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# CONDUCT OF GOVERNMENT PERSONNEL

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DOCUMENTS

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## HEARINGS

BEFORE THE

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## COMMITTEE ON

## BANKING, HOUSING, AND URBAN AFFAIRS

## UNITED STATES SENATE

NINETY-FIFTH CONGRESS

FIRST SESSION

ON

### S. 695

TO AMEND THE DEFENSE PRODUCTION ACT OF 1950 TO  
INHIBIT CONFLICTS OF INTEREST IN PROCUREMENT

MAY 19, 20, AND 23, 1977

Printed for the use of the Committee on Banking,  
Housing, and Urban Affairs

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## CONFLICT OF INTEREST LEGISLATION

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THURSDAY, MAY 19, 1977

U.S. SENATE,  
COMMITTEE ON BANKING, HOUSING, AND URBAN AFFAIRS,  
*Washington, D.C.*

The committee met at 9:45 a.m., in room 5302, Dirksen Senate Office Building, the Hon. William Proxmire (chairman of the committee), presiding.

Present: Senator Proxmire.

### OPENING STATEMENT BY SENATOR PROXMIRE

The CHAIRMAN. The committee will come to order.

During the next 3 days of hearings, the committee will be considering S. 695, a bill which I introduced with Senators Brooke, Bayh, and others to curb conflict of interest situations. During these hearings, the committee will hear testimony from Members of Congress and representatives of the General Accounting Office, the executive branch and private organizations.

This legislation would accomplish several important objectives in regard to conflict of interest in the area of procurement and contracting. The bill's main feature is a 2-year restriction on employment by any former procurement official with any company over which that official had exercised significant procurement responsibility.

Another positive step is the extension of employment disclosure requirements for officials leaving the Government to work for Government contractors or coming to the Government from the employ of Government contractors. Presently, only employees and former employees of the Department of Defense and the National Aeronautics and Space Administration are subject to these disclosure requirements.

Finally, the bill would establish a conflict of interest review board to review the disclosure statements and to rule on possible conflicts of interest. This board would be authorized to advise individuals on the applicability of this law. This will promote uniform and consistent application of conflict of interest provisions throughout the Federal Government. Membership on the board would be made up of the Chairman of the Civil Service Commission, who would act as Chairman; the Attorney General of the United States; and the Comptroller General of the United States. These are the three individuals within the Federal Government who currently exercise authority for enforcement or review of conflict of interest laws and regulations. During these

hearings, we will hear testimony from representatives of all three prospective review board members.

Recent examples of corruption and conflict of interest have persuaded many people both in and out of Government that new controls are necessary to assure high standards of ethical conduct by Federal employees. Public employment is a public trust. It must be treated as such.

This bill is also an economy measure. Earlier this week the Senate passed a \$35 billion military procurement bill that will cost every American family \$700 this year. We know that a lot of these procurement funds are being eaten up by cost overruns. And these cost overruns can be traced in many cases to sweetheart deals between Federal procurement officials and defense contractors.

But this bill is not an alternative to the one proposed by the Carter administration and introduced by Senator Ribicoff (see appendix VI, page 253), they have different objectives and different effects. I have reviewed the administration legislation. It will make a definite contribution to conflict of interest legislation. I intend to add my name as a cosponsor. I am enthusiastic about it.

Yet the two pieces of legislation are separate and distinct. They deal with different aspects of the same problem. The administration bill requires financial disclosure. S. 695 requires disclosure of past and present employment with Government contractors. The administration bill extends restrictions on all former Federal employees from formal representation to informal contacts with their former agencies. By contrast, S. 695 imposes tighter limits on the post-Government activities of former procurement officials.

The administration bill would not have any significant effect on the post-Government employment activities of retired military officers. They form the largest group of former Federal procurement officers. The so-called "civil selling law" already bars them for 3 years from many of the activities that would be prohibited by the administration bill.

Useful as the administration bill will be—and I'm sure it will be useful—it would have a minimal effect on the procurement scandals that have arisen in defense contracting. I support the administration proposal. Yet S. 695 also merits careful and separate consideration. I will be interested later in today's session to hear the remarks of Dr. Campbell. He has been designated as the administration spokesman on the bill presently before this committee.

95TH CONGRESS  
1ST SESSION

# S. 695

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## IN THE SENATE OF THE UNITED STATES

FEBRUARY 10 (legislative day, FEBRUARY 1), 1977

Mr. PROXMIRE and Mr. BAYH (for themselves, Mr. BROOKE, Mr. BURDICK, Mr. FORD, Mr. HUMPHREY, and Mr. METZENBAUM) introduced the following bill; which was read twice and referred to the Committee on Governmental Affairs

FEBRUARY 24 (legislative day, FEBRUARY 21), 1977

Referred jointly to the Committees on Banking, Housing, and Urban Affairs and Governmental Affairs with instructions that if and when ordered reported by either committee, the other committee have thirty calendar days to report or be deemed discharged from further consideration

---

## A BILL

To amend the Defense Production Act of 1950, as amended.

1       *Be it enacted by the Senate and House of Representa-*  
2       *tives of the United States of America in Congress assembled,*  
3       That this Act may be cited as the "Defense Production Act  
4       Amendments of 1977".

5       SEC. 2. Insert immediately after title VII the following  
6       new title:

7       "TITLE VIII—CONDUCT OF GOVERNMENT  
8       PERSONNEL

9       "SEC. 801. (a) As used in this Act the term—

10       "(1) 'contracting officer' means any employee of  
11       the United States, the independent agencies thereof,

1 or the government of the District of Columbia who by  
2 virtue of his position or appointment in accordance with  
3 applicable agency regulations is authorized to solicit or  
4 select sources of supply, or describe requirements for,  
5 enter into, award, modify, terminate, administer, or make  
6 determinations or findings with respect to, any contract,  
7 or to otherwise exercise any part of such authority;

8 “(2) ‘compensation’ includes any payment, gift,  
9 benefit, reward, favor, gratuity, or employment valued  
10 in excess of \$50 at prevailing market price;

11 “(3) ‘contractor’ is any person, partnership, cor-  
12 poration or agency thereof other than the United  
13 States, the independent agencies thereof, or the District  
14 of Columbia, who offers, negotiates, agrees, or other-  
15 wise contracts to supply the United States, the inde-  
16 pendent agencies thereof, or the District of Columbia,  
17 with goods, services, or supplies, and any parent, sub-  
18 sidiary, or affiliate thereof; and

19 “(4) ‘procurement contract’ is any agreement by  
20 which the United States, the independent agencies  
21 thereof or the District of Columbia purchase, lease, or  
22 otherwise engage in the acquisition of supplies, serv-  
23 ices or other materiel, to include such agreements as:  
24 orders for the procurement of services or supplies;  
25 awards, notices of awards; contracts of fixed price, in-

1 centive contracts, and cost and cost-plus-a-fixed-fee con-  
2 tracts; contracts providing for the issuance of job or-  
3 ders, task orders, or task letters thereunder; letter con-  
4 tracts and purchase orders; or any supplemental agree-  
5 ment with respect to any of the foregoing.

6 “(b). No contracting officer, while so employed, shall  
7 accept compensation from any contractor without prior  
8 written permission of the standards of conduct counsellor  
9 for his employing department or agency. Nothing in this  
10 subsection shall prohibit the acceptance of such compen-  
11 sation as is specifically authorized by departmental or  
12 agency directive or regulation.

13 “(c) No contracting officer who, during the last three  
14 years of his employment by the United States Government,  
15 engaged, officially or unofficially, in duties of his office in  
16 regard to any procurement contract shall accept compensa-  
17 tion from any contractor receiving funds under such contract  
18 for a period of two years following his employment with the  
19 United States, the independent agencies thereof, or the Dis-  
20 trict of Columbia.

21 “(d) No contracting officer who, during the last three  
22 years of his employment by the United States Government,  
23 engaged, officially or unofficially, in duties of his office in re-  
24 gard to any procurement contract shall accept compensation

1 from any employment which was created, supported, or sub-  
2 sidized by Federal revenues under such procurement contract  
3 until the expiration of five years following such contracting  
4 officer's termination of employment with the United States,  
5 the independent agencies thereof, or the District of Columbia.

6       “(e) No contracting officer, while so employed, who  
7 engaged, officially or unofficially, in duties of his office in  
8 regard to any procurement contract shall own, possess or  
9 control, directly or indirectly, jointly or severally, any stock,  
10 stock option, or other like financial holding, in any contractor  
11 who has been affected by such action. In any instance where  
12 such contracting officer may be called on to deal in an official  
13 capacity with a matter which would affect a contractor in  
14 which he holds such financial interest, he shall promptly dis-  
15 pose of such financial holding or formally disqualify himself  
16 from any dealings in such matter. Written notice of such dis-  
17 posal or disqualification shall be provided by such contracting  
18 officer to the Conflict of Interest Review Board.

19       “(f) Whoever violates this section shall be guilty of a  
20 felony, and shall be fined not more than \$5,000 or impris-  
21 oned for not more than one year, or both.

22       “(g) Whoever offers, tenders, or grants any compensa-  
23 tion to any contracting officer, the acceptance of which would  
24 result in a violation by such contractor of this section, shall  
25 be guilty of a felony and shall be fined not more than

1 \$25,000 and imprisoned for not more than one year, or  
2 both.

3 "SEC. 802. (a) There is established a Conflict of In-  
4 terest Review Board, which shall review compliance by  
5 contracting officers with this Act. The Board shall consist  
6 of the Chairman of the United States Civil Service Commis-  
7 sion, who shall act as Chairman of the Board, the Attorney  
8 General of the United States, and the Comptroller General  
9 of the United States.

10 "(b) The Board shall have the power to appoint, fix  
11 the compensation of, and remove an executive secretary and  
12 three additional staff members without regard to chapter 51,  
13 subchapters III and VI of chapter 53, and chapter 75 of  
14 title 5, United States Code, and those provisions of such  
15 title relating to the appointment in the competitive service.  
16 The executive secretary and the three additional staff mem-  
17 bers may be paid compensation at rates not to exceed the  
18 rate prescribed for levels IV and V of the Federal Execu-  
19 tive Salary Schedule, respectively.

20 "(c) The Board is not authorized to appoint or utilize  
21 the services of advisory committees, or to employ consult-  
22 ants for the fulfillment of its responsibilities. Nothing herein  
23 shall prohibit the temporary employment of clerical assistants  
24 or the solicitation or acceptance of advice from outside  
25 parties.

1       “(d) All departments and agencies of the Government  
2 are authorized to cooperate with the Board and to furnish  
3 information, appropriate personnel with or without reim-  
4 bursment; and such financial and other assistance as may be  
5 agreed to between the Board and the department or agency  
6 concerned.

7       “(e) (1) Any person who is offered compensation that  
8 might place him in violation of subsection (c) or (d) of  
9 section 801 of this Act, prior to the acceptance of such  
10 compensation, may apply to the Board for advice on the  
11 applicability of this Act to such compensation. The Board is  
12 authorized, upon such application, to review such proposed  
13 compensation and to issue advisory opinions stating whether  
14 such compensation would result in a violation of the intent of  
15 this Act: *Provided*, That such action shall be accomplished  
16 after—

17       “(A) appropriate notice is provided in the Federal  
18 Register not less than ten working days before the Board  
19 is to meet to consider such application;

20       “(B) interested parties are permitted, upon written  
21 request, to present testimony relating to the issuance of  
22 such advisory opinion; and

23       “(C) the Board shall inform Congress, and provide  
24 notice in the Federal Register, within thirty days after  
25 the issuance of any advisory opinion, describing—

1           “(i) the name of the applicant for such ad-  
2           visory opinion;

3           “(ii) the contractor from which such applicant  
4           intends to accept compensation;

5           “(iii) the duties of such applicant during the  
6           last three years of his employment as a contracting  
7           officer;

8           “(iv) any official responsibilities such appli-  
9           cant exercised with regard to any procurement con-  
10          tract in which an interest is or was retained by  
11          the contractor which proposes to provide such  
12          compensation;

13          “(v) a description by a representative of the  
14          contractor, based upon testimony delivered to the  
15          Board, of the complete terms and conditions of the  
16          proposed compensation, including any prospective  
17          services that such applicant will perform on behalf  
18          of the contractor; or

19          “(vi) a statement of the findings of fact and  
20          opinion which led the Board to conclude that such  
21          compensation would or would not offend the intent  
22          of this Act.

23          “(2) The Board is authorized to issue a statement of  
24          findings of fact and opinion along with an advisory opinion

1 finding that the proposed compensation would not violate  
2 the intent of this Act if—

3 “(A) the involvement of the applicant in a procure-  
4 ment contract otherwise described in this Act was so  
5 remote or inconsequential that it could have had no  
6 significant effect on the procurement contract in  
7 question;

8 “(B) the involvement of the contractor in such pro-  
9 curement contract was remote or inconsequential; or

10 “(C) the national interest requires that, the pro-  
11 hibitions of this Act notwithstanding, such applicant  
12 should be allowed to accept such compensation.

13 “(f) There shall be available to any person as a defense  
14 in any criminal or civil case brought for violation of this  
15 Act that—

16 “(1) the Board was in unanimous agreement, as  
17 expressed in a properly issued advisory opinion, that such  
18 compensation would not violate the intent of this Act;  
19 and

20 “(2) such person fully complied, without alteration,  
21 with the understanding of circumstances as expressed by  
22 the Board in its statement of findings of fact and advi-  
23 sory opinion, and with any additional guidance or sug-  
24 gestions proposed by the Board.

25 “(g) In furtherance of the duties and responsibilities

1 described in this Act, the Board is authorized to require, by  
2 subpoena or otherwise (to be issued under the signature of  
3 the Chairman, or, in his absence, another Board member  
4 designated by him) the attendance of such witnesses and  
5 the production of such books, papers, and documents as it  
6 may require, and to administer such oaths, and to take such  
7 testimony as it may deem necessary.

8 “(h) All such meetings to consider applications for  
9 an advisory opinion on the applicability of section 801 of  
10 this Act shall be open to the public, and a verbatim tran-  
11 scription of all such meetings and all other deliberations of  
12 the Board shall be available for public inspection during  
13 regular working hours at the offices of the Board.

14 “(i) The Chairman of the Board is required to promptly  
15 report to the Attorney General, and to provide such assist-  
16 ance as may be required, whenever the Board shall learn  
17 of an action which appears to involve a violation of this Act  
18 or any other Federal law. The Attorney General shall report  
19 to the Chairman of the Board and to the Congress on the  
20 disposition of any such case.

21 “(j) The Chairman shall review all agency programs to  
22 assure that all positions subject to the provisions of section  
23 801 of this Act are identified, and that all persons subject  
24 to these provisions are provided adequate notice of such  
25 prohibitions and restrictions.

1       “(k) The Board is authorized to develop and promul-  
2 gate appropriate regulations to implement this Act.

3       “(l) The Board shall report to the Congress, on an  
4 annual basis, its activities, deliberations, and investigations,  
5 and shall recommend such legislative or regulatory actions  
6 as it deems appropriate to promote high ethical standards  
7 for Government employees.

8       “(m) There are authorized to be appropriated such  
9 sums as may be necessary to carry out the purposes of this  
10 Act.

11       “SEC. 803. (a) As used in this section—

12       “(1) the term ‘former Government employee’  
13 means any former employee of the United States, in-  
14 cluding consultants or part-time employees, whose salary  
15 rate at any time during the three-year period immedi-  
16 ately preceding the termination of his last employment  
17 with the United States was equal to or greater than  
18 the minimum salary rate at such time for positions in  
19 grade GS-13;

20       “(2) the term ‘contracts awarded’ includes the net  
21 dollar amount of modifications to, and the exercise of  
22 options under, such contracts excluding all transactions  
23 amounting to less than \$10,000 each;

24       “(3) the term ‘agency’ refers to any executive

1 department or independent agency of the United States;  
2 and

3 “(4) the term ‘Government contractor’ refers to  
4 any entity receiving contract awards from a Govern-  
5 ment agency, or any subsidiary, parent company, or af-  
6 filiate thereof.

7 “(b) Under regulations prescribed by the head of each  
8 agency—

9 “(1) any former Government employee who dur-  
10 ing any fiscal year—

11 “(A) was employed by or served as a consult-  
12 ant or otherwise to a Government contractor for  
13 any period of time,

14 “(B) represented any Government contractor  
15 at any hearing, trial, appeal, or other action in  
16 which the United States was a party and which  
17 involved services and materials provided or to be  
18 provided to the United States by such contractor,  
19 or

20 “(C) represented any such contractor in any  
21 transaction with the United States involving serv-  
22 ices or materials provided or to be provided to the  
23 United States by such contractor,  
24 shall file with the Chairman of the Conflict of Interest

1 Review Board, in such form as the Chairman may pre-  
2 scribe, not later than February 15 of the next succeeding  
3 fiscal year, a report containing the following informa-  
4 tion—

5 “(A) his name and address;

6 “(B) the name and address of the Government  
7 contractor by whom he was employed or whom he  
8 served as a consultant or otherwise;

9 “(C) the title of the position held by him with  
10 the Government contractor;

11 “(D) a description of his duties and the work  
12 performed by him for the Government contractor;

13 “(E) his grade, level, or salary rate while em-  
14 ployed by the United States;

15 “(F) a description of his duties and the work  
16 performed by him while on active duty or while em-  
17 ployed by the United States during the three-year  
18 period immediately preceding the termination of his  
19 employment with the United States;

20 “(G) a description of any work performed by  
21 him in connection with any United States Govern-  
22 ment contract while employed by the United States,  
23 if the Government contractor by whom he is em-  
24 ployed is providing substantial services or materials  
25 for such contract, or is negotiating or bidding to pro-

1 provide substantial services or materials for such  
2 contract.

3 “(8) the date on which his employment with  
4 the United States was terminated, and the date on  
5 which his employment, as an employee, consultant,  
6 or otherwise with the Government contractor began  
7 and, if no longer employed by such Government  
8 contractor, the date on which such employment  
9 with such Government contractor terminated; and

10 “(9) such other pertinent information as the  
11 Chairman of the Conflict of Interest Review Board  
12 may require.

13 “(2) any employee of the United States, including  
14 consultants or part-time employees, who was previously  
15 employed by or served as a consultant or otherwise to  
16 a Government contractor in any fiscal year, and whose  
17 salary rate with the United States Government is equal  
18 to or greater than the minimum salary rate for positions  
19 in grade GS-13, shall file with the Chairman of the  
20 Conflict of Interest Review Board, in such form and  
21 manner and at such times as the Chairman may pre-  
22 scribe, not later than February 15 of the next succeed-  
23 ing fiscal year, a report containing the following infor-  
24 mation—

25 “(A) his name and address;

1           “(B) the title of his position with the United  
2           States Government;

3           “(C) a description of his duties with the  
4           United States;

5           “(D) the name and address of the Government  
6           contractor by whom he was employed or whom he  
7           served as a consultant or otherwise;

8           “(E) the title of his position with such Gov-  
9           ernment contractor;

10          “(F) a description of his duties and the work  
11          performed by him for the Government contractor;

12          “(G) the date on which his employment as  
13          a consultant or otherwise with such contractor ter-  
14          minated and the date on which his employment as  
15          a consultant or otherwise with the United States  
16          began; and

17          “(H) such other pertinent information as the  
18          Chairman of the Conflict of Interest Review Board  
19          may require.

20          “(c) (1) No former Government employee shall be  
21          required to file a report under this section for any fiscal  
22          year in which he was employed by or served as a con-  
23          sultant or otherwise to a Government contractor if the total  
24          amount of contracts awarded to such contractor by the  
25          agency by which he was formerly employed did not total

1 at least \$1,000,000 or 1 per centum of the total contract  
2 awards made by such agency; and no employee of the  
3 United States shall be required to file a report under this  
4 section for any year in which the contracts, awarded by  
5 the agency by which he is employed to the contractor by  
6 which he was formerly employed, did not total at least  
7 \$1,000,000 or 1 per centum of the total contract awards  
8 made by such agency.

9       “(2) No former Government employee shall be re-  
10 quired to file a report under this section by any fiscal year  
11 on account of employment with or services performed for  
12 the United States if such employment was terminated three  
13 years or more prior to the beginning of such fiscal year;  
14 and no employee of the United States shall be required to  
15 file a report under this section on account of employment  
16 with or services performed for a Government contractor if  
17 such employment was terminated or such services were  
18 performed three years or more prior to the effective date  
19 of his employment with the United States.

20       “(3) No former Government employee shall be re-  
21 quired to file a report under this section for any fiscal year  
22 during which he was employed by or served as a consult-  
23 ant or otherwise to a Government contractor at a salary  
24 rate of less than \$20,000 per year; and no employee of  
25 the United States, including consultants or part-time em-

1 ployees, shall be required to file a report under this sec-  
2 tion if, during his prior employment with a Government  
3 contractor, his salary rate did not exceed \$20,000 per year.

4 “(d) (1) The Chairman of the Conflict of Interest  
5 Review Board shall, not later than March 31 of each year,  
6 file with the President of the Senate and the Speaker of  
7 the House of Representatives a report containing a list of  
8 the names of persons who have filed reports with him for  
9 the preceding fiscal year pursuant to subsections (b) (1)  
10 and (b) (2) of this section. The Chairman shall include  
11 after each name so much information as he deems appro-  
12 priate and shall list the names of such persons under the  
13 Government contractor for whom they worked or for whom  
14 they performed services.

15 “(2) The Chairman of the Conflict of Interest Re-  
16 view Board shall review each report filed with him for the  
17 preceding fiscal year pursuant to subsections (b) (1) and  
18 (b) (2) of this section, and shall report not later than  
19 March 31 of each year, to the President of the Senate and  
20 the Speaker of the House of Representatives, on the dis-  
21 position of any instances which appear to involve a viola-  
22 tion of section 801 of this Act or any other provisions of  
23 Federal law.

24 “(3) The Chairman of the Conflict of Interest Re-  
25 view Board shall review and approve plans developed by

1 the head of each agency to assure that procedures are  
2 developed which assure that each person subject to the  
3 reporting requirement of subsection (b) (1) and (b) (2)  
4 of this section is made aware of these requirements.

5 “(4) The Chairman of the Conflict of Interest Review  
6 Board shall undertake a continuous review to determine that  
7 all persons subject to the reporting requirement of subsections  
8 (b) (1) and (b) (2) of this section are in compliance with  
9 these requirements, and shall report not later than March 31  
10 of each year, to the President of the Senate and the Speaker  
11 of the House of Representatives, on his efforts to assure com-  
12 pliance with these reporting requirements.

13 “(c) Any former Government employee whose em-  
14 ployment with or services for a Government contractor ter-  
15 minated during any fiscal year shall be required to file a  
16 report pursuant to subsection (b) (1) of this section for  
17 such year if he would otherwise be required to file under this  
18 section; and any person whose employment with or services  
19 to the United States terminated during any fiscal year shall  
20 be required to file a report pursuant to subsection (b) (2) of  
21 this section for such year if he would otherwise be required  
22 to file under this section.

23 “(f) The Chairman of the Conflict of Interest Review  
24 Board shall maintain a file containing the information filed  
25 with him pursuant to subsections (b) (1) and (b) (2) of

1 this section and such file shall be open for public inspection  
2 at all times during the regular workday.

3 “(g) Any person who fails to comply with the filing  
4 requirements of this section shall be guilty of a misdemeanor  
5 and shall, upon conviction thereof, be punished by not more  
6 than six months in prison or a fine of not more than \$1,000,  
7 or both.

8 “(h) No person shall be required to file a report pur-  
9 suant to this section for any fiscal year prior to the fiscal  
10 year 1977.”

Our first witness is Hon. Charles Bennett, Representative from the third district of Florida. It's appropriate that Congressman Bennett should lead off these hearings. Congressman Bennett has been one of the most consistent and articulate advocates of high standards of ethical conduct throughout the Federal Government. He was the author of the original Code of Ethics for the House of Representatives. He has for many years introduced legislation regarding this subject. His proposals in the House of Representatives appear to have come before their time because the committees responsible for considering his proposals have failed to take them into account. Had Congressman Bennett's proposals been adopted when first proposed, I believe that the unfortunate patterns of influence would have not have been a problem and I believe that the proposals of Congressman Bennett would have saved literally hundreds and hundreds, perhaps billions of dollars of the taxpayers' money.

Last summer when I asked the staff of the Joint Committee on Defense Production to assist the Banking Committee in developing a comprehensive approach to procurement related prohibitions, my first directive to them was they contact Congressman Bennett's office and seek his advice and assistance. Both personally and through his staff he gave invaluable assistance in the preparation of this legislation. His personal comments on early proposals were perhaps the most helpful comments received from any source.

Congressman Bennett, I would like to welcome you to this side of Capitol Hill. I am most anxious to hear your testimony.

**STATEMENT OF HON. CHARLES E. BENNETT, U.S. HOUSE OF REPRESENTATIVES, THIRD DISTRICT OF THE STATE OF FLORIDA**

Mr. BENNETT. Thank you, Senator, and I must say your own leadership for our country in trying to eliminate waste and see to it things are properly done has been a constant inspiration to me and I think to the whole country.

I appreciate the opportunity to appear before this distinguished committee and I want to congratulate you on your untiring effort in behalf of conflict of interest legislation.

[Complete statement follows:]

**PREPARED STATEMENT OF HON. CHARLES E. BENNETT, U.S. REPRESENTATIVE FROM FLORIDA**

Mr. Chairman, I appreciate the opportunity to appear before this distinguished committee and I want to congratulate you on your untiring effort in behalf of conflict of interest legislation. You have fought a long battle in the Senate, as I have in the House, for the enactment of meaningful and effective conflict of interest laws, and I am hopeful that the current effort will lead to passage of the important legislation we are discussing today.

I strongly support S. 695, which is identical to H.R. 3222, introduced by myself and others, the bill which I introduced in the House. This legislation would amend the Defense Production Act of 1950 to halt a subtle type of conflict of interest that has plagued the Federal government for many years. The bill would prohibit any former Federal employee who participated in a contract formulation or employment with anyone who has a direct interest in the contract, for a period of two years. The prohibition would be extended to five years in a case in which the job sought by the former Federal employee was created, supported, or subsidized by federal revenues under a procurement contract in which he had participated.

This legislation is similar to a bill I first introduced in 1951, and during the 94th Congress 47 Members of the House cosponsored my conflict of interest bill. Mr. Reuss, Mr. Moorhead and Mr. Mitchell of Maryland joined with me in introducing H.R. 3222 in February and a number of other Members have contacted me about their interest in cosponsoring the legislation. I plan to reintroduce the bill later this month and I expect a good percentage of the House to join in cosponsoring this needed legislation.

The bill is divided into three main sections. The first section addresses the prohibitions on post-government employment. No former Federal employee, who participated in a procurement contract during his last three years of government employment would be permitted to accept employment or compensation from a contractor involved in that contract, for a period of two years. The employment prohibition extends to five years if the job in question is directly funded by a contract in which the employee participated while working for the government.

Former employees who violate the employment prohibitions established in this section would be subject to a maximum fine of \$5,000 and/or a maximum prison sentence of one year. Anyone employing such a person in violation of this section would be subject to a maximum fine of \$25,000 and/or a maximum prison sentence of one year. I believe the prohibitions in this section will greatly curtail the incidence of post-employment conflict of interest situations for former Federal employees.

The second section would establish a 3-member Conflict of Interest Review Board. The Chairman of the Civil Service Commission would serve as chairman of the Board with the Attorney General and the Comptroller General serving as members. This Board would provide a central coordinating authority in the Executive Branch to provide for consistent application of the law throughout the Federal government. In addition, the Board would issue advisory opinions to individuals who are not sure whether they fall under the prohibitions in this legislation.

The third section establishes reporting requirements for former Federal employees accepting employment with companies having contracts with their former agency and for persons leaving private contracting agencies to work for the government. This provision is similar to disclosure requirements already in effect for NASA and Defense Department personnel.

It should be stressed that this legislation does not prohibit all private employment for contracting officers and employees leaving the government. The prohibitions apply in those particular cases where the employee wants to go to work for a company with a direct interest in a contract in which that employee participated. The employee would not be barred from taking employment with other companies in the same industry.

I certainly do not believe that all Federal contracting officers fall prey to this type of conflict of interest. But these employees surely realize that contract decisions they make for the government today could lead to lucrative employment with the contracting company tomorrow. For some, this temptation may be too great to bear. The purpose of this legislation is to remove that temptation and thereby eliminate the possibility of conflict of interest situations occurring.

The need for legislation to deal with this kind of conflict of interest has long been apparent. In 1956, a report on the inquiry into aircraft production costs and profits stated:

"The presence of retired military personnel on payrolls, fresh from the 'opposite side of the desk' creates a doubtful atmosphere . . . companies whose business is so closely interwoven with the military establishment ought to lean over backward so that no suggestion of favoritism, influence or 'old school tie' could be read into their conduct."

In 1960, the New York City Bar Association issued an excellent report entitled "Conflict of Interest and Federal Service" in which it said:

"Interviews revealed a substantial body of opinion that government employees who anticipate leaving their agency someday are put under an inevitable pressure to impress favorably private concerns with which they officially deal."

This report helped prod Congress to enact a Federal conflict of interest law in 1962, but time has shown us that stronger legislation is needed. For example, in 1970 the Fitzhugh Commission provided documented evidence that anticipation of a lucrative job can have a significant effect on a government procurement official's decisions.

In 1975, the Council on Economic Priorities released a report providing evidence that many former Defense Department employees have gone to work for military contractors after playing an active part in negotiating defense contracts with

those same contractors. It was reported that 27 percent of the employees who left the Defense Department to take positions with military contractors were working in conflict of interest situations.

The need is clear and the time for action is now. President Carter showed his interest in the subject earlier this year by requiring pledges from his top level appointees that they will steer clear of possible conflict of interest situations in their post-government employment. In addition, the President included post-employment restrictions in "The Ethics in Government Act of 1977" which he sent to Congress earlier this month.

Under existing law, a federal official may not, for a period of one year after leaving the government, make any formal appearance on behalf of a private party regarding a matter formerly under his official responsibility. The President's bill would extend the prohibition period from one year to two and would include informal as well as formal contacts. The President's bill is a step in the right direction, but it does not address the bigger problem of former Federal procurement officials accepting jobs with private contractors immediately after leaving government service. S. 695 deals squarely with this pressing problem.

In the wake of recent government scandals, the American people are yearning for a strong indication that they are governed by good and honest men and women who put government service before private gain. There has never been a better climate for ethical reform, and I urge the committee to take advantage of this climate and pass this long overdue conflict of interest legislation.

The CHAIRMAN. Thank you very, very much, Congressman Bennett, for an excellent statement. We very much appreciate it.

I have a series of questions I'd like to ask you. First, what about civilians who come to Government agencies and from industry and plan to return to industry after Federal service? In your view, would this bill permit that?

Mr. BENNETT. I imagine he would be forbidden to return if he had exercised any procurement responsibility over his former employer's program.

The CHAIRMAN. What would such an individual have to do to ensure that he could return to a former employer after his stint as a civil servant? I'm talking about a situation where somebody has worked for a particular firm and he wants to serve the Government. They need his skill and ability and experience. He wants to go back to his firm. After all, he's made a career with that firm and if he can't go back he probably won't come to work for the Federal Government and we lose a valuable possible civil servant.

Mr. BENNETT. I certainly have seen many instances of this, particularly in the high level of people in the secretarial positions, in the secretaries of various departments, and I agree with you that the problem is real because some of these departments require leadership that should be based on experience and therefore the problems are apparent. He would probably be permitted to return if he had taken no action affecting that company's procurement. He could probably accomplish this by disqualifying himself from any decisions affecting that company.

The CHAIRMAN. Isn't it true, however, that current Federal law requires an individual to disqualify himself from any decisions affecting a company that he plans to work for?

Mr. BENNETT. Yes; I believe that is correct. He must disqualify himself if he holds an interest in the company, if he's negotiating for employment, or if he's accepted a job offer.

The CHAIRMAN. Well, S. 695, the bill that you're the principal author of in the House and I'm the author of in the Senate, would probably have little effect on the Government's efforts to recruit individuals since by disqualifying themselves, which they are already

required to do, they could assure that they would be allowed to return to private industry. Is that right?

Mr. BENNETT. That's correct, although I believe the official would have to demonstrate to the Review Board that he had truly disqualified himself of all matters affecting the company.

The CHAIRMAN. Now there are just a couple more matters I'd like to ask your judgment on briefly.

This bill requires that a Commission be set up, including the chairmanship by the Chairman of the Civil Service Commission. The Comptroller General would be a member and the Attorney General would be a member. Now the argument might be made that these are very busy men, full time and then some in their other work. Would they be able to give this Ethics Commission the kind of time and attention that they should to make it effective?

Mr. BENNETT. I believe they would. There already is, without statutory authority, a division or some personnel in the Civil Service Commission that does work on ethical matters and in the current Congress I'm sure that's going to be made statutory. I have forgotten what the bill is in, but it's in a bill to give some statutory foundation for that.

That person, or small group of persons, could certainly adequately advise the Civil Service Commission head of the proper procedures to follow and I would think that unless there were some logical input from the other two that this would probably be the leading type of authority that would be taken because I think it would be the only institutionalized group in the Federal service that can do that.

The CHAIRMAN. Now as one final question I'd like to ask, the contention is made that the administration's bill would be adequate and it would not be necessary for us to pass this additional legislation which would prohibit employment for 2 years with a firm with whom the official had been dealing in any of the 3 preceding years as a procurement official. They say that's unnecessary because the administration's bill would continue for the lifetime prohibition against acting as an agent or attorney or otherwise representing any person before an agency in any matter in which the employee personally participated.

Furthermore, they argue that the Carter bill that's going to be before the Congress would enlarge the 1-year prohibition to 2 years against going before an employee's former agency in regard to a particular matter which was in his official responsibility and both those prohibitions would be broadened to embrace any oral or written communication designed to influence the former official's agency on any particular matter before it. So they argue that rather than prohibit the employment that all that's necessary is to prohibit the official from appearing on a particular matter over which he had jurisdiction.

What's your answer to that?

Mr. BENNETT. Well, I think that's a very much weaker proposal and I doubt in my mind it would get at the heart of the problem. I think what your bill addresses would be a much more effective way of getting rid of this problem and the fact that you appear or don't appear is not nearly as significant as whether you're employed.

The CHAIRMAN. The heart of the problem in the minds of many of the taxpayers is the notion that a high procurement official is dealing with a particular company, contractor "A," and he in effect decides

that they will get tens of millions of dollars—maybe hundreds of millions of dollars—of business and then he turns around a few months after that and accepts a job with them. He may not deal with his former associates. He may not deal with a particular engine or whatever it was he was working on, but it seems to be a reward. Maybe he'll get a \$90,000 or \$100,000 salary and the feeling is that his loyalty to the prospective employer when he is a procurement official is likely to color and conflict with his responsibility as an official of the Federal Government.

Mr. BENNETT. I certainly agree with you. I think that anything short of the bill that we have would be a mistake to do because I think there's nothing untoward or improper in the bill we have and I do think it gets as far as I can see to the heart of the matter.

My mind is not closed to looking—and I hope your staff will look—at anything that possibly should be added on in addition from the executive branch. They may have suggestions which we could add, but I wouldn't want to subtract anything from this law. I think perhaps the prohibitions should apply to the legislative branch as well for anyone who may take a job with some company that has things to present to the committee from which he came or something like that. I think that's a possibility.

The CHAIRMAN. I like that idea. I think it makes a lot of sense. We ought to think about that.

Thank you very, very much, Congressman Bennett, for a fine presentation.

Mr. BENNETT. Thank you. Congratulations again.

The CHAIRMAN. Our next witness today is the Senator from South Dakota, Hon. James Abourezk. Senator Abourezk is a cosponsor of S. 695. He's also presented an amendment for consideration by the committee which deals with a separate but related problem, the organizational conflict of interest.

Organizational conflicts of interest arise when a Government contractor cannot render impartial advice to the Government because of an outside commercial interest or when a company can obtain an advantage over its competitor by virtue of the evaluation work performed by the Government employee. Organizational conflicts can have serious anticompetitive consequences. The different agencies have chosen to deal with this problem in different ways. Most are dealt with through procurement regulations, although each agency approaches the problem in different ways.

Senator Abourezk's amendment would involve a new approach since Congress would be directing all agencies to take certain actions to avoid organizational conflicts. Senator Abourezk is I think about as innovative and imaginative and I think altogether is as effective a Senator as we have in the U.S. Senate. We are very honored to have Senator Abourezk appear before us as a witness this morning and delighted that he's sponsoring S. 695.

95TH CONGRESS  
1ST SESSION

# S. 695

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## IN THE SENATE OF THE UNITED STATES

APRIL 19 (legislative day, FEBRUARY 21), 1977

Referred to the Committee on Banking, Housing, and Urban Affairs and  
ordered to be printed

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## AMENDMENT

Intended to be proposed by Mr. ABOUREZK to S. 695, a bill to  
amend the Defense Production Act of 1977<sup>50</sup>, as amended,  
viz:

1 On page 18, line 10, delete the quotes and final period  
2 and add at the conclusion thereof the following:

3 "TITLE IX—ORGANIZATIONAL CONFLICT OF  
4 INTEREST

5 "SEC. 901. (a) The Administrator of each Federal  
6 department and independent agency shall by regulation  
7 require any person proposing to enter into a contract, agree-  
8 ment, or other arrangement, whether by advertising or  
9 negotiation, for the conduct of research, development, evalua-  
10 tion activities, or for technical and management support

Amdt. No. 192

1 services to provide the Administrator, prior to entering into  
2 any such contract, agreement, or arrangement, with all rele-  
3 vant information bearing on whether that person has a pos-  
4 sible conflict of interest with respect to (1) being able to  
5 render impartial, technically sound, or objective assistance or  
6 advice in light of other activities or relationships with other  
7 persons or (2) being given an unfair competitive advantage.  
8 Such person shall insure, in accordance with regulations pub-  
9 lished by the Administrator, compliance with this section by  
10 any subcontractor of such person, except supply subcon-  
11 tractors: *Provided*, That this requirement shall not apply to  
12 subcontracts of \$10,000 or less.

13 “(b) The Administrator shall not enter into any such  
14 contract, agreement, or arrangement unless he affirmatively  
15 finds, after evaluating all such information and any other  
16 relevant information otherwise available to him, either  
17 that (1) there is little or no likelihood that a conflict of  
18 interest would exist, or (2) that such conflict has been  
19 avoided after appropriate conditions have been included in  
20 such contract, agreement, or arrangement: *Provided*, That if  
21 he determines that such conflict of interest exists and that  
22 such conflict of interest cannot be avoided by including  
23 appropriate conditions therein, the Administrator may enter  
24 into such contract, agreement, or arrangement, if he deter-  
25 mines that it is in the best interests of the United States to

1 do so and includes appropriate conditions in such contract,  
2 agreement, or arrangement to mitigate such conflict.

3       “(c) The Administrator shall publish rules for the  
4 implementation of this section, in accordance with section  
5 553 of title 5, United States Code, as soon as possible after  
6 the date of enactment of this section but in no event later  
7 than one hundred and eighty days after such date.”.

STATEMENT OF HON. JAMES ABOUREZK, U.S. SENATOR FROM  
SOUTH DAKOTA

Senator ABOUREZK. Thank you very much, Senator Proxmire.

I have a long and detailed statement which I'd like to submit for the record and I just want to give a very brief summary of it if I might.

The CHAIRMAN. Yes. The entire statement will be printed in full in the record.

Senator ABOUREZK. I would like to give a brief summary of my statement and ask that my complete statement be printed in the record.

I appreciate the opportunity to appear before the Committee on Banking, Housing, and Urban Affairs in support of S. 695. In particular, I appreciate the committee's consideration of the amendment I have proposed to S. 695 on organizational conflicts of interest in Government contracting. I believe this amendment on organizational conflicts complements the provisions of S. 695, which concern personal conflicts of Government contracting officers.

My statement this morning describes (1) the history of the existing law on the subject of organizational conflicts of interest, (2) the Bechtel hearings on organizational conflict of interest, (3) follow-up on the Bechtel hearings, (4) the history of my amendment to the ERDA Authorization Bill and (5) the effect of my amendment to S. 695. As you can see the statement is very detailed. Attached to it are 28 exhibits running 96 pages (see appendix II pages 129-224), which give your committee a complete background on the subject of organizational conflict of interest.

Organizational conflict of interest has been a recognized problem in Government contracting for over 15 years, yet until yesterday there was still no statute which defines when such conflicts occur or requires that they be avoided. Fortunately a number of agencies have issued regulations which build on certain well-established principles regarding the nature of organizational conflict. Unless avoided organizational conflicts have the potential to give contractors an unfair competitive advantage and to distort Government policymaking.

As you can see from my statement, this amendment to S. 695 is based on an amendment which was adopted yesterday by the Congress as part of the ERDA authorization bill for fiscal 1977.

My amendment No. 192 to S. 695 is identical to the provision of the ERDA authorization bill which was adopted by conference last session—except it applies governmentwide. As I think is apparent from my statement, the amendment is modest in scope and it has been endorsed by the Comptroller General. There is no reason to delay further.

Why should we tolerate the expenditure of taxpayer dollars on any study which may be biased? Why shouldn't the Government require applicants for public contracts to disclose if they have outside conflicting interests? Why shouldn't the Government be required to evaluate information disclosed to it by contract applicants? There is no reason why the Congress should wait to direct Federal agencies to take these preliminary steps to avoid organizational conflicts of interest.

I am happy to say that the Bechtel hearings—and the Condor missile hearings chaired by Senator Proxmire—have resulted in a reevaluation of present Government policies on organizational conflict by the Office of Federal Procurement Policy, the General Services, and the Armed Services Procurement Committee. I have had access to drafts of the new OFPP/GSA and ASPR regulations and I can state that they recognize the basic principles upon which my amendment is based. The OFPP/GSA regulations will be the first government-wide regulations on this subject. Substantial effort is being made to coordinate civil and military policies in this area. But Congress must make sure that these new regulations meet the minimum standards which my amendment sets. The committee may, however, wish to encourage these Government efforts by authorizing one Government agency such as GSA to promulgate governmentwide regulations to implement my amendment.

Year after year vigilant Members of Congress uncover examples of Government contracts with an organization with a conflict of interest. The Government can never expect to get its money's worth from these contracts. Even if the contractor's outside interests do not introduce bias into a study, the appearance of a conflict makes it impossible for the Government to rely on the study to make decisions affecting the public interest.

I do not offer my amendment as a panacea for ill-conceived Government decisionmaking. It will, however, help to insure that to the extent that Government policy relies on the results of public contracts, the Government can have greater confidence that it is relying on impartial, unbiased, and objective assistance and advice.

Let me again state my appreciation for the opportunity to appear here today and for your consideration of my amendment on organizational conflict of interest.

Thank you.

The CHAIRMAN. Senator Abourezk, your amendment would require contractors to disclose any outside private interest which might create a conflict in the Federal contract awards as I understand it. Is it better, in your judgment, to publicize these outside private interests or would it be enough to ask contractors to certify they have none?

Senator ABOUREZK. I believe companies would be quite unhappy having to certify that they have no conflicts. They would be doing so at their peril. I think companies would prefer simply to disclose their outside interests and rely on the Government to determine if a conflict exists.

Also, the Government has the responsibility to determine whether or not a conflict exists. If the companies simply certify that no conflict exists, the Government will have to review that determination anyway. Therefore I prefer disclosure to certification.

The CHAIRMAN. Why does your amendment require applicants for research and development contracts to disclose their outside private interests?

Senator ABOUREZK. Those research and development contracts raise the most difficult problem in identifying the conflicts of interest. They arise in research and development contracts because the company has some outside private interests, and without requiring the disclosure of these outside private interests, the Government may never know that a conflict exists.

The CHAIRMAN. How about limiting Government disclosure requirements only to management and technical service contracts where the main problem seems to lie?

Senator ABOUREZK. Disclosure should not be limited to management and technical service contracts. Conflicts arise with these contracts because a company has an interest in a series of Government contracts. The company has a conflict if it can bias the results of the first contract so that it will be awarded the subsequent Government contract. There is no great need for disclosure in this situation because the Government should already be fully aware of the possibility for future Government contracts.

The CHAIRMAN. Now there are organizational conflict of interest regulations for some departments of Government already I understand. Your amendment provides a procedure for establishing additional regulations. Would it not make more sense for the Congress simply to mandate standard Government-wide regulations rather than specifying new procedures?

Senator ABOUREZK. At some point Congress may have to prescribe standard Government-wide regulations. But we have had no attempt to vigorously enforce the existing regulations. The existing regulations are general but we are dealing with a lot of types of contracts. My procedural reforms will greatly increase enforcement. We should try it first.

The CHAIRMAN. Now in your prepared remarks you mention that the executive branch is in the process now of issuing government wide regulations on organizational conflict of interest. Perhaps this summer. Should Congress withhold action on this matter until these new regulations are published?

Senator ABOUREZK. Congress should not wait until the executive branch issues its regulations on organizational conflict of interest. My amendment sets certain minimum requirements which are now supported by the Comptroller General. Any Government regulations which do not meet these minimum requirements would be inadequate.

The CHAIRMAN. Senator Abourezk, one of the perennial protests we get—and there's a lot to it as you know—against any kind of legislation that requires disclosure is that it may cause undue, excessive paperwork or administrative headaches for potential contractors. Would your disclosure procedures, in your judgment, perhaps add to the paperwork burden significantly?

Senator ABOUREZK. Not significantly. Only minimally. I have to say that ever since I have been in the Senate I have annually disclosed to the public—primarily in South Dakota but it's available to the wire services and anybody else who wants it—my own financial situation, my income, honorariums, and the amount of property that I own, which is almost none. My disclosure is very simple compared to a lot of people. But while I find that burdensome once a year to do that, I just think it's an awful lot better to do that than to try to keep it secret. So I think when companies have to disclose about organizational conflicts of interest that ought to be one of the hazards of bidding and negotiating for Government contracting. I don't think you can play dice under a blanket any more like you used to be able to do, and I don't think one ought to.

The CHAIRMAN. Finally, could your amendment be modified—would you favor modifying your amendment to give one Government agency the responsibility for issuing regulations to implement the amendment?

Senator ABOUREZK. Yes. I think it could very easily, if it were GSA, as I suggested. GSA might be a good agency to do that in. But I think, nevertheless, they ought to apply governmentwide, whether or not one agency takes the responsibility to write the regulations.

The CHAIRMAN. Senator Abourezk, thank you very, very much for an excellent presentation. We very much appreciate it.

Senator ABOUREZK. Thank you for your time.

[Complete statement follows:]

PREPARED STATEMENT OF HON. JAMES ABOUREZK, U.S. SENATOR FROM SOUTH DAKOTA

I appreciate the opportunity to appear before the Committee on Banking, Housing, and Urban Affairs in support of S. 695. In particular, I appreciate the Committee's consideration of the amendment I have proposed to S. 695 on organizational conflicts of interest in government contracting. I believe this amendment on organizational conflicts complements the provisions of S. 695, which concern personal conflicts of government contracting officers.

In my statement this morning I would like first to describe (1) the history of the existing law on the subject of organizational conflicts of interest, (2) the Bechtel hearings on organizational conflict of interest (3) follow-up on the Bechtel hearings, (4) the history of my amendment to the ERDA Authorization Bill and (5) the effect of my amendment to S. 695.

HISTORY OF EXISTING LAW ON ORGANIZATIONAL CONFLICT OF INTEREST

Organizational conflict of interest has been a recognized problem in government contracting for over fifteen years, yet there is still no statute which defines when such conflicts occur or requires that they be avoided. Fortunately a number of agencies have issued regulations which build on certain well established principles regarding the nature of organizational conflict. Unless avoided organizational conflicts have the potential to give contractors an unfair competitive advantage and to distort government policy making.

In 1959 and 1961, the House Committee on Government Operations issued several reports on the subject of organizational conflict of interest,<sup>1</sup> and in 1962 an ad hoc committee appointed by President Kennedy headed by David E. Bell, Director of the Bureau of the Budget, submitted the comprehensive Bell Report<sup>2</sup> which reviewed extensively the whole subject of contracting out. One of the recommendations of the Bell Report was for the President to "instruct each Department and agency head, in consultation with the Attorney General, to proceed to develop . . . a code of conduct for individuals and organizations in the research and development field . . ." <sup>3</sup> The Department of Defense, National Aeronautics and Space Administration, and the Atomic Energy Commission issued such codes as agency regulations.

The basic principles in these regulations have remained unchanged since their adoption and are heavily influenced by the type of conflict which was the subject of the initial congressional hearings. That conflict arose when one government contractor, Thompson-Ramo-Woolridge and its subsidiary, Space Technology Laboratories,<sup>4</sup> were first given contracts to write specifications relating to a product or service later to be procured and second were allowed to bid to fill the resulting procurement contract. The conflict arose in the ability of that one

<sup>1</sup> House Committee on Government Operations, "Organization and Management of Missile Programs," H.R. Rep. No. 1121, 86th Cong., 1st Sess. (1959); House Committee on Government Operations, "Air Force Ballistic Management (Formation of Aero Space Corporation)," H.R. Rep. No. 324, 87th Cong., 1st Sess. (1961).

<sup>2</sup> U.S. Bureau of the Budget, "Report to the President on Government Contracting for Research and Development," S. Doc. No. 94, 87th Cong., 2d Sess. (1962) (Bell Report).

<sup>3</sup> Bell Report 14.

<sup>4</sup> House Committee on Government Operations, Avoiding Conflicts of Interest in Defense Contracting and Employment, H.R. Rep. No. 917, 88th Cong., 1st Sess. (1963).

company to write the specifications in such a way as to favor its prospects for later being awarded the "follow-on" contract to produce the "hardware" items. All government regulations explicitly acknowledge this definition of a conflict of interest and attempt to neutralize this classic conflict by barring a company which has prepared specifications from later competing to supply the item or service. These "hardware bans" prevent a conflict from industry's standpoint in that an "unfair competitive advantage" would otherwise accrue to one contractor.

In addition to protecting competitors' interests, however, all government regulations on organizational conflict are explicitly directed at preventing a second type of conflict. This conflict adversely affects the government's interest in being able to secure "impartial, technically sound, objective assistance and advice." It arises when a contractor has outside interests which affect its ability to render such assistance and advice. Although this second type of conflict is explicitly covered by agency regulations on organizational conflict, its existence is generally ignored because such conflicts are harder to identify and not so easily neutralized. In contrast the prospects for a follow on procurement are obvious and any resulting conflict is easily neutralized by hardware bans.

Let me emphasize this point by referring to the present regulations on organizational conflicts at the Energy Research and Development Administration. In section 9-1.5406(c) these regulations state "Basically, potential conflicts become acute when ERDA's quest for objectivity is paramount, such as for advice, evaluations, technical and analytical services and similar assistance that lay direct groundwork for program decisions on large future procurements, research and development programs, and production . . . However, contracting and program officials should be alert to other situations which may warrant application of the general policy." All of the guidelines on organizational conflict set forth in the next section of the ERDA regulations concern conflicts arising from follow-on procurements. This emphasis is typical of all federal regulations on organizational conflict. While the regulations require protection of both competitor's and the government's interest, in practice only competitors interests are protected.

Two consequences of this emphasis on protecting competitors' interests—rather than the government's interests—arise with respect to "sole source" awards and "unsolicited proposals." A sole source contract is one which is awarded without competitive bidding because the contractor is the only one which can perform the contract. Obviously, if there is no competitor, no competition can be hurt by the award of a contract, even if it is a follow-on contract. The fact that a contractor is a sole source, however, does not automatically guarantee that the contractor meets the government's need for impartial, unbiased, and objective assistance and advice. Nonetheless, the ERDA regulations specifically exempt sole source contractors—even ones who prepare specifications for a follow-on contract—from the prohibitions of its organizational conflict regulations. See 9-1.507(c).

Unsolicited proposals are offers initiated by a contractor to enter into a government contract. The government encourages unsolicited proposals because they constitute an important source of innovation. Although government regulations on unsolicited proposals specifically provide that such proposals should be awarded by competitive bids, in many cases unsolicited proposals result in sole source contracts to the party initiating the proposal. It should be clear that as desirable as unsolicited proposals are, they raise a special problem from the government's point of view in obtaining impartial, unbiased, and objective assistance. The government cannot assume that the initiator of the proposal has the same interest in objectivity as the government. Indeed, the real possibility that the contractor interest is in conflict with the interest of the government should lead to special efforts to enforce the organizational conflict regulations. No special effort is, however, made by agencies with respect to unsolicited proposals as few of them lead to follow-on procurements.

One final point emphasizes how important it is to identify an organizational conflict before a contract is awarded. The organizational conflict regulations are not self-executing, that is, if a contract officer does not identify a conflict and take appropriate actions, no action of the agency can later have any effect on the contractor or its performance of the contract. In other words, unless a conflict is identified before a contract is awarded, its too late to do anything about the conflict. Obviously this places a great premium on early and thorough investigation of contract applicants.

This history of the present government regulations and program on organizational conflict leads directly to consideration of the Bechtel Company contract.

## THE BECHTEL HEARINGS

In the winter of 1975 I chaired three days of hearings of the Subcommittee on Energy Research and Water Resources, Senate Interior Committee. These hearings concerned a Bechtel Corporation contract to study coal transportation for the Department of the Interior and later the Energy Research and Development Administration. These hearings are entitled "Organizational Conflict of Interest in Government Contracting."

Testimony at both the November 17 and December 5, 1975, hearings showed that Bechtel first formulated a computer model of coal transportation as a part of its contracted study and then utilized the computer model in part to compare the economics of transporting coal from Wyoming to Arkansas by unit train and by the coal slurry pipeline Energy Transportation Systems, Inc., hopes to build. At the time Bechtel had a 40 percent ownership interest in ETSI and was locked in a bitter battle with railroads who opposed the coal slurry pipeline. This comparison of coal slurry and unit trains occurred during Phase II of the project when a test case was selected to validate the computer model created during Phase I. At the December 5 hearing I submitted for the record the actual computer print-outs of this test case computer run. It contains the model's "preferred solution" for transporting coal from Wyoming to Arkansas, specifically that ETSI's coal slurry pipeline is the cheapest way to transport this coal.

In addition to documenting the direct relationship between the Bechtel study and the ETSI proposal, witnesses at the December 5 hearing disclosed the following facts: (1) Mr. Thomas Aude, an employee of ETSI, worked on those parts of the Interior/ERDA contract which related to coal slurry pipelines at the same time he worked for ETSI, and (2) at the same time Bechtel's Scientific Development Operation and Pipeline and Production Services Division were performing the Interior/ERDA contract, these same Bechtel divisions were performing a contract which Bechtel had concluded with ETSI to evaluate ETSI's coal slurry pipeline proposal. In short there was no attempt to insulate the Bechtel personnel working on the Interior/ERDA study from Bechtel and ETSI personnel working on the ETSI pipeline project.

It is apparent that even if the government did not understand the relationship between the government study and the ETSI pipeline, Bechtel did. As the study was winding down Bechtel personnel working on the Interior/ERDA contract demonstrated their interest in informing ETSI personnel of the nature of the Interior/ERDA study by specifically inviting the ETSI personnel to a briefing on it. Indeed, this relationship was apparently evident to Bechtel from the beginning. It was Bechtel—not the government—which proposed that the government award such a contract to study coal transportation. In other words, it was an unsolicited proposal. That proposal was submitted to the Interior Department one day after ETSI was incorporated. Bechtel even managed to be awarded the contract on a sole source basis.

On the basis of these facts and others in the record, I have concluded that the Bechtel's ERDA contract involved a conflict of interest due to its relationship to ETSI's pipeline proposal. Both Interior and ERDA dispute this conclusion; however, I must note that their testimony assumed that the ETSI proposal was not specifically included in Bechtel's test case. These witnesses were also apparently unaware of the additional facts I have outlined.

I would like to reiterate one thing regarding the nature of conflict of interest which I stated on several occasions during the hearings. Conflict of interest is measured by an objective standard. One need not find actual bias or corruption in order to establish that a conflict of interest exists. As the Supreme Court said in the Mississippi Valley Case, "An impairment of impartial judgment can occur in even the most well-meaning men when their personal economic interests are affected by the business they transact on behalf of the government." 364 U.S. 520. For this reason the Supreme Court concluded that the conflict of interest laws "attempt to prevent honest government agents from succumbing to temptation by making it illegal for them to enter into relationships which are fraught with temptation." It was therefore irrelevant to the hearings whether Bechtel's report for Interior/ERDA was, in fact, biased. Accordingly, the Subcommittee made no attempt to marshal the technical expertise necessary to evaluate the actual details of the report. The principle of conflict of interest lies on a much higher level than that. ERDA did acknowledge, however, that it would have to take expensive extra steps to validate the Bechtel study given the possibility that it was, in fact, biased due to Bechtel's coal slurry interests. (See "Organizational Conflict"

at 25). Without this validation one would always be suspicious that the study was biased.

The Bechtel contract is interesting from the perspective of the existing law on organizational conflicts of interest in several respects.

First, the Interior Department contracting officer was apparently unaware that Bechtel had a financial interest in ETSI. There was no requirement that Bechtel disclose any of its interests which created a conflict even if Bechtel was fully aware of the conflict. See "Organizational Conflict" at 15, 21, and 26. In fact, Bechtel did not specifically bring its ETSI interest to the attention of the contracting officer at the Interior Department, who in turn made no effort to find out whether a conflict might exist. No third party brought Bechtel's conflict to the attention of the Department because the Bechtel contract was awarded without competitive bidding.

Second, the Bechtel contract does not involve any "follow-on" procurement, which, as I have said, is the classic type of organizational conflict. The organizational conflict in the Bechtel contract arises because of Bechtel's private outside interests, not because it hopes to receive another Government contract related to the initial one. In this sense it fits within the second half of the standard definition of what constitutes an organizational conflict, but not the first half. This contract raises conflicts in Bechtel's ability to provide impartial, technically sound, objective assistance to the Government but does not confer any unfair competitive advantage on Bechtel.

As I have stated, most government efforts to avoid organizational conflicts are directed at conflicts arising from follow-on procurements. The Bechtel contract, therefore, challenged the sensitivity of the Government to conflicts which have less classical dimensions.

Third, the Bechtel contract also does not meet the classic model of an organizational conflict because it was a sole-source contract. As I have said a contract may only be awarded on a sole source basis if there is literally no other organization can perform the contract. In such a situation there is no competitor to be hurt and—by definition—no unfair competitive advantage to the contract recipient. It is clear, however, that bias may still exist. For this reason as well, the Bechtel contract presented a challenge to the sensitivity of the government in avoiding organizational conflicts.

These three factors are interrelated. The failure of agencies involved with the Bechtel contract to look beyond the presence or absence of competitive advantage is the reason why no disclosure was required of Bechtel's outside interests. The government agencies involved could easily ascertain whether or not they would award any follow-on contract. The fact that the contract was sole source would eliminate any possibility of unfair competitive advantage even if a follow-on procurement was contemplated. The combination of the absence of any follow-on contract and the award of the contract on a sole source basis dulled the agency's interest in investigating for conflicts which arose from Bechtel's private outside interests. The government made sure that no competitor of Bechtel would be put at an unfair disadvantage but made no efforts to assure that the government would receive impartial unbiased, and objective advice.

The subcommittee was extremely fortunate to hear from one of the few experts on the subject of organizational conflicts of interest, Mr. Gilbert A. Cuneo. Mr. Cuneo is the executive partner of the law firm of Sellers, Conner and Cuneo, one of the most prestigious government contract firms in the country. His experience includes litigating the only court case on the subject of organizational conflicts of interest, *Hayes International v. John L. McLucas*, 509 F. 2d 247 (5th Cir. 1975), cert. den. 1975. That case involved a contract awarded by the Air Force to the Boeing Company for certain maintenance, modification and related services on the worldwide Air Force fleet of aerial tankers. The conflict arose because Boeing had earlier been awarded a contract to write the specifications for the maintenance and modification contract. This was a clear follow-on type conflict.

Mr. Cuneo testified that it was "definitely [his] opinion that the two basic objectives which the Government [seeks] to achieve to avoid organizational conflicts of interest . . . are independent of each other." See "Organizational Conflict" at 155. Mr. Cuneo went on to say "[T]he Government should not issue research contracts to an organization whose judgment may be biased due to an organizational conflict of interest even though there is no follow-on procurement contract with respect to which competitors of the research contractor may be disadvantaged. The Government's interest would be greatly violated if, by the issuance

of a research contract to a contractor who has a conflict, the contractor would be biased in performing the requirements of the research contract. The Government contracts to obtain the best judgment of a contractor and should do everything within its power to avoid a conflict that might bias that judgment. Further, in my opinion, an organizational conflict of interest may result from circumstances other than the pecuniary interest of the organization. Of course, almost any advantage that an organization obtains under a contract might have at least some indirect pecuniary value. For example, development of a reputation or position in industry might not directly involve pecuniary interest but it certainly is a benefit to the organization. Knowledge gained from organizational conflict of interest situation does make it possible for the organization to improve its industry position." See "Organizational Conflict" at 155.

This same point about the independent importance of the Government's interest was emphasized in dialogue between staff and Mr. Cuneo. This point is so important that I want to quote this dialogue at length:

"Staff. You said the Government should not issue a research contract to a contractor whose judgment might be biased, even though there is no follow-on procurement contract with respect to which competitors of the research contractor might be disadvantaged. Why is it that the agency regulations don't seem to take this commonsense point into account? Why do they only deal with a conflict in a situation where there is subsequent procurement?"

"Mr. Cuneo. Frankly, I don't know. That is why I say if [the Pentagon] had stopped after just issuing what the two paramount objectives of the regulations should be, it would have been very clear. As you say, it would have been a commonsense approach. Instead they then went on talking about a number of other things, very sophisticated things and clouded the whole situation.

"Staff. The issue of organization conflict of interest arose historically in a situation where there was a follow-on procurement situation and maybe that explains why the regulations were written to take that one situation so particularly into account.

"Mr. Cuneo. It is easier to apply it in that situation. I know back in 1963 in our *International Telephone and Telegraph* case, that was a classical case. Our subsidiary was in research and development and as you might know from reading the public press and otherwise, ITT is a tremendous production organization for DOD and other Government agencies. They just did not want to run a chance of having their big area of Government contracting cut off because they had this subsidiary that had research and development contracts and did issue reports and did do the things that might prejudice competitors and also might be to their bias.

"Staff. When the agencies limit their conflict of interest principles to follow-on procurement situations aren't they excluding a great many conflict of interest possibilities?"

"Mr. Cuneo. I think so because there's more involved than just possible follow-on contracts.

"Staff. If you have a research contract to start with and then have a follow-on procurement contract and the follow-on procurement contract is awarded on a sole source basis, not competitive bidding, under present regulations there is no possibility of competitive disadvantage because it was a sole source contract. Should that make any difference? Can there still be conflict?"

"Mr. Cuneo. Yes, I think there can be because in my opinion, the two paramount objectives of DOD's regulation is in the alternative. If you read ASPR 113.2, you will see after the first objective statement, it then says (or) and they refer to the competitive situation. I would say that the bias angle is still present under the circumstances that you give. In fact, I do believe you have to be more careful, the Government will have to be a little more careful where it has—where it is going sole source.

"In that situation, especially if the contractor knows that it is a sole source procurement, and he probably will know that, there is a danger—I don't want to say contractors are dishonest, they are not. But there is a danger that some contractors could take advantage of the situation and write a biased report or do biased things to the disadvantage of the Government.

"Staff. In other words, when the contractor is bidding on the research contract, he can see that any subsequent procurement will be sole source. Therefore, under the present regulations, whatever the situation is, his getting that subsequent contract cannot be a conflict of interest because there can be no competitive disadvantage in such a subsequent contract.

"Mr. Cuneo. That's right, you only have the second objective to apply. But in my opinion, you also have the first objective which is to eliminate the possibilities of bias.

"Staff. In other words, it is just as important to protect the Government from bias that will hurt its interests as it is to prevent bias that will hurt competitors' interests?"

"Mr. Cuneo. That's right."

See "Organizational Conflicts" at 160-161.

Mr. Cuneo also emphasized that "the Government contracting officers have an affirmative obligation to inquire as to the existence of an organizational conflict of interest. They should have superior knowledge to that of contractors with regard to what constitutes an organizational conflict of interest and the application of rules pertaining thereto." See "Organizational Conflict" at 156.

The importance of an early investigation for conflicts was also emphasized by Mr. Cuneo because the conflicts regulations are not self-executing. As an aid to contracting officers to identify conflicts at an early stage in the contracting process Mr. Cuneo endorsed requiring contract applicants to disclose possible conflicts in advance. This would be in the interest of contractors because "they don't want to have anything hanging over their heads. [I]t would be better to have it that way. See "Organization Conflicts" at 159.

The combination of the provocative factual situation involved in the Bechtel contract and the expert testimony of Mr. Cuneo resulted in a very instructive set of hearings. Over one hundred and forty exhibits were introduced for the record including all of the law review articles and Comptroller General opinions on organizational conflict of interest. It is appropriate that such an exhaustive study be undertaken as Congress has held no comprehensive oversight hearings on this subject in the twelve years prior to the Bechtel hearings.

#### FOLLOW-UP ON THE BECHTEL HEARINGS

I felt strongly that the Bechtel hearings should result in a reexamination of the applicable agency regulations. To that end I engaged in extended correspondence with the agencies involved in the Bechtel contract trying to find ways to make their policies more effective.

In my opening statement to the December 5, 1975, hearing, I set out for discussion purposes seven principles which I felt should define an organizational conflict. See "Organizational Conflicts" at 170-171. See Exhibit 1. Later, on January 20, 1976, I wrote letters to Mr. H. Gregory Austin, the Solicitor of the Interior Department, and Mr. R. Tenney Johnson, General Counsel at ERDA asking for their reaction to a more detailed version of these principles. ERDA and Interior responded to my letter on February 20 and 27 respectively. On February 27 I again wrote both agencies seeking clarification of their responses. Both agencies responded to these letters on March 24. This correspondence appears in the subcommittee hearings. See "Organizational Conflict" at 103-118; See Exhibits, 2, 3, 4, 5, 6, 7 and 8.

In my January 20 letter I emphasized many of the same points I have reiterated here. For example, the first principle I set forth was:

"An independent purpose of conflict of interest regulations is to avoid a conflict which may affect the capacity of a contractor to render impartial, technically sound, and objective assistance and advice to the government. The Government's interest in receiving such assistance and advice is fully sufficient to justify Government action to avoid a conflict of interest, even though competitors of the contractor are in no way affected by the conflict. Therefore, a conflict of interest may exist even if a contract is awarded on a sole source basis or there is no follow-on procurement contract."

I made it clear in my letter that "in terms of defining conflict of interest, I did not find [the agencies'] present regulations inadequate if it is made clear that a conflict may exist whenever a contractor's judgment or performance may be biased, even if there is no resulting competitive disadvantage."

In his February 20, response to my letter, Mr. Johnson acknowledged that the ERDA regulations "do, in fact, make this distinction" between bias and competitive advantage. The Interior Department agreed with this point in its March 24 letter. Both agencies agreed that conflicts could arise even though no follow-on contract could result and even though a contract is issued on a sole source basis. I consider these acknowledgments to be an essential first step in improving the implementation of these agencies' regulations on organizational conflicts.

I went on to describe the general principles which one must bear in mind in judging in a particular case whether a contractor's judgment may be biased. As a general proposition it is clear that bias "may exist whenever a contractor may receive benefits from the contract beyond those specified in the contract." Let me emphasize that I was and am not asserting that bias will necessarily arise whenever extra benefits may accrue to the contractor. But if one does not recognize that there is the potential for bias whenever extra benefits accrue, one is likely to ignore or overlook situations in which bias can arise.

Certain extra benefits clearly do not normally give rise to bias. For example, in an August 31, 1964, opinion the General Accounting Office acknowledged in a contract dispute matter that with any company which receives Government contracts: "there is inevitably built up as a by-product of the work an increasing depth of experience in and understanding of the technical problems involved . . . [A]ccumulated experience of this kind is of particular value to the Government . . . [Previous] experience in the work [is] a question of fact. That the Government paid for the work out of which is experience [grew] and, hence 'financed' it, seems unavoidable. Indeed, in a real sense that experience constitutes a valuable business asset. Such an asset should not be lightly weighed or discarded. Certainly, it would have been improper for the Bureau to have ignored that accumulated experience in connection with the subject award for the purpose of treating all 'bidders' as having equal technical capability regardless of the actual facts.

"Upon review, we find no legal basis to object to the award as made. While Dayton T. Brown, Inc., enjoyed an 'in house' capability which resulted from previous Government work, we are unable to agree that such capability created an 'unfair' competitive advantage in Dayton T. Brown, Inc., to the exclusion of all others. This accumulation of technical capabilities, whether through Government contracting or otherwise, may not be ignored or equalized for benefit of less qualified concerns. It was incumbent upon the Government to award the contract to the concern having the highest technical competence, and the fact that the Government may have previously 'financed' such competence would not justify an award to a less qualified concern to the possible detriment of the Government. The procurement agency in the exercise of its management responsibility properly awarded the contract to that concern which would perform in a manner most advantageous to the Government."

In *Re Carl A. Binder*, GAO Opinion B-153686 (August 31, 1964); See "Organizational Conflicts" at 835-837. I agree with the principles described in this statement.

In my January 20 letter I also emphasized that "it may sometimes be necessary and in the public interest to award contracts despite the existence of a conflict." Moreover, agencies have developed a number of contract clauses which can effectively neutralize any conflict which may exist. Hardware exclusion clauses are just the beginning. For example, clauses may be fashioned to isolate contract personnel from other personnel with conflicting interests. By using such clauses there will be little reduction in an agency's flexibility in awarding contracts. As I stated in this letter "By remaining flexible as to the remedy which will be imposed once a conflict is noted—even to the point of selectively awarding contracts despite the existence of a known conflict—there will no longer be so much incentive to avoid an initial finding that a conflict, in fact, exists."

I certainly don't think an agency should be able to ignore a conflict—much as the National Environmental Policy Act has been interpreted to allow agencies to proceed despite a known adverse environmental impact. The Government clearly would have no grounds for issuing a contract to an organization with a conflict that could not entirely be neutralized if another qualified organization has no such conflict. Similarly, no contract should be issued if the Government has a clear option to conduct the research or other activity itself—without contracting out. But if the Government genuinely needs to contract out and has no option but to contract with an organization despite the existence of a contract, my letters stated my understanding that the public interest may be served by proceeding to award the contract.

