usually when we think about an employer retaliating against an employee whistleblower, we usually think of the individual being fired or demoted. But the suspension or revocation of an employee's security clearance can have just as chilling an effect. Last year at the National Security Subcommittee hearing on this issue we heard from Government officials who reported abuses at our Nation's most secretive counter-terrorism national security and law enforcement programs and who all claimed to have been retaliated against for trying to correct these abuses. Silencing national security whistleblowers who are attempting to report waste, fraud and abuse places our Nation in great danger.

This bill before us would include revocation of security clearance as a prohibited retaliation under the act. To whomever wishes to respond, do you think that is a significant problem and you think this provision will help better protect national security whistleblowers? Mr. Zaid?

Mr. ZAID. Yes, sir. As part of my practice, I frequently deal with clearance matters. I think I testified at that hearing, in fact, as I recall. One of my clients, Anthony Schaffer, of the Defense Intelligence Agency, had had his clearance stripped, revoked in the aftermath of the Evil Danger allegations.

The problem with dealing with whistleblower retaliation and the clearance issues are trying to draw a clear line of path between the two. It is very difficult in experience to be able to prove that the whistleblowing activities had something to do with the clearance, and even in the cases that it does, very often the clearance matters that are underlying the subject of the revocation or denial have some arguable standing basis on their own. Anything can happen. With Tony Schaffer, part of the allegation against him was that he had stolen pens from the embassy when he was 14 years old, 30 years earlier. And that was being used as a pattern and practice allegation against him, that he had mis-used his cell phone to the tune of $67 at part of his work responsibilities.

So the key in being able to I think deal with the clearance aspect would be, especially in whistleblowers, would be to create specific jurisdiction, whether at the MSPB or even better, at a Federal court level, to be able to review a substantive determination of a clearance decision. Right now, the way it stands, no Federal court will go anywhere near security clearance unless it is a constitutional matter.

Chairman WAXMAN. What do you think about the provisions in the bill?

Mr. ZAID. I think the provisions in the bill are great for a start.

Chairman WAXMAN. But you would expand on it?

Mr. ZAID. I would expand, I would likely expand——

Chairman WAXMAN. Let me ask you to give us your thoughts further on the expansion. I just want to quickly ask a few questions and you might have noticed the bells, so we are going to have to break. So maybe even if we can complete the questioning before the last opportunity to vote, that would be helpful.

Just very quickly, do you think it is appropriate to have scientists and medical professionals protected when they disclose

abuses of authority? Do you all think that that is a helpful provision? Dr. Weaver.

Mr. WEAVER. Of course. People should not be penalized for telling the truth, especially when it is scientifically and objectively determined.

Chairman WAXMAN. On the appellate review issue, what we did is, despite there is a rationale for all appeals going to the Federal circuit, in order to have a legal landscape that is clear for all employees and employers, I would like to know how you respond to those concerns. Do you think that allowing whistleblower cases to go through the normal appeals process, rather than centralizing cases in the Federal circuit court of appeals will help maintain the integrity of the whistleblower protections passed by Congress?

Mr. WEAVER. It works for all other statutes, essentially, right? I mean, you end up having the leavening effects of multiple circuits looking at the same legal problem, arriving at the truth, and then conflicts are hammered out. In the present system, there is, they have a lock on it, they essentially have it all to themselves, it should be all circuits review.

Chairman WAXMAN. I appreciate that. Let me recognize Mr. Platts and see if we can get through this before the last opportunity before we have to vote.

Mr. PLATTS. Thank you, Mr. Chairman. I just want to followup on that last point. The way we had the bill introduced is with the Federal circuit. But I will be looking to offer an amendment tomorrow for all circuit to open it up the same as other reviews. If we did not do that with all the other changes that we are trying to address in the bill, if we do not address and allow all circuit review, what do you think our likelihood of success, meaning giving true protections to Federal employees under this bill without that, given the track record of the Federal circuit? Mr. Devine.

Mr. DEVINE. Congressman, I think until you do address that issue, we are going to be prisoners of the broken record syndrome. Congress has made very clear that it supports a certain boundary of free speech rights for public servants. The Federal circuit has made it adamantly clear that they disagree and will not accept those boundaries.

Although stability in case law is a very worthy goal, and Professor Weaver is right, it hasn't been a serious obstacle for other whistleblower issues, there is an even bigger issue here. Who is going to write the law for ethical freedom of speech by Government employees?

I will just give you a few examples. This is an absolute test of wills between Congress and one particular court. In 1994, the committee report said, it is also not possible to further clarify clear statutory language. Protection for any whistleblowing disclosure evidencing a reasonable belief truly manes any. Since 1994, the court has created nearly a dozen all-encompassing loopholes so that any means almost never.

