H.R. 3452, PRESIDENTIAL AND EXECUTIVE OFFICE ACCOUNTABILITY ACT

HEARING

BEFORE THE

SUBCOMMITTEE ON GOVERNMENT MANAGEMENT, INFORMATION, AND TECHNOLOGY

OF THE

COMMITTEE ON GOVERNMENT REFORM AND OVERSIGHT

HOUSE OF REPRESENTATIVES

ONE HUNDRED FOURTH CONGRESS

SECOND SESSION

ON

H.R. 3452

TO MAKE CERTAIN LAWS APPLICABLE TO THE EXECUTIVE OFFICE OF THE PRESIDENT, AND FOR OTHER PURPOSES

JUNE 25, 1996

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

U.S. GOVERNMENT PRINTING OFFICE

44–004 WASHINGTON : 1997

For sale by the U.S. Government Printing Office
Superintendent of Documents, Congressional Sales Office, Washington, DC 20402
ISBN 0-16-055838-7

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H.R. 3452, PRESIDENTIAL AND EXECUTIVE OFFICE ACCOUNTABILITY ACT

TUESDAY, JUNE 25, 1996

HOUSE OF REPRESENTATIVES,
SUBCOMMITTEE ON GOVERNMENT MANAGEMENT,
INFORMATION, AND TECHNOLOGY,
COMMITTEE ON GOVERNMENT REFORM AND OVERSIGHT,
Washington, DC.

The subcommittee met, pursuant to notice, at 10:10 a.m., in room 2154, Rayburn House Office Building, Hon. Stephen Horn (chairman of the subcommittee) presiding.

Present: Representatives Horn, Davis, Fox, Tate, Maloney, and Peterson.

Also present: Representative Mica.

Staff present: Russell George, staff director and counsel; Anna Miller and Mark Uncapher, professional staff members; Erik Anderson, clerk; Bruce Gwinn, senior minority policy analyst; and Mark Stephenson, Liza Mientus, and Matthew Pinkus, minority professional staff members.

Mr. HORN. Good morning. The Government Management, Information, and Technology Subcommittee will come to order.

In the Federalist Papers No. 57, James Madison stated that, "one of the strongest bonds by which human policy can connect the rulers and the people" and restrain the rulers from "oppressive measures" is that "they can make no law which will not have its full operation on themselves and their friends, as well as in the great mass of society." In that light, today we will review the provisions in H.R. 3452, the Presidential and Executive Office Accountability Act, which, if enacted, would require the application of certain civil rights, labor, and employment laws on the White House; laws which are currently imposed on the private sector and Congress.

This legislative proposal is based on the Congressional Accountability Act of 1995, whose author is with us today, Mr. Shays of Connecticut, (Public Law 104–1), which took 11 civil rights, labor, and workplace laws and applied them to Congress.

It includes provisions to provide for a chief financial officer within the White House, and makes future employment laws applicable to the White House. The bill also would amend the Congressional Accountability Act to permit awards of punitive damages in certain discrimination cases where they are available to private sector employees.

Today, we will hear testimony in support of H.R. 3452 from our distinguished colleagues as well as members of the Government Reform and Oversight Committee and various witnesses, Mr. Mica

of Florida, the author of the current bill, and Mr. Shays of Connecticut, the author of the congressional bill.

Mr. Mica, chairman of the Subcommittee on Civil Service, introduced H.R. 3452, and Mr. Shays, chairman of the Subcommittee on Human Resources and Intergovernmental Relations, is a cosponsor of H.R. 3452, as am I.

We will hear the opinions of a panel of experts. The panel includes a former official of the White House, Greg Walden; Deanna Gelak, chair of the Congressional Coverage Coalition and Director of Congressional Affairs, Society for Human Resource Management; and Sandy Boyd, assistant general counsel, Labor Policy Association.

Our final witness is the Director of the Office of Administration in the White House, Franklin S. Reeder, whose office administers all matters relating to personnel and financial management within the Executive Office of the President.

We thank you all for joining us. We look forward to having your testimony.

[The text of H.R. 3452 follows:]

I

104TH CONGRESS
2D SESSION

H. R. 3452

To make certain laws applicable to the Executive Office of the President, and for other purposes.

IN THE HOUSE OF REPRESENTATIVES

MAY 14, 1996

Mr. MICA (for himself, Mr. CLINGER, Mr. HORN, Mr. BACHUS, Mrs. SEASTRAND, Mr. SOLOMON, Mr. NORWOOD, Mr. WELDON of Florida, Mr. KINGSTON, Mr. HAYWORTH, Mr. BURR, Mr. ENSIGN, Mr. SAM JOHNSON of Texas, Mr. DUNCAN, Mr. GILMAN, Mr. BASS, Ms. GREENE of Utah, Mr. KOLBE, Mr. WAMP, Mr. ZELIFF, Mr. INGLIS of South Carolina, Mr. HOSTETTLER, Mr. LAHOOD, Mr. CHAMBLISS, Mrs. KELLY, Mr. ENGLISH of Pennsylvania, Mr. SCHIFF, Mr. MCCOLLUM, Mr. COX of California, Mr. CHRYSLER, Mr. CHRISTENSEN, Mr. LAZIO of New York, Mr. FORBES, Mr. LEWIS of Kentucky, Mr. COBLE, Mr. MILLER of Florida, Mr. SAXTON, Mr. BARTON of Texas, Ms. PRYCE, Mr. RIGGS, Mr. POMBO, Mr. COLLINS of Georgia, Mr. EVERETT, Mr. DOOLITTLE, Mr. LIGHTFOOT, Mr. EHLERS, Mr. TALENT, Mr. SKEEN, Mr. WATTS of Oklahoma, Mr. CASTLE, Mr. DREIER, Mr. HASTERT, Mr. EMERSON, Mr. SMITH of Michigan, Mr. UPTON, Mr. DEAL of Georgia, Mr. CALVERT, Mr. LIVINGSTON, Mr. TORKILDSEN, Mr. MCCRERY, Mr. TATE, Mr. HOKE, Mr. HAYES, Mr. FUNDERBURK, Mr. COOLEY of Oregon, Mr. BARTLETT of Maryland, Mr. CRAPO, Mr. CAMPBELL, Mr. MANZULLO, Mr. HASTINGS of Washington, Mr. DORNAN, Mr. JONES, Mr. PORTMAN, Mr. FAWELL, Mr. BURTON of Indiana, Mr. ROBERTS, Mr. SANFORD, Mr. TIAHRT, Mr. MCINTOSH, Mr. SHADEGG, Mr. HEINEMAN, Mr. BROWNBACK, Mr. ROHRABACHER, Mr. BRYANT of Tennessee, Mr. LARGENT, Mr. SOUDER, Mr. DAVIS, Mr. ROTH, Mr. TAUZIN, Mr. GRAHAM, Mr. BAKER of California, Mr. NETHERCUTT, Mr. MCDADE, Mrs. MEYERS of Kansas, Mr. FOX of Pennsylvania, Mrs. JOHNSON of Connecticut, Mr. NEUMANN, Mr. KIM, Mr. FOLEY, Mr. ALLARD, Mr. HERGER, Mr. STEARNS, Mr. LIPINSKI, Mr. SCHAEFER, Mr. DIAZ-BALART, Mr. SHAYS, and Mr. TAYLOR of North Carolina) introduced the following bill; which was referred to the Committee on Government Reform and Oversight, and in addition to the Committees on Economic and Educational Opportunities, the Judiciary, and Veterans' Affairs, for a period to be subsequently determined by the

Speaker, in each case for consideration of such provisions as fall within the jurisdiction of the committee concerned

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A BILL

To make certain laws applicable to the Executive Office of the President, 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 **SECTION 1. SHORT TITLE AND TABLE OF CONTENTS.**
4 (a) SHORT TITLE.—This Act may be cited as the
5 "Presidential and Executive Office Accountability Act".
6 (b) TABLE OF CONTENTS.—The table of contents for
7 this Act is as follows:

Sec. 1. Short title and table of contents.
Sec. 2. Extension of certain rights and protections to presidential offices.
Sec. 3. Financial officers within the Executive Office of the President.
Sec. 4. Amendment to definition of "special government employee".
Sec. 5. Applicability of future employment laws.
Sec. 6. Amendments to the Congressional Accountability Act of 1995.
Sec. 7. Repeal of section 320 of the Government Employee Rights Act of 1991.

8 **SEC. 2. EXTENSION OF CERTAIN RIGHTS AND PROTEC-**
9 **TIONS TO PRESIDENTIAL OFFICES.**
10 (a) IN GENERAL.—Title 3, United States Code, is
11 amended by adding at the end the following:
12 **"CHAPTER 5—EXTENSION OF CERTAIN**
13 **RIGHTS AND PROTECTIONS TO PRESI-**
14 **DENTIAL OFFICES**

"SUBCHAPTER I—GENERAL PROVISIONS

"Sec. 401. Definitions.

"Sec. 402. Application of laws.

"SUBCHAPTER II—EXTENSION OF RIGHTS AND PROTECTIONS

"PART A—EMPLOYMENT DISCRIMINATION, FAMILY AND MEDICAL LEAVE, FAIR LABOR STANDARDS, EMPLOYEE POLYGRAPH PROTECTION, WORKER ADJUSTMENT AND RETRAINING, EMPLOYMENT AND REEMPLOYMENT OF VETERANS, AND INTIMIDATION

"Sec. 411. Rights and protections under title VII of the Civil Rights Act of 1964, the Age Discrimination in Employment Act of 1967, the Rehabilitation Act of 1973, and title I of the Americans with Disabilities Act of 1990.
"Sec. 412. Rights and protections under the Family and Medical Leave Act of 1993.
"Sec. 413. Rights and protections under the Fair Labor Standards Act of 1938.
"Sec. 414. Rights and protections under the Employee Polygraph Protection Act of 1988.
"Sec. 415. Rights and protections under the Worker Adjustment and Retraining Notification Act.
"Sec. 416. Rights and protections relating to veterans' employment and reemployment.
"Sec. 417. Prohibition of intimidation or reprisal.

"PART B—PUBLIC ACCESS PROVISIONS UNDER THE AMERICANS WITH DISABILITIES ACT OF 1990

"Sec. 420. Rights and protections under the Americans with Disabilities Act of 1990.

"PART C—OCCUPATIONAL SAFETY AND HEALTH ACT OF 1970

"Sec. 425. Rights and protections under the Occupational Safety and Health Act of 1970; procedures for remedy of violations.

"PART D—LABOR-MANAGEMENT RELATIONS

"Sec. 430. Application of chapter 71 of title 5, relating to Federal service labor-management relations; procedures for remedy of violations.

"PART E—GENERAL

"Sec. 435. Generally applicable remedies and limitations.

"SUBCHAPTER III—ADMINISTRATIVE AND JUDICIAL DISPUTE-RESOLUTION PROCEDURES

"Sec. 451. Procedure for consideration of alleged violations.
"Sec. 452. Counseling and mediation.
"Sec. 453. Election of proceeding.
"Sec. 454. Appropriate agencies.
"Sec. 455. Judicial review.
"Sec. 456. Civil action.
"Sec. 457. Judicial review of regulations.
"Sec. 458. Other judicial review prohibited.
"Sec. 459. Effect of failure to issue regulations.

"Sec. 460. Expedited review of certain appeals.
"Sec. 461. Payments.
"Sec. 462. Confidentiality.
"Sec. 463. Definitions.

"SUBCHAPTER IV—EFFECTIVE DATE

"Sec. 471. Effective date.

1 **"Subchapter I—General Provisions**

2 **"SEC. 401. DEFINITIONS.**

3 "Except as otherwise specifically provided in this
4 chapter, as used in this chapter:

5 "(1) BOARD.—The term 'Board' means the
6 Merit Systems Protection Board under chapter 12 of
7 title 5.

8 "(2) COVERED EMPLOYEE.—The term 'covered
9 employee' means any employee of an employing of-
10 fice.

11 "(3) EMPLOYEE.—The term 'employee' includes
12 an applicant for employment and a former employee.

13 "(4) EMPLOYING OFFICE.—The term 'employ-
14 ing office' means—

15 "(A) each office, agency, or other compo-
16 nent of the Executive Office of the President;

17 "(B) the Executive Residence at the White
18 House; and

19 "(C) the official residence (temporary or
20 otherwise) of the Vice President.

1 **"SEC. 402. APPLICATION OF LAWS.**

2 "The following laws shall apply, as prescribed by this
3 chapter, to all employing offices (including employing of-
4 fices within the meaning of section 411, to the extent pre-
5 scribed therein):

6 "(1) The Fair Labor Standards Act of 1938.

7 "(2) Title VII of the Civil Rights Act of 1964.

8 "(3) The Americans with Disabilities Act of
9 1990.

10 "(4) The Age Discrimination in Employment
11 Act of 1967.

12 "(5) The Family and Medical Leave Act of
13 1993.

14 "(6) The Occupational Safety and Health Act
15 of 1970.

16 "(7) Chapter 71 (relating to Federal service
17 labor-management relations) of title 5.

18 "(8) The Employee Polygraph Protection Act of
19 1988.

20 "(9) The Worker Adjustment and Retraining
21 Notification Act.

22 "(10) The Rehabilitation Act of 1973.

23 "(11) Chapter 43 (relating to veterans' employ-
24 ment and reemployment) of title 38.

1 "Subchapter II—Extension of Rights and
2 Protections

3 "PART A—EMPLOYMENT DISCRIMINATION, FAM-
4 ILY AND MEDICAL LEAVE, FAIR LABOR
5 STANDARDS, EMPLOYEE POLYGRAPH PRO-
6 TECTION, WORKER ADJUSTMENT AND RE-
7 TRAINING, EMPLOYMENT AND REEMPLOY-
8 MENT OF VETERANS, AND INTIMIDATION

9 "SEC. 411. RIGHTS AND PROTECTIONS UNDER TITLE VII OF
10 THE CIVIL RIGHTS ACT OF 1964, THE AGE DIS-
11 CRIMINATION IN EMPLOYMENT ACT OF 1967,
12 THE REHABILITATION ACT OF 1973, AND
13 TITLE I OF THE AMERICANS WITH DISABIL-
14 ITIES ACT OF 1990.

15 "(a) DISCRIMINATORY PRACTICES PROHIBITED.—All
16 personnel actions affecting covered employees shall be
17 made free from any discrimination based on—
18 "(1) race, color, religion, sex, or national origin,
19 within the meaning of section 703 of the Civil
20 Rights Act of 1964;
21 "(2) age, within the meaning of section 15 of
22 the Age Discrimination in Employment Act of 1967;
23 or
24 "(3) disability, within the meaning of section
25 501 of the Rehabilitation Act of 1973 and sections

1 102 through 104 of the Americans with Disabilities
2 Act of 1990.
3 "(b) REMEDY.—
4 "(1) CIVIL RIGHTS.—The remedy for a viola-
5 tion of subsection (a)(1) shall be—
6 "(A) such remedy as would be appropriate
7 if awarded under section 706(g) of the Civil
8 Rights Act of 1964; and
9 "(B) such compensatory or punitive dam-
10 ages as would be appropriate if awarded under
11 section 1977 of the Revised Statutes, or as
12 would be appropriate if awarded under sections
13 1977A(a)(1), 1977A(b)(2), and, irrespective of
14 the size of the employing office,
15 1977A(b)(3)(D) of the Revised Statutes.
16 "(2) AGE DISCRIMINATION.—The remedy for a
17 violation of subsection (a)(2) shall be—
18 "(A) such remedy as would be appropriate
19 if awarded under section 15(c) of the Age Dis-
20 crimination in Employment Act of 1967; and
21 "(B) such liquidated damages as would be
22 appropriate if awarded under section 7(b) of
23 such Act.
24 In addition, the waiver provisions of section 7(f) of
25 such Act shall apply to covered employees.

1 "(3) DISABILITIES DISCRIMINATION.—The rem-
2 edy for a violation of subsection (a)(3) shall be—
3 "(A) such remedy as would be appropriate
4 if awarded under section 505(a)(1) of the Reha-
5 bilitation Act of 1973 or section 107(a) of the
6 Americans with Disabilities Act of 1990; and
7 "(B) such compensatory or punitive dam-
8 ages as would be appropriate if awarded under
9 sections 1977A(a)(2), 1977A(a)(3),
10 1977A(b)(2), and, irrespective of the size of the
11 employing office, 1977A(b)(3)(D) of the Re-
12 vised Statutes.
13 "(c) DEFINITIONS.—Except as otherwise specifically
14 provided in this section, as used in this section:
15 "(1) COVERED EMPLOYEE.—The term 'covered
16 employee' means any employee of a unit of the exec-
17 utive branch, including the Executive Office of the
18 President, whether appointed by the President or by
19 any other appointing authority in the executive
20 branch, who is not otherwise entitled to bring an ac-
21 tion under any of the statutes referred to in sub-
22 section (a), but does not include any individual—
23 "(A) whose appointment is made by and
24 with the advice and consent of the Senate;

1 "(B) who is appointed to an advisory com-
2 mittee, as defined in section 3(2) of the Federal
3 Advisory Committee Act; or
4 "(C) who is a member of the uniformed
5 services.
6 "(2) EMPLOYING OFFICE.—The term 'employ-
7 ing office', with respect to a covered employee,
8 means the office, agency, or other entity in which
9 the covered employee is employed (or sought employ-
10 ment or was employed in the case of an applicant or
11 former employee, respectively).
12 "(d) APPLICABILITY.—Subsections (a) through (c),
13 and section 417 (to the extent that it relates to any matter
14 under this section), shall apply with respect to violations
15 occurring on or after the effective date of this chapter.
16 **"SEC. 412. RIGHTS AND PROTECTIONS UNDER THE FAMILY**
17 **AND MEDICAL LEAVE ACT OF 1993.**
18 "(a) FAMILY AND MEDICAL LEAVE RIGHTS AND
19 PROTECTIONS PROVIDED.—
20 "(1) IN GENERAL.—The rights and protections
21 established by sections 101 through 105 of the Fam-
22 ily and Medical Leave Act of 1993 shall apply to
23 covered employees.
24 "(2) DEFINITIONS.—For purposes of the appli-
25 cation described in paragraph (1)—

1 "(A) the term 'employer' as used in the
2 Family and Medical Leave Act of 1993 means
3 any employing office; and
4 "(B) the term 'eligible employee' as used
5 in the Family and Medical Leave Act of 1993
6 means a covered employee who has been em-
7 ployed in any employing office for 12 months
8 and for at least 1,250 hours of employment
9 during the previous 12 months.
10 "(b) REMEDY.—The remedy for a violation of sub-
11 section (a) shall be such remedy, including liquidated dam-
12 ages, as would be appropriate if awarded under paragraph
13 (1) of section 107(a) of the Family and Medical Leave
14 Act of 1993.

15 **"SEC. 413. RIGHTS AND PROTECTIONS UNDER THE FAIR**
16 **LABOR STANDARDS ACT OF 1938.**

17 "(a) FAIR LABOR STANDARDS.—
18 "(1) IN GENERAL.—The rights and protections
19 established by subsections (a)(1) and (d) of section
20 6, section 7, and section 12(c) of the Fair Labor
21 Standards Act of 1938 shall apply to covered em-
22 ployees.
23 "(2) INTERNS.—For the purposes of this sec-
24 tion, the term 'covered employee' does not include an
25 intern as defined in regulations under subsection (c).

1 "(3) COMPENSATORY TIME.—Except as pro-
2 vided in regulations under subsection (c)(3), covered
3 employees may not receive compensatory time in lieu
4 of overtime compensation.
5 "(b) REMEDY.—The remedy for a violation of sub-
6 section (a) shall be such remedy, including liquidated dam-
7 ages, as would be appropriate if awarded under section
8 16(b) of the Fair Labor Standards Act of 1938.
9 "(c) REGULATIONS TO IMPLEMENT SECTION.—
10 "(1) IN GENERAL.—The President shall issue
11 regulations to implement this section.
12 "(2) AGENCY REGULATIONS.—Except as pro-
13 vided in paragraph (3), the regulations issued under
14 paragraph (1) shall be the same as substantive regu-
15 lations promulgated by the Secretary of Labor to
16 implement the statutory provisions referred to in
17 subsection (a) except insofar as the President may
18 determine, for good cause shown and stated together
19 with the regulation, that a modification of such reg-
20 ulations would be more effective for the implementa-
21 tion of the rights and protections under this section.
22 "(3) IRREGULAR WORK SCHEDULES.—The
23 President shall issue regulations for covered employ-
24 ees whose work schedules directly depend on the
25 schedule of the President or the Vice President that

1 shall be comparable to the provisions in the Fair
2 Labor Standards Act of 1938 that apply to employ-
3 ees who have irregular work schedules.

4 **"SEC. 414. RIGHTS AND PROTECTIONS UNDER THE EM-**
5 **PLOYEE POLYGRAPH PROTECTION ACT OF**
6 **1988.**

7 "(a) POLYGRAPH PRACTICES PROHIBITED.—No em-
8 ploying office may require a covered employee to take a
9 lie detector test where such a test would be prohibited if
10 required by an employer under paragraph (1), (2), or (3)
11 of section 3 of the Employee Polygraph Protection Act of
12 1988. In addition, the waiver provisions of section 6(d)
13 of such Act shall apply to covered employees.

14 "(b) REMEDY.—The remedy for a violation of sub-
15 section (a) shall be such remedy as would be appropriate
16 if awarded under section 6(c)(1) of the Employee Poly-
17 graph Protection Act of 1988.

18 "(c) REGULATIONS TO IMPLEMENT SECTION.—

19 "(1) IN GENERAL.—The President shall issue
20 regulations to implement this section.

21 "(2) AGENCY REGULATIONS.—The regulations
22 issued under paragraph (1) shall be the same as
23 substantive regulations promulgated by the Sec-
24 retary of Labor to implement the statutory provi-
25 sions referred to in subsections (a) and (b) except

1 insofar as the President may determine, for good
2 cause shown and stated together with the regulation,
3 that a modification of such regulations would be
4 more effective for the implementation of the rights
5 and protections under this section.

6 **"SEC. 415. RIGHTS AND PROTECTIONS UNDER THE WORK-**
7 **ER ADJUSTMENT AND RETRAINING NOTIFI-**
8 **CATION ACT.**

9 "(a) WORKER ADJUSTMENT AND RETRAINING NOTI-
10 FICATION RIGHTS.—

11 "(1) IN GENERAL.—Except as provided in para-
12 graph (2), no employing office shall be closed or
13 mass layoff ordered within the meaning of section 3
14 of the Worker Adjustment and Retraining Notifica-
15 tion Act until the end of a 60-day period after the
16 employing office serves written notice of such pro-
17 spective closing or layoff to representatives of cov-
18 ered employees or, if there are no representatives, to
19 covered employees.

20 "(2) EXCEPTION.—

21 "(A) IN GENERAL.—In the event that a
22 President (hereinafter in this paragraph re-
23 ferred to as the 'previous President') does not
24 succeed himself in office as a result of the elec-
25 tion of a new President, no notice or waiting

1 period shall be required under paragraph (1)
2 with respect to the separation of any individual
3 described in subparagraph (B), if such separa-
4 tion occurs pursuant to a closure or mass layoff
5 ordered after the term of the new President
6 commences.
7 "(B) DESCRIPTION OF INDIVIDUALS.—An
8 individual described in this subparagraph is any
9 covered employee serving pursuant to an ap-
10 pointment made during—
11 "(i) the term of office of the previous
12 President; or
13 "(ii) any term, earlier than the term
14 referred to in clause (i), during which such
15 previous President served as President or
16 Vice President.
17 "(b) REMEDY.—The remedy for a violation of sub-
18 section (a) shall be such remedy as would be appropriate
19 if awarded under paragraphs (1), (2), and (4) of section
20 5(a) of the Worker Adjustment and Retraining Notifica-
21 tion Act.
22 "(c) REGULATIONS TO IMPLEMENT SECTION.—
23 "(1) IN GENERAL.—The President shall issue
24 regulations to implement this section.

1 "(2) AGENCY REGULATIONS.—The regulations
2 issued under paragraph (1) shall be the same as
3 substantive regulations promulgated by the Sec-
4 retary of Labor to implement the statutory provi-
5 sions referred to in subsection (a) except insofar as
6 the President may determine, for good cause shown
7 and stated together with the regulation, that a modi-
8 fication of such regulations would be more effective
9 for the implementation of the rights and protections
10 under this section.

11 **"SEC. 416. RIGHTS AND PROTECTIONS RELATING TO VET-**
12 **ERANS' EMPLOYMENT AND REEMPLOYMENT.**

13 "(a) EMPLOYMENT AND REEMPLOYMENT RIGHTS OF
14 MEMBERS OF THE UNIFORMED SERVICES.—
15 "(1) IN GENERAL.—It shall be unlawful for an
16 employing office to—
17 "(A) discriminate, within the meaning of
18 subsections (a) and (b) of section 4311 of title
19 38, against an eligible employee;
20 "(B) deny to an eligible employee reem-
21 ployment rights within the meaning of sections
22 4312 and 4313 of title 38; or
23 "(C) deny to an eligible employee benefits
24 within the meaning of sections 4316, 4317, and
25 4318 of title 38.

1 "(2) DEFINITION.—For purposes of this sec-
2 tion, the term 'eligible employee' means a covered
3 employee performing service in the uniformed serv-
4 ices, within the meaning of section 4303(13) of title
5 38, whose service has not been terminated upon the
6 occurrence of any of the events enumerated in sec-
7 tion 4304 of such title.
8 "(b) REMEDY.—The remedy for a violation of sub-
9 section (a) shall be such remedy as would be appropriate
10 if awarded under paragraphs (1), (2)(A), and (3) of sec-
11 tion 4323(c) of title 38.
12 "(c) REGULATIONS TO IMPLEMENT SECTION.—
13 "(1) IN GENERAL.—The President shall issue
14 regulations to implement this section.
15 "(2) AGENCY REGULATIONS.—The regulations
16 issued under paragraph (1) shall be the same as
17 substantive regulations promulgated by the Sec-
18 retary of Labor to implement the statutory provi-
19 sions referred to in subsection (a) except to the ex-
20 tent that the President may determine, for good
21 cause shown and stated together with the regulation,
22 that a modification of such regulations would be
23 more effective for the implementation of the rights
24 and protections under this section.

1 **"SEC. 417. PROHIBITION OF INTIMIDATION OR REPRISAL.**

2 "(a) IN GENERAL.—It shall be unlawful for an em-
3 ploying office to intimidate, take reprisal against, or other-
4 wise discriminate against, any covered employee because
5 the covered employee has opposed any practice made un-
6 lawful by this chapter, or because the covered employee
7 has initiated proceedings, made a charge, or testified, as-
8 sisted, or participated in any manner in a hearing or other
9 proceeding under this chapter.

10 "(b) REMEDY.—A violation of subsection (a) may be
11 remedied by any legal or equitable remedy available to re-
12 dress the practice opposed by the covered employee or
13 other violation of law as to which the covered employee
14 initiated proceedings, made a charge, or engaged in other
15 conduct protected under subsection (a).

16 "(c) DEFINITIONS.—For purposes of applying this
17 section with respect to any practice or other matter to
18 which section 411 relates, the terms 'employing office' and
19 'covered employee' shall each be considered to have the
20 meaning given to it by such section.

21 **"PART B—PUBLIC ACCESS PROVISIONS UNDER**
22 **THE AMERICANS WITH DISABILITIES ACT OF 1990**

23 **"SEC. 420. RIGHTS AND PROTECTIONS UNDER THE AMERI-**
24 **CANS WITH DISABILITIES ACT OF 1990.**

25 "(a) RIGHTS AND PROTECTIONS.—The rights and
26 protections against discrimination in the provision of pub-

1 lic services and accommodations established by sections
2 201, 202, and 204, and sections 302, 303, and 309, of
3 the Americans with Disabilities Act of 1990 shall apply,
4 to the extent that public services, programs, or activities
5 are provided, with respect to the White House and its ap-
6 purtenant grounds and gardens, the Old Executive Office
7 Building, the New Executive Office Buildings, and any
8 other facility to the extent that offices are provided for
9 employees of the Executive Office of the President.
10 "(b) REMEDY.—The remedy for a violation of sub-
11 section (a) shall be such remedy as would be appropriate
12 if awarded under section 203 or 308 of the Americans
13 with Disabilities Act of 1990, as the case may be, except
14 that, with respect to any claim of employment discrimina-
15 tion, the exclusive remedy shall be under section 411 of
16 this title. A remedy under the preceding sentence shall be
17 enforced in accordance with applicable provisions of such
18 section 203 or 308, as the case may be.
19 "(c) DEFINITION.—For purposes of the application
20 under this section of the Americans with Disabilities Act
21 of 1990, the term 'public entity' as used in such Act,
22 means, to the extent that public services, programs, or ac-
23 tivities are provided, the White House and its appurtenant
24 grounds and gardens, the Old Executive Office Building,
25 the New Executive Office Buildings, and any other facility

1 to the extent that offices are provided for employees of
2 the Executive Office of the President.

