

# ARTICLES

## Public Financial Disclosure by Federal Officials: A Functional Approach

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For a generation or more, improving the ethical standards of government officials has been an important theme in American political rhetoric. The personal character of Presidential candidates, members of Congress, and other officials has been called into question. Lawyers see these issues translated into statutes, executive orders, legislative rules, and canons of judicial ethics that have been adopted in response to this concern.

The current focus on government ethics can make it easy to forget that comprehensive attempts to legislate the ethical behavior of federal officials are less than thirty years old. Indeed, the Ethics in Government Act,<sup>1</sup> the major governing legislation, was passed only eleven years ago in response to the Watergate scandal. However, responding to the continuing interest in ethics, one of President Bush's first official acts was to appoint a commission to evaluate existing legislation and to consider whether further changes should be proposed.<sup>2</sup>

This article examines one aspect of federal ethics legislation, the requirement that high executive branch officials make public financial disclosure of their income and assets. Financial disclosure illustrates the ratchet effect of ethics regulation, i.e., the view that one may add requirements but not correct excesses of the past. In this sense, they constitute a paradigm of both the

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1. Pub. L. No. 95-521, 92 Stat. 1824 (1978).

2. The President's Commission on Federal Ethics Law Reform was chaired by Judge Malcolm Wilkey. Griffin Bell was vice chairman. Members were Jan Baran, Judith Bello, Lloyd Cutler, Fred Fielding, Harrison Schmidt, and James Woolsey. Its report was entitled "To Serve with Honor: Report of the President's Commission on Federal Ethics Law Reform" (March 1989) [hereinafter *TO SERVE WITH HONOR*]. After no public hearings or debate, Congress attached major changes in federal ethics legislation to a pay raise bill passed in the waning hours of the first session of the 101st Congress (1989). References in this article to existing law are to the new legislation. See Ethics Reform Act of 1989 [hereinafter 1989 Ethics Act].

possibilities and limitations of trying to enhance ethical sensitivity by using legislative mandates.

This article will argue that one needs to distinguish primary from secondary ethics regulations. Primary provisions are those designed to protect the government against real abuses, e.g., self-dealing, trading in government secrets, and influence peddling. Secondary provisions are those designed to help enforce the primary regulations. Financial disclosure properly fits into the secondary category. Failure to distinguish between the types, however, has led to the requirement of more disclosure than necessary.

## I. A BRIEF HISTORY OF FINANCIAL DISCLOSURE REQUIREMENTS

### A. EARLY FEDERAL ETHICS LEGISLATION

During the first 175 years of United States history, ethical problems were probably at least as prevalent as they are today. In his Godkin lectures at Harvard in 1951, Senator Paul Douglas recalled that legendary Senator Daniel Webster was on retainer from the Second Bank of the United States during the debate over the renewal of its charter.<sup>3</sup> Abraham Lincoln himself, reports Douglas, “put men into positions where he knew they would enrich themselves” and “used dishonest men to corrupt others to obtain what we would consider beneficent ends.”<sup>4</sup>

Before the Second World War, however, the only ethical issue other than outright bribery directly addressed by federal legislation involved the payment of claims after the Civil War. Private citizens had filed such claims for damage to or taking of property in the war effort. Some federal officials assisted citizens to pursue such claims and often were paid to do so. Concern that officials might misuse their federal positions to seek advantage for their friends or clients led, in 1864, to legislation against such assistance, whether or not undertaken for compensation.<sup>5</sup> The statutes were later amended, but largely to extend the prohibition to pressing claims involving matters on which a former official had worked while in government.<sup>6</sup>

*United States v. Bergson*<sup>7</sup> illustrates just how narrow the legislation was. A former lawyer in the antitrust division was indicted for seeking to get the Justice Department to issue two antitrust clearance letters in cases on which

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3. P. DOUGLAS, *ETHICS IN GOVERNMENT* 15 (1952) [hereinafter DOUGLAS].

4. DOUGLAS, *supra*, at 17 (citing Carl Sandburg).

5. Act of June 11, 1864, ch. 119, 13 Stat. 123 (codified at 18 U.S.C. § 281 (1858)) (repealed 1962) (compensated assistance); An Act to Prevent Frauds Upon the Treasury of the United States, ch. 18, § 2, 10 Stat. 170 (1853) (codified at 18 U.S.C. § 283 (1858)) (repealed 1962) (uncompensated assistance).

6. *See, e.g.*, Post Office Appropriations Act, ch. 256, § 5, 17 Stat. 202 (1872) (codified at 5 U.S.C. § 99 (1858)) (repealed 1962).

7. 119 F. Supp. 459 (D.D.C. 1954).

he had worked directly while at Justice. That violated the *Canons of Ethics*,<sup>8</sup> and would clearly be illegal today.<sup>9</sup> Thirty-five years ago, however, in light of the statutes' language and the narrow problem with which they were intended to deal, the District Court construed the phrase "claims against the government" to mean only "demands for money or property."<sup>10</sup> Thus, the indictment against Bergson was dismissed.

In 1951, Senator Douglas conducted hearings aimed at a possible broadening of federal ethics legislation. In spite of his asserted view that ethical standards in the federal government were getting better rather than worse,<sup>11</sup> Douglas' subcommittee called for restrictions on providing gifts and entertainment to government officials, on the use of a public position to further one's private business, and on abuse by former government officials of contacts in their former agencies.<sup>12</sup>

In partial response to the Douglas subcommittee's call for action, a reluctant President Truman proposed that Congress pass ethics legislation that would require public financial disclosure by members of Congress and high level executive branch officials of their non-government income and sources of income such as real estate, securities, gifts and loans.<sup>13</sup> However, the legislation proposed by President Truman was not passed during his administration, nor during that of President Eisenhower.

#### B. THE BEGINNING OF NON-PUBLIC DISCLOSURE

While the modern attempt to try to legislate ethical conduct broadly is less than thirty years old, the use of public financial disclosure is a product of only the last fifteen years. As one of his first acts in office, President Kennedy appointed a distinguished Advisory Panel on Ethics and Conflict of Interest in Government. That panel, made up of Judge Calvert Magruder, Dean Jefferson Fordham, and Professor Bayless Manning, reported that eth-

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8. AMERICAN BAR ASSOCIATION CANONS OF PROFESSIONAL ETHICS, Canon 36: "A lawyer, . . . having been in the public employ, should not after his retirement accept employment in connection with any matter which he has investigated or passed upon while in such . . . employ."

9. 18 U.S.C. § 207(a) (1990).

10. *Bergson*, 119 F. Supp. at 468.

11. DOUGLAS, *supra* note 3, at 19.

12. The problems are discussed in DOUGLAS, *supra* note 3, at 45-58. The report of the Douglas subcommittee, "Proposals for Improvement of Ethical Standards in the Federal Government including Establishment of a Commission on Ethics," is discussed in R.N. ROBERTS, *WHITE HOUSE ETHICS: THE HISTORY OF THE POLITICS OF CONFLICT OF INTEREST REGULATION* 42-46 (1988) [hereinafter ROBERTS].

Senator Douglas was not the first to call for financial disclosure. Senator Wayne Morse had made such a call in 1946. See SENATE COMM. ON GOVERNMENTAL AFFAIRS, S. REP. NO. 170, 95th Cong., 1st Sess. 23 (1977) (to accompany S. 555, the Ethics in Government Act of 1978) [hereinafter SENATE REPORT].