I will give you another example. When Congress first passed this law in 1978, the committee report said that the purpose of it is so that Pentagon employees who disclose billions of dollars in costs overruns through doing their audits, GSA employees who find widespread fraud, nuclear engineers whose inspections find viola-

tions of safety requirements in nuclear plants, that they can do their jobs without retaliation.

Well, in 1996, the Federal circuit said the Whistleblower Protection Act doesn't count for when you are carrying out your job duties. In——

Chairman WAXMAN. Excuse me, Mr. Devine——

Mr. PLATTS. Because we are short on time, am I safe in saying that all four of you agree that all circuit review is critically important to the reforms we are pushing for?

Mr. ZAID. It may constitute legal malpractice for me to charge clients to take their whistleblower appeal up to the Federal circuit court of appeals.

Mr. PLATTS. We are in agreement. And I appreciate, again, al of you, I appreciate your testimony here today. Very in-depth, which is very helpful. And your efforts leading up to this hearing, and as we go forth.

Thank you, Mr. Chairman.

Chairman WAXMAN. Thank you, Mr. Platts.

Mr. Yarmuth and Mr. Braley, do you think you can split the next 5 minutes? Mr. Braley.

Mr. BRALEY. I have to say that I am very, very pleased to be here. I have actually had the privilege of representing whistleblowers, and I have represented people who have been blacklisted. One of my concerns is that even though the whistleblower protection deals with what is going on at the time a decision is made affecting an employee's rights with an agency or Federal Government entity, one of the concerns I have is a lack of protection of what happens after they leave and their reputations are sullied and they have no protection against interference with other employment prospects. I know some of you have encountered that in your own lives.

I am also very concerned about the lack of an adequate remedy and the form in which that remedy occurs. Because as I read the bill as it is currently drafted, it is limited to reasonable and foreseeable consequential damages which may or may not include interest that accrues for the lost time while those employees are out there in a state of limbo. It may or may not include the type of remedy that is recognized under Federal law for employees who have been discriminated against in the workplace, which is compensatory damages for the very real problem in whistleblower cases of the intense intimidation and emotional toll it takes upon them. And based upon the language that appears to me to send a mixed messages as to whether this is a legal or an equitable remedy and if so, whether it is covered by the seventh amendment of the United States bill of rights, which would guarantee the right to trial by jury, and I think raises a lot of the similar concerns you are talking about with the Federal circuit right of review.

So I am saying this very rapidly but I would be interested in any of the comments that the panelists would have about the need to go further with this bill to provide a true remedy, even though I am very, very pleased that we are taking the significant steps that we are to improve the existing remedy.

Mr. DEVINE. Mr. Braley, the bill would provide access to jury trials. It is modeled after the same language in the Sarbanes-Oxley

law for corporate whistleblowers, which is provided that right. I think your points are very well taken, though, about what happens when you win. This would be the only remedial employment law, even this legislation, if passed, that doesn't provide compensatory damages as part of its make-whole remedy. I think that is something for the committee to consider very seriously.

Mr. WEAVER. In the area of national security, any hint of equitable remedies are going to be vigorously challenged by the executive branch. And especially concerning security clearances, the executive branch position will be there is no equitable power to restore people to their job function, essentially.

Chairman WAXMAN. Thank you, Mr. Braley. Members want to ask further questions and have you respond in the record in writing. We would appreciate that.

Mr. Shays, did you want to make any last minute comments?

Mr. SHAYS. Just to thank you for participating in this hearing, and Mr. Chairman, for bringing this bill forward. It is nice to have a Member who has had personal experience.

Chairman WAXMAN. All right. Thank you very much. That concludes our hearing, we stand adjourned.

[Whereupon, at 11:45 a.m., the subcommittee was adjourned.]

[Additional information submitted for the hearing record follows:]

EXECUTIVE OFFICE OF THE PRESIDENT
OFFICE OF MANAGEMENT AND BUDGET
WASHINGTON, D.C. 20503

OFFICE OF FEDERAL
PROCUREMENT POLICY

February 21, 2007

The Honorable Henry A. Waxman
Chairman
Committee on Oversight and Government Reform
2204 Rayburn House Office Building
Washington, DC 20515

Dear Chairman Waxman:

I am writing to you today to express my views as the Administrator for Federal Procurement Policy on H.R. 984, the "Executive Branch Reform Act of 2007," which I understand was the subject of a hearing on February 13, 2007 before your Committee. This letter addresses only concerns about recruitment of personnel, and especially procurement personnel. I am concerned that several provisions of the bill will have unintended consequences that may do great damage to the Executive Branch's ability to retain and recruit qualified government acquisition personnel.