3 **"PART C—OCCUPATIONAL SAFETY AND HEALTH**
4 **ACT OF 1970**

5 **"SEC. 425. RIGHTS AND PROTECTIONS UNDER THE OCCU-**
6 **PATIONAL SAFETY AND HEALTH ACT OF 1970;**
7 **PROCEDURES FOR REMEDY OF VIOLATIONS.**

8 "(a) OCCUPATIONAL SAFETY AND HEALTH PROTEC-
9 TIONS.—
10 "(1) IN GENERAL.—Each employing office and
11 each covered employee shall comply with the provi-
12 sions of section 5 of the Occupational Safety and
13 Health Act of 1970.
14 "(2) DEFINITIONS.—For purposes of the appli-
15 cation under this section of the Occupational Safety
16 and Health Act of 1970—
17 "(A) the term 'employer' as used in such
18 Act means an employing office; and
19 "(B) the term 'employee' as used in such
20 Act means a covered employee.
21 "(b) REMEDY.—The remedy for a violation of sub-
22 section (a) shall be an order to correct the violation, in-
23 cluding such order as would be appropriate if issued under
24 section 13(a) of the Occupational Safety and Health Act
25 of 1970.

1 "(c) PROCEDURES.—

2 "(1) REQUESTS FOR INSPECTIONS.—Upon writ-
3 ten request of any employing office or covered em-
4 ployee, the Secretary of Labor shall have the author-
5 ity to inspect and investigate places of employment
6 under the jurisdiction of employing offices in accord-
7 ance with subsections (a), (d), (e), and (f) of section
8 8 of the Occupational Safety and Health Act of
9 1970.

10 "(2) CITATIONS, NOTICES, AND NOTIFICA-
11 TIONS.—The Secretary of Labor shall have the au-
12 thority, in accordance with sections 9 and 10 of the
13 Occupational Safety and Health Act of 1970, to
14 issue—

15 "(A) a citation or notice to any employing
16 office responsible for correcting a violation of
17 subsection (a); or

18 "(B) a notification to any employing office
19 that the Secretary of Labor believes has failed
20 to correct a violation for which a citation has
21 been issued within the period permitted for its
22 correction.

23 "(3) HEARINGS AND REVIEW.—If after issuing
24 a citation or notification, the Secretary of Labor de-
25 termines that a violation has not been corrected—

1 "(A) the citation and notification shall be
2 deemed a final order (within the meaning of
3 section 10(b) of the Occupational Safety and
4 Health Act of 1970, if the employer fails to no-
5 tify the Secretary of Labor within 15 days (ex-
6 cluding Saturdays, Sundays, and Federal holi-
7 days) after receipt of the notice that he intends
8 to contest the citation or notification; or
9 "(B) opportunity for a hearing before the
10 Occupational Safety and Health Review Com-
11 mission shall be afforded in accordance with
12 section 10(c) of the Occupational Safety and
13 Health Act of 1970, if the employer gives time-
14 ly notice to the Secretary that he intends to
15 contest the citation or notification.
16 "(4) VARIANCE PROCEDURES.—An employing
17 office may request from the Secretary of Labor an
18 order granting a variance from a standard made ap-
19 plicable by this section, in accordance with sections
20 6(b)(6) and 6(d) of the Occupational Safety and
21 Health Act of 1970.
22 "(5) JUDICIAL REVIEW.—Any person or em-
23 ploying office aggrieved by a final decision of the Oc-
24 cupational Safety and Health Review Commission
25 under paragraph (3) or the Secretary of Labor

1 under (4) may file a petition for review with the
2 United States Court of Appeals for the Federal Cir-
3 cuit pursuant to section 455.

4 "(6) COMPLIANCE DATE.—If new appropriated
5 funds are necessary to correct a violation of sub-
6 section (a) for which a citation is issued, or to com-
7 ply with an order requiring correction of such a vio-
8 lation, correction or compliance shall take place as
9 soon as possible, but not later than the end of the
10 fiscal year following the fiscal year in which the cita-
11 tion is issued or the order requiring correction be-
12 comes final and not subject to further review.

13 "(d) REGULATIONS TO IMPLEMENT SECTION.—

14 "(1) IN GENERAL.—The President shall issue
15 regulations to implement this section.

16 "(2) AGENCY REGULATIONS.—The regulations
17 issued under paragraph (1) shall be the same as
18 substantive regulations promulgated by the Sec-
19 retary of Labor to implement the statutory provi-
20 sions referred to in subsection (a) except to the ex-
21 tent that the President may determine, for good
22 cause shown and stated together with the regulation,
23 that a modification of such regulations would be
24 more effective for the implementation of the rights
25 and protections under this section.

1 "(3) EMPLOYING OFFICE RESPONSIBLE FOR
2 CORRECTION.—The regulations issued under para-
3 graph (1) shall include a method of identifying, for
4 purposes of this section and for different categories
5 of violations of subsection (a), the employing office
6 responsible for correction of a particular violation.

7 **"PART D—LABOR-MANAGEMENT RELATIONS**

8 **"SEC. 430. APPLICATION OF CHAPTER 71 OF TITLE 5, RE-**
9 **LATING TO FEDERAL SERVICE LABOR-MAN-**
10 **AGEMENT RELATIONS; PROCEDURES FOR**
11 **REMEDY OF VIOLATIONS.**

12 "(a) LABOR-MANAGEMENT RIGHTS.—Chapter 71 of
13 title 5 shall apply to employing offices and to covered em-
14 ployees and representatives of those employees.

15 "(b) DEFINITION.—For purposes of the application
16 under this section of chapter 71 of title 5, the term 'agen-
17 cy' as used in such chapter means an employing office.

18 **"PART E—GENERAL**

19 **"SEC. 435. GENERALLY APPLICABLE REMEDIES AND LIMI-**
20 **TATIONS.**

21 "(a) ATTORNEY'S FEES.—If a covered employee,
22 with respect to any claim under this chapter, or a qualified
23 person with a disability, with respect to any claim under
24 section 420, is a prevailing party in any proceeding under
25 section 453(1), 455, or 456, the administrative agency or

1 court, as the case may be, may award attorney's fees, ex-
2 pert fees, and any other costs as would be appropriate if
3 awarded under section 706(k) of the Civil Rights Act of
4 1964.

5 "(b) INTEREST.—In any proceeding under section
6 453(1), 455, or 456, the same interest to compensate for
7 delay in payment shall be made available as would be ap-
8 propriate if awarded under section 717(d) of the Civil
9 Rights Act of 1964.

10 "(c) CIVIL PENALTIES AND PUNITIVE DAMAGES.—
11 Except as otherwise provided in this chapter, no civil pen-
12 alty or punitive damages may be awarded with respect to
13 any claim under this chapter.

14 "(d) EXCLUSIVE PROCEDURE.—

15 "(1) IN GENERAL.—Except as provided in para-
16 graph (2), no person may commence an administra-
17 tive or judicial proceeding to seek a remedy for the
18 rights and protections afforded by this chapter ex-
19 cept as provided in this chapter.

20 "(2) VETERANS.—A covered employee under
21 section 416 may also utilize any provisions of chap-
22 ter 43 of title 38 that are applicable to that em-
23 ployee.

24 "(e) SCOPE OF REMEDY.—Only a covered employee
25 who has undertaken and completed the procedures de-

1 scribed in section 452 may be granted a remedy under
2 part A of this subchapter.
3 "(f) CONSTRUCTION.—
4 "(1) DEFINITIONS AND EXEMPTIONS.—Except
5 where inconsistent with definitions and exemptions
6 provided in this chapter, the definitions and exemp-
7 tions in the laws made applicable by this chapter
8 shall apply under this chapter.
9 "(2) SIZE LIMITATIONS.—Notwithstanding
10 paragraph (1), provisions in the laws made applica-
11 ble under this chapter (other than paragraphs (2)
12 and (3) of section 2(a) of the Worker Adjustment
13 and Retraining Notification Act) determining cov-
14 erage based on size, whether expressed in terms of
15 numbers of employees, amount of business trans-
16 acted, or other measure, shall not apply in determin-
17 ing coverage under this chapter.
18 "(g) DEFINITIONS RELATING TO SECTION 411.—For
19 purposes of applying this section with respect to any prac-
20 tice or other matter to which section 411 relates, the terms
21 'employing office' and 'covered employee' shall each be
22 considered to have the meaning given to it by such section.

1 **"Subchapter III—Administrative and Judicial**
2 **Dispute-Resolution Procedures**

3 **"SEC. 451. PROCEDURE FOR CONSIDERATION OF ALLEGED**
4 **VIOLATIONS.**

5 "The procedure for consideration of alleged violations
6 of part A of subchapter II consists of—
7 "(1) counseling and mediation as provided in
8 section 452; and
9 "(2) election, as provided in section 453, of ei-
10 ther—
11 "(A) an administrative proceeding as pro-
12 vided in section 453(1) and judicial review as
13 provided in section 455; or
14 "(B) a civil action in a district court of the
15 United States as provided in section 456.

16 **"SEC. 452. COUNSELING AND MEDIATION.**

17 "(a) IN GENERAL.—The President shall by regula-
18 tion establish procedures substantially similar to those
19 under sections 402 and 403 of the Congressional Account-
20 ability Act of 1995 for the counseling and mediation of
21 alleged violations of a law made applicable under part A
22 of subchapter II.
23 "(b) EXHAUSTION REQUIREMENT.—A covered em-
24 ployee who has not exhausted counseling and mediation
25 under subsection (a) shall be ineligible to make any elec-

1 tion under section 453 or otherwise pursue any further
2 form of relief under this subchapter.

3 **"SEC. 453. ELECTION OF PROCEEDING.**

4 "Not later than 90 days after a covered employee re-
5 ceives notice of the end of the period of mediation, but
6 no sooner than 30 days after receipt of such notification,
7 such covered employee may either—

8 "(1) file a complaint with the appropriate ad-
9 ministrative agency, as determined under section
10 454; or

11 "(2) file a civil action in accordance with sec-
12 tion 456 in the United States district court for the
13 district in which the employee is employed or for the
14 District of Columbia.

15 **"SEC. 454. APPROPRIATE AGENCIES.**

16 "(a) IN GENERAL.—Except as provided in subsection
17 (b), the appropriate agency under this section with respect
18 to an alleged violation of part A of subchapter II shall
19 be the Board.

20 "(b) EXCEPTIONS.—

21 "(1) DISCRIMINATION.—For purposes of any
22 action arising under section 411 (or any action al-
23 leging intimidation, reprisal, or discrimination under
24 section 417 relating to any practice made unlawful
25 under section 411), the appropriate agency shall be

1 the Equal Employment Opportunity Commission,
2 and the complaint in any such action shall be proc-
3 essed under the same administrative procedures as
4 any such complaint filed by any other Federal em-
5 ployee.

6 "(2) MIXED CASES.—However, in the case of
7 any covered employee (within the meaning of section
8 411(c)(1)) who has been affected by an action which
9 an employee of an executive agency may appeal to
10 the Board and who alleges that a basis for the ac-
11 tion was discrimination prohibited by section 411 (or
12 any action alleging intimidation, reprisal, or dis-
13 crimination under section 417 relating to any prac-
14 tice made unlawful under section 411), the initial
15 appropriate agency shall be the Board, and such
16 matter shall thereafter be processed in accordance
17 with section 7702 (a)–(d) (disregarding paragraph
18 (2) of such subsection (a)) and (f) of title 5.

19 "(3) JUDICIAL REVIEW.—Notwithstanding any
20 other provision of law (including any provision of
21 law referenced in paragraph (1) or (2)), judicial re-
22 view of any administrative decision under this sub-
23 section shall be by the court specified in section 455.

1 **"SEC. 455. JUDICIAL REVIEW.**

2 "(a) IN GENERAL.—The United States Court of Ap-
3 peals for the Federal Circuit shall have jurisdiction over
4 a petition for review of a final decision under this chapter
5 of—

6 "(1) an appropriate agency (as determined
7 under section 454);

8 "(2) the Federal Labor Relations Authority
9 under chapter 71 of title 5, notwithstanding section
10 7123 of such title; or

11 "(3) the Secretary of Labor or the Occupational
12 Safety and Health Review Commission, made under
13 part C of subchapter II.

14 "(b) FILING DEADLINE.—Any petition for review
15 under this section must be filed within 30 days after the
16 date the petitioner receives notice of the final decision.

17 **"SEC. 456. CIVIL ACTION.**

18 "(a) JURISDICTION.—The district courts of the
19 United States shall have jurisdiction over any civil action
20 commenced under section 453(2) and this section by a
21 covered employee.

22 "(b) PARTIES.—The defendant shall be the employ-
23 ing office alleged to have committed the violation, or in
24 which the violation is alleged to have occurred.

25 "(c) JURY TRIAL.—Any party may demand a jury
26 trial where a jury trial would be available in an action

1 against a private defendant under the relevant law made
2 applicable by this chapter. In any case in which a violation
3 of section 411 is alleged, the court shall not inform the
4 jury of the maximum amount of compensatory damages
5 available under section 411(b)(1) or 411(b)(3).

6 **"SEC. 457. JUDICIAL REVIEW OF REGULATIONS.**

7 "In any proceeding brought under section 455 or 456
8 in which the application of a regulation issued under this
9 chapter is at issue, the court may review the validity of
10 the regulation in accordance with the provisions of sub-
11 paragraphs (A) through (D) of section 706(2) of title 5.
12 If the court determines that the regulation is invalid, the
13 court shall apply, to the extent necessary and appropriate,
14 the most relevant substantive executive agency regulation
15 promulgated to implement the statutory provisions with
16 respect to which the invalid regulation was issued. Except
17 as provided in this section, the validity of regulations is-
18 sued under this chapter is not subject to judicial review.

19 **"SEC. 458. OTHER JUDICIAL REVIEW PROHIBITED.**

20 "Except as expressly authorized by this chapter, the
21 compliance or noncompliance with the provisions of this
22 chapter and any action taken pursuant to this chapter
23 shall not be subject to judicial review.

1 **"SEC. 459. EFFECT OF FAILURE TO ISSUE REGULATIONS.**

2 "In any proceeding under section 453(1), 455, or
3 456, if the President has not issued a regulation on a mat-
4 ter for which this chapter requires a regulation to be is-
5 sued, the administrative agency or court, as the case may
6 be, shall apply, to the extent necessary and appropriate,
7 the most relevant substantive executive agency regulation
8 promulgated to implement the statutory provision at issue
9 in the proceeding.

10 **"SEC. 460. EXPEDITED REVIEW OF CERTAIN APPEALS.**

11 "(a) IN GENERAL.—An appeal may be taken directly
12 to the Supreme Court of the United States from any inter-
13 locutory or final judgment, decree, or order of a court
14 upon the constitutionality of any provision of this chapter.

15 "(b) JURISDICTION.—The Supreme Court shall, if it
16 has not previously ruled on the question, accept jurisdic-
17 tion over the appeal referred to in subsection (a), advance
18 the appeal on the docket, and expedite the appeal to the
19 greatest extent possible.

20 **"SEC. 461. PAYMENTS.**

21 "A judgment, award, or compromise settlement
22 against the United States under this chapter (including
23 any interest and costs) shall be paid—

24 "(1) under section 1304 of title 31, if it arises
25 out of an action commenced in a district court of the
26 United States (or any appeal therefrom); or

1 "(2) out of amounts otherwise appropriated or
2 available to such office, if it arises out of an admin-
3 istrative proceeding under this chapter (or any ap-
4 peal therefrom).

5 **"SEC. 462. CONFIDENTIALITY.**

6 "(a) COUNSELING.—All counseling under section 452
7 shall be strictly confidential, except that, with the consent
8 of the covered employee, the employing office may be noti-
9 fied.

10 "(b) MEDIATION.—All mediation under section 452
11 shall be strictly confidential.

12 **"SEC. 463. DEFINITIONS.**

13 "For purposes of applying this subchapter, the terms
14 'employing office' and 'covered employee' shall each, to the
15 extent that section 411 is involved, be considered to have
16 the meaning given to it by such section.

17 **"Subchapter IV—Effective Date**

18 **"SEC. 471. EFFECTIVE DATE.**

19 "This chapter shall take effect 1 year after the date
20 of the enactment of the Presidential and Executive Office
21 Accountability Act.".

22 (b) REGULATIONS.—Appropriate measures shall be
23 taken to ensure that any regulations needed to implement
24 chapter 5 of title 3, United States Code, as amended by

1 this section, shall be in effect by the effective date of such
2 chapter.
3 (c) TECHNICAL AMENDMENT.—The table of chapters
4 for title 3, United States Code, is amended by adding at
5 the end the following:

"5. Extension of Certain Rights and Protections to Presidential Offices.".

6 **SEC. 3. FINANCIAL OFFICERS WITHIN THE EXECUTIVE OF-**
7 **FICE OF THE PRESIDENT.**

8 (a) CHIEF FINANCIAL OFFICER.—Section 901 of
9 title 31, United States Code, is amended by adding at the
10 end the following:
11 "(c)(1) There shall be within the Executive Office of
12 the President a Chief Financial Officer, who shall be ap-
13 pointed by the President from among individuals meeting
14 the standards described in subsection (a)(3).
15 "(2) The Chief Financial Officer under this sub-
16 section shall have the same authority and shall perform
17 the same functions as apply in the case of a Chief Finan-
18 cial Officer under section 902.
19 "(3) The Director of the Office of Management and
20 Budget shall prescribe any regulations which may be nec-
21 essary to ensure that, for purposes of implementing para-
22 graph (2), the Executive Office of the President shall, to
23 the extent practicable and appropriate, be treated (includ-
24 ing for purposes of financial statements under section

1 3515) in the same way as an agency described in sub-
2 section (b).".
3 (b) DEPUTY CHIEF FINANCIAL OFFICER.—Section
4 903 of title 31, United States Code, is amended by adding
5 at the end the following:
6 "(c)(1) There shall be within the Executive Office of
7 the President a Deputy Chief Financial Officer, who, not-
8 withstanding any provision of subsection (b), shall be ap-
9 pointed by the President from among individuals meeting
10 the standards described in section 901(a)(3).
11 "(2) The Deputy Chief Financial Officer under this
12 subsection shall have the same authority and shall perform
13 the same functions as apply in the case of the Deputy
14 Chief Financial Officer of an agency described in sub-
15 section (b).".
16 (c) TECHNICAL AND CONFORMING AMENDMENTS.—
17 (1) TITLE 31, UNITED STATES CODE.—Section
18 503(a) of title 31, United States Code, is amend-
19 ed—
20 (A) in paragraph (7) by striking "respec-
21 tively." and inserting "respectively (excluding
22 any officer appointed under section 901(c) or
23 903(c)).''; and
24 (B) in paragraph (8) by striking "Offi-
25 cers." and inserting "Officers (excluding any

1 officer appointed under section 901(c) or
2 903(c)).".
3 (2) DESIGNATION OF AGENCY HEAD.—The
4 President shall designate an employee of the Execu-
5 tive Office of the President (other than the Chief Fi-
6 nancial Officer or Deputy Chief Financial Officer
7 appointed under the amendments made by sub-
8 sections (a) and (b), respectively), who shall be
9 deemed "the head of the agency" for purposes of
10 carrying out section 902 of title 31, United States
11 Code, with respect to the Executive Office of the
12 President.

13 **SEC. 4. AMENDMENT TO DEFINITION OF "SPECIAL GOV-**
14 **ERNMENT EMPLOYEE".**

15 (a) IN GENERAL.—Section 202 of title 18, United
16 States Code, is amended by adding at the end the follow-
17 ing:
18 "(e) For purposes of the first sentence of subsection
19 (a), an individual shall be considered 'retained, designated,
20 appointed, or employed' by the Executive Office of the
21 President if such individual—
22 "(1) is retained, designated, appointed, or em-
23 ployed by the President or the Vice President, or
24 any other authorized individual (including the spouse
25 of the President or the Vice President), to provide

1 advice, counsel, or recommendations to employees of
2 the Executive Office of the President; and
3 "(2)(A) is furnished the use (exclusive or other-
4 wise) of an office or equipment at Government ex-
5 pense;
6 "(B) owns at least 10 percent of the outstand-
7 ing capital stock of a corporation, or an equivalent
8 interest in any other entity, that such individual
9 knows or reasonably should know is doing business
10 or attempting to do business with the United States
11 Government;
12 "(C) is a lobbyist, within the meaning of section
13 3(10) of the Lobbying Disclosure Act of 1995; or
14 "(D) provides advice, counsel, or recommenda-
15 tions on any of the following:
16 "(i) Personnel, organization, or reorganiza-
17 tion of the Executive Office of the President.
18 "(ii) The contracting or privatization of
19 any function of the United States Government.
20 "(iii) Contracts to provide goods or serv-
21 ices to the United States Government.
22 "(iv) Congressional hearings or proceed-
23 ings.".

1 **SEC. 5. APPLICABILITY OF FUTURE EMPLOYMENT LAWS.**

2 Each Federal law governing employment in the pri-
3 vate sector, enacted later than 12 months after the date
4 of the enactment of this Act, shall be deemed to apply
5 with respect to "employing offices" and "covered employ-
6 ees" (within the meaning of section 401 of title 3, United
7 States Code, as amended by this Act), unless such law
8 specifically provides otherwise and expressly cites this sec-
9 tion.

10 **SEC. 6. AMENDMENTS TO THE CONGRESSIONAL ACCOUNT-**
11 **ABILITY ACT OF 1995.**

12 (a) IN GENERAL.—The Congressional Accountability
13 Act of 1995 (Public Law 104–1; 2 U.S.C. 1301 et seq.)
14 is amended—
15 (1) in paragraphs (1)(B) and (3)(B) of section
16 201(b) by inserting "or punitive" after "compen-
17 satory"; and
18 (2) in section 225(c) by striking "No" and in-
19 serting "Except as expressly provided in this Act,
20 no".
21 (b) EFFECTIVE DATE.—This section shall take effect
22 1 year after the date of the enactment of this Act, and
23 the amendments made by this section shall apply with re-
24 spect to actions brought on or after the effective date of
25 this section.

1 **SEC. 7. REPEAL OF SECTION 320 OF THE GOVERNMENT EM-**
2 **PLOYEE RIGHTS ACT OF 1991.**

3 (a) IN GENERAL.—Section 320 of the Government
4 Employee Rights Act of 1991 is repealed.

5 (b) EFFECTIVE DATE.—This section shall take effect
6 1 year after the date of the enactment of this Act.

7 (c) SAVINGS PROVISION.—The repeal under this sec-
8 tion shall not affect proceedings in which the complaint
9 was filed before the effective date of this section, and or-
10 ders shall be issued in such proceedings and appeals shall
11 be taken therefrom as if this section had not been enacted.

○

Mr. HORN. And now, gentlemen, I will begin either way you would like it, Mr. Shays or Mr. Mica. It is Mr. Mica's bill, so I am delighted to start with you, and both of you are welcome to join us after you testify.

STATEMENTS OF HON. JOHN L. MICA, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF FLORIDA; AND HON. CHRISTOPHER SHAYS, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF CONNECTICUT

Mr. MICA. Mr. Chairman, I would like to thank you for the opportunity to testify before your subcommittee this morning. I made a commitment to be here this morning, Mr. Chairman, and we had a discussion about my ability to return, but I want you to know I survived driving through hailstorms. I spent a total of 8 hours over the last 48 hours in airports. I dodged a tornado. I survived three canceled airline flights, spent a night in a hotel in an airport, and, Mr. Chairman, I am here this morning, and I want you to know when I give my word, I keep my word, and nothing would keep me away.

Mr. HORN. You are a gentleman and a distinguished colleague, and, of course, I had some bait for you to get here, and they aren't here.

Mr. MICA. If Mr. Shays had attempted to go first after what I had been through, I would have punched him out. Nothing will keep me from this opportunity. And the airplane flight I finally got into Baltimore last night I wish I hadn't been on, Mr. Chairman, but I am here, and let me tell you——

Mr. SHAYS. Is his time up?

Mr. MICA. I haven't started yet, I hope.

Mr. HORN. Never use the clock on Members.

Mr. MICA. Mr. Chairman, I certainly do appreciate the opportunity to appear before your subcommittee in support of the Presidential and Executive Office Accountability Act, a bill that I introduced on May 14, 1996.

I introduced this bill because I, like many Americans, had become concerned about recent management problems at the White House, which even to the casual observer, the White House was unrefined and their operation lacked accountability, and the White House operates without responsibility to the laws that apply to the rest of us.

My bill will address three major areas of concern. The first concern is that the Executive Office of the President is not subject to the same employment laws that cover private businesses and now the Congress. Second, it would create a chief financial officer to improve financial management at the White House. Third, it would clarify the definition of special Government employee with respect to Presidential advisers and their work with the President. I will discuss each of these areas in turn.

This Congress took a historic step during its first 100 days when it made itself live under the same laws that had been imposed on the private sector. Now I feel it is time we close the loop by putting the White House under these same laws. It is time that we end what I term the last plantation where the wages and working conditions of many employees remain unaffected by Federal employ-

ment laws. When this is done, the political components of Government will be required to wrestle with the same knotty problems that private businesses face every day. The President and the White House will face compliance with the same laws and edicts that are imposed on all Americans.

The Presidential and Executive Accountability Act applies the following laws to the White House: The Fair Labor Standards Act, title VII of the Civil Rights Act of 1964, the Americans With Disabilities Act of 1990, the Age Discrimination and Employment Act of 1967, the Rehabilitation Act of 1973, the Family and Medical Leave Act of 1993, the Occupational Safety and Health Act of 1970, chapter 71 of title 5 regulating Federal labor-management relations, the Employee Polygraph Protection Act of 1988, the Worker Adjustment and Retraining Notification Act, and chapter 43 of title 38 regulating veterans' employment and reemployment rights.

Mr. Chairman, let's look first just a moment at the oldest of these statutes, the Fair Labor Standards Act. At the White House there are hundreds of unpaid volunteers performing work for the President. These range from advance people to workers in the Correspondence Office. Today, a "mom and pop" business is subject to the Fair Labor Standards Act and would violate the minimum wage law if they accepted free volunteer work. Today the Congress is also subject to all aspects of the Fair Labor Standards Act, and I believe it is time that the White House is made to feel the pain that some of our laws inflict on the public.

Yesterday, Mr. Chairman, President Clinton spoke of the importance of the Fair Labor Standards Act and Family and Medical Leave Act, and I think if you pick up today's paper and yesterday's paper, the President is talking about the Fair Labor Standards Act, then expansion of the Family and Medical Leave Act. Isn't it ironic that the first does not even apply to many at the White House, and the second only applies to policy? So we see these two laws that the President is out campaigning about expanding their provisions to the private sector do not even apply to the White House.

This bill also establishes effective redress systems for White House employees who believe their rights under any of these laws have been violated. For most of these laws, the bill follows the model adopted in the Congressional Accountability Act. Under that procedure, following a mandatory period of counseling and mediation, the employee may choose between either an administrative remedy with judicial review by the U.S. Court of Appeals for the Federal Circuit or a judicial remedy before the appropriate U.S. district court. The administrative remedy will be an appeal to the Merit Systems Protection Board or, in some discrimination cases, the Equal Employment Opportunity Commission.

The Federal Labor Relations Authority will administer labor-management relations at the White House. The Occupational Safety and Health Act will be administered by the Secretary of Labor and the Occupational Safety and Health Review Commission, just as it is in the private sector.

The remedies available to the White House employees who prevail will be the same as are now available to their private sector counterparts, or in the case of a violation of the Federal Labor Relations Act, their colleagues in executive agencies.

Under this bill, our proposal, Mr. Chairman, White House and congressional employees who prevail on discrimination claims would also be entitled to punitive damages to the same extent as employees in the private sector. Private employers are already exposed to punitive damages, and it seems unjust to allow the political branches of Government that imposed that liability to find a convenient escape hatch. What is good for the goose, Mr. Chairman, is good for the gander.

Finally, Mr. Chairman, this bill also places the White House under the public access provisions of the Americans With Disabilities Act. The remedies and enforcement procedures would be the same as if the White House were a private entity. And as you know, Mr. Chairman, we have brought the House under some of those rules, and you see going up in the hallways some conveniences for those Americans who do have various disabilities. The White House should do no less than the same.

Let me turn now, Mr. Chairman, to the second objective of this bill: the improvement of financial management at the White House. Through the hearing process during the past year and a half, we have observed that the White House financial operations lack both accountability and structure.

The Travelgate hearings highlighted some of the shortcomings in White House financial responsibility. Mr. Chairman, had there been a chief financial officer at the White House back then, he or she would have routinely reviewed the Travel Office's financial management practices. The chief financial officer would have detected any deficiencies and helped the Travel Office managers correct them. Congress failed the American people by not having adequate financial structures or safeguards in place. White House employees were used as scapegoats because we failed to have reliable management or financial accountability in our Nation's Chief Executive Office.

Likewise, Mr. Chairman, hearings conducted by our Subcommittee on National Security, International Affairs, and Criminal Justice also reveal very serious deficiencies in oversight and accountability at the White House Communications Agency. I sit on that subcommittee. Just in the past few weeks we have heard egregious examples of waste and abuse as a result of an almost total lack of controls in this agency, which is under the operational control of the Executive Office of the President. The accounting controls were so poor, the agency recently had $14.5 million in unvalidated obligations. It has been paying for equipment and services that are no longer necessary. It has been paying for items that were never delivered to the agency, and it has occasionally paid for the same items twice. An audit by the Department of Defense's IG also found that the agency paid only 17 percent of its bills on time, causing taxpayers to pay interest and penalties on the remaining 83 percent. We are fortunate, in fact, Mr. Chairman, that the White House does not have a mortgage because the way it operates, it would have been repossessed some time ago.