13. President's Special Message to Congress Recommending Conflict of Interest Legislation, 1951 PUB. PAPERS 540 (Sept. 27, 1951). See also ROBERTS, *supra* note 12, at 49.

ics laws were neither coordinated nor comprehensive.<sup>14</sup>

The panel proposed legislation to President Kennedy which was adopted in 1962 and codified as 18 U.S.C. §§ 201-218.<sup>15</sup> These are still the principal provisions regulating the conduct of present and former Executive Branch officials and members of Congress. But, while the legislation prohibited government employees from "participating personally and substantially" on behalf of the government in any matter in which the employee "has a financial interest",<sup>16</sup> none of the provisions of this "comprehensive and coordinated" approach to government ethics made any mention of affirmative financial disclosure.<sup>17</sup>

A General Accounting Office investigation of contractor gifts to defense officials, and an accusation that a Commerce Department official had profited from stock transactions using inside information, helped convince the Johnson administration that action on ethics standards was required.<sup>18</sup> The first result was Executive Order 11,222, issued by President Johnson in 1965.<sup>19</sup> That Executive Order created the first requirement that federal officials report their financial interests for the record.

The program was relatively modest, reaching only "the head of each agency, each Presidential appointee in the Executive Office of the President who . . . [heads an agency] in that Office, and each full-time member of a committee, board, or commission appointed by the President".<sup>20</sup> Each covered official was required to report: (1) the names of all for-profit and non-profit entities in which the official continued to serve as an employee, officer, owner, director, trustee, partner, adviser, or consultant, or in which the official had a continuing financial interest through the ownership of stock, a

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14. The conclusion was not surprising; it tracked closely the conclusion of a committee of the Association of the Bar of the City of New York for which Professor Manning had served as Reporter. See SPECIAL COMMITTEE ON THE FEDERAL CONFLICT OF INTEREST LAWS, THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK, CONFLICT OF INTEREST AND FEDERAL SERVICE (1960).

15. Bribery, Graft and Conflicts of Interest Act, Pub. L. No. 87-849, 76 Stat. 1119 (1962) (codified at 18 U.S.C. §§ 201-213 (1982)). The Act is discussed in Perkins, *The New Federal Conflict of Interest Laws*, 76 HARV. L. REV. 1113, 1113-17 (1963), and B. MANNING, FEDERAL CONFLICT OF INTEREST LAW 5-6 (1964).

16. 18 U.S.C. § 208 (1982).

17. The closest President Kennedy came to requiring financial disclosure was a program of confidential reporting which he initiated with respect to intermittent government employees. See Memorandum to Heads of Executive Departments and Agencies: Preventing Conflicts of Interest on the Part of Advisers and Consultants to the Government (Feb. 9, 1962).

18. See ROBERTS, *supra* note 12, at 111-19 (describes the events preceding the issuance of President Johnson's Executive Order No. 11,222. 30 Fed. Reg. 6,469 (1965).

19. Exec. Order No. 11,222, 30 Fed. Reg. 6,469 (1965) (prescribing standards of ethical conduct for government officers and employees).

20. See generally ROBERTS, *supra* note 12, at 123-24 (about 200 officials were required to provide confidential reports pursuant to President Johnson's Executive Order, although more could have been subject to the order).

retirement plan, or the like, (2) the names of the official's creditors, other than the mortgagee on the official's home or a person owed money with respect to current living expenses, and (3) a list of the official's rights in real property other than the official's residence. The information was to be filed with the Director of the Civil Service Commission and was not to be made publicly available.

Allegations about misconduct by then-Congressman Adam Clayton Powell led Congress to require disclosure by its own members and top staff in 1968.<sup>21</sup> The rules were made applicable to all senators and representatives, announced candidates for the Senate, and high level legislative staff members. House and Senate rules were different, but they required disclosure of such things as ownership interests worth more than \$5,000 in companies doing business with the government, sources of income over \$1,000 per year, unsecured liabilities in excess of \$10,000, and the identity of interests in real or personal property worth in excess of \$10,000. Again, only a limited amount of the information was made publicly available.<sup>22</sup>

Judges were not included in the above rules, but in 1969 the Judicial Conference of the United States adopted a requirement that federal judges report quarterly any nonjudicial income they earned in excess of \$100.<sup>23</sup> In 1972, when the American Bar Association adopted its *Code of Judicial Conduct*, Chief Justice Burger declared it applicable to all federal judges. That *Code* requires reporting all gifts and non-judicial income other than investments. In 1973, the Judicial Conference ordered that federal judges make those reports publicly available.<sup>24</sup>

### C. THE LEGACY OF WATERGATE

Robert Roberts asserts that “[b]etween 1969 and August of 1973 the ethics program assembled during the Kennedy and Johnson administrations fell apart because of White House, Civil Service Commission, and agency neglect.”<sup>25</sup> Although the Watergate hearings during 1973 and 1974 did not involve financial conflicts of interest, the ethical concern that Watergate

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21. See SENATE REPORT, *supra* note 12, at 23.

22. H.R. DOC. NO. 402, 90th Cong., 2d Sess. 499 (Rule XLIV; “Financial Disclosure”) (1969), and S. DOC. NO. 1, 91st Cong. 1st Sess. 60 (Rule XLIV; “Disclosure of Financial Interests”) (1968). See generally SENATE REPORT, *supra* note 12, at 23 (discussing the events leading up to the adoption of these rules).

23. JUDICIAL CONFERENCE OF THE UNITED STATES, REPORT OF THE PROCEEDINGS OF THE JUDICIAL CONFERENCE OF THE UNITED STATES 50-51 (1969). See also JUDICIAL CONFERENCE OF THE UNITED STATES, REPORT OF THE PROCEEDINGS OF THE JUDICIAL CONFERENCE OF THE UNITED STATES 6-9 (1970); JUDICIAL CONFERENCE OF THE UNITED STATES, REPORT OF THE PROCEEDINGS OF THE JUDICIAL CONFERENCE OF THE UNITED STATES 77 (1971).

24. See generally SENATE REPORT, *supra* note 12, at 24 (discussing resolutions of the Judicial Conference of the United States and the American Bar Association regarding judicial conduct).

25. ROBERTS, *supra* note 12, at 131.

raised created a mood generally receptive to a broad reform of government ethics laws.

Thus, in 1975 and 1976, the General Accounting Office selected eleven federal agencies in which to study the effectiveness of the existing financial disclosure system at revealing and preventing officials' conflicts of interests.<sup>26</sup> The study revealed that several apparent conflicts were either not identified or not corrected. Indeed, many employees had failed to file their financial disclosures at all.

The GAO findings, in turn, formed the basis of a report by Common Cause that helped solidify political support for significant new ethics legislation.<sup>27</sup> The principal concern identified by Common Cause was officials' excessive use of the revolving door, i.e., coming to government from the industry they regulated, leaving government for employment by regulated firms, or both. Officials' retention of interests in firms over which they had official responsibility was seen as part of this broader picture, and public financial disclosure was suggested as an important way to identify and prevent such conduct.<sup>28</sup>

The first fruits of this concern came in 1976 when the House and Senate imposed detailed requirements for the reporting of personal financial information on both their members and top staff. House and Senate rules again differed,<sup>29</sup> but together they required ten basic kinds of information:

1. The source and amount of earned income over \$100 and honoraria of any amount;
2. The source, amount and date of gifts aggregating \$100 or more from a single source, excluding gifts from relatives, personal hospitality, and gifts under \$35;
3. The source, amount and date of gifts-in-kind aggregating \$250 or more, with the same exclusions;
4. The source and amount of items of reimbursement aggregating \$250 or more from any single source;
5. The source and category of value of each item of unearned income over \$100 from any single source;

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26. The eighteen individual agency studies are listed and the results summarized in U.S. GENERAL ACCOUNTING OFFICE, REPORT B-103987: ACTION NEEDED TO MAKE THE EXECUTIVE BRANCH FINANCIAL DISCLOSURE SYSTEM EFFECTIVE (Feb. 1977).

27. A. KNEIER, *SERVING TWO MASTERS: A COMMON CAUSE STUDY OF CONFLICTS OF INTEREST IN THE EXECUTIVE BRANCH* (1976).

28. *Id.* at 5-9. The period generally was one in which public disclosure was being prescribed for a variety of public ills. *See, e.g.*, The Freedom of Information Act, Pub. L. No. 89-554, 80 Stat. 383 (1966) (codified as amended at 5 U.S.C. § 552 (1982)); The Government in the Sunshine Act, Pub. L. No. 94-904, 90 Stat. 1241 (1976) (codified as amended at 5 U.S.C. § 552(b) (1982)).