#### LEGISLATIVE PROPOSALS

On the basis of the correspondence with ERDA and Interior, on June 24, 1976, I introduced a floor amendment to S. 3105, the ERDA Authorization Bill for Fiscal 1977. See 122 Cong. Rec. S-10479-S-10490; See Exhibit 9. Basically the amendment made it clear that both the Government's and competitor's interest must be protected, required contract applicants to disclose possible conflicts, and

directed ERDA to investigate for possible conflicts. The Senate adopted my amendment on June 25, 1976, as title IX of S. 3105. See 122 Cong. Rec. S-10595-S-10596 (June 25, 1976); See Exhibit 10.

Subsequent to Senate action on my amendment on July 21, 1976, the General Counsel of ERDA, Mr. James A. Wilderotter, wrote to me stating a number of objections to my amendment. See Exhibit 11. He raised three general objections. First, he argued that Congress should wait until the Office of Federal Procurement Policy completed a then pending—and still pending—review of Government policies on organizational conflicts. Second, he argued that the amendment was unnecessary as ERDA was already enforcing the same conflict of interest standard as I was proposing. Third, he argued that “if Congress determines that legislation governing organizational conflicts of interest is desirable, a preferable way to accomplish this objective would be to amend . . . the existing laws governing all Federal procurement.” Notwithstanding ERDA’s objections, on August 5, 1976, the Comptroller General wrote to Representative Ken Hechler that he was “in agreement with the basic purpose of title IX.” See Exhibit 12. In response to an August 10, 1976, letter from Representative Hechler, Mr. Wilderotter reiterated his objections to title IX in an August 26, 1976, letter. See Exhibits 13 and 14.

Despite ERDA’s objections and although no similar provision was contained in the House version of the ERDA authorization bill, H.R. 13350, the House and Senate conferees adopted a modified version of my amendment as title VI. H. Rept. 94-1718; See 122 Cong. Rec. H-11417-H-11435 (September 28, 1976); See Exhibit 15.

As introduced my amendment adopted verbatim the existing ERDA definition of what constitutes an organizational conflict of interest but made clear that this definition applied to both competitive and sole source contracts. This provision was adopted by the conference.

Second, as introduced the amendment required all applicants for contracts to file with the Administrator a “written notice” describing in detail the nature and existence of any conflicting outside interests or competitive advantage. As reported from conference the amendment required applicants “to provide the Administrator . . . with all relevant information bearing on whether that person has a possible conflict of interest . . .” This change was based on language proposed by the Comptroller General in his August 5, 1976, letter. See Exhibit 13. This provision made it clear that it is the agency which has the responsibility to implement its own regulations and should not automatically defer to a notice filed by the contract applicant. Furthermore, it made it clear that the applicant must make information available to ERDA, not merely certify that no conflict existed. Such a certification, especially in an area where substantial judgment is required, would be unsatisfactory to both the contract applicant and the agency.

The reason why advance disclosure is so important has already been discussed. Without the filing of disclosure statements, agencies are likely to award contracts without being aware of existing conflicts.

Third, as introduced the amendment required the Administrator to “make the contents of (the) notice available to the public, with the exception of such parts as contain trade secrets or privileged commercial or financial information, or information disclosure of which would constitute a clear and unwarranted invasion of personal privacy” and to “receive and evaluate all public comments with respect to such notice.” The premise on which these provisions are based is that third parties—particularly competitors of the contract applicant—are frequently in the best position to apprise the agency of outside interests of a contract applicant which might raise a conflict. Particularly in the case of a contract awarded on a sole source basis, competitors would never even know that a contract might be issued until it had been issued.

In his July 21 letter Mr. Wilderotter objected that this imposed a rulemaking requirement on ERDA and would be “extremely burdensome and time-consuming.” As a technical matter, however, it is clear that the Administrative Procedure Act does not apply. Furthermore the amendment did not specify the amount of time for which the notice must be made public.

As a result of ERDA’s objections to this requirement, however, these provisions were deleted. The conference version did direct the Administrator to evaluate all relevant information made available to him from sources other than the contract applicant. Even the amendment was deleted, there was some concern that the information which a contract applicant filed with an agency could become public under the Freedom of Information Act. Actually, the original provision contained exemptions taken verbatim from the Freedom of Information Act which would apply to any request for disclosure.

Fourth, as introduced the Amendment required the Administrator to conduct a "complete, detailed and independent inquiry of the responsible bidder or offerors of the nature and existence" of any conflict. ERDA objected to this provision on the grounds that such an investigation would "add substantially to the overall timeframe for the procurement process which may not be consistent with the Government's interests in all cases."

As a result of ERDA's objections this section was modified to require that the Administrator "affirmatively find, after evaluating all (available) information" that no conflict exists or that it may be awarded by attacking appropriate restriction to the contract. In order to make such a finding the Administrator must, of course, evaluate the information filed by the applicant and make any inquiries which are appropriate.

In conference an additional proviso was also added allowing the Administrator to award a contract despite the existence of a conflict of interest "if he determines that it is in the best interests of the United States to do so and includes appropriate conditions in such contract . . . to mitigate such conflicts." Although this provision allows flexibility to the Administrator, it should be clear that this exception will be a last resort. Only where there is no alternative or where an emergency exists should a contract be issued to a party with a known conflict which cannot be fully avoided. This provision was proposed by the Comptroller General in his August 5 letter.

Finally, the Conference version obligated the Administrator to insure compliance with the conflict provisions by any subcontractor except supply contractors or subcontracts of \$10,000 or less.

The Conference Report referred specifically to ERDA's general objections to any amendment on the subject of organizational conflict. It started "Although it would appear that a government-wide approach to this problem is the preferred approach, there is no sound reason to defer all individual approaches until an all-encompassing bill is enacted." See Exhibit 15.

In the month prior to House and Senate consideration of the Conference Report the Comptroller General wrote a second letter to Congressman Ken Hechler regarding my amendment. See Exhibit 16 (with attachments). In this letter of September 30, 1976, the Comptroller General recommended that the "statutory language should be broad and general" and the regulations could then specify "when in the procurement process and from whom the information (conflicts) will be required." The letter went on to describe a new disclosure requirement which had first been applied by ERDA on August 23, 1976. This new clause provides as follows:

*Disclosure of interests*

Pursuant to ERDA PR s 9-1.54, ERDA requires information so that it may determine whether or not any situations exist which might either (1) bias a contractor's judgment, or (2) provide a contractor with an unfair competitive advantage because of any interest, financial or otherwise, which it or any of its affiliate organizations have in current activities or potential procurement opportunities relating to the work involved in this solicitation.

"Therefore, proposers must provide a brief statement of any interest, financial or otherwise, which they or any of their affiliate organizations currently have, have had in the past, or might have in the future which may relate to the work to be performed under this solicitation. ERDA will use this information to determine whether or not any situations, real or apparent, exist which might either bias a contractor's judgment in relation to its work for ERDA, or provide the contractor with an unfair competitive advantage. Proposers should properly mark any information contained in their statements which they consider proprietary data according to the instructions contained in Part C above.

"Failure to provide the statement or to disclose relevant interests may result in disqualification under this solicitation."

The Comptroller General specifically found that:

"This provision seems to be consistent with our proposed statutory language and would provide ERDA information to resolve questions of conflicts of interest. However, we believe that the use of such a clause should be mandated by regulation, rather than left to the possible uneven discretion of contracting personnel, so as to insure uniformity of application."

As is discussed below, however, the new ERDA disclosure of interest requirement is applied only for technical and management support contracts—not research and development contracts.

Finally, the Comptroller General went on to state that:

"ERDA also suggests that disclosure requirements should apply government-wide and not merely to ERDA. We agree that regulations on a government-wide basis would be appropriate, and we understand that such regulations are under study by the Office of Federal Procurement Policy, the General Services Administration, and the Armed Services Procurement Regulation Committee. However, we believe it would be useful for agencies to promulgate their own conflict of interest procedures, at least on an interim basis, while uniform regulations are under consideration."

The Conference Report was considered in the House on September 30, 1976, and adopted. See 122 Cong. Rec. H-11946-H-11959 (September 30, 1976); Exhibit 17. The only Representative to refer to the organizational conflict provisions was Representative Hechler. See 122 Cong. Rec. H-11952-11954 (September 30, 1976).

On October 1, 1976, Senator Henry Jackson brought up the ERDA Conference Report in the Senate. Due to a dispute between Senators Jackson and Gravel—having nothing to do with the merits of the Conference Report—the Senate failed to adopt the report prior to adjournment. See 122 Cong. Rec. S 17755-S-17756 (October 1, 1976). I submitted a detailed statement explaining the amendment. 122 Cong. Rec. S-17756-S-17759 (October 1, 1976). See Exhibit 18.

During the recess at the end of the Ninety-fourth Congress, Representative Hechler wrote another letter to the Comptroller General to determine the authority for ERDA's new disclosure program and the Comptroller General's evaluation of title VI as modified. See Exhibit 19. The Deputy Comptroller General replied in a December 22, 1976, letter that ERDA had authority for its disclosure program and that the Comptroller General supported enactment of title VI. See Exhibit 20. The Deputy Comptroller General went on to evaluate ERDA's determination not to apply its new disclosure policy to research and development contracts. He concluded that with these contracts "use of the disclosure provision . . . would serve a useful purpose." He went on to describe the reasons for this conclusion.

"The provisions would not per se preclude award of a contract because of conflict of interest or competitive advantage, but would provide ERDA with information indicating the existence and extent of a conflict or competitive advantage, which ERDA should consider in determining whether contract award would be appropriate. The provisions would also provide information to ERDA so that specifically tailored restrictive provisions could be utilized to mitigate any conflict.

"Similarly, we think the clauses should be used even where ERDA has determined to make award notwithstanding a conflict of interest. We recognize that situations may arise where it would be advantageous to the Government to make an award in spite of a conflict of interest, and, as pointed out above, the conflict of interest provisions do not preclude award despite the existence of a conflict. However, we believe ERDA should be completely aware of the extent of a contractor's conflict of interest so that ERDA may appropriately weigh the contractor's recommendations and whatever else is provided with the contract, and for that reason we think the use of the disclosure provisions would be appropriate regardless of ERDA's intentions regarding award. Even if ERDA is independently aware of contractor conflict or bias, the information available through offeror's affirmative disclosure might well highlight the extent of a conflict or provide additional information through which bias or conflict might in some way be limited.

"In this regard, ERDA's Assistant General Counsel—Procurement has informally advised us that ERDA will endeavor to obtain from all contractors information bearing on the existence and extent of any conflict, and thereafter restrict the conflict to the maximum extent possible. He further advised that the statement in ERDA's report that the provisions "probably would not be used" in some instances was intended to mean only that clauses prepared to suit the particular needs of individual cases will be used instead of these standard clauses."

The Comptroller General found no reason to believe that "ERDA's procurements would be unreasonably delayed" by the disclosure process nor that there was any likelihood of judicial review of ERDA's determinations regarding any conflicts delaying ERDA procurements.

In a February 2, 1977, letter Representatives John Dingell and Richard Ottinger joined me in requesting ERDA to reevaluate its policy on the basis of the Deputy Comptroller General's December 22, 1976, letter. See Exhibit 21. In a brief response on March 8, 1977, the Acting Administrator of ERDA acknowledged

that there was "a need for further evaluation and modification of our policy regarding organizational conflicts of interest." See Exhibit 22.

In the Ninety-fifth Congress the ERDA Authorization Bill was reintroduced as S. 36 on January 10, 1977. See 123 Cong. Rec. S-207-S-217 (January 10, 1977). See Exhibit 23. It was then adopted by the Senate without opposition on April 4, 1977. See 123 Cong. Rec. S-5515-S-5522 (April 4, 1977). See Exhibit 24. My amendment on organizational conflicts remained unchanged from that adopted by the Conference in the 94th Congress.

When the House Committee took up S. 36 it made some modifications in the section on organizational conflict. See Exhibit 25. These are explained in an April 20, 1977, letter to me from ERDA. See Exhibit 26. Basically this change limits the application of the amendment to "technical consulting and management support services"—that is contracts which may involve a follow-on procurement. I have written to ERDA objecting to their justification for the change. See Exhibit 27. At this late point in my statement I do not have to reiterate why I believe a limitation to the classic follow-on procurement type contract is inadequate.

Unfortunately, the Senate has been forced to accept the House amendment. This is, after all the authorization for fiscal year 1977 and there are only four months left in fiscal 1977. The Senate sponsors of S. 36 assure me that the Senate version of the fiscal 1978 authorization will contain an extension of this provision to research and development contracts.

#### EFFECT OF THE AMENDMENT

My amendment No. 192 to S. 695 is identical to the provision of the ERDA Authorization Bill which was adopted by the conference—except it applies government-wide. As I think is apparent from this statement, the amendment is modest in scope and it has been endorsed by the Comptroller General. There is no reason to delay further.

Why should we tolerate the expenditure of taxpayer dollars on any study which may be biased? Why shouldn't the Government require applicants for public contracts to disclose if they have outside conflicting interests? Why shouldn't the Government be required to evaluate information disclosed to it by contract applicants? There is no reason why the Congress should wait to direct Federal agencies to take these preliminary steps to avoid organizational conflicts of interest.

I am happy to say that the Bechtel hearings—and the Condor missile hearings chaired by Senator Proxmire—have resulted in a reevaluation of present Government policies on organizational conflict by the Office of Federal Procurement Policy, the General Services, and the Armed Services Procurement Committee. I have had access to drafts of the new OFPP/GSA and ASPR regulations and I can state that they recognize the basic principles upon which my amendment is based. The OFPP/GSA regulations will be the first government-wide regulations on this subject. Substantial effort is being made to coordinate civil and military policies in this area. But Congress must make sure that these new regulations meet the minimum standards which my amendment sets. The Committee may, however, wish to encourage these Government efforts by authorizing one Government agency such as GSA to promulgate government-wide regulations to implement my amendment.

Year after year vigilant Members of Congress uncover examples of Government contracts with an organization with a conflict of interest. The Government can never expect to get its moneys worth from these contracts. Even if the contractor's outside interests do not introduce bias into a study, the appearance of a conflict makes it impossible for the Government to rely on the study to make decisions affecting the public interest.

I do not offer my amendment as a panacea for ill-conceived government decision making. It will, however, help to insure that to the extent that Government policy relies on the results of public contracts, the government can have greater confidence that it is relying on impartial, unbiased, and objective assistance and advice.

Let me again state my appreciation for the opportunity to appear here today and for your consideration of my amendment on organizational conflict of interest.

The CHAIRMAN. Our next witness is the Hon. Alan Campbell, chairman of the U.S. Civil Service Commission. Dr. Campbell has been designated to give the official administration position on the bill.

He also has a personal interest inasmuch as he would be designated to serve as chairman of the Conflict of Interest Review Board.

Dr. Campbell, I understand there was some difficulty in providing the committee with advance copies of your prepared remarks within the 48-hour deadline which is established by the committee. An advanced copy of your testimony would have allowed this committee to study it at length and give it the attention such testimony deserves. The committee is attempting to build a complete record on this subject. But I understand you're a busy man and have many obligations. We hope in the future when you appear before this committee you will do your best to get your testimony in, in advance if you can.

Dr. CAMPBELL. We promise to do that, sir.

The CHAIRMAN. All right. Go right ahead. You have a substantial statement. If you would like to abbreviate it in any way we will print the entire statement in full in the record.

**STATEMENT OF ALAN K. CAMPBELL, CHAIRMAN, U.S. CIVIL SERVICE COMMISSION, ACCOMPANIED BY CARL GOODMAN, GENERAL COUNSEL, AND DAVID REICH, ATTORNEY ADVISER (GENERAL)**

Mr. CAMPBELL. Yes; I would like to, if I may, Senator, simply highlight my statement. I am accompanied by Carl Goodman and David Reich from the Civil Service Commission General Counsel Office who have been working with me in this area.

It's a particular pleasure for me, Senator Proxmire, to appear before your committee and particularly before you, since in my academic capacity before joining the Federal Government I was well aware of the work of your committee both in this area as well as more broadly in the urban field where I have also done a good deal of research.

Your bill, which is directed specifically to the conduct of Government employees in contract procurement, evidences obviously your continuing concern of the possibilities for improper conduct and favors when substantial contracts are being awarded by Government agencies.

I have been immersed ever since coming to Washington, which was only a few weeks ago and I was confirmed only a week and a half ago, in conflict of interest and ethics policies and legislation. At those confirmation hearings I was asked a good number of questions in this field and responded in ways relating to what was to become the administration's bill.

[Complete statement follows:]

**PREPARED STATEMENT OF ALAN K. CAMPBELL CHAIRMAN, U.S. CIVIL SERVICE COMMISSION**

It is a distinct pleasure to have this opportunity to appear before your committee, Senator Proxmire. I have been aware for many years of the work done by this committee, particularly in the complex field of defense production and procurement and your bill—S. 695—which is directed specifically to the conduct of Government employees in contract procurement, evidences your concern with the possibilities for improper conduct and favors when substantial contracts are awarded by Government agencies.

I have been literally immersed in conflict of interest and ethics policies and legislation over the past several weeks and I was questioned about my views of issues in this field at my recent confirmation hearings before the Senate Committee on Governmental Affairs, and a couple of days later I appeared before

that same committee to testify on S. 555, the bill introduced by Senator Ribicoff requiring public financial disclosure by top ranking Government personnel, and the Administration's own bill, S. 1446.

You are aware of the deep interest that President Carter has in the entire ethics program. During the campaign he expressed his concern regarding potential conflicts of interest by Government employees and before assuming office he released guidelines for public financial disclosure by Presidential appointees. Two weeks ago the President transmitted to the Congress the Administration's proposal, prepared after considerable study and analysis, entitled "The Ethics in Government Act of 1977." This proposal has three main approaches to the achievement of high ethical standards in the Executive Branch.

The basic requirement is that there be public disclosure of financial statements by all top ranking personnel in the Executive Branch, including the President and Vice President. The Administration's bill covers those in the grade of GS-16 and above, including comparable officers in the foreign service and the uniformed services.

Your bill—S. 695—appears to cover all contracting officers regardless of salary or grade. Part 735 of Title 5 of the Code of Federal Regulations issued by the Civil Service Commission, pursuant to Executive Order 11222, you should note, is directed mainly at employees who are performing significant contract work. Section 735.403 requires agencies to include within their confidential reporting requirements all employees in the grade of GS-13 or above who are responsible for "making a Government decision or taking a Government action in regard to: (1) contracting or procurement; (2) administering or monitoring grants or subsidies . . . or (4) other activities where the decision or action has an economic impact on the interests of any non-Federal enterprise."

Employees classified below GS-13 can be included in the reporting requirements only when the agency has satisfied the Commission that such employees are in positions that meet these criteria. This limitation came about as a partial concession to those who argued vehemently in 1965 when Executive Order 11222 was issued that financial reports amounted to an invasion of a Federal employee's privacy. The implementing regulation was adopted to make it more difficult to require reports from employees in positions who do not normally exercise decisional or judgmental functions. We are presently thinking of changing the Commission's regulation to authorize agencies without Commission approval to determine whether confidential financial statements should be required of any employee, regardless of salary, where his functions place him in a situation that could cause a possible conflict of interest.

Many of the provisions of Executive Order 11222 and 5 CFR Part 735 would continue in existence after the Administration's bill has been adopted. Provision is made in the proposed Ethics Act that the President can require officers or employees not covered by the Act to submit confidential statements. It would be possible, therefore, for the President and the Commission to incorporate some of the ideas expressed in S. 695 with respect to contracting officials even though they are below the grades covered by this Act.

The information to be supplied under the Administration's bill is more detailed than that which would be required by S. 695. Reports would have to be made, for example, of earned and unearned income above \$100, of assets of over \$1,000, of liabilities in excess of \$2,500 and of all honoraria.

S. 695 would preclude the acceptance of a gratuity valued in excess of \$50. It would authorize the acceptance of such a gratuity if the contracting officer received prior written permission from the Ethics Counselor of his agency. This exception puzzles us since we cannot foresee any situation in which a contracting officer should be authorized to accept a gratuity from a contractor with whom he or his agency has dealings.

Another provision of the Administration's bill which is germane to S. 695 is the requirement that employees would have to report any agreement for future employment, any continuing relationships with former employees, such as pension or benefit plans, and the sources and amounts of earned income and other payments for the year of filing and the preceding calendar year. Under S. 695, a contracting official must report any previous employment by a Government contractor for the three years prior to his entrance into employment with the United States.

A most important proposal of the Administration—now incorporated in S. 555 and adopted by the Senate Committee on Governmental Affairs—is in the field of post employment, a matter addressed in S. 695. All of us share a concern

over the "revolving door" syndrome. The President has asked the Congress to amend and strengthen the general statute on post employment—section 207 of title 18 of the U.S. Code. The Administration's bill would continue the life time prohibition against acting as agent or attorney for or otherwise representing any person before an agency in any matter in which the employee personally participated, and it would enlarge the one year prohibition to two years against appearing before an employee's former agency on a particular matter which was within his official responsibility. Both these prohibitions would be broadened to embrace any oral or written communication designed to influence the former official's agency on any particular matter before it.

Under the Administration's bill, a totally new concept would be added to section 207 in that policymaking officials would be barred from making any oral or written communication to any person in the agency with which he had previously served on any official matter which is pending before such agency or in which such agency is a party or has a direct and substantial interest, for one year after his employment with that agency has terminated. We believe that these amendments to section 207, coupled as they are with criminal sanctions, would do much to eliminate the role swapping whereby a person changes overnight from a Government policy-maker to a private lobbyist before the very agency in which he had been serving the day before.

Your bill is directed at another phase of post employment, the situation under which Government contracting officials are at times employed by companies with which they negotiated Government contracts. We feel this requires correction but we view it as part of a Government-wide problem not solely with respect to procurement but also as regards regulatory functions.

And, in this connection, we think there are a number of competing considerations that must be borne in mind. On the one hand, the procurement relationship can engender potential conflicts of interest. On the other hand, we must be mindful of the impact that restrictions of this sort may have upon the Government's ability to recruit and retain qualified personnel.

At the present time, the Civil Service Commission does not have sufficient powers to assure the proper execution of a comprehensive ethics program. The public is entitled to no less from its employees. To remedy this, the President's bill would create an Office of Government Ethics within the Civil Service Commission. The Office would be headed by a Director appointed by the President with the advice and consent of the Senate so as to highlight the significance attached to the Office by the President. To assure that the ethics program can be pursued effectively, the Administration's bill sets forth specific powers and responsibilities for the Director, included among which is the authority to order "corrective action on the part of agencies and employees which the Director deems necessary." Heretofore, the Commission had hortatory influence, at best, to recommend to an agency that it discipline an employee who had an unresolved conflict of interest. If no action were taken by the agency, the Commission could not proceed further. The Commission would not be helpless under the Administration's bill.

Your Committee is seeking to eliminate, insofar as possible, conflicts that could arise or do arise in the field of Government procurement. In this connection, under the Administration's bill the Director of the Office of Government Ethics would be empowered to assist the Attorney General in evaluating the effectiveness of the conflict of interest laws and in recommending appropriate amendments to them including any that may be deemed necessary to cover specialized situations. This power is most pertinent in connection with S. 695.

Additionally, there could be a proliferation of reporting requirements caused by legislation such as S. 695. The Department of Interior, for example, has been required by recent legislation to obtain reports from officers and employees performing functions under the Federal Land Policy and Management Act (P.L. 94-579), from officers and employees performing functions under the Mining in the Parks Act (P.L. 94-429) and from other employees performing functions under the Energy Policy and Conservation Act (42 U.S.C. § 6392). These employees in most cases are already required to submit reports to the Department of Interior under Executive Order 11222. As a result, there are some Interior employees who are required to file two or three reports on ethics and sometimes at different times during the year. S. 695 could add to this burden.

Under the Administration's bill the Commission through its Ethics Director would be granted the opportunity to look into the broad overall problem of ethics and if more specific information is necessary from particular employees

such as contracting officials, it could require additional reporting. This would allow more flexibility than a piecemeal approach by Congressional legislation whenever a particular problem comes into focus.

S. 695 would establish a Conflict of Interest Review Board to be composed of the Chairman of the Civil Service Commission, the Attorney General and the Comptroller General. We defer to the Department of Justice as to whether it would be appropriate for the Comptroller General to serve on such a Board but we question whether it would be advisable.

I would also question the composition of the Board as contemplated by S. 695. The Board would be made up of officials who already have more than sufficient duties and responsibilities to execute. The members of the Board could be at most titular.

We believe that the Administration's bill proposes a reasonable program that can be applied throughout Government to achieve fair and equitable standards of conduct rather than establishing conflict of interest requirements in a piecemeal fashion. However, the Committee should be aware that the proposed Office of Government Ethics in the Civil Service Commission could and would carefully and thoroughly consider the proposals made in S. 695 to determine the extent to which additional regulation or legislation would be required to avoid conflicts of interest by contracting officials. We feel that we can accomplish the substance of what S. 695 proposes within the framework of the enlarged and enhanced ethics program which President Carter has requested of the Congress for all Federal Executive officials and employees. Accordingly, we recommend that no action be taken on S. 695 and that the Committee give favorable consideration to the bill recommended to the Congress by the President and incorporated in S. 555.

The amendment proposed by Senator Abourezk with respect to organizational conflict of interest concerns a subject which is under study by the Office of Federal Procurement Policy. This Office, I am informed, has directed that a uniform regulation with more comprehensive coverage be developed in this field. The Department of Defense and General Services Administration are currently working on these new regulations. Under the circumstances, I would suggest that no action be taken on this amendment until the Office of Federal Procurement Policy has had an opportunity to issue Governmentwide regulations.

I have enjoyed appearing before you.

Dr. CAMPBELL. Those, Senator, are the highlights of our testimony and we of course stand ready to answer any questions you may have.

The CHAIRMAN. I want to thank you very much. You have obviously done a lot of work on this and I appreciate your having gone into the kind of detail you did.

Some of your criticisms and suggestions are very useful. I might say that I don't see any competition between the Carter proposal and our proposal. I think that they are complementary. I'm all for President Carter's proposal. I want to cosponsor that. I'm enthusiastic about it and I think it's desirable and necessary. But it approaches this in an entirely different way.

It reaches a different problem than our proposal. Let me start off, Dr. Campbell, by indicating some of the areas where I think we may differ on our interpretation of the bill that's before us.

On page 2 of your remarks (see page 44), referring to the disclosure of employment requirements, you stated the requirement referring to our bill appears to cover all contracting officers regardless of salary or grade. I don't think that's correct. I think it's incorrect. The disclosure requirement applies only to those individuals serving in grade GS-13 or higher who came to the Government from the employ of a contractor or who leave the Government to accept work with a contractor. That's identical to the requirements which already apply to DOD and NASA.

The basic employment prohibition contained in another section of the bill does apply to all contracting officers so long as they have authority as specified in the bill.

A second apparent misunderstanding is contained on page 3 of your remarks (see page 44), wherein you state, "elements of prohibition on gratuities," and I quote, "puzzle us since we cannot foresee any situation in which a contracting officer should be authorized to accept a gratuity from a contractor."

Well, I certainly applaud that sentiment, but I should point out two factors to you. The first is what we're discussing here would be a felony under this bill and I believe it would be unwise to make an acceptance of a very small gratuity a crime. Most such gratuities are already forbidden by regulation which should adequately deal with minor instances.

The second problem deals with the problem that arises whenever Congress enacts legislation that is totally inflexible. There should be some flexibility.

A third misunderstanding or misstatement is on page 3 (see page 44), where you state the information in the administration proposed disclosure statement "is more detailed than S. 695."

Again, I believe that you misunderstand the intent of our bill. We are not attempting to duplicate the provisions of the administration bill. The two disclosure requirements are totally separate. One deals with disclosure of financial arrangements and assets, while the other provides for disclosure of employment arrangements. We are concerned with employment arrangements. The President's bill deals with disclosure of financial arrangements and assets.

That concerns me because it appears that the administration believes that S. 695 somehow is competing with the administration bill and it is necessary to prove that one is better and that's not the case at all. I think, as I say, they are both desirable. They are both necessary and I don't want to give the impression at all that I'm not enthusiastically in favor of the bill that you have worked so hard on.

Dr. CAMPBELL. If the testimony carried a tone of competitiveness, that is our error. What the President clearly would like to do is to incorporate hopefully in a single bill all the matters which should be appropriately covered by ethics conflict of interest legislation and it is in that sense that we would hope it would be possible to bring together all of these various efforts that are being made both in the executive branch and in Congress to create a single set of standards and a single administrative system for dealing with them, and I would like to emphasize the latter point because the difficulty now that many of the public employees have is a set of regulations which vary from department to department and field to field and the lack of any central place for coordinating what is going on in this area. It is for that reason that the President has recommended, for example, the establishment of an office within the Civil Service Commission to try to bring some order in this total field.

The conflict of interest effort that your bill is trying to get at is obviously of concern to the administration and to the extent that its bill does not touch matters that should be covered I'm sure there's a willingness to try to work that out.

The CHAIRMAN. So what you would prefer to do, as I understand it, would be to amend your bill perhaps, if the amendment seemed in order and appropriate, so that you have a single bill considered together and that you could put this situation in one package rather than have separate bills?

Dr. CAMPBELL. That is right. Now let me say that the President's bill has been incorporated in part in Senator Ribicoff's committee bill, and that now has become a single bill incorporating both parts from the Senate contribution as well as aspects from the executive branch bill, and it would seem to be useful to try and bring all of this together so that we do not have—it isn't so much a matter of conflicting legislation in intent, but conflicting only in the sense of being on occasion inconsistent and lacking a common administrative system.

The CHAIRMAN. You see, what I miss in the President's bill—and again, I'm not critical of the bill because I think it's a good bill and I'm all for it—but one thing it doesn't have in it is some way of recognizing that when you have a procurement official who deals with a particular company, contractor "A", a big company, and he buys hundreds of millions, even billions of dollars of procurement from that company, then having done that for several years he goes to work for the company. Now you say, well, we're just going to keep him not working on "engine A," or "missile B" that he was responsible for, but he can do anything else.

Now what does John Q. Public think? Here you have an official who has worked for the Government and he goes to work for a private firm for a salary of \$70,000, \$80,000, \$90,000 or \$100,000 a year, and the feeling is that he knew right along he was going to work for that company and he was very favorable to it for that reason and he was soft when the issue would come up to him in his capacity as a Government procurement official; he permitted them to move ahead with their overruns; he wasn't as critical as he might have been perhaps. At least that's the perception. That's the feeling.

Now what we're saying is that that creates a situation where there's a conspicuous conflict of interest. All we would do would be to say he shouldn't go to work for a company with which he's dealt.

Now I understand your position is that that would discourage people with great talent who would contribute greatly to the Federal Government who wouldn't want to work for it if they couldn't go to work for a company with whom they have been dealing. I just can't believe that the talent in this country is so limited and the competence is so slight that you couldn't find somebody who would be perfectly willing to work as a procurement official and then not go to work for a company with whom he dealt. That's what we're trying to reach.

Dr. CAMPBELL. I understand what you're trying to reach and it seems to me a very fair purpose. I'm concerned that in some very highly technical fields there are limited private employers and that there could be difficulty in attracting the kind of technical expertise in the procurement field that's needed if there is an absolute prohibition on employment in companies with which they have been in association.

Now the administration's bill attempts obviously to deal with this by denying the opportunity of any contact following—

The CHAIRMAN. Any contact on a particular matter over which he had authority.

Dr. CAMPBELL. No. The 1-year denial is a complete denial of contact. Beyond that, then it becomes a matter of limiting contacts in areas in which the person was immediately involved as a Federal public servant, but there is a denial—

The CHAIRMAN. You still have the fundamental problem, which is the fact that he goes back to work for the company. There's so much money involved here. There's so much profits. The determination of a procurement official can be worth many millions of dollars to a defense contractor, well worth hiring a person even if he never has any further contact with the Defense Department. So it's perfectly understandable why people are skeptical and cynical and feel as if one of the reasons why the Government is so soft on overruns and why we have so many of them and why it's costing the Federal Government so much and why the procurement officials don't seem to really crack down is because they can look forward to a cushy job.

Dr. CAMPBELL. And I take it you do not believe that the denial of contact is sufficient restriction.

The CHAIRMAN. I think it's important. I think it's a very good one. I think it's an excellent attempt to go part of the way, but I think the fundamental problem is of the problem of what appears to be the payoff.

Let me ask—the greatest concern I have about your suggestion that we delay the consideration of S. 695 is the fact that the administration bill will have little, if any, effect on the post-Government activities of the largest single group, of military officials in the military. As you may know, section 801(c) of title 37 of the United States Code, which is administered by the Comptroller General, already prohibits for a 3-year period almost any representational activity aimed at consummating a sale. Contacts to promote good will are prohibited. Demonstrating products is prohibited. Inquiring what products the service might need in the future is prohibited. Negotiating and signing a contract is prohibited. It's possible you may obtain some additional protection by making such activities a crime rather than a matter of forfeiture. With regard to post-Government restrictions, very little would be accomplished with respect to retired military officers by enactment of your legislation. Isn't that true in light of this legislation that's already on the books?

Dr. CAMPBELL. May I ask counsel to respond because I don't know?

The CHAIRMAN. Yes. Mr. Goodman.

Mr. GOODMAN. Again, the postemployment restriction which is in the President's bill which provides for this kind of 1-year total bar from dealing with your own agency does affect people in the military who are in positions classified at grade 07 and higher. I must readily admit that I'm not prepared at the moment to precisely indicate what positions are at that grade level because I don't deal with the military as a general matter. However, there is this 1-year prohibition which would apply there as well.

Dr. CAMPBELL. It's obviously an effort to relate it to grade 16.

The CHAIRMAN. That's a brigadier general or higher, as I understand. A colonel wouldn't be affected. Is that correct?

Mr. GOODMAN. I'm not familiar with what that rank is equivalent to, quite frankly.

The CHAIRMAN. Almost all of your project managers and procurement officials are below that grade.

Mr. GOODMAN. If the problem is that the rank level is not sufficient, then this may again be an area in which consideration should be given in dealing with the provisions under this general bill that the President

has submitted, and perhaps dealing there in terms of both rank and level. Again, the same suggestion may apply here.

The CHAIRMAN. Well, we have had hearings for 2 years now and have gone into great detail. This is the problem.

Dr. CAMPBELL. There is no question that if 07 is brigadier general, and I take your word for it and that of the staff that that is the case, it does not reach as far down as we thought we were in drafting the bill.

The CHAIRMAN. The Federal Government spends well in excess of \$50 billion annually to buy supplies and services. Considering the dimensions of that spending, do you believe the actual problem is unique to Federal procurement and should thereby be classified as secondary or less important than this problem that your bill addresses?

Dr. CAMPBELL. No, we do not.

The CHAIRMAN. The staff reminds me that the problem with your proposal in its present form—and, again, I support it. I'm not critical of it, but I do want to supplement it—is that the actions that you refer to are already prohibited, and nothing would be accomplished with respect to the military, anything additionally.

Dr. CAMPBELL. I'm not certain whether that is true in relation to the absolute 1-year bar or not, but I understand that that absolute bar of any contact is not now in regulations.

There are bars to relationships, specific relationships, on things in which you've been involved.

The CHAIRMAN. But as far as strictly with respect to retired military officers is concerned.

Dr. CAMPBELL. I'm not sure which legislation we're now talking about.

The CHAIRMAN. The one that is currently in effect.

Dr. CAMPBELL. Yes; it's retired military officers only, right. And this bill obviously would relate to the year after leaving the service in which there is an absolute bar, and then a 2-year and lifetime bar on direct contacts on matters with which the employee has been involved.

The CHAIRMAN. Well, you suggested that we should defer action on this legislation and promised the office of Government Ethics would consider the proposal. Now, given the time it would take to enact your proposal, the Carter proposal, establish appropriate funds for it, hire a staff for the office, issue regulations on financial disclosure, and catch up on other problems that have been overlooked, it might very well be 1979 or 1980 before the office would be ready to begin studying the proposal.

Then, of course, it would be necessary for the office to prepare its recommendations and submit them for congressional consideration.

Now, we've already established that in the Carter bill we do very little, if anything, in the area of Defense procurement. How much longer do you think we ought to wait before we begin to deal with that problem?

Dr. CAMPBELL. Certainly there is a determination in the Senate Government Affairs Committee to move their bill quickly, and obviously the President is strongly in support of that. It is hoped that there can be legislation in this calendar year, and if that in fact happens the machinery can certainly be in place during 1978.

If I may, I would suggest that it seems to me there are two approaches. One is to try and reach agreement in areas where there are

differences in your bill and the bill that the Senate Committee has now reported to see whether we can get agreement on amendments to that bill, and then move also in the direction as to what would be the nature of the regulations that would emerge once passed and in operation.

The CHAIRMAN. Let me see if I can get a little further into a related problem. I've discussed this a little bit with Congressman Bennett.

An official of a private defense contractor is very expert in some particular field—aircraft perhaps, or missiles—and he's willing to work for the Government, and the Government is willing to have him. He has worked for a company, say, for 15 years, 10 or 15 years, and he wants to go back to the company. He likes the company; they like him; he wants to make a career with the company.

Now, your statement is that enactment of this S. 695 might handicap the Government's executive recruitment effort. In connection with the example I gave, I'd like to point out that the committee counsel is of the opinion that the Conflict of Interest Review Board would probably permit employment with any company if an individual could demonstrate that he disqualified himself in deliberations affecting that company.

He comes in. He's worked for Lockheed, or he's worked for Boeing, or for Northrop; and he says, "I'm not going to have anything to do with Lockheed, Boeing, or Northrop," or whichever firm that was, say Lockheed, "because I want to go back to Lockheed." He disqualifies himself.

Now, current law requires any Government employee to disqualify himself, anyway, from any deliberations affecting the company if he holds a financial interest in that company or if he's negotiating for or has agreed to accept employment. Disqualification doesn't seem to be an onerous burden to an individual under those circumstances. It's already required in many instances.

So would this tend to obviate your concern with respect to executive recruitment from industry, to say that under those circumstances you'd be in a position as chairman of the board to permit a return to industry and it would be perfectly proper. The law would require you to do it, to find that since he disqualified himself from working on Lockheed procurement while he was in, say, the Air Force, he would have every right to go back and work for Lockheed, and there would be no question about it.

Dr. CAMPBELL. That situation as it would be affected by the legislation now in S. 555 would, I think, be a greater protection in that, one, it would deny any possible contact of that person once he goes to Lockheed with the agency with which he's been working, even if he had ruled himself out of having any contacts with Lockheed or any other firm of that kind. And for a longer period of time he would be denied to have any contact with the Government from his private job in any matter in which he was directly involved.

Now, it seems to me that the protection there is a substantial one, and I would quite agree with you that you might argue that that would also be a restrictive factor in recruiting the kind of people that you want. It becomes a matter, Senator, of judgment as to how far you go on the one hand to make sure that we deal with conflict of interest problems and certainly postservice employment problems

while not handcuffing ourselves in relationship to the quality of people.

And, frankly, my own judgment is that until we've had some experience in this it is going to be difficult to deal with that judgmental question.

Mr. GOODMAN. If I could add to that, Senator, the proposed bill, the President's bill dealing with conflict of interest, does have a provision that attempts to deal with the issue of the person in the private sector who comes into the public sector by having a provision that anyone who did work outside the Government and comes into the Government, and has received over \$5,000 in salary from someone outside the Government during the past 2 years, has to make a financial disclosure concerning his relationships during those past 2 years prior to Government service with that company, the nature of what that relationship was, and things of that type, as well as, of course, having to make a complete disclosure of any continuing relationships that might exist with a prior employer.

So in addition to matters that Dr. Campbell has testified to, there is a public disclosure requirement as well, so that the public knows where their public servants have been in these areas.

The CHAIRMAN. I'm concerned with a case that I can think of now, and I'm sure you may be thinking of the same case, where a person went to work for the Federal Government as a very powerful procurement official and dealt with a firm, and then went back to work for the firm for \$90,000.

Now, I suppose everybody knows how he got the \$90,000. I think it was outrageous. I think it's something the public would obviously perceive as a payoff.

Now, under your bill he'd be free to do it; under our bill he wouldn't be. It's that simple. You just wouldn't reach people doing that.

I don't want to make it retroactive. I don't want to reach this man. He obeyed the law at the time, but I think that in the future we ought to prohibit that kind of activity.

Dr. CAMPBELL. If I may, Senator, in response to that comment, urge that we do try to accomplish a balance here.

As you are well aware, people in both the legislative and executive branches often do make substantial sacrifices, and I guess the issue becomes the degree to which you do restrict future earnings opportunities for people who have served in the Government.

The CHAIRMAN. Well that's right, and that's why we're proposing the review Board where they would have the opportunity to counsel such a person that he's perfectly free as long as he's disqualified himself.

You say on page 5 (see page 45), "On the other hand, we must be mindful of the impact such restrictions of this sort would have on the Government's efforts to recruit and retain qualified personnel." Now, that is what the question is about. When he comes in and he knows this is the law, he disqualifies himself from this kind of action. With S. 695, our bill, he then would be free to go back and work for the company, so it shouldn't act as a deterrent to getting competent people.

Dr. CAMPBELL. I would like to add that we are equally concerned, along with that problem, with the fact of the need for covering a broader range than procurement officers.

If you will look at the prepared testimony, in the paragraph just previous to the one that you quoted, we say that we are concerned about it as a Government-wide problem, such as regulatory agencies, FTC, the Civil Aeronautics Board, where the potential conflicts are every bit as great, I believe, as they are in the procurement field.

Whatever legislation we have, I would hope it would stretch to cover all the relevant aspects of Government rather than going about it on what seems to me to be a rather piece-meal basis.

The CHAIRMAN. Well, there is another element here. The bill that the administration has recommended only bars contacts by former Federal employees. But there is an advantage to the contractors in the knowledge of former Federal employees in post-Government jobs.

In other words, what he's interested in is getting a job with contractor A; therefore, when he deals with contractor A he's likely to follow policies which make contractor A obligated to him so they hire him. They don't give a darn if he has any contact with the Pentagon or not. They may like it if he could, but they're going to pay him off for the millions of dollars of profits they may have been able to make out of his very sensitive, cooperative, and helpful work as a Government official.

Dr. CAMPBELL. For past services.

The CHAIRMAN. That's right.

If, as you say, you're concerned about the "revolving door," then wouldn't some additional degree of protection be necessary in this with respect to the military?

Dr. CAMPBELL. Well, again, I guess it's a judgmental matter. I think that the additional restrictions in the President's bill and now incorporated in S. 555 of the year's denial of any contact, and then beyond that the denial related to anything with which the person was concerned, is a denial that will stop at least many of the things we now assume to be abuses as a result of the "revolving door."

Now, I think it is a fair argument as to whether they go far enough or not, but they certainly go beyond what is now the law.

The CHAIRMAN. One of the criticisms you had that I think would strike a responsive chord in most people is your arguing that the three people who will serve on the Ethics Commission are too busy. You argue that you—and you certainly have a big and responsible job as Civil Service Commission Chairman—Attorney General Bell, and Comptroller General Staats are all very busy men. We recognize that, but, as you know, perhaps better than anyone in the executive branch, the essence of being a successful executive is delegation of authority. That's the first thing we learned at Harvard Business School. You've got to delegate authority if you're to succeed as an executive. Anybody who tries to do all of his work himself is going to fail. There is no way you can do it if you've got a big job. You have to delegate.

Dr. CAMPBELL. Yes.

The CHAIRMAN. The question is, Whether or not you should get into this matter, whether it's important enough, whether ethics in Government really is of sufficient significance to warrant some time and attention by these three very important people.

I think it's so important, so vital, and although I recognize the legitimate point, the question of whether we should not absorb any

time on this, I think it is something that warrants some attention and some time.

Dr. CAMPBELL. Certainly I would not deny the importance and significance of the responsibility, and should it work out that the Board as described is created I am sure that the people occupying these positions will give the time and attention to it, as well as delegating the authority in a way which will mean that they can stay on top of it.

I would make a point, though, that the President had exactly the same desire for high visibility of this activity by creating an Office of Ethics in the Civil Service Commission and making the director of that office a Presidential appointee in an effort to give public visibility to the position, to have a person whose sole responsibility would be in that area, and clearly demonstrating his belief in the importance of the function.

The CHAIRMAN. But isn't it true that all three agencies currently have some responsibility for enforcing or administering Federal conflict of interest matters?

Dr. CAMPBELL. Yes; it is. I would make the point, however, I'm not in a position to testify on it. I'm sure the Justice Department will tomorrow. It's the difficulty of combining executive and legislative officers, with the Comptroller General being responsible to the Congress. Whether that is an appropriate combination of the executive and legislative branches, I think, is a question, and certainly the decision on the Federal Election Commission raises some questions.

The CHAIRMAN. Yes; it's a legitimate point. You've got the executive and legislative branches both represented here at the same time. One of the reasons we put this together was because each one of these officers has heavy responsibility already and expertise in this particular area.

Your office is responsible for passing on the adequacy of departmental standards of conduct regulations; the Comptroller General is responsible for controlling the law on selling to the Department of Defense by retired military officers; the Attorney General is responsible for the enforcement of all criminal conflict of interest laws.

So it would seem to me that each of these officers is peculiarly and specially prepared to deal with these matters that currently fall in that responsibility.

Dr. CAMPBELL. That certainly is correct. I would only add the additional comment that the Comptroller will obviously speak for himself, but in testifying on the Senate bill in this area he felt very strongly about the conflict situation in relationship to getting involved in the executive branch affairs.

The CHAIRMAN. Now, setting aside the question of who would serve on the Conflict of Interest Review Board, and it may be necessary to make a change there, do you agree that a body which would promote standard Government-wide interpretation of conflict of interest legislation and could advise individuals on their possible criminal liability would serve a useful purpose?

Dr. CAMPBELL. Yes, indeed, and that was one of the justifications in the President's bill for the creation of a single office for doing that.

Now, it may be that there are other ways of doing it, but the intent is exactly the same as your intent.

The CHAIRMAN. Dr. Campbell, our next witness is here, Senator Metzenbaum. We're anxious to hear from him. But, in concluding, may I have your firm commitment that your office and the White House will work with this committee to insure the two bills are consistent and noncontradictory?

Dr. CAMPBELL. You certainly may have that commitment.

The CHAIRMAN. Thank you very much. I think we can work something out here. I appreciate so much your thoughtful statement, even though I disagree with some of your conclusions, and I'm hopeful that we can come together on legislation to do the job as it has to be done.

Dr. CAMPBELL. We appreciate the opportunity to testify, sir.

The CHAIRMAN. Thank you, sir.

Senator Bayh couldn't appear today, but he asked that I include his attached statement in the record of today's proceedings. He's the principal cosponsor of the bill.

[See appendix V, page 247, for Senator Bayh's statement.]

The CHAIRMAN. The committee's next witness will be Senator Howard Metzenbaum of Ohio. I think it is especially notable that he is sponsoring this legislation. He was a businessman before coming to the Senate, and he has familiarity with how business operates.

He is in my view an outstanding and particularly sensitive U.S. Senator, concerned with ethics, concerned with proper deportment on the part of Members of Congress and the executive branch and the responsibility all of us hold to the public to discharge our responsibilities honestly.

Also, I think he is very much aware of the cost of conflicts of interest and corruption

Senator Metzenbaum, go right ahead.

#### STATEMENT OF HON. HOWARD METZENBAUM, U.S. SENATOR FROM THE STATE OF OHIO

Senator METZENBAUM. Mr. Chairman, I'm very happy to be here today to speak in support of this legislation. I only wish that Mr. Campbell, Chairman of the Civil Service Commission had said that the administration put its total support behind this legislation.

I would urge upon the administration that they take another look at S. 695, with a view towards making it a part of the administration program.

Mr. Chairman, I would like to commend you for your active leadership role in this area. You have attempted to insure that governmental officials are the kind of people that the American public wants in public office, to try to avoid conflicts of interest that are so self-evident.

Mr. Chairman, I must say that, while it is always a pleasure to appear before your committee, I'm truly disappointed that these hearings had to take place.

My disappointment is not with this committee, but with the failure of Secretary of Defense Brown to act in this area, as a matter of executive responsibility.

When Secretary Brown appeared before the Armed Services Committee, I made clear to him that I, and many other Senators,

were not satisfied with the way Pentagon spending was being managed. I emphasized that conflict of interest situations were intolerable. I suggested that he follow President Carter's lead by requiring that procurement officials agree not to work for defense contractors for two years after retirement.

Secretary Brown replied that I had identified a problem, but he was not sure I had identified a solution. The Secretary said he would think about some different approaches. [See appendix III, pages 225-226]. Since those hearings, I have talked and written to Dr. Brown repeatedly, urging him to provide me and the country with a solution. To date he has not responded.

[See appendix III, pages 230-234.]

Mr. Chairman, Secretary Brown has been in office for almost 4 months. He could have taken actions shortly after taking office which would have gone a long way toward making this bill unnecessary. But he has done nothing. That's the reason I commented that I'm sorry we have to go forward with hearings on a piece of legislation. By an Executive order the Secretary could handle the matter and follow the lead that's already been taken by his own President, the man who appointed him.

I am afraid, Mr. Chairman, that this inaction indicates that it is business as usual at the Pentagon—tough management of tax dollars is still not a major concern. Frankly, this is no longer good enough for the people of my State and the Nation. They are demanding tougher laws on conflict of interest, because they want honest and objective management of the way their tax dollars are spent. Pentagon procurement personnel watch over almost \$50 billion of the Nation's tax dollars. They must have a commitment to good management which is beyond question. They must also have a concern about competitive bidding practices, which they don't have. The Secretary has done nothing in this area either.

I might say in that same regard that I was particularly pleased to see that the Secretary of HEW did take the lead with respect to the procurement practices at HEW. I would hope that the Secretary of Defense would note the steps that have already been taken by Secretary Califano and perhaps follow in his lead.

Under the current laws, questions continue to abound. According to Pentagon records, since 1970 at least 2,600 Department of Defense officials have gone to work for defense contractors after leaving the Pentagon. Moreover, these numbers have been growing by leaps and bounds. In 1975 the number of Pentagon retirees moving to the defense industry increased by more than 65 percent.

These figures in themselves would be disturbing. But, as you well know, Mr. Chairman, the numbers are incomplete. Because of lax recordkeeping, Pentagon figures understate the actual number of retirees in the defense industry by 30 to 50 percent. And I cannot understand a Government that permits this kind of procedure to continue by turning its head away.

When the Secretary was before the Armed Services Committee for confirmation, he was worried about that conflict of interest laws would cause people not to come from outside the defense industry to the Defense Department. The Secretary of Defense is the one best able to address himself to that subject. He didn't come from the defense industry, and there are certainly many others out there just like him.

There are many who believe enough in their Government to be willing to commit themselves not to take a job with the defense industry with which they were negotiating while in the Pentagon.

It could be, of course, that those who left the Pentagon to work for defense contractors were very good guardians of the public's dollars while they worked for the Defense Department. But if we look at some of the individual cases, we can understand why the public might question the dedication to objective management of certain men who have retired. For example, an Air Force lieutenant colonel who recently retired had been chief of testing for the remotely piloted vehicle, the RPV, System Program Office. Ten days after leaving the Pentagon, he was hired by Lear Siegler, one of the major remotely piloted vehicle contractors. An Air Force colonel who was project manager for the heavy lift helicopter was hired by Boeing, the heavy lift helicopter's prime contractor, 4 days after retirement.

Can anybody really suggest that when he was making decisions having to do with Boeing that he really was serving the Government's interest and not having a concern about the interest of his future employer?

Another colonel who had been special assistant commander on Minuteman management has retired to go to work for Rockwell, the producer of major Minuteman components.

And, of course, the most celebrated recent case is that of a top civilian, Malcolm Currie, who served as Director of Defense Research and Engineering, a post critically important to defense procurement. Mr. Currie first came to public attention in 1975 when he was fined 4 weeks pay for accepting the hospitality of Rockwell International at their fishing lodge in the Bahamas. Questions have arisen about Mr. Currie recently because he accepted a job with Hughes Aircraft after he had played a key role in the Pentagon's decision to award a \$194 million contract to Hughes for the Roland missile.

Now, I do not mean to imply that all of these men gave away tax dollars for personal gain. Some or all of them may have been honest and objective watchdogs of public money while at the Pentagon. We don't know. But, as a former businessman, I do know that I would not want the man who is deciding how to spend my company's money to be tempted by the possibility of a better paying job with one of my suppliers while he is working for me. I would fire him summarily if I knew he was going to take a job with one of those suppliers after he left my employ. I am sure the American people feel the same way about those who spend their dollars.

But the facts and figures on Pentagon retirees show that present laws do not guarantee that Defense Department procurement officials are committed to good management. Under the present system, procurement officials, instead of coming down hard on firms which waste our tax dollars, may be thinking about the higher paying jobs waiting for them the day after they retire. Stricter laws and better means of enforcement are needed.

S. 695 is a major step in the right direction. Its prohibition against procurement personnel working for contractors for 2 years lessens the lure of post retirement jobs. The machinery which the bill sets up will enforce the ban and insure that proper records are kept. I was pleased to be an original cosponsor of the bill, and I am proud of the fact that

I had the opportunity to be here to testify in support of it, in support of the piece of legislation that you so ably authored, Mr. Chairman. [Complete statement follows.]

PREPARED STATEMENT OF HON. HOWARD M. METZENBAUM, U.S. SENATOR  
FROM OHIO

Mr. Chairman, I would first like to commend you for your active leadership on this and previous bills designed to eliminate conflict of interest situations. I believe your efforts will be rewarded this session.

Mr. Chairman, while it is always a pleasure to appear before your committee, I must admit that I am very disappointed that these hearings had to take place. My disappointment is not with this Committee, but with the failure of Secretary of Defense Brown to act in this area, as a matter of executive responsibility. When Secretary Brown appeared before the Armed Services Committee, I made clear to him that I, and many other Senators, were not satisfied with the way Pentagon spending was being managed. I emphasized that conflict of interest situations were intolerable. I suggested that he follow President Carter's lead by requiring that procurement officials agree not to work for defense contractors for two years after retirement. Secretary Brown replied that I had identified a problem, but he was not sure I had identified a solution. He said he would think about some different approaches. Since those hearings, I have talked and written to Dr. Brown repeatedly, urging him to provide me and the country with a solution. To date he has not responded.

Mr. Chairman, Secretary Brown has been in office for almost four months. He could have taken actions shortly after taking office which would have gone a long way toward making this bill unnecessary. But he has done nothing.

I am afraid, Mr. Chairman, that this inaction indicates that it is business as usual at the Pentagon—tough management of tax dollars is still not a major concern. But this is no longer good enough for the people of my state and the nation. They are demanding tougher laws on conflict of interest because they want honest and objective management of the way their tax dollars are spent. Pentagon procurement personnel watch over almost \$50 billion of the nation's tax dollars. They must have a commitment to good management which is beyond question.

Under the current laws, questions abound. According to Pentagon records, since 1970 at least 3,600 Department of Defense officials have gone to work for defense contractors after leaving the Pentagon. Moreover, these numbers have been growing by leaps and bounds. In 1975 and 1976, the number of Pentagon retirees moving to the defense industry increased by more than 65%.

These figures in themselves would be disturbing. But—as you well know, Mr. Chairman—the numbers are incomplete. Because of lax record keeping, Pentagon figures understate the actual number of retirees in the defense industry by 30 to 50%. (*Military Maneuvers*, Council on Economic Priorities, March 24, 1975.)

It could be, of course, that those who left the Pentagon to work for defense contractors were very good guardians of the public's dollars while they worked for the Defense Department. But if we look at some of the individual cases, we can understand why the public might question the dedication to objective management of certain men who have retired. For example, an Air Force Lieutenant Colonel who recently retired had been chief of testing for the Remotely Piloted Vehicle (RPV) System Program Office. Ten days after leaving the Pentagon, he was hired by Lear Siegler, one of the major RPV contractors. An Air Force Colonel who was project manager for the Heavy Lift Helicopter was hired by Boeing, the HLH's prime contractor, four days after retirement. Another Colonel who had been Special Assistant Commander on Minuteman management has retired to go to work for Rockwell, the producer of major Minuteman components.

The most celebrated recent case, of course, is that of a top civilian, Malcolm Currie, who served as Director of Defense Research and Engineering, a post critically important to defense procurement. Mr. Currie first came to public attention in 1975 when he was fined four weeks pay for accepting the hospitality of Rockwell International at their fishing lodge in the Bahamas. Questions have arisen about Mr. Currie recently because he accepted a job with Hughes Aircraft after he had played a key role in the Pentagon's decision to award a \$104 million contract to Hughes for the Roland missile.

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of public money while at the Pentagon. We don't know. But, as a businessman, I do know that I would not want the man who is deciding how to spend my company's money to be tempted by the possibility of a better-paying job with one of my suppliers while he is working for me. I am sure the American people feel the same way about those who spend their dollars.

But the facts and figures on Pentagon retirees show that present laws do not guarantee that Defense Department procurement officials are committed to good management. Under the present system, procurement officials, instead of coming down hard on firms which waste our tax dollars, may be thinking about the higher paying jobs waiting for them the day after they retire. Stricter laws and better means of enforcement are needed.

S. 695 is a step in the right direction. Its prohibition against procurement personnel working for contractors for two years lessens the lure of post-retirement jobs. The machinery which the bill sets up will enforce the ban, and ensure that proper records are kept. I was pleased to be an original co-sponsor of the bill, and I hope this committee will act favorably on it.

The CHAIRMAN. Thank you so much Senator Metzbaum, for what I think is one of the most effective statements that we're likely to hear on this legislation.

I particularly like your reference to the fact that you as a businessman wouldn't want somebody who worked perhaps as your buyer to then turn around and go to work for the supplier from whom he had been buying. I think that anybody would recognize that right away. After all, he has a whole group of suppliers to buy from. He buys from one guy, enriches him at your expense, and then goes to work for the person from whom he has been buying.

As you say, you would fire him if you knew that. If he did that without your knowledge, you might very well want go to court after him.

What we're saying is the Federal Government deserves that kind of protection. We just want to see that people who are working in a procurement position like that cannot go to work legally for 2 years for the people with whom they have been dealing. Unfortunately, the administration bill doesn't provide that.

Senator METZENBAUM. You have to combine that question of buying from preferred sellers with the fact that 92 percent of the Defense Department procurement is done without price competitive sealed bidding. I think that when you put the two factors together . . . [See appendix III, pp. 227-229.]

The CHAIRMAN. That's an excellent point that I neglected, and it's a point that has haunted me for a long, long time.

Theoretically, the preferred method of procurement is by advertised competitive bid. Actually, as you point out, 92 percent of our procurement is by some form of negotiated procurement, much of it cost-plus. At any rate, it's procurement in which the procurement official has a colossal amount of discretion. They make the decision that it will go to a particular firm, and therefore that decision can be worth millions and millions of dollars in profit for the people who sell to the Government.

I especially like your specific reference to the fact that one man went to work 10 days after he left the Pentagon for a particular contractor, another 4 days afterward, and your reminding the committee, your reminding the Senate, of the fact that there were something like well over a 1,000 high-ranking military officials who reported employment with defense contractors last year, an increase, you say, of 64 percent of what it was in 1975. So the situation is getting worse.

In addition to that, as you may know, there was more than a 100-percent increase in the number of procurement officials who are civilians who went to work for defense contractors, so this is a situation that calls out for a remedy. There is no question about the abuse.

Senator Metzenbaum, as you know, I share your concern about the apparent inactivity of the Defense Department and the Secretary of Defense, which is by far the largest procurement agency. Can you provide for the record documentation of your communication with Secretary Brown?

Senator METZENBAUM. I certainly will. I'd be happy to do so.

The CHAIRMAN. We'd like to have that.

[See appendix III, pp. 230-234.]

The CHAIRMAN. Why in your judgment were there so many more Pentagon retirees going into the defense industry in 1975 and 1976 than in the past?

Senator METZENBAUM. I think that people learn that if Joe can do it, John can do it; and they see that there is no objection to it and there is no administration policy against it.

I think they all start to feather their own nest, and I guess it's an understandable kind of development and human nature that more and more move in that direction. I think the defense industry has recognized that the practice works and there are no sanctions against it. Defense contractors can, over cocktails or on the golf course, ask the colonel or general, or whoever happens to be negotiating the contract, "What are you going to be doing after you leave the Government? Have you been looking for a certain kind of personnel?"

Let's look at the realities of life. You hire a retired officer in the Army or in the Defense Department. You hire somebody, and you pay them \$50,000, \$60,000, \$70,000 a year; and that's peanuts, absolutely peanuts. If you agree to take them on for 5 or 10 years, it's a drop in the bucket.

The CHAIRMAN. Oh, yes, it's a marvelous investment. You hire him for \$50,000, \$60,000 or \$70,000 a year and he brings in tens of millions worth of business, out of which you make a couple of million dollars in profits. It's a real payoff.

Senator Metzenbaum, I want to thank you very much. I understand you are needed in the Judiciary Committee. You've been a fine and most helpful witness. Thank you very much.

Senator METZENBAUM. Thank you very much, Mr. Chairman.

The CHAIRMAN. I'd like to summarize the hearings this morning by saying that there appears to be general agreement that the "revolving door" should be closed. All witnesses today agreed that the heavy traffic between Government and industry can be detrimental to the Government's interest. If there have been disagreements, they have involved proper remedies, rather than identification of the problem.

Dr. Campbell expressed the commitment of this administration to policies which will safeguard the public from governmental decisions based on self-interest. However, Senator Metzenbaum questioned whether the Department of Defense had recognized and begun to act on that commitment.

Dr. Campbell further suggested, on behalf of the administration, that this committee should defer action on S. 695 until after the administration bill had been enacted. He suggested that the problems identified in S. 695 may be adequately addressed by the administration bill. He further suggested that the Civil Service Commission, if it were granted the authority, would study the proposals in S. 695 and would make a recommendation on the need for such remedies.

Now, to me that is completely unsatisfactory. The proposals contained in our bill have been around for many years. They've been studied to death. As Congressman Bennett testified, he first proposed the temporary ban on employment for procurement officials in 1951, more than 25 years ago, more than a generation ago.

The establishment of a board to advise individuals on their liability under conflict of interest law was proposed by the Fitzhugh Commission in 1970. The Fitzhugh Commission—and that was a Commission appointed by the President, President Nixon I believe, and it was composed of outstanding members of the defense industry as well as other industries. It was an industry commission. The Fitzhugh Commission proposal took almost exactly the same shape as does the Board that would be established by S. 695.

Specifically, the Fitzhugh Commission recommended:

The establishment of a Board of Ethics which would provide advisory opinions upon request to retired officers, former civilian employees, and defense contractors as to whether a particular kind of employment is in keeping with the existing standards-of-conduct rules.

Finally, the disclosure statement requirement contained in S. 695 has been in effect, with regard to several agencies, since 1969.

Furthermore, we received testimony that the administration bill would not adequately address the problems that would be dealt with by S. 695. Congressman Bennett and I agree that the administration bill would be useful, but it will not solve ethical problems in defense procurement.

I realize that to have done so would contradict the style that is being set by the new administration, but much of the confusion and apparent contradiction between the administration bill and the Proxmire-Bennett bill could have been remedied if the administration had consulted with those members of Congress who have been concerned about this issue for many years. On numerous occasions, this committee has attempted to obtain comments on various drafts of our bill from the administration, without success.

But the door is not closed to cooperation, and I hope that the administration will see the wisdom and the necessity of both of the major conflict of interest proposals now pending before the Congress.

The committee will stand in recess until tomorrow morning at 10 o'clock, when we convene to hear additional witnesses.

[Whereupon, at 11:25 a.m., the hearing was adjourned, to reconvene at 10 a.m. on Friday, May 20, 1977.]



## CONFLICT OF INTEREST LEGISLATION

FRIDAY, MAY 20, 1977

U.S. SENATE,  
COMMITTEE ON BANKING, HOUSING, AND URBAN AFFAIRS,  
Washington, D.C.

The committee met at 10 a.m., in room 5302, Dirksen Senate Office Building, Hon. William Proxmire (chairman) presiding.  
Present: Senator Proxmire.

### OPENING STATEMENT BY SENATOR PROXMIRE

The CHAIRMAN. The committee will come to order.

This morning the committee begins the second day of hearings on S. 695, a bill which I recently introduced, together with Senators Brooke, Bayh, and others. Its purpose is to improve the quality of Federal procurement decisions by avoiding certain conflict of interest situations and by setting up a Conflict of Interest Review Board to counsel civil servants on these matters.

Today the committee will hear from representatives of the other two officials designated in the bill to serve on a Conflict of Interest Review Board. Yesterday we had the Chairman of the Civil Service Commission. These representatives are the Attorney General and the Comptroller General.

Afterward, we will have the testimony of the Council on Economic Priorities, a private research organization which has studied extensively the matter of personal conflict of interest in defense procurement.

Our first witness this morning will present the views of Attorney General Griffin Bell, his Assistant Attorney General, Leon Ulman, a constitutional expert with 35 years of Government service.

Mr. Ulman, I don't wish to seem petty, but the committee received your testimony only last evening. We have a committee rule that testimony is to be submitted 48 hours in advance. It also received Chairman Campbell's testimony late in the afternoon before he appeared, although invitations to appear were extended a month ago. It's unfortunate because it makes it harder for us to prepare our questions and to go over and analyze the statements in advance. We are very anxious to hear Judge Bell's thoughts on how we can best deal with the conflict of interest problem in the procurement field, so, Mr. Ulman, you go right ahead.

**STATEMENT OF HON. LEON ULMAN, DEPUTY ASSISTANT ATTORNEY  
GENERAL; ACCOMPANIED BY EDWARD KNEEDLER, ATTORNEY  
ADVISER**

Mr. ULMAN. First of all, let me apologize for the lateness in getting our testimony to you, but there was some confusion as to who was going to testify and I wasn't notified until yesterday.

I have with me Mr. Edward Kneeder, a member of the Office of Legal Counsel's staff.

Of course, I'm happy to present the views of the Justice Department. First of all, we acknowledge your interest in this area and we share your concern for assuring the highest standards of integrity in the operation of the Federal Government.

The CHAIRMAN. May I say, Mr. Ulman, if you would care to do so, we will be happy to print in full your remarks in the record and you can abbreviate them in any way you wish.

Mr. ULMAN. I intend to.

The CHAIRMAN. Very good.

[Complete statement follows:]

**PREPARED STATEMENT OF HON. LEON ULMAN, DEPUTY ASSISTANT ATTORNEY  
GENERAL, OFFICE OF LEGAL COUNSEL, DEPARTMENT OF JUSTICE**

Mr. Chairman, I am pleased to appear before the Committee today to present the views of the Department of Justice on S. 695, a bill addressing the problem of conflicts of interest in Government contracting.

To a considerable degree, the public awareness of the potential for conflicts of interest in this area is the result of your continuing interest, Mr. Chairman. The Administration shares your concern for ensuring the highest standards of integrity in the operation of the Federal Government, including its sizable procurement programs. As you know, the President on May 3 submitted to the Congress a message and proposed implementing legislation on the subject of ethics in Government. Some of the essentials of the President's proposals were incorporated in S. 555 by the Senate Governmental Affairs Committee last week, and that bill has now been favorably reported to the full Senate.

Three titles of the bill reported by the Governmental Affairs Committee are of particular relevance to today's hearings. Title III of the bill requires public financial disclosure of all employees classified at a level equivalent to GS-16 or above in the Executive Branch, as well as top officials in the Legislative and Judicial Branches. Title IV of S. 555 establishes an Office of Government Ethics in the Civil Service Commission to oversee the financial disclosure system as well as other conflict of interest and ethical restrictions. This office will also be charged with studying the efficacy of existing laws and regulations and recommending appropriate amendments to the President and the Congress. Finally, Title V of S. 555 would impose additional post-Federal service restrictions on Executive Branch employees to supplement those presently contained in 18 U.S.C. § 207.

These features of S. 555, which the Administration fully supports, represent a significant step in the efforts of the Congress and the President to restore public confidence in the integrity of the Government. But S. 555 is not intended to be the final solution to all possible conflict of interest problems. The Committee and the President acted with care in imposing the new restrictions in order to minimize hardship on individuals and the Government's recruiting efforts and to avoid discrediting the entire effort by moving too quickly without adequate study. For example, it was decided that the public financial disclosure requirement and the new one-year period after a person leaves Government service should be limited to top officials—those at GS-16 or the equivalent—in order to reach the area of greatest potential abuse while ensuring that the measures can be efficiently implemented and tested on this somewhat limited scale. Also, S. 555 deals only with problems of an Executive Branch-wide nature. The Office of Government Ethics that would be established in the Civil Service Commission is specifically charged with evaluating the need for additional conflict of interest restrictions, including those in particular areas such as contracting.

In our view, existing requirements and the new public disclosure system and post-Federal service restrictions meet many of the concerns addressed by S. 695. We believe that the proposed Office of Government Ethics should be given the opportunity to examine the additional measures contained in the bill. The Department of Justice therefore recommends that the Committee take no action on S. 695 at this time. If I may, I would like to explain the reasons underlying this recommendation in a bit more detail and, in addition, identify several features of the bill that we find particularly troublesome.

#### SUBSECTION 801(b)

The proposed new subsection 801(b) of the Defense Production Act provides that no "contracting officer," while so employed, may accept a payment or gratuity of over \$50 from "any contractor" without prior written permission of the standards of conduct counselor of his agency. The subsection further provides that it is not to be construed to prohibit acceptance of compensation specifically authorized by agency directive or regulations. Felony sanctions for both the recipient and payor of compensation are provided in subsections 801 (f) and (g). This subsection does not appear to be consistent with the existing restrictions described below, which it would leave unaffected.

As written, subsection 801(b) seems to us too broad, because it applies even where the contractor has no relationship with the contracting officer's agency. By way of contrast, section 201(a) of Executive Order 11222 as presently in effect prohibits any employee (not just contracting officers) from receiving any gift or gratuity from a contractor or other person who has contractual or business relations with or is regulated by his own agency.

Moreover, where the restrictions in the Executive Order do apply, they ordinarily prohibit the receipt of *any* gift or gratuity, not just those over \$50—although there appears to be some merit in applying the bill's criminal sanctions only where the payment exceeds \$50.

Even if the subsection's coverage were to be narrowed to apply only to the receipt of payments from contractors who have dealings with the contracting officer's own agency, it would appear to be unnecessary as a duplication of section 201(a) of Executive Order 11222. In general, the only exceptions to the prohibition in the Executive Order and existing agency regulations against acceptance of gifts from such contractors are for participation in the affairs of professional, educational and similar organizations; receipt of unsolicited gifts of nominal value; acceptance of a meal in the course of a luncheon or dinner meeting; and personal gifts that do not stem from a business motivation. Most of these gifts present no potential for a conflict of interest and would not in any event rise to the threshold level of \$50 in value so as to require advance approval under the bill.