Again, Mr. Chairman, these are problems we believe a chief financial officer would have identified and corrected.

I think we can all agree that some strong financial management at the White House is imperative. This bill will achieve that goal.

The third objective and final objective of this bill is to require more public accountability by so-called volunteers who advise the President and employees in the Executive Office of the President. Once again, Mr. Chairman, the Travelgate hearings have revealed why Congress must take immediate action now. The activities of Harry Thomason—and I use this as one example—those hearings revealed that Harry Thomason, a Clinton operative, an unpaid volunteer, had office accommodations, roamed the halls of the White House, participated in meetings with employees of the Executive Office and the President, and attempted to influence policy. In short, he was acting as if he were a White House employee. But he was, in fact, a walking conflict of interest.

Mr. Chairman, evidence from our hearing showed that Mr. Thomason promoted dismissing Travel Office employees and an air charter company when that action could have promoted his own business interests, again a perfect example. Mr. Thomason was a partner in TRM, an enterprise that had unsuccessfully attempted to secure business from the White House and Travel Office. TRM was Thomason, Dan Richland, and Darnell Martens. Thomason, Richland, and Martens, TRM.

However, without an adequate—having an adequate definition of special Government employee, this activity, unacceptable by any standard, was SOP, standard operating procedure, at the White House.

This bill would tighten the definition of special Government employee and stop the parade of lobbyists going through a revolving door at the White House, who, in fact, escape any public accountability. And this is only one example. We don't have time to go into further details.

Mr. Chairman, finally, this bill will make reforms that are long overdue. If I may quote your comments at the press conference we held on this bill, "The Presidential and Executive Office Accountability Act will work to strengthen the American people's faith in their government. As a government 'of the people, by the people, and for the people,' it is incumbent upon the people's elected representatives to ensure that the Federal Government is run in an open and fair manner. The Presidential and Executive Office Accountability Act will do just that." And those are your comments.

I look forward to working with you, Mr. Chairman, other members of the subcommittee, to make this bill the law of the land. I will be happy to answer any questions, and I yield back the balance of my time.

Mr. HORN. The gentleman from Connecticut, Mr. Shays, is recognized.

Mr. SHAYS. Thank you, Chairman Horn, Ranking Member Maloney, and Mr. Peterson. I appreciate the opportunity to testify before you regarding H.R. 3452, the Presidential and Executive Office Accountability Act introduced by my colleague Congressman John Mica of Florida.

I commend Congressman Mica for introducing this important legislation, which would bring certain White House employees under the laws that now govern the private sector and Congress and create a chief financial officer [CFO] for the Executive Office of the President. The bill would also amend the Congressional Account-

ability Act to provide for punitive measures for Members of Congress.

I must say the only criticism I have is one I reserve for myself and my staff. I wish we had thought of this legislation first. My praise goes out to Congressman Mica and his staff for initiating this legislation.

When former Congressman Dick Swett and I introduced the Congressional Accountability Act on the first day of the 103d Congress and began pushing for passage, we laid out three guiding principles: If a law is right for the private sector, it is right for Congress; Congress will write better laws when it has to live by the same laws it imposes on the private sector; and three, the separation of powers embodied in the Constitution must be respected.

These principles are just as true for the White House as they are for the Congress. If a law is right for the private sector, it is right for the White House; the White House will propose and enact better laws when it has to live by the same laws it imposes on the private sector; and third, the separation of powers embodied in the Constitution for the executive branch must be respected.

I believe H.R. 3452 lives up to these three guiding principles.

Congressman Mica's legislation establishes procedures very similar to the Congressional Accountability Act by establishing a four-step process of counseling, mediation, administrative proceeding, and/or judicial review.

H.R. 3452 brings the White House under 11 labor and employment laws from which it is currently exempt and will apply future laws passed by Congress, which is also similar to the congressional accountability bill. Whereas the Congressional Accountability Act established a nonpartisan independent Office of Compliance, H.R. 3452 provides authority to the existing Merit Systems Protection Board, MSPB, to hear cases from White House employees. The MSPB currently has responsibility for hearing and adjudicating appeals by Federal employees of adverse personnel actions and is well suited to take on this responsibility.

Under H.R. 3452 the President would have the authority to establish the regulations implementing the laws. I believe this authority should also be given to the MSPB, and I say that with no disrespect to the President, but believe just as we have our own nonpartisan independent Office of Compliance in the House, the MSPB is well suited to do it for the White House.

It is my understanding the MSPB currently has the authority to review regulations issued by the Office of Personnel Management [OPM] and to require agencies to cease compliance with any regulation that could constitute a prohibited personnel practice. Given that the MSPB also has expertise in this area, it would strengthen the integrity of the process if the authority to establish regulations is given to the MSPB rather than to the President.

I would also like to take this opportunity to address the provisions in this bill that provides for punitive damages for Members of Congress. This was an issue we grappled with during consideration of the Congressional Accountability Act. I believe punitive damages and personal liability, however, should have been part of the act, but neither was included.

Opponents of punitive damages and personal liability argued that such a provision could hold the votes of Members of Congress hostage to blackmail. In addition, there was also concern that Members of Congress face a greater likelihood of politically motivated attacks.

While this issue is worthy of study by this subcommittee, ultimately I believe the words of James Madison continue to hold true for the White House as much as they do for Congress when he wrote in the Federalist Paper No. 57, and you referred to it, Mr. Chairman—I would like to read it again—"I will add as a fifth circumstance in the situation of the House of Representatives, restraining them from oppressive measures, that they can could make no law which will not have its full operation on themselves and their friends, as well as on the great mass of society. This has always been deemed one of the strongest bonds by which human policy can connect the rulers and the people together."

Madison believed no law would be passed and did not fully—that did not fully apply to Congress. As it is now, punitive damages and personal liability exist for employers in the private sector but not Members of Congress. I believe punitive damages and personal liability go hand in hand, and both should be part of the bill when it is sent to the floor of the House for consideration, but I understand this is a very touchy issue.

Mr. Chairman, I appreciate the opportunity to testify before your subcommittee with Mr. Mica, and I also want to thank the administration for being here, and I really think that this is such important legislation that the focus shouldn't be on the abuses because Lord knows there were enough of them in Congress, but the same standard applying to Congress should apply to the White House. We both are involved in making laws, and I think we both should come under the laws we impose on everyone else.

Mr. HORN. I thank the gentleman.

[The prepared statement of Hon. Christopher Shays follows:]

Statement of Congressman Christopher Shays
on
H.R. 3452, the Presidential and Executive Office Accountability Act
before
the Government Management, Information and Technology Subcommittee
of the
House Government Reform Committee

June 25, 1996

Mr. Chairman, members of the subcommittee, I appreciate the opportunity to testify before you regarding H.R. 3452, the Presidential and Executive Office Accountability Act, introduced by Congressman John Mica of Florida.

I commend Congressman Mica for introducing this important legislation, which would bring certain White House employees under the laws that now govern the private sector and Congress, and create a Chief Financial Office (CFO) for the Executive Office of the President. The bill would also amend the Congressional Accountability Act to provide for punitive damages for members of Congress.

I must say the only significant criticism I have is one I reserve for myself and my staff: I wish I had thought of this legislation first! My praise goes out to Congressman Mica and his staff for initiating this legislation.

When former Congressman Dick Swett and I introduced the Congressional Accountability Act on the first day of the 103rd Congress and began pushing for passage, we laid out three guiding principles:

1. If a law is right for the private sector, it is right for Congress;

2. Congress will write better laws when it has to live by the same laws it imposes on the private sector;

3. The separation of powers embodied in the Constitution must be respected.

These principles are just as true for the White House as they are for Congress:

1. If a law is right for the private sector, it is right for the White House;

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I believe H.R. 3452 lives up to these three guiding principles.

Congressman Mica's legislation establishes procedures very similar to the Congressional Accountability Act by establishing a four-step process of counseling, mediation, administrative proceeding and/or judicial review.

H.R. 3452 brings the White House under 11 labor and employment laws from which it is currently exempt and will apply future laws passed by Congress. The 11 laws from which the White House is currently exempt, either fully or partially, are:

1. The Fair Labor Standards Act;
2. The Civil Rights Act of 1964;
3. The Americans With Disabilities Act;
4. The Age Discrimination in Employment Act of 1967;
5. The Family and Medical Leave Act of 1993.
6. The Federal Labor Management Relations Act;
7. The Occupational Safety and Health Act of 1970:
8. The Rehabilitation Act of 1973;
9. The Employee Polygraph Protection Act of 1988.
10. The Worker Adjustment and Retraining Notification Act of 1988
11. The Veterans Reemployment Act

Whereas the Congressional Accountability Act established a nonpartisan independent Office of Compliance, H.R. 3452 provides authority to the existing Merit Systems Protection Board (MSPB) to hear cases from White House employees. The MSPB currently has responsibility for hearing and adjudicating

appeals by Federal employees of adverse personnel actions and is well suited to take on this responsibility.

Under H.R. 3452 the President would have the authority to establish the regulations implementing the laws. I believe this authority should also be given to the MSPB.

It is my understanding the MSPB currently has the authority to review regulations issued by the Office of Personnel Management (OPM) and to require agencies to cease compliance with any regulation that could constitute a prohibited personnel practice. Given that the MSPB already has expertise in this area, it would strengthen the integrity of the process if the authority to establish regulations is given to the MSPB rather than to the President.

I would also like to take this opportunity to address the provision in the bill that provides for punitive damages for members of Congress.

This was an issue we grappled with during consideration of the Congressional Accountability Act. I believe punitive damages and personal liability, however, should have been part of the Act but neither was included.

Opponents of punitive damages and personal liability argued that such a provision could hold the votes of members of Congress hostage to blackmail. In addition, there was also concern members of Congress face a greater likelihood of politically motivated attacks.

While this issue is worthy of study by this subcommittee, ultimately, I believe the words of James Madison continue to hold true for the White House as much as they do for Congress when he wrote in Federalist Paper 57:

> I will add as a fifth circumstance in the situation of the House of Representatives, restraining them from oppressive measures, that they can make no law which will not have its full operation on themselves, and their friends, as well as on the great mass of society. This has always been deemed one of the strongest bonds by which human policy can connect the rulers and the people together.

Madison believed no law would be passed that did not fully apply to Congress. As it is now, punitive damages and personal liability exist for employers in the private sector but not members of Congress.

I believe punitive damages and personal liability go hand-in-hand and both should be part of the bill when it is sent to the floor of the House for consideration.

Mr. Chairman, I appreciate the opportunity to testify before your subcommittee and would be happy to answer any questions you may have.

Mr. HORN. We will now begin the clock at 5 minutes per Member, and we can have a second round if there are a lot of questions left.

Just for the record, let me note that Mr. Mica began his testimony at 10:07, Mrs. Maloney established the quorum at 10:13, Mr. Peterson at 10:20, Mr. Shays began at 10:25, and it is now 10:30.

Now let me ask a few questions here. I also—obviously all of your testimony that was written goes in right after we introduce you, and that is true of all witnesses, but I want two other documents in the record at this point, a letter from the U.S. Office of Government Ethics addressed to myself and Mrs. Maloney, signed by Stephen D. Potts, Director, dated June 24, 1996; a memorandum from the American Law Division of the Congressional Research Service addressed to the committee, dated June 24, 1996, and signed by Diane T. Duffy, the legislative attorney, American Law Division. This gets into the constitutionality issues related to establishing a chief financial officer in the Executive Office of the President. And we also have a memorandum June 21, 1996, from J.R. Shimpansky of the American Law Division, Congressional Research Service, and that is on the proposed Presidential Executive Office Accountability Act going through various aspects on the separation of powers.

[The information referred to follows:]

United States
Office of Government Ethics
1201 New York Avenue, NW., Suite 500
Washington, DC 20005-3917

June 24, 1996

The Honorable Steve Horn
Chairman
Subcommittee on Government Management,
Information and Technology
Committee on Government Reform and Oversight
House of Representatives
Washington, DC 20515

The Honorable Carolyn B. Maloney
Ranking Minority Member
Subcommittee on Government Management,
Information and Technology
Committee on Government Reform and Oversight
House of Representatives
Washington, DC 20515

Dear Chairman Horn and Ms. Maloney:

We understand that your subcommittee will hold a hearing on H.R. 3452, the Presidential and Executive Office Accountability Act. Section 4 of that bill contains an amendment to the definition of "special Government employee" (SGE) in 18 U.S.C. § 202(a). The proposed amendment to the definition of SGE could have an unintended and detrimental effect within the executive branch ethics program. We are therefore asking that the amendment be eliminated from H.R. 3452.

"Special Government employee" is a term that was created in 1962 for purposes of applying the newly recodified criminal conflict of interest statutes to individuals who serve the Government with or without pay on a limited time basis. Since 1962, the term has been used widely in all aspects of the executive branch ethics program. In addition to the criminal conflicts statutes, it is used in the public financial disclosure law, the confidential financial disclosure regulations of the executive branch, the civil ethics statutes of title 5, U.S.C. appendix, and the executive branch administrative standards of conduct. In most of these cases, there is a specific reference to 18 U.S.C. § 202 as the primary source of the term.

The Honorable Steve Horn
The Honorable Carolyn B. Maloney
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The amendment proposed in section 4 of H.R. 3452 would narrow the definition of special Government employee for purposes of those individuals asked to provide services in the Executive Office of the President (EOP). While the lead-in text of proposed subsection (e) is the present definition of an SGE, the text of paragraphs (1) and (2) of subsection (e) qualify that definition of general applicability by adding various conditions. Those conditions focus not only on where services are to be performed, (i.e., the EOP), but also on the private activities or associations of the individuals asked to serve.

We understand that some might view a change in the definition of special Government employee as a way to address concerns about individuals who have provided, or will provide, services to the EOP without compensation. Such concerns can be addressed, however, by ensuring a clearer understanding of what services may be properly requested from private citizens and what ethics considerations apply when those services are provided. A change in the definition of SGE will not ensure that understanding. And, because there is no difference in the application of ethics restrictions to those providing services to the EOP and those providing services elsewhere in the executive branch, we do not believe that a special definition for SGE's serving only in the EOP is appropriate or is justified.[1] Since the Government is concerned about all of its processes, the agency in which these individuals are asked to provide services should make no difference in determining whether there is a conflict of interest. Wherever an individual is providing services, after his official status is determined, his private activities, holdings and associations become primary considerations in how the conflicts laws apply.

We have never believed that a system or practice in any agency should be tolerated that encourages or allows private citizens to direct other Government employees in their official duties, to have access to confidential Government information for personal use, to participate on an advisory committee other than as a publicly recognized representative of a particular sector, and to otherwise direct official policies and the expenditure of official funds, without the application of conflict laws and regulations. We do not support a definitional change targeted at one agency that might provide other agencies with an argument that they have more latitude to allow such a practice to develop. The present Government-wide definition of SGE does not present the opportunity for such latitude.

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[1]Certain Executive orders place higher conduct restrictions upon full time employees serving in the White House office, but do not do so for SGEs.

Given our 17 years experience with the ethics program, we do believe that the definition of SGE in 18 U.S.C. § 202(a) could be amended to be more clear. The amendments we might suggest would focus the definition on the services for which an individual is retained, designated, appointed, or employed. For instance, since the mid-1960's the definition of SGE in 18 U.S.C. § 202(a) has been interpreted not to include individuals who are selected by the Government to serve as "representatives" of particular viewpoints in giving the Government advice on a specific subject. To apply the conflicts provisions to those individuals would impede their ability to provide the very services the Government wishes to receive. From time to time, the Government has an interest in hearing the clearly biased positions of particular groups, and takes into account the biased views that are being given by these "representatives." These "representatives" are "retained, designated or appointed" primarily to serve on advisory groups which by statute or charter require specific representational makeup. Someone not familiar with Government processes and the ethics program might not clearly understand the distinction simply by reading the definition of SGE now in section 202. An amendment clarifying the differences would be helpful. To more fully explain the difference between an SGE and a "representative" we enclose for your reference a published 1982 memorandum from this Office advising agencies of this long held interpretation of section 202. (OGE Advisory Memorandum 82 x 22)

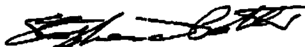
Despite the concerns outlined above, we do not believe the present definition of SGE in 18 U.S.C. is so flawed that it is in need of immediate change. We would like an opportunity to focus carefully on what we believe might be the most efficacious amendments for the entire ethics program. This would take into consideration past interpretative gloss, our practical experiences, and the effect of the elimination by OPM of the practical interpretative provisions of special Government employees that appeared previously in the Federal Personnel Manual (FPM). Provisions in the FPM had provided very useful guidance to agencies regarding such issues as how to count the days when calculating the 130 days of actual service, when to make that determination, and how to document it. We would be happy to work with the Congress on appropriate changes, but because that might take more time than the consideration of other provisions of this bill, we are requesting that the proposed amendment to 18 U.S.C. § 202(a) be eliminated from H.R. 3452. In that way, we could have the time necessary to develop language that is most helpful to the ethics program of the executive branch.

We appreciate this opportunity to provide our views and would ask that this letter be included in the hearing record. The Office

The Honorable Steve Horn
The Honorable Carolyn B. Maloney
Page 4

of Management and Budget advises that there is no objection from the standpoint of the Administration's program to the presentation of this report.

Sincerely,



Stephen D. Potts
Director

Enclosure

Congressional Research Service • The Library of Congress • Washington, D.C. 20540-7000

June 24, 1996

TO : House Committee on Government Reform and Oversight
Attention: Ms. Anna Miller

FROM : American Law Division

SUBJECT : Constitutional Issues Relating to Establishing a Chief Financial Officer in the Executive Office of the President

This memorandum responds to your request concerning a legal analysis of H.R. 3452, 104th Congress, entitled the "Presidential and Executive Office Accountability Act," (the bill) which amends the Chief Financial Officers Act of 1990 (the Act) and establishes a Chief Financial Officer (CFO) in the Executive Office of the President (EOP).[1] The following summarizes the Chief Financial Officers Act; summarizes and discusses the provisions of the bill; and discusses relevant constitutional issues raised by the bill, including whether the bill impermissibly intrudes upon the President's ability to perform his constitutional functions. The following also includes observations concerning the bill and issues which may merit further drafting attention.

Overview: Chief Financial Officers Act

The Chief Financial Officers Act of 1990[2] established a framework for improvement of financial management and operations throughout the government. The Act created a new structure which included a new Deputy Director for Management in the OMB and established a new OMB unit called the Office for Federal Financial Management (OFFM). The Act provided for the appointment or designation of a CFO and Deputy CFO in the major executive

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[1] The Executive Office of the President includes the White House Office, the Office of Management and Budget, the Council of Economic Advisers, the National Security Council, the Office of the U.S. Trade Representative, the Office of Science and Technology Policy, the Office of the National Drug Control Policy, the Office of Administration, and the Office of the Vice President. Government Manual, 1995/96.

[2] 31 U.S.C. §§901-903. The CFO Act was affected by passage of two recent laws in the 103rd Congress, the Government Performance and Results Act and the Government Management Reform Act, Pub. L. No. 103-356, respectively, which expanded and modified reporting requirements for financial statements by agencies, including the CFO agencies.

agencies.[3] The main focus of the Act is the improvement in the management and operation of government-wide financial audits and reporting procedures. The CFO structure is different than the Offices of the Inspector Generals which are watch-dog units charged with detecting and preventing waste, fraud and abuse in government programs and operations.

For the executive departments and several other entities, the Act provides that the CFO shall be appointed by the President, by and with the advice and consent of the Senate, or be designated by the President, in consultation with the head of the agency.[4] For other agencies, e.g., General Services Administration, the CFO is appointed by the agency head.[5] Under current law, CFOs are required to, among other things: (1) report directly to the head of the agency regarding financial matters; (2) oversee all financial management activities relating to programs and operations of the agency; and (3) develop and maintain an integrated agency accounting and financial management system, which complies with applicable accounting principles and policies and requirements prescribed by OMB. CFO programs must (a) provide complete, reliable, consistent and timely information prepared on a uniform basis and which responds to the financial needs of agency management; (b) develop and report on cost information; (c) integrate accounting budget information; and, (d) provide a systematic measurement of performance. CFO's are required to make recommendations to the agency head regarding selection of the Deputy CFO and direct, manage, and provide agency guidance and oversight of agency financial management personnel, activities, and operations, including, among other things, the preparation and annual revision of the agency plan to implement the 5-year financial management plan prepared by the Director of the OMB[6].

Additionally, current law requires that the CFO prepare and transmit an annual report to the agency head and the Director of OMB which includes:

- a description and analysis of the status of financial management at the agency;

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[3] Twenty-four CFOs currently are in place.

[4] This group includes the executive departments and the Environmental Protection Agency and the National Aeronautics and Space Administration. 31 U.S.C. §§901(a)(1) and (b)(2).

[5] This group includes the Agency for International Development, the Federal Emergency Management Agency, the Nuclear Regulatory Commission, the Office of Personnel Management, the Small Business Administration, and the Social Security Administration. 31 U.S.C. §§902(a)(2) and (b)(2).

[6] This subsection also requires the CFO to direct, manage and provide policy guidance and oversight regarding the development of agency budgets; recruit, select, and train personnel to carry out financial activities; approve and manage agency financial systems designs or enhancement projects; implement agency asset management systems including systems for cash management, credit management, debt collection, and property and inventory management and control. 31 U.S.C. §902. The 5-year plan is required under 31 U.S.C. §3512 requires OMB to prepare and submit to Congress a financial management report and a government-wide which covers a 5-year period.

- the annual financial statements prepared under 31 U.S.C. §3515;

- the audit report transmitted to the agency head under 31 U.S.C. §3521(f);

- a summary of reports on internal accounting and administrative control systems submitted to the President and the Congress under amendments made by the Federal Managers' Financial Integrity Act of 1982; and,

- other information the agency head considers appropriate to "fully inform the President and the Congress concerning the financial management of the agency".[7]

Moreover, the CFO must monitor the financial execution of the budget of the agency in relation to actual expenditures, and prepare and submit to the agency head timely performance reports. The CFO must also review on a biennial basis, the fees, royalties, rents and other charges imposed by the agency for services and things of value it provides.

The Act provides the CFO with certain powers so that he may perform his functions. CFOs are authorized to "have access to all records, reports, audits, reviews, documents, papers, recommendations, or other materials which are the property of the agency or which are available to the agency, and which relate to programs and operations with respect to which that agency CFO has responsibilities under this section."[8] However, the CFO may not have greater access to records, materials, other documents of any Inspector General's Office than is provided for under any other law.[9] The CFO may request information or assistance from any federal, state or local government entity. And, to the extent provided for in appropriations, the CFO is authorized to enter into contracts and other arrangements with public agencies and private persons for the preparation of financial statements, studies, analyses, etc.

In 1994, changes in the law significantly extended the requirement for audited financial statements covering *all* accounts to include the CFO agencies.[10] Previously, all agency heads covered under the Act were required to prepare and submit to the OMB audited financial statements for each revolving and trust fund and for accounts which performed substantial commercial functions. As a three-year pilot project, the Act required statements covering all accounts for some of the CFO agencies. In 1994, Congress enacted changes that extended the audited financial statements requirement for all accounts of executive agencies, including the CFO agencies. The new requirements provide that not later than March 1, 1997, and for each year

[7] 31 U.S.C. §902.

[8] 31 U.S.C. §902(b)(1)(A).

[9] 31 U.S.C. §902(b)(2).

[10] 31 U.S.C. §3515.

following, the agency head must submit to the OMB an audited financial statement for the preceding fiscal year, covering all accounts and associated activities of each office, bureau, and activity of the agency. Furthermore, not later than March 31, 1998, the Secretary of the Treasury, in coordination with the OMB, must submit to the President and Congress an audited financial statement covering all executive branch agencies for the preceding fiscal year.

Summary of H.R. 3452, Section 3

In general, H.R. 3452, if enacted, would apply eleven civil rights and labor laws to the EOP. Section 3 of the bill establishes the CFO and Deputy CFO in the EOP. The bill provides further that the EOP CFO shall have the same authority and perform the same functions as CFOs under 31 U.S.C. §902. The bill provides that the President would designate an employee of the EOP, other than the CFO or Deputy CFO, to serve as the "head of the agency" for carrying out the purposes under 31 U.S.C. §902. Regarding appointment of the EOP CFO, the bill provides that the CFO would be appointed by the President from among individuals meeting the standards in §901(a)(3), that is individuals that possess demonstrated ability in general management of, and knowledge of and extensive practical experience in financial management practices in large governmental or business entities. Thus it appears that the appointment of the EOP CFO would not require a Senate role or consultation with the agency head, who in this case would be the President's designee. The bill provides that the President shall appoint a Deputy CFO who has the same powers and functions as currently established Deputy CFOs.

With respect to the performance of the EOP CFO's functions, the bill provides that the Director of OMB shall prescribe regulations which are necessary to ensure that for the purposes of implementing the EOP CFO provisions, that the EOP shall "*to the extent practicable and appropriate*, be treated (including for purposes of financial statements under section 3515) in the same way as" other CFOs.[11] This section appears to provide the Director of OMB considerable discretion in his rulemaking authority to develop and promulgate regulations that, ostensibly, should include special provisions reflecting the unique functions of the EOP. Although the bill does not provide express or detailed guidance for the Director, presumably these regulations would take into serious consideration the sensitive functions of the President and his officers and employees in the White House, the Council of Economic Advisers, the National Security Council, the Office of the U.S. Trade Representative, the EOP Office of Administration, the Office of the Vice President and other offices within the EOP.

Under the technical and conforming amendments section of the bill, several important provisions are found. The bill would amend 31 U.S.C. §§501(a)(7) and (a)(8) which set out the specific functions of the Deputy Director for Management at OMB regarding CFOs. Specifically, the bill would *remove* the application of two subsections to the new CFO and Deputy CFO of the EOP:

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[11]H.R. 3452, §3(a); emphasis added.

the Deputy Director for Management/OMB (1) would *not* develop and maintain qualification standards for the CFO and Deputy CFO of the EOP and (2) would *not* provide advice to the agency head with respect to the selection of the EOP CFO or Deputy CFO. Thus, it appears that the other functions of the Deputy Director for Management/OMB remain applicable to the EOP CFO and Deputy CFO, several of which are summarized as follows:

- provide overall direction and leadership to the executive branch on financial matters;
- review agency budget requests for financial management systems;
- review and recommend to the Director changes to the budget and legislative proposals of agencies to ensure they are in accordance with financial plans of the OMB;
- monitor the financial execution of the budget;
- oversee, and periodically review, and make recommendations to the agency heads on administrative structure with respect to financial management activities.[12]

Discussion of legal issues

Questions are raised concerning whether the establishment of an EOP CFO would interfere impermissibly with the performance of the President's constitutional functions.[13] The concept of protecting the President's ability to effectively perform his functions is founded in the separation of powers doctrine. By establishing three branches of government, a system of checks and balances was created to ensure the proper functioning of the coordinate branches. The Constitution "contemplates that practice will integrate the dispersed powers into a workable government. It enjoins upon its branches separateness but interdependence, autonomy but reciprocity."[14]The Supreme Court has recognized that the Framers "built into the tripartite Federal Government ... a self-executing safeguard against the encroachment or aggrandizement of one branch at the expense of the other."[15] Other important Supreme Court cases have examined whether specific facts presented the "danger of congressional

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12 31 U.S.C. §503 [Functions of Deputy Director for Management].

13 The Constitution empowers the President to, among other things, be the Commander in Chief of the Army and Navy, to grant reprieves and pardons, to make treaties, by and with the advice and consent of the Senate, appoint ambassadors, Judges of the Supreme Court as well as officers of the United States, and to take care that the laws be faithfully executed. Art II, §§2 and 3.

14 *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 635 (1952)(Jackson, J. concurring), quoted with approval in *Mistretta v. United States*, 488 U.S. 361, 381 (1988).

15 *Buckley v. Valeo, 424 U.S. 1, 122 (1976).*

usurpation of Executive Branch functions"[16] or involved an attempt by the Congress to increase its own power at the expense of the executive branch.[17] Even more recently, the Court in *Loving v. United States* stated, "Even when a branch does not arrogate power to itself, moreover, the separation-of-powers doctrine requires that a branch not impair another in the performance of its constitutional duties.[18]

The Court has established two tests that are applied to determine whether an enactment would (1) impermissbly disrupt the proper balance between the branches by interfering with the President's ability to perform his constitutional functions or (2) would tend to encroach upon the functions of the executive branch or (3) would impermissibly increase or aggrandize Congress' powers at the expense of the President's power. Although the assessment of these three concerns as they relate to H.R. 3452 is speculative in so far as it is unknown what the bill, if enacted, would provide for exactly, the Court's tests and treatment of separation of powers challenges guide an examination of the bill, as introduced.