29. The rules are set out in SENATE REPORT, *supra* note 12, at 25-26.

6. The identity and category of value of interests in property held for investment or production of income, which had a value in excess of \$1,000;
7. The identity, category of value, and dates of transactions in securities, commodities or real property, which had a value in excess of \$1,000;
8. The identity and category of value of personal liabilities which exceeded \$2,500;
9. The identity of patent rights and agreements for future employment; and
10. The identity of positions held with private organizations.

#### D. THE ETHICS IN GOVERNMENT ACT OF 1978

The financial disclosure provisions of the Ethics in Government Act of 1978 were the culmination of these developments. Two basic arguments were made for the need for the new legislation.<sup>30</sup>

First, existing financial disclosure requirements were not uniform throughout government.<sup>31</sup> After adoption of its 1976 rules, Congress had imposed financial disclosure burdens on itself. It is not surprising that Congress then felt justified in imposing similar burdens on others.

Second, legislation was arguably needed because none of the statutory financial disclosure requirements then in place provided that the disclosures were to be publicly available. That argument assumed that public financial disclosure was desirable, a premise supported by the following four points.<sup>32</sup>

For one, public disclosure of financial information could serve to increase public confidence in government generally in the aftermath of Watergate. This argument, of course, was available to justify absolutely any legislation to which the "ethics" label could be applied.

Next, public financial disclosure arguably would show most public officials to be honest, thus benefitting both the public generally and the officials whose integrity would be made a matter of public record. In fact, neither before nor after the legislation has one seen a news story that "99.99% of federal officials are proved honest." In practical fact, this argument was also a makeweight.

Third, public financial disclosure was said to be necessary to deter people

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30. See generally SENATE REPORT, *supra* note 12, at 27-28 (explaining the perceived inadequacies of the financial disclosure requirements).

31. Of course, that argument can always be made whenever laws differ as they frequently do. The concern for uniformity was also important to the Wilkey Commission. Its Recommendation 1 was that 18 U.S.C. § 208, which prohibits self-dealing, be extended to judicial and non-member legislative branch officials. Recommendation 17 called for uniform financial disclosure requirements among the three branches. TO SERVE WITH HONOR, *supra* note 2, at 12-16, 83-85.

32. The arguments in various forms were made widely. See, e.g., ROBERTS, *supra* note 12, at 140-44; REPORT OF THE COMMISSION ON EXECUTIVE, LEGISLATIVE AND JUDICIAL SALARIES (1976).

with unsavory financial pasts from even thinking about seeking public employment, thus preventing future financial scandals. Again, one cannot disagree with the objective, but it is not clear that people with "unsavory" pasts, apparent on the face of their confidential disclosure forms to Senate committees, for example, were being appointed and confirmed.

Fourth, public financial disclosure was arguably necessary to deter self-dealing while in public service. Self-dealing was already a crime under 18 U.S.C. § 208, but the public availability of information could both increase the likelihood of catching wrongdoers and cause them to decide not even to take the chance of profiting from misconduct. In addition, it would provide a public check on waivers of insignificant conflicts permitted in § 208(b). This argument, described in this article as the "monitoring rationale," is the one on which public financial disclosure was ultimately meant to stand or fall.

## II. THE PRESENT STATUTORY REQUIREMENTS

The Ethics in Government Act substantially achieved Congress' objective of uniform reporting requirements. Financial disclosure requirements for executive branch officials are very similar to those imposed on members of Congress and top legislative staff members,<sup>33</sup> as well as federal judges.<sup>34</sup> In working through the complex requirements, it is useful to distinguish three kinds of questions which are at the heart of any program of financial disclosure.

1. *Who* should be required to make financial disclosure? Should it be all political appointees? Should high level civil servants be included? Are there lower level employees who should also be required to report?

2. *What* information should be required? Should comprehensive financial information about the employee be required or only that which might suggest a conflict of interest? Should different information be required before confirmation than is required thereafter?

3. *How* should the requirements be enforced? Should supporting data be required of respondents? What sanctions should be available for failure to file a required report or an omission in such a report?

### A. WHO IS REQUIRED TO MAKE DISCLOSURE?

Under the Ethics in Government Act, as amended in 1989, ten categories

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33. 2 U.S.C. §§ 701-709 (1982 & Supp. V 1988).

34. 28 U.S.C. app. §§ 301-308 (1982 & Supp. V 1988). The constitutionality of applying statutory disclosure standards to federal judges was upheld in *Duplanter v. United States*, 606 F.2d 654 (5th Cir. 1979), *cert. den.*, 449 U.S. 1076 (1981).



of government officers and employees are subject to disclosure requirements under 5 App. U.S.C. § 201.

1. Each person nominated for a position, appointment to which required the advice and consent of the Senate;<sup>35</sup>

2. Each officer and employee of the executive branch (including a special employee who is expected to work more than 60 days in a year) whose position is classified GS-16 or above (the Senior Executive Service), or who is paid at a level higher than the minimum rate paid a GS-16;<sup>36</sup>

3. Each member of a uniformed service whose pay grade is at or in excess of O-7 (brigadier general and above);<sup>37</sup>

4. Each employee determined by the Office of Government Ethics to be of a classification equal to 2 & 3, above;<sup>38</sup>

5. Each administrative law judge;<sup>39</sup>

6. The Postmaster General, Governors of the Postal Service, and all other Postal Service and Postal Rate Commission employees whose rate of pay exceeds the minimum for GS-16;<sup>40</sup>

7. Each person excepted from competitive civil service appointment because the person's job is deemed to be of a confidential or policy-making character, unless the person is excused from the reporting requirement by the Director of the Office of Government Ethics on the ground such exclusion would not affect the integrity of the government;<sup>41</sup>

8. The President and Vice President, and each person who becomes a candidate for those offices;<sup>42</sup>

9. The Director of the Office of Government Ethics and each designated agency ethics official;<sup>43</sup>

10. Any civilian employed in the Executive Office of the President who holds a commission of appointment from the President.<sup>44</sup>

That list includes more than 5000 people.<sup>45</sup> In addition, the Ethics in Government Act was amended in 1985 to make yet more people potentially

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35. 5 U.S.C. app. § 201(b)(1) (1982 & Supp. V 1988). The 1989 legislation will move these requirements to parallel provisions of Title 2, U.S.C. Because the precise citations are not available as this article goes to press, citations to 5 U.S.C. app. are retained throughout this article.

36. *Id.* § 201(d), (f)(3).

37. *Id.* § 201(f)(3) (1982).

38. *Id.*

39. *Id.* § 201(f)(4).

40. *Id.* § 201(f)(6).

41. *Id.* § 201(f)(5).

42. *Id.* § 201(c), (f)(1)-(2).

43. *Id.* § 201(f)(7).

44. *Id.* § 201(f)(8) (as amended in 1989).

45. Subsection (h) of 5 U.S.C. app. § 201 confers authority on Designated Agency Ethics Officials to exempt persons who are expected to work less than 60 days in a calendar year from the reporting requirements. Subsection (i) gives similar authority to the Director of the Office of Gov-

subject to reporting.<sup>46</sup> Under the amended provision, the President is now authorized to require confidential financial disclosure reports of such other "officers and employees in the executive branch" as the President may prescribe.<sup>47</sup>

#### B. WHAT INFORMATION IS REQUIRED?

The information required from each of these people by 5 App. U.S.C. § 202 is very extensive. The ten categories into which the information falls are clearly based on the categories of information required in the 1976 rules of the House and Senate. Each respondent today must describe:

1. The identity and value if it exceeded \$1,000 at the close of the preceding calendar year (reported in one of seven categories — under \$15,000, \$15,000 to \$50,000, \$50,000 to \$100,000, \$100,000 to \$250,000, \$250,000 to \$500,000, \$500,000 to \$1 million and over \$1 million) of any interest in a trade or business or asset held for investment or production of income by the reporting individual, excluding both debts owed to the official by a relative and personal savings accounts which aggregate less than \$5,000;<sup>48</sup>

2. The identity and value (using the categories in number 1, above) of liabilities in excess of \$10,000 owed by the reporting official to anyone other than a spouse, parent, grandparent, brother, sister or child of the reporting individual or of the reporting individual's spouse (but excluding the individual's home mortgage, all loans secured by personal property not in excess of the purchase price of the items which secure it, and all revolving charge accounts with individual balances under \$10,000 at the close of the preceding calendar year);<sup>49</sup>

3. The date, parties to, and terms of any future employment arrangements negotiated by the reporting individual, any leave of absence during the period of federal service, continuing payments from a former employer, or continuing participation in a former employer's welfare or benefit plan;<sup>50</sup>

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ernment Ethics when the government employee is expected to work less than 130 days and the position is unlikely to involve a conflict of interest.