#### SUBSECTION 801(c)

Subsection 801(c) provides that a contracting officer who during the last three years of his Government employment engaged in duties of his office in regard to any procurement contract shall not accept employment or compensation from any contractor receiving funds under such contract for a period of two years after his employment has ceased.

Restrictions on post-Federal service employment may constitute a significant problem for the individuals who would be affected. We question whether restrictions such as these should be imposed absent compelling reasons. One purpose of the proposed restriction is apparently to remove any incentive for a contracting officer to favor a contractor in hopes of a job offer. At the present time, however, we are not aware of data or information establishing the seriousness of this problem. We have reservations about a statute that would impose substantial restrictions on employment opportunities on the sizable number of persons who would never seek to curry favor with a contractor in this manner in order to reach a few who might. We therefore recommend that this problem be referred to the proposed Office of Government Ethics for further study, in cooperation with the Office of Federal Procurement Policy.

In this connection, the Committee may wish to consider the significant new post-Federal service restrictions proposed in the bill reported by the Governmental Affairs Committee and supported by the Administration. At present, 18 U.S.C. § 207(a) imposes a lifetime prohibition against a former officer or employee of the Executive Branch representing anyone before a Government agency or in court in connection with a particular matter in which he participated

personally and substantially on behalf of the Government. However, that section does not prohibit a former employee from consulting with or otherwise assisting a private company in matters in which he participated while with the Government as long as he does not represent the company in its dealings with the Government on such matters. Thus, a person who negotiated a contract with a private contractor on behalf of the Government may accept employment under that contract. S. 555 as reported by the Governmental Affairs Committee would extend 18 U.S.C. § 207(a) to prevent such aiding or assisting in connection with contracts or other particular matters in which the person participated on behalf of the Government unless the head of the individual's former agency certifies by notice published in the Federal Register that the national interest would be served. This revision will therefore solve one important aspect of the "revolving door" problem—switching sides on specific matters.

Subsection (b) of 18 U.S.C. § 207 prohibits an employee of the Executive Branch, for one year after he leaves the Government, from representing anyone before an agency or in court in connection with matters that were under his official responsibility when he was with the Government. S. 555 would extend this bar to two years and prohibit informal contacts as well as formal appearances.

Finally, a new subsection 18 U.S.C. § 207(c) would be added by S. 555 to provide that top-level officials, for one year after they leave the Government, may not make an appearance or attendance before their former agencies or make any contact with the intent to influence their former agencies on pending business.

This new subsection, if enacted, will strike at what we believe to be the heart of the "revolving door" problem by preventing top-level officials from exerting influence over former colleagues and subordinates for a one-year period after they leave the Government. This purpose is similar to that underlying a specific statute which seeks to prevent the misuse of influence by retired military officers in procurement situations. That statute, 18 U.S.C. § 281, prohibits retired officers of the Armed Forces from representing any person in the sale of anything through the military department in whose service they hold a retired status.

As mentioned earlier, the proposed new 18 U.S.C. § 207(c) would apply throughout the Government—not just to contracting officers—but it would also apply only to officials at GS-16 or above or the equivalent. We would expect that the Director of the proposed Office of Government Ethics would give consideration to the advisability of extending this one-year prohibition against all appearances and contacts to additional employees, either across the board or in specific areas, such as procurement. In the area of Government contracting, the Director would surely cooperate closely with the Office of Federal Procurement Policy, which has recently been studying other ways in which to ensure the integrity of the contracting process.

#### SUBSECTION 801(d)

In addition to the two-year employment ban in the proposed subsection 801(c) of the Defense Production Act, subsection (d) would impose a five-year prohibition against a former contracting officer's accepting compensation "from any employment which was created, supported, or subsidized by Federal revenues" under a procurement contract in connection with which he engaged in some duties of his office. The five-year prohibition seems unduly stringent, and we foresee difficulties in determining whether a given position is actually supported out of contract funds.

#### SUBSECTION 801(e)

Subsection 801(e) would prohibit a contracting officer who engaged in duties of his office in regard to any procurement contract from owning, possessing, or controlling any financial holding in any contractor who has been affected by such action. It would also require that where any contracting officer may be called on to deal in an official capacity with a matter which would affect a contractor in which he holds a financial interest, he must promptly dispose of the financial interest or disqualify himself in any dealings in the matter. We believe that these restrictions largely duplicate existing law.

The requirement of disqualification or divestiture would appear to be unnecessary because disqualification or divestiture is already required under 18 U.S.C. § 208(a) where an employee has a financial interest. Similarly, section 203 of Executive Order 11222 prohibits employees from having "direct or indirect financial interests that conflict substantially, or appear to conflict substantially, with their responsibilities and duties."

The first sentence of subsection 801(e) would appear to be unnecessary as well. A contracting officer covered by the first sentence would have been required under 18 U.S.C. § 208(a) to divest himself of any interest in the contractor before participating personally and substantially in matters relating to the contract. The first sentence therefore deals only with financial interests acquired after the contracting officer has completed work on the contract. We can see no reason why a contracting officer should be prohibited from purchasing securities or other holdings under these circumstances, unless he uses nonpublic Government information in doing so. Such misuse of inside information is already prohibited by section 205 of Executive Order 11222.

## SECTION 802

The section 802 that would be added to the Defense Production Act by the bill would establish a Conflict of Interest Review Board to review compliance by contracting officers and former contracting officers with the provisions of section 801, just discussed, and with section 803, which would require reporting of affiliations with Government contractors. The Conflict of Interest Review Board would consist of the Chairman of the Civil Service Commission, the Attorney General, and the Comptroller General. We oppose section 802 for several reasons.

First, it seems to us to be highly undesirable to constitute a collegial body of the heads of three separate Government agencies—especially when it includes the Comptroller General, an official of the Legislative Branch. Membership of the Comptroller General on a Board which would perform the Executive function of granting waivers of the post-Federal service ban and overseeing enforcement of reporting requirements is in our view inconsistent with the constitutional principle of separation of powers.

Second, we do not believe that a collegial body is necessary. Its function would primarily be to give formal advisory opinions (in effect, waivers) to permit former contracting officers to be employed by or receive compensation from contractors where the potential for conflict of interest is remote or where the national interest requires. § 802(e)(2). We believe that it would be preferable to vest the power to waive whatever post-Federal service restrictions may be enacted in the head of the agency involved or in that agency's ethics counselor or in the proposed Office of Government Ethics to be established in the Civil Service Commission under S. 555. The conflict of interest laws at the present time provide for waivers to be granted by the agency head or a subordinate official, see, e.g., 18 U.S.C. §§ 207(b) and 208 (b)(1), and it is followed in the revision of the post-Federal service instructions in 18 U.S.C. § 207 proposed in S. 555.

## SECTION 803

The proposed section 803 of the Defense Production Act would require present and former Federal employees to report employment with Government contractors who have substantial contracts with the agency with which the employees are or were employed. Section 803 is patterned after 42 U.S.C. § 2462 and 50 U.S.C. § 1436, which impose reporting requirements on present and former employees of NASA and the Department of Defense.

We question whether it is appropriate to require a substantial number of additional people to report without first assessing the costs and benefits of the NASA and Defense reporting systems. It is our understanding, for example, that there have been few requests for the reports from these two agencies.

The number of Federal employees at GS-13 or higher has been estimated to be in excess of 240,000. Section 803 would potentially cover all of these plus persons as GS-12 paid at a rate greater than the minimum GS-13 level. An additional number of former employees would also be covered. Of course, reporting would only be required if the employee or former employee was employed by a Government contractor who had in excess of \$1,000,000 or 1 percent of the agency's contracts, but this might cover a substantial number of people. The provision in subsection 803(c)(3) that a person need not report if he was not paid at a rate of \$20,000 per year by the contractor or the Government would not exclude many people, since that figure is considerably below the minimum rate for GS-13. Furthermore, with respect to present Government employees, outside employment must be reported on financial statements filed pursuant to Executive Order 11222, and prior associations would have to be reported under the financial disclosure provisions of S. 555. To this extent, S. 695 would duplicate existing and other proposed requirements.

Finally, we note that there may be substantial self-incrimination problems in the requirement in subsection 803 (b)(1)(7) that a former Government employee provide a description of any duties he performed in connection with a Government contract if the contractor by whom he is employed is providing or is negotiating or bidding to provide materials or services for the contract. The proposed subsections 801 (c) and (d) would make it unlawful for the individual to have accepted employment from the contractor in the first place if he had performed official duties for the Government in connection with the contract. Thus, subsection 803(b)(1)(7) would require the individual, under penalty of criminal sanctions, to report information that would necessarily incriminate himself. The mere assertion of the Fifth Amendment privilege against self-incrimination under these circumstances would tend to be incriminating, and it is possible that the reporting individual could simply file a form making no reference to information required by subsection 803(b)(1)(7) or perhaps fail to file altogether. See *Grosso v. United States*, 390 U.S. 62 (1968); *Marchetti v. United States*, 390 U.S. 39 (1968). See also *Garner v. United States*, 424 U.S. 648, 658-59 (1976).

If subsections 801 (c) and (d) are deleted and the mere acceptance of employment with a contractor having an interest in the contract for which the contracting officer had responsibilities is not unlawful, subsection 803(b)(1)(7) is not facially objectionable on self-incrimination grounds. Even then, however, a former Government employee required to file under the bill could assert his Fifth Amendment privilege in certain situations and refuse to report information that would incriminate him under other statutes—such as the prohibitions against representational activities in 18 U.S.C. §§ 207, 281 and 283. Similarly, a present Government employee would be free to assert a privilege against disclosure of information that may be incriminating in context, such as evidence of the receipt of “compensation from a Government contractor during the period of Federal service.

#### AMENDMENT NO. 192

Finally, the amendment intended to be proposed by Senator Abourezk on the subject of “organizational conflict of interest” is more properly a concern of the Office of Federal Procurement Policy. I understand that Office is actively working with the Department of Defense and the General Services Administration toward the development of Government-wide organizational conflict of interest regulations. We defer comment on the proposal at this time pending the completion of that Office’s work in developing such regulations.

In closing, I would again like to point out that the new Government-wide public disclosure and post-Federal service restrictions contained in S. 555, when coupled with existing conflict of interest provisions, address many of the problems to which S. 695 is directed. We suggest that the new measures proposed in this bill warrant further study.

The CHAIRMAN. Thank you very much, Mr. Ulman.

Mr. Ulman, there’s a sharp difference of opinion obviously between you and those of us who support the bill that’s before us. I’m in favor of the administration bill. I’m for it. I think it’s a good bill. I think it’s a desirable bill. I want to cosponsor that bill, but I think it does not cover a very, very important element of procurement.

You point out that it does something in the same direction this does by inhibiting the contact of a procurement official from leaving the Pentagon and then going back and making representations to the Pentagon with respect to a particular procurement on which he was working. I think that’s too narrow and I think it leaves a very big element of conflict of interest which is untouched.

Let me ask you this. If it were demonstrated that the seriousness of this problem had been documented—that is, the seriousness of the problem of a public procurement official being bought off in effect by the defense contractor—would you agree with the need for this kind of legislation?

Mr. ULMAN. I think that if that were done we certainly would be in a position to reconsider what we have said.

The CHAIRMAN. All right. In his testimony yesterday, Congressman Bennett—let me give you some documentation—referred to several reports which as long as 20 years ago documented the danger of allowing such situations to continue.

Let me read from several examples.

From 1956 the presence of retired military personnel on payrolls, fresh from the "opposite side of the desk" creates a doubtful atmosphere—companies whose business is so closely interwoven with the military establishment ought to lean over backward so that no suggestion of favoritism, influence, or "old school tie" could be read into their conduct.

From a 1960 New York Bar Report:

Interviews revealed a substantial body of opinion that Government employees who anticipate leaving their agency some day are put under an inevitable pressure to impress favorably private concerns with which they officially deal.

From the 1970 report of the Fitzhugh Commission—as you remember, that was a Commission appointed by President Nixon I think, as recommended by Secretary Laird, of top people in industry as well as in Government and universities to make a study of procurement. This is what they found.

The temptation to curry favor with the contractor in the expectation of future and hopefully lucrative employment is present. In this regard, one of the onsite surveys of the Civil Service Commission reported allegations that the plant representative at a major aircraft company had failed to pursue the Government's interest diligently in a number of instances in the hope of gaining post-retirement employment with the company, and he was in fact subsequently employed by that defense contractor.

Then, from a memorandum written by an official of the United States Air Force:

In formulating a broad management improvement plan for Minuteman, I believe you should consider the problem posed by the mass migration of Air Force officers into the management ranks of contractors with whom they have dealt. The Air Force plant representative who revoked our clearances at Autonetics is now a division manager at Autonetics. His predecessor, equally protective of the contractor's interest, is also now employed by North American Aviation. The program officer who blocked access by the Minuteman Program Control Office to Autonetics contract negotiation records is now employed by North American Aviation. The officer cited to me as responsible for killing the cost reduction project I contracted to perform at Autonetics is now employed by North American Aviation. It is perfectly clear to me that these same officers studiously avoided any action which might offend their ultimate employer.

Now it seems to me that, when we have documented the problems that can be caused by allowing this situation to remain uncorrected and when the Pentagon's own figures show in 1975 over 600 high ranking military officers reported that they were now working—former military officers were reported they were now working for defense contractors—I guess in 1975 there were 600. In 1976, over 1,000 reported that they are now working for defense contractors. This is a cause for legitimate concern.

This is not a new proposal. It's not a radical proposal. In my judgment, it's not going to throw people out of work. Do you care to comment in view of that documented record?

Mr. ULMAN. Well, yes, I have several comments. First of all, I don't regard the mere fact that people go to work in some area in which they have acquired Government experience as establishing that they gained those jobs because they exhibited favoritism. To me that's a

non sequitur. I don't regard the mere fact that they get jobs with contractors because they have acquired Government expertise—

The CHAIRMAN. No; I don't think in every case that's the situation at all, but what I think this documentation shows is there are many cases where that is the instance and there certainly would be a perfectly understandable concern by the public, by the taxpayer, that there is a payoff.

Mr. ULMAN. Well, I just can't see how it establishes the point because someone simply says it's my opinion that it's so. In other words, it's arguing backwards. They are saying these people have gotten jobs with the contractors, therefore it follows that they got the jobs because they favored the contractors.

The CHAIRMAN. I don't say that at all. What I say is there are cases where this was probably true, where they got the job with the contractor because they favored the contractor.

Mr. ULMAN. I can't see it.

The CHAIRMAN. There are other cases where I'm sure it was not true. But as I say, there's documentation here, specific documentation—the Autonetics case, for instance, where the payoffs were pretty clear, and I think you have to believe in the tooth fairy not to believe there's a substantial amount of this.

Mr. ULMAN. Well, I think I've said about all I can on that. It may be that's something prevalent in the Defense Department. If so, I think it should be dealt with there and not applied across the board.

The CHAIRMAN. The bill would only apply in the case of a contract of over \$1 million, so it would be rather rare outside of the Pentagon. Most of the very large contracts involving large sums are in the Pentagon. That's the biggest one. But I don't see why it shouldn't apply elsewhere, too.

There is a contradiction in your testimony with regard to the question of whether the Carter administration proposal on post-employment restrictions will solve the serious conflict of interest problems that exist. Incidentally, it's important to note that none of the individuals that I have cited in the documentation I just gave you would be covered by the administration bill. You state:

This new subsection, if enacted, will strike at what we believe to be the heart of the "revolving door" problem by preventing top level officials from exerting influence over former colleagues and subordinates.

Yet in the very next sentence of your prepared remarks, you acknowledge that similar restrictions already apply to retired military officers. But we know that these restrictions haven't had the desired effect of controlling abuses in the military. Since the restrictions which already apply to retired military officers haven't worked, how will enactment of S. 555 do anything more to correct this serious problem?

Mr. ULMAN. I frankly don't understand why there's an inconsistency. We're talking about contacts and I take it—if I understand the law, as it now applies to the Defense Department and other military departments it prohibits a retired military officer from engaging in any sales contacts with the military departments. I think that's in 18 U.S.C. 281.

The CHAIRMAN. That's right.

Mr. ULMAN. And I understand you to say is that that hasn't worked. The CHAIRMAN. What I'm saying is that doesn't prevent the payoff. You see, what happens is that the time that the official is valuable to the defense contractor is when he's working for the Pentagon. He may or may not be of some use in a particular procurement that he had been associated with before once he goes to work for the defense contractor, but it's when he's working for the Federal Government that he has the real discretion and the authority and is able to make decisions which are worth millions of dollars in profits to the contractor.

Mr. ULMAN. Well, I agree that the administration bill doesn't deal with that aspect of temptation.

The CHAIRMAN. Now in your prepared remarks you say that:

We would have considerable reservations about a statute that would impose substantial reductions on employment opportunities on the sizeable number of persons who would never seek to curry favor with a contractor in this manner in order to reach a few who might.

Our third witness today represents an organization which produced a most exhaustive and critical study of conflict of interest problems in military procurement. That study found that only 27 percent of all individuals leaving the Department to accept employment with contractors—a total of less than 400 individuals in a 5-year period—could be considered to have a conflict of interest. I don't want to minimize this figure because I believe that one conflict of interest is too many. However, when you refer to "substantial restrictions" on a "sizeable number of people," I think it is important to keep in mind that, in absolute terms, the number who would be affected is very small. Additionally, most of those individuals would be permitted to pursue their occupations with numerous corporations in defense industry, since the prohibition would apply to only a small number of defense contracting firms. Can you clear up this apparent contradiction?

Mr. ULMAN. Well, I'm not familiar with the testimony, but I don't concede that there is a contradiction. You're telling me that someone has said it would apply only to a small number of people.

The CHAIRMAN. Well, have you made any kind of a study as to how many individuals this would apply to?

Mr. ULMAN. No; I haven't. I said that if we had gotten figures and so forth, we could determine what may have happened, but I'm not aware of any such figures now.

The CHAIRMAN. You see what we are doing is we are saying that this would only apply to working for a firm, a defense contractor, with whom that procurement official has specifically dealt with in the preceding 3 years. He could work with all the other contractors he wants to. He's got the whole universe of the private sector where he can work, but he just wouldn't be able to work—if he worked on a Lockheed contract he wouldn't be able to go to work for Lockheed. If he worked on a North American contract he wouldn't be able to go to work for North American. That's all. It seems to me that doesn't throw him out of work. He just couldn't go to work for a particular firm.

Furthermore, as we pointed out yesterday, we have a very common situation where the Defense Department wants to get a good sharp expert, say from a particular firm—say from Boeing—and this man has worked for 10 or 15 years at Boeing and wants to go back and

finish his career with Boeing. Fine. He goes into the Defense Department and he does what he should do—he disqualifies himself on any Boeing procurement. Then he can go and back to Boeing finish his career. That's the way it seems to me the situation ought to be handled. That way there's no conflict of interest. The Defense Department gets his services but they don't have any of the uneasy feeling which I would have if I were head of the Defense Department and had people there who were from Boeing working on Boeing contracts and going back to Boeing. So it seems to me there are ways that you can provide an opportunity to get expert people working for the Government and then going back to private industry and finishing their career.

Mr. ULMAN. As I see, from what you tell me, it would have a very limited impact. On the other hand, as an example, we have lawyers in the Justice Department who have worked on antitrust cases where they are opposed by law firms and they leave to go to those law firms. Now they can't participate in that case, but they can get the job with the law firm, and I have never thought that while they were with the Government they were looking forward to getting jobs with a particular law firm. It's never been a problem in the Justice Department. You say it has been a problem in procurement in the Defense Department. I take it you say that because there are large numbers who do that, from which you conclude that they must have been tempted.

The CHAIRMAN. No. I gave you some documentation, the cases where there was more than just a speculation because they went back to a firm—they went back to a firm after they had worked on a particular contract.

Mr. ULMAN. What's wrong with that?

The CHAIRMAN. Well, I think there may be plenty wrong with that.

Mr. ULMAN. Well, I'd like to know what it is.

The CHAIRMAN. I think any sophisticated taxpayer would wonder what's happened to his money when you see these big overruns and the Defense Department throwing their business to particular contractors and, of course, as you know, most of the procurement by Defense is not in an advertised, competitive bidding; it's by selection.

Mr. ULMAN. I guess from your standpoint I'm an unsophisticated taxpayer.

The CHAIRMAN. At any rate, you acknowledge that you haven't studied the problem here and wish we would wait until you do. What we are saying is we have studied the problem and many others have and we don't see any reason why we should wait.

Now there is another matter that troubles me greatly. The post-Government employment restrictions in S. 555 would apply only to officials at the level of GS-16 or brigadier general. The Joint Committee on Defense Production has found that many officials who would not be covered in any fashion by this legislation have tremendous authority over procurement decisions. In fact, many of the most critical decisions are made by people below the rank of brigadier general.

To give only one example, the official who has the authority to commit the United States to final settlement of overhead cost claims, which can run into hundreds of millions of dollars annually, is normally of the GS-14 or GS-15 level.

This is an additional reason why I believe that the problems dealt with are distinct and merit separate treatment. The problem you address, postemployment use of influence, is probably only a serious problem with respect to officials who occupied a high rank. But for the problem addressed by our bill—the ability of current Government employees to influence procurement—this is not at all true. I think it would be a mistake to try to consolidate the two problems into one package.

Can you tell the committee how the administration bill would prevent the recurring problem that S. 695 addresses?

Mr. ULMAN. Only if the administration bill operated at a lower salary level.

The CHAIRMAN. Do you think there's merit in modifying it so it would?

Mr. ULMAN. Well, I don't know. I can't say on that. There may be merit, but I can't obviously speak for the administration as a whole on that.

The CHAIRMAN. Mr. Ulman, you say that "rigorous internal enforcement of procurement regulations" may be a "more desirable approach" than the 2-year employment restriction contained in S. 695.

Of course, if everyone followed procurement regulations to the letter, we would be in a different situation. But it is still possible to meet every requirement of the procurement regulations and yet show favoritism in the award or administration of a contract. Procurement regulations do not provide for the case in which all requirements can be met by all contractors but one of the contractors is still favored by a procurement official.

That's a tough problem because the favoritism may be difficult to demonstrate—all other things being equal. Would you agree that there is a need to reduce the temptation for that kind of favoritism?

Mr. ULMAN. Only if I accept your underlying premise that there is a temptation, and I'm not prepared to accept that.

The CHAIRMAN. What's that? I missed that.

Mr. ULMAN. I say I would agree with you only if I were to accept your underlying premise that there is a temptation, and I'm not prepared to accept that.

The CHAIRMAN. You're not prepared to accept the notion that there is a temptation for a procurement official—

Mr. ULMAN. I certainly wouldn't.

The CHAIRMAN [continuing]. To favor a firm which might employ him and pay him \$60,000 or \$70,000 salary?

Mr. ULMAN. It wouldn't bother me if I were there. I wouldn't be tempted. I take an oath when I go to work and I'm employed by the Federal Government to act objectively and impartially, and I think that in the vast majority of cases that's what Federal employees do.

The CHAIRMAN. Well, you may or may not be right. I don't know if it's a vast majority of cases. I think we are all human and we all tend to kid ourselves and I think if we're working for the Government and we're dealing with people we like on the outside, we know that they may hire us, I think it might well have some effect and often these decisions are marginal—often they are close—and you're likely to make a decision in favor of the contractor where you shouldn't do it if you feel that might be crucial in whether or not they will hire you.

Mr. ULMAN. Well, we have different viewpoints.

The CHAIRMAN. Mr. Ulman, I'd like to sincerely thank you for your testimony. I found it very useful. From the questions I asked, it may not appear like it, but I found many of your comments and suggestions to be very helpful indeed. They will be given serious consideration.

May I ask, in conclusion, as I did yesterday of Dr. Campbell, whether you will agree to make yourself available to meet with the committee members or staff to iron out any of the problems that exist with regard to this legislation?

Mr. ULMAN. Yes.

The CHAIRMAN. Will you do that?

Mr. ULMAN. Yes.

The CHAIRMAN. Very good. Thank you very much.

Mr. ULMAN. Thank you.

The CHAIRMAN. Our next witness today represents the third office designated in S. 695 to serve on the Conflict of Interest Review Board. He's Mr. Paul Dembling, who serves as General Counsel of the General Accounting Office. Mr. Dembling is a graduate of the George Washington University Law School. He's served for many years in legal positions in the Federal Government. He's served as Deputy General Counsel and as General Counsel for the National Aeronautics and Space Administration, and he's served as General Counsel of the General Accounting Office since 1969.

Mr. Dembling, we are happy to have you. Go right ahead. If you would like to summarize your statement in any way, we will have it printed in full in the record. Would you like to identify the two gentlemen with you?

Mr. DEMBLING. Yes. I'd like to introduce Mr. Harold Lewis, Assistant Director of Federal Personnel and Compensation Division of GAO on my left; and Mr. Raymond Wyrsh, attorney in the Office of General Counsel at GAO.

The CHAIRMAN. All right. Mr. Dembling, go right ahead, sir.

**STATEMENT OF HON. PAUL G. DEMBLING, GENERAL COUNSEL,  
GENERAL ACCOUNTING OFFICE; ACCOMPANIED BY HAROLD E.  
LEWIS, ASSISTANT DIRECTOR, FEDERAL PERSONNEL AND COM-  
PENSATION, GAO; AND RAYMOND WYRSCH, ATTORNEY, OFFICE  
OF THE GENERAL COUNSEL, GAO**

Mr. DEMBLING. I have a short statement that I will summarize to leave more time for questioning as you desire.

[Complete statement follows.]

**PREPARED STATEMENT OF HON. PAUL G. DEMBLING GENERAL COUNSEL, U.S.  
GENERAL ACCOUNTING OFFICE**

Mr. Chairman and members of the committee: I appreciate your invitation to appear as a witness before your Committee today to discuss our views on S. 695 as amended; a bill which if enacted would be cited as the "Defense Production Act Amendments of 1977."

This bill sets forth (1) a code of conduct for contracting officers; (2) reporting requirements for present and former Federal contracting officers; and (3) reporting requirements for current Federal employees, GS-13 equivalent and above, who were formally employed by, or served as a consultant to, a Government contractor and (4) reporting requirements for former Federal Government employees. Also, the bill would establish a Conflict of Interest Review Board to enforce its provisions.

The objectives of S. 695 are to help assure that the Government's business is done properly and that the citizens' confidence in their Government is maintained. We would agree that no Government employee, particularly Federal employees who award and supervise the billions of dollars in contracts and grants for the Government each year, should be placed in a situation where they might feel tempted, or pressure could be exerted by the anticipation of a lucrative job offer outside the Government, to favor their own private economic interests over the interests of the Government. Reasonable steps should be taken to avoid suspicion that this can happen. A strong code of conduct, together with an effective conflict of interest disclosure system, can help provide such assurance.

Our overall difficulty with S. 695 is its piecemeal approach to the problem of enforcing ethical standards in the executive branch. If a Conflict of Interest Review Board were established for contracting officers, one could logically conclude that such boards may be necessary for other occupations.

We believe, as an alternative, that an office of ethics should be established in the executive branch to enforce codes of ethics and financial disclosure regulations for all executive branch employees. In a recent report to the Congress, "Action Needed To Make The Executive Branch Disclosure System Effective" (FPCD 77-23, February 28, 1977), we recommended that the President of the United States establish an office of ethics with adequate resources to address the problems of enforcement and compliance for the executive branch. Among its responsibilities, we stated that this office should:

Issue uniform and clearly stated ethical standards of conduct and financial disclosure regulations as discussed in GAO reports.

Develop financial disclosure forms so that all relevant information is obtained concerning employee interests needed to enforce conflict-of-interest matters.

Make periodic audits of the effectiveness of agency financial disclosure systems on a sample basis to see that they include appropriate procedures for collecting and reviewing statements, and followup procedures to preclude possible conflicts of interest.

Establish a formal advisory service to render opinions on matters of ethical conduct so that all agencies are advised of such opinions.

Provide criteria for positions requiring disclosure statements.

Investigate and resolve ethical conduct matters unresolved at the agency level, including allegations against Federal employees.

Provide a continuing program of information and education for Federal employees.

Administer the financial disclosure system for Presidential appointees under section 401 of Executive Order 11222.

Report annually to the President and the Congress on the effectiveness of the ethics program and recommend changes or additions to applicable laws as appropriate.

We believe such an office could encompass the functions of S. 695 concerning codes of ethics, financial reporting, enforcement, advisory opinions, and oversight responsibility. The office of ethics could be given the additional responsibilities regarding oversight of post-employment reporting requirements.

The Senate is currently considering the "Public Officials Integrity Act of 1977." S. 555 provides for the establishment of an Office of Government Ethics within the Civil Service Commission which would recommend rules and regulations to be promulgated by the President pertaining to the identification and resolution of conflicts of interest. We believe that S. 695 would be useful in prohibiting conflict of interest situations currently not being covered. From an institutional standpoint we take the position that the requirements of S. 695 should be centralized in one office in the executive branch designated to deal with conflict of interest matters. If S. 555 is enacted, the Office of Government Ethics would be suitable for including the S. 695 requirements.

Regarding organizational conflicts of interest, the bill would require persons entering into contracts for conducting research, development, evaluation activities, or for technical and management support services to furnish agencies information concerning possible organizational conflicts-of-interest. While it is recognized that several departments and agencies do have regulations dealing with organizational conflicts of interest, they are not as broad in coverage as is contemplated by the proposed amendment No. 192 to S. 695. There is a need for such coverage in the area of organizational conflicts of interests in Federal procurements.

The proposed amendment substantially reflects our recommendation of last year for the prevention of organizational conflicts of interests in ERDA procurements. In making that recommendation we noted the desirability of clearly defining Government contracting personnel responsibilities for avoiding conflicts in this area, while at the same time stressing our concerns that those responsibilities not introduce unnecessary administrative burden and delay into the procurement process. The proposed amendment includes a \$10,000 threshold amount for sub-contracts but would presumably apply to all prime contracts regardless of amount. The Committee might consider whether the benefits to be derived from the amendment is justified in terms of the administrative burdens on all parties and the possible lessening of competition which may result absent a threshold amount for prime contracts.

This concludes my prepared statement. I will be pleased to reply to your questions.

Mr. CHAIRMAN. Mr. Dembling, I want to thank you very much. I think it's a very good statement. I'm delighted to have your assertion that you seem to support the main thrust of S. 695.

You say, as I now repeat:

The objectives are to help to assure the Government's business is done properly and that the citizens' confidence in their Government is maintained. We would agree that no Government employee, particularly Federal employees who award and supervise the billions of dollars in contracts and grants for the Government each year, should be placed in a situation where they might feel tempted, or pressure could be exerted by the anticipation of a lucrative job outside the Government, to favor their own private economic interests over the interests of the Government.

Of course, that's what we're trying to get at and I very, very much appreciate your recognition of that and your support for it.

Many of the suggestions that are cited on pages 2 and 3 of your testimony (see page 75), are embodied in either S. 555 or S. 695. Do you think that your suggestion would be adequately implemented in the employment disclosure provisions and the provisions on advice to individuals contained in S. 695 were rewritten so that the authority for providing such advice and reviewing such reports were assigned to an organization such as the Office of Government Ethics proposed in S. 555?

Mr. DEMBLING. We felt that it could be covered by the Office of Government Ethics. If the provisions were rewritten so that Office or the Director of that Office would have the responsibility. It could be handled in that fashion, yes.

The CHAIRMAN. You see, we wanted to have an office that had sufficient clout and prestige and independence that it would be really listened to and could have force and effect. Do you think that the creation of such an organization, ethics organization, within the Civil Service Commission, presumably headed by a person with the rank of Assistant Commissioner, could have sufficient independence and enough prestige and clout to be effective in controlling ethical problems in Government?

Mr. DEMBLING. I think it could be. It would depend of course upon the Chairman of the Civil Service Commission and how he operated with the head of the Office of Government Ethics. What autonomy that office was given to enforce the provisions.

The CHAIRMAN. I've got a rather long point I'd like to make before I ask a question.

One matter that concerns me pertains to the post-Government employment restrictions in the administration proposal. That part of

the bill would apply to any contact with a former agency official. I think it's useful. The problem with the former agency official who switches sides and comes back to lobby and twist arms with the agency that formerly employed him, often dealing with people who had been his subordinates, can be quite serious.

With regard to the aspect of Government procurement of most concern to the sponsors of this legislation that is the military. I'm afraid that the Carter proposal, S. 555, would accomplish very little, if anything. That's because there's already a law on the books which applies to all retired military officers and you heard our discussion just before on this. This law is pretty strict. It says that for 3 years after his retirement no officer may sell to any agency of the Department of Defense—and I'd like to read several passages into the record which describes the limitations which already apply to the military. The first is from the DOD Standards of Conduct Directorate. The second passage is from a guidebook prepared by the U.S. Navy for retiring personnel.

The first passage states that:

For the purposes of this statute, the term "selling" includes the following activities: (1) signing a bid proposal or contract; (2) negotiating a contract; (3) contracting an officer or employee of the Department of Defense for the purpose of obtaining or negotiating contracts, negotiating or discussing changes in specifications, prices, costs, allowances or other terms of the contract, or settling disputes concerning performance of the contractor; (4) any other liaison activity with a view toward the ultimate consummation of a sale, even though the actual contract therefore is subsequently negotiated by another person.

Now that sounds pretty restrictive to me and it appears from that definition as if very few official contacts with Defense agencies would be permitted.

The second passage which summarizes rulings of the Comptroller General is even more restrictive.

Any activity undertaken to affect sales is prohibited even though no actual sale or contract is made. The Comptroller General has held that contacts held for the purpose of promoting good will which may lead to future sales falls within the scope of the statutes. Demonstrations or explanations of a company's products are considered part of the selling process. Contacts made for the purpose of determining the requirements of the uniformed service for products which an employer may desire to manufacture may be similarly considered. Under the decisions of the Comptroller General, the retired regular officer may not permit his name to be used as a key to open the door to the Armed Services Procurement Offices for his employer salesman.

Now the reason I took so much time to review these precedents is to demonstrate that the laws proscribing contacts for the contractor for retired military officers are already restrictive. It may be true that the Carter guidelines add further restrictions, but it would be a slight extension on what is already a matter of law insofar as military officers are concerned.

Can you point out to me any significant expansions which the Carter post-Government employment proposals would make over this already impressive legislation we have already on the books?

Mr. DEMBLING. No, I don't think that it does expand that statute. The administration's proposal changes the postemployment activities statute applying to other former employees. It changes the provision in title 18, from 1 year to 2 years. It also broadens the coverage by including informal contacts in addition to the formal contacts which

are prohibited today. That's the extension of title 18 that the administration bill makes. It does not cover all of the postemployment activities that are embraced in S. 695.

The CHAIRMAN. Well, you say that it's broader because it covers informal contacts?

Mr. DEMBLING. Broader than it used to be, yes.

The CHAIRMAN. Yet the present law on military officers, according to the Comptroller General's restrictions, says:

Any activity undertaken to affect sales is prohibited, even though no actual sale or contract is made. The Comptroller General has held that contacts held for the purpose of promoting good will which may lead to future sales falls within the scope of the statutes.

I doubt very much if S. 555 does anything really to change the force of present law with respect to retired military.

Of course, what I'm trying to get at is something that you properly highlighted on your first page when you pointed out that it is desirable to try to prevent the kind of temptation which might be in the way of a procurement official who might be contemplating future employment with a contractor with whom he's dealing, and this is a problem not addressed by the administration bill.

Thank you very much. We appreciate your testimony very much, Mr. Dembling. It was most helpful.

Our final witness this morning is Dr. Gordon Adams. Dr. Adams is Director of Military Research at the Council on Economic Priorities. Dr. Adams is here to present testimony on findings and recommendations pertaining to conflict of interest in the military that grow out of a research study released by the Council on Economic Priorities. He's in a unique position to comment on this legislation because the Council is one of the few organizations that has exhaustively reviewed conflict of interest problems in military procurement.

Dr. Adams received a doctorate in political science from Columbia University. He's served on the faculties of Columbia University and John Jay College. He's also been an International Affairs Fellow at the Council on Economic Priorities. The Council on Economic Priorities also produced an economic analysis of the B-1 bomber and the improper payments by overseas corporations.

Dr. Adams, we are delighted to have you. If you want to abbreviate your statement in any way the entire statement will be printed in full in the record.

#### STATEMENT OF DR. GORDON ADAMS, COUNCIL ON ECONOMIC PRIORITIES

Mr. ADAMS. Thank you very much, Mr. Chairman.

I am delighted to appear today before this committee, Mr. Chairman, to present testimony on behalf of the Council on Economic Priorities with regard to S. 695. The council, as you know, is a public interest research organization based in New York City. Since our creation in 1969, we have published a number of newsletters, reports, and studies investigating social and economic issues of major public importance in such areas as corporate disclosure practices, equal employment, energy costs and alternatives, environmental pollution, and military contracting. Our goal is to publish and disseminate

unbiased and detailed information on the practices of U.S. corporations in areas that vitally affect society.

The council has been involved in research on the problem of conflict of interest for several years, focusing on the Department of Defense. In 1973, we undertook a study of the interchange of personnel between the Department of Defense and military contracting companies. We believe that such interchanges, if widespread, can have a serious effect on defense contracting decisions. Our data source for this study was the reports filed with the DOD pursuant to your own 1969 amendment, Senator Proxmire.

We followed up our initial study, published in 1975, with an August 1975 newsletter, and more recently, with a 1977 newsletter focusing on legislative and administrative efforts to cope with the problems contained in current conflict of interest legislation. In addition, CEP's Executive Director, Alice Tepper Marlin, appeared before the Joint Committee on Defense Production in February 1976, to testify on the problems of inadequate enforcement of existing reporting requirements.

Today we are addressing ourselves to a new piece of proposed legislation which, we believe, will make an important contribution to clarifying the conflict of interest situation and to resolving problems in this area. Although I am aware that S. 695 would apply throughout the Government, I would like to confine my remarks to problems CEP has identified with regard to the Department of Defense, and to comment on the ways in which this legislation would contribute to their solution.

Our study reached three overall conclusions. First, a significant percentage—slightly more than one fourth—of the people leaving the Department of Defense during a 5-year period to accept employment with military contracting companies, took jobs with contractors over which they had exercised some procurement responsibilities. Second, current laws regarding conflict of interest are neither well written nor adequately enforced. Third, the 1969 congressional amendment requiring complete disclosure of high-level interchanges between DOD and military contractors has not been adequately implemented by the Department of Defense.

All three of these problems are addressed and, to some extent, corrected by the bill currently pending before this committee. And today we are addressing S. 695 which we believe will make an important contribution to clarifying the conflict of interest situation and to resolve new problems in this area. Now although I'm aware that S. 695 would apply throughout the Government, I would like to confine my own remarks to problems we identified with regard to the Department of Defense.

Based on reports on file at the Department of Defense, we found that between fiscal year 1968 and fiscal year 1973 slightly more than 400 individuals had left the DOD to accept employment with military contractors receiving over \$10 million annually in defense contracts. Of these 1,400, CEP determined that 379, or about 27 percent, had been in a position at DOD where they might have played an official role in procurement decisions affecting their future employers.

I would like to make it very clear that CEP did not accuse these individuals of violating any law, nor have we said that any of them

committed an act of wrongdoing. We were concerned, rather, with the widespread nature of this pattern of hiring. CEP feels that a tendency of officials to accept employment with contractors over which they had some procurement responsibility cannot help but soften the normal commercial distance which should exist between a seller, who is trying to do profitable business for his firm, and a buyer, who is trying to obtain satisfactory goods at the lowest possible price. CEP recognizes that this type of personnel exchange is only one of many factors which can affect the contracting relationship to the detriment of the taxpayers, but we also want to underline its importance.

During the course of our study, we analyzed the conflict of interest laws currently in effect and certain legislative proposals which had not yet been enacted. We found no current law which addressed the problem we identified. Generally, conflict of interest law has focused on the use of influence by a person after he or she leaves the employment of the Federal Government. For instance, retired military officers are prohibited from "selling" supplies and services to the Department of Defense. Additionally, a former Federal employee is prohibited from representing a private organization as an "agent or attorney" on a matter that he or she had dealt with as a Government employee. The administration's current proposal would make a useful contribution to toughening up these requirements.

It seems ironic, however, to be so concerned about an individual's use of influence after he or she leaves Government and to pay so little attention to the much greater influence a current Government employee could bring to bear while anticipating employment with a military contractor. This type of influence could take many forms. A procurement official might approve a minor design change which could increase a contractor's profit by millions of dollars. He or she might describe requirements for a system in a way that gave one company an advantage over its competitors. The possibilities for favoritism while in office are endless and, I acknowledge, difficult to pin down. It is very hard from the outside to determine that one contractor ought to be chosen over another on grounds different from those offered by the DOD to justify its decision. Moreover, it is virtually impossible to prove that the expectation of future employment was the key element in a procurement officer's decision while in the Pentagon.

CEP was very concerned about this problem and we feel it has been adequately dealt with in the Proxmire-Bayh bill, which limits the expectations procurement officers can have about employment opportunities with contractors over which they have exercised authority in the DOD.

My major concern about section 801 of this bill, which contains the basic prohibition, is that you may have defined the term "contracting officer" too narrowly. Many officials in sensitive positions may escape coverage if the bill takes effect in its present form. I would suggest that you include other, more general job descriptions in this definition, to ensure that all officials with a procurement role are covered.

There is one other point I want to make before leaving this topic, and in light of the preceding testimony I think it's particularly

worthwhile to make it. One of the major criticisms leveled at the CEP study and one that I am sure has been or will be raised in opposition to S. 695 is that this reform would deny employment to a large number of individuals simply because they had served in the military or worked for the Federal Government. I think this argument should be discounted for several reasons.

First, although the number of officials leaving the Pentagon to go to work for military contractors seems large, a much greater number of people who leave DOD each year do not go to work for military firms. The Fitzhugh Commission estimated that less than 5 percent of all retiring military officers go to work for a defense contractor in any capacity. This is very important because the other 95 percent would feel no effect whatsoever from this legislation. Moreover, the number affected would decline even further because the legislation concerns only procurement officials. Pilots, combat officers, and technicians would face no such prohibition. Finally, since most procurement officials deal with only a few contractors, the number of individuals who would be totally barred from employment in the defense industry would be miniscule. A contracting official concerned, say, with Lockheed and Northrop during the last 3 years of his employment, would be free to work with a multitude of other firms in the industry.

In view of the minimal disruption that most officials would experience, CEP believes that this bill represents a fair and just approach to the problem. By removing the possibility of employment for actions favorable to a military contractor, this bill should also remove the incentive procurement officials might feel to favor a contractor's interest.

Before concluding, I would like to make some remarks about section 803, which establishes a government-wide disclosure requirement for officials coming to the Government from contractors or leaving the Government to accept employment with contractors. This section would extend requirements that currently apply to DOD and NASA to all other Government agencies. The reports made under this requirement would be filed with and reviewed by the new Conflict of Interest Review Board.

Past DOD reports filed on the basis of the 1969 amendment served as the basis for CEP's study, "Military Maneuvers." These reports are a useful reference and we endorse the extension of this requirement throughout the Government. CEP agrees with your statement, Senator Proxmire, that "sunlight is a great disinfectant" and that public disclosure of such details is useful.

I have one suggestion on this section, however. The DOD and NASA reports are currently filed with those agencies and it is unclear, as the bill is written, whether the existing reports would continue to be filed with these agencies, or whether they should also go to the new Board. I think that this area of possible confusion should be clarified, and I recommend that you seriously consider transferring the authority to receive these existing reports to the Board. Based on our research, we concluded that DOD had done an inadequate job of fulfilling its responsibilities to assure compliance with the filing requirement, to review reports for possible conflicts of interest, and to summarize the reports to Congress. CEP found that between 1971 and 1973 a minimum of 1,500 reports that should have been filed were not filed and

DOD had made no effort to improve compliance. We have noted in our research there are considerable problems in the DOD followup on this particular reporting requirement and I would like to introduce into the record at this point chapter 6 of the "Military Maneuvers," our report on the problem, which summarizes some of those problems.

[See appendix IV, page 235.]

We understand that DOD has recently taken some steps to improve its implementation of the Proxmire disclosure requirement. We reviewed these steps in our recent newsletter and concluded that it was too early to judge their effectiveness. Ultimately, I believe that the DOD may never take this requirement completely seriously. Therefore, the Review Board should be given the authority to implement this requirement.

This concludes my presentation today, Mr. Chairman. I want to thank you for the opportunity to testify and I will be glad to answer any questions.

[Complete statement follows.]

PREPARED STATEMENT OF DR. GORDON ADAMS, DIRECTOR OF MILITARY RESEARCH, COUNCIL ON ECONOMIC PRIORITIES

I am delighted to appear today before this committee, Mr. Chairman, to present testimony on behalf of the Council on Economic Priorities with regard to S. 695. The Council, as you know, is a public interest research organization based in New York City. Since our creation in 1969, we have published a number of newsletters, reports and studies investigating social and economic issues of major public importance in such areas as corporate disclosure practices, equal employment, energy costs and alternatives, environmental pollution and military contracting. Our goal is to publish and disseminate unbiased and detailed information on the practices of U.S. corporations in areas that vitally affect society.

The Council has been involved in research on the problem of conflict of interest for several years, focusing on the Department of Defense. In 1973, we undertook a study of the interchange of personnel between the Department of Defense and military contracting companies. We believe that such interchanges, if widespread, can have a serious effect on defense contracting decisions. Our data source for this study, as you are aware, Sen. Proxmire, was the reports filed with the DoD pursuant to your own 1969 amendment.

We followed up our initial study, published in 1975, with an August, 1975 newsletter and, more recently, with a 1977 newsletter focusing on legislative and administrative efforts to cope with the problems contained in current conflict of interest legislation. In addition, CEP's Executive Director, Alice Tepper Marlin, appeared before the Joint Committee on Defense Production in February, 1976, to testify on the problems of inadequate enforcement of existing reporting requirements.

Today we are addressing ourselves to a new piece of proposed legislation which, we believe, will make an important contribution to clarifying the conflict of interest situation and to resolving problems in this area. Although I am aware that S. 695 would apply throughout the government, I would like to confine my remarks to problems CEP has identified with regard to the Department of Defense, and to comment on the ways in which this legislation would contribute to their solution.

Our study reached three overall conclusions. First, a significant percentage—slightly more than one fourth—of the people leaving the Department of Defense during a five-year period to accept employment with military contracting companies took jobs with contractors over which they had exercised some procurement responsibilities. Second, current laws regarding conflict of interest are neither well written nor adequately enforced. Third, the 1969 Congressional amendment requiring complete disclosure of high-level interchanges between DoD and military contractors has not been adequately implemented by the Department of Defense.

All three of these problems are addressed and, to some extent, corrected by the bill currently pending before this Committee.

Based on the reports on file at the Department of Defense, CEP found that between FY1968 and FY1973 slightly more than 1400 individuals had left the DoD to accept employment with military contractors receiving over \$10 million annually in defense contracts. Of these 1400, CEP determined that 379, or about 27%, had been in a position at DoD where they might have played an official role in procurement decisions affecting their future employers.

I would like to make it very clear that CEP did not accuse these individuals of violating any law, nor have we said that any of them committed an act of wrongdoing. We were concerned, rather, with the widespread nature of this pattern of hiring. CEP feels that a tendency of officials to accept employment with contractors over which they had some procurement responsibility cannot help but soften the normal commercial distance which should exist between a seller, who is trying to do profitable business for his firm, and a buyer, who is trying to obtain satisfactory goods at the lowest possible price. CEP recognizes that this type of personnel exchange is only one of many factors which can affect the contracting relationship to the detriment of the taxpayers, but we also want to underline its importance.

During the course of our study, we at CEP analyzed the conflict of interest laws currently in effect and certain legislative proposals which had not yet been enacted. We found no current law which addressed the problem we identified. Generally, conflict of interest law has focused on the use of influence by a person after he or she leaves the employment of the Federal government. For instance, retired military officers are prohibited from "selling" supplies and services to the Department of Defense. Additionally, a former federal employee is prohibited from representing a private organization as an "agent or attorney" on a matter that he or she had dealt with as a government employee. The administration's current proposal would make a useful contribution to toughening up these requirements.

It seems ironic, however, to have so much concern about an individual's use of influence after he or she leaves government and so little concern about the much greater influence a current government employee could bring to bear while anticipating employment with a military contractor. This type of influence could take many forms. A procurement official might approve a minor design change which could increase a contractor's profit by millions of dollars. He or she might describe requirements for a system in a way that gave one company an advantage over its competitors. The possibilities for favoritism while in office are endless and, I acknowledge, difficult to pin down. It is very hard from the outside to determine that one contractor ought to be chosen over another on grounds different from those offered by the DoD to justify its decision. Moreover, it is virtually impossible to prove that the expectation of future employment was the key element in a procurement officer's decision while in the Pentagon.

CEP was very concerned about this problem and we feel it has been adequately dealt with in the Proxmire-Bayh bill, which limits the expectations procurement officers can have about employment opportunities with contractors over which they have exercised authority in the DoD.

My major concern about Section 801 of this bill, which contains the basic prohibitions, is that you may have defined the term "contracting officer" too narrowly. Many officials in sensitive positions may escape coverage if the bill takes effect in its present form. I would suggest that you include other, more general job descriptions in this definition, to ensure that all officials with a procurement role are covered.

There is one other point I want to make before leaving this topic. One of the major criticisms levelled at the CEP study and one that I am sure has been or will be raised in opposition to S. 695 is that this reform would deny employment to a large number of individuals simply because they had served in the military or worked for the federal government. I think this argument should be discounted for several reasons.

First, although the number of officials leaving the Pentagon to go to work for military contractors seems large, a much greater number of people who leave DoD each year do not go to work for military firms. The Fitzhugh Commission estimated that less than five percent of all retiring military officers go to work for a defense contractor in any capacity. This is very important, because the other ninety-five percent would feel no effect whatsoever from this legislation. Moreover, the number affected would decline even further because the legislation concerns only procurement officials. Pilots, combat officers, and technicians would face no such prohibition. Finally, since most procurement officials deal with only

a few contractors, the number of individuals who would be totally barred from employment in the defense industry would be miniscule. A contracting official concerned, say, with Lockheed and Northrop during the last three years of his employment, would be free to work with a multitude of other firms in the industry.

In view of the minimal disruption that most officials would experience, CEP believes that this bill represents a fair and just approach to the problem. By removing the possibility of employment for actions favorable to a military contractor, this bill should also remove the incentive procurements officials might feel to favor a contractor's interests.

Before concluding, I would like to make some remarks about Section 803, which establishes a government-wide disclosure requirement for officials coming to the government from contractors or leaving the government to accept employment with contractors. This section would extend requirements that currently apply to DoD and NASA to all other government agencies. The reports made under this requirement would be filed with and reviewed by the new Conflict of Interest Review Board.

Past DoD reports filed on the basis of the 1969 amendment served as the basis for CEP's study, *Military Maneuvers*. These reports are a useful reference and we endorse the extension of this requirement throughout the government. CEP agrees with your statement, Sen. Proxmire, that "sunlight is a great disinfectant" and that public disclosure of such details is useful.

I have one suggestion on this section, however. The DoD and NASA reports are currently filed with those agencies and it is unclear, as the bill is written, whether the existing reports would continue to be filed with these agencies, or whether they should also go to the new Board. I think that this area of possible confusion should be clarified, and I recommend that you seriously consider transferring the authority to receive these existing reports to the Board. Based on our research, we concluded that DoD had done an inadequate job of fulfilling its responsibilities to assure compliance with the filing requirement, to review reports for possible conflicts of interest, and to summarize the reports to Congress. CEP found that between 1971 and 1973 a minimum of 1500 reports that should have been filed were not filed and DoD had made no effort to improve compliance. At this point, I would like to submit for the record an excerpt from *Military Maneuvers* which summarizes some of the problems we found with DoD's implementation of this requirement.

We understand that DoD has recently taken some steps to improve its implementation of the Proxmire disclosure requirement. We reviewed these steps in our recent newsletter and concluded that it was too early to judge their effectiveness. Ultimately, I believe that the DoD may never take this requirement completely seriously. Therefore, the Review Board should be given the authority to implement this requirement.

This concludes my presentation today, Mr. Chairman. I want to thank you for the opportunity to testify and I will be glad to answer any questions.

The CHAIRMAN. Well, thank you very much, Mr. Adams, for an excellent and thoughtful and perceptive statement.

In your testimony you suggest that the bill may need further clarification with respect to the term "contracting officer." You say that "many officials in sensitive positions may escape coverage if the bill takes effect in its present form."

Mr. ADAMS. That's right.

The CHAIRMAN. And you go on to say, "I suggest you include other more general job descriptions in this definition to insure that all officials with a procurement role are covered."

Now that's a suggestion I think we will want to consider very carefully. Do you have any specific suggestions as to what could be done to improve the definition?

Mr. ADAMS. I have some thoughts about possible language. Although these are not necessarily legal wordings, Senator, terms such as "a person who evaluates contractor performance" or "persons who exercise other oversight over procurement actions," or "persons who participate in weapon systems milestone decisions," are good exam-

ples. All of those tend to broaden the definition that's currently in the legislation to cover a wider range of officials.

The CHAIRMAN. Can you give us any notion of how much broader a number of officials would be included if we made the kind of redefinition you propose?

Mr. ADAMS. I couldn't give you a precise number. I would describe the current definition as one that applies to plant representatives and project managers. It's a project managers definition. I don't know the number of officials in the Department of Defense beyond this level who would be covered. In any case, the number doesn't alter the problem of the narrowness with which the current definition would apply, I think my suggestions would capture some serious conflict of interest problems higher up the ladder.

The CHAIRMAN. There's been a suggestion that the functions assigned to the Conflict of Interest Review Board should be combined into one office such as the Office of Government Ethics proposed in the administration's conflict of interest bill. The argument has been made that this is a hybrid group that we propose with the Civil Service Commissioner, the chairman, the GAO and the Attorney General. They are very busy and to expect them to give any attention to this is unrealistic. Do you think these functions could be combined in a new office proposed by the Administration of Government Ethics?

Mr. ADAMS. I have several thoughts on that. I haven't reviewed the administration's Office of Ethics proposal in any detail. My sense is that combining the two is probably acceptable with a couple of reservations that I think are worth the committee's attention.

The first is that it would be useful to have a representative of the Attorney General on the Conflict of Interest Review Board, as has been proposed, since that agency would probably be responsible for the enforcement of S. 695 and any provisions of S. 555 introduced into the current statutes.

As to the other reservation, I took great note of the GAO testimony that preceded me that the actual authority of the proposed Office of Ethics to enforce the requirements you introduced in S. 695 may not exist under the current draft of S. 555. So if the Board were transferred to an Office of Ethics, the Senators and Members of the House concerned would want to look carefully at the language to provide adequate responsibilities and authority to that office to grant waivers and exceptions, to review data being reported to that office and to request enforcement where necessary.

The CHAIRMAN. I appreciate that very much. That's an excellent caution.

At one point in your testimony, you appear to contradict one of the key assertions made by the witness from the Department of Justice, Mr. Ulman, in support of his suggestion that the committee defer action on this legislation. In his prepared remarks, he said:

At the present time, however, we are not aware of data or information establishing the seriousness of this problem. We have considerable reservations about a statute that would impose substantial restrictions on employment opportunities on the sizable number of persons who would never seek to curry favor with a contractor in this manner in order to reach a few who might.

On the other hand, you refer to the "minimal disruption" that would be felt. Could you respond to the expression of concern by Mr. Ulman?

Mr. ADAMS. I would be happy to, Senator. In our testimony we define one situation which would free a number of procurement officials from problems, that is, those officials accepting employment with contractors with whom they had not dealt in a procurement capacity while in Government. So I think the bill is very carefully drafted to avoid casting too wide a net.

You, yourself, Senator, referred this morning to another instance where the net is more carefully defined than the Justice Department testimony suggests. Officials who come in from a contractor and agreed in advance not to participate in decisions involving that company thereby waive the applicability of this legislation to actions that they might take as a procurement official.

As I have said in my testimony, the number of officials that we found in a potential conflict of interest situation is small. I don't want to minimize the importance of that, Senator. I think it's worth saying not only that one conflict of interest is one too many, but 379 over a 5-year period are far too many and could affect millions of dollars of taxpayers money in procurement decisions.

In other words it is a real problem but sufficiently small in numbers that strong legislation won't seriously hamper employment opportunities for the vast majority of Pentagon employees seeking employment in defense industry or elsewhere in the private sector.

There may be one other problem, however. If the definition were extended to include some of the categories I suggested in response to your previous question, you may end up dealing with officials in the Department of Defense who have reviewed procurement actions involving a substantial number of companies, if not all of the companies in the defense industry. I am sure, as previous research by this committee and the Joint Committee on Defense Production shows that there are a number of officials at a very top level in the Defense Department for whom this would be a real problem. My answer to the problem that might pose for people operating at that level is that it is precisely for those situations that the waiver power granted to the Review Board becomes important. If the Board examines those cases and looks at the importance and utility of that official to the industry, it will be in a position to make a judgment about the desirability of a waiver.

So I think the bill is well drafted to deal with the problem in contrast to the view of the Department of Justice. I note, incidently, that the Department of Justice has not really looked at the data to verify their assertion.

The CHAIRMAN. Thank you. That's a most helpful and thoughtful answer. Thank you very much, Mr. Adams.

I'd like to just make a closing statement. I would like to observe that there are some conflicts in the testimony we have heard this morning about conflict of interest. Our first witness, representing the Department of Justice, demonstrated what can only be characterized as a lack of knowledge about the problems which S. 695 seeks to halt. In spite of the impressive documentation that has been compiled over the years by various committees of Congress, by the Fitzhugh Commission, by private research groups and by Pentagon officials themselves, the Justice Department apparently persists in the belief that there is no problem if they do not recognize it.

Of even greater concern to me is Mr. Ulman's assertion that "It wouldn't bother me" as he said, to know that a procurement official was going to work for a firm over which he exercised procurement authority while he was a Federal official. I think that's astounding, especially in view of the documentation of what this can lead to.

The position of the Justice Department appears to be that if an abuse is not committed by a majority of potential offenders, then it is not an abuse at all. Moreover, the restrictions proposed in S. 695 do not—as the Justice Department appears to think—impose undue burdens on a very large population of civil servants. The restrictions apply only to certain people, only to certain, identifiable contractors, and only to contracts of a certain size.

I am glad to say that the other witnesses this morning did not show the same misunderstanding of the problems and the bill that seems to exist at the Justice Department. Mr. Dembling of the General Accounting Office and Mr. Adams of the Council on Economic Priorities are familiar with both actual abuses and, more importantly the potential for abuse that exists in connection with contract favoritism and post-Government employment.

Their testimony revealed, as the Justice Department testimony did not reveal, that the public and its Government cannot afford to be uncertain about the motives of procurement officials in making decisions that affect millions or billions of dollars of the taxpayers' money. Whenever there is such uncertainty, the history of human experience shows that it should be resolved by acting as though men are imperfect and susceptible to temptation. That is the prudent course that men and governments have followed through the ages in regard to conflict of interest. That is the prudent course which S. 695 attempts to pursue. It is both prudent and not unnecessarily burdensome. I hope in the near future that the Administration will come to see this bill for what it is—an additional piece of long overdue conflict of interest legislation, and not an alternative to its own useful and constructive bill.

The committee will stand in recess until 10 o'clock Monday morning when we have our final session on this bill.

[Whereupon, at 11:20 a.m., the hearing was recessed, to reconvene at 10 a.m. Monday, May 23, 1977.]

The first part of the report deals with the general situation of the country and the progress of the work done during the year. It is followed by a detailed account of the various projects and the results achieved. The report concludes with a summary of the work done and a list of the names of the staff members who have been engaged in the work.

The second part of the report deals with the financial statement of the organization. It shows the income and expenditure for the year and the balance sheet at the end of the year. It also shows the details of the various items of income and expenditure and the names of the persons who have been engaged in the work.

The third part of the report deals with the general remarks of the organization. It discusses the various problems which have arisen during the year and the steps which have been taken to deal with them. It also discusses the future plans of the organization and the steps which will be taken to carry them out.

The fourth part of the report deals with the names of the staff members who have been engaged in the work during the year. It lists their names and the positions which they have held.

## CONFLICT OF INTEREST LEGISLATION

MONDAY, MAY 23, 1977

U.S. SENATE,  
COMMITTEE ON BANKING, HOUSING, AND URBAN AFFAIRS,  
*Washington, D.C.*

The committee met at 10 a.m., in room 5302, Dirksen Senate Office Building, Hon. William Proxmire (chairman of the committee) presiding.

Present: Senators Proxmire and Schmitt.

### OPENING STATEMENT BY SENATOR PROXMIRE

The CHAIRMAN. The committee will come to order.

Today the committee will complete hearings on S. 695, a bill to reduce opportunities for favoritism in Government procurement. This proposed legislation was introduced in February by myself, Senators Bayh and Brooke, and others. I am happy to report that the companion measure will be reintroduced in the House in the next few weeks by Representative Charles Bennett with over 50 cosponsors.

Both House and Senate bills would do three things. They would place a 2-year employment limitation on former Federal procurement officials with regard to certain Federal contractors. They would require employment disclosure reports by certain civil servants entering or leaving Federal service. And they would set up a Conflict of Interest Review Board to examine and issue advisory opinions on disclosure statements.

We have had 2 days of very interesting hearings on the bill from Government witnesses and from sponsors and cosponsors of the legislation. Today's witnesses represent the public viewpoint on this measure. We are privileged to have with us David Cohen, the president of Common Cause, and Leonard Meeker, an attorney from the Center for Law and Social Policy.

I would like to note for the record that the committee also invited testimony from several other organizations representing individuals whose interests might be affected by this legislation. Among these organizations were the Air Force Association, the Association of the United States Army, the Navy League, the American Defense Preparedness Association, the Retired Officers Association, the Reserve Officers Association, and the National Security Industrial Association. All of them declined to present testimony or to submit statements.

I'm glad to welcome David Cohen. Mr. Cohen, you have long been a spokesman for the public. We are anxious to have your testimony. Go right ahead and introduce your colleague if you would like to do so.

## STATEMENT OF DAVID COHEN, PRESIDENT, COMMON CAUSE

Mr. COHEN. With me, Mr. Chairman, is Katy Schrocher, who is a member of our issue development staff and among her responsibilities includes working in conflict of interest, financial disclosure, and other ethics related matters.

I very much appreciate being able to testify here and what I would like to do if I may, Mr. Chairman, is read my testimony because some of the specific aspects of it doesn't lend itself so well to summary, but I welcome any kind of dialog along the way and I don't think you have to sit and listen to me read it before we get into any questions.

The CHAIRMAN. Well, if you do skip any part of it, we will be happy to have it printed in full in the record.

[Complete statement follows:]

### PREPARED STATEMENT OF DAVID COHEN, PRESIDENT, COMMON CAUSE

Common Cause appreciates this opportunity to testify today on S. 695 and the conflicts of interest problems it addresses, particularly the revolving door. We would like to commend Chairman Proxmire for his continuing outspoken concern in this area, and we are pleased that the Committee is undertaking to shut the door.

The legislation considered today bears directly and vitally on government's earning trust and confidence. It sets a high and necessary standard for integrity and accountability by government employees and officials.

Citizens are deeply concerned by the role that the personal interests of public officials and the superior access of special interest groups play in the policy-making process. Unfortunately, this is too often the case. Sometimes officials have a financial interest of their own in the very matters that are affected by their duties. Such conflicts of interest can occur in several ways: through public officials having stock holdings which are related to their official duties, through the acceptance of gifts and favors from those who do business with the government, and through the maintenance of outside interests or sources of income. The result, however is usually the same. These conflicts undermine the integrity and objectivity of public servants.

Such conflicts are also created by the revolving door between federal agencies and the private enterprises they regulate or contract with. Officials and employees who used to work for private enterprise may have continuing financial ties with them, such as shared income arrangements or receipt of pension benefits. Those who anticipate future employment with certain firms have a vested interest in accommodating them while in office, for example, by helping a firm obtain a contract.

The nature of the conflict of interest problem is government-wide. It affects Congress, the executive branch and the judiciary. Existing statutes and regulations have been only casually enforced. Conflict of interest policy and enforcement have not been treated seriously by either Democratic or Republican Administrations. In recent surveys over the last two years in thirteen agencies and three executive departments, the General Accounting Office found that no less than 12 percent of the employees required to file financial disclosure statements had apparent conflicts between personal financial interests and their official duties. GAO also found that 10 percent of those required to file financial statements had failed to do so.

Under present procedures, agency employees are supposed to file annual financial statements with a designated official in their agency. Sometimes these statements are not filed at all, and there is no followup enforcement to obtain them. The statements are supposed to be reviewed for any real or potential conflicts of interest. Often this review is done by untrained employees and is so superficial that blatant conflicts are undetected. Criteria for determining conflicts are often not adequately developed and used. When conflicts are spotted, notification of required remedial steps is sometimes slow and followup checks to see whether the conflict was resolved are sometimes non-existent. Exemptions are often granted in secret, so that no remedial action is required at all.

Review by the Civil Service Commission of line agency enforcement of conflict regulations has been virtually nonexistent. This is not surprising given that the Commission had only one attorney devoted to ethics matters for the entire executive branch during fiscal years 1976 and 1977. In a recent FOIA request to the Office of General Counsel, CSC, Common Cause requested copies of the entire written output of the Counsel's office on ethics matters for 1975-76. The response indicated that the CSC had no budget specifically allocated to ethics; that the CSC had no information on other agencies' ethics budgets; and that the written ethics material (i.e., interpretations, general guidelines, etc.) generated by the CSC was minimal.

#### POSTEMPLOYMENT RESTRICTIONS

Existing statutory postemployment prohibitions are riddled with loopholes. 18 U.S.C. 207 does not in any way disqualify former government employees from acting as agent or attorney for private interests before an agency in general rule-making proceedings or in the formulation of general policy or standards. An individual is not disqualified on a matter even if he or she was deeply involved in developing the agency's proposed rules or preliminary policy on that subject.

Further, section 207 does not prohibit postemployment activities that may be described as aiding or assisting another. As construed by former Attorney General Robert Kennedy:

"An individual who has left an agency to accept private employment may, for example, immediately perform technical work in his company's plant in relation to a contract for which he had official responsibility—or, for that matter, in relation to one he helped the agency negotiate." (Memorandum of Attorney General Regarding Conflict of Interest, February 1, 1963, 28 F.R. 985)

Third, the statute does not apply to matters arising after an employee or official has left, and both are free to appear before the agency on those matters the day after they leave the government.

#### EXISTING REGULATIONS

Common Cause recently completed a survey of the postemployment regulations of twenty-two agencies.<sup>1</sup> Ten of those agencies impose more stringent restrictions on postemployment activities than required by section 207.<sup>2</sup> For example, FTC regulations prohibit former employees from participating through any form of professional consultation or assistance in any proceeding or investigation pending before the FTC while they were with the Commission unless specifically authorized. (16 C.F.R. 4.1(b))

Six of the agencies require that a former employee obtain authorization from the agency before he may appear before it.<sup>3</sup>

Only the SEC, DOC and DOI have regulations that go beyond the statute with respect to negotiations for private employment while still in government service.

Finally, only the SEC and DOD impose any postemployment reporting requirements on former employees.

#### POSTEMPLOYMENT ACTIVITIES

The only comprehensive data available on postemployment activities is on former Defense Department employees. Under the Proxmire amendment, former civilian employees at Grade GS-13 and above and retired officers above the rank of major must file reports with the Department for 3 years after leaving DOD if they accept employment with a defense contractor.

Recently, as Senator Proxmire reported, the Pentagon experienced a sharp increase in the number of former military officers and high level civilians taking defense industry jobs. During fiscal year 1976, there was a 68-percent increase over fiscal year 1975 in the number of former officers taking such jobs, while the number of civilian employees going to the defense industry increased by 178 percent.

The report also showed an increase of 120 percent over fiscal year 1975 in the number of people coming to the Pentagon from the defense industry.

<sup>1</sup> Departments of Agriculture; Commerce; HEW; HUD; Interior; Defense; Justice; Labor; State; Transportation; Treasury; CAB, FPC, SEC, ICC, GSA, FTC, FRB, FMC, FCC, EPA, and CFTC.

<sup>2</sup> FPC, SEC, FTC, FRB, FMC, FCC, CFTC, DOD, HUD, and DOL.

<sup>3</sup> FPC, SEC, FTC, FMC, CFTC, DOL.

The absence of an across-the-board reporting requirement makes it impossible to cite comprehensive statistical data. DOD figures and individual examples from press reports nevertheless suggest a widespread practice of public officials moving from government into jobs with client firms, and then engaging in activities for such firms that involve their former agency.

In the summer of 1976, Common Cause conducted a study (*Serving Two Masters*) to determine the extent to which agency employees who subsequently took jobs with companies regulated by their agency kept up business contacts with their former agency. Our survey noted that 28 officials from 11 agencies, according to media reports, left the government for jobs with regulated companies or law firms that represent such companies. Our findings showed that 20 of the 28 individuals had contacted officials in their former agency on matters of agency policy or specific proceedings. None of these individuals, it is important to note, violated any law or regulation.

We found the same revolving door situation at the Food and Drug Administration. Twelve lawyers left the General Counsel's office to take non-government jobs in the last five years. The Center for Science in the Public Interest reports that all but one of them took industry jobs.

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Section 801(4)(c) would prohibit a contracting officer for a two year period after leaving government from accepting any gifts, payment or employment from any contractor working on a contract with which the officer was involved. Subsection (d) further prohibits for an additional three year period—for a total of five—accepting employment created, supported or subsidized under such contract.

Common Cause agrees with the thrust and purpose of these provisions. Government employees should not accommodatively design, award or administer contracts with an eye toward later employment with the contractor. Nor should employees design or award contracts which will guarantee them a later job under the contract. The procurement process demands impartial and unbiased decision-making. If that standard is not met, the potential is enormous for wasteful spending and contract terms that disadvantage the government.

The bill defines a contracting officer as any government employee authorized to select sources of supply or describe requirements for, award, terminate or administer any contract. We believe it is particularly important that this definition include officers who determine in the first instance that a contract should be let. That determination is especially vulnerable to manipulation, as the nature of the decision can be such that only one contractor could ever fill the requirements.