In *Nixon v. Administrator of General Services*, the former President challenged the constitutionality of the legislation which gave the GSA control over the documents and tape recordings of his administration. In evaluating the challenge to the law to determine whether it was an impermissible interference by Congress into matters inherently solely the business of the President, the Court adopted a two part test:

> In determining whether the Act disrupts the proper balance between the coordinate branches, the proper inquiry focuses on the extent to which it prevents the executive branch from accomplishing its constitutionally assigned function .... Only where the potential for disruption is present must we then determine the impact is justified by an overriding need to promote objectives within the constitutional authority of Congress ....[19]

The Court, in upholding the constitutionality of the statute, recognized a sphere of power that should be free from intrusion by a coordinate branch. However, as seen in the two-prong test, the examination calls for balancing the interests of the two branches.

This test can be applied to section 3 of the bill establishing the EOP CFO. Would this enactment disrupt the proper balance between Congress and the President by preventing the latter from performing his constitutional duties?

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16 *Bowsher v. Synar*, 478 U.S. 714, 727 (1986).

17 *Morrison v. Olson*, 487 U.S. 654 (1988)(upholding judicial appointment and limitations on removal of independent counsel.)

18 64 U.S.L.W. 4390 (June 3, 1996), citing *Mistretta, supra*, at 397-408.

19 433 U.S. 425, 443 (1977); See also *U.S. v. Nixon*, 418 U.S. 683 (1974).

Certainly there would be some degree of "disruption" in that the performance of financial management activities would be modified and placed under the umbrella of the CFO Act. Internal financial management and auditing functions currently in place would be eliminated. Yet, conceivably, some level of disruption would be lessened in that the new CFO duties would come within a well-established and tested framework. Other CFOs have been in place since 1990. Second, the bill provides that the Director of OMB should promulgate regulations that "to the extent practical and appropriate" treats the EOP CFO the same as other CFOs. This general authority has great potential for carving out special provisions for the CFO in the EOP to provide for the least amount of disruption of the President's duties. This grant of authority may be used to create thoughtful and well-crafted regulations which recognize, and make exceptions for, the sensitive and confidential nature of EOP matters. Certainly, such exceptions would be appropriate for sensitive matters involved in the White House Office with regard to the President and his duties, the USTR, the National Security Council and other offices which may be involved in issues dealing with national security, confidential policy matters and similar issues.

The bill, however, does not detail these or other exceptions with particularity. The delegation of general rulemaking authority to the Director without specific exemptions may provide a basis for an argument that an impermissible level of disruption would or may occur. Although we do not know what regulations the Director would issue, the point remains that the bill does not carve out areas in which the CFO would not function. The bill does not guide the Director in his rulemaking function. Other bills introduced in the past, for example, the bill which would establish an Inspector General in the EOP[20], have carved out areas that would not be subject to the new officer's jurisdiction. For instance, exceptions could include financial management matters relating to areas of deliberations and decisions on policy matters or matters, the disclosure of which, would constitute a serious threat to the national security or would significantly impair national interests. In order to guard against a court finding impermissible intrusion and disruption, special provisions that recognize the unique functions and daily operations of the offices that constitute the EOP may be included.

Additionally, the bill provides that the CFO shall have access to all records, reports, reviews, documents, papers, recommendations, and other materials which are the property of the EOP or which are available to the EOP, and which relate to the programs and operations with respect to which the CFO has responsibilities. This section in particular raises important constitutional concerns in that excessive intrusion into the documents, reports, and other materials in the EOP may be impermissibly disruptive under the test adopted in *Nixon v. GSA*. Again, the bill does not create a zone of protection for the President or his offices. Relying on the general rulemaking authority of the Director of OMB to articulate such a zone may be insufficient to make the argument that the performance of the President's constitutional functions is being protected. This is very difficult to assess because at this time no such

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[20] H.R. 3038, 103rd Congress.

regulations have been developed or proposed. The bill may, through amendments, create broad and well-crafted exemptions to ensure that the President could continue to perform his constitutional functions without an undermining or disruptive influence.

A second test adopted in separation of powers cases focuses on efforts by one branch to encroach on another or efforts by one branch to increase its power at the expense of another branch through a process called aggrandizement. In *Morrison v. Olson*, the Court stated:

> Time and again we have reaffirmed the importance in our constitutional scheme of separation of governmental powers into the three coordinate branches ... As we stated in *Buckley v. Valeo* [citation omitted]..., the system of separate powers and checks and balances established in the Constitution was regarded by the Framers as 'self-executing safeguard against the encroachment or aggrandizement of one branch at the expense of the other.' .... We have not hesitated to invalidate provisions of law which violate this principle ...On the other hand, we have never held that the Constitution requires that the three branches of Government 'operate with absolute independence.' *U.S. v. Nixon*, [citation omitted]; see also, *Nixon v. Administrator of General Services* [citation omitted]....[21]

Later in *Mistretta*, the Court assessed encroachment and aggrandizement issues in the context of the separation of powers doctrine:

> It is this concern of encroachment and aggrandizement that has animated our separation-of-powers jurisprudence and aroused our vigilance against the 'hydraulic pressure inherent with each of the separate Branches to exceed the outer limits of its power' [citation omitted]....Accordingly, we have not hesitated to strike down provisions of law that either accrete to a single branch powers more appropriately diffused among separate branches or that undermine the authority and independence of one or another coordinate branch .... By the same token, we have upheld statutory provisions that to some degree commingle the functions of the Branches, but that pose no danger of either aggrandizement or encroachment.[22]

Applying its own test, the Court in *Mistretta*, rejected the claim that the Sentencing Reform Act of 1984, as amended, violated principles of separation of powers. The Court, citing the above noted precedent as well as the *Nixon* cases,

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[21] *Morrison*, 487 U.S., at 693. This test was reaffirmed expressly in *Metropolitan Airports Authority et al. v. Citizens for the Abatement of Aircraft Noise, et. al*, 111 S.Ct. 2298 (1991).

[22] 488 U.S., at 382, citing *Morrison* and *CFTC v. Schor*, 478 U.S. 833, 851 (1986)(upholding agency's assumption of jurisdiction over state law counterclaims.)

recognized an overlapping responsibility between the three branches and adopted a flexible understanding of separation of powers.[23]

Applying this flexible aggrandizement/encroachment test to the bill, it may be argued that the bill, to a certain extent, attempts to prevent aggrandizement of powers for the Congress or attempts to prevent encroachment into areas of the President that are solely his. For example, the bill does *not* permit the Deputy Director for Management/OMB (1) to develop and maintain qualification standards for the EOP CFO or Deputy CFO under 31 U.S.C. §§901 and 902, as amended by the bill and (2) to provide advice to the agency head (the President's designee) with respect to the selection of the EOP CFO or Deputy CFO. Thus, the President's selection of the CFO and Deputy are not constrained by the bill.[24] Additionally, the bill does not require the appointment to be made with the advice and consent of the Senate. And, the bill does not limit the President's power to remove this official. Moreover, proponents of the bill may argue that Congress' role is restrained in that it is limited to receiving reports and other information and does not have a more intrusive reporting or information-gathering role. These provisions would tend to support an argument that the bill does not impermissibly seek to aggrandize powers for one branch at the expense of another.

Notwithstanding these provisions, however, the bill applies all other powers of the Deputy Director for Management and all other provisions of the CFO Act to the new CFO of the EOP. These powers, as seen above, are broad and far-reaching. Some may argue that because the CFO is granted such an impressive range of power, e.g., access to all records, and because he must report his findings to Congress, that this would result in Congress accreting to itself executive power. Along these same lines, some may argue that a court would be called upon to invalidate such an attempt to place a CFO in the EOP to perform these functions, to gain such intimate knowledge of each office which constitutes the EOP and then report this knowledge to Congress in the manner required under the bill. By the same token, the bill does not appear to take into account the unique entity[25] and functions of the EOP and the universe of matters which may be involved. To weather potential aggrandizement/encroachment arguments, the drafters may want to include provisions which recognize and protect the sensitive matters which arise within the day-to-day operations of the various units within the EOP.

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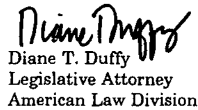
23 488 U.S., at 381. The Court rejected arguments that the Sentencing Commission membership effected an unconstitutional accumulation of power within the Judicial Branch and at the same time undermined the Judicial Branch's independence and integrity. Moreover the Court concluded that the concerns of disruption of the balance of power between the branches was unfounded and did not compel the Court to invalidate the law.

24 As noted earlier, the President should choose a CFO with the requisite knowledge and experience needed for the job.

25 The EOP is different structurally than other executive departments in that to a degree, it is decentralized and consists of self-contained units. e.g., USTR, National Security Council, etc.

Finally, several other observations may be made. For example, the bill does not appear to define the EOP. Second, the bill does not include provisions for the transfer of existing functions, personnel, property and records of the agency that relate to financial management functions into the new CFO's office. As seen in the CFO Act, provisions have been made for the transfer of functions and personnel into the new offices.[26] An examination of the Government Manual indicates that currently there is a Director of Financial Management Division in the Office of Administration in the EOP. Other offices and personnel with financial management duties may exist as well. Third, the bill may want to provide the President with the opportunity to submit a reorganization plan that proposes the arrangement of the new office as has been provided for other agencies under the CFO Act.

We hope this memorandum is useful to you. Please contact us if you require any further assistance.



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[26] See 31 U.S.C. §901 note.

Mr. HORN. Now, let the clock begin now, not when I am putting things in the record, and let me just raise a few questions.

The White House does use volunteers, as we know it has happened in every administration, to simply process the mail because it is overwhelming. We use interns that are in academic programs, as presumably the ethics criterion here, and we are not allowed to use adults unless they are—we are limited to senior citizens volunteers unless that has been changed by Mr. Shays' act.

So one of the things I think you need to deal with is would interns still be able to serve on the White House staff during the summers or whenever, as they do on our staffs, and if so, what are the criteria that guide the interns, and would senior citizen volunteers who have served every administration in sorting the mail, that I can think of in modern times, would they be excluded if your bill was to become law?

Mr. MICA. Mr. Chairman, the intent of the bill is to get some handle on this, that the White House shouldn't have any privileges that business or the Congress is excluded from. It is our feeling that there should be some similar standard.

I have no problems with students who are part of an academic program participating, but I think you will find in the White House the volunteers go far beyond that. There are many people who have no status in the academic community. That is one of our concerns, then, using these folks in a way that is prohibited under the Fair Labor Standards Act.

Then also my other concern is the definition of special employees when you have folks like—and I say Harry Thomason. You have another character that we are investigating, Mort Engelberg. Then you have different standards. Some are reimbursed on a per diem basis. In fact, part of the law reads that unless you are an employee, you are not entitled to some per diem. So certain exceptions are made in the White House that are not made anywhere else.

We do need to be reasonable. There is a place for volunteers, but there are many questions raised by their level of activity, by their participation——

Mr. HORN. I understand that they shouldn't be lobbyists by another disguise, and the Thomason case you cited as that. We don't want to include that. We also—obviously adults come under internship programs, too——

Mr. MICA. Our bill would not exclude those, as I understand it, that are involved with academic-type activity, and similarly you, Mr. Chairman, cannot go out and just have volunteers roaming in our office.

Mr. HORN. That is correct under the House ethics rules.

Let me ask you the question, under the inspector general you provide for a chief financial officer. We recommended from this committee that the White House ought to have an inspector general. Why was not the inspector general included in your bill?

Mr. MICA. I would be open to that, and I think Mr. Clinger has recommended, and possibly you and other Members have recommended, inspector general is sort of responsible after the fact to view what is going on and keep everything straight. The chief financial officer is important to the structure, operations, the accountability, so we have the records in order, so that things don't

take place in the management and financial operations on an ongoing basis. So I could support both.

Mr. HORN. That is all I wanted to hear.

Now, the separation of powers situation we have in relation to discrimination cases, not wanting to be under the thumb of an executive branch which would be playing political games with Congress. We set up our own Office of Compliance. It is also possible that an EEOC staffed in one administration could play political games with the Office of—the Executive Office of the President. Now, should the President at the Executive Office have an Office of Compliance similar to our Office of Compliance?

Mr. MICA. I think that would probably be a good idea. It is important that we ensure the integrity of the process both for the Congress and for the White House, much as we want the President to enjoy the same types of protections we have set for ourselves.

Mr. HORN. I think it is important, as you suggest, because both offices are political offices, they are not civil service offices. They have got civil servants in the Executive Office of the President in a sense, or on assignment, or whatever, certainly in the Office of Management and Budget. But the fact is it is a political office, and those are generally pleasure appointments within the Executive Office. Some aren't, and some people stay there just to stay here 10, 20, 30, 40, 50 years, even though there is—most civil service here they stay because they are competent, and other people hire them.

I think you are being very reasonable on this, and we will incorporate some of the suggestions and dialog we have had here so we don't limit the Presidency any more than we limit the legislative branch.

Mr. Shays, do you have any comments on this?

Mr. SHAYS. No.

Mr. HORN. None, OK.

I now yield 5 minutes to the gentlewoman from New York, the ranking minority member, Mrs. Maloney.

Mrs. MALONEY. Thank you very much, Mr. Chairman.

I flew in from New York for my hearing. I request you put my opening statement in the record as read.

Mr. HORN. Absolutely.

Mrs. MALONEY. Thank you.

[The prepared statement of Hon. Carolyn B. Maloney follows:]

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STATEMENT OF THE HON. CAROLYN B. MALONEY

HEARING ON H.R. 3452, THE PRESIDENTIAL AND EXECUTIVE OFFICE ACCOUNTABILITY ACT

June 25, 1996

Thank you Mr. Chairman. The bill we will consider today, H.R. 3452, the Presidential and Executive Office Accountability Act, is based on the sound premise that the federal government should be subject to the same laws and regulations as the private sector. Congress has already passed the Congressional Accountability Act, which does this for Congress. This legislation would extend the law to the White House and the Executive Office of the President. While I believe this is a very good idea, I am unfortunately unable to fully endorse H.R. 3452 at this time because of certain drafting and technical problems. However, I would like to see some version of this bill become law and hope that the Chairman will work with me to address the concerns of all interested parties.

H.R. 3452 would apply to the Executive Office of the President eleven civil rights, labor, and workplace laws which Congress applied to itself in the Congressional Accountability Act. OSHA, the American with Disabilities Act, the Family and Medical Leave Act, the Civil Rights Act of 1964 -- these are only some of the landmark laws governing the private sector which would be applied to the White House. This bill would also establish remedies and procedures, similar to those in the private sector, for aggrieved employees.

These are worthy goals, but in reaching them we must be careful of unintended results. For example, as currently drafted this legislation would abolish the White House volunteer program, something I doubt anyone wants. The bill would also forbid the President from using political affiliation as a criteria in hiring, which is entirely unrealistic. In addition, the bill would create a Chief Financial Officer for the Executive Office of the President and amend the definition of "special government employee" as it is applied in that office. Neither of these provisions were part of the Congressional Accountability Act, nor are they particularly relevant to applying private sector laws to the government. While these provisions may have some benefits, I believe they need more study. Do we really need a CFO for the 1700 employees of the Executive Office of the President? Would the changes to the definition of special government employee in this bill make it impossible of the President to ask advise from any outside experts? These and other questions need to be answered as we consider this legislation. Finally, the Justice Department has raised serious Constitutional questions relating to the separation of powers doctrine which need to be addressed.

Mr. Chairman, we should consider this legislation in a truly bipartisan way, with proper respect for the institutional concerns of the Executive Office of the President. I look forward to hearing from today's witnesses and to working with you as this legislation moves forward. Thank you Mr. Chairman.

Mrs. MALONEY. I commend my two colleagues on this bill. I was in Florida recently, Mr. Mica. I met a lot of your constituents. I wanted to ask you, first of all, about section 411 of your bill on page 7, and it reads that it would give courts or administrative bodies the authority to order the President to hire, reinstate, or promote an individual. And is that your intent, and isn't that unconstitutional under the appointments clause of article 1 of the Constitution concerning Presidential appointments?

Mr. MICA. Again, I think there are some employees that are covered under title 3, some employees that are covered under title 5. What we are trying do is set up some mechanism for grievance, and when there has been some type of—there is some type of unjust activity or action against an employee, that that employee has some rights similar to what others have in the private sector and in other Government agencies governmentwide for redress of their grievance and replacement. We are not trying to interfere with the President's authority, the President would still be able to hire and fire at will, but we are trying to set up again some mechanism for redressing a wrong in the employment practice.

Mrs. MALONEY. You would be willing to work legislation to amend that so that the authority or administrative bodies would not dictate to the President regarding hiring or firing practices?

Mr. MICA. Absolutely. I think the bill does need some fine tuning and can be vastly improved by input from your side of the aisle and from the administration. We are going to hear from the administration officials who have some suggestions, and I am open to that.

Mrs. MALONEY. Would you consider another approach possibly amending the bill to create an Office of Compliance for the White House, just as Congress established an Office of Compliance for the legislative branch? As you know, we have numerous bills before Congress where we have really tried to keep our separation of powers and not have a court oversight of our various activities, and I just wondered would you entertain such an amendment to create an Office of Compliance?

Mr. MICA. I think Chairman Horn asked a similar question, and I said I would be very receptive to any type of structure or mechanism that would serve that purpose. And again, we do have political offices here, and you don't want the President, just like we don't want the Congress, caught up in undue constraints or situations that may or may not apply to other parts of Government or the private sector. So yes, I would——

Mrs. MALONEY. You mentioned we do have an office of great importance, but there is also a political side to elections and to offices, and when Congress passed the Congressional Accountability Act, it provided in section 502 for Members to consider party affiliation and really political and personal compatibility in our hiring practices. But your bill does not have a provision allowing the White House to exercise the same consideration in hiring decisions and practices, and would you be willing to consider—would you amend the bill to give the White House the same flexibility concerning political compatibility as Congress has?

Mr. MICA. I would have no problem with that type of an amendment.

Mrs. MALONEY. Thank you very much.

To follow up on what the chairman mentioned earlier—and we have had a very good bipartisan cooperation in this subcommittee, and probably in one of the most partisan Congresses in history. We pass a lot of good bills out of this committee, but he raised the point of the volunteers, and I know for years the White House has had a volunteer program for Boy Scouts and Girl Scouts, and it would not fit the definition. You said it must have an academic leaning to it. This is really public service learning, the young people should be trained in caring about other people.

I, for one, am concerned about not allowing the volunteer program to go forward. Even President Bush's—one of his main initiatives was 1,000 lights. We should encourage volunteers, and certainly the best way to encourage volunteers is by example, and I would like to add my voice in support of the statements earlier that the chairman made for consideration of exempting volunteers from this legislation so we can consider—continue in that great tradition of volunteering in this country, starting right there at the White House.

Mr. MICA. I have no problem with the use of volunteers. I would even like to see the Congress allowed to use more volunteers. Again, when you have a law like the Fair Labor Standards Act, you don't want the Congress or the White House to carve out a niche and use people where they should be using full-time people. So there has to be a balance.

We want to encourage voluntarism, but we also want compliance. Again, I could probably operate my office very efficiently with a core of volunteers, and maybe businesses could take advantage of voluntarism, but we operate now under some strict constraints. Part of my bill is also to get the White House and the Congress and the American people to think about the constraints of some of the laws that we impose on the private sector, and now we have imposed on Congress, so maybe we have to rethink our laws in terms of how it affects voluntarism and the private sector also.

Mr. HORN. I yield 5 minutes to the gentleman from Virginia, Mr. Davis.

Mr. DAVIS. Thank you, Mr. Chairman.

Let me ask—Mr. Mica addressed this, but as the author of the Shays act, Mr. Shays, would you have any problem with the Executive Office of the President being subject to the laws the President signs into law?

Mr. SHAYS. No. I had a very strong statement. I think this is an excellent proposal. I do have some reservations, I mean, but they are things that could be worked out with the White House, and I hope that there is not an adversarial focus to this hearing because it will be very destructive. For instance, we made sure that we could hire people based on party. If that is not in the bill, and it isn't, it should clearly be in, and sometimes I think the White House in their statement might focus in on those kinds of things.

Mr. DAVIS. I think it is important we try to work with the White House because this will apply to future White Houses as well, to be as constructive as we can in the institution. But we are adopting up here the new rules on Capitol Hill, finding out some of them, as convenient as they have been in the past, but I think it is a

learning education for both workers and Congress in terms of some of the laws we have passed.

The administration and employee protections in H.R. 3452 is left to various offices, agencies, and departments under the control of the President. Should we be concerned whether these bodies will be able to conduct effective, impartial investigations when they are also subordinate to the President?

Mr. MICA. That is one area that does raise some concerns. We will have to look at the way we construct this and exemptions that should be granted. Again, we are dealing with a different situation than the private sector or the Congress-to-agency relationships, so we would be open to amendments or suggestions to make certain that there are no problems in that area.

Mr. DAVIS. Let me ask, we have got to be respectful of the right of the President to receive confidentially, to surround himself with people of his own choosing. Do you think there are any provisions of this act that compromise the President's ability to receive advice or to hire people for political reasons?

Mr. MICA. I don't believe so, and if you look at some of the abuses that we found, whether it is the Thomason problems or the White House communication, the same—the same protection should be mandated by Congress. We have an obligation to make sure, regardless of what administration—as I understand it, even in the White House Communications Agency, with their activities, and some of the misconduct and lack of financial accountability that took place under the Republicans. It is now taking place under the Democrats. It doesn't matter who is in charge. We have the responsibility for making certain that safeguards and controls and those provisions are in place.

Mr. DAVIS. Let me just ask each of you a last question. The ability of White House employees to unionize, it has been debated here on Capitol Hill and is still being debated on that. Do any of you have any thoughts on that?

Mr. SHAYS. It is pretty basic for me, Mr. Davis. If people in the private sector have the right to organize, people in the public sector should. If we have given that right to employees in the private sector, we should have to live by that same process. And we may like it, we may not like it, but in my judgment it should be the same.

It touches, if I could, just on—Mrs. Maloney was talking about the question of basically judicial review. Does the court have the right to tell a President what to do? Well, when it comes to the laws, yeah. Just as under our congressional accountability, if we—whatever views we may have on an employee ultimately, they may go to the Office of Compliance, but ultimately can go to the court, and the court can hold us accountable. I think it is important to say to Mrs. Maloney that the same process would apply to the—should apply to the White House as well on both issues.

Mr. MICA. I would agree with the right to organize, but not the right to strike.

Mr. DAVIS. Thank you very much. I yield back, Mr. Chairman.

Mr. HORN. Let me just interject the question here, and I will ask Mr. Peterson if he does not want to question at this time. I will ask Mr. Fox after that, but let's go back to the Truman administration.

At one point Truman got so fed up with the railway strike and a few other things, he wanted to draft workers into the Army, set up legislation to that effect. As I remember, the House passed it since majorities run the House. Robert Taft, not known to be a particular friend of labor by labor, stopped it in the Senate. If the President did that, and the staff walked out that was unionized, what have you done to the Office of the Presidency?

Mr. MICA. That is why I said they would have the right to organize some system to vent their grievances, but not the right to strike.

Mr. HORN. As you know, the Dutch Army is unionized as a member of NATO, and there is a good question as to what happens when commands are given. And I don't think anybody would want the American Army to be unionized, but I just know that we ought to think about it because what we are doing here, we have to think about what happens 50 years from now and 100 years from now.

Mr. SHAYS. Mr. Chairman, I want to point out in terms of a strike, I agree with Mr. Mica. We did not pass the congressional accountability law to allow our employees the right to strike. We gave them the right to organize and bargain collectively, but not the right to strike.

Mr. HORN. On the special employees, you will recall that President Roosevelt had a lot of so-called dollar-a-year men, and it would now be dollar-a-year men and dollar-a-year women. Is there a way we should write this bill so we can make sure that anybody in that position is not also a lobbyist? In other words, if you are bringing in someone to advise the President, she ought to operate by the same rules we have to operate by, we either get rid of part of our business or whatever, and the Ethics Committee reviews that.

Now, should we put in language to deal with that conflict of interest problem, because you cited a very real example that ought to worry anybody, somebody walking the halls down there that has a lot of clients. And there is another one you can name from the campaign, rather well known, that has done the same thing. That isn't unusual in the White House, but it should stop, and this is a good place to stop it.

Mr. MICA. I am not sure if my legislation will correct all of these things, and you don't want to keep the President from getting advice from the private sector or from knowledgeable sources, and some of those may be lobbyists, some of them may be——

Mr. HORN. That doesn't stop the person giving advice. What does stop, though, is somebody holding a desk in the White House office and acting with the aura of the White House of the President while he is also feathering his nest with his clients.

Mr. MICA. You said it, Mr. Chairman, and those are the concerns. I don't know if this will remedy those type of situations. That is our intent, and it is very important that we do that and that we make certain that there is no question about the integrity of the operations. So we set a structure up, and if you are a special Government employee, there is one set of standards. Maybe we need to look into something that goes beyond what I proposed here today, but we are trying to build a mousetrap, and we may not

catch all the rats, and that mousetrap has to survive not just this administration, but future administrations.

Mr. HORN. I now yield 5 minutes to the gentleman from Pennsylvania, Mr. Fox.

Mr. FOX. I include in part of my 5 minutes the opening statement.

Mr. HORN. Absolutely. Would you like it printed as read without objection?

Mr. FOX. Without objection, thank you.

Thank you, Mr. Chairman. Needless to say, having this hearing certainly is a very important step to the continuation of the Shays Congressional Accountability Act, which is probably the crown jewel of the accomplishments of the 104th Congress thus far.

I would like to ask a question in terms of legislation to our outstanding panelists who are before the committee this morning. Yesterday President Clinton proposed offering the American public a flextime plan similar to what many Government employees already enjoy, an idea that many Republicans have been touting for years. The Government has employees that work 60 hours in 1 week and 20 hours next week when they are not as busy.

Is flextime good for the public sector and not good for the private sector, and won't this bill show bureaucrats the inflexibility of strict Federal laws and thereby encourage more realistic Government?

Mr. MICA. Mr. Fox, one of the problems I have is that the White House now doesn't comply with the Fair Labor Standards Act as it is written, nor does it comply with the Family and Medical Leave Act as written. There are questions about both of these in the response we got from the Congressional Research Service in their opinion as to compliance.

Now, they may by policy comply with some of the provisions of these laws, but our job isn't to set policy with the White House or oversee just their policy at the time. Our job is to set the structure and standard and how the laws apply. There is, in fact, what I consider a loophole here, and we do have the President recommending some of these things for the private sector when the White House isn't complying or required to comply under law, with the existing laws, and that is part of the intent of this law.

Now, to the question of should we have the flexibility, I would support it, fine, but we should have the private sector be given that leeway if the public sector has that leeway. Now, the public sector is taking, in fact, advantage of some of those situations, through some loopholes, and the private sector has been made to comply.

Mr. SHAYS. Mr. Fox, without hardly any exception, whatever is good for the private sector is good for Congress, and I think Mr. Mica is correct, it is good for the White House, the Executive Office. And I do believe in flextime, and Mr. Goodling has introduced a bill that would make it voluntary for the private sector, and therefore it should apply to the private sector; but in the absence of applying to the private sector, it shouldn't apply to the public sector.

Mr. FOX. Thank you. I thank the expert witnesses for appearing.

Mr. HORN. I yield 5 minutes to the gentleman from Washington, Mr. Tate.

Mr. TATE. Thank you, Mr. Chairman. I can tell you when I was running for this particular position, one of the things I used to talk about was making sure those folks in Washington, DC, the other Washington, had to live by the same laws as everybody else. I don't care what gripe it was, it was always the one that received the loudest response of everything I had to say. Those in Washington saw themselves as the ruling class instead of the serving class, and they should live by the same laws as everybody else. Liberal, conservative groups, anywhere else in between, the most popular thing we talk about is making Congress live by the same laws. We would better understand what working families live by all the time.

What has really been the true impact—besides, people at home are obviously glad—what has been the true impact of requiring Congress to live by those 11 labor laws that in the past it has been kept from? Mr. Shays or Mr. Mica.

Mr. SHAYS. First off, it is a moral issue. It is immoral for us to impose laws that we don't live by, so we have started that connection again with the American people who we represent. And second, we will write better laws if we have to live by those laws.

Flexibility is the case in point. The executive branch has flexibility in terms of instead of a 40-hour work week; I am talking about the branch, now. We had when we chose the congressional accountability bill, we could say, well, we could model the private sector at 40 hours and then time-and-a-half, or we could model the executive branch. We got very close to modeling the executive branch, though some of us wanted it to be the private sector.

Steny Hoyer, a Democrat who became very active in this, said when I was a lawyer we had to pay our people time and a half. We should have to do the same thing here.

Now we are having to argue that maybe flexibility makes sense, and if it makes sense for us, it makes sense for the private sector. So I agree that the American people understood this law a lot sooner than we did, but we always have to be faithful to it and make sure that we don't carve out exemptions.

And the only dangerous point, but it is one that we need to tread into, is this whole thing with volunteers, because I do think that getting Americans to understand how their Government works makes sense. So having interns, whether they be college interns or senior interns, to make it part of an education program, but when you get the dollar-a-year person danger or you get someone who comes in for nothing and basically can roam Congress or roam the White House with impunity, it happens under both administrations, both parties, that has to be dealt with.

Mr. TATE. So I take from that we are going to write better laws and more——

Mr. SHAYS. Without question. I am absolutely convinced of it.