46. Ethics in Government Act Amendments of 1985, Pub. L. No. 99-190, § 148(b), 99 Stat. 1325 (1985). The amendments were also designed in part to make clear that persons required to make confidential disclosure need not be required to disclose the same things required in public disclosure. Further amendments to the confidential disclosure provisions were made by the 1989 Act.

47. In response to this grant of authority, President Reagan has issued Executive Order 12,565, (Sept. 26, 1986), 3 C.F.R. 229 (1987). The Office of Government Ethics has proposed to further codify the requirement. 51 Fed. Reg. 43,359 (1986) (to be codified at 5 C.F.R. pt. 735) (proposed Dec. 2, 1986). However, President Bush superseded the executive order by issuing "Principles of Ethical Conduct for Government Officers and Employees." Exec. Order No. 12,674, 54 Fed. Reg. 15,159 (1989).

48. 5 U.S.C. app. § 202(a)(3), (d) (1982) (as amended in 1989).

49. *Id.* § 202(a)(4) (as amended in 1989).

50. *Id.* § 202(a)(7).

4. The source of all compensation in excess of \$5,000 received by the reporting individual in the two years prior to the individual's becoming a federal official, and a brief description of the services for which the compensation was paid. It is of particular interest to lawyers entering government service that disclosure under this provision is not required with respect to legally privileged information or "with respect to any person for whom services were provided by any firm or association of which [the reporting] individual was a member partner or employee unless such individual was directly involved in the provision of such services;"<sup>51</sup>

5. The source, type and amount of non-governmental earned income, including honoraria, which in the aggregate exceed \$200, received by the reporting individual in the preceding calendar year, and, effective 1991, all gifts made to charity in lieu of honoraria;<sup>52</sup>

6. The date, a brief description, and the value if over \$1,000 (using the categories in number 1, above) of each purchase, sale or exchange of real property, stock or other securities during the preceding calendar year, except transactions between the reporting individual and a spouse or children;<sup>53</sup>

7. All positions the reporting individual has held during the two years before appointment (and annually thereafter) as a more-than-honorary officer, director, trustee, partner, proprietor, representative, employee, or consultant in any for-profit or non-profit organization (other than a religious, social, fraternal, or political entity);<sup>54</sup>

8. The source, value and a brief description of all gifts to the reporting individual from any source which exceed \$200 in aggregate value over the preceding year, excluding gifts from relatives and "personal hospitality of an individual";<sup>55</sup>

9. The source and a brief description of reimbursements aggregating in excess of \$200 received by the reporting individual from any source in the preceding calendar year (i.e., whether or not from a relative and with no de minimis figure);<sup>56</sup>

10. The source and type of all dividends, rents, interest, and capital gains in excess of \$200 in the preceding calendar year, with amounts of each reported in one of seven categories, namely, below \$1,000, \$1,000 to \$2,500, \$2,500 to \$5,000, \$5,000 to \$15,000, \$15,000 to \$50,000, \$50,000 to \$100,000, \$100,000 to \$1 million and over \$1 million.<sup>57</sup>

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51. *Id.* § 202(a)(6)(B).

52. *Id.* § 202(a)(1)(A) (as amended in 1989).

53. *Id.* § 202(a)(5).

54. *Id.* § 202(a)(6)(A).

55. *Id.* § 202(a)(2)(A) (as amended in 1989).

56. *Id.* § 202(a)(2)(B) (as amended in 1989).

57. *Id.* § 202(a)(1)(B) (as amended in 1989).

The official is also required to report most of the above information as it relates to his or her spouse and dependent children. Except for things such as gifts received completely independent of the spouse's relationship to the official, property interests of a child which were not in any way obtained from assets or activities of the official, and interests of a spouse living separate and apart with an intention of terminating the marriage, the reporting must be thorough and comprehensive.<sup>58</sup>

### C. HOW ARE THE REQUIREMENTS ENFORCED?

Enforcement responsibility for the financial disclosure provisions is widely distributed. Filing and availability of reports are the subject of 5 App. U.S.C. §§ 203 and 205. Most individuals are required to submit their financial disclosure form to the designated ethics official for their agency.

Nominees who require Senate confirmation also file with the Director of the Office of Government Ethics. The Director then transmits the report to the Senate committee. Nominees also report whatever other information on other forms may be required by the Senate committee with jurisdiction over the nomination.<sup>59</sup>

Within 15 days of receiving the report, it must be made available for public inspection along with the official position description for the office the individual holds. Exceptions to this requirement are made only for persons engaged in intelligence activities whose identification would compromise the national interest.<sup>60</sup> All such reports are available for both inspection and copying by any person upon disclosure of the person's identity, address, occupation, and any organization for which the information is being obtained. The information may not be used to establish a credit rating or for any purpose which is illegal or commercial or connected with a political or charitable solicitation.<sup>61</sup>

In most cases, the statute requires that, within 60 days of the filing of each report, the form be reviewed by the agency's "designated ethics official." In some cases, review is by the Director of the Office of Government Ethics.<sup>62</sup> If the reviewing official believes that more information is required, that information is requested and supplied. If the reviewing official concludes that the financial disclosure shows the individual not to be in compliance with applicable laws and regulations, the person is given an opportunity to conform.

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58. *Id.* §§ 202(e), (f). Pursuant to § 207 of the Act, as amended, the President may require officers and employees in the executive branch to submit, on a confidential basis, such additional information as the President may direct. 5 U.S.C. app. § 207 (1982).

59. 5 U.S.C. app. § 202(c) (1982 & Supp. V 1987).

60. *Id.* § 205(a).

61. *Id.* § 205(b)(2), (c).

62. *Id.* § 206(a).

Most often, the person will have to sell an asset which creates a conflict, create a blind trust into which his or her assets may be put, give back income or a gift properly received, request an exemption from one or more requirements of the act, or request a transfer, reassignment, or limitation of duties. If none of these will eliminate the problem, the individual will have to refuse the appointment or, if already in office, resign.<sup>63</sup>

Under § 204 of the Act, the Attorney General has authority to prosecute willful falsification of, or failure to file, a required report. The action brought is a civil action and the court may assess a civil penalty not to exceed \$10,000 for each violation.<sup>64</sup> In addition, the section provides that any "appropriate personnel or other action" may be taken against the offender by the head of the agency and Office of Personnel Management which is consistent "with applicable law or regulation."<sup>65</sup>

### III. THE NEXT ROUND OF ETHICS LEGISLATION

President Bush took office in January 1989 pledging to make ethics a top priority in his administration.<sup>66</sup> As President Kennedy had done 28 years earlier, the President appointed a distinguished commission and directed it to make legislative proposals that he could submit to Congress.

The Bush commission considered recommendations from both agencies and individuals. With respect to financial disclosure, both the Office of Government Ethics<sup>67</sup> and a committee of the Administrative Conference of the United States<sup>68</sup> suggested that the requirements be made less detailed and more related to functional objectives.

Common Cause, on the other hand, took a strong public position against any change because of fear of weakening current requirements.<sup>69</sup> The commission's final report, issued in less than six weeks, called for some increase

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63. *Id.* § 206(b). The blind trust remedy is discussed at length in § 202(f)(2), (7).