We recommend that high officials who would not be affected by the company-specific ban on employment be prohibited for a period of at least two years from having any contact for pay—formal or informal—with their former agency.

A reasonable cooling off period is necessary to insure that a former official cannot exert undue influence on the contracting process. This is essentially what the House Government Operations Committee has proposed in its bill to establish a Department of Energy.

We also believe the bill's postemployment prohibitions should not become in fact an industrywide ban on employment. This is particularly likely to happen with high level officials, who may by regulation or statute have the responsibility to sign off on all contracts. We suggest that the company-specific employment ban be activated for high-level officials when they go outside of normal procurement contract channels. We recognize that each agency of the government has different procurement practices and procedures. We would be happy to work with this Committee in identifying those, so that enforcement of this employment ban can be monitored. In addition, business competitors can likely be counted on to plan their role of aggressive-competitor and ring the bell when normal procedures have not been followed in the awarding of a contract.

We feel that these proposals must be complemented by a tough lobby disclosure bill, which covers efforts to lobby the executive branch for government contracts. This would add an important monitoring mechanism to make certain that the conflict of interest provisions are being complied with.

#### PREVIOUS EMPLOYMENT WITH A CONTRACTOR

Conflicts of interest can also occur when a contracting officer is assigned to work on a contract affecting his former private employer. We recommend that provisions be added to the bill to require contract officers to disqualify themselves

if the contract involves an enterprise by whom the officer was employed within the previous two years.

A similar provision has been included in the House version of the bill establishing a Department of Energy.

#### STOCK OWNERSHIP

Common Cause strongly supports section 801(e), which would require contracting officers who hold conflicting stocks to either disqualify themselves from taking any action which could affect that stock, or divest themselves of the offending asset. Stock ownership does present a clear conflict of interest, and we agree that the remedy must be either disqualification or divestiture. However, unless supervisors are aware of the stock holdings of subordinate contracting officers, the system is largely self-policing. We recommend that the legislation make clear that the disclosure systems already in place be structured to insure supervisor awareness of potential conflict situations in which an employee should disqualify himself.

We also believe that stock ownership presents conflicts of interests for those in the Congress. While we are pleased that the House and Senate adopted Codes of Conduct which will require disclosure of stock holdings, we believe that is just a first step. Members of Congress, just as executive branch employees, must deal with the conflicts problems caused by acting on matters which could significantly affect their financial holdings.

#### PREVIOUS AND POSTEMPLOYMENT REPORTING

Common Cause supports the bill's pre- and postemployment reporting requirements. The revolving door problem threatens the impartiality and independence of agencies, both by government employees seeking work in the private sector, and agencies hiring a disproportionately large number of employees from the industries they interface with. Agencies that draw high percentages of their top policymakers from their client companies tend to inherit industry biases or accept industry's point of view on key issues.

Common Cause recognizes that agencies sometimes need the expertise that former employees of client companies can provide. Nevertheless, agencies should maintain a balance and recruit personnel—especially top policymakers—from a variety of sources. Preemployment reporting is necessary to provide a basis for assessing the degree of imbalance and potential bias that exists, so that appropriate remedial action can be taken.

Our study "Serving Two Masters", as we have mentioned earlier, documented a widespread practice of public officials moving into jobs with regulated and contractor firms after leaving government. This practice points to a serious potential for conflicts of interest on the part of employees in virtually every federal agency.

Specifically, we found that:

- 52.5 percent (or 73) of the top 139 employees of the Energy Research and Development Administration used to work for private enterprises in the energy field, and 75 percent of these 73 employees came from ERDA contractors.
- 72 percent (or 307) of the top 429 employees of the Nuclear Regulatory Commission have been employed by private energy enterprises, and 90 percent (or 279) of these 307 employees came from enterprises holding NRC licenses or contracts. Common Cause research also showed that 192 of these 279 employees came from firms that, in addition to having dealings with NRC, also had contracts with ERDA.
- 65 percent of NRC's 162 consultants were presently working both for NRC and private enterprises that are recipients of NRC licenses or contracts.
- 35 percent (or 23) of 66 top Interior Department officials have been employed by private enterprises involved in energy activities, and 52 percent (or 12) of these 23 employees came from private enterprises which have leases from DOI or have received contracts from the Department.

Those who anticipate future employment with their agency's client companies may have a vested interest in acting in behalf of certain companies while in office, or at least in behalf of the industry in general. This conflict is created by the very real opportunity to take jobs with such companies, or with law firms that represent them.

In addition to the conflicts of interest that could arise, the practice of taking jobs with regulated or contractor firms perpetuates the problem of undue industry influence in federal agencies.

We have recently completed a review of the post-employment reports filed by former Defense Department employees since August 1975. One difficulty we found in making sense of the reports was the absence of any indication of whether the work performed for the government involved a contract and, if so, who that contractor was. Therefore, we particularly favor the provisions of section 803(b) (1)(G), which would require that such information be included in the departing employee's report.

#### ADMINISTRATION AND ENFORCEMENT

Common Cause believes that the revolving door problem is governmentwide, occurring in the areas of contracts, grants, regulatory and other professional activities. S. 695 addresses the problem only in the context of contracts, and would not affect the bulk of employees in the regulatory and licensing agencies.

The nature of the problem demands a governmentwide solution. The legislative vehicle used by S. 695—the Defense Production Act—should not foreclose that broader approach. For example, others on whom we would like restrictions placed, such as a ban on contracts with former agencies, are the FDA lawyer who goes to a drug firm, the mine inspector who takes a consulting job with a mining company after leaving the government, and the grant officer who gets a job working on the grant which he awarded.

We recognize that government service is used by many employees to develop valuable training and experience. There is nothing inherently evil about this. Private enterprise will no doubt continue to find government service by prospective employees valuable, just as the government finds previous business or other professional experience useful. What we seek to do, however, is to try to insure impartiality and objectivity in the governmental process.

Common Cause believes that responsibility for the administration and review of postemployment reports and enforcement of postemployment prohibitions must be viewed in the broader context of conflict of interest. Overall authority in these areas should be given to whatever agency or office in the government will be responsible for financial disclosure reports and the resolution of financial conflicts of interest. We must avoid fragmentation of this responsibility, as divided authority in the past has led to inadequate review and enforcement of existing conflict of interest laws and regulations.

Although the Civil Service Commission has failed up to now to play a meaningful role in ethics matters, we have nevertheless concluded, after much analysis, that a fundamentally revitalized Civil Service Commission should be the basic vehicle on which to build a sound executive branch conflict of interest system. We believe the Commission should perform the duties S. 695 would give its Conflict of Interest Review Board, composed of the Chairman of the Civil Service Commission, the Comptroller General and Attorney General.

We would like to insert for the record that portion of our testimony before the Senate Governmental Affairs Committee that deals with enforcement of the proposed public financial disclosure system. We believe this would be useful to the Committee in further explaining how we think such a system should be administered and enforced.

#### ORGANIZATIONAL CONFLICTS OF INTEREST

Common Cause strongly supports Senator Abourezk's proposed amendment to S. 695, which seeks to identify and eliminate organizational conflicts of interest. We would like to commend the Senator for his continuing efforts in this area, and we note that language nearly identical to his amendment was included in S. 36, the fiscal year 1977 ERDA authorization bill.

Organizational conflicts of interest arise in government contracts and other relationships with corporations and private organizations. The considerations which justify eliminating personal conflicts of interest apply with equal force to organizational conflicts. The government must receive impartial and objective information in return for its contract dollar.

The absence of conflict of interest rules for organizations allows, for example, private, profitmaking consulting firms to work for industry clients and government at the same time, on projects that can have a material and substantial effect on an industry's interests. It permits corporations to aggrandize their positions by providing self-serving information to the government. Senator

Abourezk's hearings on this issue in the last Congress made the point very clearly in its examination of a 1974 Bechtel Corp. contract with ERDA. Bechtel contracted to study the comparative economics of coal transportation by unit train and coal slurry pipeline. Bechtel, it turns out, held a 40-percent interest in Energy Transportation Systems, Inc., which hopes to build the pipeline. What conclusion Bechtel reached is not important for our purposes. What is important is that no matter what the conclusion was, it necessarily lacked credibility and even the appearance of objectivity because of Bechtel's special relationship with ETSI. Clearly, the government did not get full value for the contract price.

To remedy this problem, Senator Abourezk's amendment would require each agency and department to promulgate regulations requiring prospective contractors in the areas of research and development, evaluation, and technical and management support systems to provide the agency or department administrator with all relevant information as to whether there is a potential conflict with respect to either being able to render objective and impartial assistance or being given an unfair competitive advantage. The two-pronged nature of the test is important, as the rules will then also apply to possible conflicts in sole source or negotiated contracts where, by definition, the competitive impact test would not apply.

Subsection (b) of the amendment requires an affirmative finding by the administrator that either there is no or little possible conflict, or that conditions have been included in the contract which avoid such conflicts. The subsection also contains a waiver provision, by which an administrator can go ahead with the contract—even though the conflict cannot be avoided—if he finds it is in the best interests of the government to do so. We believe that the legislative history should emphasize that waivers are to be granted sparingly, and only in truly unusual or exceptional circumstances.

We urge that an administrator be required to publish his findings and reasons for granting a waiver in the Federal Register. Without publication, it is possible that a reading of the contract would not indicate the potential for a conflict of interest, particularly where no clause to the contract could be devised which would mitigate the conflict. This is particularly important for third party challenges to the contract. Further, we recommend, that copies of waiver findings be filed with GAO, and that GAO be directed to review them to make certain they are appropriate, in the best interest of the government, and that the conflict could not be avoided or mitigated by adding contract conditions.

We appreciated this opportunity to present our views on these issues, and we stand ready to work with this Committee in the months ahead.

The CHAIRMAN. I might tell Senator Schmitt, if he'd like to intervene at any point we will conduct this a little differently. We only have two witnesses this morning and feel free to interrupt at any time.

Senator SCHMITT. I appreciate that, Mr. Chairman.

Mr. COHEN. The whole point of having these hearings really is another indication of this committee and you, Mr. Chairman, taking the question of conflicts of interest seriously and I think we have too long had a permissive policy on this subject and that permissive policy is what needs correcting. So we appreciate this opportunity to testify and we are pleased the committee is holding hearings on conflict of interest questions as they relate to the revolving door and other aspects, and I hope we can find appropriate ways of shutting that door soon.

The legislation considered today bears directly and vitally on Government's earning trust and confidence. It sets a high and necessary standard for integrity and accountability by Government employees and officials.

Citizens are deeply concerned by the role that the personal interests of public officials and the superior access of special interest groups play in the policymaking process. Unfortunately, this is too often the case. Sometimes officials have a financial interest of their own in the

very matters that are affected by their duties. Such conflicts of interest can occur in several ways: through public officials having stock holdings which are related to their official duties, through the acceptance of gifts and favors from those who do business with the Government, and through the maintenance of outside interests or sources of income. The result, however, is usually the same. These conflicts undermine the integrity and objectivity of public servants.

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The nature of the conflict of interest problem is Governmentwide. It affects Congress, the executive branch and the judiciary. Existing statutes and regulations have been only casually enforced. Conflict of interest policy and enforcement have not been treated seriously by either Democratic or Republican administrations. In recent surveys over the last 2 years in 13 agencies and three executive departments, the General Accounting Office found that no less than 12 percent of the employees required to file financial disclosure statements had apparent conflicts between personal financial interests and their official duties. GAO also found that 10 percent of those required to file financial statements had failed to do so.

The CHAIRMAN. Did GAO find that in the 10 percent that failed to file there were conflicts of interest or were they just—

Mr. COHEN. I think this comes from the lack of public disclosure and that, in turn, results in just often people not bothering to do it with poor enforcement, precisely because there is no public financial disclosure.

The GAO found—

Senator SCHMITT. Excuse me. Just to clarify the answer to the chairman's question, you don't see that that 10 percent is necessarily doing it to avoid identification of a conflict of interest; it's just the fact that they say, well, nobody is going to bother to check up on it, I just won't take the trouble to file?

Mr. COHEN. I am not saying that those 10 percent have conflicts of interest because we don't know because they failed to file; but among those who did file, they did find conflicts among 12 percent. That's my understanding of the data.

I think there are two points on this. One is that there is a need for personal financial disclosure among employees at a certain level. GS-16 is a perfectly reasonable point to cut it off in most instances, not necessarily with procurement officers or contract officers. The legislation that's moving now and that has been cleared by the Senate Government Affairs Committee deals with that problem. Disclosure is one aspect.

The second aspect is what do you do with the disclosure when you find an apparent or probable conflict? I think you can treat conflicts a lot better once you have personal financial disclosure and then you can take whatever the necessary additional steps are to correct the

conflict. And what the GAO has shown is that the lack of public disclosure leads to some people not disclosing and to also unattended conflicts without any followup.

I'd like to turn if I may to one additional point which is that sometimes even when conflicts are spotted, the remedial steps taken are sometimes slow and I think that's why we need a process and procedure for dealing with this in the executive branch level.

In our judgment, review by the Civil Service Commission of line agency enforcement of conflict regulations has been virtually nonexistent. This is not surprising given that the Commission had only one attorney devoted to ethics matters for the entire executive branch during fiscal years 1976 and 1977. In a recent Freedom of Information Act request to the Office of General Counsel, CSC, Common Cause requested copies of the entire written output of the CSC counsel's office on ethics matters for 1975-76. The response indicated that the CSC had no budget specifically allocated to ethics; that the CSC had no information on other agencies' ethics budgets; and that the written ethics material (that is, interpretations, general guidelines, et cetera), generated by the CSC was minimal.

In our judgment, Mr. Chairman and Senator Schmitt, the post-employment restrictions question—

The CHAIRMAN. Before you get into that, I understand you suggest the duties of the Conflicts of Interest Review Board be assigned instead to the Civil Service Commission and yet you have just indicated that the Civil Service Commission hasn't done much in the area of employee ethics in the past. They have assigned, as you say, minimum personnel and they haven't followed up very much.

Do you believe that the Commission could handle the review and advisory functions in S. 695 to give them more duties than they have now?

Mr. COHEN. Well, I think I'd be happy to discuss if I may, Mr. Chairman, the section of our testimony dealing with administration and enforcement which appears on pages 12 and 13 (see page 94).

The CHAIRMAN. Why don't you wait for that. You feel that you have changes, you're suggesting then that would affect this.

Mr. COHEN. That's right. I think any legislation that just had hortatory language to the Civil Service Commission to do the job would not be very good legislation. Therefore I think we know enough to put in some standards and requirements of the Civil Service Commission and I think your own Conflict of Interest Review Board could fit into that framework. In our own study that we did last year, on conflicts of interest, we thought enforcement was a very key aspect of this and unless you built in a pattern of having some outside enforcement to go along with the Government agencies that had to do the job that ultimately the enforcement would break down. But I think it's important to fix responsibility and I think this just validates the point that until now responsibility has not been fixed.

On postemployment restrictions, in our judgment, 18 U.S.C. 207 does not in any way disqualify former Government employees from acting as agent or attorney for private interests before an agency in general rulemaking proceedings or in the formulation of general policy or standards. An individual is not disqualified on a matter even if he or she was deeply involved in developing the agency's proposed rules

or preliminary policy on that subject. As far as we could tell, there has been no Attorney General that has countermanded the statement that Robert Kennedy made when he was Attorney General, in which he said in his memorandum that an individual who has left an agency to accept private employment may, for example, immediately perform technical work in his company's plant in relation to a contract for which he had official responsibility—or, for that matter, in relation to one he helped the agency negotiate.

So you have a situation that based on every aspect of current interpretation, in our judgment, needs correction.

The statute does not apply to matters arising after an employee or official has left, and both are free to appear before the agency on those matters the day after they leave the Government.

On the situation on existing regulations, our own survey which we recently completed, a survey of the postemployment regulations of 22 agencies, 10 of those agencies impose more stringent restrictions on postemployment activities than required by section 207. For example, FTC regulations prohibit former employees from participating through any form of professional consultation or assistance in any proceeding or investigation pending before the FTC while they were with the Commission unless specifically authorized, and there are other regulations as well, but what I think this shows is that there are certainly departments in the Government that feel they have to do something about the problem and the fact that they do it is a suggestion that there needs some corrective legislation, corrective steps taken by Congress, that would begin to establish appropriate legislative standards for the various departments and agencies.

With respect to private employment while still in Government service, only the SEC, the Department of Commerce and the Department of the Interior have regulations that go beyond the statute, and only the SEC and the Defense Department impose any postemployment reporting requirements on former employees.

Now as relates to postemployment activities, the only comprehensive data available on postemployment activities is on former Defense Department employees, and that's because of the Proxmire amendment. The absence of data is not to suggest that nothing should be done about the problem. Because of the change in administration, we urge, and indeed petition the Civil Service Commission to try and require that at least at the upper levels that there be some reporting of postemployment with people leaving the Government. The Civil Service Commission did not respond.

As you reported, Senator Proxmire, the Pentagon experienced a sharp increase in the number of former military officers and high-level civilians taking defense industry jobs. During fiscal year 1976, there was a 68-percent increase over fiscal year 1975 in the number of former officers taking such jobs, while the number of civilian employees going to the defense industry increased by 178 percent.

The report also showed an increase of 120 percent over fiscal year 1975 in the number of people coming to the Pentagon from the defense industry.

The absence of an across-the-board reporting requirement makes it impossible to cite comprehensive statistical data. DOD figures and individual examples from press reports nevertheless suggest a wide-

spread practice of public officials moving from Government into jobs with client firms, and then engaging in activities for such firms that involve their former agency. That's why we say that the problem is across the board and has to be dealt with affecting other agencies as well as the Defense Department.

Just as one example, from our own study, we showed as a result of Freedom of Information requests that 20 of the 28 individuals had contacted officials in their former agency on matters of agency policy or specific proceedings. None of these individuals, it is important to note, violated any law or regulation. These were 28 people at the regulatory commission level and at other high levels. While none of these officials violated any laws or regulations, the absence of policy needs correction and let me turn if I may to S. 695, Mr. Chairman.

Senator SCHMITT. Excuse me. Could I ask a question here and that is, has Common Cause discussed within their own ranks the possibility of defining conflicts of interest to the point where they could be prosecuted rather than trying to devise some mechanism by which somebody leaving the Government cannot hold certain kinds of jobs? I mean, they could hold that job and never have a conflict of interest. Have you discussed that alternative?

Mr. COHEN. Yes; we have. We face that, Senator Schmitt, in a lot of the legislation we deal with, whether it's the sunshine legislation or financial disclosure, conflicts of interest, lobby regulation, campaign finance regulation—and our tendency is that while we believe there ought to be criminal sanctions in the legislation for willful violations, the most serious kinds of violations, that effective enforcement cannot be done through the criminal law. It only takes care of the grossest and worst abuses. In fact, what we are trying to do and what I think all of us are trying to do who are grappling with these problems is to come up with a method of enforcement that is workable, that is not draconian, that is not punitive, but people know where they stand. And that's one of the reasons we want an outside review board to fit into any pattern of enforcement. There are gray area questions and when someone is involved in a gray area question that person should be able to get advice and counsel and then be able to rely on that advice and counsel. That's why I think we try and talk about what the ground rules are and about modes of enforcement that don't rely exclusively and solely on the criminal law.

The CHAIRMAN. If the Senator would yield, the problem is this. It's not only a matter of a person who has worked in the Pentagon or worked in NASA or some other agency and then going to work for the contractor and when he works for the contractor being in a position to improperly influence the Pentagon. That's the lesser concern.

What concerns me is that while he's working in the Defense Department he has an offer of a job or he contemplates that he may have a job if he behaves himself in a certain way with respect to the defense contractor. With that in mind, he of course, with great authority as a Pentagon official, he may be able to throw a contract to a contractor. He may be able to handle a contract in a way that increases the income the contractor will have, the profits the contractor has. And then he leaves the Pentagon and goes to work for that contractor as a kind of reward. He may never do anything once he goes to work for the con-

tractor which is unethical or improper in any way. He may not have anything to do with the Defense Department. Nevertheless, the damage has been done while he is working for the Pentagon before he goes.

So the only way you can reach that is to have some kind of limitation on his employment with the contractor with whom he has dealt after he leaves the Pentagon. That's why my bill tries to reach that.

Senator SCHMITT. Recognizing those issues, there are still basically here a blanket restriction on the individual freedom of an individual once they leave Government and that's not exactly consistent with the previous Common Cause efforts and the current Common Cause efforts, and I'm just curious how you resolve this particular conflict in your mind and I think your previous answer has illuminated that to some degree. You don't think there's any other alternative.

Mr. COHEN. No. I think later in the testimony we deal with the question of both contacts and other restrictions that ought to exist on postemployment activities without advocating an industry-wide ban. I think we are quite aware of the fact that there needs to be—there are balancing values here and I think it is possible to draw post-employment regulations in such a way that does not prevent people from moving inside and outside of Government—I think there's a value in having people move inside and outside of Government—and also, without their necessarily having to be involved or working for companies or firms or institutions that they have had specific dealings with.

So I do not see our thrust as absolutely limiting the freedom of high Government officials.

The CHAIRMAN. Let me give you a specific example of the kind of problem that I think is quite frequent. You have a good man working for Boeing, good in the sense that he would be very helpful to the Government—expert, highly competent—the Government wants him and he would be happy to work for the Government for a few years but his career is with Boeing and he wants to go back with Boeing and he wants to finish his career with Boeing.

What happens in that case, when this man comes into the Defense Department, he comes into the Department with an understanding that he could deal with any other defense contractor except Boeing. As far as Boeing is concerned, he ought to be off it so he can go back to it, and that's the way it ought to be. The legislation that's pending would permit that. He could go into the Defense Department and say that as far as Boeing is concerned he is disqualifying himself and work for the Defense Department for several years and go back to his former employment and finish out his career with the people he worked with with no handicap or no penalty.

Senator SCHMITT. I think it's important that we be very careful to exercise that kind of craftsmanship in any legislation because one of the greatest resources the Government has to work on problems is in the private sector.

The CHAIRMAN. That's right.

Senator SCHMITT. If we close the doors too tightly we will not have access to that resource and it's a tough thing to do and although you have crafted a very simple explanation there—OK, you don't get to work on Boeing—in practice, having been inside the technical world,

it's very tough to actually adhere to that kind of craftsmanship and we're going to have to—maybe the Review Board is the answer, so long as there's some protection once the Board has given a ruling for the individual if they follow that ruling and then later are accused of an illegal act.

Mr. COHEN. You can't change the ground rules. I think people have a right to rely on something that's official and responsible. I think the point that Senator Proxmire made that's important from our view is that you have to look at the conflicts of interest policy in a total way. By that, I mean when you enter Government and when you leave Government. And later in the testimony—I won't bother reading it—we cite some facts from the energy agencies and the imbalance and where they recruited from and the same—it's part of dealing with that balance of recruitment and where you work and the kinds of things you work on that are part of what needs to be dealt with in this instance.

Senator SCHMITT. Well, that's one of certainly the most commonly cited examples, getting people from the petroleum industry working in the Federal Energy Administration, but where are you going to find people more knowledgeable about the oil and gas business than in the petroleum industry?

Mr. COHEN. It's another issue.

Senator SCHMITT. It's very tough.

Mr. COHEN. And it's another debate. No one is saying don't have people from the petroleum industry. What we are saying is don't have most people from the petroleum industry, and it's when you begin to focus on the front end as well as the back end, the entry level as well as the leaving level, that you then can begin to develop what I think are workable approaches to begin to take that issue seriously.

Senator SCHMITT. I think it's important to say that the final test of success of legislation like this, if it becomes law, is whether or not the Government still has access to the kind of talent it needs in order to conduct its business, and if we find that in oversight on such legislation that the Government is losing access to that, then obviously we have not crafted the right kind of law. I think it's important to have that followup.

Mr. COHEN. Senator, I completely agree with you about followup. I think all of this—I have just seen too many programs developed in too many different areas that have not been followed up on and I had a chance to sit in on the nomination of Mr. Medina and I think the very fact that—I think the very fact that you on this committee take your oversight seriously—and I wish other committees would as well and that we had a proper oversight program—but we would never advocate exempting any program from effective and proper oversight, even the ones we are for.

On S. 695, section 801(4)(c) would prohibit a contracting officer for a 2-year period after leaving Government from accepting any gifts, payment or employment from any contractor working on a contract with which the officer was involved. Subsection (d) further prohibits for an additional 3-year period—for a total of 5 years—accepting employment created, supported or subsidized under such contract.

Senator SCHMITT. Can you just draw some limits on what involvement is? For example, I didn't choose to pursue a career in industry, but had I gone on with North American or Rockwell International, for example, after having flown in one of their spacecraft and been closely identified with that spacecraft, would that have been involvement beyond what you think would be proper?

Mr. COHEN. I don't know how to—it's tough to respond on things that—

Senator SCHMITT. Don't feel you have to. I just draw that because that's what happens when you get into the nitty-gritty of making the decision. What can this person do or not do?

The CHAIRMAN. I think the Senator from New Mexico raises an excellent point and I think the language does take care of that, but we are going to search it out to make sure it does. It certainly wouldn't intend to cover you in that position. We are concerned with procurement officials who have the authority to determine whether or not a contract goes to a particular contractor and I'm sure you recognize you didn't have any interest in that authority at that point.

Senator SCHMITT. On the other hand, I have been in several capacities, including that as an astronaut, involved in procurement activities as a member of a board. For example, I did not exercise it, but I was selected and had other circumstances not have intervened, would have been on the board that selected the contractor for the lunar roving vehicle. Boeing happened, in that example, to be selected. It gets to be very tough.

The CHAIRMAN. In that event, maybe you shouldn't have gone to work for Boeing for 2 years after that. Don't you think that would have been a proper limitation?

Senator SCHMITT. That's what we've got to decide, where are those lines drawn?

The CHAIRMAN. Well, let me read the language. It says:

Anyone who by virtue of his position or appointment in accordance with applicable agency regulations is authorized to solicit or select sources of supply, or describe requirements for, enter into, award, modify, terminate, administer, or make determinations or findings with respect to, any contract, or to otherwise exercise any part of such authority.

Senator SCHMITT. Depending on how you interpret some of those words, it might or might not include an advisory board as a procurement officer.

The CHAIRMAN. I think it very well might and if it did and if you had any determination on that, frankly, I think it should and I don't think you would be very comfortable being on a board saying we're going to give this to Boeing and then go to work for Boeing.

Senator SCHMITT. I personally would not, but if you expand it to that degree, then you suddenly are including an extremely large number of people within a particular agency. Those procurement boards tend to grab talent from all over an agency and sometimes across agency lines and I think we have to be—as we get into this in the mark-up, we have to make sure that we are in fact precisely defining those terms so that the agencies know and the board knows, the advisory board, who is going to come under the umbrella of this particular Act.

The CHAIRMAN. Right.

Mr. COHEN. Common Cause agrees with the thrust and purpose of these provisions. Government employees should not accommodatively design, award, or administer contracts with an eye toward later employment with the contractor. Nor should employees design or award contracts which will guarantee them a later job under the contract. The procurement process demands impartial and unbiased decisionmaking. If that standard is not met, the potential is enormous for wasteful spending and contract terms that disadvantage the Government.

The bill defines a contracting officer as any Government employee authorized to select sources of supply or describe requirements for award, terminate, or administer any contract. We believe it is particularly important that this definition include officers who determine in the first instance that a contract should be let. What I think you can see, Senator Schmitt, is that one of the things we want to do is focus in on what various activities people actually engage in. That determination—and the reason we talk about an officer who determines in the first instance that a contract should be let is because that person is in a key position and that determination is especially vulnerable to manipulation, as the nature of the decision can be such that only one contractor could ever fill the requirements.

We recommend that high officials who would not be affected by the company-specific ban on employment be prohibited for a period of at least 2 years from having any contact for pay—formal or informal—with their former agency. I know there are a lot of high officials who are involved sometimes tangentially and sometimes in much more involved ways in the contract letting period and we think that a reasonable cooling off period is necessary to insure that a former official cannot exert undue influence on the contracting process. This very pattern has already been set by the House Government Operations Committee in their Department of Energy bill.

We believe that the bill's postemployment prohibitions should not become in fact an industrywide ban on employment. This is particularly likely to happen with high level officials, who may by regulation or statute have the responsibility to sign off on all contracts. I think that's one of our ways of dealing with the fact of not overreaching but at the same time we suggest that the company-specific employment ban be activated for high level officials when they go outside of normal procurement contract channels. We recognize that each agency of the Government has different procurement practices and procedures. We would be happy to work with this committee in identifying those, so that enforcement of this employment ban can be monitored.

Senator SCHMITT. Would you say that this would apply to the subcontractors process also?

Mr. COHEN. I would. It seems to me that in the nature of the contracting work, subcontracting is not an insignificant item. So I think those ground rules probably ought to apply to the subcontracting situation.

I think there's an advantage in having ground rules such as these. For one thing, as business competitors, in the framework of these rules, they can play an aggressive role, particularly when normal procedures have not been followed in the awarding of a contract. That would be one of the ways of surfacing high level officials who went outside of the normal pattern of contract procurement.

We feel that these proposals must be complemented by a tough lobby disclosure bill which covers efforts to lobby the executive branch for Government contracts. This would add an important monitoring mechanism to make certain that the conflict of interest provisions are being complied with.

Conflicts of interest can also occur when a contracting officer is assigned to work on a contract affecting his former private employer. We recommend that provisions be added to the bill to require contract officers to disqualify themselves if the contract involves an enterprise by whom the officer was employed within the previous 2 years.

A similar provision has been included in the House version.

Common Cause strongly supports section 801(e), which would require contracting officers who hold conflicting stocks to either disqualify themselves from taking any action which could affect that stock, or divest themselves of the offending asset. Stock ownership does present a clear conflict of interest, and we agree that the remedy must be either disqualification or divestiture. However, unless supervisors are aware of the stock holdings of subordinate contracting officers, the system is largely self-policing. We recommend that the legislation make clear that the disclosure systems already in place be structured to insure supervisor awareness of potential conflict situations in which an employee should disqualify himself.

We also believe that stock ownership presents conflicts of interest for those in Congress. While we are pleased that the House and Senate adopted codes of conduct which will require disclosure of stock holdings, we believe that is just a first step. Members of Congress, just as executive branch employees, must deal with the conflicts problems caused by acting on matters which could significantly affect their financial holdings.

Senator SCHMITT. Does that include tax legislation?

Mr. COHEN. Yes, it includes tax legislation.

Senator SCHMITT. So you propose anybody with an interest in tax legislation should not vote on tax legislation?

Mr. COHEN. Or divest themselves.

Senator SCHMITT. But that's everybody in the country.

Mr. COHEN. No. Again, Senator Schmitt, I think for so long neither the Senate nor the House took this problem with any degree of seriousness as an institution, although lots of individual legislators voluntarily made disclosures and from time to time withdraw from voting, but I understand if a Senator came from Vermont, say, where there are at various times in the Vermont sense there have been more cows there than people—

The CHAIRMAN. It's true of Wisconsin, too.

Mr. COHEN. I wasn't sure about that. That's why I was afraid to venture forth. But I could understand that the dairies are an important matter in Vermont and Wisconsin, and if one has dairy holdings one doesn't want to deprive representation from your entire constituency—

The CHAIRMAN. You see, this question goes farther than that. Even if a Senator has no stock holdings at all, none, say he has nothing but a mortgage on his house and the house equity is the only net worth he has. He's still affected by general tax legislation. Any

kind of tax cut affects him. Any kind of a tax increase affects him. If we hadn't changed the rebate, that would have gone to everybody and the rebate we had in 1975 did go to everybody, including Members of Congress. So there is a conflict of interest on some of these things which is inescapable.

Mr. COHEN. But it's also possible to draw lines that get at the specific kinds of matters which don't deal with general policy and I think—

The CHAIRMAN. You're talking about the specific areas?

Mr. COHEN. That's right. I think in that sense it's important that the House and Senate, as institutions, deal with this question and I know you're discussing it.

Senator SCHMITT. I'm dealing with it in a major part of every one of my days.

Mr. COHEN. As a member of the Ethics Committee?

Senator SCHMITT. Yes, as vice chairman of that committee, and it's a very tough problem and even without the kind of thing you were suggesting here we could very easily get into this being a full-time job for six Senators. It's moving in that direction and I think we have to realize what is practical and what isn't. Let me give you one example of where I voted present on an amendment to the tax bill which had to do with the exemption for single taxpayers. I happen to be single and had I voted for it I would have been voting for a tax windfall, a very small one, for myself. Do you think that was proper? Should I have voted for or against that or was voting present the appropriate thing to do? Should all other single Senators and Congressmen—

The CHAIRMAN. I don't know how in the world you can escape voting for that. After all, I'm married, as are other Members, and we are affected by that, too. It's true we are not affected maybe as explicitly, but if you pay more or less, we pay less or more. So that there's no way you can have a disinterested vote in the Senate, either single or married—I don't know of any other status.

Senator SCHMITT. The reason I bring it up is to illustrate—you say you can draw lines, and in theory you can always draw a line, but in practice I think we're going to have a very, very difficult time in drawing some of these lines. We have to draw some because I believe that there can be a very and has been a very great conflict of interest within the Congress as well as in the Federal Establishment. I think they are exceptions rather than the rule, but they still have occurred and we have to find ways to define those that are particularly onerous and be able to have laws that prohibit them and can be prosecuted. But again, the drawing of the line—and I illustrate the ridiculousness to some degree, just to make a point—

Mr. COHEN. Your point about their having been the exception rather than the rule—I agree with that and for a lot of people in Government service they really want to work at having some sense of pride about the work they do, about building an institution that can be respected instead of scoffed at as it often is, and I think this is one of the reasons that there's a value in treating this policy comprehensively and seriously and so that people know what the ground rules are, and eliminating the exceptions would be one of the ways of building your respect. It can always be diverting to discuss the House and Senate as

an institution, but I think it is possible to draw a line. The distinction I would make on your example, Senator, as a single taxpayer, is that that's a large class of people and recently the House adopted a tax advantage to legislators and I don't exactly recall the details, but it affected former State legislators who served in the Congress, and who just got elected—about half of them voted present and half of them voted for it. That's a pretty narrow class and there is an example of a clear conflict of interest even though I can't recall to you the details of the tax.

The CHAIRMAN. You've got to be pragmatic on these things. After all, on the salary vote, every one of us had the clearest kind of a conflict of interest. No question about it. There's no way, unless you voted against it, I suppose, that you could say that—most didn't—that you could say there wasn't a conflict of interest and it was a narrow class, just Members of Congress, only 100 of us, but we voted on it.

Senator SCHMITT. Well, procedurally.

The CHAIRMAN. Well, our vote determined whether or not—if you supported the Allen position we would not have gotten a salary increase.

Mr. COHEN. I just want to say one point on postemployment restrictions involving—

The CHAIRMAN. But there's no way we could act within the various situations we were in.

Mr. COHEN. Although the law should be changed and the pay process procedures ought to be changed.

The CHAIRMAN. Well, that's a long discussion, but as Senators dealing with the whole spectrum of national legislation we often do find ourselves in a situation where there's no pragmatic practical way of escaping from the appearance of a conflict of interest. You just have to recognize that's it; you're in it, but, because of this responsibility, everyone should try to minimize the situations where there is a specific and substantial conflict.

Mr. COHEN. We have recently completed a review of the post-employment reports filed by former Defense Department employees since August 1975 and one difficulty we found in making sense of the reports was the absence of any indication of whether the work performed for the Government involved a contract and, if so, who that contractor was. Therefore, we particularly favor the provisions of section 803(b)(1)(G), which would require that such information be included in the departing employee's report.

Senator SCHMITT. Excuse me. That is going to be extremely difficult. What you're asking is that an employee's record be kept and obviously has to be kept up to date, every instance or contract that somehow affected the implementation, awarding, or implementation of a contract. Having been in NASA, that's an extremely large number of contracts. It can be any kind of review board that may reflect what the contractor is going to do for the agency at some later time which is in turn an update of that contract which would change the profit or loss picture for that contractor, and there are all sorts of people involved in that and much below GS-16. That was another question I wanted to ask you—why you picked GS-16? Because it's really by function rather than by grade.

Mr. COHEN. We did for financial disclosure and one of the things I said at the very start was that there are certain other functions which by the nature of the function you have to go below GS-16.

Senator SCHMITT. Let me give you an example. In various spacecraft reviews, preliminary design reviews which affect the performance of the contract, at the end of that the contractor is directed to do certain things and the contracts are modified. There can be several hundred people in an agency involved in one of those and there are many, many of them through a particular research and development cycle. So again, I'm not disputing your aim. I think we have to look very, very carefully at how broadly we draw these lines or we may get into something that's completely unenforceable, or if you enforce it, it would cause a particular contracting program to grind to a halt.

Mr. COHEN. On the questions of administration and enforcement, in our judgment, the nature of the problem demands a Government-wide solution. The legislative vehicle used by S. 695—the Defense Production Act—should not foreclose that broader approach. For example, others on whom we would like restrictions placed, such as a ban on contacts with former agencies, are the FDA lawyer who goes to a drug firm, the mine inspector who takes a consulting job with a mining company after leaving the Government, and the grant officer who gets a job working on the grant which he awarded.

In our judgment, the responsibility for the administration and review of postemployment reports and enforcement of postemployment prohibitions must be viewed in the broader context of conflict of interest. Overall authority in these areas should be given to whatever agency or office in the Government will be responsible for financial disclosure reports and the resolution of financial conflicts of interest. We must avoid fragmentation of this responsibility, as divided authority in the past has led to inadequate review and enforcement of existing conflict of interest laws and regulations.

Although the Civil Service Commission has failed up to now to play a meaningful role in ethics matters, we have nevertheless concluded, after much analysis, that a fundamentally revitalized Civil Service Commission should be the basic vehicle on which to build a sound executive branch conflict of interest system. We believe the Commission should perform the duties S. 695 would give its Conflict of Interest Review Board, composed of the Chairman of the Civil Service Commission, the Comptroller General, and Attorney General.

If I may, Mr. Chairman, I'd like to insert for the record a full discussion of enforcement that we gave in testifying in support of S. 555, the bill that deals with financial disclosure. We believe this would be useful to the committee in further explaining how we think such a system should be administered and enforced.

[Additional information received for the record follows:]

#### ADMINISTRATION AND ENFORCEMENT OF EXECUTIVE BRANCH CODE

Public financial disclosure is the first step toward a largely self-monitoring ethics system. An important second step is the establishment of a random auditing process for all covered public officials. Common Cause strongly endorses the random audit process set forth in Section 206 of S. 555. The third step toward effective administration and enforcement of the federal ethics system must involve a drastic upgrading and reorganization of the Executive Branch ethics infrastructure.

Current review and enforcement procedures in the Executive Branch are severely inadequate for even the existing conflict of interest provisions, much less for any new disclosure or conflict provisions. Over the last two years, the GAO found in one agency after another that enforcement mechanisms were ill-designed and ineffective.

Under present procedures, agency employees are supposed to file annual financial statements with a designated "ethics counselor" in their agency. Sometimes these statements are not filed at all, and there is no follow-up enforcement to obtain them. The statements are supposed to be reviewed for any real or potential conflicts of interest. Often this review is done by untrained employees and is so superficial that blatant conflicts are undetected. Criteria for determining conflicts are often not adequately developed and used. When conflicts are spotted, notification of required remedial steps is sometimes slow and follow-up checks to see whether the conflict was resolved are sometimes non-existent. Exemptions are often granted in secret, so that no remedial action is required at all.

Review by the Civil Service Commission of line agency enforcement of conflict regulations is virtually non-existent. This is not surprising given that the Commission had only one attorney devoted to ethics matters for the entire Executive Branch during fiscal years 1976 and 1977. In a recent FOIA request to the Office of General Counsel, CSC, Common Cause requested, in effect, copies of the entire written output of the Counsel's office on ethics matters for 1975-76. The response indicated that the CSC had no budget specifically allocated to ethics; that the CSC had no information on other agencies' ethics budgets; and that the written ethics material (i.e. interpretations, general guidelines, etc.) generated by the CSC was minimal.

The Civil Service Commission has failed in the past to play a meaningful role on ethics matters. Nevertheless, as we have analyzed the ethics enforcement and administration issue, we have come to the conclusion that a fundamentally revitalized Civil Service Commission must be the basic vehicle on which to build a sound Executive Branch conflict of interest system. The CSC can only play an effective oversight and enforcement role in our view if it is restructured internally, if the President and his Commission appointees provide leadership, if other components of the ethics system are revitalized, and if outside checks on the system are provided as well.

Common Cause proposes the following principles to guide reorganization and upgrading of the Executive Branch ethics system:

1. *A strengthened CSC must contain a well-staffed and funded Ethics Division with final appeal, enforcement and oversight responsibility for the Executive Branch ethics system.* The Division staff will need to include lawyers, hearing examiners, investigators and support personnel. The Division must be given appropriate audit and subpoena powers if it is to play an effective role.

2. *The Ethics Division of CSC should be headed by a Presidential appointee responsible to the Commissioner of the CSC who shall provide to the President and Congress a public biannual report on the activities of the Division.*

3. *CSC's Ethics Division should have the following authorities.*—Review and approval of agency regulations and interpretations; determination, where it deems advisable, of Executive Branch-wide regulations, interpretations and operational structures and processes; review and approval of agency enforcement procedures and decisions; final resolution of appeals from any agency decision or action; investigation, on its own initiative, of potential conflict of interest situations; and resolution of outside complaints or petitions for rulemaking.

These three principles are substantially reflected in S. 555. However, the bill does not grant subpoena power to the Ethics Director, nor does it specifically empower the Director to undertake investigations on his own initiative into possible conflicts of interests. Common Cause endorses Section 401, which establishes clear Presidential responsibility for monitoring and improving the Executive Branch ethics system.

4. *The ethics infrastructure now in place in each line agency must be strengthened.*—Ultimate responsibility for overseeing ethics matters within any agency should be held by the agency's general counsel, inspector general, or a specially-appointed ethics counsel (in any case, reporting directly, periodically and publicly to the agency head). All agency personnel involved in operating the ethics system must have appropriate training.

5. *Line agencies should have initial responsibility for receiving financial disclosures, examining them for potential conflicts of interests, ordering appropriate resolutions of conflicts (e.g., divestiture), preparing advisory opinions, investigating possible*

*conflicts on their own initiative, taking disciplinary action (administrative and civil sanctions), preparing regulations, and administering all appropriate ethics provisions.*—Each agency should have the initial obligation and opportunity to keep its own house in order on ethics matters.

Common Cause specifically supports Section 308 of S. 555, which states clearly the responsibilities of the agencies with respect to determining and resolving individual conflicts of interest, and prescribing administrative sanctions where justified.

We also agree that a copy of each report filed with the agencies should be filed with the Civil Service Commission so that public access to reports is facilitated.

6. *Non-government individuals and organizations should have the right to file formal complaints or petitions for rulemaking with the CSC regarding conflict of interest matters and to receive formal CSC response.*—Procedures for outside complaints are mandated by Section 308 (e)1 of S. 555.

7. *Non-governmental parties should be given standing to sue to enforce any conflict of interest or financial disclosure statute.*—Government agencies, including the Justice Department, have not been noted in the past for placing a high priority on enforcement in this area. Citizen standing is an essential complement to and incentive for effective enforcement by the CSC, line agencies and Department of Justice.

8. *The GAO should operate as an independent monitor of the financial disclosure system.*—Specifically, GAO should conduct random audits of the disclosures made by Executive Branch personnel to determine their accuracy. Again, an outside check on Executive Branch self-enforcement is necessary, and GAO is well-equipped to play this role. Section 206 of S. 555 provides for GAO audits with respect to Congress and the Judiciary. However, only five Executive Branch officials are so covered. Common Cause believes that GAO should be instructed to conduct some random audits in the Executive Branch on its own, in addition to approving audit regulations for use within the Executive Branch.

9. *In order to provide an additional measure of public accountability, we would propose that a government-wide advisory body be established consisting primarily of private citizens.*—The purpose of this body would be to review the impact and effectiveness of conflict of interest measures after a reasonable period of implementation and report its findings to all three branches of government.

If the financial disclosure system contemplated by this Committee, and the additional conflict of interest prohibitions to be developed later by this Committee, are backed by the administrative and enforcement structure just outlined, we believe a huge stride will have been undertaken toward building an ethics system that will work and that will deserve public confidence.

Common Cause strongly supports Senator Abourezk's proposed amendment to S. 695, which seeks to identify and eliminate organizational conflicts of interest. We would like to commend the Senator for his continuing efforts in this area, and we note that language nearly identical to his amendment was included in S. 36, the fiscal year 1977 ERDA authorization bill.

Organizational conflicts of interest arise in Government contracts and other relationships with corporations and private organizations. The considerations which justify eliminating personal conflicts of interest apply with equal force to organizational conflicts. The Government must receive impartial and objective information in return for its contract dollar.

If I may, Mr. Chairman, I'd like to just insert the rest of the statement in the record because I know I have taken longer than any of us anticipated. We urge that an administrator be required to publish findings for granting any kind of a waiver on these organizational conflicts in the Federal Register. I think that's another aspect of any overall conflict of interest policy and, as I indicated earlier, we are ready to work with this committee in the months ahead because I think you're making an important contribution to the development of conflicts of interest policy.

The CHAIRMAN. Mr. Cohen, I mentioned—one of the first questions I asked you was about whether or not you felt that the Civil Service Commission had the competence and the concern and ability to handle this if we abolished the Conflict of Interest Review Board that we have proposed, which would have the Attorney General, the Comptroller General and the Chairman of the Civil Service Commission acting together.

Now I'd like to ask you the more important part of the question, which is whether or not the Civil Service Commission or an agency within it would have the clout and prestige to really stand up and make its rulings stick, as would a board with these three high officers heading it?

Mr. COHEN. That depends on how the law is written, and I'd like to just indicate some standards that we think are absolutely prerequisites and if those standards aren't met then it wouldn't have the clout. In other words, if one makes a judgment that the Civil Service Commission should be the enforcer, then you have to design and establish by legislation the organizational objectives of the Civil Service Commission to accomplish the job. If that's not done, then it won't have the clout.

First of all, the strengthened Civil Service Commission must contain a well-staffed and well-funded ethics division with final appeal enforcement and oversight responsibility for the entire executive branch system. That means it has to be a real division with a staff that includes lawyers, hearing examiners, investigators, support personnel. Without that, it can't do the job. It has to have the authority to have appropriate audit and subpoena powers if it's to play an effective role.

Second, the Ethics Division of the Civil Service Commission should be headed by a Presidential appointee responsible to the Commissioner of the Civil Service Commission who shall provide to the President and Congress a public report on the activities of the Division.

The CHAIRMAN. Maybe the fact that he's a Presidential appointee would certainly help.

Mr. COHEN. It won't help without the other backup work.

The CHAIRMAN. But even with the clout that you give him and the legal force you give him, it seems to me that it's not simply a matter of having that authority. It's being in a position where you really can, in fact, use it. I just wonder if a person who is below the top level in the Civil Service Commission would be able to act in these matters that would affect people much higher ranking and with much greater prestige and be able to make it stick.

Mr. COHEN. Let me try and draw an analogy which may not be precise enough or apt enough, but let me try anyway. I think there is a value in having the use of inspector generals in the various departments. It helps play a useful role in knowing what's going on in those departments. That person in the Civil Service Commission level is in that kind of category and should be an independent person, and that's independent in the sense that—and the analogy is wrong because we're not dealing with criminal matters here—but when we talk about triggering a special prosecutor under a formula when there are crimes or apparent crimes of official wrongdoing and you want some sort of a person with independent standing—that's what this division should be. But what I would like to do, Mr. Chairman, because we have thought about this, I'd like to itemize some more

of what we see as the criteria to make it work and we are serious about the criteria.

The Ethics Division should have the following authorities: Review and approval of agency regulations and interpretations; determination of executive branch-wide regulations; interpretations of operational structures and processes; review and approval of agency enforcement procedures and decisions, final resolution of appeals from any agency decision or action; investigation on its own initiatives of potential conflicts of interest situations; and resolution of outside complaints or petitions for rulemaking.

Now, these items get to the point of the earlier discussion with Senator Schmitt about the criminal enforcement versus developing a system of compliance and making it work. Unless this were part of it, then it couldn't do the job. We believe that the ethics infrastructure in place in each line agency needs to be strengthened and ultimate responsibility for overseeing ethics matters within any agency should be held by the agency's general counsel, inspector general, or specially appointed ethics counsel. In any case, reporting directly, periodically, and publicly to the agency head. And in developing this system, while line agencies should have initial responsibility for receiving financial disclosure, examining them for potential conflicts of interest, ordering appropriate resolutions of conflicts of interest, preparing advisory committee opinions, investigating possible conflicts of interest and so forth—while each individual agency should have the initial obligation and opportunity to keep its own house in order on ethics matters, there has to be a clear statement of responsibility of the agencies with respect to determining and resolving these individual conflicts. That's why they ultimately must report to the Ethics Division of the Civil Service Commission.

In addition, whatever agency is set up, we believe in the citizen complaint procedure. Nongovernment individuals and organizations should have the right to file formal complaints for rulemaking with the CSC regarding conflict of interest matters and receive formal CSC response, and nongovernmental parties should have standing to sue to enforce any conflict of interest or financial disclosure statute. We think the GAO should operate as an independent monitoring of financial disclosure system and we also, in order to provide an additional measure of public accountability, we would propose that a Government-wide advisory body be established consisting primarily of private citizens.

The CHAIRMAN. All right. Now let me say I'm very happy that Senator Schmitt could be here this morning and could take part in this colloquy and this interrogation of you because he brings a good, solid practical commonsense view to this situation with his experience as an astronaut in the space agency. He also, of course, brings a very helpful insight because of his experience as vice chairman of the Ethics Committee and his concern with that and his study of the matter.

Now, having said that, let me say that I agree with your concern and with Senator Schmitt's concern that the postemployment restrictions shouldn't become an industrywide ban on employment. Obviously it would tend to discourage good people from working with the Government, highly competent people.

One concern I have in this regard is that it's possible to follow all the procurement rules and still rig competition or provide other benefits to a contractor. I feel the provisions for granting waivers and the possibility that an official can disqualify himself from acting on matters affecting a certain company might solve the problem.

Can you explain your suggestion that the company-specific employment ban be activated for high level officials when they go outside the normal procurement channels?

Mr. COHEN. As you know, a lot of officials have some sort of formal role by statute or by regulation in the awarding of contracts and that is often just the signing off procedure. When a person signs off, that person is not really involved in the decisionmaking. It just keeps moving up the ladder or across the table.

Senator SCHMITT. Excuse me—may not. I know within NASA every individual in that chain was involved, including the Administrator, with the final review before there was a signoff.

Mr. COHEN. That's a much greater involvement. In that kind of a description you have a genuine involvement. We were talking about a situation in which there isn't—in which sometimes there is no involvement except just signing your name to something and sometimes that administrator—that top level official really has an interest, for whatever the reasons might be—and I'm not suggesting a corrupt interest—that person is involved at various stages of the decision about the terms of the contract, as to how the competition ought to be established, what the ground rules ought to be. When you're involved that way, then I think the company-wide ban or the company-specific ban needs to be triggered.

The CHAIRMAN. Would you favor including Members of Congress and possibly even congressional staff in the limitations on stock ownership and employment?

Mr. COHEN. Definitely on—I think something has to be done on the stock ownership question.

The CHAIRMAN. How about employment? After all, Members of Congress can often have quite an influence on whether a contract goes to a certain—they fight pretty hard on the floor and elsewhere to get the contract for a particular firm.

Mr. COHEN. They fight hard on the floor and if you have any kind of a normal logging procedure, which we have advocated, which some of the departments now—or some of the agencies now have, you will find that the legislators and their offices play a role in asking what's going on and intervening and so those kinds of functions do require ground rules and the answer is yes.

The CHAIRMAN. Senator Schmitt.

Senator SCHMITT. Would your recommendation be that complaints from within or without Government on a potential conflict of interest be made public and that the investigation be carried out publicly?

Mr. COHEN. First of all, we think the complaints ought to be sworn. There ought to be a sworn affidavit. When we filed our own complaint against Congressman Sikes, it was a sworn affidavit. That results in your not shooting from the hip and that would be irresponsible, to shoot from the hip. I think the disposition of complaints ought to be made public, what's been done in terms of looking at it—there ought to be a public accounting of what's been done with that. I assume

what you're getting at is the kind of situation where the complaint is filed that only damages reputations and has no basis in fact. That's why you need to set up a proceeding in which a responsible body looks at the complaint and then makes a decision. But I think it is only appropriate that the disposition of the complaint, even if it is rejected because it is inaccurate or faulty or has no basis of fact, that that ought to be public.

Senator SCHMITT. As with this procedure which now is in effect with Congress where during a campaign a candidate for an office could be seriously damaged by a complaint that was aired publicly, we may see this actually occur even though whatever rules and guidelines we may try to establish—this could happen also within the executive branch in a disgruntled subcontractor that didn't get a contract, or a disgruntled small business that thought they should have been involved in it, or a large business that should have gotten the contract—all the way along you could seriously damage the reputation not only of an individual but of a particular company or the agency itself. I think you have to be very careful about that process.

Mr. COHEN. That's right, and that's why I think a public disposition of whatever the decision is on the complaint, works to the benefit of the person who's been wronged or the institution or agency that has been wronged.

Senator SCHMITT. That's one thing, but the process by which that complaint is reviewed and investigated is a very difficult one to keep in confidence, particularly with the very active and aggressive press as we have in this country—and I think it's appropriate that we have it—but nevertheless, a person's career could be ruined. A candidate or a Senator or a Congressman's career can be ruined just by the existence of an unfounded complaint. I think we have to be very, very careful how we approach this.

Mr. COHEN. I don't disagree with that, but I think the procedures that the House and Senate Ethics Code have adopted are clearly in the right direction. I think it's appropriate that complaints be sworn before they are filed.

Senator SCHMITT. But I'm not a lawyer, but really, perjury is a very difficult thing to prove I think in many cases, particularly when all the facts may not be available to the person that has sworn the complaint.

Mr. COHEN. I think just as with financial disclosure, when you as a legislator fill out your financial disclosure statement, the very act of filling it out makes you a cautious and more careful person and that certainly is what we hear from all the State officials who have had to work on enforcing it. Thirty-eight States have it. I think it's true here, too. I think I would not discount the importance of the sworn statement. I also think it is a protection to all involved to have the disposition of the case done publicly, the report made public, the case for why it's been disposed the way it has.

Senator SCHMITT. Do you see Common Cause or other such organizations exercising fairly extensively the privilege of filing complaints?

Mr. COHEN. I hope not. I hope not. We filed our complaint against Congressman Sikes after exhausting all our remedies. We started by

discussing it with the House Democratic leadership, then with Members of the House Democratic Caucus and with all Congressmen. We couldn't get anyone to file a complaint. We couldn't even get three people to turn our own complaint down in order to give us standing and it wasn't until CBS exposed the issue that we found 44 legislators racing one another to transmit our complaint which was the third way we could get standing. So we really exhausted all our remedies. We do not see ourselves as the public vigilantes on this or to substitute for what ought to be sound and good procedures. One of the reasons we spend as much time as we do on what ought to be a good enforcement mechanism is because we want the system to work. What we will do is pay attention to the procedures used. We will certainly comment on what we think are the adequacy of the procedures. We are going to guard the ethics code because I hope it is not changed or at least until it's gotten a good chance to work, but we do not see our role as filing complaints.

Senator SCHMITT. And you're not going to pick and choose between candidates or officials to be appointed to agency positions?

Mr. COHEN. No. You know, the St. Petersburg Times first exposed Congressman Sikes. We did our own research after that and we added to the state of knowledge about Congressman Sikes, and that took about 9 months of work and I can't begin to tell you how many people-hours were involved in that. I think we have more important things to do than to go about filing complaints and nothing would make us happier than having good enforcement systems that work because then people know where they stand and they understand it and we can begin to build some respect and pride for the institution of government which I think would go down to the private sector as well.

Senator SCHMITT. So if Joe Doaks becomes known to you as a nominee for a particular job within the Department of Defense and you for some reason as an organization or maybe as a suborganization of Common Cause in some State says, hey, he has a conflict of interest; you don't generally foresee a complaint being filed prior to his confirmation?

Mr. COHEN. No; but I think what we would like to do is—one of the things we're doing right now is analyzing the reports the DOD had to make on previous employment as a result of Senator Proxmire's amendment. I think if we find some things that appear to be conflicts of interest, we may make some inquiries on them. We may want to know something about that, but I do not see our mission as one of engaging in a game of seeing how many complaints we can file.

The thing that was revealing about the Sikes matter, Senator, was that it illustrated how the Congress—at least the House is not very eager to enforce the ethics code on its own Members and I think it therefore led to some changes and I think it was very illustrative of how the system doesn't work and should work.

Senator SCHMITT. Thank you, Mr. Chairman.

The CHAIRMAN. Well, thank you very much, Mr. Cohen, for your excellent testimony and very helpful responses. You made a fine record. We very much appreciate it.

Mr. COHEN. Thank you, Mr. Chairman.

The CHAIRMAN. Our final witness of these hearings will be an attorney who has extensively studied conflict of interest problems in

the Federal Government. Leonard Meeker is an attorney with the Center for Law and Social Policy, a Washington public interest law firm. Mr. Meeker has worked on a number of important court cases, including one case that's currently in the courts dealing with the B-1 bomber. He's also studied conflict of interest problems and several years ago published "Integrity in the Federal Service," a study which summarizes what he found with regard to the adequacy of conflict of interest laws and the application by Federal agencies of ethical standards. He will be testifying today on what he found during the course of his study.

Mr. Meeker, we are very happy to have you and you have a concise statement. Go right ahead and we will have a few questions for you.

**STATEMENT OF LEONARD MEEKER, CENTER FOR LAW AND SOCIAL POLICY, AUTHOR OF "INTEGRITY IN THE FEDERAL SERVICE"**

Mr. MEEKER. Thank you, Mr. Chairman. I have submitted a statement which will appear in the record and I'd just like at this point to make a few comments on some of the matters which seem to me most important in this area.

[Complete statement follows:]

**PREPARED STATEMENT OF LEONARD C. MEEKER, ATTORNEY, CENTER FOR LAW AND SOCIAL POLICY**

I am Leonard Meeker, an attorney with the Center for Law and Social Policy, a public interest law firm in Washington. At the Center, I have had occasion to work on matters dealing with conflict of interest in the Executive Branch of the United States Government, and have prepared a report entitled "Integrity in the Federal Service." The statement that I give today sets forth individual views and does not represent positions taken by the Center for Law and Social Policy.

The problem of conflicts of interest on the part of officers in the Executive Branch of the Federal Government is by no means a new one. Fifteen years ago, near the start of the Kennedy Administration, Congress overhauled the laws dealing with conflict of interest on the strength of studies and reports by disinterested individuals and groups, including the Association of the Bar of the City of New York. The resulting legislation was an improvement over what had been on the books before then.

However, over the last few years, and particularly during the period from 1969 to 1977, a substantial number of instances has come to light of conflicts of interest that may not have been dealt with adequately by the existing statute law. Moreover, it has been clear that implementation and enforcement of the laws already on the books were substantially deficient during those years.

One area of particular concern has been conflicts affecting contracting officers of the Government, both during their service as federal employees and following their departure from the federal service. Given the public record of conflict, which has been spread over the pages of leading American newspapers during the last few years, I believe the concerns reflected in S. 695 are well-founded.

At the outset, it might be observed that this legislation is limited in its targeting to conflicts of interest of Government contracting officers. Clearly, the legislation does not imply that there are no other kinds of conflicts and that no other legislation may be needed.

The substantive prohibitions set forth in subsections 801(b), (c), (d), and (e), in the proposed Defense Production Act Amendments are all soundly conceived.

Section 802 of the proposed Amendments deals with implementation of the new substantive law that would be created by them. Implementation and enforcement are of great importance. Without serious and practical dispositions in this area, no new substantive legislation can be effective. Review of agency practices during the last few years, and of the Department of Justice response to them, reveals that conflict of interest laws and regulations have often been regarded as a nuisance rather than as serious legal dispositions requiring faithful compliance. Individual

agencies have often been at best half-hearted in their dealing with conflicts of interest. They have not been energetic in briefing their officers and employees clearly and fully on what the laws and regulations require and prohibit. They have often interpreted or distinguished away instances of conflict rather than recognize and confront them directly. Not infrequently, when a conflict has been identified, no effective steps were taken to deal with it administratively, and references to the Department of Justice for prosecution have been the rarest of all phenomena in the field.

Effective regulation of conflict of interest requires that each agency adopt and insist upon high standards. Agencies need to review their own regulations to ensure that they are consistent with the applicable Executive Orders and civil service regulations. In the past, some have not been. An agency needs to ensure that its regulations be adequate and appropriate to the sector of the public business that it dispatches. An agency needs to set up internal machinery for enforcing its regulations.

Section 801(b) of the proposed Amendments refers to the existence and functioning of a "standards of conduct counselor" in each agency. Such counselling needs to be undertaken thoughtfully and needs to be backed up by the full authority of those ultimately responsible for direction of the agency. It would be my suggestion that the counselling function should be placed in the agency's legal office, since that office may have optimum competence for interpreting and applying the relevant statutes and regulations.

Experience suggests strongly that implementation and enforcement cannot be left to rest entirely with the employing agency. An audit and review function has great importance—not least to create a powerful incentive for the agency to do a thorough and effective job in this area. This leads to the question of what audit and review mechanism will be most effective and practical.

Section 802 of the proposed Amendments would establish a Conflict of Interest Review Board composed of the Chairman of the Civil Service Commission, the Attorney General, and the Comptroller General. This is indeed a high level Board. Pursuant to the proposed Section 802(b), the Board would have an Executive Secretary and three other staff members. I raise the question here whether this mechanism is the best that can be devised for dealing with the problem. The three individual members of the Board have many other responsibilities, and there is a question how much time and attention they would be able to give to conflicts of interest in the case of Government contracting officers. Moreover, the contemplated staff of the Board is small.

I should like to suggest for the Committee's consideration an alternative approach. Under this approach, each agency would be required to make periodic reports to the Civil Service Commission on its administration of the substantive provisions in the Defense Production Act Amendments. Such reporting would include specifically all instances in which an agency had approved the acceptance by a contracting officer of compensation from a contractor. The reporting would cover also all investigations by the agency of alleged conflict of interest violations on the part of agency officers and employees. The new statutory provisions might include a requirement that reports of investigations be submitted within thirty days after the completion of an investigation. They could go on to provide that if the Commission should find the investigation, or any sanctions imposed as a result of it, to be inadequate, the Commission would then be empowered to conduct its own investigation and to impose appropriate administrative sanctions. The Commission should be required to list, in its periodic reporting to the Congress, (a) the number of investigations conducted by federal agencies; (b) the result of these investigations; (c) the number of investigations conducted by the Civil Service Commission; and (d) the results of the latter investigations. In addition, the General Accounting Office could be given a special watchdog function, on behalf of Congress, to scrutinize and audit situations of possible conflict anywhere in the Government. This arm of the Congress operating in the field would form a valuable supplement and serve as a stimulus to the Civil Service Commission operating as an arm of the Executive Branch.

The Amendments proposed in S. 695 provide for criminal penalties for various infractions of the law. This is salutary. In addition, the new legislation could appropriately require federal agencies to adopt regulations providing for administrative enforcement as well. Such regulations should spell out clearly that breach of the public trust is a serious offense and that sanctions for violations of agency regulations could range from a letter of reprimand for minor infractions to dismissal from employment for serious transgressions.

Still a further mechanism for providing effective enforcement of conflict of interest laws and regulations would be a jurisdictional statute empowering the Federal District Courts to adjudicate citizen suits—(a) against the Civil Service Commission or a Government agency for failure to deal adequately and appropriately with a case of conflict of interest, and (b) against an agency to enjoin it from permitting a former employee to deal with the agency on a matter where his private capacity involved a conflict of interest. Such a statute might provide that suits could be commenced after some minimum period, such as 60 days, from the time when the plaintiffs had brought the matter to the attention of the Commission or of the agency, as the case might be. This would give the Commission or the agency 60 days within which to respond to a complaint. If at the end of that time a potential plaintiff remained unsatisfied, suit could then be commenced.

There are, of course, many ways in which the provisions of law regarding conflict of interest in the Executive Branch of the Government can be substantially improved. Legislation is one appropriate avenue. I should like to suggest that consideration be given to additional legislative measures beyond those affecting Government contracting officers. Furthermore, I believe that the Civil Service Commission and the operating agencies of the Executive Branch should be strongly encouraged to review their conflict of interest regulations from top to bottom, in the light of experience, with a view to a general reordering and modernization. This seems particularly appropriate at the beginning of a new national Administration.

Mr. MEEKER. The initiative in proposing S. 695 is a very welcome one because the problem of conflict of interest is one that has not only become larger but has become more widely known during the last few years.

The legislation now before the committee is focused particularly on the contract process in Government. That indeed is an important process. There have been conflicts. They ought not to continue in the future. I would simply want to emphasize what seems to me to be a reality about this area which is that conflicts of interest are related. There are many different ways in which they come up. Contracting officers are one group of people who may be involved in conflicts of interest. Regulatory officials also. Both members of commissions and significant staff members of commissions in Federal agencies are another group where the conflict of interest problem is serious and has been shown to be in the last few years.

There is a question of discussion of employment by Federal officials while they are still Federal officials when they are discussing what they might do outside the Government and very frequently this is related to their work with the Government.

Still another area is what former Federal officials do in private life after they have left the Government.

In all of these matters my view is that the present statutory provisions in 18 U.S.C. 207 and 208 are not adequate and new legislation is needed. I think that S. 695 deals very well with the contracting officer problem. Like Mr. Cohen, I certainly agree that enforcement is at the heart of the problem. We have had conflict of interest legislation on the books for many years. The last general overhauling was done in 1962. Yet the results haven't measured up to what they ought to be. I think that's fundamentally because the executive branch, beginning at the top, including Cabinet officers and their principal assistants, have not taken conflict of interest seriously. It has been regarded as a nuisance rather than as a problem that needs to be addressed seriously, dealt with properly, so that the public can have full confidence in the integrity of the Government.

So, to begin with, I believe that a clear indication by Congress and new legislation would be the right way to start.

Next, the Government agencies need to take this seriously, both in the sense of undertaking to carry out faithfully all the provisions of the law the Congress enacts, but the agencies should also review their own regulations. As Mr. Cohen has pointed out, some agencies have regulations that are distinctly better than others. Some go beyond the provisions of the existing legislation. I think all agencies should be encouraged to review their regulations and to adopt up-to-date provisions which are appropriate to their particular situation. Not every agency needs the same regulations, but each one ought to review its own, and the Civil Service Commission should have oversight responsibility with respect to all of them.

Within an agency, I certainly agree with Mr. Cohen, there needs to be an independent authority, whether it is an inspector general or a legal officer, who will have supervisory responsibility for enforcement of the laws and regulations with respect to conflict of interest. It would be his job to assure that all employees of the agency understand fully what the law and regulations require and that they comply with the law and regulations.

Beyond the agency itself, I believe that the Government does need to have a central body for overall enforcement. S. 695 proposes a board of three, three very high level officers, the Chairman of the Civil Service Commission, the Attorney General, and the Comptroller General. I would have two concerns about this arrangement.

First, those are all individuals who have many responsibilities, important responsibilities. I would be a little concerned whether they could pay enough attention and give enough of their time individually to this problem so as to constitute a really effective supervisory body. And I say that particularly because of the realization that conflict of interest is not confined to the area of Government procurement. The whole area of conflict of interest is much broader. The volume of business, I think, may be rather large and it seems to me that another supervisory agency for the Government as a whole would be advisable. Here I would agree with Mr. Cohen that the Civil Service Commission is the appropriate body. It's quite true that that Commission has been very disappointing in its performance of late. I would hope that with new membership and with some new legislation it would do a lot better and I believe it should have the chance to do it. It seems to me that this agency which does have as its primary focus the efficient and honest management of the civil service is an appropriate place to have this responsibility located.

S. 695 provides for essentially a rather small staff. It's always well to begin modestly. My impression, though, is that the problem and the work will be a good deal larger than the staff envisioned in section 802(b) could handle satisfactorily. I think Mr. Cohen is correct that the Civil Service Commission does need a division with responsibility for ethics in the executive branch and that that division will need to be appropriately staffed.

Going on to what other mechanisms might be used to assure the Civil Service Commission will do its job efficiently and thoroughly and faithfully, here it seems to me that there are two or three other adjuncts which could be important.

First, the Commission should have a positive review responsibility with respect to agencies. Not only should they consider cases referred to them by agencies, but they should have the duty of examining decisions on conflict of interest where an agency decided that a particular conflict was not significant enough to preclude participation of either a regulatory official or a contracting officer in a matter where he had a conflict.

Then I think the Commission ought to be required to make reports to the Congress on its activities in this field so that the Congress and its committees could see what is happening in the executive branch and what the Civil Service Commission is doing. Those reports should include the coverage of any recommendations for prosecution that might be made and the disposition of any such recommendations.

I think the General Accounting Office has made some very useful and revealing studies and it would naturally continue as the arm of Congress with the mission of seeing how well statutes are in fact being carried out.

Now with respect to the role of criminal legislation, it seems to me that having appropriate criminal legislation enacted is valuable. It's valuable finally as a deterrent rather than as the principal means of seeing to it that conflicts of interest in fact are eliminated from the executive branch. I think that the main reliance for eliminating conflicts of interest in the Federal service does need to be placed on devoted and efficient executive branch attention to the problem, emphasis on it, and an acceptance of the proposition that conflict of interest is simply going to be eliminated because it is in the Government's interest; it's in the public's interest; and Government will have the trust that it wants if conflicts of interest can be wiped out.

Thus, I think that S. 695 is a very constructive piece of legislation. I would urge that at the same time the Congress might usefully look over the field and see in what other respects the existing laws might be revised. Here I would suggest particularly the function of Federal agency regulation of industry and other types of business in the United States, the question of Federal employees negotiating for private employment while they remain in Federal service, and also the question of what limits ought to be placed on their activities after they have left the Government. Here I think there may be differences appropriate as between middle level officials and those who may have served as members of a regulatory commission.

Finally, I think that Congress could appropriately indicate to the executive branch the desirability of surveying from top to bottom the executive agency regulations in this field and do that under the supervision and guidance of the Civil Service Commission.

I think that's all that I would want to say at this point but I would be very happy to try to respond to any questions.

The CHAIRMAN. Thank you very much, Mr. Meeker. We are very grateful for your testimony and I am very grateful personally for your support of our bill.