The Office of Personnel Management (OPM) predicted recently that a peak wave of federal retirements will occur between 2008 and 2010 and that "the loss of so many individuals with a deep, ingrained institutional knowledge of their agency has the potential to cause a lapse or pause of service delivery." We must find ways to retain qualified persons who are at or approaching retirement age. Concurrently, we must find effective ways to recruit qualified persons and more effectively train the employees we have. One of my highest priorities is the acquisition workforce. Of the roughly 28,000 contracting professionals currently in the federal government, we estimate that 20 percent are eligible for retirement now and that 40 percent are eligible to retire within the next ten years. Concern about the adequacy of the acquisition workforce has also been expressed in recent Congressional hearings and by the Acquisition Advisory Panel, established by Section 1423 of Public Law 108-136. Accordingly, my office is working on several initiatives to improve recruitment, retention, and expertise of the government-wide acquisition workforce. However, I am concerned that these initiatives could be minimized if several of the bill's provisions are enacted. I will focus on the following provisions of the bill that directly affect procurement officials.

Sec. 4 (Additional Provisions Relating to Procurement Officials) would –

- Double the length of the post-employment (revolving door) ban on compensation, from one year to two years;

- Create a "reverse revolving door" restriction on certain conduct of federal government employees who were previously employed by contractors; and
- Require our office to monitor and investigate individual and agency compliance with these provisions.

Although these provisions are intended to address recent unethical conduct of government procurement officials, I believe that they will have the unintended effect of harming the career prospects of the overwhelming number of honest, experienced government employees and encourage them to leave government service early. A January 2006 report by the Office of Government Ethics to the President and Congress noted numerous concerns expressed about the expected impact on recruitment and retention of laws restricting post-government employment, including a statement from the National Academy of Science that the "laws restricting post-Government employment have become the biggest disincentive to public service." The bill's proposed extension of the "procurement integrity" post-employment ban on compensation adds another disincentive to continued government service – effectively foreclosing many future employment opportunities for an unacceptably long period – that may induce some experienced personnel to advance the date of their retirement. Considering the likely negative effect upon recruitment and retention, this proposed extension does not seem appropriate.

Also, I want to point out that the "reverse revolving door" restriction could harm the government's ability to obtain experienced procurement officials from the private sector. Even if the government were able to hire such experienced procurement officials, this restriction would limit the government's ability to use the technical knowledge and expertise of former contractor employees in evaluating contractor proposals and performance. Additionally, the Office of Federal Procurement Policy does not have current staffing or expertise for such investigations. These investigations should be conducted by agency Inspectors General and, where appropriate, referred to the Department of Justice.

In closing, I want to assure you that I share your concern for high ethical standards. Recently, I sent the enclosed October 27, 2006 guidance to all department and agency Chief Acquisition Officers and Senior Procurement Executives emphasizing the importance of compliance with laws, regulations, and ethical standards. I also stressed the need for agencies to cooperate fully with the National Procurement Fraud Task Force, established by the Department of Justice to promote early detection, prevention, and prosecution of procurement fraud. I will continue to emphasize the importance of adhering to high ethical standards.

Thank you for the opportunity to express my views on this bill that are of special concern to this office. I am advised that there is no objection to the submission of this letter from the standpoint of the Administration and that enactment of H.R. 984 in the form in which it was introduced and its impact on retention and recruitment of qualified acquisition personnel would not be in accord with the President's program.

Sincerely,

Paul A. Denett
Administrator

Enclosure

Identical Letter Sent to The Honorable Tom Davis

EXECUTIVE OFFICE OF THE PRESIDENT
OFFICE OF MANAGEMENT AND BUDGET
WASHINGTON, D.C. 20503

OFFICE OF FEDERAL
PROCUREMENT POLICY

October 27, 2006

MEMORANDUM FOR CHIEF ACQUISITION OFFICERS
SENIOR PROCUREMENT EXECUTIVES

FROM: Paul A. Denett
Administrator

SUBJECT: Ethics and Working with Contractors

Contractor performance is essential to accomplish almost every aspect of your various missions, including responding to emergencies. We are in a new contract environment with a much greater reliance on service contracts and, increasingly, government employees work alongside contractor personnel in a "mixed workplace."

Nearly all government and contractor personnel adhere to high ethical standards and strive for efficiency and delivering best value to the government. Unfortunately, a few have not. All too often, we hear about instances of ethical misconduct, rather than the great contracting success stories where our contracting officers shine. I am very proud of them and will be calling on you to help publicize these success stories.

We rely on contractors to provide innovative and less costly solutions to the challenges we face. However, we must always be vigilant to protect the integrity of the process. We owe that to the taxpayers and the businesses, small and large, that compete for government contracts. It is also important that we comply with the various laws, regulations, and standards of conduct that apply to government employees and contractors. We must never forget that government employment is a public trust, and we need to avoid even the appearance of a conflict of interest.