64. *Id.* § 204(a) (as amended in 1989). The Justice Department has brought at least four such suits since 1978. U.S. Department of Justice, News Release, September 29, 1988.

65. 5 U.S.C. app. § 204(c) (1982 & Supp. V 1987).

66. Indeed, a concern about ethics had been a part of his campaign. *E.g.*, Speech to Congressional Interns (July 26, 1988), *reprinted in* 134 CONG. REC. S9840-41 (daily ed. July 26, 1988).

67. Letter from Frank Q. Nebeker, Director of the Office for Government Ethics, to Chairman Wilkey (Feb. 10, 1989). The 49-page letter was detailed, and with respect to financial disclosure, it called for fewer general statutory requirements and more discretion in the Office of Government Ethics to tailor requirements to the circumstances of particular government positions.

68. An earlier version of this article was sent to the Commission by the Committee on Government Ethics. In addition, two members of the Committee, Lloyd Cutler and Fred Fielding, were also members of the Commission.

69. *Compare Bush's Panel Favors Easing Ethics Rules: Financial Disclosure Would be Curtailed*, Washington Post, Feb. 21, 1989, at 1, col. 1, *with Ethics Panel Tentatively Backs Honoraria Ban in Top Jobs*, Washington Post, Feb. 23, 1989, at 1, col. 1 (reporting Common Cause reaction to the first story and the resulting changes in the Commission's tentative position).

in financial disclosure.<sup>70</sup>

First, the commission recommended raising the highest category in which assets would be required to be reported from \$250,000 to \$1 million in order to identify very large interests, and the top category of income reported from \$100,000 to \$250,000.<sup>71</sup>

Second, the commission recommended requiring disclosure of the amounts and holders of political appointees' home mortgages.<sup>72</sup> These are typically the largest liabilities of government officials, the commission reasoned, so there was no reason to exempt them from disclosure.

Third, the commission recommended requiring disclosure of all liabilities owed by political appointees to their relatives other than their spouse, children, parents, and siblings.<sup>73</sup> The mere fact that a creditor is distantly related to the official, the commission argued, does not eliminate the possibility of being pressured into acting improperly.

After review, President Bush proposed legislation which went even beyond the commission's recommendations.<sup>74</sup> The resulting legislation, the Government Ethics Reform Act of 1989, was passed, after no public hearings, as part of the Congressional salary increase package in the last day of the first session of the 101st Congress.<sup>75</sup> What makes ethics regulation seem to move only in the direction of greater restriction? How should one suggest the direction of future changes in financial disclosure requirements?

One might argue that more disclosure is always better than less. After all, people who are hesitant about making financial disclosures must inevitably have something to hide. However, when one is talking about ethics legislation, executive orders and the like, one is talking about a form of public regulation. People may differ about how to measure the costs and benefits of this regulation, but it is undeniable that there are costs involved. The costs are of at least two types.

First is the practical burden faced by an individual who must assemble and report information accurately. That is, in evaluating a disclosure requirement one should ask whether a nominee or employee would reasonably be expected to have at hand the information which he or she is required to report.

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70. TO SERVE WITH HONOR, *supra* note 2, Recommendation 16, at 79.

71. *Id.* at 81.

72. *Id.*

73. *Id.*

74. The proposed law was called the "Government Wide Ethics Act of 1989." S. 765, 101st Cong., 1st Sess., 135 Cong. Rec. S3,760 (1989). A comparable bill was introduced in the House of Representatives. H.R. 2337, 101st Cong., 1st Sess. (1989). On the same day, April 12, 1989, President Bush issued Executive Order 12,674 which imposed additional ethics restrictions on executive branch officials. See Exec. Order No. 12,674, 54 Fed. Reg. 15,159 (1989).

75. 1989 ETHICS ACT, *supra* note 72, at § 201(f)(10).

Second is the psychological burden imposed on an individual who must make his or her financial status publicly available to others. The person may have something to hide, but often will not. The question to ask should be whether a reasonable person would consider the questions to be an excessive invasion of privacy given the value of the information in terms of the purpose to be served by it.<sup>76</sup>

There is little question that the costs are real and burdensome. They are borne first by individuals, but ultimately by the nation as people decide whether or not to take positions in government. A nationwide Academy of Public Administration survey of post-1978 appointees to high federal positions, for example, found that more than 30% had great difficulty or very great difficulty filling out their disclosure forms. This compared to less than 10% reporting difficulty before 1978.<sup>77</sup>

Both the National Academy of Public Administration<sup>78</sup> and the Office of Government Ethics<sup>79</sup> also report that these burdens have deterred a significant number of good people from accepting federal positions. Given a political climate in which even inadvertent omission of some piece of required information could lead to charges of "unethical conduct," such deterrence is not surprising.

The potential countervailing benefit from financial disclosure, however, is real. Monitoring the behavior of agents is a problem in almost any organization. Corporations face the challenge, for example, of assuring that their managers are not stealing corporate assets or business opportunities. Members of labor unions need assurance that their officers are working to serve the members and not themselves. The problem of monitoring government officials is not unlike such problems in the private sector. It is, however, made more difficult by the numbers of officials who might violate their trust and the relative lack of control that voters have over their elected representatives, much less over employees of the executive branch.

Financial disclosure should not be seen as an end in itself. It serves both as an enforcement mechanism for, and as a way of calling attention to 18 U.S.C. § 208, the basic criminal statute prohibiting self-dealing. In principle, public

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76. This privacy argument is heard less often today, but it was of such concern in the 1960's that the original policy of confidential financial disclosure was almost stillborn. See ROBERTS, *supra* note 12, at 124-26. Indeed, the privacy concern was what kept public disclosure requirements limited to a relatively small number of high-level officials.

77. NATIONAL ACADEMY OF PUBLIC ADMINISTRATION, *LEADERSHIP IN JEOPARDY: THE FRAYING OF THE PRESIDENTIAL APPOINTMENTS SYSTEM* 14 (1985).

78. *Id.* See also THE IN-AND-OUTERS 83-88 (G. Mackenzie ed. 1985) (discussing the effect of the Ethics in Government Act on presidential appointees).

79. Walter, *The Ethics in Government Act, Conflict of Interest Laws and Presidential Recruiting*, 1981 PUBLIC ADMINISTRATION REVIEW 659 (at the time the article was written, Walter was Director of the Office of Government Ethics).

financial disclosure by federal officials makes it possible to monitor financial incentives faced by those officials and the extent to which they may have profited from official action.

It is a mistake to use financial disclosure to go beyond the task of disciplining self-dealing and to try to assure the basic integrity of government officials. No one can oppose honesty in government, but financial disclosure is unlikely to have much effect on making officials better people. Indeed, attempting to assure fundamental integrity by use of financial disclosure is the functional equivalent of the character and fitness investigations of state bar applicants. The difficulties and abuses inherent in such inquiries are well documented.<sup>80</sup>

The monitoring function of financial disclosure may produce benefits, but increased disclosure is not necessarily better than less. The challenge is to develop disclosure obligations that both maximize the relevance to self-dealing of the information sought and minimize the burdens on the persons supplying it.

#### IV. A MONITORING MODEL OF FINANCIAL DISCLOSURE

If the purpose of financial disclosure is monitoring official misconduct, present disclosure requirements could be reduced without appreciable loss of effectiveness. Indeed, creating a mechanism for auditing the completeness and accuracy of the information already obtained would be more likely to raise the level of ethical behavior than would asking for more information. The following recommendations do not retreat from concerns about ethical conduct, but they examine the function of present disclosure standards from a monitoring perspective.