Mr. TATE [continuing]. That have real world applications.

Mr. SHAYS. Without question.

Mr. TATE. Mr. Mica.

Mr. MICA. I view the White House, and I have said this and I don't mean it in a derogatory sense, but it is sort of the last plantation. We imposed these laws on business and industry some time ago; 18 months ago we imposed them on Congress, and the American people expect the legislative branch to comply with the laws.

I think that they would expect the Chief Executive Office of our Nation to comply with the laws.

There may be some exemptions to the law. The courts carved one out yesterday when the President was charged with sexual harassment and the courts have determined you can't have the President subject to these kinds of suits while they are in office. We need to carve out some exemptions for the Chief Executive Officer that make sure he is protected in the process of ensuring the White House and the President comply with the rest of the laws.

That doesn't mean that he is excluded. He may have to go to trial on that charge after he leaves office or at some time. But we are not doing this for Bill Clinton and we are not doing it for George Bush and we are not doing it for Ronald Reagan; we are doing it for the White House for many years to come.

We have seen where mistakes have been made by Presidents in the past, and again, people feel very strongly, just like the people you spoke about when you ran for office, that none of us should be above the law. We should all comply with that law in a reasonable fashion.

Mr. TATE. I want to commend both of you. You have been real leaders on this issue.

Mr. Shays, this was one of the first things we passed, and you should be commended.

Mr. Chairman, I would hope that we would have speedy action on this particular proposal. I think if we have done anything in this Congress, it is we have tried to restore people's faith in their Government, to make sure their elected officials are living by the same laws as everybody else.

I yield back the balance of my time.

Mr. HORN. I yield 10 minutes to the ranking minority member, and unless there are other questions, that will be it.

Mrs. Maloney of New York.

Mrs. MALONEY. I have a few practical questions of how that would happen. The chief financial officers now in the various agencies report to the agency head and they issue public reports. Who would the chief financial officer in the White House report to?

There is really not a hierarchy. There are 12 separate little offices. Would we then be creating a 13th office of the CFO and would that CFO respond to whomever?

Mr. MICA. He or she would report to the chief of staff in that case. As far as the report, the problem is right now you don't have the report or the information or the structure in place.

I have no problem with keeping these limited to the White House or to the congressional committee with oversight. It doesn't necessarily have to be public on every financial transaction within the White House. But right now there is no chief financial officer, there isn't the structure or the requirement in place that the finances be conducted in this fashion.

Mrs. MALONEY. The GAO has the authority to audit and report, and often does on the White House.

Mr. MICA. Here again that is just like the IG that the chairman spoke about. That is sort of after the fact.

What I am talking about is an operational structure in place, a manager who is responsible for finances. Whether again it goes to

the White House communications expenditures, whether it was against Bush or Reagan or Clinton, when you see that there is no one in charge of the finances, the way money is expended, that is as the transaction occurs and someone in charge of the transaction—the audit function is after the fact. And the IG, you know when you get to the IG you are dealing with tough times.

Mrs. MALONEY. So you don't believe or—let me ask you, would you think that requiring the GAO to oversee and issue yearly reports and audits, do you believe that would be sufficient?

Mr. MICA. Again, the GAO does not come in and manage or financially operate the office. It is more of an oversight responsibility and after the fact.

I am concerned about the day-to-day operations and that we ensure, regardless of who the President is, and if he has good people surrounding him or bad people, that we put in place the best structure to deal with the finances of our land's chief financial office.

If the President's office and White House operations are run in a half-baked fashion, again regardless of who the President is or the people he brings in, we haven't done our job.

Mrs. MALONEY. Where would you put the chief financial officer? They have, roughly, 12 separate offices.

Mr. MICA. I would leave flexibility to the President. I don't know if we need to get into those details. We could do that, but I would envision again that he would report—he or she would report to the chief of staff. Then we know we have set someone in place, we know what their day-to-day responsibility is, and we would know that somebody is in fact in charge and responsible.

Mr. HORN. Would the gentlewoman yield?

Mrs. MALONEY. Sure.

Mr. HORN. We shouldn't write into law that that chief financial officer reports to the chief of staff. The officer reports to the President of the United States and he may delegate who else——

Mr. MICA. Every President or Chief Executive should have the prerogative on how to structure that. We are just saying that there should be someone in charge of the finances.

Mrs. MALONEY. When Congress passed—and I really applaud my colleague Mr. Shays for his leadership on the Congressional Accountability Act, it recognized the cost of implementation. Last year, Congress appropriated $2.5 million; next year, $3.3 million and up to 23 employees. While the Executive Office of the President is much smaller than Congress, implementing this bill would cost some money.

Would you be willing to consider authorizing funds for implementation and how much do you think this will cost?

Mr. MICA. I don't know if you are asking Mr. Shays.

Mrs. MALONEY. Either one of you.

Mr. MICA. From my looking at this, if we instituted the chief financial officer you could save enough alone to cover the cost of this. If necessary, we may have to appropriate more funds, but I recommend you just get a copy of the last hearing that our National Security Subcommittee did on the White House Communications Agency. If you couldn't save enough money by having a chief financial officer in place, just by having someone there in charge of the finances of the White House, you know I will buy you lunch at your

favorite restaurant in Washington with dessert and after-dinner drinks.

Mr. SHAYS. Just as we have the Office of Compliance, I had suggested that the Merit Systems Protection Board be that organization, so you would probably expand their budget slightly. I don't think we should be reluctant to spend what it takes to do that. In the private sector they have costs to comply; we should in the public sector. So whatever is required to pay for an office that does the job correctly, it should be appropriated.

Mrs. MALONEY. I would like to followup on the line of questioning of the chairman on the new definition of special Government employee and the possibility that this would in some way chill contact with the President or possibly isolate the President from seeking outside advice. When we passed our Accountability Act, the Congress hasn't applied this new definition of special Government employee to ourselves with all of the disclosure requirements, and why should this provision be applied to the President if we are not going to apply it to ourselves.

Mr. SHAYS. I am not sure I agree with your last statement. You are not allowed to have volunteers work in Congress unless they fit certain categories.

I found I broke the law the first time I was elected. I did a questionnaire and got 18,000 responses, but didn't have it so you could tabulate it electronically and I brought in 100 volunteers for 2 weekends to tabulate it and was told I had broken the law.

The challenge is this, and it needs to be addressed, but I realize we are on dangerous territory. Moreover, in the White House under either administration you have very successful businessmen and women who want to give advice and help the White House but they don't want to give up their million-dollar-a-year job. So we have to get a handle on how you define a consultant and how much a consultant gets paid.

In no way should we inhibit a President from getting the best information, but at the same time, we have to find a way to prevent people who are simply lobbyists inside the White House. I say that not insinuating that that happens any more in this White House than the previous one.

Mrs. MALONEY. To followup on a point that you made; to give one example, former Senator Howard Baker who is very respected on both sides of the aisle, he served as a White House Chief of Staff in 1987 and 1988, if this bill passes, would Baker have been able to serve as an advisor to Presidents Reagan and Bush, or would he have been subject to conflict of interest statutes and financial disclosure statements? I think we have to be careful with this.

I would like President Reagan, President Bush, President Clinton, any President to be able to talk to whomever they want to talk to to gain information, and I don't want to make it so it is a crime to talk to the President of the United States.

Mr. SHAYS. But nobody is insinuating that. The question is does that person have a desk in the White House?

Mrs. MALONEY. For example, Howard Baker.

Mr. SHAYS. I think that raises serious questions. Howard Baker, bless his heart, is a distinguished Senator and also a significantly large fundraiser for the Republican Party and also one of the most

influential lobbyists. He can talk to the President, he can advise the President. The question is should he have a desk at the White House, and I don't think he should.

Mrs. MALONEY. Baker would not have been able to serve—under this bill, if I am reading it correctly, Baker would not have been able to serve as Chief of Staff in 1987 on 1988, am I correct?

Mr. MICA. Absolutely not, because he was in fact a full-time employee. That is not prohibited.

The question is not the full-time employee; the question is people that sort of float around the White House are given a desk, access, a pass, given all the prerogatives of the office, even some are paid per diem and are not full-time employees; what is their responsibility? That is where you want to have a clear definition. That is where the people want to know if someone—it looks like a duck, it swims, it has feathers, it is in water, it quacks like a duck, and they are telling us it is not a duck, then you have concerns. The duck is serving its own interests. These are the things that you want to make certain you don't do in that kind of activity.

Mrs. MALONEY. If I could followup on your duck analogy. Just to use this example, because a lot of times if you use an example it is easier than talking in the abstract. Under your bill and Mr. Shays bill, Mr. Baker could have a full-time job but he could not advise the President?

Mr. MICA. Under my bill someone can still advise the President, he can seek counsel, he can seek information. It is when they come into the White House, when they have a pass, when they have a desk, when they use the telephone, when some are paid per diem, all these questions are raised about the status of special Government employees. Then they are excluded from some of the laws, like conflict of interest.

If Howard Baker had done something that promoted the interest of Howard Baker or his law firm, there is a conflict of interest. He is a full-time employee. We have this gray area that is now being transgressed and it needs to be defined; who are those folks and what laws are they subject to and what ethics of the White House rules are they subject to? So this is the problem that we are trying to address in the bill also.

I don't know—again, I use analogies, sometimes I get in trouble for it, but mousetrap. We don't know if we have built a mousetrap to catch the rats in this case. We want to make certain that we are constructing something that will weed out the bad guys. We are not going to do it in 100 percent of the cases, but are trying to construct something that will transcend our tenure here.

Mr. SHAYS. There are really two issues. There is one issue of making sure we abide by the same laws we impose on the private sector. The private sector is not allowed to hire someone below the minimum wage. They are not allowed to basically hire someone for nothing. That same basic principle applies to us.

We could staff our offices with volunteers. The challenge we have is there is a public service element, but we want to make sure that if someone does a fair day's work, they get paid for it.

Now what the White House does, and rightfully so, they hire consultants. Like IBM can hire a consultant, the White House can. It raises another issue separate from the concept of what is right for

the private sector is what is right for the public sector. That is the whole issue of conflict of interest. The conflict of interest is a gigantic issue and has been for many years and not easy to sort out, and maybe not a perfect solution to it.

You raised the question of judicial review as if you were concerned that the court would have a right to tell the President what to do. The court has a right to tell Congress what to do under congressional accountability. They should have the right to tell the President, subject to laws that we are under, that we have imposed on the private sector. So just as I might do something that would impinge on your civil rights if I were a Member of Congress and you were on my staff, you could take it to the Office of Compliance.

If you didn't like what the Office of Compliance had done, you now have the right to judicial review. We felt that judicial review was probably the most important thing in that third branch, that same process would apply to the White House. The White House should be able to hire and fire based on politics, and that is paramount.

We have it still in Congress. But if they do something based on discrimination, then they should be held accountable, the White House, like Congress, and like the private sector, and then the court should step in and say, not acceptable; that person is back on the payroll.

Mrs. MALONEY. I certainly recognize the importance of a court and judicial review and the violation of our laws, but at first glance it almost appeared like they could dictate who you hired or fired, and I think that would be problematic.

Just in New York City we created advisory boards to advise the mayor on who he should hire. The mayor decided he didn't want to hire these people and there was a huge problem. Basically, we elected a mayor, he can hire and fire whoever he wants, and I respect that. I fear that if we get too much like a straitjacket we won't be able to operate.

Mr. SHAYS. I don't think the bill does that. We apply it to the Congress and we are not going to have to hire and fire people, nor should the President be other than subject to the laws that exist.

Mrs. MALONEY. I think that the special Government employees definition has to be worked on a bit. I think that when you can define it as receiving pay, receiving resources, phones, desks, whatever, that that might be a more concrete standard that you can look at. I just don't want to do anything that inhibits Members of Congress or Senators or anyone in the private or public sector their ability to talk to experts in different fields and gain the advice that they may want to gain.

Mr. MICA. We would not want to endanger that, but I think we are on the same track here. We will be glad to work with both sides of the aisle on the issue.

Mr. HORN. Thank you, gentlemen.

You are free to join us if you would like, to listen to the other panels and ask questions.

If not, thank you very much.

Panel 2 will come forward, Gregory S. Walden and Sandra J. Boyd, and Deanna R. Gelak.

If you would stand and raise your right hand.

[Witnesses sworn.]

Mr. HORN. All three witnesses affirmed.

We will begin with Mr. Walden, who is counsel to Mayer, Brown & Platt and former Assistant White House Counsel.

Thank you for coming again and sharing your insights with us.

STATEMENTS OF GREGORY S. WALDEN, COUNSEL, MAYER, BROWN & PLATT, AND FORMER WHITE HOUSE COUNSEL; SANDRA J. BOYD, ASSISTANT GENERAL COUNSEL, LABOR POLICY ASSOCIATION; AND DEANNA R. GELAK, CHAIR, CONGRESSIONAL COVERAGE COALITION, DIRECTOR OF CONGRESSIONAL AFFAIRS, SOCIETY FOR HUMAN RESOURCE MANAGEMENT

Mr. WALDEN. Thank you, Mr. Chairman.

My name is Greg Walden. I am counsel to the law firm of Mayer, Brown & Platt in Washington, DC. The views expressed herein are my own, based largely on my service as associate counsel to President Bush between 1991 and 1993, where I functioned as day-today advisor to White House staff.

My testimony focuses specifically on section 4, of H.R. 3452, which would amend the definition of special Government employee, because my experience in the White House convinced me that legislative revision of this definition is warranted.

My observations of the Clinton administration's difficulties with this concept are contained in my book, "On Best Behavior," published earlier this year by Hudson Institute.

I commend the sponsors of this bill for addressing this important but very complicated subject. As is often the case, identifying a problem that needs legislation is easier than drafting legislation that precisely addresses the problem.

While section 4 is intended to cover the type of regular advisor to the President, such as Harry Thomason, and would do so, I believe it is both overinclusive and underinclusive. As I will explain later, section 4 should be revised to adopt a functional test, one that concentrates on the nature of the Federal service the advisor is providing rather than on the advisor's outside interests and affiliations.

As has been previously recognized, there is nothing unusual or wrong about the President or White House seeking advice from persons outside of Government. Indeed, Presidents should be encouraged to develop and maintain contacts with persons outside of Government who can be called upon from time to time to provide impartial, disinterested advice, special expertise, or simply a perspective different from those found within Government.

But it is equally clear that the regular presence of these informal advisors in the White House poses ethics concerns, because as private citizens, they have jobs, professions, clients, financial interests, and other affiliations that could give rise to a potential conflict of interest.

Where an informal advisor performs certain functions that ordinarily would be provided by a Government employee, the advisor risks being considered a special Government employee. That is currently defined as someone who is retained or appointed to perform

duties on a full-time or part-time basis with or without compensation for no more than 130 days within any 365 consecutive days.

Now, an SGE is not necessarily required to sever any outside affiliation or interest, but is subject to the conflict of interest laws which prohibit the advisor from providing advice on or otherwise participating in any particular matter in which he has a financial interest. Also, most SGEs must file a confidential financial disclosure report.

It is also clear that the current definition of special Government employee in title XVIII does not adequately address the several ethics concerns, for it is often uncertain, even to an agency ethics official, whether an outside advisor has become an SGE by virtue of the advisor's regular presence and nature and extent of his participation in internal Government deliberations. The words of the statute suggest a functional test; yet no such test is spelled out in the statute. And yet whether an advisor is subject to the criminal conflict of interest laws turns on this elusive meaning.

The clear focus on section 4 of the bill is on informal or outside advisors who are not appointed to advisory committees or part-time commissions. This is appropriate because among the thorniest issues involving the reach of the conflict of interest laws is whether informal advisors who regularly provide advice to the President become subject to the ethics laws.

While the statutory definition of SGE has not been materially revised since its enactment in 1962, the Office of Government of Ethics and the Department of Justice have issued some helpful guidance. The central factor that emerges from such guidance is whether the advisor is in fact performing a Federal function.

Now, providing advice to the President is not inherently a Federal function, because the President receives from persons, both inside and clearly outside the Government, advice; but the regular provision of advice which is given in official White House meetings with other White House staff present and which advice is often indistinguishable from the advice provided by the White House staff, suggests that such an informal advisor is performing a Federal function and is a de facto member of the White House staff.

The badges of Government employee status, pay, title, paperwork, office, pass and phones, are just that, indicia. They are concomitant with the exercise of a Federal function. The frequency of meetings, their nature, and the manner in which the advice is solicited, given and debated, are all relevant.

A continuum exists from a one-time visit with the President, to the periodic one-on-one visits by the pollster, to the regular participation in White House meetings involving the President and others, to the advisor with the White House pass office and phone, and to the advisor who chairs meetings and directs others.

In my view, Harry Thomason and Paul Begala were far enough along the continuum to be considered special Government employees, although the White House did not so conclude, and Richard Morris should be considered one right now. Any legislative revision to the definition of special Government employee should attempt to capture these types of advisors.

But any attempt to clarify this definition may suffer from both over inclusiveness and under inclusiveness, as I believe section 4

of the bill presently does. For example, section 4 would capture Harry Thomason because he was given an office and a phone and provided advice regarding the staffing and structure of the White House Travel Office.

The provision would not appear to have covered Paul Begala, who was more or less a fixture in the White House in 1993, or to cover Dick Morris now, who was reported to have frequently visited the White House over the past, dispensing policy advice to the President and others, unless either one of those was involved in giving advice with regard to congressional hearings or proceedings or was a registered lobbyist at the time. So in this respect, I think the bill is underinclusive.

My major concern with section 4, however, is with proposed section 202(e)(2) (B) and (C). These provisions would base the application of the concept of SGE, and thus the applicability of the conflict laws, not on the functions performed in the White House, but on the advisor's outside interests and affiliations. This would mark a departure from the usual way of defining Government service and lead to anomalous results.

In my view, a person who is a lobbyist or the owner of a company with business pending before the Government should be considered a special Government employee only if he were retained to engage in a Federal function, which could in certain circumstance include provision of advice. Once a determination is made that a person is a Government employee, then the conflict of interest laws and standards attach and prohibit that person from participating personally and substantially in any particular matter in which he has a financial interest.

So I would recommend that the functional test should be codified and the functional test would look to the nature of the services the person is retained to provide. A person who is retained to supervise or direct or manage or oversee any other Federal employee in the conduct of their office would be a special Government employee. A person retained to chair or organize meetings of Federal employees on matters of Government policy would also be considered a special Government employee.

Last, the concept should encompass a person retained to provide regular advice to the Government and to provide such advice to the Government as part of the Government's internal deliberative process. This last provision is the most difficult to define with precision, but it is the role most informal advisors such as Harry Thomason and Paul Begala play.

Finally, I recommend that any revision to the definition of a special Government employee cover the entire executive branch, not just the Executive Office of the President. Although the most visible ethics problems in the Clinton administration involving outside advisors have involved the White House, the problem could arise just as easily in a Cabinet Department. Moreover, it is important when crafting an ethics provision to ensure that application is uniform throughout the executive branch unless there is convincing reason for special treatment.

I thank the subcommittee for the opportunity to provide these views and remain available to answer any questions.

Mr. HORN. Thank you very much for that helpful testimony.

[The prepared statement of Mr. Walden follows:]

Mr. Chairman, Members of the Subcommittee. My name is Greg Walden. I am currently counsel with the law firm of Mayer, Brown & Platt in Washington, D.C. The views expressed herein are my own, based on my service as Associate Counsel to President Bush, from 1991 to 1993, where I functioned as the day-to-day ethics adviser to White House staff.

I wish to focus specifically on section 4 of H.R. 3452, which would amend the definition of "special Government employee" in 18 U.S.C. 202(a), because my experience with the concept while in the White House in the Bush Administration led to me to believe that legislative revision of the definition is warranted. My observations of the Clinton Administration's various difficulties with the concept are contained in my book, On Best Behavior -- The Clinton Administration and Ethics in Government, published earlier this year by the Hudson Institute. Three chapters in my book are devoted to the problem: one deals with the President's heavy and perhaps unprecedented reliance on advisers and consultants who are not regular Federal employees, such as Harry Thomason, Paul Begala, and Dick Morris; one deals with whether the First Lady was a special Government employee while she chaired the Health Care Task Force (I conclude that she was); and another deals with the status of the so-called "anonymous horde" of outsiders who served on the interdepartmental working group that prepared recommendations for the Clinton Administration's health care legislative package.

I commend the sponsors of H.R. 3452 for addressing this important but complicated subject. As is often the case, identifying a problem in need of legislation is easier than drafting legislation that precisely addresses the problem. While section 4 is intended to cover the type of regular adviser to the President such as Harry Thomason, and would do so, I

believe it is both overinclusive and underinclusive. As I will explain later, section 4 should be revised to adopt a functional test, one that concentrates on the nature of the Federal services the adviser is providing, rather than on the adviser's outside interests or affiliations.

Every President has relied to varying degrees on the advice of persons outside of the Government. And every President has maintained a regular line of communication with his party's Chairman and other key party officials. There is nothing unusual or wrong about the President or White House seeking advice from persons outside of Government; indeed, Presidents should be encouraged to develop and maintain contacts with persons outside of the Government, who can be called upon from time to time to provide impartial or disinterested advice, special expertise, or simply a perspective different from those found within Government. Moreover, as de facto head of his political party, the President must be able to meet freely and regularly with party officials.

As private citizens, these advisers have jobs, professions, clients, financial interests, and other affiliations that could give rise to a potential conflict or appearance of a conflict if they were Government employees. However, so long as these informal advisers do not exercise any Government function or direct or supervise any Federal employee, they remain outside of the Government and are not subject to the laws and standards of ethical conduct.

Where an informal adviser performs certain functions that ordinarily would be performed by a Government employee, the adviser risks being considered a "special Government employee." The term "special Government employee" is defined by 18 U.S.C. 202(a) as

> an officer or employee of the executive . . . branch of the United States Government . . ., who is retained, designated, appointed, or employed to perform, with or without compensation, for not to exceed one hundred and thirty days during any period of three hundred and sixty-five consecutive days,

temporary duties either on a full-time or intermittent basis[.]

A special Government employee is not necessarily required to sever any outside interest or affiliation, but is subject to conflict-of-interest restrictions, which prohibit the adviser from providing advice on or otherwise participating in any particular matter in which he has a financial interest.[1] In order to remedy an identified conflict or potential conflict, a special Government employee must either rid himself of the conflicting interest or association or recuse himself from the matter which gives rise to the conflict.

Also, most special Government employees are required by law to file a confidential financial disclosure report within 30 days of assuming their duties.[2] These reports are intended to assist agency ethics officials in identifying potential conflicts of interest.

Even if an adviser avoids engaging in conduct that would make him a special Government employee, as that term is now defined, his financial interests and outside affiliations nonetheless carry the potential for ethics concerns. The President seeks advice from persons whose opinions and judgment he respects and trusts; he may well be oblivious of an adviser's financial interests and affiliations, and yet the adviser is not easily separated from them. Because the adviser is given access to the White House that is not ordinarily given to persons outside of Government, the suspicion arises that the adviser may be acting on behalf of a client or in furtherance of a financial or fiduciary interest, in addition to, or

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[1]18 U.S.C. 208(a); 5 CFR 2635.402(a).

[2]5 CFR 2634.904(b). Some special Government employees, by virtue of their rate of pay or significant responsibilities, are required to file a public financial disclosure report. <u>See</u> 5 CFR 2634.202.

instead of, providing advice based on one's general experience and expertise. This suspicion leads to the conclusion that the person or entity on whose behalf the adviser is acting is being given special access and preferential treatment. Special access and preferential treatment run afoul of a cardinal principle of Government ethics, that "[e]mployees shall act impartially and not give preferential treatment to any private organization or individual."[3]

Without a financial disclosure report or other form of disclosure, the White House may be ignorant of the adviser's financial interests and affiliations that could color (or be seen to color) his advice, unless the adviser brings them to the White House's attention or until the media reveals one or more of them in a less-than-flattering light. The White House therefore is for the most part unable to identify potential conflicts. The public, of course, is even more in the dark.

Advisers who are granted special entree into the White House by virtue of a previous affiliation with the President (through former Government service, political campaigns, or business enterprises), and who use that special access to promote the interests of a client, are subject to criticism for trading on their former ties. This situation is virtually indistinguishable from the revolving door phenomenon, to which the post-employment restrictions in statute and executive order are addressed. The concern over the revolving door is that recently departed Federal officials have inordinate influence over Government decisionmaking by virtue of the associations they developed and the information they obtained while in Government. Yet, this same concern is present when the President grants a meeting to a former colleague, business partner, or campaign official.

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[3]Exec. Order 12,674 (as amended), § 101(h); 5 CFR 2635.101(b)(8).

Moreover, informal advisers who participate in White House policy and strategy meetings are likely to be privy to nonpublic information that may be of interest and use to an adviser's outside clients. This gives such outside clients a window on White House deliberations that is not open to all.

So it is clear that the regular presence of informal advisers in the White House poses a host of ethics concerns. And it is equally clear that the current definition of "special Government employee" in Title 18 does not adequately address these concerns, for it is often uncertain -- even to an agency ethics official -- whether an outside adviser has become a special Government employee by virtue of the adviser's regular presence and the nature and extent of his participation in internal Government discussions. The words of section 202(a) suggest a functional test ("retained . . . to perform . . . duties"), yet no such test is spelled out in the statute. Thus, whether an adviser is subject to the criminal conflict-of-interest laws turns on a meaning, which remains elusive.

The term "special Government employee" was first defined by statute in 1962, as part of the recodification of the conflict-of-interest laws, and made effective in 1963. The concept originated with President Kennedy's desire to ensure that advisers and consultants to the Government would be subject to the same conflict-of-interest standards to which regular Federal employees are subject, while not being subject to the full panoply of ethics standards.[4] Previously, the ethics laws had been construed equally to apply to regular Government employees and consultants who performed temporary or intermittent services to

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[4]*See* Memorandum to the Heads of Executive Departments and Agencies (Feb. 9, 1962), *cited in* OGE Informal Advisory Letter 82 X 22 (July 9, 1982), at 328-332.

the Government. Because special Government employees serve the public interest, they were made subject to the conflict-of-interest restriction of 18 U.S.C. 208 to the same extent as a regular employee. Because of the parttime, temporary, or intermittent nature of their service, however, the other ethics laws were applied to them in a more limited way.[5]

Also important was the distinction the new law implicitly drew between a special Government employee and a person who is not ***any*** type of Government employee. Following the enactment of section 202(a), President Kennedy issued a memorandum dated May 2, 1963, entitled, "Preventing Conflicts of Interest on the Part of Special Government Employees," which drew an important distinction between a ***special Government employee*** and a ***representative***.

> It is occasionally necessary to distinguish between consultants and advisers who are special Government employees and persons who are invited to appear at a department or agency in a representative capacity to speak for firms or an industry, or for labor or agriculture, or for any other recognizable group of persons, including on occasion the public at large. A *consultant or adviser whose advice is obtained* by a department or agency from time to time *because of his individual qualifications and who serves in an independent capacity is an officer or employee of the Government.* On the other hand, *one who is requested to appear* before a Government department or agency *to present the views of a non-governmental organization or group which it represents, or for which he is in a position to speak, does not act as a servant of the Government and is not its officer or employee. He is therefore not*

[5]Basically, special Government employees are treated as regular employees for purposes of 18 U.S.C. 207 (post-employment restrictions) and 208 (conflict-of-interest), but subject to lesser restrictions in 18 U.S.C. 203, 205 and 209. And, unlike some regular officers or employees, special Government employees may engage in outside employment for compensation. For example, special Government employees who are appointed by the President are not subject to the outside earned income ban imposed by Executive Order 12,674 (as amended).

subject to the conflict of interest laws[.][6]

It is apparent that the primary focus of the 1962 legislation was on members of advisory committees and other parttime members of other formally established entities. And most of the practical questions concerning special Government employees to date have involved participants in advisory committees and parttime Government commissions.

Often advisory committees are composed largely of representatives of private interests. The very *raison d'etre* of most advisory committees is to obtain the views of persons and entities who would be directly affected by the regulation or legislation under consideration. These persons are appointed ***because*** of their position in the private or non-Federal sector, and are expected to provide their particular perspective and represent their parochial interests on the advisory committee. They are not called upon to shed their background, opinions, and affiliations and represent only the public interest, however that might be defined.

For these reasons, advisory committee members are often considered "representatives," neither regular employees nor SGE's, and they are not subject to the conflict-of-interest laws. The check on the inordinate or improper influence of private interests on Government deliberations is to place the advisory committee's deliberations in the sunshine, where the public can monitor the propriety and integrity, as well as the reasonableness, of the Government's decisionmaking.

In any attempt to improve upon the definition of "special Government employee," I

[6]Quoted in OGE Informal Advisory Letter 82 X 22, 325 at 329-30 (July 9, 1982)(emphasis in original).

recommend that the concept of "representative" be codified, to make it clear that such persons are not subject to the conflict-of-interest laws. Defining "representative" at the same time the definition of "special Government employee" is revised would also serve to clarify the concept "special Government employee." In theory, there should be no gray area between these two concepts. If a person regularly advises the Government, he is doing so either as a ***representative of a private interest*** or as a ***special Government employee serving the public interest***.