Administration witnesses have opposed S. 695. They support S. 555, which I support, too. I think it's a good bill. I don't think it goes far enough. President Carter has made a major issue of integrity in Government. I think one of the reasons he was elected was he felt that people didn't trust our Government, that our Government had

become too far removed from the people, too extravagant, and also in some cases too corrupt, and he indicated his concern with that and his determination to do something about it.

I think he's moved in the right direction and deserves great credit for it, but the administration seems blind to the revolving door and I think the revolving door is what we have to hit and what S. 695 does hit and what S. 555 pretty much ignores. They say people shouldn't come back and represent a private contractor before an agency for which they were employed. There's already legislation affecting retired officers in that area as you know and this wouldn't reach the fact that a person had been in effect favored by a defense contractor because he in turn had favored them when he was working for the Pentagon.

Let me ask about the areas where you spent most of your time explaining your position. Your alternative to the Conflict of Interest Review Board seems to provide for the advisory authority to be delegated to each agency, at least in the first instance, with some oversight authority for the Civil Service Commission. Is that correct?

Mr. MEEKER. Yes, it is.

The CHAIRMAN. Wouldn't it be more likely to get consistent interpretation of the law if this advisory and review authority were handled by one central organization such as the Civil Service Commission?

Mr. MEEKER. Well, I would wonder whether every conflict of interest issue that ever arises in an agency needs to be referred to a central body and determined there. It seems to me in the first instance it ought to be disposed of and perhaps in many it can be satisfactorily disposed of within the agency itself. But difficult questions or questions on which there have been conflicts among agencies would go to the Civil Service Commission either on request of the agency or on request of the Civil Service Commission, which then would make a single government-wide decision on the point.

The CHAIRMAN. But you see, if each agency is given primary review authority, I'm afraid it would be likely to brush off the Civil Service Commission if the Commission comes in after the fact to review the agency's implementation of the law. For example, the Defense Department has not done a very good job in my view of implementing existing ethics regulations and guidelines such as the Executive order for standards of conduct. They have a particular status and I think a very strong status in our Federal Government—they should have—but sometimes I think it's a little excessive and I'm inclined to feel they might pretty much dismiss the Civil Service Commission stepping in. The Civil Service Commission might be a little timid in trying to use whatever clout we might write into the law, as Mr. Cohen suggested we should, if we rely on this kind of a setup with a primary authority for the Defense Department, say, for them, and then the Civil Service Commission coming in rather lightly and timidly later.

Mr. MEEKER. That danger surely exists. I think one of the great problems in implementation and enforcement has been the fact that departments and agencies have not taken seriously the subject of conflict of interest and they will need to do so in the future. I would think that if new legislation were enacted now making clear the concern and the conviction of the Congress about it that attitude would change both because of the law and with a new administration which has addressed a good deal of attention to the subject.

Naturally, if it does not work out that way with the Civil Service Commission being given a review authority rather than the power of decision in every case, then obviously the system is not working and it would have to be revised. I would merely have some reservation about centralizing the system so much that no decision could ever be made on any conflict of interest question until it had been approved by the Civil Service Commission.

The CHAIRMAN. I think you raised a good point. Somehow we have to reconcile these things. I'm just afraid the agency might say to the Civil Service Commission, you don't understand the problem; we do; go away. I'm also concerned about the conflict of interest authority body has enough authority and clout to make its opinions carry some weight in the agencies. Do you think an Office of Ethics in the Civil Service Commission would carry such weight in the situation you outlined on page 4 (see page 116) in your remarks?

Mr. MEEKER. I think it can and, in part, this would be accomplished through the issuance of a new Executive order. The Executive order on the legislation to be enacted would provide that every agency should review its own regulations in this field and should make provision for a procedure that would call for the submission of questions to the Civil Service Commission when the question was controversial, marginal or a subject of dispute among agencies.

I think the President in an Executive order could make very clear that the final authority rests with the Commission and not with the individual agencies.

The CHAIRMAN. Senator Schmitt.

Senator SCHMITT. I tend to think it should be possible to work out the triggering mechanism or mechanisms so that the agencies or departments could handle questions of conduct—which I prefer as a word rather than ethics—I don't think you change things too much if you say conduct—the questions of conduct would be handled in the agency. But again, I'm speaking from a biased point of view because I think the agencies obviously should have worked out that mechanism and any commission or board that you establish, however, will come in after some trip wire had been triggered. Maybe it could be triggered by a written complaint that the agency did not feel they wanted to deal with, a copy of which was sent to the Commission, and if the Commission felt the Commission ought to be involved, then that could be the trigger. I think if you don't do that, you're going to find the possibility and a very real probability that the Commission would be inundated. It would be saturated. I think we can in fact work out some way if this legislation proceeds on through to markup, to divide that responsibility, Mr. Chairman. I think it would be very important to try to do that just to spread the load of enforcement. It could become a very difficult thing.

I would like to ask you a question relative to one that I asked earlier. That is, how do you see drawing that line within the Government of where a person would become subject to these kinds of conflict of interest rules and regulations? You were here I believe and heard some of the extreme examples on both sides, and then the difficult part is to put the line in the middle. Do you have any advice to the committee on that?

Mr. MEEKER. Drawing lines is always one of the hard things to do in the law and in providing for its proper administration.

Senator SCHMITT. You would agree that a GS-16, an arbitrary GS-16, would not be an adequate line?

Mr. MEEKER. I think the line, instead, needs to be drawn on the basis of an individual's function. If an individual is in fact a contracting officer, has been identified as such, and negotiates on a contract, works on it, elaborating the terms of it, and then recommends it for conclusion to a superior, obviously he's very much involved and should plainly be covered.

Senator SCHMITT. Now let me proceed. What about the board that advises him in the research and development area any way where you have a procurement board as well as the actual procurement officer?

Mr. MEEKER. The reality is that such a board has a position of much authority because the very purpose of the existence of the board is to assure that the contracting process will be carried out in the best possible way in the interest of the Government, and if the board has made a recommendation ordinarily a contracting officer and the other people who are involved in the administrative process of concluding the contract will be rather chary about disregarding the recommendations of a board. They may, of course, convene another board if they have some serious disagreement with the first, but I think the reality of the influence of an advisory board in such a case probably means that the members of that board are affected and do need to be affected by conflict of interest rules. I think the harder situation is where farther along in the process a senior official, perhaps an assistant secretary, may sign or initial the memorandum that has recommended that the contract be let. That individual may have not a great deal of personal involvement in the discussions which have taken place. He may not have by any means full knowledge of all that has happened, but within the department the contract decision may require approval at his level. So on the strength of the recommendations from many others, including the contracting officer and a board, that assistant secretary may sign the document which is the formal and official approval of the contract.

There, it seems to me, the problem is not so much of his individually being involved in a possible conflict of interest. The problem is of a different sort. This becomes the problem of appearance. Suppose later it's brought out that that assistant secretary approved a contract for a particular defense contractor without much personal involvement and then later goes to that company as a vice president. This will probably create or could create a very unfortunate public impression. So that the question of appearance I think has to be taken into account, too. It is difficult, of course, to penalize people for actions merely because of the appearance that they create.

The CHAIRMAN. Would the Senator yield at that point, because I think you raised a very, very sensitive and thoughtful point here. This is exactly why we have written into the legislation the provision for waivers and I think that under those circumstances the appearance of a conflict of interest could be handled by saying, here, you had a review by the Government; they found that although there was some superficial relationship, that there was nothing substantive. There was no real authority and that for that reason the waiver is granted and was granted and this man was able to return to the com-

pany for which he worked, and I think that would put him in a much better position and it would help solve that problem.

Mr. MEEKER. I would agree. I think the agency needs to consider waiver questions carefully, to make their decisions public after they have been reached, and, of course, to report them to the Civil Service Commission so that it will know what is happening and the facts will be available if anybody wants to look at them later.

Senator SCHMITT. I might carry you a little farther along in the chain. The contract has been let. Now you have the administration contract which could have great influence on profit and loss within the company itself. How do you see that? Does the program manager of a particular project now come under the umbrella of an act of this kind?

Mr. MEEKER. Well, I think he must. It's very hard to see how the person in that position within the Federal agency can fail to be covered without opening a pretty large loophole.

Senator SCHMITT. And the staff of that program manager?

Mr. MEEKER. If they are individuals who are working on the contract and its execution, if they have significant functions that are substantive and not simply ministerial, then I would say, yes, they do need to be considered as well.

Senator SCHMITT. So then, you would include these people who are involved in various review efforts of the contract, of design change decisions, if we were talking about a piece of hardware; service change decisions if we were talking about a service contract? The reason I'm leading you this way is that in my experience you have just about included most of the professional staff of an agency like NASA and I suspect an agency like the Department of Defense, and I'm not sure that we can handle that large a definition. I'm extremely sympathetic with the legislation. I want to be sure it's something we can afford.

Mr. MEEKER. If you have individuals who have exercised a significant professional function and have participated in decisions that have really made a difference to the contractor as well as to the Government, then it seems to me that their relationship to the contractor must be very carefully controlled and indeed they need to be isolated from having a conflict of interest caused by a special relationship with that contractor, not with others, but with the one that has the contract that they are now looking at.

Senator SCHMITT. Well, I would just say, Mr. Chairman, that's very easy to say, but I think it would be very difficult to devise and not interfere with the normal flow of the activities under that contract.

So I appreciate your testimony. I appreciate the efforts that the chairman is making to deal with a very, very difficult subject.

The CHAIRMAN. It would seem to me that the waiver you and I discussed just a minute ago would have more credibility and more acceptability if it were made by a force outside the agency. That's one of the reasons why I think having an independent review board as I have suggested might have a very useful function.

Mr. MEEKER. I think that type of decision is one that would be—

The CHAIRMAN. Particularly if it affected a high level person.

Mr. MEEKER. It would be appropriate for review outside of the agency itself.

The CHAIRMAN. Mr. Meeker, I want to thank you very much again for superlative testimony, very, very helpful and highly responsive to our concerns here.

Now I believe anybody reading the record of these hearings will have to agree there's a fuller appreciation of favoritism in procurement outside of the executive branch than there is inside it. Perhaps that is understandable.

The question, then is, how to protect the public interest without recurring and expensive investigations of every aspect of every procurement decision and without a cumbersome administrative system. We do not want a remedy worse than the ill it seeks to cure.

S. 695 has been carefully drafted to make the medicine fit the disease. It prohibits for 2 years the employment of former Federal officials by contractors over whom these officials exercised significant contractual authority. It requires these same individuals, when entering or leaving Federal service, to disclose their past or future employment. And it sets up a board to review these disclosure statements and to advise officials on what they may or may not do in terms of post-Government employment.

These are precise and appropriate steps for protecting the public interest. They will not burden the bureaucracy or hamper Government recruitment.

In addition, this bill will go beyond the administration measure to address problems for which the administration legislation, as necessary as it is, provides no remedies—3 days of testimony have shown that there are ways to improve S. 695. Suggestions for improvement will be taken very seriously, especially in regard to the composition of the Conflict of Interest Review Board. But I am gratified to note that seven of the nine witnesses in these hearings strongly endorsed the approach taken in S. 695. And none of the witnesses condemned it. I take this as a sign that the time has come for passage of legislation that will achieve the objectives of S. 695.

The committee will stand adjourned.

[Whereupon, at 11:50 a.m., the hearing was adjourned.]

## APPENDIX I

### BIOGRAPHIES OF WITNESSES

#### CHARLES E. BENNETT, U.S. REPRESENTATIVE FROM FLORIDA

Charles E. Bennett, Democrat, of Jacksonville, Fla.; born December 2, 1910; educated in Florida schools, from first grade in grammar school through college; University of Florida graduate (B.A. and Juris Doctor degrees; president of student body and editor of school paper); honorary degree of Doctor of Humanities from University of Tampa; honorary Doctor of Law, Jacksonville University; practiced law in Jacksonville prior to election to Congress; president of Jacksonville Junior Chamber of Commerce; served as member of Florida House of Representatives in 1941; enlisted March 13, 1942, and served 58 months in Infantry in World War II, including guerrilla combat in the Philippines; awarded Silver Star, Bronze Star, Combat Infantry Badge, Philippine Legion of Honor, Gold Cross for gallantry in action, and French Chevalier de la Legion d'Honneur; discharged as captain January 13, 1947; elected to Infantry Hall of Fame, Fort Benning Officer Candidate School, in 1958; awarded Izaak Walton League Award for outstanding conservation accomplishments; Distinguished Service Award of Jacksonville University; Significant Alumni Award of University of Florida; Distinguished Eagle Scout Award; Fiftieth Anniversary Medallion for vocational rehabilitation work; Distinguished Service Award, President's Committee on Employment of the Handicapped, 1969; president in 1972 of University of Florida Alumni Association; twice awarded certificate by Freedoms Foundation "for outstanding achievement in bringing about a better understanding of the American way of life"; awarded Good Government Award by Jacksonville and United States Junior Chambers of Commerce; affiliated with Disabled American Veterans, American Legion, Veterans of Foreign Wars, Masons, Lions, and Sons of the American Revolution; member, board of trustees of Lynchburg (Christian Church) College; Bennett has set an alltime voting record in Congress for he has not, in more than 25 years, missed a single legislative vote, on any rollcall; member of House Armed Services Committee; chairman various subcommittees; appointed in 89th Congress as chairman of House Committee on Standards and Conduct; author of four books: *Laudonniere and Fort Caroline* (University of Florida Press, 1964); *Settlement of Florida* (University of Florida Press, 1968); *Southernmost Battlefields of the Revolution* (Blair, Inc., 1970); and *Three Voyages* (University of Florida Press, 1974); co-author *Congress and Conscience* (J. B. Lippincott, 1970); elder in the Riverside Avenue Christian Church; married to Jean Fay Bennett; four children: Bruce, Charles, James, and Lucinda; elected to the 81st Congress on November 2, 1948; reelected to each succeeding Congress.

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#### ALAN K. CAMPBELL, CHAIRMAN, U.S. CIVIL SERVICE COMMISSION

Born: May 31, 1923—Elgin, Nebr.

Marital status: Married to Jane Owen (daughter, Kimberly Ann; son, Charles Duncan).

Education: Whitman College, A.B.; Wayne State University, M.P.A.; Harvard University, M.P.A., Ph. D.

Experience: Appointed Chairman, U.S. Civil Service Commission, by President Jimmy Carter, May 5, 1977.

#### GOVERNMENTAL

*State of New York.*—Elected Delegate-at-large to New York State Constitutional Convention and Chairman of the Convention's Committee on Home Rule and Local Government, 1967.

Experience continued: Deputy Comptroller for Administration and Research, 1960-61. State Council of Economic Advisors, 1970-74. Temporary State Com-

mission on the Revision and Simplification of the Constitution, 1965-66. Chairman, State Democratic Platform Committee, 1962. Senator Robert Kennedy's Military Academy Selection Board, 1965-68. State Advisory Council on Continuing Higher Education, 1966-68. Herbert H. Lehman Fellowship Committee of the State Education Department, 1967-68. Co-Chairman, Governor's-Comptroller (N.Y.). Accounting Improvement Committee, 1960-61.

*Federal Government.*—Consultant, Advisory Committee on Intergovernmental Relations, 1969-77; Urban Education Task Force, Department of Health, Education, and Welfare, 1969-70; Member, Advisory Committee to the Secretary of Housing and Urban Development, 1967-68; Consultant, National Science Foundation, 1973-74; Consultant, National Institute of Education on Research and Development Funding Policies of the Institute, 1975.

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HOWARD M. METZENBAUM, U.S. SENATOR FROM OHIO

Howard M. Metzenbaum, Democrat, of Cleveland, Ohio; born in Cleveland, Ohio, June 4, 1917; B.A., Ohio State University, 1939; LL.B., Ohio State University School of Law, 1941; Ohio House of Representatives, 1943-47; Ohio State Senate, 1947-51; campaign manager for Senator Stephen M. Young (D.-Ohio) in 1958 and 1964; Democratic nominee for the U.S. Senate, 1970; founder, Metzenbaum, Gaines, Finley & Stern Co., L.P.A.; chairman, ComCorp, Inc., a group of suburban weeklies in the Cleveland area; vice chairman, Fellows of Brandeis University; trustee, St. Vincent Charity Hospital, United Cerebral Palsy Association, the American Cancer Society (Cleveland), ALSAC-St. Jude Children's Research Hospital; national cochairman, Citizen's Committee for the Conquest of Cancer; board member, American Museum of Immigration; married to the former Shirley Turoff, August 8, 1946; four daughters: Barbara (Mrs. James D. Bonner), Susan (Mrs. Joel Hyatt), Shelley, and Amy; appointed U.S. Senator, January 4, 1974, to fill the vacancy created by the resignation of William B. Saxbe, and served until December 23, 1974; unsuccessful candidate for renomination in 1974; resumed the practice of law in Ohio; elected to the U.S. Senate, November 2, 1976, for the 6-year term beginning January 3, 1977.

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JAMES G. ABOUREZK, U.S. SENATOR FROM SOUTH DAKOTA

James G. Abourezk, Democrat, of Rapid City, S. Dak.; born in Wood, Mellette County, S. Dak., February 24, 1931; B.S. in civil engineering, South Dakota School of Mines, Rapid City, S. Dak., 1957-61; J.D., University of South Dakota Law School, Vermilion, S. Dak., 1963-66; admitted to practice before the South Dakota Supreme Court, the Federal Court District of South Dakota, and the U.S. Supreme Court; served in the U.S. Navy, 1948-52; former partner, law firm of LaFleur & Abourezk, Rapid City, S. Dak.; married Mary Ann Houlton, 1952; three children, Charles Thomas, Nikki June, and Paul Edwin; elected to 92d Congress November 3, 1970; elected to the United States Senate, November 7, 1972, for the term ending January 3, 1979.

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LEON ULMAN

Mr. Ulman received his A.B. degree from Columbia University and his LL.B. from Fordham University.

He is a member of the New York, District of Columbia, U.S. Supreme Court and American Bar Associations, and the Committee on Government Liaison, Administrative Law Section.

From 1942 to date, Mr. Ulman has served as staff attorney for the Board of Immigration Appeals; staff attorney, Criminal Division; Chief, Appeals and Research Section, Office of Alien Property; and, Deputy Assistant Attorney General, Office of Legal Counsel, Department of Justice. He is a member of the U.S. delegation to the International Conference on civil liability for damage caused by land-based nuclear reactors and a former member of the Interagency

Committee on Mexican Illegal Aliens. He is also Chairman of the Department Classification Review Committee.

Mr. Ulman's position responsibilities include advising the White House and all Executive branch departments and agencies on a great variety of legal problems such as the President's constitutional authority, agency statutory authority and the Constitutional aspects of important administration legislative proposals. These responsibilities include meeting with White House and agency staff.

Mr. Ulman has been honored with the Attorney General's Distinguished Service Award (1970), is a nominee for the Rockefeller Public Service Award and is Phi Beta Kappa (Columbia).

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PAUL G. DEMBLING

Mr. Dembling was sworn in as General Counsel of the General Accounting Office on November 17, 1969.

Mr. Dembling received his A.B. cum laude and with special honors in economics and his M.A. degree from Rutgers University where he had served as graduate assistant and teaching fellow. He received his Juris Doctor from George Washington University Law School, serving as an editor of the Law Review.

When Mr. Dembling entered the Federal service he occupied various industrial relations positions. Later, he served successively as Special Counsel, Legal Advisor, and General Counsel with the National Advisory Committee for Aeronautics. In the latter capacity, he was a principal drafter of the Administration bill which became the National Aeronautics and Space Act of 1958.

Upon the formation of NASA, Mr. Dembling was appointed Assistant General Counsel. In addition, he served as Chairman of the NASA Board of Contract Appeals. When he was appointed Director, Office of Legislative Affairs, he continued to serve as Vice Chairman of the NASA Inventions and Contributions Board. From 1963 until 1967, he served as Deputy General Counsel, when he was named General Counsel, occupying that position until September 1969, when he was appointed Deputy Associate Administrator of NASA.

From 1964 to 1969, Mr. Dembling also served as a member of the United States delegation to the U.N. Legal Subcommittee in the drafting of the Outer Space, Astronaut, and Liability Treaties.

He is the recipient of the Army's Civilian Meritorious Award and NASA's highest award, the Distinguished Service Medal, the National Civil Service League Award. He was elected to the National Academy of Public Administration in 1973.

Mr. Dembling is a member of the District of Columbia bar and of the American Bar Association (member of Council of Public Contract Law Section), the Federal Bar Association (member of National Council 1964- ), the International Institute of Space Law (President, U.S. 1971-72), and the National Contract Management Association (Fellow; member of Board of Advisors 1971- ). He served as Editor in Chief of the Federal Bar Journal from 1962 to 1969, and has written more than 20 articles for law reviews and other professional journals. He also serves as Professorial Lecturer at George Washington University National Law Center.

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GORDON M. ADAMS, DIRECTOR OF MILITARY RESEARCH, COUNCIL ON ECONOMIC PRIORITIES

Dr. Adams received his Ph.D. and M.A. in political science from Columbia University and his B.A. in political science from Stanford University.

Before coming to the Council on Economic Priorities, Dr. Adams held the positions of: visiting scholar, Institute on Western Europe; assistant professor, Department of Political Science, Columbia University; adjunct professor, Thematic Studies Program, John Jay College; fellow, University Consortium for World Order Studies; fellow, Grant-in-Aid program, American Council on Learned Studies; International Affairs Fellow, Council on Foreign Relations; and, staff associate, Social Science Research Council.

His related professional experience includes: editorial board member, *Politics and Society*, 1970-present; and member, University Seminar on the Political Economy of War and Peace, Columbia University, 1975-present.

Dr. Adams received a Foreign Area Fellowship from the Social Science Research Council and a Fulbright Fellowship to the College of Europe, Bruges, Belgium. He is the author of *The B-1 Bomber* (Council on Economic Priorities, New

York, New York, 1976) and co-author of *The Invisible Hand* (CEP, New York, New York, 1976).

He has received a certificate and diploma from the College of Europe in Bruges, Belgium (1964) and a certificate from the European Institute of the Columbia University (1966).

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DAVID COHEN

David Cohen, President of Common Cause, has been Executive Officer of the organization since April 1976.

Mr. Cohen joined the Common Cause staff in July 1971 when he served as Director of Field Organization. He later served as Vice President for Operations, Executive Vice President, and subsequently President in April 1975.

As a public interest lobbyist, Mr. Cohen has participated in numerous issue battles: civil rights, consumer affairs, urban affairs, anti-poverty and end-the-war legislation. He has published numerous articles on the need to revitalize the operations of Congress. His "Party Leaders in Congress" is a case study which has appeared in a college text.

Mr. Cohen served on the Secretary of the Treasury's Advisory Committee on Private Philanthropy and Public Needs; he is a non-lawyer member of the Ethics Committee of the District of Columbia Bar; and he is a member of the Synthesis Panel of the National Academy of Sciences' Committee on Nuclear and Alternative Energy Systems.

Mr. Cohen currently is an Associate Fellow of Calhoun College, Yale University. He formerly served on the Washington, D.C. Jewish Community Relations Council.

A native of Philadelphia, Pennsylvania, Mr. Cohen received a B.A. from Temple University in 1957. He is married and has two children.

Before coming to Common Cause, Mr. Cohen was Associate Legislative Director of the Council for Community Action from 1969 to 1971. While there, he concentrated on legislative and executive branch activities affecting the poor. Other previous positions include Legislative Representative for the Industrial Union Department of the AFL-CIO and Legislative Representative for the Americans for Democratic Action.

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LEONARD C. MEEKER, CENTER FOR LAW AND SOCIAL POLICY

Mr. Meeker received his A.B. degree from Amherst College and his LL.B. from Harvard University.

He is a member of the District of Columbia, California, Federal and American Bar Associations as well as a member of the Washington Council of Lawyers. He presently is vice president of the American Society of International Law.

From 1940 to date Mr. Meeker has served as an attorney in the Office of the General Counsel, Treasury Department; attorney in the Office of the Solicitor General of the Department of Justice; attorney in the Office of the Legal Advisor of the Department of State; Assistant Legal Adviser for United National Affairs, Deputy Legal Adviser and Legal Adviser, Department of State; U.S. Ambassador to Romania; and attorney, International Project, Center for Law and Social Policy.

Mr. Meeker received the Rockefeller Public Service Award in 1968.

## APPENDIX II

### EXHIBIT 1: EXCERPT FROM OPENING STATEMENT OF SENATOR ABOUREZK AT DECEMBER 5, 1975, HEARING

Although it is clearly appropriate for this subcommittee to evaluate how Bechtel was awarded this particular contract, I believe these hearings have served an even more important function. The Congress has not held any hearings on organizational conflict of interest in 12 years. It is apparent to me that the present Government policies in this sensitive and important areas are shockingly inadequate.

In fact, the Federal procurement regulations, which cover all Government contracts, contain no provisions whatsoever on organizational conflict of interest.

The present agency regulations define conflicts of interest in the narrowest possible way and do not even require a contract applicant to disclose any possible conflicts.

Both the issues I have been raising and the distinguished testimony of Mr. Gilbert Cuneo at the last hearing make it clear that Government regulations must, as they presently do not, define conflict of interest according to the following commonsense principles.

(1) A conflict of interest may exist whenever a Government contractor may receive benefits from the contract beyond those specified in the contract itself. It makes no difference whether these benefits are later to be conferred by the Government or whether they arise in the contractor's dealings in the private sector. Whether or not the particular benefits which accrue to a contractor raise a conflict of interest or are merely incidental to the performance of any contract is a determination which must be carefully made on a case-by-case basis.

(2) The ways in which the contractor may use the results of the contract determines whether or not a conflict exists, even though it may not be the Government's intention to use the contract in that particular way.

(3) The purpose of conflict of interest regulations is to bar contracts where the conflict may bias the contractor's judgment. The Government's interest in receiving unbiased judgments is fully sufficient to justify barring contracts with firms or individuals with a conflict of interest even though competitors of the contractor are in no way affected by the bias.

(4) Where the results of a contract may have an effect on the direction of Government policy in a way which benefits the contractor, a conflict of interest may exist even though the contract results do not

absolutely assure the ultimate direction of the Government policy. In other words, Government regulations should recognize that there is a temptation for contractors to bias their judgments even when the contract results may have only a partial effect on subsequent Government decisionmaking.

(5) Because the purpose of conflict of interest regulations is to prevent even the temptation for bias, the Government should not award a contract to a firm or individual with a conflict of interest and then hope that the Government later can locate and neutralize any bias affecting the contract results.

(6) All contract applicants should be required to affirmatively disclose the existence of a potential conflict of interest. Similarly, all Government contract officers should be required to investigate the contract applicant for any conflicts of interest. Such disclosure and investigation should be especially rigorous if the contract proposal was not solicited by the Government in the first place.

(7) When a potential conflict of interest is found to exist, the Government should attempt to fashion a contract clause to bar the flow of benefits, whatever they might be, to the contractor which creates the conflict. If no such clause can be fashioned, the contract should not be awarded. If a contract applicant fails to disclose a conflict which is discovered later, the Government should be able to bar the flow of such benefits even though no exclusion clause was written into the contract initially.

The subcommittee's examination of the Bechtel contract in light of these principles is especially timely principally because the General Services Administration is presently drafting the first Government-wide regulations on organizational conflict of interest. If the seven principles I have suggested are incorporated in these regulations, we will see a veritable revolution in the way the Government spends approximately 60 billion tax dollars a year. This is the amount of contracts the Government awards each year.

EXHIBIT 2: LETTER FROM SENATOR JAMES ABOUREZK TO  
MR. H. GREGORY AUSTIN AND MR. R. TENNEY JOHNSON

HENRY M. JACKSON, WASH., CHAIRMAN  
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## United States Senate

COMMITTEE ON  
INTERIOR AND INSULAR AFFAIRS  
WASHINGTON, D.C. 20510

January 20, 1976

Mr. H. Gregory Austin  
Solicitor  
Department of the Interior  
Eighteenth and C Streets, N.W.  
Washington, D.C. 20240

Mr. R. Tenney Johnson  
General Counsel  
Energy Research and Development  
Administration  
20 Massachusetts Avenue, N.W.  
Washington, D.C. 20545

Dear Sirs:

During your agencies' appearances before the Subcommittee on Energy Research and Water Resources on November 17, 1975, I stated that I would be sending suggestions for revisions in your regulations for the avoidance of organizational conflict of interest. My suggestions are enclosed, together with a copy of the testimony of Mr. Gilbert Cuneo, given on November 21 before the Subcommittee, which will be helpful as background.

Several points are fundamental to understanding the thrust of these suggestions. First, I believe the orientation of your present regulations is insufficiently flexible in one crucial respect. In effect, they define and recognize the existence of a conflict of interest only if it is sufficient to require inclusion of a hardware exclusion clause. In effect this approach defines conflict of interest in terms of whether one particular remedy is appropriate. This results, if you will, in the tail wagging the dog. This approach necessarily leads your agencies to ignore the existence of conflicts of interest with respect to which inclusion of a hardware exclusion clause is not appropriate. For example, inclusion of such a clause is presently not appropriate if there is no follow-on procurement contract or if a contract is awarded on a sole-source basis. However, it is clear from the Subcommittee's hearings that organizational conflict of interest may exist even if there is no follow-on procurement contract and even if a contract is awarded on a sole-source basis. Therefore, I believe it makes no sense to define conflict of interest in terms of whether a hardware exclusion clause is

appropriate. Rather, one must first determine - as per my suggestion - whether a conflict of interest exists, from whatever cause; and then determine the appropriate remedy, whether it be an exclusion clause or otherwise. This two step analysis will necessarily broaden your agencies' sensitivities to the existence of a conflict of interest, while also broadening your efforts to fashion an appropriate remedy.

Second, in terms of defining conflict of interest, I do not find your present regulations inadequate if it is made clear that a conflict may exist whenever a contractor's judgment or performance may be biased, even if there is no resulting competitive disadvantage. This point is made clear when conflict of interest is no longer, in effect, defined in terms of whether a hardware exclusion clause is warranted. By making it clear that conflicts of interest may exist even though an exclusion clause is not appropriate, it is also made clear that the two avowed purposes of your conflict regulations - protection of the government and protection of competitors - are fully independent and sufficient grounds upon which to take corrective action.

Third, when determining whether a contractor's judgment or performance may be biased, it is clear that the main focus should be on determining whether the contractor has some special and unique interest which creates divided loyalties. However, as I have stated in Section A(2), I also believe a conflict may arise even if the contractor receives no more benefits than any other contractor in the same industry. The point I am making is that industries - as well as the individual contractors within an industry - have special interests which may create a conflict of interest on the part of any contractor within that industry. This observation is certainly relevant to the decade-long debate over the appropriate government policy towards in-house research and non-profit contractors, however, I believe that in terms of your regulations it may be sufficient to incorporate my observation without directly engaging in the larger debate.

Fourth, because the approach taken in my suggestions will substantially broaden the number of contracts with respect to which a conflict will be noted, I recognize that under exceptional circumstances it may sometimes be necessary and in the public interest to award contracts despite the existence of a conflict. I have provided some guidelines for determining whether the tests of necessity and public interest have been met. If a contract is then awarded despite a conflict, I have set forth certain disclosures to be made of the conflict prior to and at the time the award is made and in all resulting work products. By remaining flexible as to

the remedy which will be imposed once a conflict is noted - even to the point of selectively awarding contracts despite the existence of a known conflict - there will no longer be so much incentive to avoid an initial finding that a conflict, in fact, exists.

I have drafted these suggestions to emphasize a two step procedure because I am confident that ample recognition of the existence of a conflict will result in substantial and imaginative efforts to avoid that conflict. I am equally confident that where a conflict remains significant even after avoidance techniques have been employed, the government will choose in most cases not to award a contract and proceed to satisfy its needs without resorting to procurement. However, I emphasize that without an initial recognition of the existence of a conflict, no effort whatever will ensue to avoid it.

I know that your agency will be receptive to these suggestions and that revision of your regulations will substantially reduce the incidence of organizational conflict of interest. Because I understand that the General Services Administration shortly will be issuing its first regulations in this area, I have also sent them a copy of this letter. I am, however, also considering the desirability of introducing legislation in the area.

I request that you prepare a detailed evaluation of my suggestions by February 13, 1976. If you have any questions, please feel free to contact me directly or contact Chuck Ludlam at 224-4434.

Sincerely,

James Abourezk

cc: Mr. Moody Tidwell, Interior  
Mr. James F. Kelly, Interior  
Commissioner Gilbert G. Stamm, Interior  
Dr. S. William Gouse, ERDA  
Mr. Philip Reed, GSA  
Mr. Dave Lowrey, GSA  
Mr. Gilbert A. Cuneo, Esq.  
Senator Lawton Chiles, Chairman, Subcommittee on Federal Spending Practices  
Mr. Les Fettig, Staff Director, Subcommittee on Federal Spending Practices  
Mr. Dan Guttman, Esquire

PRINCIPLES OF CONFLICT OF INTEREST

The following outline presents principles to be incorporated in regulations for avoidance of organizational conflict of interest. These statements of principle are not drafted in language appropriate for adoption as a regulation. Accordingly, all discussions of these principles should focus on the ideas expressed rather than on language or form.

This outline makes a clear distinction between the issues of (1) whether a conflict of interest exists, and (2) the appropriate steps to be taken to avoid the conflict.

A. DETERMINATION OF EXISTENCE OF A CONFLICT OF INTEREST

(1) An independent purpose of conflict of interest regulations is to avoid a conflict which may affect the capacity of a contractor to render impartial, technically sound, and objective assistance and advice to the government. The government's interest in receiving such assistance and advice is fully sufficient to justify government action to avoid a conflict of interest, even though competitors of the contractor are in no way affected by the conflict. Therefore, a conflict of interest may exist even if a contract is awarded on a sole source basis or there is no follow-on procurement contract.

(2) A conflict of interest may exist whenever a contractor may receive benefits from the contract beyond those specified in the contract. A conflict may arise from benefits which later accrue to the industry of which the contractor is a part even if the contractor itself receives no more benefits than any other contractor in the industry. It makes no difference whether the benefits are later to be awarded or conferred by the government

or whether they arise in the contractor's dealings in the private sector. Interests which create a conflict may include prior and prospective interests as well as current interests. Under exceptional circumstances a conflict may arise from benefits which are not directly financial in character. Whether or not the particular benefits which accrue to a contractor raise a conflict of interest is a determination primarily related to whether the benefits which accrue to the contractor would accrue to any organization or individual performing the contract or whether they accrue to some special degree to a particular contractor or industry because of interests of that particular contractor or industry. Such a determination can be made only after a complete investigation and analysis of the nature of the contract and of the benefits and the relationship of such benefits to the performance of the contract.

(3) The receipt by a contractor of certain types of special benefits is presumed to raise a conflict of interest. Included among the special benefits raising such presumption are the following:

(a) permitting a contractor to bid on a government procurement contract, the nature of which may be or is determined in whole or in part by the results of an earlier contract performed by the same contractor; or

(b) a contractor performing a research contract which requires an evaluation of the efficiency or performance of facilities or technology in which the contractor has or may have a financial interest.

(4) Where the results of a contract may have an effect on the direction of government policy in a way which benefits the contractor, a conflict of interest may exist even though the contract results do not absolutely assure the ultimate direction of the government policy. In other words, government regulations should recognize that the capacity

of a contractor to render impartial, technically sound, and objective assistance and advice may be affected if the contractor perceives that the contract results may have a partial effect on subsequent government decision-making. Furthermore, a conflict of interest may arise where a contract which is awarded by one agency may have an effect on the direction of another agency's policy in a way which benefits the contractor.

(5) When determining whether a contractor has a conflict of interest, the interests of the directors of the contractor should be given equal weight with the interests of the contractor itself.

(6) The way in which the contractor intends or may make use of the work product of a contract determines whether or not a conflict of interest exists, even though it may not be the government's intention or practice to use the contract work product in that particular way.

(7) Because the purpose of conflict of interest regulations is to prevent even the temptation for bias, it is not relevant to any determination regarding the existence of a conflict of interest that the government later can identify and neutralize any bias affecting the work product of the contract. Similarly, it is not relevant that the contractor has the professional reputation of being able to resist temptations such as arise from a conflict of interest.

(8) All contract applicants should be required to affirmatively disclose to the agency the existence of any potential conflict of interest. Such applicants must also furnish a complete list of prior, current, and prospective clients as well as a description of the work performed. Similarly all government contract officers should be required to investigate the contract

applicant for any possible conflict of interest. The agency shall take steps to assure that disclosure of any of this information provided by the contractor respects any legitimate need for privacy on the part of the applicant.

(9) Disclosure requirements and investigation should be especially rigorous if the contract proposal was unsolicited by the government because unsolicited proposals are by their nature more likely to reflect the interests of the company making the proposal.

(10) The existence of a conflict of interest is more likely to be disclosed if a contract award is based on competitive bidding. For this reason government regulations should emphasize that unsolicited proposals should be awarded to the company making the proposal on a sole source basis only if competitive bidding is clearly inappropriate.

#### B. ACTION TO PREVENT OR NEUTRALIZE A CONFLICT OF INTEREST

(1) When a conflict of interest is found to exist, the government should attempt to fashion a contract clause to bar the flow of benefits - whatever they might be - to the contractor which create the conflict. Included among the clauses which may serve this purpose are hardware exclusion clauses, clauses requiring the contractor to divest the conflicting interests or clauses which prevent any overlap of personnel or reliance on data which creates the conflict. As one method for neutralizing a conflict of interest, the government may consider awarding overlapping contracts to each of several organizations with differing or competing interests.

(2) If it is not possible for the government to fashion an effective contract clause or award overlapping contracts which prevents or neutralizes a conflict of interest, the government should thoroughly evaluate whether the advice and assistance may be obtained without awarding a contract.

(3) If the government determines it must award a contract, the government may not award the contract to an organization with a conflict, unless (a) all feasible and prudent steps have been taken to avoid the conflict, (b) No other organization or combination of organizations are capable of performing the contract without an equivalent conflict of interest, (c) no other organization is unfairly disadvantaged, (d) the nature of the conflict is disclosed for public comment in advance of the contract award, at the time the contract is awarded, and in all of the work product of the contract,\* and (e) the General Counsel or equivalent<sup>officer</sup> of the department or agency expressly approves the awarding of the contract as being necessary and in the public interest.

(4) If a contract applicant fails to disclose a conflict of interest known to it at the time the contract is awarded and if this conflict is later discovered by or brought to the government's attention, the government should be empowered to bar the flow of special benefits to the contractor or take other steps to neutralize the conflict, even though no benefits exclusion or other clause initially was written into the contract. The government should seek to impose other penalties on the contractor as appropriate.

(5) If, during the performance of a contract, a conflict of interest arises due to circumstances not foreseeable when the contract was awarded,

\* All reports or other work product authored or substantially authored by contractors should be clearly identified as such, whether or not a conflict exists.

the government should formally evaluate whether the conflict of interest may so affect the capacity of the contractor that unilateral termination of the contract by the government is warranted.

(6) Standing should be given to competitors or other interested parties to challenge the awarding of a contract on the basis that regulations on conflict of interest have been violated. Procedures should be adopted so that any such challenge will be expeditiously resolved. \*\*

\*\* Congressional action would be needed to fully implement this proposal.



EXHIBIT 3: LETTER FROM MR. TENNEY JOHNSON, ERDA  
GENERAL COUNSEL TO SENATOR JAMES ABOUZEK  
UNITED STATES  
ENERGY RESEARCH AND DEVELOPMENT ADMINISTRATION  
WASHINGTON, D.C. 20545

February 20, 1976

Honorable James Abouzeck  
Senate Committee on  
Interior and Insular Affairs

Dear Senator Abouzeck:

Thank you for your thoughtful letter dated January 20, 1976, requesting my comments on suggested revisions in ERDA regulations governing the avoidance of organizational conflicts of interests.

Your suggestions raise certain fundamental questions that could have far-reaching consequences not only for ERDA's procurement practices but for procurement throughout the Federal Government. Accordingly, I have taken the liberty of forwarding a copy of your letter for study and review to those agencies directly concerned with overall Federal procurement policy, namely, the General Services Administration, the Office of Federal Procurement Policy, and the Armed Services Procurement Regulations Committee.

However, I should like to offer some preliminary thoughts I have in regard to your suggested revisions. In general, I believe that the present ERDA regulations for avoidance of organizational conflicts (Part 9-1.54, copy enclosed for your convenience), while they might be improved as discussed briefly below, are basically sound. Starting from the premise that there are a myriad number of situations that might present an actual or potential conflict of interest, ERDA's regulations are based on two fundamental and separate principles: first, that prospective contractors should not be placed in a position where the circumstances would hamper their unbiased and objective advice or assistance; or, second, where the award of a contract would, by reason of extrinsic facts, give them an unfair competitive advantage.

Since not all actual or potential conflicts cases can be clearly identified in advance, it must be recognized that

the application of the basic principle--preventing actual or potential bias in the contractor's judgment or unfair competitive advantage or both--will ultimately depend on the exercise of good judgment by procurement officials in the light of all the facts to the extent that they are or can be known.

It is in this latter regard, the fullest knowledge of the facts and circumstances bearing upon the conflicts question, where I believe a positive step forward can be taken as suggested by one of your recommendations. That is to say, it would, as you suggest, be helpful to require affirmative disclosure by contract applicants for conflicts purposes. Just how such disclosure should be made--perhaps for example, by way of a blanket certification similar to that of the certification or representation regarding small business status or contingent fees; or by way of a detailed statement of financial interests similar to those currently required of higher grade Government employees and consultants and advisors--is something that will require careful study. Similarly, the proper evaluation of any disclosure reports or filings would require a detailed review by knowledgeable Government personnel (technical assessment; legal staff; economists and accountants) that could add substantially to the overall time frame for the procurement process, especially in the case of large dollar-volume contracts involving research and development aimed at advancing the state of the art in the entire spectrum of energy technologies (solar, geothermal, fossil, nuclear, etc.), with an attendant unavoidable delay, which may well not be in the Government's best interest under some circumstances.

I can certainly agree, too, that competitive procedures are better than sole-source awards as a means of minimizing conflicts of interest, as pointed out in one of your suggestions. We at FRDA are emphasizing to all our contracting personnel the need for increasing competition in obtaining contractor assistance of all types.

On the other hand, some of your recommendations appear to me to be based on a misunderstanding of our current regulations. For example, your letter states that our regulations "define and recognize the existence of a conflict of interest only if it is sufficient to require the inclusion of a hardware exclusion clause" (underscoring supplied). You will note in this regard that our regulations provide in pertinent part:

"The general policy [of preventing bias and unfair competitive advantage] cannot be automatically or routinely implemented; the application of considered judgment is necessary if that policy is to be applied in an effective, workable manner. The following sections provide guides for the application of the general policy in specific situations. However, contracting and program officials should be alert to other situations which may warrant application of the general policy." (§9-1.5406(c))

As I also pointed out in my prepared statement submitted to your Subcommittee on November 17, 1976 (copy attached, page 3), a restriction on follow-on procurement is merely one tool, apart from not letting the contract to a particular firm, which may be used to accomplish the paramount objective of preventing biased judgment by or unfair competitive advantage to the contractor. Again, in the case of unsolicited proposals, I pointed out that the ERDA staff review procedure is designed to determine whether a potential conflict exists and, if so, whether the conflict shall be resolved "either by not awarding the contract or by adding properly drawn restrictions against future procurements in defined areas." (Page 8)

You note in your letter, "I do not find your [ERDA] present regulations inadequate if it is made clear that a conflict may exist whenever a contractor's judgment or performance may be biased, even if there is no resulting competitive disadvantage." (Underscoring supplied) I submit that our regulations do, in fact, make this distinction.

Some of your recommended revisions or principles appear to me to pose substantial problems of interpretation and application. For example, under your principle designated A.(6), it is stated that "the way in which the contractor intends or may make use of the work product of a contract determines whether or not a conflict of interest exists, even though it may not be the Government's intention or practice to use the contract work product in that particular way." (Underscoring supplied) In my view, to predicate a finding of conflict on the contractor's "intent" (assuming that such intent could be inferred from facts preceding an award), in contradistinction to the Government's "intention", is to introduce an extraneous and misleading element into the entire

process of avoidance of conflicts. Whether a contractor has or may have bias or unfair advantage should depend on an objective evaluation by the Government of all the known facts and circumstances, and no element of "intent" (on the part of the contractor or Government) need come into play.

I am particularly concerned about the concept that a conflict of interest may be found where (your principle designated A(2)) "benefits...later accrue to the industry of which the contractor is a part even if the contractor itself receives no more benefits than any other contractor in the industry" (underscoring supplied). To promulgate this concept as a fundamental principle for conflicts avoidance would, I believe, be inconsistent with the declared Congressional policy governing ERDA's mission under its organic Acts (Energy Reorganization Act of 1974, P.L. 93-438; Federal Nonnuclear Act, P.L. 93-577), and it would thwart ERDA from accomplishing its mission. Under the cited Acts, ERDA is charged with carrying out a broad range of research and development programs to explore and utilize all forms of energy. The ultimate objective is to make all energy sources (fossil, nuclear, solar, geothermal) commercially available for the national well-being and security. Therefore, if ERDA, in letting a research and development for solar energy application to company A, were to be precluded from such an arrangement because "the industry of which [company A] is a part," would benefit--a fundamental purpose of the aforementioned Acts--then clearly this agency could not operate to accomplish the tasks mandated by the Congress. I, therefore, believe such a test as you have proposed of "benefit to industry" is at war with the declared Congressional intent set forth in our organic Acts and is unworkable.

Lastly, I disagree with the concept--inherent in your proposals--that if a contractor has any conceivable self-interest in the outcome of the contract in terms of benefiting from possible future governmental action, the contract should not be awarded or should be avoided. There is a spectrum of situations in which possible future benefits to the contractor may be inferred. Not all of them, in my view, call for avoiding the contract.

In the first place, one of the incentives inherent in any contract is a possible future benefit to be derived from performance of the work. The development contractor,

for example, hopes for a future production contract (either from the Government or possible commercial customers) and, depending on the complexity of the developed item, has a built-in advantage for such a contract over possible competitors. (I agree that the Government should do everything possible to bring in competition for such contracts as early as possible.) Such an advantage is recognized as fair and not a "conflict of interest."

This is near one end of the spectrum of situations; toward the other end is the situation where a contractor is to prepare a work plan or a specification. The possibility of favoring one's own product in this situation is real and should generally be avoided. Even here, however, the possibility of conflict of interest, while real, may nonetheless be mitigated by subsequent independent reviews and testing of the contractor's actual work product. Here your concept of "overlapping awards"--separate contracts for portions of the overall work product--may have some useful application. While it is difficult to articulate the specific point on this spectrum where permissible contracts cross over to impermissible ones, certainly a crucial factor in judging on these matters is the relative predictability that the contract results will be used in the manner reasonably envisaged by the contractor.

The conclusion which I draw from all this is that Government contracting officials must ever be alert to the potential for organizational conflicts of interest and must be prepared, as provided for in our regulations, to exercise their best judgment in the light of the basic principles of avoiding bias in work product or preventing unfair competitive advantage and in the light of all the facts in each specific situation.

I trust that the foregoing preliminary thoughts and comments will be helpful to your Subcommittee. Please let me know if I can provide further information.

Sincerely,

/s/

R. Tenney Johnson  
General Counsel

Enclosures



EXHIBIT 4: LETTER FROM MR. H.GREGORY AUSTIN,  
INTERIOR DEPARTMENT SOLICITOR TO SENATOR JAMES ABOUREZK  
UNITED STATES

DEPARTMENT OF THE INTERIOR

OFFICE OF THE SOLICITOR

WASHINGTON, D.C. 20240

Honorable James Abourezk  
United States Senate  
Washington, D.C. 20510

Dear Senator Abourezk:

This refers to your letter of January 20, 1976, and the attached "Principles of Conflict of Interest" addressed to the General Counsel of ERDA and myself, in which you bring to our attention your thoughts and suggestions for consideration in revising our regulations relating to the avoidance of organizational conflicts of interest. You have asked for our evaluation of your suggestions.

I would like to thank you for your interest in the Department with regard to this matter.

Before considering specific items, there are several observations I would like to make. A number of your suggestions present novel approaches and raise broad policy considerations that are of general concern to at least those Government agencies with contracting programs. The establishment of a broad Government-wide policy is, of course, outside the scope of this Department's authority. Such authority is vested in the General Services Administration which has the responsibility for promulgating the Federal Procurement Regulations (FPRs), the Office Federal Procurement Policy (OFFPP) within the Office of Management and Budget, and the Armed Services Procurement Regulation Committee (ASPR). As you are aware, the FPR Committee in GSA is presently developing a regulation on avoidance of organization conflicts of interest. In this context my remarks relate solely to the position of this Department and do not constitute the official position of the Executive Branch on this subject.

One of the most difficult issues to be resolved in formulating a policy on organizational conflicts of interest is the establishment of an adequate definition of what constitutes such a conflict. Subparagraphs (2), (3) and (4) of Section A of the attachment to your letter address this issue, focusing primarily on the avoidance of benefits to a contractor. In my opinion further refinement is still required lest by overzealousness we inhibit the incentive of contractors to do business with the Government. In this regard, I believe that more than simply benefits to a contractor must be identified in reaching the

determination of the existence of an organizational conflict of interest. There must also be considered whether there is an adverse impact on the Government as the result of those benefits. To the extent that benefits can be categorized as placing a Government contractor in a position where it has an unfair competitive advantage or if a contractor's interests are such that there would be a justifiable basis for assuming that such a contractor's work product will be biased or otherwise prejudiced, then I agree there must be adequate safeguards to protect the Government's interests. I would not at this time be inclined to limit benefits flowing to a Government contractor beyond these general parameters.

While the suggestion in subparagraph (5) of Section A of the attachment, that the interests of the directors of a company should be given equal weight with the interest of the contractor in determining organizational conflicts of interest, has merit as an abstract principle, I believe the implementation of such a standard poses substantial practical problems which require further study and consideration. One item that will have to be considered is the definition of the type of interests of the director of a company that will constitute an organizational conflict for the company itself. A related question is, should the interests of officers of the company and major stockholders also be included in the determination? In addition there are practical problems related to the gathering of information on the interests of the individuals within the corporation, and in evaluating such information. Should the Government require a corporation to gather disclosure statements from its employees? Should the corporation or the Government, or both, analyze the information? Who, and how with any degree of certainty and reasonableness, should make the decision as to whether an individual's private interest constitutes an organizational conflict on the part of the corporation? Consideration will also have to be given to such questions as should there be a right of appeal for either or both the individual and the corporation; who would hear the appeal and the procedures that will have to be established to handle the appeal; all impacting upon the manpower constraints under which we all operate and the need to expeditiously handle the business of the Government.

The suggestion in subparagraph (6) of Section A of the attachment would require the procurement activity to predict during the contractor selection process whether the work product of the contract will constitute an organizational conflict of interest for the

contractor at some undefined future time. I believe that in most instances this will constitute an unreasonable burden since adequate information will not be available to the procurement activity at the time of contractor selection to make this type of a determination.

The suggestion which is implicit in subparagraph (8) of Section A, that there should be fuller disclosure requirements on the part of contractors to assist the Government in making a determination as to whether there is an organizational conflict of interest, has merit and should be explored further. However, I anticipate that there will be considerable difficulty in drafting a provision that will be sufficiently definitive and yet broad enough to accomplish the objective of requiring a contractor to affirmatively disclose a potential conflict of interest.

Subparagraphs (9) and (10) of Section A deal with unsolicited proposals. In many instances companies expend considerable time and effort in preparing unsolicited proposals. These proposals are, of course, submitted by companies with the hope and expectation that their efforts will be rewarded with Government contracts. Frequently, an unsolicited proposal will contain a company's proprietary data and information. Unsolicited proposals are also a valuable resource to this Department, as well as other Government agencies.

In formulating any type of policy that restricts the award of contracts to firms submitting unsolicited proposals, there must be a careful balancing that takes into consideration the various factors enunciated in the preceding paragraph. This Department has already issued a regulation which defines the findings and justifications that are required before a noncompetitive award may be made on the basis of an unsolicited proposal. (See the recent additions to 41 CFR 14-3, 40 Federal Register 39864, August 29, 1975.)

Your suggestions would add a new dimension to the above restrictions - vigorous disclosure requirements and investigations of unsolicited proposals to determine organizational conflicts of interest. If such a procedure were adopted it might inhibit a valuable resource to the Department, as well as adding sizeable administrative costs. Therefore, I would urge that any policy change of this type be coordinated with the entities responsible for establishing an overall Government policy in this area.

With respect to Section B of the attachment which is entitled "Action to Prevent or Neutralize a Conflict of Interest", I believe the fashioning of appropriate safeguards must be on a case-by-case basis after an analysis and determination of the nature of the organizational conflict of interest presented. The inclusion of a hardware exclusion clause in the follow-on procurement type of situation is one such remedy which has been used by this Department in a number of instances. (A list of those procurements where this type of clause has been used has already been furnished to your office.) The Department will, of course, continue to use hardware exclusion clauses in appropriate cases. Subparagraph (1) of Section B also refers to clauses which require the contractor to divest the conflicting interest; clauses which prevent any overlap of personnel or reliance on data which creates the conflict and awarding overlapping contracts to neutralize an organizational conflict of interest. Subparagraphs (2), (3), (4), and (5) of Section B describe the steps that should be taken if the Government cannot draft an adequate clause to deal with an organizational conflict of interest. All of your suggestions may have merit, however, it is not possible for me to evaluate the appropriateness of these suggestions without having specific factual situations before me.

In regard to subparagraph (6) of attachment B, there already exists an established procedure whereby the General Accounting Office (GAO) considers organizational conflict of interest issues. If those procedures are considered inadequate then I agree that some other or additional procedures should be provided.

Sincerely yours,

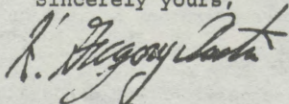


EXHIBIT 5: LETTER FROM SENATOR JAMES ABOUREZK  
TO MR. R. TENNEY JOHNSON

U.S. SENATE,  
COMMITTEE ON INTERIOR AND INSULAR AFFAIRS,  
Washington, D.C., February 27, 1976.

Mr. R. TENNEY JOHNSON,  
General Counsel, Energy Research and Development Administration,  
Washington, D.C.

DEAR MR. JOHNSON: This refers to your February 20, 1976, reply to my letter of January 20, 1976, regarding your agency's regulations for the avoidance of organizational conflict of interest.

In certain respects your letter failed to comment directly on the conflict of interest principles set forth in my letter. So that I may understand your Department's position with respect to each of the principles which I proposed, would you please give me separate and specific answers to each of the following ten questions:

1. Does your Department agree that in implementing your Department's conflict of interest regulations, a clear distinction should be made between (a) whether a conflict of interest exists and (b) the appropriate steps to be taken to avoid any conflict, and if not, why not?

2. Does your Department agree that a conflict of interest may exist where the results of a contract have an effect on the direction of government policy in a way which benefits the contractor, even though the contract results do not absolutely assure the ultimate direction of that government policy, and if not, why not?

3. Does your Department agree that a conflict of interest may arise where the results of a contract awarded by one agency have an effect on the direction of another agency's policy in a way which benefits the contractor, and, if not, why not?

4. Does your Department agree that a conflict of interest may exist where it knows that a contractor will receive benefits from the contractor's use of the work product of a contract, even though such use is not that which the government will make of the results, and if not, why not?

5. Does your Department agree that because the purpose of conflict of interest regulations is to prevent even the temptation for bias on the part of a contractor, it is not relevant to any determination regarding the existence of a conflict that the government may later attempt to identify and neutralize any bias affecting the work product of the contract, and, if not, why not?

6. Does your Department agree that in determining whether a conflict of interest exists it is not relevant that a contractor has the professional reputation of being able to resist temptations such as arise from a conflict of interest, and if not, why not?

7. Does your Department agree that unsolicited proposals are by their nature more likely to involve a conflict of interest on the part of the company making the proposal than is the case with a contract proposal initiated by the government, and if not, why not?

8. Does your Department agree that disclosure requirements for contractors awarded sole-source contracts resulting from an unsolicited proposal should be no less extensive than for contractors awarded contracts on the basis of competitive bidding and not resulting from an unsolicited proposal, and if not, why not?

9. Does your Department agree that if a contract applicant fails to disclose a conflict of interest known to it at the time the contract is awarded and if this contract is later discovered by or brought to the government's attention, your Department has the power at least to disqualify that contractor from bidding on a follow-on procurement contract, and if not, why not?

10. Does your Department agree that standing should be given to competitors or other interested parties to challenge the awarding of a contract on the basis that regulations on conflict of interest have been violated, and if not, why not?

Because your Department has already fully considered the matters addressed in these questions in responding to my January 20, 1976, proposals, would you provide your answers to me by Friday, March 5. Printing of the transcript of the Subcommittee's Bechtel hearings will be delayed if your answers are not submitted to me by that date.

Please contact Chuck Ludlam at 224-4434 if you have any questions regarding this letter.

Sincerely,

JAMES ABOUREZK.

EXHIBIT 6: LETTER FROM SENATOR JAMES ABOUREZK  
TO MR. H. GREGORY AUSTIN

U.S. SENATE,  
COMMITTEE ON INTERIOR AND INSULAR AFFAIRS,  
Washington, D.C., February 27, 1976.

Mr. H. GREGORY AUSTIN,  
Solicitor, Department of the Interior,  
Washington, D.C.

DEAR MR. AUSTIN: This refers to your February 20, 1976, reply to my letter of January 20, 1976, regarding your agency's regulations for the avoidance of organizational conflict of interest.

In certain respects your letter failed to comment directly on the conflict of interest principles set forth in my letter. So that I may understand your Department's position with respect to each of the principles which I proposed, would you please give me separate and specific answers to each of the following fifteen questions:

1. Does your Department agree that in implementing your Department's conflict of interest regulations, a clear distinction should be made between (a) whether a conflict of interest exists and (b) the appropriate steps to be taken to avoid any conflict, and if not, why not?

2. Does your Department agree that a conflict of interest may exist even if there is no follow-on procurement contract, and if not, why not?

3. Does your Department agree that a conflict of interest may exist even if a contract is awarded on a sole-source basis, and if not, why not?

4. Does your Department agree that a conflict of interest may exist if a contractor's interests are such that there would be a justifiable basis for assuming that such a contractor's work product will be biased or otherwise prejudiced, even if the contractor is not placed in a position where it has an unfair competitive advantage, and if not, why not?

5. Does your Department agree that a conflict of interest may arise from benefits which later accrue to the industry of which the contractor is a part even if the contractor itself receives no more benefits than any other contractor in the industry, and if not, why not?

6. Does your Department agree that a conflict of interest may exist where the results of a contract have an effect on the direction of government policy in a way which benefits the contractor, even though the contract results do not absolutely assure the ultimate direction of that government policy, and if not, why not?

7. Does your Department agree that a conflict of interest may arise where the results of a contract awarded by one agency have an effect on the direction of another agency's policy in a way which benefits the contractor, and if not, why not?

8. Does your Department agree that a conflict of interest may exist where it knows that a contractor will receive benefits from the contractor's use of the work product of a contract, even though such use is not that which the government will make of the results, and if not, why not?

9. Does your Department agree that because the purpose of conflict of interest regulations is to prevent even the temptation for bias on the part of a contractor, it is not relevant to any determination regarding the existence of a conflict that the government may later attempt to identify and neutralize any bias affecting the work product of the contract, and if not, why not?

10. Does your Department agree that in determining whether a conflict of interest exists it is not relevant that a contractor has the professional reputation of being able to resist temptations such as arise from a conflict of interest, and if not, why not?

11. Does your Department agree that unsolicited proposals are by their nature more likely to involve a conflict of interest on the part of the company making the proposal than is the case with a contract proposal initiated by the government, and if not, why not?

12. Does your Department agree that disclosure requirements for contractors awarded sole-source contracts resulting from an unsolicited proposal should be no less extensive than for contractors awarded contracts on the basis of competitive bidding and not resulting from an unsolicited proposal, and if not, why not?

13. Does your Department agree that the existence of a conflict of interest is more likely to be disclosed if a contract award is based on competitive bidding, and if not, why not?

14. Does your Department agree that if a contract applicant fails to disclose a conflict of interest known to it at the time the contract is awarded and if

this contract is later discovered by or brought to the government's attention, your Department has the power at least to disqualify that contractor from bidding on a follow-on procurement contract, and if not, why not?

15. Does your Department agree that standing should be given to competitors or other interested parties to challenge the awarding of a contract on the basis that regulations on conflict of interest have been violated, and if not, why not?

Because your Department has already fully considered the matters addressed in these questions in responding to my January 20, 1976, proposals, would you provide your answers to me by Friday, March 5. Printing of the transcript of the Subcommittee's Bechtel hearings will be delayed if your answers are not submitted to me by that date.

Please contact Chuck Ludlam at 224-4434 if you have any questions regarding this letter.

Sincerely,

JAMES ABOUREZK.

EXHIBIT 7: LETTER FROM MR. R. TENNEY JOHNSON  
TO SENATOR JAMES ABOUREZK

UNITED STATES  
ENERGY RESEARCH AND DEVELOPMENT ADMINISTRATION  
WASHINGTON, D.C. 20545



MAR 24 1976

Honorable James Abourezk  
Senate Committee on Interior  
and Insular Affairs

Dear Senator Abourezk:

ERDA is pleased to reply to your specific questions in the order stated in your letter of February 27, 1976.

1. Question. Does your Department agree that in implementing your Department's conflict of interest regulations, a clear distinction should be made between (a) whether a conflict of interest exists and (b) the appropriate steps to be taken to avoid any conflict, and if not, why not?

Answer. ERDA agrees that the two questions are distinct and sequential. However, they are also interrelated and must not be considered in isolation from each other. Further, each of the questions has a number of divisions. For example, is the conflict of interest actual or hypothetical, is it significant, can it be mitigated by steps taken either during or after the contract? Resolution of these matters requires consideration of the entire context rather than approaching the problem solely as a two-step process.

2. Question. Does your Department agree that a conflict of interest may exist where the results of a contract have an effect on the direction of government policy in a way which benefits the contractor, even though the contract results do not absolutely assure the ultimate direction of that government policy, and if not, why not?

Answer. A conflict of interest may or may not exist in the situation posed. Whether the conflict exists depends on the specific facts of the situation. The predictability of the beneficial result to the contractor is an element in determining whether the conflict is so significant that steps need to be taken to mitigate or avoid it. Moreover, the mere possibility of future benefit to the contractor--without further definition of what that benefit is or how reasonably predictable it is--is not sufficient to create a conflict of interest. In ERDA procurement, successful performance of a development contract may well create opportunities for future contracts or commercial business, and give the contractor an advantage for these benefits.

Such opportunities are part of the incentives to perform the contract and not inherently conflicts of interest. The advantage is not in itself unfair nor does it create the likelihood of bias in the work product. On the other hand, performance of a planning contract which lays out a future development program and delimits choices, may very well induce bias in the contract result or give the contractor an advantage which is truly unfair, unless steps are taken--such as an exclusion from government-sponsored development work in the field for a limited time--to mitigate or avoid the conflict.

3. Question. Does your Department agree that a conflict of interest may arise where the results of a contract awarded by one agency have an effect on the direction of another agency's policy in a way which benefits the contractor, and, if not, why not?

Answer. A conflict of interest may conceivably arise in this situation, and procurement officials must remain sensitive to the possibility. Nevertheless, in a specific case, facts may indicate that the likelihood or predictability of benefits to the contractor is so uncertain as to mitigate the conflict. For example, if a contractor successfully performs a development contract for one agency, another agency may wish to engage that contractor to assist in drafting a regulation based on the technology. This would not appear to be a conflict situation, at least as far as the first agency is concerned. However, a conflict might more readily arise if the sequence is reversed: if one contractor assists first in drafting the regulation, it may create an advantage for itself in any later government-sponsored development work to meet the conditions of the regulation.

4. Question. Does your Department agree that a conflict of interest may exist where it knows that a contractor will receive benefits from the contractor's use of the work product of a contract, even though such use is not that which the government will make of the results, and if not, why not?

Answer. A conflict of interest may conceivably exist in this situation, but in our view it is more likely not to exist. As indicated in previous answers, the possibility that successful performance of a development contract will create future business opportunities for the contractor is not unfair, nor will it necessarily result in a biased work product. In ERDA's case, if successful performance leads to competitive commercialization of an energy technology by the contractor and by others, one of ERDA's principal missions is fulfilled. To exclude an ERDA contractor from commercializing the technology it develops is neither practicable nor desirable. ERDA must take care, of course, to assure that other companies can practice the technology as well as the original contractor.

5. Question. Does your Department agree that because the purpose of conflict of interest regulations is to prevent even the temptation for bias on the part of a contractor, it is not relevant to any determination regarding the existence of a conflict that the government may later attempt to identify and neutralize any bias affecting the work product of the contract, and, if not, why not?

Answer. A conflict may be determined to exist without reference to steps which may be taken to mitigate or avoid it. However, if such steps are taken, the conflict may then cease to exist. As an incidental point, ERDA does not agree that the purpose of the regulations should be stated as preventing "even the temptation for bias"; such a test is too abstract and subjective to be useful. The purpose is to avoid placing contractors in positions where the circumstances would hamper their providing unbiased and objective advice and assistance or in positions where the award of a contract would extrinsically give them an unfair competitive advantage.

6. Question. Does your Department agree that in determining whether a conflict of interest exists it is not relevant that a contractor has the professional reputation of being able to resist temptations such as arise from a conflict of interest, and if not, why not?

Answer. ERDA agrees that the contractor's reputation is not a controlling factor in determining whether a conflict of interest exists.

7. Question. Does your Department agree that unsolicited proposals are by their nature more likely to involve a conflict of interest on the part of the company making the proposal than is the case with a contract proposal initiated by the government, and if not, why not?

Answer. The potential for conflict of interest is as real in a response to a government initiative as it is where a company comes up with a good idea on its own initiative. Procurement officials should be equally sensitive to this potential whether the procurement is unsolicited or competitive. Oftentimes, unsolicited proposals are in reality responses to some generally stated need.

8. Question. Does your Department agree that disclosure requirements for contractors awarded sole-source contracts resulting from an unsolicited proposal should be no less extensive than for contractors awarded contracts on the basis of competitive bidding and not resulting from an unsolicited proposal, and if not, why not?

Answer. Yes, ERDA agrees.

9. Question. Does your Department agree that if a contract applicant fails to disclose a conflict of interest known to it at the time the contract is awarded and if this contract is later discovered by or brought to the government's attention, your Department has the power at least to disqualify that contractor from bidding on a follow-on procurement contract, and if not, why not?

Answer. In a gross situation, such as where the contractor has misled the government or falsely misrepresented the situation at the time of contracting to induce the contract, ERDA has power to disqualify the contractor from being awarded the follow-on contract. However, ERDA believes that it is desirable to establish clear rules of disclosure so that contractors may know precisely what is expected of them, and thereby uncertainty in government procurement may be avoided.

10. Question. Does your Department agree that standing should be given to competitors or other interested parties to challenge the awarding of a contract on the basis that regulations on conflict of interest have been violated, and if not, why not?

Answer. Bidders and other parties interested in a specific procurement may protest a procurement decision to the General Accounting Office pursuant to 31 U.S.C. 74, for failure to abide by the applicable laws and regulations, including the regulations on avoidance of conflict of interest. Bidders and other interested parties may also challenge proposed procurement actions in the courts and obtain injunctive relief in appropriate situations under the doctrine of Scanwell Laboratories, Inc. v. Shaffer, 424 F. 2d 859 (D.C. Cir. 1970). ERDA believes that further legislation is not needed in this field and could be harmful. Creation of new standing doctrines and further causes of action could delay indefinitely a procurement sequence which is already long indeed.

ERDA regrets the delay in responding to your request. Please advise if further information is needed.

Sincerely,

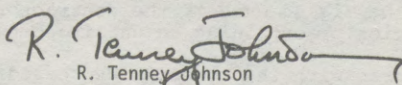
  
R. Tenney Johnson  
General Counsel



EXHIBIT 8: LETTER FROM MR. H. GREGORY AUSTIN  
TO SENATOR JAMES ABUREZK  
UNITED STATES

DEPARTMENT OF THE INTERIOR  
OFFICE OF THE SOLICITOR  
WASHINGTON, D.C. 20240

MAR 24 1976

Honorable James Abourezk  
United States Senate  
Washington, D.C. 20510

Dear Senator Abourezk:

This refers to your letter of February 27, 1976, in which you requested my response to 15 questions relating to this Department's regulations, policies, and procedures for the identification and resolution of potential, apparent, or actual organizational conflicts of interest of contractors.

In questions 1 through 4, you ask whether this Department agrees with the following concepts:

1. That a distinction must be made between the identification of a conflict of interest and the steps that are to be taken to deal with the conflict;
2. That a conflict may exist even in cases where there is no follow-on procurement;
3. That a conflict may exist even if a contract is awarded on a sole-source basis; and
4. That a conflict may exist where there is a justifiable basis for assuming that a contractor's work product will be biased even if the contractor is not placed in the position of obtaining an unfair competitive advantage.

We agree with the concepts expressed in questions 1 through 4.

You ask, in question 5, whether there may be a conflict of interest where the benefits which later accrue to a Government contractor are through its membership or association with an industry even if the benefits are no greater than the benefits that may accrue to other companies that are a part of that industry.

Given the appropriate mix of facts and circumstances it is conceivable that an unacceptable organizational conflict of interest might exist in certain types of situations contemplated by your question. For example, where the Government makes a policy decision which will favor one industry over another industry. Whether there is a potential that a report by a contractor with an interest in one of the industries will be biased depends, in part, upon such factors as the extent of the contractor's relationship to the particular industry and the degree to which the Government's policy decision will affect the industry. We can envision situations where these and other factors could have such a substantial affect on a contractor's livelihood that there would be a reasonable basis for assuming that a contractor might be tempted to slant the study to favor its interests. However, we are not convinced that in this type of situation it would not be possible to fashion appropriate safeguards to be included in the contract which would either eliminate the conflict or reduce the risks to the Government to a level that is considered to be acceptable. If appropriate safeguards could be fashioned, we would not object to awarding a contract to the firm despite the identification of a potential organizational conflict of interest.

Question 6 asks whether there may be a conflict of interest where the results of a contract may have an effect on the direction of Government policy even if the contract results do not assure the ultimate direction of that policy? Question 7 is somewhat interrelated and concerns a situation where the results of a contract might effect another agency's policies to the contractor's benefit.