##### RECOMMENDATION ONE

A. The following categories of persons should continue to be presumed required to make public financial disclosure:

(1) The President, Vice President, and nominees for and incumbents in positions which require Senate confirmation;

(2) Full-time officers and employees of the executive branch (including independent agencies) whose positions are classified as GS-16 or above or who are paid at or above the minimum rate of pay for GS-16. To be consistent, the requirements should be extended to (1) each member of a uniformed service whose pay grade is at or in excess of O-7; (2) the Postmaster General, Deputy Postmaster General, each Governor of the United States Postal Ser-

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80. See, e.g., Rhode, *Moral Character as a Professional Credential*, 94 YALE L.J. 491 (1985); McChrystal, *A Structural Analysis of the Good Moral Character Requirement for Bar Admission*, 60 NOTRE DAME L. REV. 67 (1984).



vice, and each Postal Service and Postal Rate Commission employee or officer whose rate of pay equals or exceeds the minimum rate of basic pay for GS-16; (3) each Administrative Law Judge whose rate of pay equals or exceeds the basic pay for GS-16; and (4) all other employees determined by the Director of the Office of Government Ethics to be in positions equal in responsibility to those normally classified at GS-16 or above.

B. Congress should amend the Ethics in Government Act to permit the Director of the Office of Government Ethics:

(1) To extend the reporting requirement, on a position or categorical basis, to any officer, employee, or special government employee of the executive branch not covered by the act, whose position is determined by the Director to present an unusual opportunity for conflict of interest; and

(2) To exempt from the reporting requirement those positions otherwise subject to the requirement whose responsibilities are identified by their agencies and determined by the Director to be unlikely to place their incumbents in situations of conflict of interest.

Government officials required to make financial disclosure should be those who are most likely to have conflicts of interest prohibited by 18 U.S.C. § 208. As discussed above, the Ethics in Government Act now identifies ten categories of individuals who are required to submit financial disclosure forms. Recommendation One combines several categories and eliminates others, but its basic effect would be to give the Office of Government Ethics authority to evaluate whether or not a particular job or job category requires coverage.<sup>81</sup>

The President and Vice President are covered by this recommendation primarily for the symbolic value of holding them to the same standards required of subordinate officials. Presidential and vice presidential violations of conflict of interest laws are unlikely to be discovered through their financial disclosure forms; conversely, including them in coverage is not likely to discourage candidates for the offices.

Nominees for positions which require Senate confirmation are the persons who most clearly should be required to make financial disclosure. They are most likely to be coming into government from outside, most to return to the private sector, and most likely to have accumulated assets or personal interests which could be served improperly while in government service.

Furthermore, each such nominee must face a Senate committee. The committee will want to know of possible financial conflicts, so the burden of filing under the Ethics in Government Act is unlikely to be an added burden. The

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81. The proposals in this report are directed only at appointments to executive departments and independent agencies. Congress' original objective of having parallel ethics legislation for all three branches of government was highly desirable, however, and the approach used in this report should be taken with respect to legislative and judicial financial disclosure as well.

requirements of the Act should be coordinated as nearly as possible with those of Senate committees, but the basic reporting requirement is appropriate.

The application of financial disclosure requirements to career civil servants and military officers reaches both more people and more situations. By no means all appointees to positions paid at a rate for GS-16 or above are persons who come into government through the revolving door, and there is normally little public curiosity about the financial dealings of people who are not in the public eye. On the other hand, career officials certainly can have accumulated assets over their careers which would create conflicts of interest. Likewise, many career officials have plans and aspirations to work in the private sector after government service. Further, it is often true that career officials hold some of the most powerful positions in the government in terms of ability to favor one interest over another. The ability to award a contract worth millions of dollars, for example, may reside in someone subordinate to the officials who require Senate confirmation. Thus, presumptive coverage of all such jobs and their incumbents is appropriate.<sup>82</sup>

Similarly, the Ethics in Government Act properly requires disclosure by many Administrative Law Judges (ALJs). They are not now covered by the parallel provisions which apply to Article III judges,<sup>83</sup> yet the same concerns about litigants knowing the interests of such judges may be present. However, not all ALJs are alike in this regard. ALJ's who hear Social Security Disability cases for the Department of Health and Human Services, for example, do important work but would rarely have a disqualifying conflict. Furthermore, applicants for Social Security benefits are unlikely to peruse a financial disclosure form before their claims are heard. In short, financial disclosure of financial interests may be appropriate for some kinds of Administrative Law Judges but not others. Fortunately, the line between ALJs who hear large volumes of routine cases and those with more traditional functions tends to be drawn between judges paid above or below grade GS-16, so the general distinctions work here as well.<sup>84</sup>

Finally, there is no reason to treat Postal Service officials differently. The risk of self-dealing is certainly present given the significant value of contracts which the Postal Service has the power to award. Technical independence of

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82. The Director of the Office of Government Ethics would continue to be covered under Recommendation One because the director is now paid at Executive Salary Level III, 5 U.S.C. § 5314. See Pub. L. No. 100-598, 102 Stat. 3031 (1988).

83. 28 U.S.C. app. §§ 301-308 (1982).

84. See generally Lubbers, *Federal Agency Adjudications: Trying to See the Forest and the Trees*, 31 FED. BAR NEWS & J. 383 (1984). Presently, the Ethics in Government Act covers all Administrative Law Judges. Thus this proposal would change present law by excluding from coverage all who are paid below grade GS-16.

the Postal Service should not change the approach to the ethics issues presented.

The recommendation also suggests, however, that coverage of many civil servants and military officers could better be handled by focusing on the character of the position rather than exclusively on the pay grade of the incumbent as the act now does. To be sure, senior civil servants and military officers all have important positions, but many are more subject to conflicts of interests than others. If the Director of the Office of Government Ethics were given the power to exempt some positions held by these officials from coverage of the act, just as the Director now may do with respect to confidential assistants,<sup>85</sup> the presumption in favor of coverage would remain, but the burden of disclosure could be minimized where it does not produce commensurate benefits. Recommendation One so proposes.

On the other hand, not all power which is subject to abuse resides in officials with pay grades of GS-16, O-7, and above. Recommendation One thus also proposes giving the Director authority to extend the requirements of the act to civil servants and military officers below the grades of GS-16 and O-7 who occupy positions that present an unusual risk and opportunity of self-dealing.<sup>86</sup> Decisions to add or delete positions from required financial disclosure under the act should be made only after public notice and opportunity for comment. The decisions should be subject to judicial review.

The same substantive and procedural approach also should be applied to determine whether particular special government employees should be required to make financial disclosure.<sup>87</sup> Such positions cover an extremely wide range of activities, perhaps including even members of advisory committees that meet only intermittently.<sup>88</sup> That such employees should have different treatment has long been recognized. Exactly what the treatment should be should be resolved in each case by the Office of Government Ethics.

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85. 5 U.S.C. app. § 201(f)(5) (1982).

86. The authority given the President to add to the list of persons required to file confidential reports, and the President's authority to require less information from some such persons, are steps in the right direction. *See supra* note 42 and accompanying text.

87. The term "special government employee" was created by President Kennedy's 1962 legislation, Pub. L. No. 87-849, § 202, 76 Stat. 1121, to distinguish part-time employees from full-time employees for purposes of the ethics laws. The term is currently defined in 18 U.S.C. § 202 (1982).

88. A report to the Administrative Conference of the United States discusses the extent to which ethics legislation should cover positions created by the Federal Advisory Committee Act, 5 U.S.C. app. §§ 1-15 (1972). Berg, *Conflict of Interest Requirements for Members of Federal Advisory Committees* (1989). The report was the basis for Administrative Conference Recommendation 89-3, 1 C.F.R. § 305.89-3 (1990).

## RECOMMENDATION TWO

A. Congress should continue to require both *incumbent* executive branch officers and employees whose positions are covered by the Ethics in Government Act, *and nominees* for those positions, to disclose publicly:

(1) The date, parties to, and terms of any future employment arrangements negotiated by the reporting individual, leaves of absence during the period of federal service, continuing payments from a former employer, or continuing participation in a former employer's welfare or benefit plan; and

(2) The identity of all positions held by the reporting individual as an officer, director, trustee, partner, proprietor, representative, employee or consultant of any corporation, company, firm partnership, or other business enterprise, any non-profit organization, any labor organization, or any educational or other institution other than the United States, but not including positions held in religious, social, fraternal, or political entities, or positions solely of an honorary nature.