The clear focus of section 4 of the H.R. 3452 is on informal or outside advisers who are not appointed to, or serving in the capacity as a member of, an advisory committee or parttime commission. This is appropriate, because among the thorniest issues involving the reach of the conflict-of-interest laws is whether informal advisers who regularly provide advice to the President and other Government officials become subject to the ethics laws.

While the statutory definition of "special Government employee" has not been materially revised since its enactment, the Office of Government Ethics (OGE) and the Department of Justice have issued some helpful guidance.

In 1981, OGE listed some criteria to determine whether someone is a special Government employee, as opposed to someone who is not any type of Federal employee: Whether the person (1) has sworn or signed an oath of office, (2) is paid a salary or expenses, (3) enjoys agency office space, (4) serves as a spokesperson for the agency, (5) is subject to the supervision of a Federal agency, and (6) serves in a consulting or advisory

capacity to the United States.[7] While these criteria are instructive, they are not particularly helpful with regard to informal advisers to the President. Of greater relevance are two opinions that dealt specifically with the issue of frequent or regular advice. As will be seen, both opinions embraced a functional test, although neither opinion provided clear guidance as to when an informal adviser became a special Government employee.

In 1977, the Justice Department's Office of Legal Counsel (OLC) was asked to determine whether a particular individual's frequent informal consultations with the President made him a "special Government employee." OLC determined that, as a general rule, even frequent consultations did not make an informal adviser a special Government employee, "just as Mrs. Carter would not be regarded as a special Government employee solely on the ground that she may discuss governmental matters with the President on a daily basis."[8]

However, OLC determined that because the individual in question had gone beyond the role of informal adviser, he had become a special Government employee and should be formally appointed and duly sworn.

> Mr. A, however, seems to have departed from his usual role of an informal adviser to the President in connection with his recent work on a current social issue. Mr. A has called and chaired a number of meetings that were attended by employees of various agencies, in relation to this work, and he has assumed

[7]OGE Informal Advisory Letter 81 X 8 (Feb. 23, 1981), citing B. Manning, Federal Conflict of Interest Law 26-30 (1964). The second criterion -- pay -- is not determinative, because section 202(a) expressly provides that special Government employees may be retained without compensation. The first criterion -- oath of office -- is a formality the absence of which also should not be deemed determinative. The third criterion -- supervision by a Federal agency -- is relevant mainly to the concept of independent contractors, who, largely because they operate without direct Government supervision, are not deemed employees of the United States.

[8]2 Op.O.L.C. 20 (Feb. 24, 1977).

> considerable responsibility for coordinating the Administration's activities in that particular area. Mr. A is quite clearly engaging in a governmental function when he performs these duties, and he presumably is working under the direction or supervision of the President. For this reason, Mr. A should be designated as a special Government employee for purposes of this work, assuming that a good faith estimate can be made that he will perform official duties relating to that work for no more than 130 out of the next 365 consecutive days. If he is expected to perform these services for more than 130 days, he should be regarded as a regular employee. In either case, he should be formally appointed and take an oath of office.[9]

The Office of Government Ethics also considered the status of informal advisers:

> 3. *Individuals Outside the Government Who Advise an Official Informally*
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> A Federal official may occasionally receive unsolicited, informal advice from an outside individual or group of individuals regarding a particular matter or issue of policy that is within his official responsibility. . . . An incident of this sort sometimes prompts the inquiry whether the outsiders have become SGE's of the agency. In general, the answer is that they have not, for they are not possessed of appointments as employees ***nor do they perform a Federal function***.
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> However, as so often happens in considering the applicability of the conflict-of-interest laws, a generality is insufficient here and a *caveat* is in order. ***An official should not hold informal meetings more or less regularly with a nonfederal individual . . . for the purpose of obtaining information or advice for the conduct of his office. If he does so, he may invite the argument that willy-nilly he has brought them within the range of 18 U.S.C. 202-209.***[10]

The considerations used in determining whether someone is a special Government employee are similar to, ***but not the same as***, the criteria in the definition of "officer" and "employee" in the Federal personnel statutes relied upon by the White House, 5 U.S.C. 2104

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[9]Id. at 23.

[10]OGE Informal Advisory Letter 82 X 22, 325, at 336 (July 9, 1982)(emphasis added).

and 2105.

> An "officer" means "an individual who is--
> (1) required by law to be appointed in the civil service . . . ;
> (2) engaged in the performance of a Federal function under authority of law or an Executive act; and
> (3) subject to the supervision of [the President or Federal officer], while engaged in the performance of the duties of his office. . . .[11]

> An "employee" means "an individual who is--
> (1) appointed in the civil service . . .;
> (2) engaged in the performance of a Federal function under authority of law or an Executive act; and
> (3) subject to the supervision of [the President or Federal officer] while engaged in the performance of the duties of his position. . . .[12]

These criteria, while also instructive, are not dispositive. For instance, a formal appointment is not necessary to subject an informal adviser to the conflict-of-interest laws. The definition of special Government employee in 18 U.S.C. 202(a) is broader than the definitions in sections 2104 and 2105. In the latter statutes, an "appointment" is required. Section 202(a), however, includes all those who are "retained, designated, appointed or employed" to perform Government duties.

In its 1977 opinion, OLC examined the criteria in the definitions of "officer" and "employee" in 5 U.S.C. 2104 and 2105, stating that "variants of these same three factors have, in fact, been utilized in one context or another under the conflict-of-interest laws.

> For example, the first criterion under the civil service test -- that the person be appointed in the civil service -- is analogous to the definition of the term "special Government employee" for the purposes of the conflict-of interest laws: an officer or employee "who is retained, designated, appointed, or

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[11] 5 U.S.C. 2104(a).

[12] 5 U.S.C. 2105(a).

> employed" to perform duties . . . . The quoted phrase connotes a formal relationship between the individual and the Government. . . . In the usual case, this formal relationship is based on an identifiable act of appointment. . . . ***However, an identifiable act of appointment may not be absolutely essential for an individual to regarded as an officer or employee in a particular case . . . perhaps where there was a firm mutual understanding that a relatively formal relationship existed.***[13]

Thus, OLC recognized that the definitions in the personnel statutes were not determinative of the applicability of the conflict-of-interest laws.[14]

The central factor that should be used to determine whether an informal adviser is a special Government employee is whether the adviser is in fact performing a Federal function. Providing advice to the President is not inherently a Federal function, because the President receives advice from persons both inside and (clearly) outside of Government. But the regular provision of advice, which is given in official White House meetings, with other White House staff present, and which advice is often indistinguishable from the advice provided by the White House staff, suggests that such an adviser is performing a Federal function and is serving as a de facto member of the White House staff.

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[13]2 Op.O.L.C. at 20-21 (emphasis added).

[14]Similarly, OGE's 1982 informal advisory letter considered sections 2104 and 2105 as only "instructive" in interpreting the definition of a special Government employee in the context of advisory committees. There are several additional reasons why these provisions do not further define "special Government employee." First, both sections 2104 and 2105 begin with the phrase, "For the purposes of this title" (Title 5), so that these laws do not expressly define the words "officer" and "employee" in Title 18. Second, Title 5 concerns the U.S. Government civil service; most employees of the White House Office are hired instead under authority of Title 3, § 105. Third, exempting a person performing a Federal function from the ethics laws merely for lack of a formal appointment would exalt form over substance and create a gap in coverage. The White House, or any other agency, would be able to exempt an unpaid adviser from coverage of the ethics laws simply by declining to execute the proper paperwork.

The badges of Government employment status -- pay, title, paperwork, office, pass and phone -- are just that, indicia. They are concomitant with the exercise of a Federal function. The fundamental question remains whether the adviser is performing a Federal function. So the frequency of meetings, their nature, and the manner in which the advice is solicited, given, and debated are all relevant.

A continuum exists from the one-time visit with the President, to the periodic one-on-one visits by the President's pollster, to the regular participation in White House meetings involving the President and others, to the adviser with a White House pass, office and phone, to the adviser who chairs meetings or directs others. In my view, Harry Thomason and Paul Begala were far enough along the continuum to be considered special Government employees (although the White House did not so conclude), and Dick Morris should be regarded as one now. Any legislative revision to section 202(a) should attempt to capture these types of advisers.

Codification of the functional test, as used by Justice and OGE, would be helpful, if only to dispel the notion that the absence of a formal appointment or paperwork is dispositive. But codification of the functional test would not obviate the exercise of judgment and discretion by agency ethics officials within the White House, because applying the functional test would depend heavily on the facts. And a further caution is that any attempt to clarify the definition of special Government employee may suffer from over- or under-inclusiveness, as I believe section 4 of H.R. 3452 does.

For example, section 4 would capture Harry Thomason, because he was given an office and a phone and provided advice regarding the staffing and structure of the White

House Travel Office. The provision would not, however, appear to have covered Paul Begala, who was more or less a fixture in the White House in 1993, or to cover Dick Morris now, who is reported to have frequently visited the White House over the past dispensing policy advice to the President and others, unless either was involved in giving advice with regard to congressional hearings or proceedings, or was a registered lobbyist at the time. It is my opinion that both individuals at one time or another have served as a special Government employee. The list of Government activities in proposed section 202(e)(2)(D) omits many Government activities that are equally important and sensitive as Government contracts or privatization.

The provision also may be read to cover the Chairman of the President's political party, or the President's pollster, who meets with the President regularly, sometimes with other White House officials present. If the provision is not intended to cover advice that is given directly (and perhaps exclusively) to the President or Vice President (by referring to advice only to "employees of the Executive Office of the President"), that should be spelled out clearly.

My major concern with section 4, as drafted, is with proposed section 202(e)(2)(B) and (C). These provisions would base the application of the concept of special Government employee, and thus the applicability of the conflict-of-interest laws, not on the functions performed in the White House, but on the adviser's outside interests or affiliations. This would mark a departure from the usual way of defining Government service, and lead to anomalous results. In some cases, there would not be any ethical concern with a person retained to provide regular advice to the White House on one subject if the person were a

major stockholder of a company doing business with the United States on a completely separate matter. Similarly, there are many situations that could be envisioned where the White House seeks from a person who is a registered lobbyist under the Lobbying Disclosure Act of 1995 advice regarding a matter for which the person is not a registered lobbyist. Yet, both of these situations appear to be covered by the provision, as drafted. In my view, a person who is a lobbyist or the owner of a company with business pending before the Government should be considered a special Government employee only if he were retained to engage in a Federal function (which could in certain situations include the provision of advice). If they are, the conflict-of-interest and financial disclosure laws apply.

The test to determine whether someone is an employee of the Executive Branch, whether permanent or temporary, regular or special, should turn on the functions and duties of the employee, not on the employee's outside interests. Once the determination is made that a person is a Government employee, then the conflict-of-interest laws and standards attach, and prohibit that person from participating, personally and substantially, in any particular matter in which he has a financial interest.

Codification of a functional test would begin with the distinction between a representative and a special Government employee. It would next look to the nature of the services the person is retained to provide: a person retained to supervise, direct, manage, or oversee any other Federal employees in the conduct of their office would be a special Government employee; a person retained to chair or organize meetings of Federal employees on matters of Government policy would also be considered a special Government employee. Last, the concept should encompass a person retained to provide ***regular*** advice

to the Government, and who provides such advice to the Government ***as part of the Government's internal deliberative process***. This last provision is the most difficult to define with precision, but it is also the role most informal advisers such as Harry Thomason and Paul Begala play.

Finally, I recommend that any revision of the definition of "special Government employee" cover the entire Executive Branch, not just the Executive Office of the President. Although the most visible ethics problems in the Clinton Administration involving outside advisers have involved the White House, the problem could arise just as easily in a Cabinet Department. Moreover, as both President Bush in Executive Order 12,674 and this Congress in the Ethics Reform Act of 1989 recognized, it is important, when crafting an ethics provision, to ensure that its application is uniform throughout the Executive Branch, unless there is a convincing reason for special treatment.

I thank the Subcommittee for the opportunity to provide these views and remain available to answer any of your questions.

Mr. HORN. We will now have Sandra J. Boyd, the assistant general counsel of the Labor Policy Association.

Ms. Boyd.

Ms. BOYD. Thank you.

Mr. Chairman and distinguished members of the subcommittee, I am pleased to appear before you today to discuss H.R. 3452. I am assistant general counsel of the Labor Policy Association, a public policy advocacy organization of the senior human resource executives of America's major corporations whose purpose it is to ensure that U.S. employment policy supports the competitive goals of its member companies and their employees. LPA is strongly committed to ensuring that this Nation's labor laws meet the workplace needs of employers both now and in the 21st century.

Whether the labor laws currently on the books, many of which were written over half a century ago, actually meet the needs of today's employers and employees is debateable. It is difficult, however, if not impossible, to have a full and open debate on the subject of this Nation's labor laws when those who make labor and employment policy are exempt from complying with the very laws in question.

This is one of the primary reasons that Congress passed the Congressional Accountability Act on a bipartisan basis, subjecting itself for the first time to 11 labor laws. For the same reasons we supported the Congressional Accountability Act we also support those portions of H.R. 3452, the Presidential and Executive Office Accountability Act, which would apply those very same 11 labor laws to the Executive Office of the President in the same manner as they are applied to the private sector and Congress.

It is instructive to review the reasons why the Congressional Accountability Act was passed, since in large measure H.R. 3452 is modeled on it. The Congressional Accountability Act was enacted by Congress so that it would be required to live by the same labor laws that it considers appropriate for the private sector.

The act was signed into law by the President on January 23, 1995, and passed with overwhelming bipartisan support. As we heard Representative Shays say earlier today, there were three guiding principles in passing the Congressional Accountability Act; they were: "If the law is right for the private sector, it is right for Congress. Congress will write better laws when it has to live by the same laws it imposes on the private sector and the executive branch, and we must as well respect the separation of powers."

Representative Goodling echoed such sentiments when he stated: "We will never be as careful as we should be in passing, changing and drafting laws until we ourselves are forced to comply with those laws, and the fundamental unfairness of a double standard is obvious in any case."

Again and again, Members and Senators mentioned the need for Congress to comply with those same laws as it imposes on the private sector. The benefits of doing so include a better understanding of the laws Congress passes, their effects, as well as an increase in congressional credibility with the public. Affording congressional employees the same protections as private sector employees was also an important factor.

Representative Lee Hamilton acknowledged that there were three reasons why Congress should follow the same laws as the private sector. They are, first, the widespread perception that Members have exempted themselves from many laws significantly undermines the confidence of the American people in this institution. We lose credibility and legitimacy when people believe that Members are somehow above the law.

Second, more fully applying the law to Congress will improve the quality of the legislation we pass.

Third, and this point I think has not been mentioned, it is simply unfair to congressional employees not to extend them the same rights and protections available to those who work elsewhere. Perhaps Representative Upton put it most succinctly when he noted: "Each year we pass more and more regulations on American business. It is time for us to start practicing what we preach and walk the walk."

Let me give just one example of how I think the Congressional Accountability Act is already working. One of the concerns that LPA members have is with respect to the Fair Labor Standards Act overtime exemptions. The regulations which are used to determine who is entitled to overtime and who is exempt and the flexibility provisions or lack thereof were last revised in the 1950's and are extraordinarily difficult to work with.

For years members of the business community, both small and large, have implored the Department of Labor and Congress to do something about these rules, to make them more certain and to revise them in a way to recognize the changes that have occurred in the workplace. These requests have fallen on deaf ears.

Beginning on January 23, 1996, Congress had to comply with those very same rules and was faced with determining for the first time in each office who was entitled to overtime and who was exempt under those same outdated rules. How would one classify a legislative assistant, the office manager, how would records be kept? Suddenly these became relevant issues.

An audit of three congressional offices by the FLECS Coalition, a group of companies and associations representing a wide variety of industries who are seeking reform to the FLSA, was widely distributed and discussed. Almost overnight there was a change in congressional offices.

Members began to ask: Does that law make sense the way it is written? Does it protect those employees it is meant to protect? Can we do better?

By having to comply fully with labor laws in our own offices these issues have taken on new meaning. This would not have occurred but for the Congressional Accountability Act, and I fully expect that the impact of H.R. 3452 would be the same. The current debate that we heard today from Mr. Mica on comptime and flexibility is another good example.

The Congressional Accountability Act made clear that the motivating force between that act was to end the double standard whereby Congress passes labor laws for itself but exempts itself from coverage. As one report stated, the greatest impetus to reform arises from a growing perception both within and outside Congress

that the present system creates an unfair double standard between Congress and other employers.

By enacting laws for others and appearing to exempt itself, Congress has done great damage to the public perception of Congress. The present situation constitutes an unacceptable double standard which breeds further public cynicism. Congress has now ended that double standard for itself, and I commend it for doing so, and it is appropriate that it end that double standard for the rest of the Government as well.

Thank you.

Mr. HORN. Thank you very much for that most helpful statement.

[The prepared statement of Ms. Boyd follows:]

MR. CHAIRMAN AND DISTINGUISHED MEMBERS OF THE SUBCOMMITTEE: I am pleased to appear before you today to discuss the H.R. 3452. My name is Sandy Boyd. I am Assistant General Counsel at the Labor Policy Association. The Labor Policy Association is a public policy advocacy organization of the senior human resource executives of America's major corporations whose purpose is to ensure that U.S. employment policy supports the competitive goals of its member companies and their employees. LPA is strongly committed to ensuring that this nation's labor laws meet the workplace needs of employers and employees both now and in the 21st Century.

Whether the labor laws currently on the books, many of which were written over a half a century ago actually meet the needs of today's employers and employees is debatable. It is difficult, if not impossible, to have a full and open debate on the subject of this nation's labor laws when those who make labor and employment policy are exempt from complying with the very laws in question. This was one of the primary reasons that this Congress passed the Congressional Accountability Act, on a bipartisan basis, subjecting itself for the first time to eleven labor laws. For the same reasons we supported the Congressional Accountability Act we also support those portions of H.R. 3452, the Presidential and Executive Office Accountability Act, which would apply those same eleven labor laws to the Executive Office of the President in the same manner as they apply to the private sector and Congress.

It is instructive to review the reasons why the Congressional Accountability Act was passed since H.R. 3452 is modeled on it. The Congressional Accountability Act of 1995, Pub. L. No. 104-1, 1995 U.S.C.C.A.N. (109 Stat.) 3, ("CAA") was enacted by Congress so that Congress would be required to live by the same labor laws that it considers appropriate for the private sector. The Congressional Accountability Act of 1995 was signed into law by the President on January 23, 1995. The legislation, first introduced in 1993, passed both the House and the Senate in January of 1995 with overwhelming bipartisan support.

Rep. Christopher Shays (R-CT), in introducing the CAA reiterated that in working on the bill Members had "3 guiding principles," they were:

> If a law is right for the private sector, it is right for Congress. Congress will write better laws when it has to live by the same laws it imposes on the private sector and the executive branch and we must as well respect the separation of powers embodied in the Constitution.

Id. at H94. Rep. William F. Goodling (R-PA) echoed such sentiments when he stated:

> We will never be as careful as we should be in passing, changing, and drafting laws until we ourselves are forced to comply with those laws and the fundamental unfairness of a double standard is obvious in any case. So let us not pat ourselves on the back too eagerly tonight. It is long overdue.

Id. at H95.

Again and again Members and Senators mentioned the need for Congress to comply with the same laws as those imposed on the private sector. The benefits of doing so include a better understanding of the laws Congress passes, and their effects, as well as an increase

in congressional credibility with the public. Affording congressional employees the same protections as private sector employees was also an important factor.

Rep. Lee H. Hamilton (D-IN) acknowledged that there are three reasons why Congress should follow the same laws as the private sector. They are:

> First, the widespread perception that Members have exempted themselves from many laws significantly undermines the confidence of the American people in this institution. We lose credibility and legitimacy when people believe that Members are somehow above the law. Second, more fully applying laws to Congress will improve the quality of the legislation we pass...Third, and this point I think has not been mentioned, it is simply unfair to congressional employees not to extend to them the same rights and protections available to those who work elsewhere.

Id. at H95.

Rep. Roscoe G. Bartlett (R-MD) also acknowledged during debate that "members of Congress should be treated the same as our laws treat the American people." Id. at H96. He proposed that if the laws are simply too onerous, then Congress should stop passing them. Rep. Eva Clayton (D-NC) also declared that Congress has "outlived the days when Congress can expect special and different treatment from the average employer." Id.

Rep. Howard P. McKeon (R-CA) found that as a businessman, he had felt the burden of government regulation, but as a Congressman was exempt from it and concluded that "that must change." Id. Rep. Anthony C. Beilenson (D-CA) commented that Members of

Congress ought to be held "to the same standards that our laws demand of private-sector employers." Id. Rep. Frederick S. Upton (R-MI) put it succinctly when he noted that:

> Each year we pass more and more regulations on American businesses. It is time for us to start practicing what we preach and walk the walk.

Id. at H98. Rep. Greg Ganske (R-IA) found that "when Congress has to deal with the same laws and regulations that small businesses do, I predict that we will modify many of the laws in a more common sense way." Id. at H101.

As Senator Charles E. Grassley (R-IA) stated, "Congress can no longer refuse to live by the laws it passes. The time is long overdue." Id. at S440. Senator Grassley went on to note that he was pleased that Congress would now be complying with the same laws it has enacted for the private sector, quoting from James Madison in Federalist Paper 57 that "Congress shall pass no law that does not have full operation on itself." Id. These sentiments were repeated again and again by other Senators in the floor debate on the CAA. A Committee Report of the House of Representatives stated:

> Our constituents want Congress to fully comply with laws it has imposed on the private sector. They have judged Congress' efforts to date in this area to be inadequate. In Federalist No. 57, James Madison described as "one of the strongest bonds by which human policy can connect the rulers and people together" the fact that Congress "can make no law which will not have its full operation on themselves and their friends, as well as on the great mass of society." Insofar as government deviates from that standard of solidarity, Madison argued, the people will feel themselves oppressed. More than two centuries later, it is clear that the American people are frustrated by the seeming immunity of Congress from certain laws that often seem onerous when visited on the rest of the nation, despite the worthy public policy purposes which such laws may serve. Addressing this

> issue would clearly help close the credibility gap which exists between Congress and the American public.

H.R. Rep. No. 650 at 11-12.

Senator Grassley also believed that passing the CAA would cause Congress to rethink this Nation's labor laws. It would do so by ensuring that:

> Members of Congress will know firsthand the burdens that the private sector lives with. By knowing these burdens, Congress may decide that the laws indeed are burdensome. That realization may lead to necessary reform of the underlying legislation. It is true that there will be additional costs imposed on Congress if this legislation passes. However, these are costs that the private sector has had to live with for years.

Id. at S441.

As Senator James M. Inhofe (R-OK) so succinctly stated:

> The fact that Congress has routinely exempted itself from laws and regulations which affect virtually every other person, business and organization in the land says volumes about the arrogance of power, about the insulation of Washington from the real world, about the gulf which has come to exist between the people and those who are elected to represent them.

Id. at S453.

Let me give one example of how the Congressional Accountability Act is already working. One of the concerns LPA members have is with respect to the Fair Labor Standards Act (FLSA) overtime exemptions. The regulations which are used to determine who is entitled to overtime and who is exempt were last revised in the 1950's and are extraordinarily difficult to work with. For years, members of the business community, both

small and large, have implored the Department of Labor and Congress to do something about these rules, to make them more certain and to revise them to recognize the changes that have occurred in the workplace. These requests have fallen on deaf ears. Beginning on January 23, 1996 Congress had to comply with these very same rules and was faced with determining in each individual office who was entitled to overtime and who was exempt using those same outdated rules. How would one classify a legislative assistant? the office manager? How should records be kept? These suddenly became relevant issues. An audit of three congressional offices by the FLECS coalition, a group of companies and associations representing a wide variety of industries who are seeking reforms to the FLSA, was widely distributed and discussed. See Attached. Almost overnight there was a change in congressional offices. Members began to ask, does this law make sense the way its written? Does it protect those employees its meant to protect ? Can we do better? By having to comply fully with labor laws in their own offices these issues have taken on new meaning. This would not have occurred but for the Congressional Accountability Act. I fully expect that the impact of H.R. 3452 will be the same.

Conclusion

The Congressional Accountability Act made clear that the motivating force behind the CAA was to end the double standard whereby Congress passes labor laws but exempts itself from coverage. As the report states:

> The greatest impetus for reform arises from a growing perception, both within and outside the Congress, that the present system creates an unfair double standard between

> Congress and other employers. By enacting laws for others, and appearing to exempt itself, the Congress has done great damage to the public perception of Congress. The present situation constitutes an unacceptable "double standard," which only breeds further public cynicism towards Congress.

S. Rep. No. 397, 103d Cong., 2d Sess., at 4-5 (1994).

Congress has now ended the double standard for itself and it is appropriate that it end the double standard for the rest of the government as well.

FLECS Flexible Employment Compensation and Scheduling Coalition

Wage/Hour Audit of Fictitious Congressional Office Reveals a Web of Confusion Awaiting Congress

Beginning on January 23. 1996, both Houses of Congress will be covered by 10 employment laws, with which private sector and state and local government employers have had to comply for several years. Members of Congress will quickly learn that of these laws, the Fair Labor Standards Act (FLSA), requiring payment of a minimum wage and overtime, will likely be the most troublesome. Perhaps more than any other employment law, the FLSA is riddled with ambiguities and labyrinthine complexities that even FLSA experts have difficulty deciphering and applying to specific situations.

The statute must be complied with every pay period, with a wrong guess potentially resulting in thousands of dollars of liability for a small business—millions for a large company. Indeed, the Employment Policy Foundation has estimated that a miscalculation of the exempt status of only 10% of these employees (a minimal estimate) would cost the economy almost $20 billion annually.

To assist Members of Congress in preparing for compliance, the Flexible Employment Compensation and Scheduling (FLECS) Coalition has prepared the attached simulated audit of a hypothetical congressional office. The audit has been prepared by three FLSA experts: Sandra J. Boyd, Esq., of the employment law firm of McGuiness & Williams and counsel to the FLECS Coalition; Maggi Coil, Compensation Director of Motorola, Inc.; and Dean Sparlin, Esq., of the law firm of Gibson, Dunn & Crutcher and counsel to the FLSA Reform Coalition. All three of these individuals have extensive experience in performing FLSA compliance audits and based the simulated audit on audits they have recently conducted of actual congressional offices.

The audit demonstrates that for Members of Congress, the most challenging aspect in complying with the FLSA will be ascertaining which staff members are nonexempt under the FLSA (and therefore owed time-and-a-half overtime) and which ones are exempt from the overtime provisions. It is widely assumed—incorrectly—that most employees who are commonly considered "professional" employees fall neatly within the so-called "white collar" exemptions of the FLSA. As the audit demonstrates, these exemptions are much more narrow than the common usage of the terms. Moreover, the burden falls on the employer to demonstrate that an employee meets the somewhat obscure elements of the exemption. A definitive answer is only available after the matter has been fully litigated with a wrong guess causing backpay to be awarded to that employee, and potentially doubled, for all overtime worked during the prior two or three years.

The audit and an executive summary are attached.

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Executive Summary of the Fictitious Congressional Audit

When the Congressional Accountability Act goes into effect on January 23, 1996, Congressional offices will be required by the Fair Labor Standards Act (FLSA) to investigate the functions that each employee performs in order to determine whether or not they are exempt from the Act's overtime provisions. In the past, nearly all congressional employees were treated as exempt. However, under the FLSA, offices will only be able to classify as exempt those employees who fit into three narrowly crafted classifications.

The Flexible Employment Compensation and Scheduling (FLECS) Coalition compiled a fictitious audit on the basis of three actual congressional audits. The fictitious audit shows that a majority of hill staffers will not be exempt from the overtime requirements. The following is a breakdown of how the positions were classified in the fictitious audit. It should be borne in mind that these classifications are based on the specific functions performed by the fictitious employees and should not be translated to other offices without a thorough examination.

Exempt	Nonexempt
• District Director	• District Representative/Caseworker
• Chief of Staff	• Press Secretary
• Legal Counsel	• Legislative Assistant
• Legislative Director	• Legislative Correspondent
• Office Manager	• Systems Administrator
	• Staff Assistant
	• Executive Assistant

Once offices determine the exemption status for their employees, they will need to implement new managerial practices. Time records will need to be kept to document the number of hours worked by the nonexempt employees for purposes of calculating overtime. In addition, cash overtime at time and a half will have to be paid to all nonexempt employees. For employees in Congressional offices, this overtime cannot be paid with compensatory time off in lieu of cash overtime.

Congressional employers will soon discover what private sector employers have long known—the FLSA is neither employer nor employee friendly. Decisions with regard to who is and who is not entitled to overtime should be easily discernable; they are anything but. Congressional coverage was passed so that Congress would be covered by the same labor laws as the rest of the country. Congress is about to find out what that means.

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January 22, 1996

TO: Congressman Al B. Darnd

FROM: Tilly Laika Tizh, Esq.
Seymour, Vial, Aishens, & Gagg

RE: **Impact of Fair Labor Standards Act**

In anticipation of the coverage of Members of Congress under the Fair Labor Standards Act (FLSA), effective January 23, 1996, your administrative assistant, Maxim M. Drive, asked our law firm to perform an audit of your Washington and district offices. We were told to examine your operations in the same manner we would examine those of any of our clients since the Office of Compliance has proposed applying many of the same Department of Labor regulations that currently apply to private sector employers.