The underlying concept in both of these questions is the identification of potential bias on the part of prospective contractors. In appropriate cases, after considering all of the facts and circumstances, it is conceivable that an organizational conflict of interest might be identified in the types of situations contemplated by these questions. However, we believe that the concept expressed in the response to question 5, that it might well be possible to fashion appropriate safeguards to be included in the contract that would either eliminate the conflict or reduce the Government's risk to an acceptable level, would be for consideration in determining

whether to proceed with an award. Please note that we agree with your underlying premise, that all bias should be identified and dealt with in one manner or another.

Question 8 asks whether there might be an organizational conflict of interest where the Government knows that a contractor may receive benefits from the work product of a contract even if such use may not be the same as that which the Government may make of the results of the contract.

It is difficult to give a categorical answer to question 8, in that it would be necessary to carefully analyze the character of the benefits flowing to the contractor on a case-by-case basis before reaching a conclusion as to whether the benefits are beyond the limits of permissibility. For example, the fact that a Government contractor converts knowledge acquired as the result of furnishing a work product to the Government to a competitive advantage does not necessarily constitute an impermissible act by the contractor. In this area, I think that there must be a balancing whereby a contractor is permitted to enjoy the benefits arising out of doing business with the Government, even if it is a competitive advantage, but that a line must be drawn at some point where the benefits adversely affect the public interest such as where an unfair competitive advantage would accrue to a contractor. An unfair advantage that would be destructive of the competitive nature of Government procurements would be a type of situation where the benefit to a contractor would be considered to be beyond permissible limits. In this context, we can conceive of certain situations where an affirmative answer to your question could be given.

Question 9 asks, based on the assumption that the purpose of organizational conflict of interest regulations is the avoidance of even the temptation for bias on the part of the contractor, whether a determination may be made that a conflict exists even in the situation where the bias might later be identified and the Government might take adequate steps to neutralize any bias affecting the work product of the contract.

In our opinion such temptations on the part of prospective contractors should properly be identified in order that appropriate steps may be taken to avoid or neutralize the bias. However, avoiding even the temptation for bias does not seem to be an achievable objective; therefore, we disagree with the premise that this should be the purpose of the regulations.

In question 10 you ask if the Department agrees that a contractor's professional reputation of being able to resist the temptation for bias is not relevant in determining whether an organizational conflict of interest exists.

As a general proposition, we agree with the principle expressed in question 10. However, we believe the reputation of the prospective contractor could well be a factor to be considered in fashioning appropriate safeguards which then would become an element in making the determination whether to proceed with the award.

Question 11 asks whether the Department agrees that unsolicited proposals by their nature are more likely to involve organizational conflicts of interest than proposals submitted in response to a solicitation initiated by the Government.

We have difficulty with the assumption that there is an inherent likelihood that an unsolicited proposal constitutes a greater danger of an organizational conflict of interest on the part of the offeror than in other cases. In actual practice unsolicited proposals are usually submitted by offerors as a result of a known Government need, so for practical purposes these may not be a great deal of difference between solicited and unsolicited proposals. While there could be situations where a firm submits an unsolicited proposal solely for the purpose of advancing its own interests, to the Government's detriment, we believe that in most cases this would be recognized in the evaluation process by the officials responsible for the procurement, in which event appropriate steps could be taken to protect the Government's interests.

The concept in question 12 is that disclosure requirements for contractors should be no less extensive with regard to sole-source awards than with contracts awarded pursuant to competitive bidding.

We agree with this principle.

Question 13 asks whether the Department agrees that a conflict of interest is more likely to be disclosed if a contract award is based on competitive bidding.

A representative of this office was advised in a recent telephone conversation with Mr. Ludlam of your staff that your primary interest in asking the question was to ascertain the type of procurement where there would be the greatest public exposure of the identity of the firms being considered for an award of a Government contract. Your thought here apparently is that the greater the exposure, the more opportunity there is for the public to provide the procuring agency with information relating to actual or potential organizational conflicts of interest of the firms being considered for an award.

In specific response to your question, the sealed bid, publicly advertised procurement provides the greatest exposure of the identity of the various firms responding to the solicitation since such information is made public at the time of bid opening. It is the policy of the Department to formally advertise its procurements whenever possible; however, in those situations where formally advertised procurements are not appropriate, the Department favors competitively negotiated procurements. Sole-source awards are only made as a last resort. As to negotiated procurements, the Federal Procurement Regulations provide that after receipt of proposals, no information regarding the number or identity of the offerors participating in the negotiations shall be made available to the public or to any one whose official duties do not require such knowledge.

While we do not discount the public as a valuable source of information as to actual or potential organizational conflicts of interest in those situations where the identity of prospective contractors may be made publicly available, negotiated procurements also inherently offer perhaps even greater opportunities to obtain information on this issue. In either competitive or sole-source negotiated procurements, there usually are in-depth discussions with the firm or firms in line for the award. During these discussions the procuring activity may well discover information relating to possible organizational conflicts of interest. Once such information comes to light the procuring activity can then take appropriate steps to probe the information deeply enough to either identify the conflict or satisfy itself that a conflict does not exist.

Question 14 poses a situation in which a contractor does not disclose a known conflict and this fact is later brought to

the Government's attention. You ask whether this Department has the power to at least disqualify the contractor from bidding on the follow-on procurement.

Depending on the facts and circumstances either or all of the following alternatives might be available to the Department in the type of situation posed.

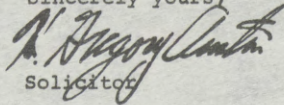
1. If there is an intentional misrepresentation, the contractor could be subject to criminal penalties.
2. The contractor could be suspended or debarred in accordance with the procedures in the Federal Procurement Regulations which would preclude the contractor from competing for any Government contracts for a specified period of time.
3. The firm could be determined to be disqualified for the award of a particular contract on the basis that it does not meet the minimum standards of a responsible Government contractor.
4. The firm could be precluded from competing on the follow-on procurement assuming that an appropriate clause was included in the initial contract or solicitation.

Question 15 asks whether standing should be given to competitors or other interested parties on the basis that regulations on organizational conflicts of interest have been violated.

Please be advised that the General Accounting Office recognizes that competitors and other "interested" persons have standing to challenge proposed contract awards based on issues related to organizational conflict of interest.

Again, we would like to thank you for your interest in this Department and we hope that this letter is of assistance to you.

Sincerely yours,



Solicitor

EXHIBIT 9: INTRODUCTION BY SENATOR ABOUREZK  
OF AMENDMENT NUMBER 1947 TO S. 3105,  
THE ERDA AUTHORIZATION BILL FOR FISCAL 1977

June 24, 1976

CONGRESSIONAL RECORD—SENATE

S 10479

**ENERGY RESEARCH AND DEVELOPMENT ADMINISTRATION AUTHORIZATIONS—S. 3105**

AMENDMENT NO. 1947

(Ordered to be printed and to lie on table.)

Mr. ABOUREZK. Mr. President, today, I am submitting an amendment to S. 3105, the ERDA authorization bill, which would—for the first time—charge ERDA to avoid organizational conflict of interest in its contracting. This amendment results directly from 3 days of hearings which I chaired in the Energy Research and Water Resources Subcommittee last winter.

The hearings revealed that there is presently no Federal statute whatsoever concerning organizational conflict of interest in Government contracting. Similarly, neither the General Services Administration nor the Office of Management and Budget has issued any regulations or guidelines in this area. A number of agencies—including ERDA—have taken the initiative to issue regulations on organizational conflict of interest which—by these agencies' own admissions—are inadequate. The inadequacy of these regulations was demonstrated in the subcommittee hearings last winter and was confirmed in a Comptroller General opinion. The subcommittee's hearings were the first held on this subject in the Congress in 12 years.

As a concept, conflict of interest is intuitive. The Bible warns simply:

June 24, 1976

No man can serve two masters; for either he will hate the one and love the other, or else he will hold to the one and despise the other.

"Organizational" conflict is distinguished from "personal" conflict in that it applies the same conflict standards to organizations which apply to individuals.

In the early 1960's expenditures by the Federal Government for research and development grew dramatically. This growth forced the Government to review its policies with respect to this research. In 1962, a Presidential commission recommended that Federal agencies adopt codes of conduct to bar a firm from holding one contract in which it advised the Government on what type of hardware the Government should purchase and then turning around and bidding on a subsequent contract to sell the Government that same hardware. During this time there had been congressional hearings on a Ramo-Woodridge contract by the Defense Department which involved precisely this class of conflict of interest. The direction of all Federal regulations on organizational conflict of interest promulgated since this time has been heavily influenced by this limited class of conflicts of interest.

As the Senate examines this issue, I would like to emphasize one point. Conflict of interest is measured by an objective standard. One need not find actual bias or corruption in order to establish that a conflict of interest exists. As the Supreme Court said in the Mississippi Valley case:

An impairment of impartial judgment can occur in even the most well-meaning men when their personal economic interests are affected by the business they transact on behalf of the government.

For this reason the Supreme Court concluded that the conflict of interest laws attempt to prevent honest Government agents from succumbing to temptation by making it illegal for them to enter into relationships which are fraught with temptation. As applied to Government research this means that the Government should not contract with organizations to conduct research on subjects where the organization is tempted to bias the results of the research to benefit the organizations' financial interests.

Let me briefly summarize the results of the subcommittee's hearings on this subject. In 1974, Bechtel Corp. contracted with ERDA to study the economics of coal transportation.

Bechtel initiated the contract proposal, and it was awarded without competitive bidding. After formulating a computer model of coal transportation as a part of its contracted study, Bechtel utilized the computer model in part to compare the economics of transporting coal from Wyoming to Arkansas by unit train and by the coal slurry pipeline Energy Transportation Systems, Inc., hopes to build. However, it turns out Bechtel has a 40 percent interest in ETSI. This comparison between ETSI's project and unit trains occurred during phase II of the project when a test case was selected to validate the computer model created during phase I. At the hearing I submitted for the record the

actual computer printouts of this test case computer run which contains the model's "preferred solution" for transporting coal from Wyoming to Arkansas, which concludes—predictably—that ETSI's coal slurry pipeline is a cheaper way to transport this coal than unit trains.

In addition to discussing the relationship between the Bechtel study and the ETSI proposal, witnesses at the hearing disclosed the following facts: First, Mr. Thomas Aude, of Bechtel, had eight billable hours working on those parts of the ERDA contract which relate to coal slurry pipelines at the same time he worked for ETSI; second, at the same time Bechtel's Scientific Development Operation and Pipeline and Production Services Division were performing the ERDA contract, these same Bechtel divisions were performing a contract which Bechtel had concluded with ETSI to evaluate its pipeline proposal; and third, Bechtel personnel working on the ERDA contract demonstrated their interest in informing ETSI of the nature of the ERDA study by formally inviting ETSI to a briefing on the study.

On the basis of these facts and others in the record, I have concluded that the Bechtel's ERDA contract involved a conflict of interest due to its relationship to ETSI's pipeline proposal. The Comptroller General concluded that the actions of Bechtel and the Government were at least "somewhat questionable."

This type of conflict of interest is endemic in Government contracting. Example after example of such conflicts are described in "The Shadow Government," a recent book by Daniel Guttman. It is time that the Congress focused on this problem.

This amendment to the ERDA authorization bill is a modest beginning but would substantially improve current policies in this field. Because there is presently no statement of congressional policy in the field, this ERDA amendment will serve as a prototype for future efforts by Congress to prevent organizational conflicts of interest.

The ERDA amendment's definition of organizational conflict of interest, (g) (2) (A) and (B), is taken verbatim from present ERDA regulations. It would bar the award of contracts to organizations which "may be unable to render impartial, technically sound, or objective assistance or advice due to its other activities or its relationships with other organizations or would be given an unfair competitive advantage." This is meant to be a broad delegation of authority to ERDA. A narrower definition of conflict of interest might unduly restrict the agency.

However, this broad definition will be applicable to a wider range of contracts than is presently the case because, first, it applies to both advertised and negotiated contracts; second, a conflict is defined as arising with the presence of either bias or unfair competitive advantage; and third, the agency may not waive application of the conflict standard. In all three of these respects, the amendment goes beyond present ERDA regulations and serves fundamentally to

broaden the impact of the conflict of interest principle. By presently limiting the application of this principle to a narrow range of contracts, ERDA frustrates effective implementation of the principle.

Furthermore, section (g) (3) requires—for the first time—disclosure by the contract applicant of potential conflicts of interest. Incredibly, ERDA presently requires no disclosure by a contract applicant of a conflict of interest, even if the applicant is fully aware of the conflict. These parts of the applicant's disclosure statement which are not privileged would be published for comment.

Section (4) requires ERDA to investigate for conflicts of interest any successful bidder or applicant. Such investigations would not be required of all bidders, only the one which is successful. No such investigation is presently required.

Sections (5) and (6) require ERDA to issue regulations and set the effective date of the provisions.

Imposing these simple requirements on ERDA will in no way delay or complicate ERDA's procurement process. This amendment provides no additional standing on any party to challenge ERDA's contracting process. It will, however, clearly notify ERDA that Congress wants that agency to strengthen its present program for the avoidance of organizational conflict of interest.

June 25, 1974

## CONGRESSIONAL RECORD—SENATE

S 10595

EXHIBIT 10: SENATE CONSIDERATION OF  
AMENDMENT NUMBER 1947 to S. 3105,  
ERDA AUTHORIZATION BILL FOR FISCAL  
1977

## AMENDMENT NO. 1947

Mr. ABOUREZK. Mr. President, I call up amendment No. 1947.

The PRESIDING OFFICER. The amendment will be stated.

The second assistant legislative clerk read as follows:

The Senator from South Dakota (Mr. ABOUREZK) proposes amendment numbered 1947.

Mr. ABOUREZK. Mr. President, I ask unanimous consent that reading of the amendment be dispensed with.

The PRESIDING OFFICER (Mr. SCHWEIKER). Without objection, it is so ordered.

The amendment is as follows:

On page 68, line 5, insert the following:  
TITLE IX—ORGANIZATIONAL CONFLICT  
OF INTEREST

SEC. 901. (a) Section 6813 of title 42 is amended by adding at the conclusion thereof the following:

"(12) maintaining and promoting active and open competition among private persons and organizations involved in energy research and development."

(b) Section 6817 of title 42 is amended by adding at the conclusion thereof the following:

"(g) (1) The Administrator shall exercise his powers under this section in such a manner as to maintain and promote active and open competition among private persons and organizations involved in energy research and development.

"(2) The Administrator shall make no arrangements (including contracts, agreements, and loans) whether by advertising or

negotiation for the conduct of research and development activities with any private person or organization when, after appropriate restrictions have been attached to such arrangements, such person or organization—

"(A) may be unable to render impartial, technically sound, or objective assistance or advice due to its other activities or its relationships with other organizations; or

"(B) would be given an unfair competitive advantage.

"(3) At the earliest practicable time prior to the Administrators making any such arrangements—

"(A) all persons or organizations interested in making such arrangements shall file with the Administrator a written notice describing in detail the nature and existence of any such activities or relationships or competitive advantage;

"(B) the Administrator shall make the contents of such notice available to the public, with the exception of such parts as contain trade secrets or privileged commercial or financial information, or information disclosure of which would constitute a clear and unwarranted invasion of personal privacy; and

"(C) the Administrator shall receive and evaluate all public comments with respect to such notice.

"(4) Prior to making any such arrangements the Administrator shall conduct a complete, detailed and independent inquiry of the responsible bidder or offerors of the nature and existence of any such activities or relationships or competitive advantage.

"(5) The Administrator shall promulgate rules for the implementation of this subsection as soon as possible after the date of its enactment but in no event later than six months after such date.

"(6) This subsection shall take effect six months after the date of its enactment and shall not apply to arrangements made prior to such date."

Mr. ABOUREZK. Mr. President, this amendment would add a ninth title to S. 3105 to define for the first time ERDA's responsibility to avoid organizational conflict of interest in its contracting.

If this amendment becomes law it will be the first statement of congressional policy in this area.

"Organizational" conflict of interest is a term of art which applies to conflicts of interest which arise in Government contract work with corporations. The basic principle is the same as is now embodied in a number of Federal statutes dealing with "personal" conflict of interest on the part of individuals.

Although there is no Federal statute on organizational conflict of interest this concept is well known at ERDA and a number of other Federal agencies. In fact, ERDA already has regulations on this subject—and AEC had regulations on this subject for about 10 years before that.

This winter I chaired 3 days of hearings in the Energy Research and Water Resources Subcommittee. The subcommittee heard from 16 witnesses from ERDA, Interior, NEP, Bechtel, and the private bar; 147 exhibits were submitted for the record. The published hearings run nearly 1,000 pages. Since then I have engaged in extensive and detailed correspondence with ERDA and Interior about the need to revise their regulations. I have been in contact with GSA and OMB to encourage them to promulgate policies in this area.

The amendment I propose is a modest beginning. Its definition of what constitutes a conflict of interests taken verbatim from the present ERDA regulations. It improves upon these regulations in three ways. It broadens the range of contracts which ERDA's regulations will reach. It requires contract applicants to disclose possible conflicts and it requires ERDA to investigate for conflicts. At the hearings it was shocking to me how narrowly ERDA limited its regulations and that ERDA requires no disclosure or investigation of conflicts of interest.

This amendment is not intended to be the final word on organizational conflict of interest. But it is an improvement.

I have discussed this amendment with Senator FANNIN and Senator CHURCH, and I am hopeful they will accept it, so that we can further consider this issue in conference.

Mr. CHURCH. Mr. President, I ask the able Senator from South Dakota whether he undertook to clear this amendment with the Senators who handled the nuclear programs authorized by this bill—that is, with those who represented the Joint Committee on Atomic Energy.

Mr. ABOUREZK. That has been done by my staff.

Mr. CHURCH. And they raised no objection to the amendment?

Mr. ABOUREZK. As I understand it, that is correct.

Mr. CHURCH. Mr. President, while the Committee on Interior and Insular Affairs has not had an opportunity to examine the amendment, it is true that the Senator from South Dakota held 3 days of hearings on the matter of organizational conflict of interest and that the objectives sought by the amendment is supported by the committee.

Therefore, acceptance of the amendment will give the committee an opportunity to further examine the text of the amendment and to present the amendment to the conferees.

I want the Senator to know that in accepting this amendment, I cannot foreclose the possibility that we may have to wait another year before such requirements are finally written into the law. However, the Senate conferees will do their best to present the case in conference, in the hope that the House will see fit to accept the amendment.

Mr. FANNIN. Mr. President, I ask this of the Senator from South Dakota: Did he discuss this matter with any of the ERDA officials with respect to the way it is to be handled and what is involved?

Mr. ABOUREZK. I have not discussed with ERDA how the amendment is to be presented. However, I have had extensive correspondence with ERDA, in which I have asked them to adopt their own regulations along these lines, advising them that I would offer legislation in the event they failed to do so. They failed to do so, and that is why I am proceeding in this manner.

Mr. FANNIN. Did the Senator receive answers to his correspondence?

Mr. ABOUREZK. Yes.

Mr. FANNIN. Which indicated a refusal to carry through? What was the reason for having the amendment?

Mr. ABOUREZK. I would not say a direct refusal, but a failure to adopt anything near this kind of standard of conduct on the part of ERDA and the corporations which contract with it.

Mr. FANNIN. According to the explanation of the Senator from South Dakota, the way in which the affairs should be handled would carry out his desires. I do not know that we need an amendment to make a requirement, but I concur with the floor manager of the bill, that it is the desire to carry it to conference, and the Senator from Arizona will not disagree.

Mr. ABOUREZK. Mr. President, I yield back the remainder of my time.

Mr. CHURCH. I yield back the remainder of my time.

The PRESIDING OFFICER. All time on the amendment is yielded back.

The question is on agreeing to the amendment of the Senator from South Dakota.

The amendment was agreed to.

EXHIBIT 11: LETTER FROM JAMES A. WILDEROTTER,  
GENERAL COUNSEL OF ERDA TO SENATOR HENRY JACKSON

UNITED STATES  
ENERGY RESEARCH AND DEVELOPMENT ADMINISTRATION  
WASHINGTON, D.C. 20545

JUL 21 1976

Senator Henry Jackson  
Chairman of Senate Committee on  
Interior Insular Affairs

Dear Mr. Chairman:

I wish to take this opportunity to express our views on Title IX of H.R. 13350, the ERDA authorization bill as passed by the Senate, that is being reviewed by the Conference Committee. As you know, Title IX which was Amendment No. 1947 to S. 3105 when introduced on the Senate floor on June 25 by Senator Abourezk was agreed to (Cong. Rec., June 25, 1976, pp. S10595-96).

The effect of Title IX of H.R. 13350 would be to add two provisions to the Energy Reorganization Act of 1974 (P.L. 93-438). The first provision would add to the stated duties of the ERDA Administrator the responsibility of "maintaining and promoting active and open competition among private persons and organizations involved in research and development." The second provision would amend Section 107 of the Act, concerning the Administrator's powers, by adding a new subsection which would require the Administrator:

1. to exercise his enumerated powers "in such a manner as to maintain and promote active and open competition" and
2. to make no contract or other arrangement with any person or organization that may be "unable to render impartial, technically sound, or objective assistance or advice due to its relationships with other organizations" or who "would be given an unfair competitive advantage."

In addition, Title IX would require that prior to the Administrator making any contract or other arrangement, prospective contractors would have to file a "written notice describing in detail the nature and existence of any such activities or relationships or competitive advantage." This "notice" would have to be made available for "public comments" which the Administrator would be required to "evaluate." Further, before any contract award, the Administrator would be required to conduct "a complete, detailed and independent inquiry . . . of the nature and existence of any such activities or relationships or competitive advantage."

Finally, ERDA would be required to promulgate implementing regulations within six months of enactment, when the requirements of Title IX of H.R. 13350 would become effective.

For the reasons summarized below, ERDA believes that Title IX of H.R. 13350 is premature, unnecessary, and would hinder this Agency in fulfilling its Congressional mandate to carry out a broad range of research and development programs aimed at making all energy sources -- including fossil, nuclear, solar, geothermal -- commercially available for the Nation's well being and security.

#### I. Background

Following three days of hearings before the Energy Research and Water Resources Subcommittee of the Senate Interior and Insular Affairs Committee last November, Senator Abourezk in January and February 1976 sent two letters to the then General Counsel of ERDA, R. Tenney Johnson. Copies of those letters and ERDA's replies are enclosed together with a copy of Mr. Johnson's prepared statement before the Subcommittee.

As indicated in Mr. Johnson's letter of February 20, the suggestions made by Senator Abourezk with respect to revising ERDA regulations governing the avoidance of organizational conflicts of interest (41 CFR Part 9-1.54, copy enclosed) "raise certain fundamental questions that could have far-reaching consequences not only for ERDA's procurement practices but for procurement throughout the Federal Government." For that reason, a copy of Senator Abourezk's initial letter of January 20, 1976, was sent "for study and review to those agencies directly concerned with overall Federal procurement policy, namely, the General Services Administration, the Office of Federal Procurement Policy, and the Armed Services Procurement Regulations Committee." In this connection, OFPP has been in communication with Senator Abourezk on this matter and has directed GSA, with the cooperation of all Federal procuring agencies, to develop suitable government-wide procedures on organizational conflicts of interest. That effort is now underway. Until said process is complete, however, legislative action such as Title IX of H.R. 13350 is premature and inappropriate.

Since copies of the correspondence between OFPP and Senator Abourezk on this matter were not included in the materials inserted into the Congressional Record in connection with Senator Abourezk's amendment, we are including them for the guidance of the Conference Committee.

## II. Comments on Title IX of H.R. 13350

In addition to the points set forth in the enclosed correspondence and discussed by Mr. Johnson in his testimony last November, we would like to call to the Conference Committee's attention a few specific impacts of Title IX of H.R. 13350, and our views with respect to those impacts.

We believe that Title IX is unnecessary. The Amendment merely duplicates current requirements insofar as it enjoins the Administrator to "maintain and promote active and open competition." In carrying out its statutory mandate, ERDA enters into various types of contractual arrangements for energy research and development. Regardless of the type of contract -- advertised or negotiated, fixed price or cost reimbursement, or cost sharing -- ERDA is required by the Federal Property and Administrative Services Act of 1949 (41 U.S.C. 471 et seq.), the Federal Procurement Regulations (41 CFR Chapter I) and the ERDA Procurement Regulations (41 CFR Chapter 9) to assure that "active and open competition" is maintained to the fullest extent possible. Generally, all contracts in excess of \$10,000 must be formally advertised. Contracts may be negotiated if certain requirements are met, but even in negotiated procurements they must be "on a competitive basis to the maximum practicable extent" (underscoring supplied, FPR §1-3.101(d); ERDA-PR 59-3.000).

In addition, we believe Title IX of H.R. 13350 is unnecessary insofar as it would preclude the Administrator from entering into contracts for which "appropriate restrictions" cannot be attached to avoid an organizational conflict of interest. ERDA's Procurement Regulations (41 CFR Part 9-1.54), like Title IX of H.R. 13350, already preclude award of a contract that would place a prospective contractor in a position -- either due to its other activities or its relationships with other organizations -- which would hamper its unbiased and objective assistance; or give the prospective contractor an unfair competitive advantage by reason of extrinsic facts. There is, therefore, no need for a statutory provision such as Title IX of H.R. 13350 to require ERDA to do what it is already required to do and does under existing law.

We are also strongly opposed to that part of Title IX of H.R. 13350 which would require the solicitation and evaluation of public comments on a "written notice" of potential organizational conflicts of all prospective contractors prior to the making of any contract or other arrangement. This provision would, as a practical matter, impose upon ERDA (but not

other major procurement agencies such as DOD or NASA) the rule-making requirements of the Administrative Procedure Act (5 U.S.C. §551, et seq.). However, that law, which generally requires publication of proposed rules and the opportunity for the public to participate in the rule-making process, expressly exempts "any matter relating to agency management or personnel or to public property, loans, grants, benefits, or contracts" (5 U.S.C. §553(a)(2); see Atty. Gen. Manual on APA, 1947, p. 27; see also Summary of the Report of the Commission on Government Procurement, 1972, p. 14).

While the views of interested parties may be (and, in fact, are) solicited in the formulation and development of procurement regulations (COGCP Summary, supra, p. 14), it would be extremely burdensome and time consuming for an agency to solicit public views on individual procurement actions whether for organizational conflicts purposes or otherwise. The unavoidable delay of such a requirement would undoubtedly frustrate implementation of ERDA's mandate.

Apart from the conflict with the Administrative Procedure Act, as described above, it must be recognized that the "complete, detailed and independent inquiry" required to be undertaken by the Administrator by Title IX of H.R. 13350 would add substantially to the overall time-frame for the procurement process which may not be consistent with the Government's best interests in all cases.

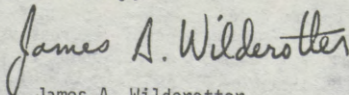
In any event, if the Congress determines that legislation governing organizational conflicts of interest is desirable, a preferable way to accomplish this objective would appear to be to amend -- presumably after suitable hearings and opportunity for all interested agencies to participate -- the existing laws governing all Federal procurement activities -- i.e., the Federal Property and Administrative Services Act of 1949 (41 U.S.C. 471, et seq.) and the Armed Services Procurement Act of 1947 (41 U.S.C. 251-60).

In summary, ERDA strongly opposes Title IX of H.R. 13350 and urges its rejection and deletion by the Conference Committee.

The Office of Federal Procurement Policy of the Office of Management and Budget has advised that it concurs in the views expressed herein.

Please let me know if I can provide further information.

Sincerely,



James A. Wilderotter  
General Counsel

Enclosures:

1. Statement of R. Tenney Johnson before Senate Energy Research & Water Resources Subcommittee, 11/17/75
2. ERDA Regulations for Avoidance of Organizational Conflicts, 41 CFR Part 9-1.54
3. Ltr dtd 1/20/76, Senator Abourezk to R. Tenney Johnson & H. Gregory Austin, Solicitor, DOI
4. Ltr dtd 2/20/76, R. Tenney Johnson to Senator Abourezk
5. Ltr dtd 2/27/76, Senator Abourezk to R. Tenney Johnson
6. Ltr dtd 3/24/76, R. Tenney Johnson to Senator Abourezk
7. Ltr dtd 5/24/76, Hugh E. Witt to Senator Abourezk with Enclosures

EXHIBIT 12: LETTER FROM THE COMPTROLLER GENERAL  
TO REPRESENTATIVE KEN HECKLER  
COMPTROLLER GENERAL OF THE UNITED STATES  
WASHINGTON, D.C. 20548



August 5, 1976

B-178205

The Honorable Ken Heckler  
Chairman, Subcommittee on Energy Research  
Development and Demonstration (Fossil Fuels)  
Committee on Science & Technology  
House of Representatives

Dear Mr. Chairman:

You have requested our comments on Title IX, "Organizational Conflict of Interest," of H.R. 13350, as amended, which would require the Energy Research and Development Administration (ERDA) to take certain specified steps to prevent organizational conflicts of interest from arising in its contracting for research and development (R&D) efforts.

Title IX would preclude ERDA from entering into R&D arrangements (including contracts) with any firm which "may be unable to render impartial, technically sound, or objective assistance or advice due to its other activities or its relationship with other organizations" or which "would be given an unfair competitive advantage." To this end, Title IX would require all persons or organizations interested in contracting with ERDA to file with ERDA "a written notice describing in detail the nature and existence of any such activities or relationships or competitive advantage." Such notice would be made available for public comment which ERDA is to "receive and evaluate." ERDA would also be required to conduct a detailed inquiry of offerors with respect to possible conflicts of interest prior to making any award. Finally, Title IX would require ERDA to promulgate implementing regulations.

As you know, I am deeply concerned about the organizational conflict of interest problem and have recently urged development of agency guidelines that would impose clearly defined duties in this area on Government contracting personnel. I therefore am in agreement with the basic purpose of Title IX. However, I believe Title IX would unnecessarily impose administrative burdens and undue delay in ERDA's procurement process, and could, in fact, result in a lessening of competition. It also may be overly restrictive since it may not always be in the Government's best interests to refuse to award a contract on the basis of a remote, as opposed to a clear and direct, conflict of interest.

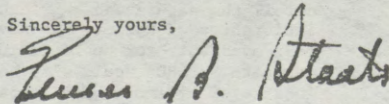
I think it would be more appropriate for statutory language to provide more generally for both Government officials and those who seek contracts with the Government to take affirmative steps with respect to disclosing and evaluating information bearing on a potential contractor's conflict of interest.

In this connection, I suggest that in place of Title IX as it is currently worded, language along the following lines be considered:

"The Administrator shall, by regulations to be promulgated by him, require any person or organization proposing to enter into a contract, agreement or other arrangement for research, development or evaluation activities to provide the Administrator, prior to entering into any such contract, agreement or arrangement, with all relevant information bearing on whether that person or organization has a possible conflict of interest with respect to being able to render impartial, technically sound, or objective assistance or advice in light of other activities or relationships with other organizations. The Administrator shall not enter into any such arrangement unless he affirmatively finds, after evaluating such information and any other relevant information available to him, either that (1) there is little or no likelihood that a conflict of interest would exist, or (2) that it would otherwise be in the best interest of the Government to enter into the arrangement."

We trust this serves the purpose of your inquiry.

Sincerely yours,



Comptroller General  
of the United States

EXHIBIT 13: LETTER FROM REPRESENTATIVE KEN HECHLER  
TO DR. ROBERT SEAMANS, ERDA ADMINISTRATOR

DUJN E. YEAGUE, TEX., CHAIRMAN  
KEN HECHLER, W. VA.  
THOMAS N. DOWNING, VA.  
DON FUGZA, FLA.  
JAMES W. SPENCINGTON, MD.  
WALTER FLOWERS, ALA.  
ROBERT A. ROE, N.J.  
MIKE MC CONNACK, WASH.  
JORGE E. BROWN, JR., CALIF.  
ALEX HILFORD, TEX.  
RAY THURNTON, ARK.  
JAMES H. SCHUBER, N.Y.  
RICHARD L. OTTINGER, N.Y.  
MIDNEY A. WALSMAN, CALIF.  
PHILIP H. HAYES, IND.  
JON HASKIN, IOWA  
JIM LUDY, CALIF.  
JEROME A. ANGER, N.Y.  
CHRISTOPHER J. DODD, CONN.  
MICHAEL T. BLODIN, IOWA  
TIM L. HALL, ILL.  
ROBERT KNUESER, TEX.  
MABLEY LLOYD, TENN.  
JAMES J. BLANCHARD, MICH.  
TIMOTHY E. WIRTH, GOLD.

CHARLES A. MOHRER, OHIO  
ALPHONZO BELL, CALIF.  
JOHN JAHMAN, OKLA.  
JOHN W. WYDLER, N.Y.  
LARRY WINN, JR., KANS.  
LOUIS FREY, JR., FLA.  
BARRY M. GOLDWATER, JR., CALIF.  
MARVIN L. ESCH, MICH.  
JOHN P. CONLAN, ARIZ.  
GARY A. MYERS, PA.  
DAVID F. EMERY, MAINE  
LARRY PRESSLER, S. DAK.

COMMITTEE ON SCIENCE AND TECHNOLOGY  
U.S. HOUSE OF REPRESENTATIVES  
SUITE 2321 RAYBURN HOUSE OFFICE BUILDING  
WASHINGTON, D.C. 20515

JOHN L. BRIGERT, JR.  
EXECUTIVE DIRECTOR  
HAROLD A. GOULD  
PHILIP B. YFAGER  
FRANK R. HAMMILL, JR.  
JAMES E. WILSON  
J. THOMAS BATHCHOFFO  
JOHN D. HOLMFELD  
RALPH N. READ  
ROBERT C. KETCHAM  
ROBERT B. DILLAWAY  
REGINA A. DAVIS  
MINORITY COUNSEL:  
MICHAEL A. SUPERATA

August 10, 1976

Dr. Robert C. Seamans  
Administrator  
Energy Research and Development  
Administration  
Washington, D.C. 20545

Dear Dr. Seamans:

Our Subcommittee is quite concerned with the problem of organizational conflicts of interest. After our hearings earlier this year, we wrote to ERDA and the Interior Department concerning this problem in connection with a Bechtel Corporation study of slurry pipelines. In addition, we asked the General Accounting Office to examine this problem in connection with another ERDA contract.

Consequently, we believed it appropriate to ask the GAO to review and comment on title IX of H.R. 13350, as passed the Senate. That title is aimed at preventing organizational conflicts of interest in connection with ERDA programs. We provided to the GAO a copy of a July 22, 1976, letter to Senator Jackson from ERDA's General Counsel concerning this title so that the GAO would have ERDA views on that Senate amendment to H.R. 13350.

The GAO's reply, dated August 5, 1976, is enclosed for your review and comment. It indicates that the GAO is "in agreement with the basic purpose of Title IX," but suggests an alternative which is aimed at dealing with the problem of contractor disclosing information which would enable ERDA to determine whether a proposed procurement involves a situation covered in ERDA's regulations (section 9-1.5407). Such a disclosure statement would be subject to 5 U.S.C. 1001, concerning false statements. We understand that ERDA's current regulations do not require such a disclosure which appears to place ERDA's contracting officer at a disadvantage in trying to make the determination required by the ERDA regulations. Unless the proposed contractor volunteers such information, or unless the ERDA contracting officer has independent knowledge of it, it is unlikely that he will know of such conflicts prior to contracting. You will recall that such a situation occurred in connection with the Bechtel study.

Dr. Robert C. Seamans  
Page Two

August 10, 1976

You will recall that on February 5, 1976, we wrote to ERDA and Interior about the Bechtel situation and recommended that both agencies "develop an appropriate disclosure regulation." A copy of those letters is enclosed for your convenience.

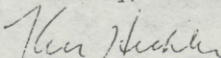
We never received a reply from Interior. But on March 5, 1976, ERDA's then General Counsel indicated that "there is merit in this recommendation," and that it was under consideration as part of a Government-wide effort. We have not heard further about the status of that effort.

We would appreciate ERDA reviewing the GAO's alternative provision which could be added to Public Law 93-577 in Conference on H.R. 13350, and providing to us your comments thereon by August 23, 1976. We would also welcome any suggested changes for our consideration to the GAO language that might improve it.

We note your General Counsel's suggestion in the July letter to Senator Jackson that legislation on this subject be deferred until Government-wide procedures are developed, and that the Office of Federal Procurement Policy hopes to have a proposed regulation by September 1, 1976. This effort is apparently the same one that ERDA referred to in the March 5, 1976, letter to our Subcommittee mentioned above. We would appreciate ERDA indicating in its response the current status of that effort and the timetable for publication and promulgation of such a regulation, as well as a brief summary of what might be included in that regulation insofar as disclosure is concerned.

Please provide a copy of your reply to Chairman Jackson and the GAO.

Sincerely,



KEN HECHLER, Chairman  
Subcommittee on Energy Research,  
Development and Demonstration  
(Fossil Fuels)

Enclosures

EXHIBIT 14: LETTER FROM JAMES A. WILDEROTTER,  
 ERDA GENERAL COUNSEL TO REPRESENTATIVE KEN HECHLER  
 UNITED STATES  
 ENERGY RESEARCH AND DEVELOPMENT ADMINISTRATION  
 WASHINGTON, D.C. 20545

AUG 26 1976



Honorable Ken Hechler  
 Committee on Science and Technology  
 House of Representatives

Dear Mr. Hechler:

This is in response to your letter of August 10, 1976 concerning the Comptroller General's comments on Title IX, "Organizational Conflicts of Interest," of H.R. 13350, as amended. Specifically, you asked for our views on the Comptroller General's suggested alternative language and for the current status of the Office of Federal Procurement Policy's efforts to develop Government-wide procedures for organizational conflicts of interest.

At the outset, we note that while the Comptroller General indicated agreement with the basic purpose of Title IX of H.R. 13350, he expressed the opinion that the specific language of this proposed legislation would:

" . . . unnecessarily impose administrative burdens and undue delay in ERDA's procurement process, and could, in fact, result in a lessening of competition. It also may be overly restrictive since it may not always be in the Government's best interests to refuse to award a contract on the basis of a remote, as opposed to a clear and direct, conflict of interest."

As we indicated in our letter to Senator Jackson dated July 21, 1976, we are in complete agreement with the Comptroller General regarding the adverse effect of Title IX.

The Comptroller General suggested that in lieu of Title IX a provision be included in H.R. 13350 whereby ERDA would be required to issue regulations requiring:

" . . . any person or organization proposing to enter into a contract, agreement or other arrangement for research, development or evaluation activities to provide the Administrator prior to entering into such contract, agreement or other arrangement with all relevant information

Honorable Ken Hechler

- 2 -

AUG 26 1976

bearing on whether that person or organization has a possible conflict with respect to being able to render impartial, technically sound, or objective assistance or advice in light of other activities or relationships with other organizations."

Based upon such information the Comptroller General proposes that an evaluation and affirmative finding be made "either that (1) there is little or no likelihood that a conflict would exist, or (2) that it would otherwise be in the best interest of the Government to enter into the arrangement."

While we do not object in principle to the suggestion of the Comptroller General, we do have the following reservations. First, the language would appear to require opinions or conclusions on the part of a prospective contractor as to what would constitute a conflict of interest. Although the disclosure of "all relevant information" would be required, this is qualified or defined by the words "with respect to being able to render impartial, technically sound or objective assistance." Strictly factual disclosures of past or planned activities in the general area covered by the prospective contract might be preferable.

Second, the language is unclear as to whether disclosure would be required of all proposers or only those selected for contract negotiation. The value of requiring disclosure by all proposers is questionable.

As we noted in our July 21, 1976 letter to Senator Jackson, OFPP has directed GSA, with the cooperation of all Federal procuring agencies, to formulate appropriate Government-wide procedures in this area of organizational conflicts. That effort is now under way. Although we cannot provide you with a precise date for publication of regulations, ERDA will continue to cooperate with OFPP and GSA in an effort to develop effective procedures as soon as possible. It remains our view that any legislation in this area would be premature until this effort is complete.

In any event, if a disclosure requirement along the lines suggested by the Comptroller General is deemed desirable, we believe it should apply not merely to ERDA but Government-wide. We, therefore, are sending a copy of this letter and your correspondence to the General Services

Honorable Ken Hechler

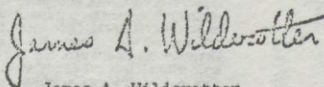
- 3 -

AUG 26 1976

Administration, the Office of Federal Procurement Policy, and the  
Armed Services Procurement Regulations Committee for their consideration.

As you requested, a copy of this letter also is being sent to Senator  
Jackson and to GAO.

Sincerely,



James A. Wilderotter  
General Counsel

cc: Senator Henry M. Jackson  
Honorable Elmer B. Staats,  
Comptroller General  
Mr. Hugh E. Witt, ~~-----~~  
Administrator for Federal  
Procurement Policy  
Mr. Philip G. Read,  
Director of Federal  
Procurement Regulations  
Col. Thomas F. Blake, Jr.  
Chairman of ASPR Committee

EXHIBIT 15: EXCERPTS FROM CONFERENCE REPORT ON H.R. 13350,  
ERDA AUTHORIZATION BILL FOR FISCAL 1977

September 28, 1976

CONGRESSIONAL RECORD—HOUSE

H 11417

CONFERENCE REPORT ON H.R.  
13350, AUTHORIZING APPROPRIATIONS TO ENERGY RESEARCH AND DEVELOPMENT ADMINISTRATION

Mr. McCORMACK submitted the following conference report and statement on the bill (H.R. 13350) to authorize appropriations to the Energy Research and Development Administration in accordance with section 261 of the Atomic Energy Act of 1954, as amended, section 305 of the Energy Reorganization Act of 1974, and section 16 of the Federal Nonnuclear Energy Research and Development Act of 1974, and for other purposes:

## CONFERENCE REPORT (H. REPT. NO. 94-1718)

The committee of conference on the disagreeing votes of the two Houses on the amendment of the Senate to the bill (H.R. 13350) to authorize appropriations to the Energy Research and Development Administration in accordance with section 261 of the Atomic Energy Act of 1954, as amended, section 305 of the Energy Reorganization Act of 1974, and section 16 of the Federal Nonnuclear Energy Research and Development Act of 1974, and for other purposes, having met, after full and free conference, have agreed to recommend and do recommend to their respective Houses as follows:

H 11422

CONGRESSIONAL RECORD—HOUSE

September 28, 1976

## TITLE VI—ORGANIZATIONAL CONFLICTS

Sec. 601. The Federal Nonnuclear Energy Research and Development Act of 1974 (42 U.S.C.) is amended by adding a new section to read as follows:

"Sec. 19. (a) The Administrator shall by regulation require any person proposing to enter into a contract, agreement, or other arrangement, whether by advertising or negotiation, for the conduct of research, development, evaluation activities, or for technical and management support services to provide the Administrator, prior to entering into any such contract, agreement, or arrangement, with all relevant information bearing on whether that person has a possible conflict of interest with respect to (1) being able to render impartial, technically sound, or objective assistance or advice in light of other activities or relationships with other persons or (2) being given an unfair competitive advantage. Such person shall insure, in accordance with regulations published by the Administrator, compliance with this section by any subcontractor of such person, except supply contractors: *Provided*, that this requirement shall not apply to subcontracts of \$10,000 or less.

"(b) The Administrator shall not enter into any such contract, agreement, or arrangement unless he affirmatively finds, after evaluating all such information and any other relevant information otherwise available to him, either that (1) there is little or no likelihood that a conflict of interest would exist, or (2) that such conflict has been avoided after appropriate conditions have been included in such contract, agreement, or arrangement: *Provided*, That if he determines that such conflict of interest exists and that such conflict of interest cannot be avoided by including appropriate conditions therein, the Administrator may enter into such contract, agreement, or arrangement, if he determines that it is in the best interests of the United States to do so and includes appropriate conditions in such contract, agreement, or arrangement to mitigate such conflict.

"(c) The Administrator shall publish rules for the implementation of this section, in accordance with 5 U.S.C. 553, as soon as possible after the date of enactment of this section but in no event later than 180 days after such date."

*Organizational conflict of interest*

The Senate amendment includes a provision which would amend the Energy Reorganization Act of 1974 to define by statute the responsibility of the Energy Research and Development Administration to avoid conflicts of interest in its contracts with private persons or organizations involved in energy research and development. The House bill contains no comparable provision.

The Energy Research and Development Administration has advised that it is strongly opposed to adoption of the Senate provision. ERDA's principal objection is to the requirement that it solicit and evaluate public comments on a written notice of potential organizational conflicts of all prospective contractors prior to the making of any contract or other arrangement. This requirement, according to ERDA, would be extremely burdensome and time-consuming for the agency and would result in unavoidable delay in ERDA's procurement process. ERDA also argues that the requirement would conflict with the Administrative Procedure Act and would impose on ERDA procedural requirements which would not be applicable to other major procurement agencies such as the Department of Defense and NASA.

ERDA contends that the prohibition on entering into contracts for which appropriate restrictions cannot be attached to avoid an organizational conflict of interest and the requirement that ERDA maintain and promote active and open competition are already fully satisfied by the statutes and regulations governing ERDA's procurement activities.

Finally, ERDA argues that any legislation governing organizational conflicts of interest ought to take a Government-wide approach. ERDA, therefore, suggests that an amendment to the existing laws governing all Federal procurement activities, adopted after suitable hearings at which all interested agencies are given an opportunity to participate, would be a preferable approach to the Senate provision.

A Government-wide approach to solving organizational conflict of interest problems is also recommended by the Office of Federal Procurement Policy of the Office of Management and Budget, and the General Services Administration is presently developing regulations following this approach.

Although it would appear that a Government-wide approach to this problem is the preferred approach, there is no sound reason to defer all individual approaches until an all-encompassing bill is enacted. For this reason, the conferees have agreed to the Senate provision with clarifying revisions adopted by the conference committee.



EXHIBIT 16: LETTER FROM DEPUTY COMPTROLLER GENERAL  
TO REPRESENTATIVE HECHLER (WITH ATTACHMENTS)

COMPTROLLER GENERAL OF THE UNITED STATES  
WASHINGTON, D.C. 20548

B-178205

September 30, 1976

The Honorable Ken Hechler  
Chairman, Subcommittee on Energy Research  
Development and Demonstration (Fossil Fuels)  
Committee on Science & Technology  
House of Representatives

Dear Mr. Chairman:

Your letter dated August 10, 1976, requests our comments on the position taken by the Energy Research and Development Administration (ERDA) in response to our letter dated August 5, 1976, to you, in which we suggested alternative language to the current wording of Title IX, "Organization Conflict of Interest", of H.R. 13350, as amended.

Our suggested language would require ERDA to promulgate regulations requiring prospective contractors to provide ERDA with "all relevant information" which would have a bearing on whether the prospective contractor would have a possible conflict of interest in connection with research, development, or evaluation activities.

ERDA "does not object in principle" to this alternative language. However, ERDA observes that the requirement for prospective contractors to disclose information bearing upon their ability to render "impartial, technically sound or objective assistance" would appear to require opinions or conclusions on the part of a prospective contractor as to what would constitute a conflict of interest. ERDA suggests that strictly "factual disclosures of past or planned activities in the general area covered by the prospective contract might be preferable." ERDA also observes that our alternative language does not clearly indicate whether disclosure would be required of all offerors or only those selected for contract negotiation.

We think the statutory language should be broad and general, and should be implemented by detailed regulations. We would expect that such regulations would specify the precise nature of the information to be disclosed and also would require the submission of any other "relevant" information. We would also expect that the regulations would specify when in the procurement process and from whom the information will be required.

We notice that ERDA has recently begun to use a new disclosure clause. Request for proposals No. DSA-76-869, issued by ERDA on August 23, 1976, provides:

" DISCLOSURE OF INTERESTS

Pursuant to ERDA PR § 9-1.54, ERDA requires information so that it may determine whether or not any situations exist which might either (1) bias a contractor's judgment, or (2) provide a contractor with an unfair competitive advantage because of any interest, financial or otherwise, which it or any of its affiliate organizations have in current activities or potential procurement opportunities relating to the work involved in this solicitation.

"Therefore, proposers must provide a brief statement of any interest, financial or otherwise, which they or any of their affiliate organizations currently have, have had in the past, or might have in the future which may relate to the work to be performed under this solicitation. ERDA will use this information to determine whether or not any situations, real or apparent, exist which might either bias a contractor's judgment in relation to its work for ERDA, or provide the contractor with an unfair competitive advantage. Proposers should properly mark any information contained in their statements which they consider proprietary data according to the instructions contained in Part C above.

"Failure to provide the statement or to disclose relevant interests may result in disqualification under this solicitation."

ERDA, in a letter to us dated September 10, 1976, a copy of which is enclosed, indicated that it "presently contemplates that this disclosure clause will be used \* \* \* in subsequent solicitations when the nature of the work warrants its inclusion \* \* \*."

This provision seems to be consistent with our proposed statutory language and would provide ERDA information to resolve questions of conflicts of interest. However, we believe that the

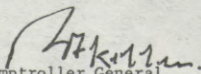
use of such a clause should be mandated by regulation, rather than left to the possible uneven discretion of contracting personnel, so as to insure uniformity of application.

ERDA also suggests that disclosure requirements should apply Government-wide and not merely to ERDA. We agree that regulations on a Government-wide basis would be appropriate, and we understand that such regulations are under study by the Office of Federal Procurement Policy, the General Services Administration, and the Armed Services Procurement Regulation Committee. However, we believe it would be useful for agencies to promulgate their own conflict of interest procedures, at least on an interim basis, while uniform regulations are under consideration.

We hope this information serves the purpose of your inquiry.

Sincerely yours,

Deputy

  
Comptroller General  
of the United States

Enclosure



UNITED STATES  
ENERGY RESEARCH AND DEVELOPMENT ADMINISTRATION  
WASHINGTON, D.C. 20545

September 10, 1976

RECEIVED  
GAG - INDEX & FILES

1976 SEP 15 PM 1 40

Lawrence Lebow, Esq.  
Office of General Counsel  
General Accounting Office  
Washington, D. C. 20548

Dear Mr. Lebow:

This will confirm our telephone conversation on September 8, regarding ERDA policy and practice for the avoidance of organizational conflicts of interests.

This subject was discussed in our letter of August 26, 1976 to Congressman Hechler, a copy of which was sent to GAO. In your call on September 8, you referred to ERDA RFP No. DAS-76-869, dated August 23, 1976, which contains a clause similar to that suggested by GAO. (RFP Attachment 1, paragraph D).

The referenced clause was used by ERDA for the first time in this RFP, and we presently contemplate that this disclosure clause will be used by ERDA in subsequent solicitations when the nature of the work warrants its inclusion, such as management support services for computer systems, and management support services for general program development and planning.

ERDA has submitted this disclosure clause (in revised form) to the Office of Federal Procurement Service, Federal Supply Service, GSA for its consideration in developing an appropriate policy. A copy of our transmittal to that office is enclosed.

I trust that this information will enable you to make a further suitable reply to Mr. Hechler.

Sincerely,

Elliot Winnick, Attorney  
Office of the General Counsel

Enclosure:  
As stated

SEP 8 1976

Mr. Philip C. Read  
Director, Federal Procurement  
Regulations  
Federal Supply Service  
General Services Administration  
Washington, D.C. 20405

Dear Mr. Read:

Please refer to Mr. Witt's letter of May 11, 1976 to Heads of Executive Departments and Establishments, subject "Contractor's Organizational Conflicts of Interest" and his letter to you which was attached thereto.

Enclosed for your information and consideration are copies of an organizational "Conflicts of Interest" contract clause and a companion "Disclosure of Interests" requirement for inclusion in requests for proposals, which we have developed for use in connection with our ongoing procurement effort at ERDA. You may find it helpful in your consideration of this problem on a Government-wide basis.

If you have any questions or if you would like to discuss the matter in more depth, please do not hesitate to call me.

Sincerely,

*LSJ*

Lloyd W. Sides  
Assistant General Counsel  
for Procurement

Enclosures:  
As Stated

cc w/encl: LeRoy J. Haugh  
Assistant Administrator  
for Regulations  
Office of Federal Procurement  
Policy

Disclosure of Interests

Pursuant to ERDA PR §9-1.54, ERDA requires information so that it may determine whether or not any situations exist which might either (1) bias a contractor's judgment, or (2) provide a contractor with an unfair competitive advantage because of any interest, financial or otherwise, which it or any of its affiliate organizations have in current activities or potential procurement opportunities relating to the work involved in this solicitation.

Therefore, proposers must provide a brief statement of any interest, financial or otherwise, which they or any of their affiliate organizations currently have, have had in the past, or are contemplating for the future, which may relate to the work to be performed under this solicitation. ERDA will use this information to determine whether or not any situations, real or apparent, exist which might either bias a contractor's judgment in relation to its work for ERDA, or provide the contractor with an unfair competitive advantage. Proposers should properly mark any information contained in their statements which they consider proprietary data according to the instructions contained in Attachment A, Section I.8.

Failure to provide the statement or to disclose relevant interests may result in disqualification under this solicitation.

ARTICLE I - CONFLICTS OF INTEREST

A. Purpose. Pursuant to ERDA PR §9-1.54, the primary purpose of this Article is twofold, namely, to assure that the work performed by the contractor under this contract is not biased because of its current activities or its potential future procurement opportunities related to the work under this contract, and to assure that the contractor does not obtain any unfair competitive advantage over other competitive parties by virtue of its performance of this contract. In recognition thereof, the parties agree to the following restrictions:

B. Restrictions. The restrictions described herein shall apply to participation by the contractor or any of its affiliate organizations in procurements covered by this Article as a prime contractor, subcontractor of any tier, co-sponsor, vendor, joint venturer, consultant or in any other capacity.

1. Preparation of Specifications and Statements of Work.

a. If the contractor under this contract prepares or furnishes essentially complete specifications to be used in any procurement and if the exceptions listed in ERDA-PR (41 C.F.R.) 9-1.5407(d)(1) through (4) (October 7, 1975) do not apply, the contractor shall be ineligible to compete for the work covered by such procurement, as a prime contractor or otherwise, during the initial procurement and for a period of three (3) years after the completion of this contract or any extension thereof.

b. If the contractor under this contract undertakes work which essentially is to assist ERDA or a contractor of ERDA in the preparation of a statement of work, or provides material leading directly and predictably to a statement of work, to be used in the procurement of a product or service, the contractor under this contract will not be allowed to supply the service, or the product or major components thereof as a prime contractor or otherwise for a period of three (3) years after the completion of this contract or any extension thereof. This restriction shall not apply if it is determined and justified in accordance with established criteria that the contractor is a sole source for the required product or service. The content of a statement of work is not considered predictable if two or more contractors, unaffiliated with each other, are involved substantially in the preparation of material leading to it. Generally, feasibility studies which do not propose in detail the characteristics of a possible final product are not considered to be work statements.

## 2. Access to and Use of ERDA Information.

a. If the contractor under this contract is given by ERDA, or obtains access to, information regarding ERDA's plans, policies, programs, studies, data, etc., which is not generally available to other non-Government organizations, the contractor shall not be eligible to compete for or perform work directly relating to such ERDA information for a period of three (3) years after the completion of this contract or any extensions thereof, or, in the event the information is made generally available to the public or other interested parties, for a period of one (1) year after the release of such information to allow the public or other interested parties opportunity to assimilate and act on such information.

b. In addition, commercial or other use of information or data developed or obtained under this contract is subject to the principles and procedures of ERDA PR 59-1.5403 and other applicable regulations and provisions of this contract.

## 3. Performing Evaluation or Consulting Services.

a. If the contractor under this contract performs evaluation or consulting services for ERDA in connection with or relating to a particular procurement, the contractor shall be ineligible to compete for the work covered by such procurement. In addition, the contractor will not be permitted to evaluate or give consulting services to ERDA during the period of this contract:

1) On any product or service which the contractor provides to ERDA; or

2) On the product or services provided to ERDA by any firm with which the contractor has a consulting relationship or participates in the preparation of a response to a procurement solicitation by ERDA;

b. Furthermore, the contractor will not give consulting services to prospective offerors on a procurement item for which it has performed or will perform evaluation services for ERDA.

c. Government waiver. ERDA may waive any or all restrictions of this Article in specific cases if it is determined by the Manager of an ERDA Field Office or the cognizant ERDA Program Division Director or their designee that such waiver is in the best interests of the Government. Any application by the contractor for any waiver should be made through the Contracting Officer to the authorized ERDA official, and the basis for any waiver granted shall be appropriately documented in writing.

EXHIBIT 17: HOUSE CONSIDERATION OF CONFERENCE REPORT  
ON H.R. 13350, ERDA AUTHORIZATION BILL FOR FISCAL 1977

H 11946

## CONGRESSIONAL RECORD—HOUSE

September 30, 1976

CONFERENCE REPORT ON H.R.  
13350, AUTHORIZING APPROPRIATIONS FOR THE ENERGY RESEARCH AND DEVELOPMENT ADMINISTRATION

Mr. TEAGUE. Mr. Speaker, I call up the conference report on the bill (H.R. 13350) to authorize appropriations to the Energy Research and Development Administration in accordance with section 261 of the Atomic Energy Act of 1954, as amended, section 305 of the Energy Reorganization Act of 1974, and section 16 of the Federal Nonnuclear Energy Research and Development Act of 1974, and for other purposes, and ask unanimous consent that the statement of the managers be read in lieu of the report.

The Clerk read the title of the bill.

H 11950

## CONGRESSIONAL RECORD—HOUSE

September 30, 1976

Mr. HECHLER of West Virginia. Mr. Speaker, I am pleased that we are finally at the point of concluding consideration of H.R. 13350 which passed both the House and the other body last June.

H 11952

## CONGRESSIONAL RECORD—HOUSE

September 30, 1976

## ORGANIZATIONAL CONFLICTS OF INTERESTS

Last February my subcommittee and a Senate subcommittee headed by Senator ABOURNIEK of South Dakota held separate hearings on an ERDA-Bechtel contract where we learned that ERDA's current regulations and procedures concerning organizational conflicts of interests are woefully inadequate. If ERDA on its own initiative or through some other source is aware of such conflicts in connection with a proposed contract, ERDA can react and take precautionary action, including rejection of the contract. But it cannot require the proposed

September 30, 1976

CONGRESSIONAL RECORD—HOUSE

H 11953

contractor and subcontractors to disclose information to ERDA as to such possible conflicts.

After our hearings the Senator and I separately urged ERDA to take corrective action. ERDA responded by saying that indeed it was a problem, but wanted it to be considered as a government-wide problem. This was obviously an effort by ERDA to delay. Unfortunately, by this time corrective action by our committee in H.R. 13350 was not possible. But fortunately, Senator ABRAHAMSON successfully added a title to the Senate version of H.R. 13350 dealing with this problem. After that bill passed the Senate, I asked the General Accounting Office to review the new title. On August 5, 1976, the GAO replied with the following letter:

WASHINGTON, D.C.,  
August 5, 1976.

HON. KEN HECHLER,  
Chairman, Subcommittee on Energy Research Development and Demonstration (Fossil Fuels), Committee on Science and Technology, House of Representatives.

DEAR MR. CHAIRMAN: You have requested our comments on Title IX Organizational Conflict of Interest, of H.R. 13350, as amended, which would require the Energy Research and Development Administration (ERDA) to take certain specified steps to prevent organizational conflicts of interest from arising in its contracting for research and development (R&D) efforts.

Title IX would preclude ERDA from entering into R&D arrangements (including contracts) with any firm which "may be unable to render impartial, technically sound, or objective assistance or advice due to its other activities or its relationship with other organizations" or which "would be given an unfair competitive advantage." To this end, Title IX would require all persons or organizations interested in contracting with ERDA to file with ERDA "a written notice describing in detail the nature and existence of any such activities or relationships or competitive advantage." Such notice would be made available for public comment which would also be required to conduct a detailed inquiry of offerors with respect to possible conflicts of interest prior to making any award. Finally, Title IX would require ERDA to promulgate implementing regulations.

As you know, I am deeply concerned about the organizational conflict of interest problem and have recently urged development of agency guidelines that would impose clearly defined duties in this area on Government contracting personnel. I therefore am in agreement with the basic purpose of Title IX. However, I believe Title IX would unnecessarily impose administrative burdens and undue delay in ERDA's procurement process, and could, in fact, result in a lessening of competition. It also may be overly restrictive since it may not always be in the Government's best interests to refuse to award a contract on the basis of a remote, as opposed to a clear and direct, conflict of interest.

I think it would be more appropriate for statutory language to provide more generally for both Government officials and those who seek contracts with the Government to take affirmative steps with respect to disclosing and evaluating information bearing on a potential contractor's conflict of interest.

In this connection, I suggest that in place of Title IX as it is currently worded, language along the following lines be considered:

"The Administrator shall, by regulations to be promulgated by him, require any person or organization proposing to enter into a contract, agreement or other arrangement

for research, development or evaluation activities to provide the Administrator prior to entering into any such contract, agreement or arrangement, with all relevant information bearing on whether that person or organization has a possible conflict of interest with respect to being able to render impartial, technically sound, or objective assistance or advice in light of other activities or relationships with other organizations. The Administrator shall not enter into any such arrangement unless he affirmatively finds, after evaluating such information and any other relevant information available to him, either that (1) there is little or no likelihood that a conflict of interest would exist, or (2) that it would otherwise be in the best interest of the Government to enter into the arrangement."

We trust this serves the purpose of your inquiry.

Sincerely yours,  
ELMER B. STANTS,  
Comptroller General of the United States.

Thereafter, I wrote on August 10, 1976, to ERDA about the GAO reply. My letter and enclosure follow:

WASHINGTON, D.C.,  
August 10, 1976.

DR. ROBERT C. SEAMANS,  
Administrator, Energy Research and Development Administration, Washington, D.C.

DEAR DR. SEAMANS: Our Subcommittee is quite concerned with the problem of organizational conflicts of interest. After our hearings earlier this year, we wrote to ERDA and the Interior Department concerning this problem in connection with a Bechtel Corporation study of slurry pipelines. In addition, we asked the General Accounting Office to examine this problem in connection with another ERDA contract.

Consequently, we believed it appropriate to ask the GAO to review and comment on title IX of H.R. 13350, as passed the Senate. That title is aimed at preventing organizational conflicts of interest in connection with ERDA programs. We provided to the GAO a copy of a July 22, 1976, letter to Senator Jackson from ERDA's General Counsel concerning this title so that the GAO would have ERDA views on that Senate amendment to H.R. 13350.

The GAO's reply, dated August 5, 1976, is enclosed for your review and comment. It indicates that the GAO is "in agreement with the basic purpose of Title IX," but suggests an alternative which is aimed at dealing with the problem of contractor disclosure information which would enable ERDA to determine whether a proposed procurement involves a situation covered in ERDA's regulations (section 9-1.5407). Such a disclosure statement would be subject to 6 U.S.C. 1001, concerning false statements. We understand that ERDA's current regulations do not require such a disclosure which appears to place ERDA's contracting officer at a disadvantage in trying to make the determination required by the ERDA regulations. Unless the proposed contractor volunteers such information, or unless the ERDA contracting officer has independent knowledge of it, it is unlikely that he will know of such conflicts prior to contracting. You will recall that such a situation occurred in connection with the Bechtel study.

You will recall that on February 5, 1976, we wrote to ERDA and Interior about the Bechtel situation and recommended that both agencies "develop an appropriate disclosure regulation." A copy of the letters to Interior which was also sent to ERDA is enclosed for your convenience.

We never received a reply from Interior. But on March 5, 1976, ERDA's then General Counsel indicated that "there is merit in your recommendation," and that it was under consideration as part of a Government-wide

effort. We have not heard further about the status of that effort.

We would appreciate ERDA reviewing the GAO's alternative provision which could be added to Public Law 93-877 in Conference on H.R. 13350, and providing to us your comments thereon by August 23, 1976. We would also welcome any suggested changes for our consideration to the GAO language that might improve it.

We note your General Counsel's suggestion in the July letter to Senator Jackson that legislation on this subject be deferred until Government-wide procedures are developed, and that the Office of Federal Procurement Policy hopes to have a proposed regulation by September 1, 1976. This effort is apparently the same one that ERDA referred to in the March 5, 1976, letter to our Subcommittee mentioned above. We would appreciate ERDA indicating in its response the current status of that effort and the timetable for publication and promulgation of such a regulation, as well as a brief summary of what might be included in that regulation insofar as disclosure is concerned.

Please provide a copy of your reply to Chairman Jackson and the GAO.

Sincerely,  
KEN HECHLER,  
Chairman, Subcommittee on Energy Research, Development and Demonstration (Fossil Fuels).

WASHINGTON, D.C.,  
February 5, 1976.

MR. THOMAS S. KLEPPE,  
Secretary of the Interior, Interior Building, Washington, D.C.

DEAR MR. SECRETARY: Our Subcommittee has been examining the procedures used by the Office of Coal Research, now a part of the Energy Research and Development Administration, in letting a study contract for over \$400,000 on May 29, 1974, to the Bechtel Corporation of San Francisco, California. As you probably know, there has been a great deal of critical public comment of ERDA's handling of this contract. When the contract was executed, the OCR was an agency within the Interior Department.

On July 27, 1973, Bechtel submitted to the then Director of the OCR, Dr. George E. Hill, an unsolicited proposal "for a transportation study directed to developing an efficient means of evaluating the cost-effectiveness of various methods of delivering clean energy from coal to demand centers." The proposal was estimated to cost the Government \$369,088. Prior to this submission, we understand that an OCR official, Mr. A. Howard Smith, visited Bechtel and, among other things, discussed the proposal with Bechtel officials. On May 29, 1974, the contract for the study was signed by Bechtel and the OCR. The contract cost had risen to \$413,205.

One day prior to submitting the 1973 proposal to the OCR, Bechtel incorporated a subsidiary, the Energy Transportation Systems, Inc. (ETSI), to build a coal slurry pipeline from Wyoming to Arkansas.

At recent Senate hearings on the OCR proposal, Mr. Smith testified as follows:

"To the best of my recollection, I do not remember learning about the existence or function of ETSI during 1974. However, certain records indicate I attended a briefing on the proposed ETSI pipeline from Wyoming to Arkansas prior to the award of the Bechtel contract. Although I do have a recollection of attending this meeting, I only recall that a pipeline from Wyoming to Arkansas was discussed in which Bechtel had an interest. I do not recall the name ETSI. Furthermore, I do not remember that any Bechtel research people who I knew to be associated with the computer model proposal were present at that meeting. I have reviewed the attendance list of the meeting and do not recognize any of the Bechtel representatives who were present. In any event, it would not have occurred

H 11954

CONGRESSIONAL RECORD—HOUSE

September 30, 1976

to me to consider the pipeline effort being discussed to be in conflict with the computer model."

As a matter of fact, our investigation indicates that this "briefing" took place on May 23, 1976 in the Secretary's Conference Room in your Department. On May 21, 1974, the Director of Interior's Office of Environmental Project Review sent a memorandum to 15 Interior offices and agencies, including the Director of the Office of Coal Research. That memorandum was entitled, "Briefing on a 1030 Mile Coal Slurry Pipeline Project by Energy Transportation Systems Incorporated (Wyoaming to Arkansas)."

Your Department's files indicate that Mr. Smith attended this briefing on behalf of the Director of the OCR. They also indicate that several Bechtel officials were present, including Mr. E. J. Wasp, who is identified on pages 3-4 of the Bechtel unsolicited study proposal of July, 1973, as one of the principal project personnel and who has been a Vice President of ERTSI since it was formed in 1973.

It is clear from the above information that at least one week prior to executing the contract on May 29, 1974, the OCR knew or should have known that a subsidiary of Bechtel (ERTSI) was planning to build a coal slurry pipeline crossing "public lands and Indian lands." Mr. Smith testified that it did not occur to him that there may have been a "conflict." Although it is quite possible that he and the OCR did not consider the two matters as related, we are concerned that your Department, and apparently ERDA, does not require proposed Government contractors to disclose at the time they submit proposals and prior to actual contracting what, if any, possible conflicts with their pending proposal may exist.

We think that such a disclosure requirement is essential in order for the Government to determine whether or not a conflict exists. Once disclosed, the Government could still execute a proposal, with appropriate safeguards, or turn it down.

We urge that your Department develop an appropriate disclosure regulation, as soon as possible. If you believe this recommendation is not practicable or reasonable, please so advise us, setting forth your reasons.

We are sending a copy of this letter to ERDA with the recommendation that ERDA develop such a regulation also.

Sincerely,

KEN HECHLER,

Chairman, Subcommittee on Energy Research, Development and Demonstration (Fossil Fuels).

ERDA was not, as one can imagine, enthusiastic about the GAO proposal. ERDA continued to maintain that it should not be singled out. ERDA contended that this is a governmentwide problem. Thus, we need a general legislative solution which, of course, would be beyond the scope of H.R. 13350.

However, Senator ABRAHAM and myself continued to believe that legislation for ERDA on this subject is essential. We worked with the help of our staff on improving the GAO language. This was done and it was offered to the conferees who unanimously accepted our revised version of the basic GAO language.

The conferees agreed, as their report succinctly states, that "there is no sound reason to defer 'this legislative solution' until an all-encompassing bill is enacted." I fear that if Congress did wait, several Congresses will pass. Indeed, we are, in this legislation, anticipating a problem, rather than reacting to a disaster.

The new provision in title VI of the bill is added to Public Law 93-577. It re-

quires that ERDA issue regulations within the next 6 months implementing this section. These regulations must undergo public scrutiny before they are finalized.—ERDA should not use the contracts exemptions from public participation of 5 U.S.C. 553. In this regard, I insert the following letter to ERDA on this matter of public participation. I have not yet received a reply. My letter follows:

WASHINGTON, D.C.

August 6, 1976.

Dr. ROBERT C. SEAMANS,  
Administrator, Energy Research and Development Administration, Washington, D.C.

DEAR DR. SEAMANS: On July 23, 1976, your agency published a regulation "expanding and clarifying the policies and procedures concerning the receipt, evaluation, acceptance, or rejection of 'Unsolicited Proposals'", and provided that the regulation shall be effective on the same date it was published (41 F.R. 30330-30334). No opportunity was given by ERDA for public comment there prior to adoption, although the regulation states public comments received "on or before September 21, 1976 will be considered in determining whether revision of this regulation may be advisable." The regulation is silent on whether or not the public will be informed of ERDA's decision, should ERDA decide that such revision after this comment period, is not "advisable." In any event, these substantial changes in the regulation are effective until after the comment period and the ERDA decision.

In a July 21, 1976 letter to the Senate Committee on Interior and Insular Affairs, ERDA's general Counsel, Mr. James Wilderouter, commented on title IX of H.R. 13350—the ERDA authorization bill for FY 1977—which was added to that bill by Senator ABRAHAM on the Senate Floor on June 25, 1976. The title is aimed at the problem of organizational conflicts of interest which, as you know, are of concern to this Subcommittee.