B. In addition to the information required to be reported under A above, Congress should continue to require that *nominees* for positions for which disclosure is required under the Ethics in Government Act report the source of all compensation in excess of \$5,000 received by the reporting individual from one source in the two years preceding the one in which the nominee files, and a brief description of the services for which the compensation was paid.<sup>89</sup>

C. In addition to the information required to be reported under A above, Congress should continue to require covered *incumbent* executive branch officers and employees to disclose:

(1) The source, type, and amount of non-governmental earned income received by the reporting individual, including honoraria, which in the aggregate exceeded \$200; and

(2) The date and a brief description of each purchase, sale, or exchange of real property with a value over \$1,000, except (i) transactions between the reporting individual and a spouse or children, (ii) transactions involving a personal residence of the reporting individual or the individual's spouse, and (iii) transactions involving an investment in the nature of a case equivalent (e.g., a money market fund, certificate of deposit, or personal bank account).

D. Congress should amend the current requirements with respect to the following additional items to require incumbent officials to disclose:

(1) The identity of any interest in a trade or business or asset held for

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89. As current law provides, this requirement should not apply to information about any person for whom services were provided by the firm or association of which the nominee was a member, partner, or employee, unless the nominee was directly involved in the provision of such services.

investment or production of income, if the value of the interest exceeds \$1,000; and

(2) The identity of liabilities in excess of \$1,000 owed by the reporting official, other than the official's home mortgage, loans for the purchase of personal property which are secured by the property purchased, sums owed to a relative, and revolving charge accounts; and

(3) The source and a brief description of any gifts of transportation, lodging, food or entertainment, or any reimbursements for same, with a value in excess of \$250 per event, received by the reporting individual from any source other than a relative in the preceding calendar year; and

(4) The source, value, and a brief description of all other gifts to the reporting individual from any source which exceed \$100 in aggregate value over the preceding year, again excluding gifts from relatives.

The present requirement for reporting arrangements for leaves of absence, future employment arrangements, and the like, is certainly proper. Concerns about the revolving door have always been at least in the background of issues of financial disclosures.<sup>90</sup> Interests in future employment are exactly the kinds of interests that could affect decisions while in office, and indeed they were subjects of reporting in even early programs such as Executive Order 11,222.

Likewise, continued reporting of leadership positions in for-profit and not-for-profit organizations provides a way to monitor fiduciary duties which the employee has that might conflict with the employee's official duties. One must be careful that any such reporting have minimal effects on the employee's rights of free association, but the report's limitation to leadership positions and the law's complete exclusion of social, religious, and political organizations seem to achieve that purpose.

The present requirement to report the sources of all income over \$5,000 for a full year before the official comes into government constitutes a relatively nonburdensome way to suggest possible sources of influence over the official. Further, it is important to know the amount of non-governmental income earned by persons currently in government. Requiring such annual disclosure helps assure that they are not violating 18 U.S.C. § 209, which prohibits augmenting one's government salary, or worse, taking money from a person or organization with an interest that is in conflict with his or her official responsibility. But this recommendation would eliminate the current requirement of disclosure of all sources of non-governmental earned income over \$100 for the year *before* a person entered government as far more detailed than necessary to monitor real conflicts of interest.<sup>91</sup>

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90. See A. KNEIER, *supra* note 27.

91. 5 U.S.C. app. § 202(a)(1)(A) (1982).

It is similarly important to report transactions in real estate and securities so as to negate the possibility that the official has acted using information acquired as a government official. However, the recommendation suggests excepting transactions within the family, and purchases and sales of shares in money market funds or other instruments which have the characteristics of cash rather than equity or longer-term debt because they are unlikely to implicate government interests.<sup>92</sup>

The report of business interests and assets held for investment or production of income is likewise basic to the recognition of potential conflicts of interest and the structuring of remedies with which to avoid them. The minimum \$1,000 value presently in the act is a good figure to avoid the reporting of de minimis interests.<sup>93</sup>

Unlike the present statute, however, this recommendation would not require reporting valuation of the assets, even by categories, if the value exceeds \$1,000. Valuation of assets can be a major problem. Pieces of real property that have not been sold in many years, shares of stock in a family corporation, and the like, are often impossible to value precisely. Even the category of value into which they fall may be unclear if the categories are drawn as narrowly as they are under the present act. Further, once a conflict-creating interest exists, the conflict is not technically of greater or lesser magnitude depending on the size of the interest. All that is left is a general curiosity about the extent of public personalities' wealth.<sup>94</sup>

The identity and value of liabilities are also appropriate for disclosure. Incentives for wrongdoing are not always created by the desire to get rich. Financial pressures can also be caused by a debt burden which is too large to carry on a government salary. Indeed, the real criticism of the present act on this point is that the threshold is too high. If each asset worth over \$1,000 must be reported, reporting of debts should not begin at \$10,000. A reduction of the debt threshold to the same \$1,000 figure as for assets would give a more accurate sense of the financial picture of the reporting official. The suggested exemption of routine personal debts which present little possibility

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92. Instruction I.A. to Schedule B of Form SF 278 (the current financial reporting instrument) so provides today.

93. In state laws which require disclosure by judges, the typical triggering amounts are \$1,000 or a 10% interest in the enterprise. Rosenbaum & Lubet, *Financial Disclosure by Judges: Functional Analysis and Critique*, 40 U. FLA. L. REV. 241, 284-87 (1988).

94. A contrary view was taken by Ann McBride of Common Cause in an Administrative Conference working conference on ethics issues in March 1988. McBride argued that valuations are necessary in order to determine the likely relative importance to the official of particular investments in his or her portfolio. ADMINISTRATIVE CONFERENCE OF THE UNITED STATES, SOURCEBOOK OF GOVERNMENT ETHICS FOR PRESIDENTIAL APPOINTEES 32 (Dec., 1988) (statements of Ann McBride).

for conflict will minimize intrusiveness and simplify the task of both the reporting and reviewing officials.

The recommendation that an official report all gifts over \$100, all entertainment over \$250 per event, and reimbursements over \$250 per event represent somewhat higher figures than in the present law in order to avoid situations where ordinary hospitality might be just below or just above reporting requirements. The basic obligation, however, is clear, easily applied, and its purpose is self-explanatory.

### RECOMMENDATION THREE

A. The requirements of the Ethics in Government Act should continue to be enforced, in the first instance, by the agencies' designated ethics officers, the Office of Government Ethics, and the relevant Senate committees in confirmation proceedings. Ultimate enforcement authority of the Attorney General, however, should be retained.

B. In addition, a system of periodic random audits should be created to verify compliance with disclosure requirements and the avoidance of conflicts of interest.

Public financial disclosure plays an important part in allowing the monitoring of official conduct. Moreover, reducing some of the scope and content of that disclosure as suggested in this report should eliminate much of the intrusiveness that leads to objections of some officials to public disclosure today.

In the first instance, the reports should be made to the agencies' designated ethics officers, the Office of Government Ethics, and the relevant Senate committee in a confirmation proceeding. The Attorney General should have the right and duty to prosecute knowing omissions or failures to file, but presumably those should be rare.<sup>95</sup>

There is, however, a schizophrenia reflected in the present financial disclosure provisions of the Ethics in Government Act. Officials are required to supply large amounts of very detailed information on an annual basis, but after initial confirmation, little effort is made either to verify its accuracy or its completeness. Nor is significant attention directed at any continuing assessment of the conflict of interest implications of what officials have reported.