To perform this audit, we have interviewed each member of your staff in Washington and in your district office. In addition, we have had each of them fill out a survey describing in detail their duties and responsibilities. Both the interviews and the surveys were performed exactly as they would be for any of our clients.

Before describing our findings, I will give you the same caveat we give to all our clients. The FLSA is an unusual blend of specificity and ambiguity that has created nightmares for human resource professionals and attorneys attempting to advise their clients on how best to comply. The FLSA became law in 1938. As a depression-era statute it sought to maximize employment by adding overtime requirements that would penalize employers who work employees over 40 hours in a workweek. DOL regulations interpreting the FLSA are, in many cases, almost as old as the statute itself. Many employers find it difficult, to say the least, to reconcile their human resource practices with guidance written decades ago for an entirely different era. Furthermore, in some areas, guidance has been provided by the Department of Labor but if your own set of circumstances do not follow precisely those described by DOL, the guidance is of limited value. Add to this the outdated nature of much of the information, and compliance becomes something of a moving target. Moreover, the courts have shown a willingness to disagree with the Department's interpretation of the statute and its regulations. All of this confusion is critically important also because under the Congressional Accountability Act, a disgruntled employee has the option of either complaining to the Office of Compliance or filing a suit in federal court.

Remember also that in many key areas the employer has the burden of proof. For example, an employer may designate an employee to be an executive, administrative, professional or outside sales employee exempt from the FLSA's overtime requirements. If challenged, the employer will have the burden of proving that an employee meets each and every one of the exemption requirements. In the case of a tie, the employer loses.

Given these realities, we take a conservative approach in advising our clients, resolving ambiguities on the side of broad coverage of the statute, since that is where the presumption generally lies. We do this not to protect ourselves but because a violation of the FLSA can have serious results. Employees can receive backpay and liquidated (double) damages for a period of two or three years, if the violation is deemed to be willful. In addition, attorneys fees and costs can be assessed against an employer. For a single employee, this can mean several thousands of dollars. If more than one employee is in the same situation, it can mean hundreds of thousands of dollars. Because of the financial implications, we generally advise our clients to adopt the safest approach.

Please feel free to contact us at 555-9999 if you have any additional questions about our report.

Introduction

We at Seymour, Vyol, Achens, & Gagg believe that the first step, and most difficult one, in an FLSA audit is determining which employees are exempt from the overtime provisions (by virtue of meeting either the executive, administrative or professional definition) of the Fair Labor Standards Act ("FLSA") and who is entitled to overtime compensation. Once this determination is made, proper working time, overtime and recordkeeping rules can be devised. In order to determine whether an employee is exempt or nonexempt, each employee's job duties and responsibilities must be assessed. It is important to remember that under the FLSA each individual employee must be examined. An employer cannot rely on job titles or job descriptions alone to determine exemption status. Rather, what is important is an employee's actual duties. In conducting our audit, we used a variety of techniques to elicit from employees information about their job duties. We should note, at this point, that because job functions are usually not stagnant, prudent employers will periodically conduct reviews of their exemption determinations to ensure that they are accurate and make changes where appropriate.

Our discussion begins with a brief review of the legal tests for exemption. We should note that there is a substantial body of case law as well as interpretive material on the FLSA, only a small portion of which appears in our discussion of the regulation's requirements. We attempted to highlight only the important considerations for your office with each of the exemption tests; we can, of course, provide additional information to you if necessary. After a discussion of the legal requirements, we have analyzed each of your staff positions to determine whether they are exempt from the overtime requirements of the FLSA by virtue of being an executive, administrative or professional employee as these terms are defined under the Department of Labor (DOL) regulations.

I. Legal Requirements of the "White Collar" Exemption Tests

In addition to the DOL regulatory definitions of "executive, administrative" and "professional" employees found at 29 C.F.R. Part 541 *et seq.*, there is a substantial body of interpretive bulletins and case law as well as opinion letters issued by the Wage and Hour Administrator on the white collar exemptions. The Board of Directors of the Office of Compliance has proposed adopting these white collar exemption regulations in their entirety. It has declined to adopt the interpretive bulletins and other relevant guidance because it only has authority to adopt "substantive regulations" of the DOL. The Board has put offices on notice, however, that "the Board will give due consideration to the Secretary's (of Labor) interpretations of the FLSA." 141 Cong.Rec. S17605 (November 28, 1995). This is consistent with the intent of the Congressional Accountability Act that Congress be subject to the same employment laws as those in the private sector. The following discussion is of the applicable regulations as well as pertinent interpretations. You may be surprised at the arcane nature of these "white collar" regulations. This is due, in large part, to the fact that

the regulations have not been substantively revised since the 1950s. This is part of why the determination of exemption status is so difficult.

It is important to note that under the FLSA all employees are presumed entitled to overtime compensation, unless the employer proves otherwise. Since the burden of proof falls heavily on the employer in proving the exemption, the employer must be careful in making such determinations, especially in "gray" areas. It is also important to remember that the actual job duties of each and every employee must be reviewed. The FLSA is not concerned with job titles, civil service classifications or other group identifications. Under the FLSA it is improper to make generalizations about whether any particular group or class is exempt; instead the specific duties of *each employee* must be examined.

The consequences of misclassifying an employee can be substantial. An employee who is misclassified is entitled to back pay, liquidated (doubled) damages, attorneys' fees and costs. Many such lawsuits are brought as class actions, where the employee seeks to add other plaintiffs to the lawsuit who have likewise been denied overtime. Obviously, the larger the "class," the greater the potential award.

In order to meet the executive, administrative or professional exemption the employee must be paid the requisite salary (currently about $13,000 a year for the short test), be paid on a salary basis[1] and meet a duties test. Since all full-time employees reviewed received at

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[1] The salary basis test, 29 C.F.R. § 541.118, has been the source of numerous problems for many employers. Changing judicial and administrative interpretations of the salary basis test have made it something of a moving target for the unwary. Many employers who believe they are in compliance have been caught by its numerous traps. It is unclear whether the Office of Compliance intends to fully apply the salary basis test to congressional offices.

Essentially, the salary basis test requires that an exempt employee receive each pay period a predetermined amount constituting all or part of the employee's compensation. An exempt employee must also receive his or her full weekly salary for any week in which work is performed. In no case may an exempt employee have his or her pay reduced for an absence of less than a day. This seemingly simple rule has caused the following common practices to be called into question, either by DOL or the courts:

- providing unpaid leave of less than a full day;
- paying overtime;
- providing compensatory time off with pay as compensation for overtime;
- deducting accrued paid leave;
- imposing disciplinary suspensions;
- requiring employees to keep time sheets; and
- setting work schedules.

least $13,000 per year, only the "short test" requirements need to be met. Each of the short test requirements for the executive, administrative and professional exemption are discussed below. If you should decide that any of your employees will be classified as "exempt," you should take care to ensure that the salary, salary basis and duties tests are met at all times.

Executive Exemption

In order to be an exempt "executive" employee under the FLSA, in addition to meeting the compensation and salary basis requirements, the employee must:

- primarily manage an agency, department or subdivision; and
- customarily and regularly direct two or more employees.

The executive employee must have management as his or her "primary duty." Primary duty generally means 50 percent or more of an employee's time. 29 C.F.R. §541.103. The supervision requirement necessitates that the executive customarily and regularly supervise two or more employees, or 80 hours worth of employee work whether the employees are full time, part time or some combination thereof. It is important to ensure that potentially exempt executive employees are not "working supervisors" or "working foreman" as they are referred to in the regulation. 29 C.F.R. §541.115. A working supervisor is one who regularly performs "production work" or other work that is unrelated or only remotely related to his or her supervisory activities.

Administrative Exemption

For an employee to meet the "administrative" exemption, in addition to receiving the required compensation and being paid on a salary basis, the employee must:

- primarily perform office or non-manual work directly related to management policies or general business operations; and
- the employee's primary duty must include work requiring the exercise of discretion and independent judgment.

Generally, exempt employees must be engaged in white collar, as opposed to manual work. They must also be involved in work related to management functions or general business operations. The regulations state:

> The phrase "directly related to management policies or general business operations of his employer or his employer's customers" describes those types of activities relating to the administrative operations of a business as distinguished from

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See Abshire v. County of Kern, 908 F.2d 483 (9th Cir. 1990); Martin v. Malcom Pirnie, Inc., 949 F.2d 611 (2d Cir. 1991); Brock v. Claridge Hotel and Casino, 846 F.2d. 180, cert. denied 488 U.S. 925 (1988)

> "production" or, in a retail or service establishment, "sales" work. In addition to describing the types of activities, the phrase limits the exemption to persons who perform work of substantial importance to the management or operation of the business or his employer's customers.

29 C.F.R. § 541.205.

Recently, this has meant that those employees who carry out policies or services for an organization have been found to not meet the exemption because they are "production workers." The following types of employees have been found to be nonexempt production workers under this analysis: probation officers; inside sales personnel; child treatment counselors; environmental conservation officers; bookkeeper; T.V. producers, directors, and writers; insurance claims investigators; state tourism officials; and criminal investigators. See *Bratt v. County of Los Angeles*, 912 F.2d. 1066 (9th Cir. 1990); *Martin v. Cooper Electric Supply Co.*, 940 F. 2d 896 (3d. Cir. 1991); *Dalheim v. KDFW-TV*, 706 F.Supp. 493 (N.D. Tex. 1988) Aff'd, 918 F.2d 1220 (5th Cir. 1990) *Gusdonovich v. Business Information Co.*, 705 F.Supp. 262 (W.D. Pa. 1985). One court has described the distinction between "production" and "administrative" employees by stating that hose whose primary duty is administrating business are "administrators" while those who provide the commodity or commodities of the organization, whether that be goods or services, are "producers." *Reich v. Chicago Title Insurance Co.*, 2 Wage & Hour Cas 2d. 150 (D. Kan. 1994).

It is also important to note that under this exemption, exercising "discretion and judgment" does not include those employees who have a significant "skill and knowledge" base from which they make decisions. 29 C.F.R. §541.207(c)(1). Employees who, although knowledgeable and skilled, perform jobs requiring continual reference to established written or other standards do *not* perform work requiring discretion and independent judgment. *Id.* See *Hashop v. Rockwell Space Operations Co.*, 2 Wage & Hour Cas. 2d. 707 (S.D. Tex. 1994)(space shuttle grand control trainers did not exercise "discretion and judgment" but rather were highly trainer technicians who performed within well-defined framework.) In general, the exercise of discretion and independent judgment involves the comparison and the evaluation of possible courses of conduct and acting or making a decision after the various possibilities have been considered. Moreover, the term implies that the person has the authority or power to make an independent choice, free from immediate direction or supervision and with respect to matters or significance. 29 C.F.R. § 541.207(a).

The Administrative exemption has become increasingly narrowed by DOL opinion letters and case law. It should be used with caution.

Professional Exemption

A "professional" employee is one who meets the compensation and salary basis test requirements and whose primary duty consists of performing work requiring advanced learning, or that is original and creative in a recognized artistic field, or work as a teacher. The work must also require the consistent exercise of discretion and judgment or consist of work requiring invention, imagination or talent in a recognized field of artistic endeavor.

The professional exemption from overtime is extremely limited. It applies only to the traditional professions (*e.g.*, law, medicine) or to artistic professionals (*e.g.*, artists, musicians). It is also important to note that not everyone working in a professional field necessarily qualifies for the exemption. For example, entry-level engineers, accountants or librarians may possess the requisite educational background but do not necessarily exercise discretion or judgment in their work; often times this does not occur until the employee has additional on-the-job experience.

II. Factual Analysis of Your Staff Jobs

Written Documentation

We found that, in your office, there was limited written job documentation available for review. There is no requirement under the FLSA to have job descriptions or job documentation but typically we begin an audit by reviewing the employer's existing job documentation before beginning the process of interviewing individual employees. From the materials that were provided to us for review (which included policies, procedures, and some employee records), I was able to get some sense of how the staff is organized, who is on the staff, and where the staff members are located (District Office versus the D.C. office).

Interviews and Surveys to Capture Job Content

I began my review by passing out an extensive questionnaire which elicited information from each staff member regarding their day-to-day duties and level of responsibility and authority. In addition, the questionnaire asked about each employee's educational background and relevant experience. All of these questions were aimed at determining whether an employee's duties make them eligible for the executive, administrative or professional exemption. One-on-one interviews with employees in your Washington, D.C. office were also held. From the surveys and interviews, I was able to better understand the organization of the staff, the roles of those individuals not available for interviews, and the duties and tasks associated with the operation of your office. On several occasions, I also met or had telephone conversations with your Administrative Assistant, Maxim M. Drive, where I posed additional questions about particular employees' job duties. After the questionnaires were reviewed and interviews conducted, I carefully examined each one to determine whether the employee, based on their duties, met the white collar exemptions.

The issue of whether jobs are exempt from the overtime provisions of the FLSA has generally not been a factor for your staff in the past. That being said, there are no processes in place to determine, on a ongoing basis, which jobs continue to qualify for exemption from the overtime provisions.

As I reviewed your staff jobs, I relied on the FLSA's duties tests and kept all potential exemption tests in mind as I considered job content. [The tests are executive, administrative, or professional. The other so-called "white collar" exemption is for outside sales persons, which is inapplicable in a congressional office setting.] These tests were applied to each of the jobs that I was able to discern from documentation, surveys and

interviews in your office. It is important to remember that while each exemption determination is expressed in terms of job titles, decisions were made solely on the basis of the job duties performed by the individual employees currently holding those positions. There are a few jobs that I have noted as nonexempt but "borderline" for exemption. It is important to remember that under the FLSA, *all* jobs are considered nonexempt unless the employer can show clearly, based on duties and responsibilities, that the job qualifies for exempt status under any one of the exemption tests. There is a significant body of recent case law that reinforces the prudence of making a job that is in the "gray area" nonexempt and paying the employee overtime rather than risk the back pay liability, liquidated damages, criminal penalties, *etc.* You should be aware also that while there is a substantial amount of case law on the exemption tests, there are few which discuss the exact job positions that you have in your office. This, of course, makes advising you more difficult. It also reinforces the need for caution.

We concluded the following with respect to the exemption status of each of your staff jobs:

District Office

Position	*Exempt*	*Nonexempt*	*Exempt Classification*
District Director	✓		Executive
District Representative/ Caseworker		✓	

Washington, DC Office

Position	*Exempt*	*Nonexempt*	*Exempt Classification*
Chief of Staff	✓		Executive
Legal Counsel	✓		Professional
Legislative Director	✓		Executive
Office Manager	✓		Administrative
Press Secretary		✓	
Legislative Assistant		✓	
Legislative Correspondent		✓	
Systems Administrator		✓	
Staff Assistant		✓	
Executive Assistant		✓	

Discussion of Staff Jobs: The following is a discussion of each of the staff jobs which we reviewed in your office. We have briefly summarized the primary duties of each of your employees as well as our opinion as to which exemptions, if any, are applicable.

District Director. The District Director is responsible for the day to day management of the Member's District Office(s). As such, he supervises all five of the District Office's employees. It is the District Director's responsibility to ensure that the District Office represents the Member when he is not present in the District. In this capacity, the District Director attends various community meetings and acts as a liaison between the Member and community organizations. When the Member is present, the District Director accompanies him at meetings and other events. The District Director also handles constituent issues which are complex or cannot be resolved by a caseworker.

While the District Director has a myriad of duties, his primary duty (which he spends in excess of 50% of his time performing) is the supervision of the five caseworkers who handle constituent mail. The District Director meets the requirements of the executive exemption.

Caseworker(s)/District Representative(s). The caseworkers, or district representatives, primarily respond to constituent mail. Much of this mail involves constituents who have disputes with government agencies (*e.g.*, a Social Security benefits claim). The caseworkers have, essentially, a "script" for how to handle all constituent mail. For example, they may ask an agency for the status of a claim, but may not attempt to influence its outcome. Any difficult or complex case work problems are forwarded to the District Director.

It is our opinion that the caseworkers do not meet any of the white collar exemptions. Their work is routine and, in large part, clerical in nature. They are closely supervised and do not exercise discretion and independent judgment. They are, therefore, ineligible for exemption.

Chief of Staff. The Chief of Staff, or Administrative Assistant, is responsible for oversight of all day-to-day staff operations in your office. All staff members report directly to the Chief of Staff. Decisions about work schedules, personnel, hiring, and firing are the responsibility of the Chief of Staff, in coordination with the Member. The Chief of Staff's primary duty is the management of the congressional office, which includes management of more than two full time employees.

We believe that the Chief of Staff (or Administrative Assistant) is clearly an exempt executive as that term is defined.

Legal Counsel. The legal counsel in your office is primarily responsible for providing legal research and advice on a wide range of issues. In her position, she provides legal opinions regarding, for example, pending legislation. She also drafts legislation and amendments of interest to the Member. On occasion, she reviews the work of the L.A.'s for legal sufficiency. She also is the staff member charged with following the activities of the Judiciary Committee, on which the Member serves. The legal counsel is consulted by the A.A. and the Member on policy making decisions. The legal counsel works independently and with little supervision. The legal counsel has a B.A. as well as a J.D. degree. She is a member of the District of Columbia bar association. Prior to joining the Congressman's office, she practiced law for five years with a private law firm.

We believe that the Legal Counsel is an exempt professional employee, as that term is defined in the regulations. She has the requisite "advanced learning" (law degree) in a recognized profession. In addition, she clearly exercises discretion and independent judgment in the performance of her work. We should caution you, however, that not every employee with a law degree (or other advanced degree) is necessarily exempt. What matter are the employee's actual job duties. In this position, the law degree was clearly a necessary requirement in order to perform the duties of the job. The same could not be said, for example, of a Legislative Assistant with a law degree. Since the law degree is not necessary in order to perform the job, the employee would not be exempt as a professional employee simply because they possess a certain degree.

Legislative Director. The legislative director's (L.D.) primary responsibility is to supervise the legislative assistants in their activities. The legislative director regularly meets with legislative assistants to review their work and to advise them on how to proceed. She also reviews all memos and other correspondence before it is sent to the Member. On occasion, she will work on pending complex legislative issues performing many of the same duties as a legislative assistant.

It is our opinion that the legislative director is an exempt executive employee given that her primary duty is the supervision of more than two employees. We caution you, however, to periodically review this decision. Since the legislative director also works on

legislation, in much the same way as the legislative assistants she supervises, there is a danger that the L.D. could become a "working supervisor." If the L.D.'s primary duty were to shift from supervision to legislative work, then the position would be nonexempt for the same reasons that the L.A. position is nonexempt.

Office Manager. The Office Manager's primary duties include: office administration; supervision of nonlegislative staff such as executive assistants; screening, interviewing and testing of potential employees; overseeing constituent mail flow; training of new personnel and; payroll. This consumes about 80% of the Office Manager's time. In addition, the Office Manager on occasion handles: individual casework, correspondence and service academy nominations.

We should note that unlike most of the positions in your office there are a substantial number of cases on the exemption status of office managers and other similar employees. Many employees who hold the title of "office manager" are nonexempt employees entitled to overtime while others may meet one of the exemption tests; it all depends on the duties and responsibilities of the individual employee who holds the position. In your office we believe that the office manager's duties appear to fall within the guidelines for administrative exemption. Under the first prong of the duties test, an office manager's responsibilities satisfy the "office or nonmanual" requirement. Moreover, performance of these duties comprises 100% of her responsibilities, thus making these office tasks her primary duty within the meaning of the regulations. In addition, her tasks appear to directly relate to the management policies or general business operations of a congressman's office. For example, by supervising nonlegislative staff, screening and interviewing potential personnel, and training new personnel, an office manager ensures that office personnel meet and function appropriately within office guidelines. In *Auer v. Robbins*, 65 F.3d. 702,721 (8th Cir. 1995) the court concluded that a quality control selection sergeant met administrative exemption requirements where his primary duty was to ensure that department personnel were functioning in a manner consistent with department policies. His tasks included coordinating and managing the activities of subordinates and determining whether officers were maintaining the standards of professionalism set forth in the department's polices and procedures. An office manager's personnel tasks involve a similar responsibility of running the office. The office manager also ensures compliance with office policies by overseeing the constituent mail flow. All of the office manager's supervisory tasks allow her to make sure that the office runs smoothly and that all outgoing information appropriately reflects the office policies.

Although some of an office manager's tasks, such as payroll and oversight of the mail flow, are clerical in nature, such tasks do not preclude her from classification as an administrative employee. The regulations state that clerical employees do not qualify as administrative. 29 C.F.R 541.205 (c)(2). Nonetheless, the court in *Hills v. Western Paper Co.*, 825 F. Supp. 936 (D.Kan. 1993) held that a branch accounting credit manager who spent more than 50% of her time doing bookkeeping and clerical work qualified as an administrative employee. The court applied the "primary duty" analysis as discussed above and found that the employee's managerial duties were far more important than her clerical duties. The court found dispositive the employee's responsibilities to supervise and evaluate another employee under her; her duty of training and orienting new employees in her

department; and her task of keeping track of bills and payments. Such supervisory functions, the court found, "relate to and are the means through which management policies are implemented in a business."

The second prong of the duties test directs that an employee's performance of her primary duty include work requiring the customary and regular exercise of discretion and independent judgment. The office manager arranges interviews, supervises, oversees, and proofreads without immediate direction on matter of substantial significance to the running of a congressman's office. She also uses her discretion in the ability to hire and fire and makes recommendations which will be given particular weight. Such employment issues left to her discretion can be deemed "significant" in that the choices involve the exercise of authority within a wide range to commit [her] employer in substantial respects financially or otherwise. The office manager bases the majority of her decisions on her own ideas, with limited or no review by others. Finally, an office manager customarily and regularly uses her discretion in the ongoing process of supervising and hiring employees for the office.

Press Secretary. The Press Secretary is responsible for all dealings with the press, both national and in the district. The press secretary writes all press releases and speeches where press interest is likely to be significant. The press secretary also maintains continuous contact with journalists in order to generate interest in the activities of the office as well as to field any press inquiries. The press secretary is consulted on many policy positions taken by the Member and is the chief advisor with respect to how these policies will be articulated to the press. In addition, he spends about 15% of his time handling constituent questions and mail. The press secretary has no supervisory responsibility over other staff members, nor does he handle administrative tasks. The press secretary has a Bachelor's degree in Communications and Political Science and spent four years working as an L.A. before his present position.

We believe that the press secretary is nonexempt. The Press Secretary does not have any supervisory responsibilities and is therefore ineligible for the executive exemption. Likewise, we do not believe that the professional exemption is applicable. Although it is possible for high-level journalists to be exempt as professionals, we do not believe that the Press Secretary would qualify. The only possible exemption left, therefore, is the administrative exemption. We found that the Press Secretary arguably exercises a sufficient amount of discretion and independent judgment to meet this prong of the administrative exemption since he is often involved in policy discussions and decisions. Moreover, there is very little supervision of his work and he has much latitude in his dealings with the press. We do not believe, however, that the Press Secretary is involved in the day to day business operations or general management policies of the operation. Rather the Press Secretary is responsible for "producing" press coverage of the office's activities as well as disseminating information to the press. As such, we believe that the Press Secretary would be found to be a "production worker" ineligible for the administrative exemption.

Legislative Assistant(s). The legislative assistants (L.A.) in your office are responsible for gathering information on specific topics (*e.g.*, crime and women's issues) in order to ensure that the Member of Congress is fully briefed and aware of issues of importance to the district, issues coming before relevant committee(s), and/or issues of particular interest. Sources of information are multiple, including but not restricted to the news media, library

research, and other sources from experts in the field. Data to be gathered is of a factual nature. Some of your L.A.'s are also responsible for all issues coming before particular committees, on which the Member serves. In these instances, L.A.'s also keep the Member briefed on all matters before the committee, attends all hearings of subcommittee's on which the member serves and assist in the preparation of briefing documents and potential questions to be used in those hearings. Occasionally, your L.A.'s will work with your legislative counsel in drafting amendments offered to bills coming before committee. In addition, L.A.'s answer constituent mail regarding issues for which the L.A. is responsible. While you have a legislative correspondent who handles routine constituent mail, the L.A's tend to handle correspondence which is more difficult, or requires their knowledge of a particular subject matter. This correspondence takes up about 20% of their time. All of your L.A.'s have at least a Bachelor's degree and some have considerable Hill experience, either as interns or as L.A.'s. None of your L.A.'s have supervisory responsibilities or any other administrative responsibilities.

Since none of your L.A.'s have supervisory duties, they cannot qualify for the executive exemption. Neither do your L.A.'s qualify for the professional exemption, since this position would not be considered a ''traditional'' profession. That leaves only the administrative exemption. In our view, the L.A.'s do not meet this exemption either. It is questionable whether they exercise the sufficient ''discretion and independent judgment'' to meet the exemption. While L.A.'s are highly skilled and have great latitude in their day-to-day responsibilities, they do not have decision-making authority regarding their duties, ultimately this rests with the Member or Chief of Staff. It is these individuals who make policy decisions about legislative issues (*e.g.*, which issues to follow, the Members position on issues, strategy to implement the position). L.A.'s are also closely supervised in their work by the Legislative Director. While L.A.'s have freedom to make decisions about routine matters, they are directed to consult with the L.D. regarding difficult decisions. This level of supervision indicates that the necessary amount of discretion and independent judgment is not present. Furthermore, L.A.'s would fail the second prong of the administrative exemption because they are not involved in the day to day business operations or management policies of the office, rather they assist in the ''production'' of the work of the office. It is likely that under recent case law and DOL opinions they would be considered ''production workers'' and, therefore, ineligible for the administrative exemption.

Legislative Correspondent. The legislative correspondent's (L.C.) duties are similar to those of the caseworker. The L.C. is responsible handling routine correspondence, usually with constituents. The legislative director assigns and reviews the L.C.'s work. The L.C. is essentially given a ''script'' for how to respond and exercises little discretion or independent judgment in his work. The L.C. is a recent college graduate. He worked on the Hill as an intern for one summer; this is his first paid position after college graduation. The L.C. position is considered an entry-level position in the office.

The L.C. is a nonexempt employee. His duties and responsibilities do not meet any of the white collar exemption tests.

Systems Administrator. The Systems Administrator's duties typically include: delegation computer work to clerical employees, typing and generating form letters, diagnosing computer problems followed by calling of repairperson; overseeing office computer system, applications and configuration; providing initial and ongoing training of D.C. and district staff on how to process constituent mail; researching and recommending new equipment and software, but not making final decisions and; serving as a technical liaison with vendors and other congressional staff.

It is possible for a computer professional to be exempt under either the administrative or professional exemption. See 29 C.F.R. § 541.207(c)(7); 29 C.F.R. § 205(c)(7) (administrative exemption); 29 C.F.R. § 541.303 (professional exemption). Both exemptions have specific tests which describe the requirements for exemption. Under either exemption, the employee must be performing sophisticated tasks which require a high degree of skill as well as discretion and independent judgment. By contrast, the systems manager in your office does not engage in many tasks that require discretion and independent judgment. In fact, his work is more "clerical and run-of-the-mill" in that he types, trains on basic programs, delegates work to clerical employees, does not make final decisions regarding new equipment and software, and calls a repairperson when there is a complex problem. The Systems Administrator in your office primarily provides other clerical workers with typing projects and instructs them on how the computer works. The system administrator's work also lacks sufficient discretion and independent judgment because, with respect to his computer work, your systems administrator primarily applies his acquired skills and makes decisions of little consequence. While a systems manager does provide training to other members of the staff and researches and recommends new equipment and software, both of which require some independent discretion and decisionmaking, much of his time is spent overseeing the office computer system and acting as technical liaison, both of which merely apply his acquired skills. We believe that the Systems Manager in your office is, therefore, nonexempt.

Staff Assistant. A Staff Assistant's duties typically include: handling flag requests and provisions White House tour passes to constituents; answering phones, greeting and dealing with constituents in the office; responding to constituent inquiries; making coffee, maintaining a neat decor in the office; opening, recording and sorting daily mail and; reading district newspapers.

The only possible exemption available to the Staff Assistant is the Administrative exemption. The staff assistant will not, however, qualify. Although a staff assistant's work qualifies as office or nonmanual, her work is clerical in nature. Her work resembles that of a secretary in that she takes flag requests, schedules White House tour for constituents, makes coffee, answers phones, greets constituents, opens, sorts and records daily mail. The regulations state that such clerical and secretarial activities do not fall within the administrative exemption. Moreover, a staff assistant typically performs 50% of her work pursuant to detailed instructions from supervisors or office procedures or subject to substantial review by others. Even if she completes the other 50% of her work pursuant to her own discretion and independent judgment, such work would not be deemed "significant." The regulations state that the exemption does not apply to the "kinds of decisions normally made by clerical and similar types of employees."

Executive Assistant. The Executive Assistant spends the vast majority of her time scheduling appointments for the Member. She also, on occasion, handles the personal business of the Congressman. The Executive Assistant also answers personal correspondence and screens personal phone calls for the Congressman.