In his letter, Mr. Wilderouter said: "We are also strongly opposed to that part of Title IX of H.R. 13350 which would require the solicitation and evaluation of public comments on a 'written notice' of potential organization conflicts of all prospective contractors prior to the making of any contract or other arrangement. This provision would, as a practical matter, impose upon ERDA (but not other major procurement agencies such as DOD or NASA) the rule-making requirements of the Administrative Procedure Act (5 U.S.C. § 551, et seq.). However, that law, which generally requires publication of proposed rules and the opportunity for the public to participate in the rule-making process, expressly exempts "any matter relating to agency management or personnel or to public property, loans, grants, benefits, or contracts" (5 U.S.C. § 552(a)(2)); see ASBY, Gen. Manual on APA, 1947, p. 27; see also Summary of the Report of the Commission on Government Procurement, 1972, p. 14).

"While the views of interested parties may be (and, in fact, are) solicited in the formulation and development of procurement regulations (COGCP Summary, supra, p. 14), it would be extremely burdensome and time consuming for an agency to solicit public views on individual procurement actions whether for organizational conflict purposes or otherwise. The unavoidable delay of such a requirement would undoubtedly frustrate implementation of ERDA's mandate."

Without commenting on title IX of H.R. 13350, we note that ERDA is relying on the above-cited exemption in 5 U.S.C. 553 to avoid publishing its procurement and other regulations as proposed rules for public comment prior to their final promulgation. The ERDA interpretation is a clear limitation on public participation. The Administrative

Conference of the United States has recommended that Federal agencies not utilize this exemption. After that recommendation, the House Committee on Government Operations wrote to all Federal agencies and urged them to adopt the Conference's recommendation administratively. One of the agencies that agreed to do so is the Interior Department, as shown in the enclosed notice of May 4, 1971 (36 F.R. 8336). We believe the Atomic Energy Commission also told the House Committee that it would agree to follow that policy.

The policy is applicable to "all offices and bureaus" at Interior, including those that were transferred to ERDA pursuant to the Energy Reorganization Act of 1974. Thus, our Subcommittee is now concerned to find that ERDA appears to have disregarded that policy and, instead, is following a policy that clearly is out of date, contrary to the recommendation of the Administrative Conference, and can severely limit public participation in rule-making.

We urge that ERDA reconsider this action and promptly adopt the policy followed by Interior for more than five years without any perceptible delay or frustration in the "mandate" of its constituent agencies.

Sincerely,

KEN HECHLER,

Chairman, Subcommittee on Energy Research, Development and Demonstration (Fossil Fuels).

The provision requires that potential ERDA contractors provide to ERDA a report of "all relevant information" bearing on possible conflict of interests. Such information reports are subject to 5 U.S.C. 1001. It uses two tests specified in the new section. The contract may not be executed if that data or other available data reveals a conflict, unless ERDA "affirmatively finds" that there is little or no likelihood of a conflict or that it has been avoided through appropriate and effective contract provisions. However, if a conflict exists and cannot be avoided, ERDA may still contract if it determines that it is in the best interests of the United States to do so and appropriate and effective contract provisions are included to mitigate the conflict to the greatest extent possible. This latter determination should not be made, lightly.

The new section also applies to sub-contractors—other than supply sub-contractors and subcontractors of \$10,000 or less.

This new provision is sound and should not be burdensome to contractors. It is a model that should be made applicable to other Government contractors.

I want to express my appreciation to Senator ABRAHAM and his staff in developing this public interest provision.

Mr. TEAGUE. Mr. Speaker, I move the previous question on the conference report.

The previous question was ordered. The SPEAKER. The question is on the conference report.

The conference report was agreed to. A motion to reconsider was laid on the table.

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EXHIBIT 18: SENATE CONSIDERATION OF  
CONFERENCE REPORT ON H.R. 13350, ERDA  
AUTHORIZATION BILL FOR FISCAL 1977

AUTHORIZING APPROPRIATIONS  
FOR THE ENERGY RESEARCH  
AND DEVELOPMENT ADMINIS-  
TRATION—CONFERENCE REPORT

Mr. JACKSON, Mr. President, I submit a report of the committee of conference on H.R. 13350 and ask for its immediate consideration.

The PRESIDING OFFICER. The report will be stated by title.

The legislative Clerk read as follows:

The committee of conference on the disagreeing votes of the two Houses on the amendment of the Senate to the bill (H.R. 13350) to authorize appropriations to the Energy Research and Development Administration in accordance with section 261 of the Atomic Energy Act of 1954, as amended, section 306 of the Energy Reorganization Act of 1974, and section 16 of the Federal Nonnuclear Energy Research and Development Act of 1974, and for other purposes, having met, after full and free conference, have agreed to recommend and do recommend to their respective Houses this report, signed by a majority of the conferees.

The PRESIDING OFFICER. Is there objection?

(The conference report is printed in

the Record of the House of Representatives.)

Mr. GRAVEL, Mr. President, I ask that the clerk read the entire document.

Several Senators addressed the Chair. Mr. GRAVEL, I believe I am entitled as a Senator to ask that it be read.

Mr. ROBERT C. BYRD. The Senator is entitled to that, but would he withhold? Will he withhold that request, please?

Mr. GRAVEL, I choose not to withhold. Mr. ROBERT C. BYRD. He can still demand it if he withholds.

Mr. GRAVEL. All right. I withhold as a courtesy to the acting majority leader.

Mr. ROBERT C. BYRD. I thank the Senator.

My I ask how lengthy is this request?

The PRESIDING OFFICER. Between 150 and 200 pages.

Mr. ROBERT C. BYRD. Mr. President, may I say this: If the Senator demands the reading of this report, and he is entitled to do this within his right, not even a motion to adjourn will interrupt the reading of that report.

Mr. GRAVEL. The Senator is correct.

Mr. ROBERT C. BYRD. It can only be interrupted by unanimous consent, and so before the Senator makes his demand and gets us started down that road, I wonder if he would allow me, without his losing his right to do this, to suggest a brief quorum.

Mr. GRAVEL. Without losing my right, I am happy to have a brief quorum.

Mr. ROBERT C. BYRD. I suggest the absence of a quorum.

The PRESIDING OFFICER. Without the Senator losing his right, the clerk will call the roll.

The assistant legislative clerk proceeded to call the roll.

Mr. ROBERT C. BYRD. Mr. President, I ask unanimous consent that the order for the quorum call be rescinded.

The PRESIDING OFFICER. Without objection, it is so ordered.

Mr. ROBERT C. BYRD. Mr. President, I ask unanimous consent that the Senator from Alaska be protected in his right to demand the reading but that he not, and I plead with him, not to do it for the moment, and let the Senator from Washington proceed.

Mr. GRAVEL. I am happy to.

Mr. JACKSON. Mr. President, I certainly do not understand this kind of a move after a year's effort on the part of the House and Senate committees to get a bill that will place some guidelines on ERDA.

What the Senator from Alaska will do is give ERDA a blank check. They can do what they want within the appropriation areas. They can ignore the restrictions in this pending measure that will apply in the weapons area, the peaceful atom, and of course, in the nonnuclear area.

I say to my colleagues—so that they will understand what happened to them—there are a lot of projects that will not be undertaken because those projects that have been designated in this bill will now be at the whim of ERDA. I think everyone here should understand that.

The report that is before us is a unanimous report, and it is regrettable that the Senator would undertake this kind of move at a late hour. There is no apparent rational reason for it. I know the real reason.

Mr. GRAVEL. I know the reason. Mr. JACKSON. You want to be on the Atomic Energy Committee.

Mr. GRAVEL. That is right. I was prepared to make a deal with you.

Mr. JACKSON. Imagine, a Senator of the United States. I am one who will not be blackmailed. I will tell you right now. This is a question of honor and decency.

Imagine coming to me and saying he will let the ERDA conference report be adopted in consideration of my helping him get on the Joint Atomic Energy Committee. That is a fact.

Mr. LONG. Mr. President, I move that we invoke the rule.

Mr. ROBERT C. BYRD. Could we proceed?

Mr. LONG. The rule is that a Senator should not say anything derogatory about another Senator.

Mr. ROBERT C. BYRD. Will the Senator withdraw it?

Mr. JACKSON. I will withdraw it, but now the Senate knows.

Mr. ROBERT C. BYRD. Does the Senator withdraw it?

Mr. JACKSON. Yes. I withdraw it.

Mr. GRAVEL. Mr. President, I feel very deeply about our nuclear situation in this country. I have tried for 8 years to get on what is considered a minor committee, and I have kept my silence, knowing full well that there was a constant effort, planned by certain elements of the leadership, to keep me from that committee, which should have been a normal thing in a normal seniority process, for the very simple reason that I was not part of the establishment with respect to the nuclear situation.

I would have hoped that we would have had the wisdom to say that it is not a bad idea to have somebody on the committee who is critical of it. But the joint committee has been all one way. So I fought for 8 years, starting with legislation that was considered radical and kooky but which is now conventional wisdom.

Now there are going to be two openings on that committee. I have already written letters to the steering committee. I do not know what forces are going to get together to say GRAVEL cannot be on that committee because he is not really trustworthy when it comes to the nuclear establishment.

Let me just say there is nothing I feel more deeply about than the nuclear arms race and the insanity that motivates this country.

This is the first opportunity I have had, like any other Senator, to stand up here and object—object on a personal privilege situation because of the late hour and say that I am fed up with some of the things we are doing.

I am doing no more than Senator DURKIN did or a whole host of Senators did here and on the other side—no more and no less. That may anger my colleague. My colleague is on the steering

committee, and he can vent his anger by trying to keep me off. But I serve notice that I will plead with every member of the steering committee to try to get him to say that I can be a critic—I hope a rational critic. But the only thing I am doing here today is to make that point so that we can begin to look at the situation in this legislation involving the nuclear arms race, which is appalling and abysmal, and I will use my rights to exercise that now.

Has the bill been withdrawn?  
Mr. ROBERT C. BYRD. Yes.

#### ABOUREZK BAN ON CONFLICTS OF INTEREST IN ERDA AUTHORIZATION BILL

Mr. ABOUREZK. Mr. President, I am gratified that the conference on the ERDA authorization bill, H.R. 13350, has accepted my proposal on organizational conflict of interest. It is now title V of this bill. I offered this provision as an amendment during the Senate debate, 122 CONGRESSIONAL RECORD S10595-10596—June 25, 1976. When I introduced the amendment for printing, I described it and introduced materials for the Record explaining how it was developed, 122 CONGRESSIONAL RECORD S10479-10480—June 24, 1976.

Prior to conference the Comptroller General proposed alternative language to my amendment. The Comptroller's letter of August 5 appears at the end of my statement. As a result of negotiations among myself, House Members, and ERDA, the Comptroller General's proposal was modified to include features of my initial proposal. The result is acceptable to me and to ERDA.

I am particularly gratified at the adoption of this title because it is the first statute on the subject of organizational conflict of interest. It results directly from 3 days of hearings which I chaired in the Energy Research and Water Resources Subcommittee last winter entitled "Organizational Conflict of Interest in Government Contracting."

The hearings revealed that there is presently no Federal statute whatsoever concerning organizational conflict of interest in Government contracting. Similarly, neither the General Service Administration nor the Office of Management and Budget has issued any regulations or guidelines in this area. A number of agencies, including ERDA, have taken the initiative to issue regulations on organizational conflict of interest which—by these agencies' own admissions—are inadequate. The inadequacy of these regulations was demonstrated in the subcommittee hearings last winter and was confirmed in a Comptroller General opinion. The subcommittee's hearings were the first held on this subject in the Congress in 12 years.

As a concept, conflict of interest is intuitive. The Bible warns simply:

No man can serve two masters; for either he will hate the one and love the other, or else he will hold to the one and despise the other.

"Organizational" conflict is distinguished from "personal" conflict in that

it applies the same conflict standards to organizations which apply to individuals.

In the early 1960's expenditures by the Federal Government for research and development grew dramatically. This growth forced the Government to review its policies with respect to this research. In 1962, a Presidential commission recommended that Federal agencies adopt codes of conduct to bar a firm from holding one contract in which it advised the Government on what type of hardware the Government should purchase and then turning around and bidding on a subsequent contract to sell the Government that same hardware. During this time there had been congressional hearings on a Ramo-Woolridge contract by the Defense Department which involved precisely this classic conflict of interest. The direction of all Federal regulations on organizational conflict of interest promulgated since this time has been heavily influenced by this limited class of conflicts of interest.

As the Senate examines this issue, I would like to emphasize one point. Conflict of interest is measured by an objective standard. One need not find actual bias or corruption in order to establish that a conflict of interest exists. As the Supreme Court said in the Mississippi Valley case:

An impairment of impartial judgment can occur in even the most well-meaning men when their personal economic interests are affected by the business they transact on behalf of the government.

For this reason the Supreme Court concluded that the conflict of interest laws attempt to prevent honest Government agents from succumbing to temptation by making it illegal for them to enter into relationships which are fraught with temptation. As applied to Government research this means that the Government should not contract with organizations to conduct research on subjects where the organization is tempted to bias the results of the research to benefit the organizations' financial interests.

Let me briefly summarize the results of the subcommittee's hearings on this subject. In 1974, Bechtel Corp. contracted with ERDA to study the economics of coal transportation.

Bechtel initiated the contract proposal, and it was awarded without competitive bidding. After formulating a computer model of coal transportation as a part of its contracted study, Bechtel utilized the computer model in part to compare the economics of transporting coal from Wyoming to Arkansas by unit train and by the coal sidery pipeline Energy Transportation Systems, Inc., hopes to build. However, it turns out Bechtel has a 40 percent interest in ETSI. This comparison between ETSI's project and unit trains occurred during phase II of the project when a test case was selected to validate the computer model created during phase I. At the hearing I submitted for the record the actual computer printouts of this test case computer run which contains the model's "preferred solution" for transporting coal from Wyoming to Arkansas, which concludes, predictably, that ETSI's

October 1, 1976

## CONGRESSIONAL RECORD—SENATE

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coal slurry pipeline is a cheaper way to transport this coal than unit trains.

In addition to discussing the relationship between the Bechtel study and the ETSI proposal, witnesses at the hearing disclosed the following facts: First, Mr. Thomas Aude, of Bechtel, had eight billable hours working on those parts of the ERDA contract which relate to coal slurry pipelines at the same time he worked for ETSI; second, at the same time Bechtel's Scientific Development Operation and Pipeline and Production Services Division were performing the ERDA contract, these same Bechtel divisions were performing a contract which Bechtel had concluded with ETSI to evaluate its pipeline proposal; and, third, Bechtel personnel working on the ERDA contract demonstrated their interest in informing ETSI of the nature of the ERDA study by formally inviting ETSI to a briefing on the study.

On the basis of these facts and others in the record, I have concluded that the Bechtel's ERDA contract involved a conflict of interest due to its relationship to ETSI's pipeline proposal. The Comptroller General concluded that the actions of Bechtel and the Government were at least "somewhat questionable."

This type of conflict of interest is endemic in Government contracting. Example after example of such conflicts are described in "The Shadow Government," a recent book by Daniel Guttman. It is time that the Congress focused on this problem.

This amendment to the ERDA authorization bill is a modest beginning but would substantially improve current policies in this field. Because there is presently no statement of congressional policy in the field, this ERDA amendment will serve as a prototype for future efforts by Congress to prevent organizational conflicts of interest.

The ERDA amendment's definition of organizational conflict of interest is taken verbatim from present ERDA regulations. It would bar the award of contracts to organizations which may be unable to render impartial, technically sound, or objective assistance or advice due to its other activities or its relationships with other organizations or would be given an unfair competitive advantage. This is meant to be a broad delegation of authority to ERDA. A narrower definition of conflict of interest might unduly restrict the agency.

However, this broad definition will be applicable to a wider range of contracts than was the practice at ERDA prior to the hearings because, first, it applies to both advertised and negotiated contracts and second, a conflict is defined as arising with the presence of either bias or unfair competitive advantage.

Since the hearings, ERDA has agreed that its regulations should be interpreted as consistent with these two points. The statute makes it clear that the conflict of interest standard applies to sole source as well as competitive contracts. The standard applies whether or not a contract arises from an unsolicited proposal.

The one change in existing law is that

this statute requires—for the first time—disclosure by the contract applicant of potential conflicts of interest. Incredibly, ERDA presently requires no disclosure by a contract applicant of a conflict of interest, even if the applicant is fully aware of the conflict. A simple certification by a contract applicant that no conflict exists will not suffice under this title. Some combination of certifications and disclosure of information would suffice as long as all information bearing on a conflict must be provided.

On the basis of this information, other information available to ERDA, and inquiries made by ERDA, ERDA must then make an affirmative finding on whether or not a conflict of interest exists. ERDA should not disregard information made available by competitors, indeed, competitors may often be aware of pertinent information regarding the existence of a conflict.

This information could not be disclosed to the public except pursuant to a Freedom of Information Act request. That act explicitly exempts "trade secrets or privileged-commercial or financial information."

Adoption of this title will complement the ongoing efforts of the General Services Administration to adopt its first regulations on organizational conflict of interest. I hope it will also lead to placing a similar provision in the omnibus bills to reform the Government procurement process, which Senator CHILES will be considering next year.

**KEN HECHLER**  
 U.S. SENATOR  
 WEST VIRGINIA

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 DIANN MCCORMICK  
 SUSAN ROSS  
 VIRGINIA SKEEN

—PLUS ANY VOLUNTEER  
 HELP WE CAN GET!

EXHIBIT 19: LETTER FROM REPRESENTATIVE  
 KEN HECHLER TO THE COMPTROLLER GENERAL

**Congress of the United States**  
 House of Representatives  
 Washington, D.C. 20515

October 7, 1976

The Honorable Elmer B. Staats  
 Comptroller General of the  
 United States  
 U.S. General Accounting Office  
 Washington, D.C. 20548

Dear Mr. Staats:

Thank you for your September 30, 1976 letter (B-178205) concerning the Organizational Conflict of Interest provision of H.R. 13350. It was quite helpful. We made it available to ERDA.

I. The new ERDA disclosure provision for RFP's and conflicts of interest clause are also quite helpful. We are concerned, however, that they may be challenged. Thus, we would like to know the statutory basis for them. In short, we want to know if they have teeth. Also, we would like to know under what circumstances the disclosure clause will not be used by ERDA. We also would like to know how and in what manner ERDA will evaluate each disclosure report. In a February 20, 1976, letter to Senator Abourezk, ERDA's General Counsel posed some obstacles to a thorough evaluation and indicated that such an evaluation may "add substantially to the overall time frame for the procurement process . . . with an attendant unavoidable delay, which may well not be in the Government's best interest under some circumstances." It is difficult to imagine when this would be the case. Additionally, we would like to know if ERDA informs respondents that their report or statement is subject to 18 U.S.C. 1001. Perhaps it would be useful for the GAO to review the responses to the August 23 RFP where ERDA first used this disclosure requirement, as well as ERDA's handling of the responses.

II. As you know, the House-Senate conferees adopted a revised version of the Senate Organizational Conflict of Interest Amendment (see H. Rept. 94-1718, September 29, 1976, title VI, pp. 18-19). The conference report on H.R. 13350 passed the House, but not the Senate.

COMMITTEE:  
 SCIENCE AND TECHNOLOGY

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The Honorable Elmer B. Staats  
Page Two

October 7, 1976

We anticipate that this provision will again be considered early in the 95th Congress. Thus, we would appreciate the GAO reviewing title VI and providing comments thereon to Congressman Ottinger, Senator Abczewski, and myself by the end of November.

We understand that some at ERDA and in industry are concerned about the "affirmative" finding of section 19(b) in title VI. They are reportedly concerned that this will trigger judicial review under the Administrative Procedure Act and thus delay the program. On the other hand, it appears that ERDA must be required to do something once ERDA obtains the data. Indeed, it appears that ERDA must make some determinations under its new disclosure clause and under current regulations. Under current procurement regulations, could those determinations be challenged in court, or to the GAO, or both? We would appreciate your views on this.

Sincerely,

*Ken Hechler*

KEN HECHLER  
Member of Congress

Forward for Divisional Control to:	
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<input checked="" type="checkbox"/> For action	<input checked="" type="checkbox"/> For info <i>Keller, Casfield, Carbone.</i>
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<i>CCR achid</i>	
By: <i>[Signature]</i>	Date: <i>10.8.76</i>

EXHIBIT 20: LETTER FROM DEPUTY COMPTROLLER GENERAL  
TO REPRESENTATIVE KEN HECHLER

COMPTROLLER GENERAL OF THE UNITED STATES  
WASHINGTON, D.C. 20548



B-178205 .98

DEC 22 1976

The Honorable Ken Hechler  
House of Representatives

Dear Mr. Hechler:

This is in response to your letter dated October 7, 1976, concerning the practices of the Energy Research and Development Administration (ERDA) with respect to the avoidance of organizational conflicts of interest.

Specifically, you asked for our views and ERDA's position on several questions regarding a new "Disclosure of Interest" clause which ERDA uses in certain solicitations, as well as our comments on Title VI, "Organizational Conflicts", of H.R. 94-1718. Our letter to you dated September 30, 1976, contained a copy of the "Disclosure of Interest" provision. ERDA's position on these matters was furnished to us by a letter dated November 30, 1976, from the General Counsel of ERDA. The questions raised and the responses are given below:

1. The statutory basis for ERDA's new "Disclosure of Interest" provisions.

The Energy Reorganization Act of 1974, 42 U.S.C. 5801 *et seq.* (1970), provides that the Administrator of ERDA is "authorized to prescribe such policies, standards, criteria, procedures, rules and regulations as he may deem to be necessary or appropriate to perform functions now or hereafter vested in him." 42 U.S.C. 5815(a) (1970). This authorization to prescribe rules and regulations appears sufficiently broad to include authority to promulgate organizational conflict of interest provisions for use in ERDA procurements.

2. The circumstances where ERDA would not use the organizational conflict of interest provisions.

ERDA's position on the use of the organizational conflict of interest provisions is as follows:

"It is contemplated that both the 'Conflicts of Interest' and 'Disclosure of Interest' clauses will be used in all procurements for technical and management support. The 'Conflicts of Interest' clause, modified to suit the circumstances, might also be inserted in RD&D contracts when appropriate.

"The clauses probably would not be used in acquisition of hardware or standard commercial items. They would not necessarily be used in development and design procurements pursuant to ERDA-PR Sec. 9-1.5407(b); and they probably would not be used in cases where it is determined that it would be in the Government's best interest to use the contractor(s), notwithstanding possible conflicts of interest.

"These contemplated procedures are expressed as probabilities because we are still in the process of refining ERDA policy in these areas, testing the use of the clauses in different circumstances, and assessing their potential impacts vis-a-vis statutory programmatic objectives."

We concur with ERDA with respect to procurements for hardware or standard commercial items. Procurement of these supplies is often made through formal advertisement, with the Government furnishing detailed product specifications and award being made to the lowest priced responsible bidder. Since the contractor is called upon only to deliver an end product which is defined in detail by Government specifications, we see no reason for the use of the conflict of interest provisions.

With regard to development and design procurements, current ERDA regulations provide:

"Development contractors generally should not be prohibited from consideration as a supplier for a product which they develop and design. In development work it is normal to select firms which have done the most advanced work and which are the most experienced in the field. It is expected that these firms will develop and design around their own prior knowledge. \* \* \* The arrangements for procurement should provide for the maximum competition consistent with satisfying ERDA requirements.

\* \* \* Appropriate steps should be taken to insure that the information furnished ERDA under the design and development contract is available to other potential bidders, on a timely basis."

While we agree generally with ERDA policy on this subject, we think that use of the disclosure provision and perhaps a modified version of the conflict of interest provision would serve a useful purpose at least with respect to identifying potential unfair competitive advantage situations. The provisions would not per se preclude award of a contract because of conflict of interest or competitive advantage, but would provide ERDA with information indicating the existence and extent of a conflict or competitive advantage, which ERDA should consider in determining whether contract award would be appropriate. The provisions would also provide information to ERDA so that specifically tailored restrictive provisions could be utilized to mitigate any conflict.

Similarly, we think the clauses should be used even where ERDA has determined to make award notwithstanding a conflict of interest. We recognize that situations may arise where it would be advantageous to the Government to make an award in spite of a conflict of interest, and, as pointed out above, the conflict of interest provisions do not preclude award despite the existence of a conflict. However, we believe ERDA should be completely aware of the extent of a contractor's conflict of interest so that ERDA may appropriately weigh the contractor's recommendations and whatever else is provided with the contract, and for that reason we think the use of the disclosure provisions would be appropriate regardless of ERDA's intentions regarding award. Even if ERDA is independently aware of contractor conflict or bias, the information available through offeror's affirmative disclosure might well highlight the extent of a conflict or provide additional information through which bias or conflict might in some way be limited.

In this regard, ERDA's Assistant General Counsel - Procurement has informally advised us that ERDA will endeavor to obtain from all contractors information bearing on the existence and extent of any conflict, and thereafter restrict the conflict to the maximum extent possible. He further advised that the statement in ERDA's report that the provisions "probably would not be used" in some instances was intended to mean only that clauses prepared to suit the particular needs of individual cases will be used instead of these standard clauses.

4. The specific manner in which ERDA will evaluate the information to be provided by offerors.

According to ERDA:

"It cannot be said at the moment with any precision or confidence what will be the 'specific manner in which ERDA will evaluate the information to be provided by offerors.' Cases where the clause have been used thus far are so few we have not developed sufficient experience to make advanced judgments. We believe that we are proceeding in a prudent manner to gain such experience so that we can establish guidelines for evaluation, given the sensitivity of the problem and its potential impact on ERDA's mission."

Informally, ERDA's Assistant General Counsel - Procurement has reported that an offeror's response to the disclosure requirement will be evaluated by a source evaluation board, which is the same group that evaluates the technical and price aspects of proposals. The board, which is comprised of procurement, financial, technical, legal and administrative personnel, will determine if an offeror has an actual, potential or apparent conflict of interest. To the extent possible, an offeror's conflict of interest will be curtailed by appropriate limiting provisions in the contract. Generally, we are told, if a conflict cannot be avoided, award will not be made. Award will be made notwithstanding a conflict only if it is determined to be in the best interest of the Government. ERDA believes this situation will rarely occur, and plans to develop specific procedures for award selection giving consideration to organizational conflicts of interest and based upon the experience to be gained in using the new disclosure clause. While no written procedure for award selection with a focus on conflicts has yet been made, ERDA is treating the disclosure statement as an eligibility requirement so that an offeror will not be considered for award unless the disclosure requirements are satisfied.

4. The likelihood that procurements might be delayed as a result of the provisions.

ERDA states:

"It seems very probable that some delay will be encountered in various procurements when these clauses are used and we believe that many potential contractors will contest or refuse their application, particularly in ERDA. There is always a possibility of delay

when something new is tried, especially when the change is perceived to potentially threaten entrance to the marketplace or to deny ERDA the services of highly regarded companies. The extent of delays probably will be uneven, and considerably more operating experience will be required before qualitative judgments can be made as to the magnitude of the impact of such measures."

We have no basis to believe that ERDA's procurements would be unreasonably delayed.

5. Whether ERDA specifically informs contractors furnishing information under its disclosure provisions of the false statement provisions of 18 U.S.C. § 1001 (1970).

ERDA does not specifically inform offerors that their disclosure statements are subject to 18 U.S.C. § 1001 (1970). In ERDA's view, it is not necessary "as offerors and bidders are generally aware of the penalties for furnishing false information."

6. Whether the Administrator's "affirmative" finding under Section 19(b) of Title VI of H.R. 94-1718 would trigger judicial review under the Administrative Procedures Act (APA) and thus delay ERDA's programs and whether GAO would review the finding.

Section 19(b) of Title VI would limit ERDA's contracting to situations where the Administrator "affirmatively finds" that there is little likelihood of a conflict of interest or that any such conflict has been avoided with appropriate contract conditions. However, if the Administrator determines that a conflict cannot be avoided, he may still contract if he determines that it is in the best interest of the Government.

ERDA is concerned that a "disappointed prospective contractor \* \* \* might well obtain judicial review" of Title VI determinations, with "consequent delay to ERDA's procurement process." ERDA recommends that if Title VI should become law, the law should expressly exempt the Administrator's findings from APA review or make those findings "final and conclusive."

The Administrative Procedures Act, 5 U.S.C. § 551 et seq. (1970), grants jurisdiction to the Federal District Courts to review "agency actions." However, actions are not judicially reviewable

under the Act (1) where a statute precludes judicial review or (2) where "agency action is committed to agency discretion by law." 5 U.S.C. § 701 (1970). Title VI would not per se preclude judicial review. However, we think that judicial review under the Administrative Procedures Act would likely be precluded on the ground that these agency "findings" are by their nature discretionary, rather than ministerial.

Moreover, even if judicial review were to occur, we do not believe that it would impose unreasonable delay on ERDA procurements. Federal procurements are currently reviewable by the District Courts. See Scanwell Laboratories v. Shaffer, 424 F. 2d 859 (D.C. Cir. 1970); Merriam v. Kunzig, 476 F. 2d 1233 (3rd. Cir. 1973). We do not believe that challenges to conflict of interest provisions would add significantly to whatever delay is currently engendered by judicial review of procurement actions. In this regard, we point out that under current standards, before a court will enjoin the award of a contract, the complaining party would have to demonstrate the likelihood of success on the merits and that the public interest will not be significantly harmed by issuance of the injunction. See, e.g., Virginia Petroleum Jobbers Association v. Federal Power Commission, 259 F. 2d 921 (D.C. Cir. 1958); General Electric Company v. Seamans, 340 F. Supp. 636 (D.C. D.C. 1972). This is a considerable burden.

GAO would likely review these "affirmative findings" in the context of a bid protest. However, our review probably would be undertaken with the view that the administrative determination is entitled to great weight, and we probably would not question such determination unless it was clearly shown to be arbitrary, unreasonable or without a substantial basis in fact. We point out, however, that if Title VI were to provide that the Administrator's findings were "final and conclusive," GAO review would be precluded.

#### 7. Our comments on Title VI.

The provisions of Title VI seem consistent with the intended purpose of avoiding organizational conflicts of interest to the maximum practicable extent without unreasonably delaying the procurement process. We believe its enactment would serve a useful purpose.

As you requested, we are today sending copies of this letter and our letter to you dated September 30, 1976, to Senator Abourezk and Congressman Ottinger.

Sincerely yours,

R.F.KELLER

(Deputy, Comptroller General  
of the United States

NINETY-FOURTH CONGRESS

EXHIBIT 21: LETTER FROM REPRESENTATIVES JOHN  
DINGELL AND RICHARD OTTINGER AND SENATOR  
JAMES ABOUZEK TO ROBERT FRI, ACTING

ROOM 3304

HOUSE OFFICE BUILDING ANNEX NO. 2  
PHONE (202) 223-1030

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RICHARD L. OTTINGER, N.Y.

ROBERT (BOB) KRUEGER, TEX.

ANTHONY TONY MOPPERTI, CONN.

ANDREW MADHIRE, N.J.

MARLEY D. STAGGERS, W.VA.

(EX OFFICIO)

JOHN D. DINGELL, MICH., CHAIRMAN

CLARENCE J. BROWN, OHIO

CARLOS J. MOOREHEAD, CALIF.

JAMES T. BROYHILL, N.C.

H. JOHN HEINE III, PA.

BARUEL L. D'YONNE, OHIO

(EX OFFICIO)

ERDA ADMINISTRATOR

CONGRESS OF THE UNITED STATES

HOUSE OF REPRESENTATIVES

SUBCOMMITTEE ON ENERGY AND POWER

OF THE

COMMITTEE ON INTERSTATE AND FOREIGN COMMERCE

WASHINGTON, D.C. 20515

February 2, 1977

Mr. Robert W. Fri  
Acting Administrator  
Energy Research and Development  
Administration  
20 Massachusetts Avenue, N. W.  
Washington, D. C. 20545

Dear Mr. Fri:

In a recent letter (B-178205.98) to Representative Ken Hechler and ourselves, the General Accounting Office expressed support for your Agency's "Disclosure of Interest" provision and indicated several areas where your Agency has agreed to expand its use. The GAO letter also expresses support for the Organization Conflict of Interest clause included in the House-passed conference report (H. Rept. 94-1718) authorizing appropriations for ERDA in FY 1977. Specifically, the letter addresses several matters of concern expressed by ERDA officials about the provision and concludes that such concerns are not well-founded. Most importantly, the GAO believes enactment of this provision "would serve a useful purpose".

A copy of the GAO letter is enclosed. We request that you review it and provide your comments thereon to us by Thursday, February 17, 1977.

We share the GAO's belief that this statutory provision will be "useful" in addressing an evergrowing and serious problem of organizational conflicts of interest. Indeed, we believe the scope of this provision should be clarified during forthcoming Congressional consideration to insure that it applies to all ERDA programs, including the nuclear program. This provision will provide a firm statutory basis for ERDA to take effective action to prevent or mitigate potentially troublesome conflict of interest situations. In our view, the provision is consistent with President Carter's goals in this area.

Mr. Robert W. Fri  
Page Two  
February 2, 1977

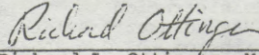
The GAO comments concerning ERDA's Disclosure of Interest clause are also helpful. We request that you keep us advised on a quarterly basis about the actions taken by ERDA to implement this clause, in accordance with the GAO comments.

With best regards,

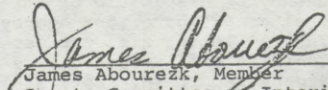
Sincerely,



John D. Dingell, Chairman  
Subcommittee on Energy and Power  
House Committee on Interstate and  
Foreign Commerce



Richard L. Ottinger, Member  
Subcommittee on Energy and  
Power  
House Committee on Interstate  
and Foreign Commerce



James Abourezk, Member  
Senate Committee on Interior  
and Insular Affairs

Enclosure



EXHIBIT 22: LETTER FROM ROBERT FRI, ACTING ERDA  
ADMINISTRATOR TO SENATOR JAMES ABUREZK  
UNITED STATES

ENERGY RESEARCH AND DEVELOPMENT ADMINISTRATION  
WASHINGTON, D.C. 20545

MAR 8 1977

Honorable James Abourezk  
Committee on Energy and  
National Resources  
U. S. Senate

Dear Senator Abourezk:

This is to acknowledge receipt of your letter dated February 2, 1977, with an attached letter from GAO to Congressman Ken Hechler dated December 22, 1976, requesting ERDA's comments thereon. The referenced GAO letter comments on ERDA's response to six questions on organizational conflicts of interest previously submitted to us by GAO on November 1, 1976, as well as an informal conversation with our procurement counsel.

In the brief period which has elapsed since the discussions with GAO, we have been using both a Disclosure of Interest provision and Conflict of Interest clause in limited situations. Definitization of ERDA policy in the overall application of these types of provisions is still in process. Experience to date indicates there is a need for further evaluation and modification of our policy regarding organizational conflicts of interest. We do, however, appreciate your continuing concern and foresee that in the not too distant future we will be in a position to make substantive policy choices and provide the comments requested in your letter of February 2, 1977.

I am confident that we will be able to define policies and procedures that will both protect the public interest and avoid the flood of paperwork and attendant delays that would accompany a sweeping approach. I will respond further in this regard.

Sincerely,

Robert W. Fri  
Acting Administrator



EXHIBIT 23: INTRODUCTION BY SENATOR HENRY JACKSON OF S. 36,  
 ERDA AUTHORIZATION BILL FOR FISCAL 1977  
 CONGRESSIONAL RECORD—SENATE

January 10, 1977

S 207

so eloquently for "simple justice" in his acceptance speech at the Democratic convention, should bear that in mind when his turn comes to name someone to the Court.

By Mr. JACKSON:

S. 36. A bill to authorize appropriations to the Energy Research and Development Administration in accordance with section 261 of the Atomic Energy Act of 1954, as amended, section 305 of the Energy Reorganization Act of 1974, and section 16 of the Federal Nonnuclear Energy Research and Development Act of 1974, and for other purposes; and

S. 37. A bill to amend the Federal Nonnuclear Energy Research and Development Act of 1974 (42 U.S.C. 5906), and for other purposes; to the Committee on Interior and Insular Affairs.

ERDA AUTHORIZATIONS, FISCAL YEAR 1977

Mr. JACKSON. Mr. President, I introduce for appropriate reference two bills which will provide the Energy Research and Development Administration with authority to spend appropriations for fiscal year 1977, to request and to issue certain loan guarantees, and for other purposes.

Under normal circumstances, ERDA's operations are governed by annual authorizing legislation pursuant to which appropriations are enacted. However, last year, enactment of ERDA's appropriations for fiscal year 1977 proceeded final consideration of the authorizing legislation which was delayed in the House of Representatives for several months. During the last day of the 94th Congress, the Senate failed to accept the conference report to the authorization act for ERDA, H.R. 13350. Inaction on the conference report left ERDA without authority to utilize funds made available by congressionally enacted appropriation bills.

It became apparent in the closing days of the 94th Congress that the new fiscal year might start without enactment of the requisite authorizing legislation. To avoid such a situation, Congress added a provision to the joint resolution for continuing appropriations, House Joint Resolution 1105, Public Law 94-473, which provided that until March 31, 1977, fiscal year 1977 appropriations to ERDA would be made available without meeting the requirement for authorizing legislation.

By the end of March, Congress must either enact authorizing legislation or enact legislation nullifying the requirement for authorizations; otherwise, a significant portion of ERDA's operation will have to cease by virtue of the limitation requiring authorizations which have been placed upon the availability of fiscal year 1977 appropriations.

The language of the two measures which I introduce today, taken together, is identical to that language relating to nonnuclear matters which was approved by the Senate and House conference to H.R. 13350, and also by the full House of Representatives when that body accepted the conference report. However, I am introducing two bills instead of one, in the hope of avoiding any delay on those matters which absolutely require authorization prior to March 31, 1977.

Funding for specific nonnuclear pro-

grams is contained in one proposal, along with those matters which were not controversial when originally considered in the Senate during the last Congress.

The second measure provides ERDA with authority to utilize loan guarantees as a financial mechanism to stimulate the development of various energy technologies. In addition, this second measure would authorize a loan guarantee program for the conversion of municipal solid waste and other forms of biomass into useful fuels or energy.

The Senate of the 94th Congress supported a loan guarantee program on two different occasions and the bill which I introduced contains the language that previously received favorable consideration by the Senate. In approving the conference report to H.R. 13350 last year, the House of Representatives voiced approval for the language of this bill authorizing loan guarantees. The House on prior occasions had considered and defeated measures which would have authorized loan guarantee programs that contemplated a much larger Federal commitment than the program contemplated by this bill. Because there has been a controversy surrounding loan guarantees, and in light of the necessity to enact authorizations for ERDA programs by the end of March, the loan guarantee language has been placed in a separate bill. If the Senate so chooses, it can examine the loan guarantee provisions at greater length without jeopardizing the funding authority required by ERDA to continue its programs beyond March 31.

I also want to emphasize that neither of these measures contains authorization for exclusively nuclear programs within ERDA. The status of the Joint Committee on Atomic Energy is uncertain at this time. Historically, the JCAE has had legislative jurisdiction over the nuclear energy research and development program of ERDA. Should another committee gain legislative jurisdiction over the nuclear programs, the possibility exists that those portions of ERDA's program dealing with nuclear R. & D. could encounter delays while new committees become familiar with that portion of the ERDA budget.

(S. 36)

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the Congress finds that the traditional energy sources of this country are being depleted and we must convert to other forms of energy. In addition, it may be necessary to undertake aggressive conservation programs to cut back on energy consumption and eliminate waste and reduce energy use. In spite of these efforts, Congress finds that energy consumption in this country will approximately double in coming decades. Therefore, it is essential that the policy of the Congress be established that every form of energy be put into use at the earliest possible moment, consistent with existing environmental laws, that new elements of energy production be placed on line as quickly as possible.

AUTHORIZATION OF APPROPRIATIONS FOR FISCAL YEAR 1977

January 10, 1977

## CONGRESSIONAL RECORD—SENATE

S 211

## TITLE IV.—ORGANIZATIONAL CONFLICTS

Sec. 401. The Federal Nonnuclear Energy Research and Development Act of 1974 (42 U.S.C. 4901) is amended by adding a new section to read as follows:

"Sec. 19. (a) The Administrator shall by regulation require any person proposing to enter into a contract, agreement, or other arrangement, whether by advertising or negotiation, for the conduct of research, development, evaluation activities, or for technical and management support services to provide the Administrator, prior to entering into any such contract, agreement, or arrangement, with all relevant information bearing on whether that person has a possible conflict of interest with respect to (1) being able to render impartial, technically sound, or objective assistance or advice in light of other activities or relationships with other persons or (2) being given an unfair competitive advantage. Such person shall insure, in accordance with regulations published by the Administrator, compliance with this section by any subcontractor of such person, except supply subcontractors. Provided, That this requirement shall not apply to subcontracts of \$10,000 or less.

"(b) The Administrator shall not enter into any such contract, agreement, or arrangement unless he affirmatively finds, after evaluating all such information and any other relevant information otherwise available to him, either that (1) there is little or no likelihood that a conflict of interest would exist, or (2) that such conflict has been avoided after appropriate conditions have been included in such contract, agreement, or arrangement: Provided, That if he determines that such conflict of interest exists and that such conflict of interest cannot be avoided by including appropriate conditions therein, the Administrator may enter into such contract, agreement, or arrangement, if he determines that it is in the best interests of the United States to do so and includes appropriate conditions in such contract, agreement, or arrangement to mitigate such conflict.

"(c) The Administrator shall publish rules for the implementation of this section, in accordance with 5 U.S.C. 568, as soon as possible after the date of enactment of this section but in no event later than 180 days after such date."

April 4, 1977

## CONGRESSIONAL RECORD—SENATE

S 5515

EXHIBIT 24: SENATE CONSIDERATION OF  
S. 36, ERDA AUTHORIZATION BILL FOR  
FISCAL 1977

and Insular Affairs" and insert "Energy and Natural Resources".

On page 13, in line 19, strike out "Interior and Insular Affairs" and insert "Energy and Natural Resources".

On page 14, in line 4, strike out "(10)" and insert "(7)(E)".

On page 14, in line 14, strike out "Interior and Insular Affairs" and insert "Energy and Natural Resources".

On page 15, in line 18, strike out "Interior and Insular Affairs" and insert "Energy and Natural Resources".

On page 15, in line 20, strike out "the support of" and insert "to support".

On page 16, in line 8, strike out "Interior and Insular Affairs" and insert "Energy and Natural Resources".

On page 20, in line 18, strike out "March 10" and insert "October 1".

On page 20, in line 21, strike out "Interior and Insular Affairs" and insert "Energy and Natural Resources".

On page 23, in line 18, strike out "\$6,000,000" and insert "\$6,990,000".

On page 23, in line 25, strike out "title III, subsection 302(1) and (2)" and insert "title II, subsection 202 (1) and (2)".

On page 25, in line 31, strike out "enacted after the date of enactment of this Act".

On page 34, in line 8, strike out "1004" and insert "504".

On page 34, in line 10, strike out "906 and 908" and insert "505 and 507".

On page 35, in line 6, strike out "905 and 908" and insert "605 and 608".

On page 36, in line 17, strike out "904" and insert "504".

On page 37, in line 10, strike out "12(c)" and insert "512(c)".

On page 38, in line 2, strike out "904" and insert "504".

On page 40, in line 8, strike out "1004" and insert "505".

On page 40, in line 9, strike out "provide" and insert "invite".

On page 40, in line 10, strike out "for the conduct".

On page 40, in line 12, strike out "of" and insert "to submit a plan for the conduct of".

On page 45, in line 20, strike out "(a)" and insert "(c)".

On page 47, in line 13, strike out "(a)" and insert "(c)".

On page 47, in line 17, strike out "(a)" and insert "(c)".

On page 47, in line 25, strike out "912(c)" and insert "512(c)".

On page 48, in line 4, strike out "(a)" and insert "(c)".

On page 48, in line 6, strike out "904" and insert "504".

On page 49, in line 22, after "1974" insert "as amended".

On page 50, in line 15, strike out "905 and 907" and insert "505 and 507".

On page 51, in line 1, strike out "907" and insert "507".

On page 51, in line 15, strike out "904(d)" and insert "504(d)".

On page 52, in line 24, strike out "904" and insert "504".

On page 53, in line 26, strike out "905 and 907" and insert "505 and 507".

On page 53, in line 11, after "1974" insert "as amended".

On page 54, in line 2, strike out "907 and 908" and insert "507 and 508".

Mr. JACKSON. Mr. President, I ask unanimous consent that all of the amendments be considered en bloc.

The PRESIDING OFFICER. Without objection, it is so ordered.

The question is on agreeing to the committee amendments.

The committee amendments were agreed to en bloc.

**ENERGY RESEARCH AND DEVELOPMENT ADMINISTRATION AUTHORIZATIONS, 1977**

Mr. ROBERT C. BYRD. Mr. President, there is one measure on the calendar that was ready for clearance by unanimous consent. We found that Mr. HATAKAWA had an amendment that he wished to call up and Mr. JACKSON is here to handle the measure.

I ask unanimous consent that Senate proceed to the consideration of S. 36.

The PRESIDING OFFICER. The bill will be stated by title.

The legislative clerk read as follows:

A bill (S. 36) to authorize Appropriations to the Energy Research and Development Administration in accordance with sec. 361 of the Atomic Energy Act of 1954, as amended, of 1974, and sec. 16 of the Federal Nonnuclear Energy Research and Development Act of sec. 303 of the Energy Reorganization Act 1974, and for other purposes.

The PRESIDING OFFICER. Is there objection to the present consideration of the bill?

There being no objection, the Senate proceeded to consider the bill, which had been reported from the Committee on Energy and Natural Resources with amendments as follows:

On page 2, in line 22, strike out "\$469,742,000" and insert "\$464,342,000".

On page 9, in line 21, strike out "S MAM" and insert "EHW".

On page 16, in line 19, strike out "Interior and Insular Affairs" and insert "Energy and Natural Resources".

On page 17, in line 11, strike out "Interior and Insular Affairs" and insert "Energy and Natural Resources".

On page 23, in line 14, strike out "Interior

April 1, 1977

## CONGRESSIONAL RECORD—SENATE

S 5519

## TITLE IV—ORGANIZATIONAL CONFLICTS

SEC. 401. The Federal Nonnuclear Energy Research and Development Act of 1974 (42 U.S.C. 4901) is amended by adding a new section to read as follows:

"Sec. 19. (a) The Administrator shall by regulation require any person proposing to enter into a contract, agreement, or other arrangement, whether by advertising or negotiation, for the conduct of research, development, evaluation activities, or for technical and management support services to provide the Administrator, prior to entering into any such contract, agreement, or arrangement, with all relevant information bearing on whether that person has a possible conflict of interest with respect to (1) being able to render impartial, technically sound, or objective assistance or advice in light of other activities or relationships with other persons or (2) being given an unfair competitive advantage. Such person shall insure, in accordance with regulations published by the Administrator, compliance with this section by any subcontractor of such person, except supply subcontractors: *Provided*, That this requirement shall not apply to subcontracts of \$10,000 or less.

"(b) The Administrator shall not enter into any such contract, agreement, or arrangement unless he affirmatively finds, after evaluating all such information and any other relevant information otherwise available to him, either that (1) there is little or no likelihood that a conflict of interest would exist, or (2) that such conflict has been avoided after appropriate conditions have been included in such contract, agreement, or arrangement: *Provided*, That if he determines that such conflict of interest exists and that such conflict of interest cannot be avoided by including appropriate conditions therein, the Administrator may enter into such contract, agreement, or arrangement, if he determines that it is in the best interests of the United States to do so and includes appropriate conditions in such contract, agreement, or arrangement to mitigate such conflict.

"(c) The Administrator shall publish rules for the implementation of this section, in accordance with U.S.C. 502, as soon as practicable after the date of enactment of this section, but in no event later than 180 days after such date."

EXHIBIT 25: HOUSE CONSIDERATION OF S. 36,  
ERDA AUTHORIZATION FOR FISCAL 1977

May 2, 1977

## CONGRESSIONAL RECORD—HOUSE

H 3062

AUTHORIZING APPROPRIATIONS  
FOR ENERGY RESEARCH AND  
DEVELOPMENT ADMINISTRATION  
FOR FISCAL YEAR 1977

MR. FUQUA. Mr. Speaker, I move to suspend the rules and pass the Senate bill (S. 36) to authorize appropriations to the Energy Research and Development Administration in accordance with section 261 of the Atomic Energy Act of 1954, as amended, section 266 of the Energy Reorganization Act of 1974, and

section 16 of the Federal Nonnuclear Energy Research and Development Act of 1974, and for other purposes, as amended.

The Clerk read as follows:

S. 36

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the Congress finds that the traditional energy sources of this country are being depleted and we must convert to other forms of energy. In addition, it may be necessary to undertake aggressive conservation programs to cut back on energy consumption and eliminate waste and reduce energy use. In spite of these efforts, Congress finds that domestic energy production in this century must appropriately double by the end of this century, and must do so as our domestic sources of petroleum and natural gas decline. Therefore, it is essential that the policy of the Congress be established that every form of energy be put into use at the earliest possible moment, consistent with existing environmental laws. Every new element of energy production be placed on line as quickly as possible.

AUTHORIZATION OF APPROPRIATIONS FOR FISCAL  
YEAR 1977

May 2, 1977

## CONGRESSIONAL RECORD—HOUSE

H 3865

**TITLE IV.—ORGANIZATIONAL COMPLEXITY**

Sec. 401. The Federal Nonnuclear Energy Research and Development Act of 1974 (42 U.S.C. 6001) is amended by adding a new section to read as follows:

"Sec. 19. (a) The Administrator shall by regulation require any person proposing to enter into a contract, agreement, or other arrangement, with the Energy Research and Development Administration whether by advertising or negotiation, or for technical consulting and management support services or other such similar services to provide the Administrator, prior to entering into any such contract, agreement, or arrangement, with all relevant information bearing on whether that person has a possible conflict of interest with respect to (1) being able to render impartial, technically sound, or objective assistance or advice in light of other interests or relationships with other persons or (2) being given an unfair competitive advantage. Such person shall insure, in accordance with regulations published by the Administrator, compliance with this section by subcontractors of such person who are engaged to perform similar services.

"(b) The Administrator shall not enter into any such contract, agreement, or arrangement unless he affirmatively finds after evaluating all such information and any other relevant information otherwise available to him, either that (1) there is little or no likelihood that a conflict of interest would exist, or (2) that such conflict has been avoided after appropriate conditions have been included in such contract, agreement, or arrangement: *Provided*, That if he determines that such conflict of interest exists and that such conflict of interest cannot be avoided by including appropriate conditions therein, the Administrator may enter into such contract, agreement, or arrangement, if he determines that it is in the best interests of the United States to do so and includes appropriate conditions in such contract, agreement, or arrangement to mitigate such conflict.

"(c) The Administrator shall publish rules for the implementation of this section, in accordance with section 1905 of title 5, United States Code, as soon as possible after the date of enactment of this section but in no event later than 180 days after such date."

EXHIBIT 26: LETTER FROM HUDSON RAGAN, ACTING  
 ERDA GENERAL COUNSEL, TO SENATOR JAMES ABUREZK  
 UNITED STATES  
 ENERGY RESEARCH AND DEVELOPMENT ADMINISTRATION  
 WASHINGTON, D.C. 20545



APR 20 1977

Honorable James Abourezk  
 Senate Committee on Interior and  
 Insular Affairs  
 United States Senate

APR 21 1977

Dear Senator Abourezk:

This is in further response to your letter of February 2, 1977, regarding the serious problem of organizational conflicts of interest.

Title IV of S. 36, the ERDA Authorization Bill, deals with this subject and is identical to Title VI of H.R. 13350, which was considered by the 94th Congress. S. 36 was passed by the Senate on April 4, 1977, and is now pending in the House before the Committee on Science and Technology. Although we commented on earlier versions of this provision during the last Congress, the currently proposed organizational conflicts of interest provision was first presented during the Conference on H.R. 13350, and we did not have an opportunity to comment on this provision directly to the Congress.

At the outset, we cannot overstate the complexity and importance of this subject and the possible adverse effects which hasty legislation might have on the accomplishment of ERDA's mission. In this sensitive and difficult area, the adoption of legislative standards without a careful and considered review of possible impact, could seriously affect the accomplishment of ERDA's Congressionally mandated goals. This could arise because of industry's reaction to such new legislative requirements and may result in fewer companies bidding for ERDA's work which would not only lessen competition for such work but could also prevent ERDA from obtaining the best qualified firm to do a particular job.

The GAO letter of December 22, 1976, (B-178205.98), on which you asked us to comment, expressed an opinion on Title VI (H.R. 13350) and ERDA policies and practices for the avoidance of organizational conflicts. The Controller General concluded overall that enactment of Title VI would "serve a useful purpose." We disagree with this conclusion.

As contemplated by GAO and provided for in S. 36, the conflicts requirement would apply to all research and development contracts. ERDA's policy and position on organizational conflicts have carefully distinguished between management and technical support services contracts where special conflicts provisions are being used and the typical research and development contracts which have generally not required such provisions. Based on our experience to require, as the bill does, detailed disclosure statements for all research and development contracts would serve no useful purpose, proliferate the paper

Honorable James Abourezk

2

APR 20 1977

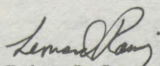
work, and constitute an unnecessary administrative burden on both the Government and proposers. This burden would be further aggravated by the subcontractor requirement of the bill which mandates an affirmative finding on conflicts by the Administrator on all nonsupply-subcontracts over \$10,000. As an aid in understanding the magnitude of the burden created by this provision, as of the end of 1976 we had approximately 6,000 open contracts and subcontracts which would have upon their award, required the application of the disclosure statement of the proposed legislation. If one estimates that 3 to 5 proposals are, on the average, submitted for each contract then 18,000 to 30,000 disclosure statements would have to be prepared, and a good number of these reviewed by ERDA for a conflicts determination.

Therefore, we disagree with the Comptroller General's statement that the proposed conflicts provision of S. 36 would not "unreasonably" delay ERDA's procurements in the fulfillment of its role in developing solutions to the national energy crisis. It should be noted that the additional requirement as to subcontracts was not included in the Comptroller General's recommendations regarding this provision (letter dated August 5, 1976, GAO to Representative Hechler, Congressional Record H. 11953V, September 30, 1976) but was added during the Conference on H.R. 13350.

We recognize that management and technical support service, including evaluation studies, do require more careful attention, and we have formulated more refined financial disclosure and organizational conflicts clauses for these contracts, which we will shortly publish for ERDA use and public comment by a temporary regulation. A copy of the proposed temporary regulations is enclosed for your information. We are studying the extent to which other types of contracts may require similar provisions and will keep you fully and currently advised of our efforts.

The Office of Management and Budget has advised that there is no objection to the submission of this report from the standpoint of the Administration's program.

Sincerely,

  
for Hudson B. Ragan  
Acting General Counsel

Enclosure:  
As stated

April 19, 1977

AGENCY: U. S. ENERGY RESEARCH AND DEVELOPMENT ADMINISTRATION

ACTION: ERDA-PR TEMPORARY REGULATION NO. 29  
SUBJECT: GENERAL POLICY FOR THE AVOIDANCE OF ORGANIZATIONAL  
 CONFLICTS OF INTEREST

SUMMARY: This temporary regulation, which modifies ERDA Procurement Regulation Subparts 9-1.54 and 9-7.50, provides additional procedures concerning the avoidance of organizational conflicts of interest, together with a standard solicitation provision and contract clause for use in technical and management support services, including evaluation and study contracts, as defined below.

DATES: Effective date - This regulation is effective upon publication in the Federal Register. Interested persons may submit comments on this regulation and those received on or before June 25, 1977, will be considered in determining whether changes in the regulation are advisable.

Expiration date - This regulation will remain in effect until it is canceled or until its provisions are incorporated into a permanent ERDA procurement regulation.

FOR FURTHER INFORMATION CONTACT: Harry M. Tayloe, Division of Procurement, Rm. C-167, USERDA, Washington, DC, 20545, (301) 353-5526.

SUPPLEMENTARY INFORMATION:

a. Subpart 9-1.54 is amended by adding paragraph (c) and (d) in §9-1.5402 and revising §9-1.5404 as follows:

Subpart 9-1.54 General Policy for the Avoidance of  
 Organizational Conflicts of Interest

\* \* \* \* \*

§9-1.5402 Scope and applicability.

\* \* \* \* \*

(c) Notwithstanding any other provision contained in this subpart, the clause set forth in §9-7.5006-40 shall be included in all contracts for technical and management support services which, for purposes of this subpart, are defined as: advice, assistance, analysis, consultation, evaluation, examination, report, review, study, survey, or similar assistance, including providing assistance in procurements and related activities to support any program or other operations of ERDA.

(d) The following provision shall be included in all solicitations for technical and management support services (as defined in §9-1.5402(c)). Where a formal solicitation is not used, the provision shall be furnished to the offeror in whatever manner is practical in order that ERDA may receive and evaluate the required information as a condition precedent to award.

Disclosure Statement Regarding Organizational Conflicts  
of Interest

Pursuant to ERDA-PR §9-1.54, it is ERDA policy to avoid situations which place an offeror in a position where its judgment may be biased because of any present or planned interest, financial or otherwise, the offeror may have which relates to the work to be performed pursuant to this solicitation, or where the offeror's performance of such work may provide it with an unfair competitive advantage. (As used herein, "offeror" means the proposer or any of its affiliate organizations or proposed subcontractors.) Therefore:

(1) The offeror shall provide a statement which describes in a concise manner all relevant facts concerning any present or planned interest (financial contractual, organizational, or otherwise) relating to the work to be performed hereunder and bearing on whether the offeror has a possible conflict of interest with respect to (a) being able to render impartial, technically sound, and objective assistance or advice, or (b) being given an unfair competitive advantage.

(2) In the absence of any interest referred to above, the offeror shall submit a statement certifying that to its best knowledge and belief no such interest exists.

(3) ERDA will review the statement submitted and may require that additional relevant information be provided by the offeror. The statement and any additional information required of the offeror or otherwise known to ERDA will be used to determine whether an award to the offeror may create a conflict of interest relating to bias or prior contractual restrictions. If such conflict is found to exist, ERDA may (i) disqualify the offeror, (ii) impose appropriate conditions which satisfactorily mitigate or avoid such conflict, or (iii) determine that it is otherwise in the best interests of the Government not to disqualify the offeror.

(4) Failure to provide the statement and any additional information required, or the nondisclosure or misrepresentation of any relevant interest shall result in disqualification under this solicitation or, if discovered after award, may result in termination at no cost to the Government, disqualification under subsequent related contractual efforts, and such other remedial action as may be permitted or provided by law or the resulting contract. The attention of the offeror in complying with this provision is directed to 18 U.S.C. §1001.

\* \* \* \* \*

§9-1.5404 Qualification and evaluation criteria, waiver.

(a) Failure on the part of an offeror to submit information pursuant to the disclosure provision set forth in §9-1.5402(d) or to accept the Organizational Conflicts of Interest Clause set forth in §9-7.5006-40 shall disqualify the offeror from further consideration for contract award. However, nothing contained herein shall preclude the offeror because of a potential conflict, from proposing to exclude specific kinds of effort from the statement of work as contained in the solicitation unless the solicitation specifically prohibits such exclusion. Any such exclusion contained in the offeror's proposal shall be considered by the Government as an evaluation factor, and if the Government considers such proposed exclusion to be an essential or integral part of the required work, the offeror's proposal may be considered nonresponsive.

(b) A manager of a field office or the Director of Procurement, or their designee, may authorize the contracting officer to grant the waiver provided for in (e) of the Organizational Conflicts of Interest Clause set forth in §9-7.5006-40.

b. Subpart 9-7.50 is amended by adding §9-7.5006-40 as follows:

Subpart 9-7.50 Use of Standard Clauses

\* \* \* \* \*

§9-7.5006 Standard ERDA clauses not included in §9-7.5004 or §9-7.5005.

\* \* \* \* \*

§9-7.5006-40 Organizational conflicts of interest.

The following clause shall be included in all contracts for technical and management support services in accordance with §9-1.5402(c):

Article - Organizational Conflicts of Interest

(a) Purpose. The primary purpose of this clause is to aid in ensuring that the contractor (1) does not obtain any unfair competitive advantage over other parties by virtue of its performance of this contract, and (2) is not biased because of its current or planned interest (financial, contractual, organizational, or otherwise) which relate to the work under this contract.

(b) Scope. The restrictions described herein shall apply to performance or participation by the Contractor and any of its affiliate organizations or their successors in interest (hereinafter collectively referred to as the "Contractor") in the activities covered by this clause as a prime contractor, subcontractor, co-sponsor, joint venturer, consultant, or in any similar capacity.

(1) Advisory, consulting, analytical, evaluation, or study work, including the preparation of statements of work and specifications:

(i) If the Contractor performs advisory, consulting, analytical, evaluation, study, or similar work under this contract, it shall be ineligible thereafter to participate in any capacity in Government contractual efforts (solicited or unsolicited) which stem directly from such work, and the Contractor agrees not to perform similar work for prospective offerors with respect to any such contractual efforts. Furthermore, unless so directed in writing by the Contracting Officer, the Contractor shall not perform any such work under this contract on any of its products or services, or the products or services of another firm for which the Contractor performs similar work. Nothing in this subparagraph shall preclude the Contractor from competing for ERDA management and technical support service follow-on contracts as defined in paragraph (f) below.

(ii) If the Contractor under this contract assists substantially in the preparation of a statement of work or specifications, the Contractor shall be ineligible to perform or participate in any capacity in any contractual effort which is based on such statement of work or specifications. The Contractor shall not incorporate its products or services in such statement of work or specifications unless so directed in writing by the Contracting Officer, in which case the restriction in this subparagraph shall not apply.

(iii) Nothing in this paragraph shall preclude the Contractor from offering or selling its standard commercial items to the Government.

(2) Access to and use of information:

(i) If the Contractor in the performance of this contract obtains access to information, such as ERDA's plans, policies, reports, studies, financial plans, or data, which has not been released to the public, the Contractor agrees not to (a) use such information for any private purpose unless the information has been released to the public, (b) compete for work for ERDA based on such information for a period of six (6) months after the completion of this contract, or the release of such information to the public, whichever is first, (c) submit an unsolicited proposal to the Government which is based on such information until one (1) year after the release of such information to the public, and (d) release such information without prior written approval by the Contracting Officer.

(ii) In addition, the Contractor agrees that to the extent it receives or is given access to proprietary data or other confidential technical, business, or financial information under this contract, it shall treat such information in accordance with any restrictions imposed on such information.

(iii) The Contractor shall have, subject to patent and security provisions of this contract, the right to use technical data it first produces under this contract for its private purposes provided that, as of the date of such use, all data requirements of this contract have been met.

(c) Subcontracts. The Contractor shall include this clause, including this paragraph, in subcontracts of any tier which involve performance of work of the type specified

in (b)(1) above or access to information covered in (b)(2) above. The use of this clause in such subcontracts shall be read by substituting the word "subcontractor" for the word "Contractor" wherever the word "Contractor" appears.

(d) Remedies. For breach of the above restrictions or for nondisclosure or misrepresentation of any relevant interest required to be disclosed concerning this contract, the Government may at no cost terminate the contract, disqualify the Contractor for subsequent related contractual efforts, and pursue other remedies as may be permitted by law or this contract.

(e) Waiver. Any request for waiver under this clause shall be directed in writing to the Contracting Officer and shall include a full description of the requested waiver and the reasons in support thereof. If it is determined to be in the best interest of the Government, the Contracting Officer shall grant such waiver in writing.

(f) Definition. The term "management and technical support services" includes any advice, assistance, analysis, consultation, evaluation, examination, report, review, study, survey, or similar assistance, including providing assistance in procurements and related activities, to support any program or other operations of ERDA.

\* \* \* \* \*

AUTHORITY: Section 105 of the Energy Reorganization Act of 1974  
P.L. 93-438.

*M. J. Tashjian*  
M. J. Tashjian  
Director of Procurement

HENRY M. JACKSON, WASH., CHAIRMAN  
 FRANK CHURCH, IDAHO  
 LEE METCALF, MONT.  
 J. BENNETT JOHNSON, LA.  
 JAMES ABOURCZEK, S. DAK.  
 FLOYD H. HASKELL, CALIF.  
 JOHN GLENN, OHIO  
 RICHARD STONE, FLA.  
 DALE BUMPERS, ARK.  
 GRENVILLE GARIBIDE, SPECIAL COUNSEL AND STAFF DIRECTOR  
 WILLIAM J. VAN HESS, CHIEF COUNSEL

PAUL J. FANNIN, ARIZ.  
 CLIFFORD P. HANSEN, WYO.  
 MARK O. HATFIELD, OREG.  
 JAMES A. MC CLINTOCK, CALIF.  
 DEWEY F. BARTLETT, OKLA.

EXHIBIT 27:  
 LETTER FROM SENATOR JAMES ABOUREZK TO  
 HUDSON RAGAN, ACTING ERDA GENERAL COUNSEL

## United States Senate

COMMITTEE ON  
 INTERIOR AND INSULAR AFFAIRS  
 WASHINGTON, D.C. 20510

May 16, 1977

Mr. Hudson B. Ragan  
 Acting General Counsel  
 Energy Research and Development Administration  
 20 Massachusetts Avenue, N.W.  
 Washington, D.C.

Dear Mr. Ragan:

Your April 21, 1977 response to the letter Representatives John Dingell and Richard Ottinger and I wrote on February 2, 1977 raises fundamental questions about your agency's interpretation of what you describe as "ERDA's mission" and "ERDA's congressionally mandated goals." Given the fact that the definition of what constitutes a conflict of interest in the ERDA Authorization Bill for Fiscal 1977 is taken verbatim from the existing ERDA regulations, I assumed that ERDA did not dispute that definition. However, this assumption appears to be inaccurate given your statement that "ERDA's policy and position on organizational conflicts have carefully distinguished between management and technical support services contracts where special conflicts provisions are being used and the typical research and development contracts which have generally not required such provisions."

As you know, the present ERDA regulations provide that an organizational conflict of interest may arise "where a contractor, normally a corporation, has interests, either due to its other activities or its relationships with other organizations, which place it in a position that may be unsatisfactory or unfavorable (a) from the Government's standpoint in being able to secure impartial, technically sound, objective assistance and advice from the contractor, or in securing the advantages of adequate competition in its procurement; or (b) from industry's standpoint in that unfair competitive advantage may accrue to the contractor in question." (emphasis supplied). The second part of the test--unfair competitive advantage--normally arises when there is a follow-on procurement to a company which performed an earlier management and technical support contract. As you know, this type of conflict is normally neutralized by inserting a hardware exclusion clause in the contract.

The regulations also provide, however, that a conflict may arise whether or not a follow-on contract is involved. Your agency expressly acknowledged in its February 20, 1976 letter that a conflict from the government's viewpoint may arise whenever a contractor is unable to render "impartial, technically sound, objective assistance or advice." A contractor may have such a conflict for many reasons unrelated to follow-on procurement. Indeed, this second definition of conflict has particular applicability to research and development contracts.

Given this fact I cannot understand your statement that conflicts provisions are "generally not required" in research and development contracts. This statement and your desire to exclude research and development contracts from the disclosure requirements of S. 36 raises doubts in my mind that ERDA intends to enforce both parts of its definition of what constitutes an organizational conflict or intends to enforce its regulations with respect to research and development contracts.

Your letter also refers to the possibility of "industry's reaction" to the conflict provisions in S. 36 affecting the number of companies bidding for ERDA's work. The intent of the conflict provisions is that by providing a new means for enforcement of the existing ERDA definition of organizational conflict certain companies which have a conflict will, in fact, be subject to such enforcement. Industry undoubtedly will have some reaction to new efforts to enforce ERDA regulations not now adequately enforced. That industry reaction must, however, be weighed against the clear public interest in enforcement of ERDA's regulations to prevent organizational conflicts of interest.

I also wish to remind you that in his December 22, 1976 letter regarding S. 36, the Deputy Comptroller General specifically found that enforcing the disclosure provision with respect to research and development contracts "would serve a useful purpose."

With reference to this discussion, could you please explain (1) why questions of impartiality, objectivity, and unfair advantage do not "generally" arise in research and development contracts; (2) why enforcement of your regulations in the case of research and development contracts should have less priority than enforcement in the case of management and technical support contracts; and (3) whether ERDA's determination on when to enforce its existing regulations on organizational conflict should be influenced by industry's reaction to such enforcement.

I would appreciate your providing us with a detailed answer to these questions no later than Friday, May 27. Thank you for your assistance.

Sincerely,

James Abourezk  
United States Senate

EXHIBIT 28: AMENDMENT NUMBER 192 TO S. 695

95TH CONGRESS  
1ST SESSION**S. 695**

---

**IN THE SENATE OF THE UNITED STATES**

APRIL 19 (legislative day, FEBRUARY 21), 1977

Referred to the Committee on Banking, Housing, and Urban Affairs and  
ordered to be printed

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**AMENDMENT**

Intended to be proposed by Mr. ABOUREZK to S. 695, a bill to  
amend the Defense Production Act of 1977, as amended,  
viz:

1 On page 18, line 10, delete the quotes and final period  
2 and add at the conclusion thereof the following:

3 "TITLE IX—ORGANIZATIONAL CONFLICT OF  
4 INTEREST

5 "SEC. 901. (a) The Administrator of each Federal  
6 department and independent agency shall by regulation  
7 require any person proposing to enter into a contract, agree-  
8 ment, or other arrangement, whether by advertising or  
9 negotiation, for the conduct of research, development, evalua-  
10 tion activities, or for technical and management support

**Amdt. No. 192**

1 services to provide the Administrator, prior to entering into  
2 any such contract, agreement, or arrangement, with all rele-  
3 vant information bearing on whether that person has a pos-  
4 sible conflict of interest with respect to (1) being able to  
5 render impartial, technically sound, or objective assistance or  
6 advice in light of other activities or relationships with other  
7 persons or (2) being given an unfair competitive advantage.  
8 Such person shall insure, in accordance with regulations pub-  
9 lished by the Administrator, compliance with this section by  
10 any subcontractor of such person, except supply subcon-  
11 tractors: *Provided*, That this requirement shall not apply to  
12 subcontracts of \$10,000 or less.