Random audits of such forms might do much to cause the requirements of disclosure to be taken seriously. The audit need not be intrusive. In the first

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95. See generally GENERAL ACCOUNTING OFFICE, ETHICS ENFORCEMENT: PROCESS BY WHICH CONFLICTS OF INTEREST ALLEGATIONS ARE INVESTIGATED AND RESOLVED (1987); GENERAL ACCOUNTING OFFICE, ETHICS ENFORCEMENT: RESULTS OF CONFLICT OF INTEREST INVESTIGATIONS (1988).

instance, it could take the form of requesting the official's income tax form for the year in question and comparing the information with that in the disclosure form. As for assets that are not directly reported on a tax form, the income from the assets would be shown. If there were income reported for which no reported assets corresponded, for example, a problem may be present.

A second line of inquiry might be a financial statement filed by the official with a bank in order to get a home mortgage. Again, the effort would be to determine the consistency of the statements. An official committing fraud in all of his or her activities might escape detection, but errors would be caught and care would be encouraged.

The audits should be done by the Office of Government Ethics, i.e., someone outside the official's own agency. Doing as few as 10% of the reports each year, selected at random, would seem likely to accomplish the deterrence objective. Clearly, if willful non-disclosure is discovered or if remedial steps need to be taken to avoid conflicts, the procedures currently in the Act should be followed.

Given the number of officials involved and the potential intrusiveness of trying to verify the absence of hidden assets, a lack of perfect enforcement is inevitable. An effort to move in the direction of verification, however, not in the direction of more disclosure, would be a far better investment of effort and resources.

## V. FINANCIAL DISCLOSURE FOR REASONS OTHER THAN MONITORING

Financial disclosure gets out of hand when its secondary or enforcement purpose is confused with a primary purpose, i.e., when disclosure is thought to be valuable in its own right. While the argument is rarely articulated, it seems to be that people who are candid about their financial affairs will be candid in discharge of their public responsibilities. Indeed, it is seemingly implied that they will then also be people of good judgement, empathy, and social concern. Stating the arguments in this way suggests their inherent weakness, but a brief look at current and proposed requirements which perform no monitoring function will illustrate how requirements can proliferate.

### A. PERSONS REQUIRED TO MAKE DISCLOSURE

At least three groups of people are required to make financial disclosure today when the reasons for their being required to do so are obscure.

Candidates for president and vice president, for example, are required to make financial disclosure.<sup>96</sup> Disclosure of their personal finances might sat-

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96. 5 U.S.C. app. § 201(c) (1982).



isfy public curiosity, but it would serve no other function. Concern about disclosure by major party candidates should not be great; they will be forced to make "voluntary" disclosure by the news media anyway, and if there is anything to report, the other party will likely raise what news organizations miss. The burden which financial reporting places on the largely symbolic candidacies of minor party candidates, however, should not be overlooked. Disclosure of assets and organizational leadership positions may burden the freedom of association of such candidates and their supporters. Elimination of the financial reporting requirement for presidential and vice presidential candidates would deny the public no essential information while removing a non-trivial burden on persons with every right to propose their name for office.

Special government employees represent a second category of persons who are presently required to make financial disclosure if they work over 60 days in a year.<sup>97</sup> They should be required to disclose only if their particular responsibilities are sufficiently sensitive that a specific requirement is imposed by the Office of Government Ethics. Special government employees present unusual problems because by definition they work part-time. Thus, they are more likely to be engaged in private activities which present potential conflicts. They also, however, have less reason to provide the government with their expertise and intrusive reporting runs a substantial risk of discouraging important part-time service. A case-by-case approach, focused on the potential for conflict of interest presented by the combination of the particular individual and the specific position, seems the best way to balance these concerns.

Finally, designated agency ethics officials seem to be required to report solely out of a concern that ethics officials also be seen as ethical as well. No one can argue with the spirit of that objective, but symbolism should not supercede the principle that there should be a reason for concern that an official has the opportunity for self-dealing that the financial disclosure provisions can help monitor. Individual designated agency ethics officials, virtually all of whom have other responsibilities in the agency as well, should not be reached by the Act unless the other role which they have would justify coverage by virtue of its grade or responsibilities.

#### B. WHAT SHOULD BE REQUIRED TO BE DISCLOSED?

Here again, the information required from reporting officials should be limited to that which may reveal the existence of a prohibited conflict, not

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97. 5 U.S.C. app. § 201(h) (1982). The Director of the Office of Government Ethics may grant a waiver to such persons if (1) they will work no more than 130 days in the year, and (2) it is unlikely that the employment of the individual will result in a conflict of interest. *Id.* § 210(i).

information which primarily appeals to the curiosity of citizens. Further, only information that can be supplied clearly and accurately should be required.

President Bush's original proposal that officials report the exact value of their individual assets was particularly unfortunate under these standards.<sup>98</sup> An official who has \$1,500 worth of a stock faces as clear a conflict of interest as she would if the stock were valued at \$15,000. Some broad categories may be appropriate to reveal extremely large holdings, but even rounding to the nearest \$1,000 demands much greater specificity than is required to serve any public purpose.

Further, the problem with providing exact valuations of many assets has already been discussed.<sup>99</sup> Saying that "good faith" estimates will be permitted does not avoid the problem. Ethics compliance is often fought out in the newspapers rather than the courts. If an outside appraiser comes up with a different valuation on an official's home than appeared on the disclosure form, for example, "good faith" will be a legal defense but not a safe harbor. A person who is concerned about taking a government position anyway is likely to think much harder about doing so if the ethics law does not make compliance turn on clearer categories and concepts than "good faith" estimates of specific value.

Reporting the exact value of gifts and reimbursements raises the same kinds of questions of valuation. Here the concern about bribery is real, but, for example, it would be hard to know the exact value of a weekend at a friend's home at the beach. The fact of such gifts in kind should be reported (although a *de minimis* amount should be recognized), and a general description of the gifts, but requiring even estimates of their dollar value is both difficult and largely unrelated to the nature of the relationship which raises ethical concerns.

Next, reporting the official's home mortgage liability is likewise unlikely to serve more than the interest of voyeurs. While the home mortgage is often a large liability, the financial disclosure form should not be used to let the public play amateur financial planner for public officials. The fact that the official has substantial equity, or does not, should not affect the public's business. One might have special rules for officials whose responsibilities involved supervision of lending institutions, or special rules if the lender is an individual with whom the official has official business dealings. Apart from those special cases, however, more disclosure is not necessarily better than less.

Likewise, routine disclosure of debts owed to family members would ordi-

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98. *Supra* note 74, at § 202(a)(3).

99. *See supra* text accompanying note 99.

narily serve no public purpose. Even excluding loans from the official's closest relatives, the fact that the official borrowed the down payment on her home from her great aunt is not the public's business. Again, one should have special rules if the great aunt is a government contractor, for example, but that is not the nature of the President's proposal, and this is another case where more information does not necessarily mean higher ethical standards.

Finally, reporting the income received by the official from assets that are already reported is excessive.<sup>100</sup> The income figure does not add to the stock of information about the official's potential conflicts. This requirement, as well, could be removed without loss of the ability to enforce the underlying ethics laws.

### CONCLUSION

No one could seriously propose today that public interest in the ethics of government officials be reduced. The concern is deep, pervasive, and appropriate. In that context, public financial disclosure has come to play an important role in identifying and deterring officials' self-dealing. Between the minimum regulation one could defend, and the maximum regulation one could imagine, however, there exists a wide range for judgment. Regulation seems to increase because policy makers seem to believe that one cannot be criticized for being "tougher" or "more ethically sensitive" than one's political opponents.

In reality, however, more financial disclosure will not necessarily lead to higher ethical standards than somewhat less disclosure will. This article has tried to make suggestions for statutory revisions based on the principle that financial disclosure should support primary ethics objectives rather than being a primary objective itself.

If the law can be tailored (1) to reach only officials whose responsibilities present a significant possibility of conflict of interest, (2) to ask for no more information than is necessary to reveal such conflicts, and (3) to provide a system by which reports can be randomly audited so as to assure their accuracy and completeness, the system of financial reporting can serve the purpose for which it was intended without imposing excessive costs on potential officials and ultimately the public.

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100. 5 U.S.C. app. § 202(a)(1)(B).