With these thoughts in mind, I ask that you –

- Emphasize the importance of compliance with laws, regulations, and standards that prescribe ethical conduct in acquisitions and working with contractors and contractor employees;
- Distribute Office of Government Ethics guidance ("Ethics and Working with Contractors – Questions and Answers," DO-06-023, dated August 9, 2006, attached); and
- Cooperate fully with the National Procurement Fraud Task Force, established by the Justice Department to promote early detection, prevention, and prosecution of procurement fraud.

Thank you for your help and attention to this important matter.

cc: The Office of Government Ethics
The National Procurement Fraud Task Force

Attachment -- DAEOgram -- DO-06-023 -- Ethics and Working with Contractors - Questions and Answers

EXECUTIVE OFFICE OF THE PRESIDENT
OFFICE OF MANAGEMENT AND BUDGET
WASHINGTON, D.C. 20503

OFFICE OF FEDERAL
PROCUREMENT POLICY

February 21, 2007

The Honorable Tom Davis
Ranking Member
Committee on Oversight and Government Reform
2348 Rayburn House Office Building
Washington, DC 20515-4611

Dear Representative Davis:

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Also, I want to point out that the "reverse revolving door" restriction could harm the government's ability to obtain experienced procurement officials from the private sector. Even if the government were able to hire such experienced procurement officials, this restriction would limit the government's ability to use the technical knowledge and expertise of former contractor employees in evaluating contractor proposals and performance. Additionally, the Office of Federal Procurement Policy does not have current staffing or expertise for such investigations. These investigations should be conducted by agency Inspectors General and, where appropriate, referred to the Department of Justice.

In closing, I want to assure you that I share your concern for high ethical standards. Recently, I sent the enclosed October 27, 2006 guidance to all department and agency Chief Acquisition Officers and Senior Procurement Executives emphasizing the importance of compliance with laws, regulations, and ethical standards. I also stressed the need for agencies to cooperate fully with the National Procurement Fraud Task Force, established by the Department of Justice to promote early detection, prevention, and prosecution of procurement fraud. I will continue to emphasize the importance of adhering to high ethical standards.

Thank you for the opportunity to express my views on this bill that are of special concern to this office. I am advised that there is no objection to the submission of this letter from the standpoint of the Administration and that enactment of H.R. 984 in the form in which it was introduced and its impact on retention and recruitment of qualified acquisition personnel would not be in accord with the President's program.

Sincerely,

Paul A. Denett
Administrator

Enclosure

Identical Letter Sent to The Honorable Henry A. Waxman

EXECUTIVE OFFICE OF THE PRESIDENT
OFFICE OF MANAGEMENT AND BUDGET
WASHINGTON, D.C. 20503

OFFICE OF FEDERAL
PROCUREMENT POLICY

October 27, 2006

MEMORANDUM FOR CHIEF ACQUISITION OFFICERS
SENIOR PROCUREMENT EXECUTIVES

FROM: Paul A. Denett
Administrator

SUBJECT: Ethics and Working with Contractors

Contractor performance is essential to accomplish almost every aspect of your various missions, including responding to emergencies. We are in a new contract environment with a much greater reliance on service contracts and, increasingly, government employees work alongside contractor personnel in a "mixed workplace."

Nearly all government and contractor personnel adhere to high ethical standards and strive for efficiency and delivering best value to the government. Unfortunately, a few have not. All too often, we hear about instances of ethical misconduct, rather than the great contracting success stories where our contracting officers shine. I am very proud of them and will be calling on you to help publicize these success stories.

We rely on contractors to provide innovative and less costly solutions to the challenges we face. However, we must always be vigilant to protect the integrity of the process. We owe that to the taxpayers and the businesses, small and large, that compete for government contracts. It is also important that we comply with the various laws, regulations, and standards of conduct that apply to government employees and contractors. We must never forget that government employment is a public trust, and we need to avoid even the appearance of a conflict of interest.

With these thoughts in mind, I ask that you –

- Emphasize the importance of compliance with laws, regulations, and standards that prescribe ethical conduct in acquisitions and working with contractors and contractor employees;
- Distribute Office of Government Ethics guidance ("Ethics and Working with Contractors – Questions and Answers," DO-06-023, dated August 9, 2006, attached); and
- Cooperate fully with the National Procurement Fraud Task Force, established by the Justice Department to promote early detection, prevention, and prosecution of procurement fraud.

Thank you for your help and attention to this important matter.

cc: The Office of Government Ethics
The National Procurement Fraud Task Force

Attachment -- DAEOgram -- DO-06-023 -- Ethics and Working with Contractors - Questions and Answers