13 “(b) The Administrator shall not enter into any such  
14 contract, agreement, or arrangement unless he affirmatively  
15 finds, after evaluating all such information and any other  
16 relevant information otherwise available to him, either  
17 that (1) there is little or no likelihood that a conflict of  
18 interest would exist, or (2) that such conflict has been  
19 avoided after appropriate conditions have been included in  
20 such contract, agreement, or arrangement: *Provided*, That if  
21 he determines that such conflict of interest exists and that  
22 such conflict of interest cannot be avoided by including  
23 appropriate conditions therein, the Administrator may enter  
24 into such contract, agreement, or arrangement, if he deter-  
25 mines that it is in the best interests of the United States to

1 do so and includes appropriate conditions in such contract,  
2 agreement, or arrangement to mitigate such conflict.

3       “(c) The Administrator shall publish rules for the  
4 implementation of this section, in accordance with section  
5 553 of title 5, United States Code, as soon as possible after  
6 the date of enactment of this section but in no event later  
7 than one hundred and eighty days after such date.”.

## APPENDIX III

## TESTIMONY FROM HEARINGS HELD BY COMMITTEE ON ARMED SERVICES, UNITED STATES SENATE, NOMINATION OF HAROLD BROWN, JANUARY 11, 1977

Senator METZENBAUM. Dr. Brown, President-elect Carter has promised to try to close the "revolving door" between Government regulatory agencies and the industries they regulate. He has proposed that all people who serve on regulatory commissions sign a pledge they will not go to work for the industries which they have been regulating for at least 2 years.

Your department faces a similar problem. Since 1969, at least 2,600 former Defense Department officials have gone to work for defense contractors. In 1975 there was a 65-percent increase.

During the last administration, there also was a disturbing tendency to hire people from defense contractors to serve as Pentagon officials.

Dr. Malcolm Currie's case was an outstanding example.

I am concerned about this, because it seems to me that the lure of a higher paying job with a defense firm may be an incentive against tough management.

Would you be willing to follow President-elect Carter's lead and require that all military and civilian officials involved in Government procurement agree not to go to work for the defense firms they monitor for at least a period of 2 years after they leave the Defense Department?

Dr. BROWN. I believe that you have identified a genuine problem, however, I have some reservations with respect to the solution.

I think it is a real dilemma, because you have to get people in who know something about this business. They will generally come from that segment of private life that deals with these matters. In getting them to come in, we ask them to make very substantial financial sacrifices, enough of a financial sacrifice so I know from personal experience that it greatly reduces our access to highly competent people.

I have been turned down on this often enough so I feel very strongly about it.

At the same time, we cannot have people dealing from both sides of the fence, and the problem arises, as you indicated, when they leave.

I believe that it is possible to find some sort of solution to this involving limitation of their interaction with their former colleagues in their new positions.

Senator METZENBAUM. Doctor, you address yourself to those cases in which we are bringing people back to Government from private industry?

Dr. BROWN. Yes, sir.

Senator METZENBAUM. Such as the Dr. Currie situation?

Dr. BROWN. Yes, sir.

Senator METZENBAUM. But what about the 2,600 I am talking about who at one point are sitting in the position of being, for example, a colonel representing the Government, then they leave, and 3 weeks later they are working for defense contractors.

What I am asking is, cannot we ask those people to sign a pledge similar to that President-elect Carter is asking of the people who come to join his team?

Dr. BROWN. Well, it is a good question, but I find it hard to answer, because I am not sure when you would get them to sign it. Would you get them to sign it when they enter the Military Academy or the Air Force Academy?

Senator METZENBAUM. When you assign them to procurement responsibilities.

Dr. BROWN. Well, I think that is worth looking at. I think that we might hurt ourselves more than we would help ourselves by essentially keeping people of great ability from entering the procurement area from the rest of the military or civilian force, because it is not just the military; it is also the civilians you have to take account of.

I think we have a genuine dilemma here, and I think that it would be analogous, I suppose, to asking a lawyer to sign a pledge that he would never represent anyone against whom he had ever acted in a court case or in a legal matter.

Senator METZENBAUM. I am only talking about a period of 2 years.

Dr. BROWN. That is a long time to go without an income. I am not trying to downplay the problem you raise; I think it is a very important one, and I do not think we have found a solution.

I am saying only that I do not think there is an easy solution.

Let me think about your suggestion, there may be some modifications of it that might work.

Senator METZENBAUM. Dr. Brown, I am somewhat disturbed by the interchange that you had this morning with Senator Nunn, because I came out with the feeling that the \$5 to \$7 billion defense budget cut of President-elect Carter was sort of a matter of mirrors. Whether it is \$5 billion or \$7 billion, I think it can be more, myself. I don't mean by cutting out some of our weapons systems, or having any impact on our force level, but I am talking about a businessman's approach to defense spending. I am aware of the fact when David Packard was the Deputy Secretary of Defense he said: "The fact is that there had been bad management of many defense programs in the past.

We spent billions of the taxpayers' dollars and sometimes we spent it badly, much of it has been due to bad management, both in the Department of Defense and the defense industry.

Frankly, gentlemen, in defense procurements we have a real mess on our hands."

Frankly, I think there is still a real mess on our hands. Since the Pentagon indicated a \$61 billion overrun for 46 major weapons systems last year.

As Secretary of the Air Force, you had direct experience with cost overruns in the disastrous C-5A program and the TFX, among others. The overrun on the C-5A is already more than \$2 billion, and last year the administration asked for an additional \$1 billion to repair the C-5A wings.

I am sure you have given this entire subject of overruns a great deal of thought. I am told by my staff that when you answered Senator Goldwater this morning with respect to the matter of overruns, you indicated much of the overruns are caused by inflation.

When the GAO made a study of that just a couple years ago, they indicated that less than one-third of the overruns were caused by inflation. What concerns me is whether or not you as the new Secretary of Defense can't make some impact on this problem. Therefore, I would like to ask if you, as Secretary of Defense, would you be willing to insert language along the following lines in the armed services procurement regulations:

No Department of Defense official shall agree to, or otherwise authorize a modification of a procurement contract which provides for a percentage cost increase greater than the rate of inflation since the date the contract was originally entered into, without the specific approval of the Secretary of Defense.

What I would like to do is have the buck stop at the Secretary of Defense's office. Would you transmit a quarterly report to the Congress on the justifications for any cost overruns, that you approve.

Dr. BROWN. Let me take the items in the order that you mentioned, Senator Metzenbaum, about the \$5 to \$7 billion savings. I believe that that is a real intention and not something to be accomplished with mirrors. I think the confusion has come in the public's mind because of the comparison with past budgets and the misunderstanding that some promise was made by Governor Carter or by myself to cut from the present budget or a budget to be submitted for fiscal 1978, whose size we don't know.

The intention is to save \$5 to \$7 billion by more efficient management, and that can't be done in 1 month or in 1 year. If such management had been in progress for several years we would have achieved such savings.

Sometimes it takes time to achieve these. For example, in closing a base there is a congressional requirement for a period of notice and there is also a requirement for an environmental impact study, separately, which adds up to another 9 months or so. So from decision to savings takes a certain amount of time and one can't say that this will be achieved in fiscal year 1978 or perhaps even fully in fiscal year 1979, but the savings that we have in mind are real and they will be accomplished without reducing military capability.

Second, with respect to overruns, there is no doubt that overruns are not due merely to inflation. Certainly the wings fix on the C-5A that you have mentioned is not a matter of inflation. It is a matter of a mistake that cost money, a great deal of money, to rectify.

The way to get out of this or the way to reduce this problem I think is through accountability. Whether every change order in the Department of Defense, and of course change orders increase costs, and presumably they are made for a reason, sometimes not for good enough reason—but whether every one of the thousands of change orders that go in should be personally approved by the Secretary of Defense is something I am not prepared to say.

Senator METZENBAUM. Only those that raise costs above the inflation rate.

Dr. BROWN. That is every one that involves a change of capability, and I think many of those, most of those that are put through are meant to either rectify a deficiency or improve a capability.

I don't think it is physically possible to do that. At the same time, I think that the idea has a great deal of merit and I think that some way needs to be found to minimize ill-conceived change orders, change orders that are put in simply because they can be put in, because someone convinces the procurement officer that to put it in will improve the capability and no one thinks about how much it costs.

I think the accountability is necessary in order to reduce this problem. I think that accountability has to be present at all levels and I think has to start with the Secretary of Defense. But if it ends at the Secretary of Defense it is not going to solve the problem.

Senator METZENBAUM. Would you be willing to report quarterly to Congress?

Dr. BROWN. On how many change orders?

Senator METZENBAUM. On the number of change orders and the reasons for them.

Dr. BROWN. Let me look into that. I think that may be a feasible thing to do.

Senator METZENBAUM. Another area, Dr. Brown, I am particularly concerned about is the lack of competition in military procurement. It disturbs me much that in 1975 91 percent of the military procurement dollars were awarded without sealed bid price competition. That wouldn't happen in local government levels and I don't know why it happens in the Pentagon.

I also found it very disturbing there was less price competition for procurement contracts in 1975 than there was in 1970. The present law specifies that Government procurement must be made on the basis of sealed bids, but it provides 17 special exceptions which the military has used much too freely to avoid price competition.

Would you be willing to make it the policy of the Department of Defense that whenever a contract is to be awarded without the use of price competitive sealed bids, the Secretary of Defense or his designee would have to approve the exemption from competitive bidding. Would you also report on a quarterly basis to Congress on contract awards made without sealed bids, containing the reasons why sealed bidding was not feasible.

Dr. BROWN. There is no doubt in my mind that competitive procurement reduces prices. I remember the efforts that were made in the 1960's in that direction and recall some of the examples in which that method did reduce prices. It depends, however, on what the item is. If a local government buys light bulbs or if the Federal Government buys light bulbs, there is no reason why it can't be done by sealed competitive bids.

But one doesn't buy houses by sealed competitive bids because they are all different. Maybe they ought to be standardized and we ought to do some more standardizing on our weapons as well. But major procurements where there is one supplier who has been producing the item, such as aircraft, I think would not be reduced in price by competitive bidding, in general, because that producer has a headstart on the learning curve.

I think that again some sort of periodic reporting to Congress on a program to increase the fraction of competitive bidding is feasible and desirable and I would be glad to look into it, but I don't know enough about it to be prepared to subscribe now to any specific language.

April 18, 1977

The Honorable Harold Brown  
Secretary of Defense  
The Pentagon  
Washington, D.C. 20301

Dear Dr. Brown:

During your confirmation hearings I expressed to you my concern about certain wasteful practices in Pentagon procurement policies. I have been a reasonably successful businessman who feels that the taxpayers should get a dollar's worth of product for every dollar spent. I am convinced that billions of dollars can be cut from the Defense budget through the use of tough-minded business methods. Over-runs can be drastically reduced. More competition can cut costs. Conflicts of interest can cease. Your early actions in office indicate your own concern about cutting back expenditures in the Defense Department and I commend you for these actions.

Now I have some specific suggestions about what you, as Secretary of Defense, can do in other ways to demonstrate your commitment to better management of the Department. I would like to have your specific response to my suggestions, and your thoughts on alternative solutions.

Though the public furor about cost over-runs has, unfortunately, died down since the late 1960's, Defense Department figures show that too many major systems continue to have astronomical cost increases. One recent report showed that 46 major weapon systems had over-runs of more than \$61 billion. Now I realize that some over-runs may be justified but, with good management, most could be avoided. I hope that one of the first things you do is put the Services and defense contractors on notice that the DOD will no longer routinely approve over-runs. To do this, more is needed than a pledge by you to look closely at the problem. Every President, every Secretary of Defense, and every Assistant Secretary of Defense dealing with procurement has pledged that he will do all he can to end over-runs. But costs continue to skyrocket. Specific steps must be taken to curb mounting over-runs.

The Honorable Harold Brown  
April 18, 1977  
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One step that I would recommend is to insert the following phrase into Part VII of the Armed Services Procurement Regulations:

No Department of Defense official shall agree to, or otherwise authorize, modifications of a procurement contract which provide for a total percentage cost increase greater than the rate of inflation since the date the contract was originally entered into, without the specific approval of the Secretary of Defense.

Clearly, you cannot personally review every contract change, though I hope you would review the larger ones. Perhaps you could take a leaf from former Defense Secretary Robert McNamara's book. McNamara brought a new team of bright young men, of whom you were one, to the Pentagon in 1960 to centralize decisions on force structure through systems analysis. I would like to see you centralize the audit function at DOD by assembling a team of bright young cost accountants. These could expand and improve the Defense Audit Service and the Defense Contract Audit Agency. This new staff would give you the tools to monitor cost increases and decide which are justified and which are not.

In addition, I would like to see the current Selected Acquisition Report system drastically improved. At Congress' requests, the GAO has made periodic special audits of the way the SAR system has been functioning. The results of these audits were disturbing. The GAO found that in 1972 and 1974 the DOD failed to report a total of \$7 billion in over-runs on programs which Congress was reviewing. Just last year, another special GAO audit found that DOD had failed to report a \$260 million cost increase in the F-16 fighter.

In each of these reports the GAO made recommendations for improving the DOD's performance on the SAR's. Will you review these recommendations and make a general evaluation of the DOD's reporting under the SAR requirements within the next year? Will you make public the results of this review?

No reform will have any beneficial effects as long as the DOD continues to bail-out wasteful contractors. The Defense Department has been unwilling to take the final step of cutting off contractors who do not perform well. Admiral Rickover has described the result very well:

The Honorable Harold Brown  
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Page Three

Large defense contractors can let costs come where they will and count on getting relief from the DOD through changes and claims, relaxation of procurement regulations and laws...or other escape mechanisms...they will make their money whether their product is good or bad; whether their price is fair or higher than it should be; whether delivery is on time or late.

Will you commit yourself to diverting Defense Department procurement funds away from contractors with a record of waste, over-runs, and poor management?

I am also very concerned about a closely related problem -- the lack of competition in defense procurement. I find it shocking that in 1975 only 8.6 percent of military procurement dollars was awarded through sealed bid price competition. Only 21.4 percent of DOD dollars was awarded through competitive negotiated contracts, in which two or three contractors were invited to bid on a project. Thus, 70 percent of DOD dollars was awarded with no price competition at all. Moreover, the trends have been in the wrong direction. There was less price competition in 1975 than in 1970.

The Services have always been extremely reluctant to encourage competition. I suspect that even though the Services claim most contracts are for sophisticated systems which cannot be procured through price competition, that oftentimes provides a shield behind which to hide rather than a reality applicable to most of our procurement purchases. I suggest you have all the Service Under-secretaries read "The General Advantages of Competitive Procurement Over Sole Source Negotiation in the Department of Defense," a November 1973 study prepared for the Joint Economic Committee. The study examined 20 complex weapon systems, including sophisticated electronics and missile systems. These contracts originally were awarded through sole source procurement, but for various reasons their costs were later readjusted through price competitive bids. The results were dramatic -- price decreases averaging 51 percent.

There are a number of specific steps I think you should take to increase competition, the easiest being for you to make it clear to the procurement officials you appoint that the general policy of the Department is to encourage price competition. Price competition should be the rule and sole-source procurement the exception.

The Honorable Harold Brown  
April 18, 1977  
Page Four

To implement this, as I suggested at your confirmation hearings, you could require that all exemptions from price competitive bidding be approved by the Office of the Secretary of Defense; additionally, I urge you to institute a system of regular quarterly reports to the Congress containing the reasons why sealed bidding was not feasible in relation to each contract where it was not used. If you do not approve of both of the procedures herein suggested with respect to competitive bidding, what alternative procedure will you adopt to require more competitive bidding, and how will you keep Congress advised of your progress?

Furthermore, I suggest that you require that all procurement contracts which are for follow-on buys be awarded on the basis of sealed bidding. This could have an immediate effect in reducing DOD spending since between 15 and 20 percent of DOD procurement dollars is spent on follow-on contracts. The follow-on buy should logically be far less costly than the original purchase, and once the technology is completed, many companies may be interested in submitting competitive proposals. What steps do you propose to take to implement savings with respect to follow-on buys?

On another point in your testimony, you addressed yourself very briefly to the protection of DOD procurement officials who speak up about waste. I am concerned about dedicated government officials being encouraged in this regard. What channels do you plan to establish to insure that those who report on waste can be effective in making their complaint, and that they are accorded a fair hearing? I would appreciate a detailed answer on this key point.

Finally, in the open hearing I suggested that you require the military and civilian personnel which you appoint to procurement positions to sign a pledge not to go to work for at least two years for defense contractors they monitor. You responded that I had identified a problem but you doubted that I had identified a solution. I would appreciate hearing your solution, since I feel that the American people -- by and large -- do not approve of the present practices.

Dr. Brown, I look forward to a good working relationship with you. To date, I have been very impressed by much of your performance in office. But as a Senator who is committed to reducing wasteful expenditures

The Honorable Harold Brown  
April 18, 1977  
Page Five

of our tax dollars, I hope to help you focus in on areas wherein I believe billions of dollars can be saved.

I look forward to hearing from you soon.

Sincerely,

Howard M. Metzenbaum  
United States Senator

cc: Senator John Stennis  
Senator Barry Goldwater

## APPENDIX IV

From Military Maneuvers: An Analysis of the Interchange of Personnel between Defense Contractors and the Department of Defense.\*

### 6

## Unreliable Reporting

Senator Proxmire's amendment to the Fiscal Year 1970 military procurement authorization bill establishing a military-retiree post-employment reporting system provides the only information on DOD-defense industry employment interchanges that is readily available to the public. Therefore, it is important that the reports be as complete and accurate as possible. This can be accomplished by assuring that: 1) all persons who are required to file reports file them; 2) the reports filed are as complete and informative as possible; 3) the reports are compiled correctly and in a useful fashion by the Department of Defense; and 4) to avoid confusion in record-keeping, persons who are not required to file reports do not file them.

In all four respects, CEP found that the present reporting system fails to accomplish its stated purpose. A reporting system which could provide useful information on aggregate numbers of interchanges and also highlight possible problem areas now provides incomplete information, sometimes summarized inaccurately, in a form that is not readily accessible or understandable. Some of the shortcomings can be attributed to weaknesses in the law, others to the DOD directive which implemented the law,<sup>36</sup> and others to an apparent lack of effort on the part of DOD officials to assure compliance with the provisions of the law.

### Provisions of the Law

The Proxmire amendment requires that all retired officers above the rank of major and civilian personnel at civil service ratings of GS-13 or higher who accept employment with companies receiving

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<sup>36</sup> DOD Directive 7700.15, "Reporting Procedures on Defense Related Employment", October 30, 1970.

more than \$10 million per year in negotiated military contracts must file a report with the service or agency that employed them for three years after leaving the employment of the Department of Defense, if currently employed at a salary of \$15,000 per year or higher, Consultants, part-time employees, and persons employed for only a portion of a year are required to file reports for that year if paid at a rate that would equal or surpass \$15,000 for full-time employment. Failure to file a report is a misdemeanor which carries criminal penalties of up to one year in jail and/or a \$1,000 fine, although there is no record of any prosecutions. The amendment also directed the DOD to prepare a form for the reports, to establish procedures for collecting and analyzing reports, to prepare a yearly summary report to the Congress, and to maintain the individual employee filings for public inspection.

The DOD directive ordered former military officers to report to their enlisted service, while former civilian employees and present civilian employees are to report to the service or agency which employs them.<sup>37</sup> The services and agencies that collect these reports are responsible for assuring complete compliance with the reporting requirement and are also required to evaluate and tabulate the reports received. The reports are then forwarded to the Office of the Assistant Secretary of Defense for Manpower and Reserve Affairs, where the DOD report to Congress is prepared and where the individual reports are maintained for public inspection for a period of three years.

### **Underreporting**

The largest and most obvious problem is that many people who should file apparently do not. In CEP's analysis of the reports filed during the first three years, it found that at least 1,500 reports that should have been filed were not. Some men with an obligation to file all three times only filed twice, while others with either a three-year or two-year obligation filed only once.<sup>38</sup>

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<sup>37</sup> Besides the Army, Navy, Air Force and the Office of the Secretary of Defense (OSD), five agencies of DOD and one independent agency have received employment reports. They are: Defense Communications Agency, Defense Supply Agency, Defense Contract Audit Agency, Defense Intelligence Agency, Defense Nuclear Agency, and National Security Agency. Because these six agencies are much smaller than OSD and the military services, and because their employees are civilian civil service employees who experience lower turnover than the military services, they receive a small number of reports each year. The six independent Defense agencies cumulatively receive fewer than 100 employment reports annually.

<sup>38</sup> This is probably a considerable underestimate of the number of missing reports. CEP could only examine people who had filed at least one report. It had no way of identifying those who failed to file even one report. CEP has prepared charts which compare the official DOD report with the number of reports that should have been filed (see pp. 64-65).



CEP determined failure to file reports by comparing job transfer dates and dates of employment against other years' reports. A person was considered to be in violation of the reporting requirement if he filed one year and, from the best information available to CEP, should have filed at least one other year but did not. CEP assumed that employment had continued with the last named company or government agency unless information to the contrary was available. It also assumed that employment was always at a GS-13 level or \$15,000 per year pay scale unless contrary information was presented.

In light of these assumptions, several caveats are in order. It is possible that some transferees named as in violation of the filing requirement may not have had to file reports. A person whose apparent violation was in years prior to his first filing may not have been required to file during those years because his salary was below \$15,000 or the GS-13 level. A person whose apparent violation occurred in the years after his last filing may not have had to file in those years because he was no longer employed. CEP presumes that there should not be many of this latter category, however, because all companies and agencies were asked to notify CEP as to which transferees were no longer employed. Of the 471 employees verified, ninety-six were no longer employed, but termination of employment had only affected the filing obligation of twenty-two men.

Underreporting results in smaller aggregate numbers on the yearly DOD reports to Congress, and makes it appear that fewer transferees have recently been employed (see the charts at the end of this chapter). By not filing, a person is also committing a misdemeanor and is denying to the public the preliminary information that might make it possible to evaluate conflict of interest problems. The public, by law, has a right to this information.

DOD does make some effort, during separation interviews with retiring personnel, to remind appropriate retirees of their obligation to file employment reports if they transfer to companies with defense contracts. In addition, notices are printed each year in magazines read by retired military officers such as *Army Times* and the Navy's Bureau of Personnel *Retired Personnel Newsletter*.

Some of the agencies within DOD go even further in an effort to remind present employees of their obligation to file reports. A few that employ a limited number of people, such as the Office of the Secretary of Defense and the Defense Nuclear Agency, personally remind current employees. The Office of the Secretary of Defense also sends a yearly reminder to each former employee at his last-known address. The Office of the Assistant Secretary for International Security Affairs, the Office of the Assistant Secretary for Systems Analysis, the National Security Agency and the Naval Electronics Laboratory Center all have at least once in the past three years partially prepared reports and sent them to recently hired transferees from defense industry for completion.

Each company is also sent a letter asking it to remind employees of their obligation to file. Some companies print notices in employee bulletins or remind recently retired officers in personal conferences.

Nevertheless, many people are apparently not filing reports. In some cases, this may be ascribed to forgetfulness, and in others, a lack of knowledge of the sometimes-confusing reporting requirements. Most confusing is the requirement dealing with timing, because reports are filed on a fiscal-year basis. For instance, an employee retiring in July 1969 would be required to file reports through Fiscal Year 1973. Reports are generally not filed until after the end of the fiscal year, which would mean that the last report would not be prepared until more than four years after a person's retirement date. Of those who file reports, most seem to be aware of this stipulation but because some are not, they are unable to fulfill their filing requirements.

Another problem, which will surface in coming years, is the fact that, as written, the DOD implementing directive requires employees to file four yearly reports.<sup>39</sup> Unless this requirement is changed or explained, many will doubtless break the law unintentionally.

The provisions relating to part-time employment and employment for a portion of a fiscal year are similarly confusing. One man, Jack G. Condon, a retired Army colonel, left the employment of Automation Industries on July 6, 1971, six days after the beginning of FY72. Because of those six days, he was required to file an employment report for FY72 more than a year after leaving the employment of Automation. He did not. Another man, Colonel Ross L. Blachly (U.S.A.F., Ret.) noted on his FY72 report that, although employed by Rand during FY71, he had made "no submission last year as earnings did not exceed \$15,000. Recent request to participate near full time necessitates this submission." Apparently unaware of the requirement that part-time employees must also file, Colonel Blachly unwittingly violated the reporting law.

### Clarifying

Such individual cases, multiplied 1,500 times, account for many of the reports not filed. Some modifications in procedures could eliminate many of these problems and assure more complete compliance with the reporting requirement. The language of the directive could be modified to eliminate the four-year requirement, or the specifics of the four-year reporting requirement could be clarified and publicized. Individual reminders could be sent to each person who had filed the previous year, calling attention to his continuing obligation.<sup>40</sup> Another procedure might help to assure more complete compliance with the reporting requirement. At present, no service or agency makes a comprehensive review of retirees and former employees to assure that all people subject to

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<sup>39</sup> The directive specifies that a person will have to file a report for any fiscal year which begins less than three years after his retirement date. An individual who retired and accepted a job with industry during FY1971 would be required to file through FY74. If he had filed the three previous reports he could conceivably believe that his obligation had ended, but FY74 would begin less than three years after his retirement.

<sup>40</sup> Another possible, though expensive, procedure would be to search the records of a separate DOD retirees form, DD Form 1357, "Statement of Employment (Retired Regular Officers)" which are required of all retired military officers. It would be possible in theory to review these forms, and notify each person who had retired within the prescribed period and listed employment with a military contractor.

the reporting requirement have filed employment reports. Some, such as the Defense Supply Agency, Defense Nuclear Agency, and the Office of the Secretary of Defense, review filings for total compliance "to the extent practicable." For instance, the Defense Nuclear Agency will notify any former employee known to be working for a contractor. Other services or agencies, such as the Army, fail to undertake any review whatsoever for reporting compliance.

The law does specify criminal penalties for failing to file such employment reports, but the DOD implementing directive does not order any of the offices involved in the collection procedure to review nonfilers. At present, the criminal sanctions are meaningless—CEP could find no evidence of any prosecutions or administrative actions based on failure to file employment reports. Detailed investigations by DOD, Congress or some independent agency and enforcement might result in more complete compliance with the requirement of this law.

### **Overreporting**

CEP also found that during Fiscal Years 1972 and 1973 approximately 200 people who were not required to file reports had filed them. Though not a violation of the law and not as large a problem as underreporting in scale, overreporting is nevertheless bothersome because it further skews the figures on retirees presented by DOD to Congress, and further complicates the task of estimating the number of industry-DOD job transfers. It also indicates, perhaps better than any other aspect of these reports, a consistent lack of follow-up by the agencies of DOD. The reporting-law implementing directive clearly states that each report should be reviewed "to determine whether each form as submitted is in fact required under the terms of the Directive."

Most commonly, reports filed are unnecessary because the job-transfer date falls either before the three-year time period or after the end of the fiscal year in question, or because the contractor employer received less than \$10 million in contracts during the fiscal year in question. These are also understandable oversights that could be corrected by more fully publicizing the technicalities of the reporting requirement or by filtering out unnecessary reports at the collection point.

CEP also found two other causes of inflated figures. A number of transferees inexplicably filed two or more reports during the same fiscal year. Also, many people who list multiple employers are

compiled under two or more employers. Since the aggregate totals are derived by merely totaling company subtotals, each employee is counted once for each entry. The most extreme example of this type of overcounting is the FY1971 reports filed with the Defense Communications Agency. Twenty-four former or present DCA employees filed reports but each was listed in the compilation under every former or present employer. One man was listed (and counted toward the total) six times. Although only twenty-four reports were filed, the Defense Communications Agency listed forty.

There is no apparent consistency on this point. The Navy, Air Force, and Army have sometimes compiled transferees with multiple jobs under all listed employers, under some listed employers, or under only one listed employer. Each multiple listing skews the figures, but it is not even possible to make an over-all allowance for multiple listings.<sup>41</sup>

Some services do attempt to filter out errors and extraneous reports. Commander Manley Wade, the contact point for Navy reports, for instance, stated that as many as one-third of the reports filed with his office are discarded as unnecessary.

Other errors by DOD in report tabulation throw aggregate figures off further. Some reports are compiled under the wrong service or agency, others under the wrong company, and others are assigned an inappropriate job classification. Many of these are routine clerical errors: for instance, some employees of the Illinois Institute of Technology Research Institute (IIT Research Institute) are coded as employees of the ITT Research Institute; one employee of Sperry Rand was coded as a Rand Corp. employee.

Since aggregate figures are compiled both by agency and company, it is important that these tabulations be made accurately.

## Divided Responsibility and Diffused Results

Many of the weaknesses in follow-up, evaluation and compilation of the reports can be ascribed to inadequate staffing and lack of time to properly perform all required tasks. Most employment reports do not start arriving at DOD until August or September of a given year, and the final report for Congress must be prepared by December 31 of that year. During that time, all reports must pass through at least three offices, and are processed through at least

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<sup>41</sup> CEP's comparative listing of reports that should have been filed each year are corrected for multiple filings and multiple compilations. Each person counts only once.

Table 7

Comparison of DOD Reports Filed, FY73, with CEP's  
Estimate of the Number that Should Have Been Filed  
(CEP corrected figures in parentheses)

	A	B	C	D	Total
Army	80 (143)	4 (6)	5 (15)	16 (64)	105 (228)
Air Force	202 (366)	2 (4)	9 (13)	10 (29)	223 (412)
Navy	191 (281)	4 (20)	16 (23)	56 (144)	267 (468)
OSD / OJCS	0 (0)	0 (0)	28 (27)	37 (64)	65 (91)
Defense Communications Agency	0 (0)	0 (0)	0 (0)	20 (26)	20 (26)
Defense Supply Agency	0 (0)	0 (0)	2 (2)	1 (2)	3 (4)
Defense Contract Audit Agency	0 (0)	0 (0)	2 (1)	1 (1)	3 (2)
Defense Nuclear Agency	0 (0)	0 (0)	0 (0)	2 (5)	2 (5)
Defense Intelligence Agency	0 (0)	0 (0)	1 (0)	3 (5)	4 (5)
National Security Agency	0 (0)	0 (0)	2 (7)	14 (17)	16 (24)
	473 (790)	10 (30)	65 (88)	160 (357)	708 (1265)

**Comparison of Reports Filed, FY72, with CEP's  
Estimate of the Number that Should Have Been Filed**  
(CEP corrected figures in parentheses)

	<b>A</b>	<b>B</b>	<b>C</b>	<b>D</b>	<b>Total</b>
Army	100 (161)	4 (8)	8 (18)	42 (62)	154 (249)
Air Force	296 (452)	1 (5)	14 (20)	14 (32)	325 (509)
Navy	186 (299)	11 (27)	18 (25)	72 (152)	287 (503)
OSD / OJCS	8 (0)	0 (0)	13 (22)	63 (53)	84 (75)
Defense Communications Agency	0 (0)	0 (0)	0 (0)	5 (30)	5 (30)
Defense Supply Agency	0 (0)	0 (0)	1 (1)	2 (6)	3 (7)
Defense Contract Audit Agency	0 (0)	0 (0)	1 (1)	0 (0)	1 (1)
Defense Nuclear Agency	1 (0)	0 (0)	0 (0)	5 (5)	6 (5)
Defense Intelligence Agency	0 (0)	0 (0)	1 (1)	0 (3)	1 (4)
National Security Agency	0 (0)	0 (0)	8 (10)	17 (18)	25 (28)
	591 (912)	16 (40)	64 (98)	220 (361)	891 (1411)

**Key:**

- A:** Retired officer, major/lieutenant commander or higher, presently employed by a military contractor.
- B:** Former officer, major/lieutenant commander or higher, presently employed by a military contractor.
- C:** Former civilian DOD official, GS-13 or higher, presently employed by a military contractor.
- D:** Former contractor official, now employed by the Department of Defense.

five distinct phases. Most reports are collected at a staff level within either the Office of Personnel or the Legal Office of the affected service or agency. They must then be sorted and evaluated for completeness of information, and reviewed for possible indications of violations of the Standards of Conduct.

In some agencies, reports are referred to legal counsel for this review. All reports, along with summary data, are then sent to the Service Secretary or Agency Director's office, then to the Office of the Assistant Secretary of Defense for Manpower and Reserve Affairs. This office is charged with producing the final summary report that is sent to Congress, and is also the final repository where the reports are maintained for public inspection. Nobody keeps the reports for a sufficient period to undertake a serious evaluation and to assure correct compilation of statistics. Even during the short time allotted for each operation to be accomplished, insufficient effort is exerted. The officer supervising collection, compilation and content evaluation of all reports filed by retired naval officers estimated to CEP that he spends at most **forty hours per year** on the reports, not counting clerical help.

The final report prepared for Congress each year also is inadequate. The publicly-released section contains two distinct breakdowns of information. The first lists numbers of reports filed, by service and category (see page 64). The second section breaks down reports by category and employer. In other words, it tells how many of each type transferee (retired officer, former officer, former civilian DOD employee, present civilian DOD employee) name each company as an employer. The report to Congress also includes a copy of each report filed (a six-to-twelve-inch pile of documents), and a listing of all filers, organized by employer.

There is no qualitative analysis, however. Howard Schuman, Senator Proxmire's administrative assistant who helped draft the amendment, told CEP that the Senator's staff has been disappointed with the DOD reports to Congress. "We asked for a report, and we have always thought that a report is an orderly piece of information put together in a thoughtful way. We've never received that."

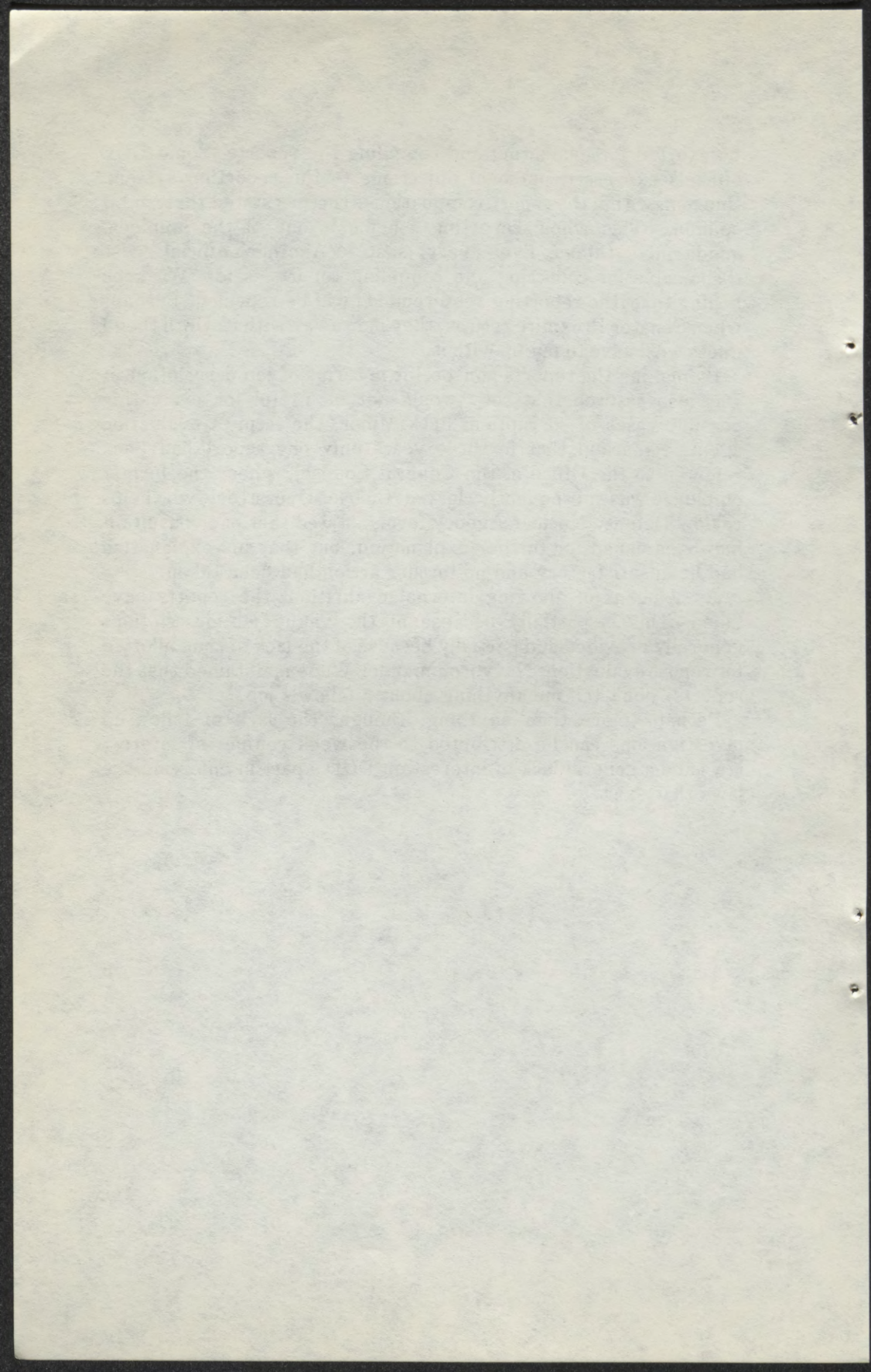
This lack of effort is apparent throughout the report collection and evaluation system. Since the entire procedure was not initiated by DOD, but was thrust upon it by Congress, it is not perceived as central to the goals of the DOD. By assigning the responsibility to offices that have other responsibilities, and by dispersing the responsibilities, it was assured that only a minimum of effort would

be exerted for evaluating and compiling the reports. Some DOD officials expressed personal objections to the reporting system. One man within the report-compilation structure stated that, in his opinion, "This whole reporting scheme is one of the stupidest goddamned things I've every seen." Another official, also responsible for collecting and compiling reports, said: "We keep hoping that [the reporting requirement] will be repealed. Perhaps when Senator Proxmire retires, they'll do away with it. Until then I guess we'll have to put up with it."

By making the reports nonspecific in terms of job description, it was also assured that they would not be useful for evaluating possible cases of corruption. Jack Miller, the Army's evaluation agent, remarked that in three years only one report had been referred to the Office of the General Counsel, where the former employee was subsequently cleared. Charles Overstreet, who helps review Defense Nuclear Agency forms, stated that one consultant had been called for further explanation, but that his explanation had been satisfactory and no further action had been taken.

As a means of allowing internal evaluation, the reports have failed. This is partially because of the vague job descriptions generally provided and partially because of the lack of time allotted for report evaluation. Navy Commander Wade maintained that the reports "don't tell me anything about a fellow's job."

Perhaps more than anything, though, the lack of follow-up investigations can be attributed to the weak conflict of interest laws and a general lack of interest on DOD's part in enforcing the laws that exist.



## APPENDIX V

TESTIMONY BY SENATOR BAYH  
ON S.695 - Defense Production  
Act Amendments  
of 1977 -- The "Revolving Door  
Syndrome"

Mr. Chairman, I want to thank you for this invitation to participate in the hearings you have scheduled today on a most important effort to restore public confidence in govern-  
ment. I hope my testimony will be helpful to you. These proceedings should give us a better idea as to the extent of the "revolving door syndrome." S. 695 will establish more effective controls over who will be permitted to pass through the revolving door from government service to private employment as well as prohibitions designed to prevent conflicts of interest in government contracting. Importantly, our bill proposes no new bureaucracy to sit on top of defense industries or the Department of Defense. Rather, it provides for an important expansion of the duties of the Chairman of the Civil Service Commission, the Attorney General and the Comptroller General of the United States.

"Lead us not into Temptation"

As the Chairman indicated in his statement of introduction of S. 695, we are trying to prevent a "situation of temptation" from developing where federal contracting personnel find themselves anticipating lucrative future employment in the private sector as a result of their day-to-day decisions in the award and management of contracts. In fairness to these officers, our legislation does not bar completely employment outside the federal government after their retirement or departure from federal service. It does restrict employment with firms the

office has dealt with.

The Conflict of Interest Review Board proposed in the bill will provide guidance by issuing advisory opinions on what employment is proper and what is improper as stipulated in Section 801. between government service and the private sector "The interchange has been taking place at a more rapid rate and for some reasons which are understandable. The Council on Economic Priorities report on the "revolving door" syndrome found that

Despite the urgent need for competent acquisition managers within the military, there are at present few incentives for qualified officers to remain in the service after 20 years. The defense industry on the other hand, provides a compelling incentive for a knowledgeable officer to leave the service.

Clearly, it would be unfair to slam the door of opportunity in the faces of dedicated military officers who have served this country well and now have an invaluable expertise to offer a company engaged in defense work. At the same time, it would only detract from our commitment to integrity if we allowed the present situation to continue. I think that our bill is sensitive to these dual concerns. They are not mutually exclusive and the provisions of S. 695 have been carefully formulated to fortify the contract manager in DoD and other federal agencies in the performance of his duty. The Fitzhugh Commission, Common Cause and the Council on Economic Priorities concur that the present limitations on contracting officers do not remove them from conflict of interest situations. This is the basic reason for the legislation before us today. It is also the basic justification for its passage.

## THE SCOPE OF THE PROBLEM

I think it would be appropriate to say that the integrity in government issue we are addressing is directly linked to the nature of the purchasing environment. A few statistics are relevant here. According to recent reports, more than \$66 billion is spent annually by the federal government in the procurement of goods and services. Contractors providing a variety of functions for the federal government number over 250,000. The Department of Defense accounted for some \$47 billion worth of such contracting in FY 1976. These figures alone indicate that the scope of the problem being discussed here today is quite broad. It involves not only assuring the integrity of our contracting officers, but facilitating improvement of contracting procedures that can save the taxpayers money while insuring the quality of government purchases. The General Accounting Office and Senator Proxmire have repeatedly called attention to this matter.

In order to understand this point a little more clearly, it is important to realize that most DoD purchases occur in the form of "sole source" procurement. The other forms which DoD purchase may take involve "competitive negotiations" and "formally advertised" procurement. In all of these categories, the contracting or procurement official plays a vital role.

In a study by Dr. D.L. McClachlan writing for the Antitrust and Economics Review last year, price reductions were found to have occurred as reliance on sole-source procurement was reduced.

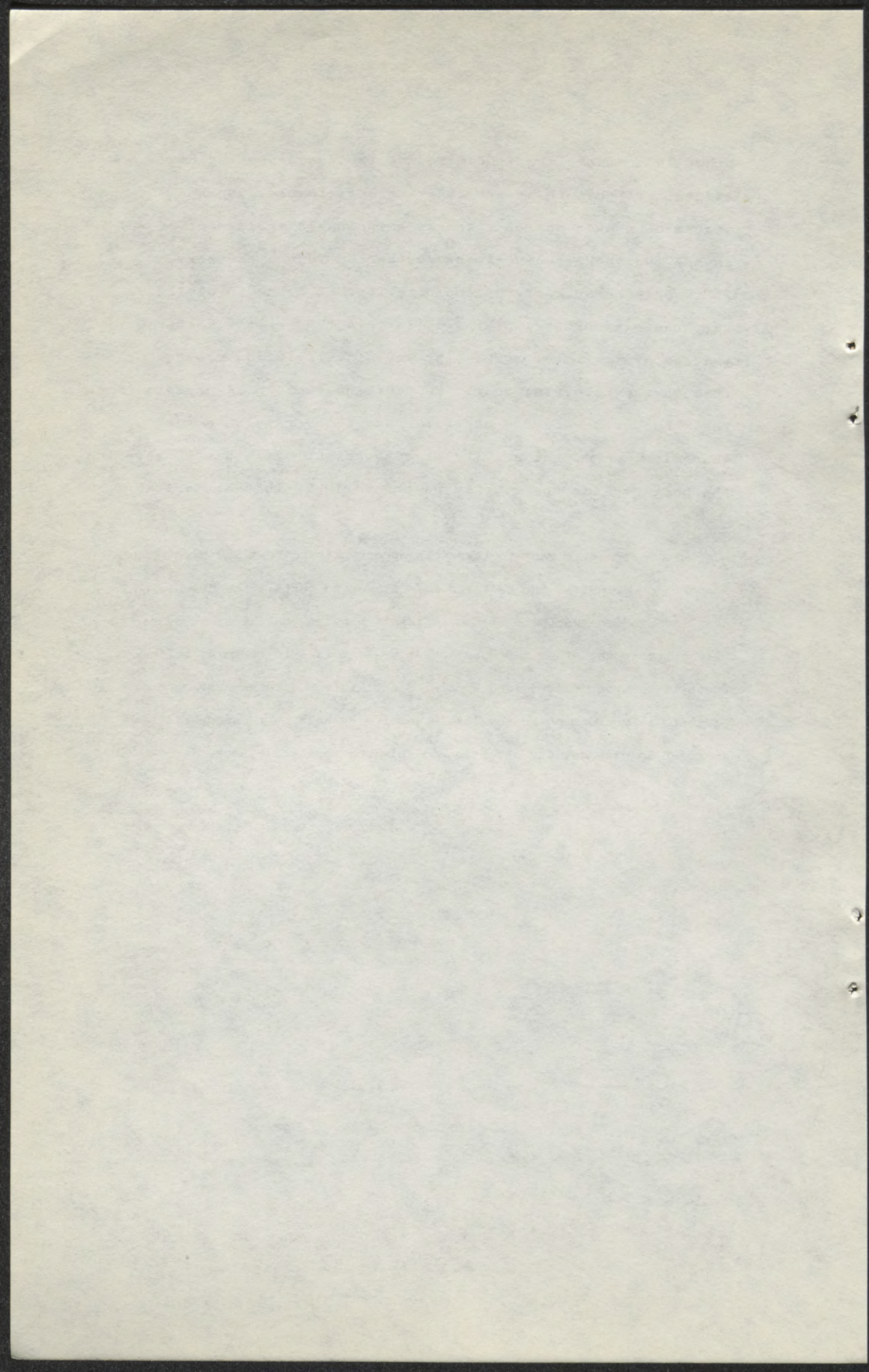
This should not be surprising considering the behaviour of pricing policies as one moves away from the monopolistic environment which is present in sole source procurement. But it is precisely because most of DoD purchases continue to occur in such an environment that the contracting officer's role is crucial. Recent statistics for DoD non-intergovernmental procurement for FY 1976 serve to underline the previous point.

In FY 1976 some \$40.726 billion were expended by DoD for ~~non-~~<sup>inter/</sup>governmental purchases. The breakdown of "competitive" and "non-competitive" (sources) was 42.6% and 57.4% respectively. This means that over \$23 billion in purchases involved relying solely on the "countervailing power" of government to assure that the product or service purchased was procured at the fairest price. It is also important to realize that \$5.8 billion of the \$23 billion are follow-on awards that were obtained through some form of previous competition. This highlights the importance of the monitoring function of contracting officials. Situations of substantial conflicts of interest cannot help but occur simply because DoD or other agency purchases are so large.

Dealing with such vast sums of tax dollars presents a constant temptation. It is clear from our recent experiences with the Russian wheat deal that it takes two to fully realize the fruits of such temptation. By adopting the prohibitions contained in S. 695 we will be making it more difficult for the unscrupulous contractor to tempt the federal contract officer with gifts, week-end retreats to hunting lodges and

other inducements that could reduce the aggressiveness of federal officers to insure contract performance. Such a statement should not be taken as a wholesale indictment of anyone who seeks a government contract. To the contrary, it is only because of the indiscretions of a few involving the huge expenditures of tax dollars in the private sector that we are now discussing the best way of restricting passage through the revolving door. We must, however, make certain that the procedures we agree on will achieve the result we seek which is to enhance the ability of contracting officials in securing the best buy for the U.S. taxpayer available in the American market place.

Mr. Chairman, I want to take this opportunity to reaffirm my strong support for S. 695 as the best and fairest way to curtail the "revolving door" syndrome. Enactment of the legislation being considered today can only buttress the other necessary steps we must take to restore public trust in both our elected and appointed officials. I think that Senator Proxmire is performing an invaluable service by holding these hearings in order to give serious attention to this most critical issue.



95TH CONGRESS  
1ST SESSION

APPENDIX VI

**S. 1446**

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IN THE SENATE OF THE UNITED STATES

MAY 3 (legislative day, APRIL 28), 1977

Mr. RIBICOFF introduced the following bill; which was read twice and referred to the Committee on Governmental Affairs

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**A BILL**

To preserve and promote ethical standards throughout the executive branch, and for other purposes.

1 *Be it enacted by the Senate and House of Representa-*  
2 *tives of the United States of America in Congress assembled,*  
3 That this Act may be cited as the "Ethics in Government  
4 Act of 1977".

5 TITLE I—GOVERNMENT PERSONNEL FINANCIAL  
6 DISCLOSURE REQUIREMENTS

7 PERSONS REQUIRED TO FILE

8 SEC. 101. (a) Upon assuming the position of an officer  
9 or employee designated in subsection (f), an individual  
10 shall file a report as required by subsection 102 (b).

II

1           (b) Upon the transmittal by the President to the Senate  
2 of the nomination of an individual to a position, appointment  
3 to which requires the advice and consent of the Senate, such  
4 individual shall file a report as required by subsection  
5 102 (b).

6           (c) Upon becoming a candidate for nomination or  
7 election to the office of President or Vice President, as deter-  
8 mined by the Federal Election Commission, an individual  
9 shall file a report as required by subsection 102 (b).

10          (d) Any individual who is an officer or employee  
11 designated in subsection (f) during any calendar year and  
12 performs the duties of his position or office for a period in  
13 excess of sixty days in that calendar year shall file on or  
14 before May 15 of the succeeding year a report as required  
15 by subsection 102 (a).

16          (e) Any individual who occupies a position designated  
17 in subsection (f), before leaving such position, shall file a  
18 report as required by subsection 102 (a), unless such individ-  
19 ual has accepted employment in another position designated  
20 in subsection (f).

21          (f) The officers and employees referred to in subsections  
22 (a), (d), and (e) are—

23               (1) the President;

24               (2) the Vice President;

1           (3) each officer or employee of an Executive  
2 agency, as defined in section 105 of title 5, United States  
3 Code, including a special Government employee as de-  
4 fined in section 202 of title 18, United States Code,  
5 whose pay rate either is specified in subchapter II of  
6 chapter 53 of title 5, United States Code, or is at a com-  
7 parable or greater pay rate under another authority; and

8           (4) each officer or employee, including a special  
9 Government employee as defined in section 202 of title  
10 18, United States Code, whose position is classified at  
11 GS-16, GS-17, or GS-18 of the General Schedule  
12 prescribed by section 5332 of title 5, United States Code,  
13 or who is in a comparable position under another au-  
14 thority; each member of a uniformed service whose pay  
15 grade is at or in excess of O-7 under section 1009 of  
16 title 37, United States Code; and each officer or em-  
17 ployee in any other position determined to be of equal  
18 classification.

19           (g) Reasonable extensions of time for filing any report  
20 may be granted under procedures prescribed by the Director  
21 of the Office of Government Ethics established by title  
22 II of this Act, but the total of such extensions shall not ex-  
23 ceed ninety days.

## CONTENTS OF REPORTS

1

2 SEC. 102. (a) Each report filed under subsections 101  
3 (d) and (e) shall include a full and complete statement, in  
4 such manner and form as the Director of the Office of Govern-  
5 ment Ethics may prescribe, with respect to—

6 (1) the source and amount of: (A) each item of  
7 earned income or aggregate of such items from a single  
8 source totaling \$100 or more, including any fee or other  
9 honorarium received in connection with the preparation  
10 or delivery of any speech, attendance at any convention  
11 or meeting, or the preparation of any article for publica-  
12 tion; and (b) any gift with a fair market value of more  
13 than \$25 or gifts aggregating \$250 or more from a sin-  
14 gle source, including transportation, lodging, food, or  
15 entertainment, other than political contributions other-  
16 wise required by law to be reported and gifts from a  
17 personal friend or relative with whom the reporting in-  
18 dividual has no contact in the course of his official duties;

19 (2) the source and category of value of income  
20 (other than earned income and gifts) received during  
21 the year which exceeds \$100 in value or amount from  
22 any one source;

23 (3) the identity and category of value of any per-  
24 sonal property held, directly or indirectly, in a trade of  
25 business or for investment or the production of income,

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1 other than household furnishings, works of art, jewelry,  
2 and collections of stamps, coins, and similar items, and  
3 which has a fair market value of at least \$1,000 at any  
4 time during the year;

5 (4) the identity (except the address of a personal  
6 residence) and category of value of each item of real  
7 property held, directly or indirectly, which has a fair  
8 market value in excess of \$1,000 at any time during the  
9 year;

10 (5) the identity and category of value of each  
11 liability owed, directly or indirectly, other than to a  
12 relative, which exceeds \$2,500 at any time during the  
13 year;

14 (6) the identity, date, and category of value of any  
15 direct or indirect transaction, other than with a spouse  
16 or minor child, in securities or commodities futures dur-  
17 ing the year which exceeds \$1,000, except that the iden-  
18 tity of the recipient of any gift to any tax-exempt or-  
19 ganization described in section 501 (c) of the Internal  
20 Revenue Code of 1954 involved in such a transaction  
21 need not be reported;

22 (7) the identity (except the address of a personal  
23 residence), date, and category of value of any direct or  
24 indirect purchase, sale, or exchange, other than a trans-  
25 action with a spouse or minor child, of any interest in

## 6

1 real property during the year which exceeds \$1,000 in  
2 value as of the date of such purchase, sale, or exchange,  
3 except that the identity of the recipient of any gift to any  
4 tax-exempt organization described in section 501 (c) of  
5 the Internal Revenue Code of 1954 involved in such  
6 a transaction need not be reported;

7 (8) any interest in a patent right, copyright, or  
8 mineral lease, and the nature of such interest, held dur-  
9 ing the year;

10 (9) the identity of all positions held as an officer,  
11 director, trustee, partner, proprietor, representative, em-  
12 ployee, or consultant of any corporation, company, firm,  
13 partnership, or other business enterprise, any nonprofit  
14 organization, and any educational or other institution:  
15 *Provided*, That this paragraph shall not require the  
16 reporting of positions held in any religious, social, fra-  
17 ternal, or political entity;

18 (10) a description of the date, parties to, and terms  
19 of any agreement or arrangement with respect to: (A)  
20 future employment; (B) a leave of absence during the  
21 period of the reporting individual's Government service;  
22 (C) continuation of payments by a former employer  
23 other than the United States Government; and (D)  
24 continuing participation in an employee welfare or bene-  
25 fit plan maintained by a former employer.

1       (b) Each report filed under subsections 101 (a), (b),  
2 and (c) shall include a full and complete statement, in such  
3 manner and form as the Director of the Office of Govern-  
4 ment Ethics may prescribe, with respect to information re-  
5 quired by paragraphs (3), (4), (5), (8), (9), and (10)  
6 of subsection (a), as of the date of filing, and the sources  
7 and amounts of earned income and other payments for the  
8 year of filing and the preceding calendar year.

9       (c) The categories for reporting the amount or value  
10 of the items covered in paragraphs (2) through (7) of sub-  
11 section (a) are as follows:

- 12           (1) up to \$5,000;  
13           (2) from \$5,000 to \$15,000;  
14           (3) from \$15,000 to \$50,000;  
15           (4) from \$50,000 to \$100,000; and  
16           (5) greater than \$100,000.

17       (d) For purposes of paragraphs (1) through (8) of  
18 subsection (a), the report shall include the gifts, unearned  
19 income, and the source (but not amount) of earned income  
20 received by and the assets, transactions, and liabilities of  
21 a spouse and minor child occupying the household of the  
22 reporting individual.

23       (e) The holdings of and the income from a trust or  
24 other financial arrangement from which the reporting indi-  
25 vidual, spouse, or minor child occupying the same house-

1 hold receives income or in which such person has a bene-  
2 ficial interest must be reported according to the provisions of  
3 this section: *Provided*, That if the beneficiary of the trust  
4 or arrangement does not have knowledge of the identity of  
5 the holdings and sources of income, the report shall so indi-  
6 cate and the reporting individual shall provide that the in-  
7 formation will be submitted by the trustee or other appro-  
8 priate person.

9 FILING OF REPORTS

10 SEC. 103. (a) Each officer and employee identified in  
11 subsection 101 (f) shall file the report required by this title  
12 with the designated official of his agency.

13 (b) In addition, the President, the Vice President, the  
14 head of each agency, each Presidential appointee in the Ex-  
15 ecutive Office of the President who is not subordinate to the  
16 head of an agency in that Office, and each full-time member  
17 of a committee, board, or commission appointed by the Presi-  
18 dent shall submit a copy of his report to the Director of the  
19 Office of Government Ethics.

20 (c) Each individual identified in subsection 101 (b)  
21 shall file the report required by this title with the agency in  
22 which he will serve and a copy of such report with the Di-  
23 rector of the Office of Government Ethics.

24 (d) Each individual identified in subsection 101 (c)  
25 shall file the report required by this title with the Federal  
26 Elections Commission.

## 1           FAILURE TO FILE OR FALSIFYING REPORTS

2           SEC. 104. (a) (1) Any individual who knowingly falsi-  
3 fies or fails to report any information required under section  
4 102 shall be fined in an amount not exceeding \$5,000 or im-  
5 prisoned for not more than one year, or both.

6           (2) The Attorney General may bring a civil action  
7 against any person who fails to file a report as required by  
8 section 101 or who fails to report any information which such  
9 person is required to report under section 102. The court in  
10 which such action is brought may assess against such person  
11 a penalty in any amount not to exceed \$5,000.

12           (b) The head of each agency and the Director of the  
13 Office of Government Ethics shall refer to the Attorney Gen-  
14 eral the name of any individual they have reasonable cause  
15 to believe has failed to file a report or has falsified or failed  
16 to file information required to be reported.

17           (c) The President, the Vice President, and the head of  
18 each agency, or the Civil Service Commission, may take any  
19 appropriate personnel or other action in accordance with ap-  
20 plicable law or regulation against any individual failing to  
21 file a report or information or falsifying information.

## 22           CUSTODY OF AND PUBLIC ACCESS TO REPORTS

23           SEC. 105. (a) Each agency shall make each report filed  
24 with it under this title available to the public within forty-  
25 five days after the receipt of such report and furnish a copy

1 of the report to any person upon written request: *Provided*,  
2 That this section does not require public availability of:

3 (1) information pertaining to the holdings and  
4 sources of income of a trust or other financial arrange-  
5 ment designed to insulate the reporting individual, his  
6 spouse, or minor child from knowledge of the holdings  
7 and sources of income of the trust if such trust or  
8 arrangement has been approved under regulations pre-  
9 scribed by the Civil Service Commission, with the con-  
10 currence of the Attorney General, as necessary to avoid  
11 potential or apparent conflicts of interest under section  
12 208 of title 18, United States Code, and other applicable  
13 laws and regulations: *Provided*, That the instrument  
14 or agreement establishing the trust or arrangement and  
15 the identity and category of value of assets initially  
16 placed in the trust or arrangement shall be made avail-  
17 able to the public under this section; and

18 (2) the report filed by any individual in the Cen-  
19 tral Intelligence Agency, the Defense Intelligence  
20 Agency, or the National Security Agency, or any indi-  
21 vidual engaged in intelligence activities in any agency  
22 of the United States, if the President finds that, due to  
23 the nature of the office or position occupied by such  
24 individual, public disclosure of such report would com-

1       promise the national interest of the Federal Govern-  
2       ment.

3       (b) The agency shall require any person inspecting or  
4 receiving a copy of a report under subsection (a) to supply  
5 his name and address and the name of the person or organiza-  
6 tion, if any, on whose behalf he is requesting a report and  
7 may require the requesting person to pay a reasonable fee in  
8 an amount which the agency finds necessary to recover the  
9 cost of reproduction and mailing of such report. The names  
10 and addresses of persons and organizations inspecting or re-  
11 ceiving a copy of a report shall be made available to the  
12 reporting individual and to the public.

13       (c) (1) It shall be unlawful for any person to inspect,  
14 obtain, or use a report—

15             (A) for any unlawful purpose;

16             (B) for any commercial purpose;

17             (C) for determining or establishing the credit  
18 rating of any individual; or

19             (D) for use, directly or indirectly, in the solicita-  
20 tion of money for any political, charitable, or other  
21 purpose.

22       (2) The Attorney General may bring a civil action  
23 against any person who inspects, obtains, or uses a report for  
24 any purpose prohibited in paragraph (1). The court in which

1 such action is brought may assess against such person a  
2 penalty in any amount not to exceed \$5,000.

3 (d) Any report received by an agency shall be held  
4 in its custody and be made available to the public for a  
5 period of five years after receipt of the report. After such  
6 five-year period the report shall be destroyed.

7 REVIEW OF REPORTS

8 SEC. 106. (a) The Director of the Office of Govern-  
9 ment Ethics and the head of each agency shall make pro-  
10 visions to assure that each report filed under subsections  
11 103 (a) and (c) and each copy of a report filed under  
12 subsection 103 (b) is reviewed to assure compliance with  
13 applicable laws and regulations.

14 (b) The Director of the Office of Government Ethics  
15 shall review, on a random basis, not less than 5 per centum  
16 of the reports filed under subsection 103 (a).

17 ADDITIONAL REPORTING REQUIREMENTS

18 SEC. 107. Nothing in this title shall be construed to  
19 prevent the President from requiring officers or employees  
20 not covered by this title to submit confidential financial  
21 statements.

22 EFFECTIVE DATE

23 SEC. 108. This title shall take effect on January 1,  
24 1978, and the reports filed under subsection 101 (d) on  
25 May 15, 1978, shall include information for calendar year  
26 1977.

## 1 TITLE II—OFFICE OF GOVERNMENT ETHICS

## 2 OFFICE OF GOVERNMENT ETHICS

3 SEC. 201. (a) There is established in the Civil Service  
4 Commission (hereinafter referred to as the "Commission")  
5 an office to be known as the Office of Government Ethics.

6 (b) There shall be at the head of the Office of Govern-  
7 ment Ethics a Director (hereinafter referred to as the "Di-  
8 rector"), who shall be appointed by the President, by and  
9 with the advice and consent of the Senate.

## 10 AUTHORITY AND FUNCTIONS

11 SEC. 202. (a) The Director shall provide, under the  
12 general supervision of the Commission, overall direction of  
13 executive branch policies related to preventing conflicts of  
14 interest on the part of officers and employees of any execu-  
15 tive agency, as defined in section 105 of title 5, United  
16 States Code.

17 (b) The responsibilities of the Director shall include—  
18 (1) developing and recommending to the Com-  
19 mission, in consultation with the Attorney General, rules  
20 and regulations to be promulgated by the President or  
21 the Commission pertaining to conflicts of interest and  
22 ethics in the executive branch, including rules and  
23 regulations establishing procedures for the filing, re-  
24 view, and public availability of financial statements filed  
25 by officers and employees in the executive branch as  
26 required by title I of this Act;

1           (2) developing and recommending to the Commis-  
2           sion, in consultation with the Attorney General, rules  
3           and regulations to be promulgated by the President or  
4           the Commission pertaining to the identification and reso-  
5           lution of conflicts of interest;

6           (3) monitoring and investigating compliance with  
7           the public financial disclosure requirements of title I of  
8           this Act by officers and employees of the executive  
9           branch and executive agency officials responsible for  
10          receiving, reviewing, and making available such state-  
11          ments;

12          (4) conducting a random annual review of not less  
13          than 5 per centum of the financial statements filed by  
14          officers and employees in the executive branch as re-  
15          quired by title I of this Act to determine whether such  
16          statements reveal possible violations of applicable con-  
17          flict-of-interest laws or regulations and recommending  
18          appropriate action to correct any conflict of interest or  
19          ethical problems revealed by such review;

20          (5) monitoring and investigating individual and  
21          agency compliance with any additional financial report-  
22          ing and internal review requirements established by law  
23          for the executive branch;

24          (6) interpreting rules and regulations issued by the  
25          President or the Commission governing conflict of in-

1 interest and ethical problems and the filing of financial  
2 statements;

3 (7) consulting, when requested, with agency ethics  
4 counselors and other responsible officials regarding the  
5 resolution of conflict of interest problems in individual  
6 cases;

7 (8) ordering corrective action on the part of agen-  
8 cies and employees which the Director deems necessary;

9 (9) requiring such reports from executive agencies  
10 as the Director deems necessary;

11 (10) assisting the Attorney General in evaluating  
12 the effectiveness of the conflict-of-interest laws and in  
13 recommending appropriate amendments;

14 (11) evaluating, with the assistance of the Attorney  
15 General, the need for changes in rules and regulations  
16 issued by the Commission and the agencies regarding  
17 conflict of interest and ethical problems, with a view  
18 toward making such rules and regulations consistent with  
19 and an effective supplement to the conflict-of-interest  
20 laws;

21 (12) cooperating with the Attorney General in de-  
22 veloping an effective system for reporting allegations  
23 of violations of the conflict-of-interest laws to the Attor-  
24 ney General, as required by section 535 of title 28,  
25 United States Code;



## 17

## ANNUAL PAY

1

2 SEC. 205. Section 5316 of title 5, United States Code,  
3 is amended by adding at the end thereof the following:

4 “( ) Director of the Office of Government Ethics.”

5

## TITLE III

6 Section 207 of title 18, United States Code, is amended  
7 to read as follows:

8 “§ 207. Disqualification of former officers and employees:

9 **Disqualification of partners of current officers**  
10 **and employees**

11 “(a) Whoever, having been an officer or employee of  
12 the executive or judicial branch of the United States Govern-  
13 ment, of any independent agency of the United States, or of  
14 the District of Columbia, including a special Government  
15 employee, after his employment has ceased, knowingly—

16 “(1) acts as agent or attorney for or otherwise  
17 represents himself or any other person (except the  
18 United States) in any formal or informal appearance  
19 before, or

20 “(2) makes any contact on behalf of himself or  
21 any other person (except the United States) with the  
22 intent to influence any department, agency, court, court-  
23 martial, or any civil, military, or naval commission of  
24 the United States or of the District of Columbia, or any  
25 officer or employee thereof, in connection with any

1       judicial or other proceeding, application, request for a  
2       ruling or other determination, contract, claim, contro-  
3       versy, charge, accusation, arrest, or other particular  
4       matter involving a specific party or parties in which the  
5       United States or the District of Columbia is a party or  
6       has a direct and substantial interest and in which he  
7       participated personally and substantially as an officer  
8       or employee, through decision, approval, disapproval,  
9       recommendation, the rendering of advice, investigation,  
10      or otherwise, while so employed, or

11      “(b) Whoever, having been so employed, within two  
12     years after his employment has ceased, knowingly—

13           “(1) acts as agent or attorney for or otherwise  
14     represents himself or any other person (except the  
15     United States) in any formal or informal appearance  
16     before, or

17           “(2) makes any contact on behalf of himself or any  
18     other person (except the United States) with the intent  
19     to influence any department, agency, court, court-  
20     martial, or any civil, military, or naval commission of  
21     the United States or of the District of Columbia, or any  
22     officer or employee thereof, in connection with any ju-  
23     dicial or other proceeding, application, request for a rul-  
24     ing or other determination, contract, claim, controversy,  
25     charge, accusation, arrest, or other particular matter in-

1       volving a specific party or parties in which the United  
2       States or the District of Columbia is a party or has a di-  
3       rect and substantial interest and which was actually  
4       pending under his official responsibility as an officer or  
5       employee within a period of one year prior to the ter-  
6       mination of such responsibility, or

7               “(c) Whoever having been so employed—

8               “(i) at a rate of pay specified in subchapter II of  
9       chapter 53 of title 5, United States Code, or a compa-  
10      rable or greater pay rate under another authority; or

11              “(ii) in a position classified at GS-16, GS-17, or  
12      GS-18 of the General Schedule prescribed by section  
13      5332 of title 5, United States Code; in a position classi-  
14      fied at O-7 or above under section 1009 of title 37,  
15      United States Code; or in a comparable position under  
16      another authority,

17      within one year after his employment with the department  
18      or agency has ceased, knowingly—

19              “(1) acts as agent or attorney for or otherwise  
20      represents any other person (except the United States)  
21      in any formal or informal appearance before, or

22              “(2) makes any contact on behalf of any other per-  
23      son (except the United States) with the intent to in-  
24      fluence the department or agency in which he served as  
25      an officer or employee, or any officer or employee

1       thereof, in connection with any judicial, rulemaking or  
2       other proceeding, application, request for a ruling or  
3       other determination, contract, claim, controversy, charge,  
4       accusation, arrest, or other particular matter which is  
5       pending before such department or agency or in which  
6       such department or agency is a party or has a direct and  
7       substantial interest—

8                “Shall be fined not more than \$10,000 or im-  
9       prisoned for not more than two years, or both:  
10       *Provided*, That nothing in subsection (a), (b), or  
11       (c) prevents a former officer or employee, includ-  
12       ing a former special Government employee, with  
13       outstanding scientific or technological qualifications  
14       from acting as agent or attorney for or otherwise  
15       representing, or making any contact on behalf of  
16       another person in connection with a particular mat-  
17       ter in a scientific or technological field if the head  
18       of the department or agency concerned with the  
19       matter shall make a certification in writing, pub-  
20       lished in the Federal Register, that the national  
21       interest would be served by such action or appear-  
22       ance by the former officer or employee: *Provided*  
23       *further*, That subsection (c) shall not apply to a  
24       former special Government employee who did not  
25       perform duties of his position in the department  
26       or agency for more than sixty days during the

1           period of three hundred and sixty-five days im-  
2           mediately preceding the date of termination of his  
3           services with such department or agency.

4           “(d) Whoever, being a partner of an officer or em-  
5           ployee of the executive branch of the United States Govern-  
6           ment, of any independent agency of the United States or of  
7           the District of Columbia, including a special Government  
8           employee, acts as agent or attorney for anyone other than  
9           the United States before any department, agency, court,  
10          court-martial, or any civil, military, or naval commission,  
11          of the United States or of the District of Columbia, or any  
12          officer or employee thereof, on behalf of any other person  
13          (except the United States), in connection with any judicial  
14          or other proceeding, application, request for a ruling or  
15          other determination, contract, claim, controversy, charge,  
16          accusation, arrest, or other particular matter in which the  
17          United States is a party or has a direct and substantial  
18          interest and in which such officer or employee of the Govern-  
19          ment or special Government employee participates or has  
20          participated personally and substantially as a Government  
21          employee through decision, approval, disapproval, recom-  
22          mendation, the rendering of advice, investigation, or other-  
23          wise, or which is the subject of his official responsibility—

24                   “Shall be fined not more than \$5,000, or imprisoned  
25                   not more than one year, or both.”.

[The page contains extremely faint, illegible text, likely bleed-through from the reverse side. The text is arranged in approximately 15 horizontal lines across the page. The right edge of the page shows signs of wear, including small holes and discoloration.]