The only possible exemption available for the Executive Assistant is the Administrative exemption. Under the duties ''short test'' for the administrative exemption, an executive assistant will not qualify. Although an executive assistant's work qualifies as office or nonmanual, her work is clerical in nature. Scheduling appointments, handling the Congressman's personal business, answering personal correspondence, and screening personal phone calls for the Congressman are analogous to a secretary's duties which the regulations classify as nonexempt work. Moreover, an executive assistant typically performs 100% of her work pursuant to office procedures, leaving no room for discretion or independent judgment. Based on the aforementioned factors, the executive assistant is a nonexempt employee.

III. Suggested Management Practices for Nonexempt Employees

Once you have determined who is exempt and who is nonexempt in your office, it will be necessary to implement new management practices, at least with respect to your nonexempt employees. This is necessary because your office will now be responsible for paying all such employees overtime at time and a half for all hours worked over 40 in a workweek. This makes it necessary to develop recordkeeping and working time practices.

Recordkeeping

While the Congressional Accountability Act did not include the recordkeeping provisions of the FLSA, it will be necessary to devise a recordkeeping system. Without one, overtime cannot possibly be correctly calculated. Moreover, proper recordkeeping is necessary in case there is a dispute with an employee about the number of hours worked. We suggest that your office keep the same kinds of records for nonexempt employees as those required by the FLSA. The FLSA specifies a number of data elements that must be maintained on each nonexempt employee for at least three years. Among the data elements required for all nonexempt employees are:

- Name
- Address
- Sex
- Date of Birth
- Base pay rate
- Job title/code

- All supplemental earnings (*e.g.*, shift differential, duty pay, *etc.*)
- Bonus payments and period the bonus is applied to
- Total hours worked on a weekly basis
- Total base rate wages paid per week
- Total "other earnings" paid per week
- Total overtime wages paid per week

We suggest that you also keep records for exempt employees as well. We recommend that you maintain the same records on your exempt employees as is required under the FLSA for exempt employees. For exempt employees (those employees exempt from the minimum wage and overtime requirements of the FLSA), the following data elements represent the primary pieces of information that must be maintained on each exempt employee for a minimum of three years:

- Name
- Address
- Sex
- Date of Birth
- Base pay rate
- All supplemental earnings (*e.g.*, shift differential, duty pay, *etc.*)
- Bonus earnings and period the bonus applies to
- Job title/code

It is important that (1) such recordkeeping processes are implemented where they do not exist and (2) your Chief of Staff, at a minimum, be aware of where the data is maintained and how to access it.

Time Reporting for Nonexempt Employees

With respect to your nonexempt employees, a process will have to be developed and implemented that provides for accurately capturing weekly time reporting for nonexempt employees. The process should allow for both the employee and the "supervisor" to validate the accuracy of work hours being reported. It should also include a process for

accounting for all paid non-work time in each work week in order to document when the forty hours of work in any single work week has been exceeded.

Compensatory Time Off for Nonexempt Employees

The Board of Director's for the Office of Compliance has proposed rules that would permit a limited form of compensatory time to be paid to those employees' whose work schedule "directly depend" on the schedule of the House of Representatives or the Senate. The term "directly depend" is construed very narrowly and we do not believe that this rule would apply to any employee in a Member's personal office (or committee staff for that matter.) That being the case, you should be aware, that the practice of giving compensatory time off to nonexempt employees is illegal. In the future all nonexempt employees who work over 40 hours in a workweek will be entitled to time and a half cash overtime.

Working Time Issues

Your office will now be required to keep track of all working time for nonexempt employees. What constitutes "working time" can be a difficult issue. You should be aware that any time an employee is "suffered or permitted" to work will be considered compensable working time, whether the employer is aware of, or condones the practice, or not. For example, work taken home will be considered hours worked. Moreover, most if not all of your staff, frequently get their lunch "to go" from the cafeteria and bring it back to the work area for consumption. If a nonexempt employee performs any work during the lunch break (*e.g.*, answers a phone) this will be counted as working time. With respect to your nonexempt employees, you will need to be diligent to ensure that all time worked is recorded and paid for.

COALITION MEMBERS

AAI Corporation
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Advocates for Flexible Employment
American Consulting Engineers Council
American Insurance Association
American Institute of Certified Public Accountants
American Network of Community Options & Resources
American Subcontractors Association
American Supply Association
Ameritech Advertising Services
Associated Builders & Contractors
The Boeing Company
Caterpillar, Inc.
Coalition for Fair Labor Standards Act Reform
College and University Personnel Association
Computer Sciences Corporation
Eastman Chemical Company
Eastman Kodak Co.
FTD Association
Fireman's Fund Insurance Co.
Food Marketing Institute
General Electric Company
Gulfstream Aerospace Corp.
Halliburton — Brown & Root
Harris Corporation
Hewlett-Packard Company
Information Technology Association of America
International Association of Amusement Parks & Attractions
Kaiser Permanente
Labor Policy Association
Motorola, Inc.
National Association of Convenience Stores
National Association of Independent Insurers
National Association of Manufacturers
National Association of Temporary and Staffing Services
National Association of Wholesale Grocers Association
National Association of Wholesaler-Distributors
National Club Association
National Council of Chain Restaurants
National Federation of Independent Businesses
National Restaurant Association
National Retail Federation
National Shoe Retailers Association
National Technical Services Association
Newspaper Association of America
North American Retail Dealers Association
PPG Industries, Inc.
Printing Industries of America
Rockwell International
The Sherwin Williams Co.
Society of American Florists
Society for Human Resource Management
The Timken Company
U.S. Chamber of Commerce
United Technologies Corp.

Mr. HORN. Our last witness on this panel is Deanna R. Gelak, chair of the Congressional Coverage Coalition, director of Congressional Affairs the Society for Human Resource Management.

Ms. GELAK. Mr. Chairman and members of the subcommittee, thank you for the opportunity to appear here today to discuss the issue of White House coverage under H.R. 3452. The Society for Human Resource Management, [SHRM] is a leading voice of the human resource profession, representing more than 70,000 human resource professional and student members from across the country and around the world.

I am Deanna Gelak, director of Congressional Affairs for SHRM and chair of the National Congressional Coverage Coalition. I appreciate the opportunity to share our views with you on this important issue.

SHRM was proud to lead the effort to push the Congressional Accountability Act through Congress. We applaud the key sponsors of the Congressional Accountability Act here today, and thank them for making congressional coverage possible. Thanks to the Congressional Accountability Act which took effect on January 23 of this year, Congress is no longer above the law.

I had the honor of chairing the National Congressional Coverage Coalition, a nonpartisan group of individuals, associations, businesses and public interest groups all committed to the principle that employment laws should apply fully to Members of Congress and their staffs. We fought for congressional coverage because we believe that congressional coverage is an issue of basic fairness and would greatly improve the public policy process.

Congressional coverage is now beginning to provide policymakers with a true understanding of the laws they pass. As the professional association which provides compliance and good practice information for private sector employers, we have been pleased to provide briefings and materials to congressional Members as they have taken the necessary steps to live under the employment laws. We know that it hasn't been easy, but it was long overdue, and it was the right thing to do.

Our members were surprised to hear that the White House exempts itself from the laws that apply to private companies and now to Congress, such as the minimum wage and overtime requirements of the Fair Labor Standards Act.

The President's staff should be protected by the same laws that the President signs for the rest of the country. Certainly, White House policymakers and their staffs would be afforded an understanding of the practical application of the laws they enact if they lived under them.

How can it be that the officials who advise the President as to whether or not to sign employment laws are exempt from these laws? White House staff have all been exempt from employment laws such as the FLSA's minimum wage and overtime requirements.

I have worked as a congressional employee, as a political employee in the executive branch and as a private sector employee, and from an employees perspective, this is an issue of basic fairness. Employees should have the same protections regardless of

where they work, whether the individual is a secretary in the White House, the Congress, or the private sector.

We strongly believe that this bill will not benefit one political party, but the American people. In addition, anything short of full coverage with the same remedies available to private sector employees would send the message that the White House considers itself above the law.

Thanks to the Congressional Accountability Act we have had a win-win situation, a win for Congress and a win for the American people. I hope that we can now make it a win-win-win, a win for the White House, a win for Congress, and a win for the American people. We would be happy to work with both White House and congressional officials to ensure that this loop is quickly closed.

Thank you for the opportunity to discuss this important issue. I would be happy to answer any questions.

[The prepared statement of Ms. Gelak follows:]

Mr. Chairman and Members of the Subcommittee:

Thank you for the opportunity to appear here today to discuss the issue of White House coverage under the Presidential and Executive Office Accountability Act, H.R. 3452. The Society for Human Resource Management, SHRM, is the leading voice of the human resource profession, representing more than 70,000 human resource professional and student members from across the country and around the world. I am Deanna Gelak, director of Congressional Affairs for SHRM and chair of the National Congressional Coverage Coalition. I appreciate the opportunity to share our views with you on this important issue.

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the necessary steps to live under the employment laws. We know that it hasn't been easy--but it was long overdue and it was the right thing to do.

Our members were surprised to hear that the White House exempts itself from the laws that apply to private companies, and now to Congress, such as the minimum wage and overtime requirements of the Fair Labor Standards Act.

The President's staff should be protected by the same laws that the President signs for the rest of the country. Certainly, White House policy makers and their staffs would be afforded an understanding of the practical applications of the laws they enact if they lived under them. How can it be that the officials who advise the President as to whether or not to sign employment laws are exempt from these laws? These officials would be afforded an understanding of the practical applications of the laws they sign if they themselves were abiding by them.

White House staff, such as employees in the offices of policy, legislative affairs and the general counsel's office have all been exempt from employment laws such as the Fair Labor Standards Act's minimum wage and overtime requirements.

I have worked as a Congressional employee, as a political employee in the executive branch, and as a private sector employee. From an employee's perspective, this is an issue of basic fairness.

Employees should have the same protections regardless of where they work--whether the individual is a secretary in the White House, the Congress or in the private sector.

We strongly believe that this bill will not benefit one political party, but the American people. If the White House does not act swiftly to rectify the situation, it could be seen as telling the American people to "do as I say, not as I do," when it comes to employment laws. In addition, anything short of full coverage--with the same remedies available to private sector employees--would send the message that the White House considers itself above the law.

Thanks to the Congressional Accountability Act, we've had a win-win--a win for Congress and a win for the American people. I hope we can now make it a win-win-win--a win for the White House, a win for Congress, and a win for the American people. We would be happy to work with both White House and Congressional officials to ensure that this loop is quickly closed.

Thank you for the opportunity to discuss this important issue. I would be happy to answer any questions.

Mr. HORN. We thank you for coming to testify.

Mr. Mica, the author of the legislation has to leave, so I will call on him first to ask questions of this panel.

The gentleman from Florida.

Mr. MICA. Thank you, Mr. Chairman.

Mr. Walden, you said that you thought we could go even beyond some of the measures that we provided in our legislation to ensure that there are better protections and safeguards, particularly in the area of definitions of special Government employee. Could you elaborate on your recommendations?

Mr. WALDEN. Yes, Congressman Mica. In section 4 of the bill, proposed section 202(e)(2)(D) provides that a special Government employee includes persons who are retained to provide advice to employees of the Executive Office of the President and who provide advice, counsel, or recommendations on any of the following, and it lists five categories of activities. There are a number of activities that are equally sensitive and important where an advisor can—the advisor can provide advice on those activities in the White House and that person should not be exempt from the definition of special Government employee if that person is also performing a Federal function. So the list of activities is limited, and I can see revising subparagraph D to include any other matters involving executive branch policy or law.

Mr. MICA. How would you ensure—I think Mrs. Maloney raised some good questions about the need to make certain that individuals who wanted to give the President advice and counsel were not precluded from that, that role, folks in business and even former employees; how would you ensure that we allow that positive exchange to take place and not inhibit that?

Mr. WALDEN. If the bill were amended to delete the subsections dealing with registered lobbyists, and I believe it is 10 percent ownership in a company with business pending in the Government, and in its place would adopt a functional test that looked at how regular the advice was provided and to whom the advice was provided, I do not think the ethics laws ought to cover the chairman of the AFL–CIO who comes in once a month to meet with the President.

It certainly should not apply to regular meetings the President has with the chairman of the national party, and I don't believe it should apply to the regular meetings the President has with his pollster. But if these are one-on-one meetings, there is not the same concern that was present in the White House in 1993. And I wouldn't rule out that it was present before that time, where consultants, outside consultants take part in the internal deliberative process involving decision meetings, where Paul Begala and others sat in on meetings to determine what the White House would advocate, what the White House would do in its official capacity. These advisors were de facto members of the White House staff and should have been covered by the ethics laws.

Mr. MICA. What about inclusion of some type of financial disclosure requirement on some of these employees or new definition of employees; do you think that would be helpful?

Mr. WALDEN. Absolutely. If the advisor becomes a special Government employee, then by law the advisor must file a confidential

financial disclosure statement. Now, there are some special Government employees whose financial disclosure statement must be public, and certainly because of the sensitivity involving advice to the President we might want to provide that financial disclosure statements filed by advisors to the White House must be made public.

Mr. MICA. A quick question for Ms. Boyd or Ms. Gelak. If some of the provisions pass that we would like to see pass, the White House would be required to comply with paying overtime, with changing the way they operate with a huge volunteer staff. We might even envision OSHA inspectors coming by the White House to check it out, compliance with the Americans With Disabilities Act, a requirement to post some of the offices in Braille, and make other accommodations.

Do you think that these types of activities will impose undue burden on the White House or its operations or undue expense?

Ms. GELAK. I would just like to respond that it is not unlike the compliance efforts which private sector employers have had to make. Doing the right thing sometimes isn't easy, so there will have to be some adjustments, there will have to be a transition period just like Congress has just seen and experienced.

Mr. MICA. So the White House is going to have to squirm the way Members of Congress have had to squirm to comply with what we have made for the private sector.

Ms. BOYD. I would add that probably your the best, the members of this committee are the best ones to answer that question.

Was it difficult to go from not complying to complying? Certainly there were probably tough changes that had to be made in offices, but I think as Mr. Shays said earlier, it is the right thing to do. It is the right thing to do from a moral perspective and it is certainly the right thing for policymakers to do who are going to be making this Nation's labor laws.

Ms. GELAK. If I could just add, as a professional organization which provides compliance information, we would be happy to work with the White House and help them gear up.

Mr. MICA. I have additional questions I might want to submit to the panel, but will yield back at this time.

Thank you for hearing my bill and allowing me to participate.

Mr. HORN. We are delighted with the initiative you have taken on this matter. If you will give the questions to the staff, we will send them to the relative panelists, and if you wouldn't mind responding to those in writing, they will go in the record at this point, without objection.

I now yield to the gentlewoman from New York, the ranking minority member, Mrs. Maloney.

Mrs. MALONEY. Thank you, Mr. Chairman.

I compliment all the panelists on their testimony and particularly Mr. Walden on a very thoughtful paper.

Mr. WALDEN. Thank you.

Mrs. MALONEY. I want to make sure I understand your belief on this. Going back to the special Government employee definition on pages 35–36, as I understand it, you would leave the definition as it is and delete from D down, is that what you are saying?

Mr. WALDEN. Page 35, I would delete B and C, but I would keep D. If we are going to keep the structure of D, which lists the type of subject matters of advice that would trigger the special Government employee definition, if we keep that concept, then I think D should be expanded to basically cover any item involving the executive branch policy, law, regulation, and enforcement.

It should not be limited to personnel matters, privatization functions, contracts, and congressional hearings. Because there is just as much of an ethics problem with an informal advisor who comes in on a regular basis to give advice on matters other than those four areas.

However, I would recommend that in place of listing the type of activities that what is put in its place is a functional test and that does extend the definition of Government employee to cover regular provision of informal advice in White House meetings with others present, where those meetings are part of the Government's internal deliberative process.

Mrs. MALONEY. I think that is an excellent suggestion. The way I read it, to go back to the example of Howard Baker, for example, if we had a Dole Presidency and Dole called up Howard Baker for advice on whether or not he should seek a filibuster, under this bill he wouldn't be allowed to do it. I don't know if we want to limit who our people can talk to on problems, if you understand what I am saying.

Mr. WALDEN. I do, and I don't think the definition of special Government employee should cover a person who provides advice from time to time.

Mrs. MALONEY. Congressional hearings and proceedings; as I read this bill and interpret it, President Dole would not be able to talk to Howard Baker even for 2 minutes, what do you think about this; should we have a filibuster or not? It is a proceeding, so he would not be allowed to talk to him on that.

Mr. WALDEN. Actually, the bill would not operate directly to prevent such a conversation. The bill as drafted would trigger the concept of special Government employee which then would trigger the application of conflict of interest laws, so that a lobbyist could provide advice, but at the same time would be subject to the criminal conflict of interest laws involving their financial interests and outside affiliations.

Mrs. MALONEY. You raised an important point when you said that the Lobbying Disclosure Act, that had very strong bipartisan support, passed in 1995, that would cover this. Any lobbyist would have to report. So you understand what I am saying; any lobbyist would have to report.

They are already covered, but do we want to do this in other areas and would not that have a chilling effect? I, for one, prefer your testimony on a functional test and a different definition I think is a much better approach than crossing the "t" and dotting the "i" with trying to define it, because I think it would possibly have the effect of people not wanting to talk to the executive branch, that they would—do you understand what I am saying?

Mr. WALDEN. Yes.

Mrs. MALONEY. I don't think that we want that. I think that we want our officials to seek advice from knowledgeable people. If that

person is a lobbyist, they have to disclose due to the lobbying disclosure law. So do we need that?

Mr. WALDEN. Well, the lobbyist—the law should not prevent the President from soliciting advice from any particular person, whether that person is a lobbyist or not. The law should provide that where that advice is given in a setting in which Government policy is being set with others, then the regular provision of the advice should trigger the application of the employee status.

Mrs. MALONEY. That is a functional test, but not this definition. I think it might have the effect of people in the private sector not wanting to talk to people in the public sector because their legal department might be telling them, if you talk to a President, you are going to have to have these disclosure requirements.

I would like to add, Mr. Chairman, that any definition we come up with I think should also apply to Congress and I think we will be more cautious with it. I, for one, don't want it, so that I can't call up a member of the private sector and say, what is your input?

We have always been a free country and free exchange. It shouldn't be abused. People trying to influence policy and lobbyists should disclose. So maybe going back to your idea of the functional test as a definition might alleviate some of the concerns that I have. I am cautious that we might go too far and cause problems.

Mr. WALDEN. It is beyond—the requirement or the trigger of a special Government employee status triggers not only financial disclosure but also the ethics laws, the conflict of interest laws. So that a lobbyist who is meeting with the President to lobby, because that is the nature of the beast——

Mrs. MALONEY. But he is already covered by the lobbying disclosure laws, so we don't need that.

Mr. WALDEN. I would not make that lobbyist a special Government employee, triggering the very conflict of interest provisions that would prohibit that communication. But where that lobbyist becomes a more or less regular visitor to the White House, becomes a regular advisor, then I think that is the time that the White House counsel's office ought to sit down with that person and say you are in here on a regular basis. We want to see your financial disclosure and you must recuse yourself, disqualify yourself from participating in any discussion in which you have a financial interest. That would focus on the functional test.

Mrs. MALONEY. I guess I am less concerned about the lobbyists, which, I think, we have strong laws of disclosure and reporting, and concerned that you can become so strict that people in the private sector won't want to talk to people in the public sector because of disclosure, conflict of interest, et cetera, even if it has nothing to do with policy.

The way this is written it says congressional hearings and proceedings. So, I could call up the head of some good Government group and ask for some advice on a congressional hearing, and all of a sudden they have to file disclosure laws.

You see what I am saying? I think it could go too far and hurt our ability to come up with a fair exchange of ideas and possibly better policy. I, for one, would like to see your ideas on a functional definition in a more specific way than the testimony that you gave today. I think that is a good way to go.

Mr. WALDEN. I will be happy to attempt to draft what is a very complicated subject. The functional test that is used now by people who understand it, comes from an opinion of the Office of Legal Counsel of the Department of Justice in 1977, and advisory opinions or informal advisory letters from the Office of Government Ethics. Even those advisory memoranda are not specific.

In my attempt I will attempt to define the functional test with as much specificity so that we can capture the regular advisors but without chilling the free exchange between the President and people outside the Government.

Mrs. MALONEY. I have no problem with the President calling a former Member of Congress for some advice on a proceeding if that person is not a lobbyist. If the person is lobbyist, they are already covered by the law?

Mr. WALDEN. The Lobbying Disclosure Act of 1995 does require registration and then reporting——

Mrs. MALONEY. Of all contacts, right?

Mr. WALDEN. The Lobbying Disclosure Act of 1995 is not that specific. It requires disclosure of the general subject matter and the particular bill number and the amount of income derived from lobbying activity rounded off to $10,000. You do not have to report that on *x* date you met with *x* person. You simply have to report that you met with someone in the House or someone in the Senate or the agency, such as White House.

Mrs. MALONEY. Do you think the lobbying disclosure law should be broadened to add disclosing whoever one talks to?

Mr. WALDEN. I think that we ought to give the Lobbying Disclosure Act time to be applied and understood and it is probably important and advisable to look at how the new law is working a year from now or 2 years from now, but I wouldn't recommend any changes at this point.

Mrs. MALONEY. Do you think this law should apply to Congress as well as the White House, to Members of Congress?

Mr. WALDEN. I haven't given that question much thought and would like to answer that for the record, if I have an opportunity to do so.

[The information referred to follows:]

The current definition of "special Government employee" in title 18 of the United States Code, 18 U.S.C. § 202(a), applies equally to the Executive and Legislative Branches of the U.S. Government. I believe any legislative revision of this term to codify the functional test used by the Department of Justice and the Office of Government Ethics should apply to Congress as well as the Executive Branch. As a general matter, ethics laws for Congress and the Executive Branch should be the same, unless there is a persuasive reason for different treatment.

Adopting a functional test should not chill the regular exchange between Members of Congress and their constituents or other members of the public. A constituent or other person representing their own or another's private interest would not become a "special Government employee" and thereby subject to conflict of interest restrictions and financial disclosure requirements unless that person regularly participated in the internal deliberative or predecisional process of the Member's office or committee. So even weekly meetings with a Member would not make the person a special Government employee unless he functioned essentially as a de facto staffer. "Internal" means non-public. The term "deliberative process" is well-known to Executive Branch agencies; it consists of inter- and intra-agency discussions and written communications which lead to an agency ruling, policy, approval or other decision. This concept should not be difficult to apply to the Legislative Branch.

Mrs. MALONEY. Thank you very much.

Mr. HORN. Those are very good questions and I think that is a key section of the bill.

Mr. Walden, if I might, let's both turn to page 35, section 4, work our way down.

Is there anything on A in general and then the subsections that are added, e1, that concerns you on that language? You will note it includes the spouse of the President or the Vice President.

There is no question that spouses in the future might well pursue professional careers, even as they are the First Lady or the First Man or the First Gentleman, or whatever, and we need to be cognizant of that when we write law.

For example, the spouse of a sitting member of the Supreme Court is a member of a law firm, and obviously the law firm doesn't handle cases and he doesn't handle cases before the Supreme Court. So some of that is solved that way, but here you have people that might well be in two worlds. They will be running an Office of the First Lady and the social engagements, policy engagements, and others that relate to that. They might also be pursuing a career. What does that language do to them?

Mr. WALDEN. Well, the current law would cover someone who has a formal position in the Office of the First Lady.

Mr. HORN. Would it cover the First Lady?

Mr. WALDEN. In my opinion——

Mr. HORN. The First Lady is a, has a masters degree in business and is interested in international marketing and continues to work for a firm, or the First Man, whatever, when we ever get to that. The question is, Which of these laws apply to the spouse who continues some professional occupation?

Mr. WALDEN. I don't read this particular provision as covering the spouse by itself. The words, including the spouse, I read to be the spouse of the President being the person who is retaining, appointing, or employing the outside individual; not that the person providing advice is the spouse. I think the current law—in fact, I did look at this in my book and concluded that when Mrs. Clinton was given the chairmanship of the health care task force, she was serving as a special Government employee under the current law. But I will admit that the current law is unclear. The White House certainly didn't regard her as covered for other reasons. I have also found it invalid and unpersuasive.

I don't think I have a great difficulty with (e)(1). It just restates the retention, designation, appointment, or employed and covers that to the White House office, but that is currently covered right now. I think the difficulties I have are 2 (A) through (D), which follow the conjunctive from (1). 2(A) talks about furnishing the use of a—furnished the use of an office or equipment at Government expense. As I said, this is a clear indication that someone really is functioning and performing a Federal function.

Mr. HORN. And equipment includes a telephone, obviously.

Mr. WALDEN. That is right. But I would not want that to be applied to someone who comes in once in a while to meet with the President and then goes to the outer office and says, may I use the phone? Dedicated use of equipment would indicate that the person is expected to perform a Federal function. I think that is an indication that the person is performing a Federal function.

I would not say just because you have an office you are performing a Federal function. I think there is a rebuttable presumption that you are. B and C do not focus on what functions or advice the person is giving but on the status of the individual.

Mr. HORN. What about the 10-percent standard?

Mr. WALDEN. I would leave that to the conflict of interest law 18 United States Code 208. I would not put that in the definition of the employee. When one concludes that by the regular provision of advice an outsider is de facto—has become a special Government employee, then the conflict of interest laws apply and prohibit that adviser from participating in any official matter, any particular matter in which he has a financial interest, whether it is 5 percent or 10 percent.

Mr. HORN. Well, if it was General Motors and he or she owed 1 percent, that is a substantial amount.

Mr. WALDEN. That is right. Actually, conflict of interest laws do not have a de minimis provision. If you have $10 of General Motors stock, you should not be passing on questions of policy and regulations involving General Motors. That is the current law, and I would like to see that provision kept the way it is in 18 United States Code 208, but subsection B, or subparagraph B, be deleted from the definition of special Government employee.

Mr. HORN. OK; C, now, anything there?

Mr. WALDEN. I would delete C also, because C would trigger the definition of special Government employee to lobbyists. Again, that focuses on their outside activities and outside status, not on what they were doing in the Government.

If a lobbyist, because of regular provision of advice in White House meetings, is performing a Federal function, then the definition of special Government employee should apply and prohibit that lobbyist from participating in any matter in which that lobbyist has an interest, a client. But it would not prohibit the lobbyist commenting on something completely separate from the lobbyist's financial holdings or clients.

I would not want to—well, I would be concerned about a lobbyist speaking in White House meetings on matters on which the lobbyist has an interest. If the President would want the lobbyist to talk about something that is completely unrelated to lobbying activities the person is not engaged in or doesn't relate to any outside interest or affiliation, I don't think there should be any problem. But we would know that because the regular provision of advice would trigger the financial disclosure requirements and the public would be able to see what those financial interests are.

Mr. HORN. As I look at D 1, 2, 3, 4, those are rather parochial and sort of de minimis areas. They are important occasionally in the life of an administration, such as personnel organization, reorganization of the Executive Office of the President, but it seems to me in your exchange with Mrs. Maloney you are talking about broader policy advice regardless of the area, and I don't know that we need to have these four.

I think what we need is a generic term there that covers the dangers one could have. Now let's face it, every administration has some sort of informal task forces they might have from one time or another, and then the question is if they include in that task

force a mix of people from a particular industry—which might include the labor component, management component, the public interest component, whatever—how much, if anything, are we limiting the President's ability to get who he wants or, more likely, some of the staff's ability to get who they want when they are looking at the ramifications of a particular policy that is in some stage of development?

They might have already had the Government departments working on it. They are trying to get some compromise that relates to a bunch of long-running bureaucracies in this town, pull the pieces together so the President can recommend something to Congress.

Mr. WALDEN. The President ought to not be restricted in any way in creating informal task forces made up of people from outside of Government with parochial or financial interest, and that is covered by the Federal Advisory Committee Act.

Most members of advisory committees are appointed by virtue of outside interest or affiliation, but because they serve on a task force, it does not necessarily mean they become a special Government employee because they are not asked for their general policy advice, they are not part of the Government's internal deliberative process, they are part of a process in the sunshine under the Federal Advisory Committee Act, and they are expected to give their opinion based on their own affiliation and outside interest.

So——

Mr. HORN. Usually those are not public meetings; right?

Mr. WALDEN. No. Under the Federal Advisory Committee Act, the meetings are open to the public.

Now there are exceptions, and if you recall, the health care task force was made up of Federal employees, full-time Federal employees and the First Lady, and the court of appeals held that the First Lady was functioning as a de facto employee or officer and therefore the task force could keep its meetings private, but remanded to the district the question of whether the intragovernmental working group, which included hundreds of outsiders with financial and professional interests, what the court—I believe the Justice Department—called an anonymous court of individuals, remanded to district court the question of whether that was an advisory committee, and the question was settled.

So it was never resolved, although the district court Judge Lambreth, did indicate, and it is clear that the court of appeals suggested, that the working group was probably a Federal advisory committee, and, if so, then the working group meetings should have been open to the public. They were not and that issue was litigated.

Mr. HORN. Thinking back to the Reagan administration when he had a number of young assistants in his administration chair various groups on agriculture and this kind of thing that brought together, obviously, the affected part within government, let's say they had a few people into those meetings. Ordinarily those meetings were not public. These are sort of working party meetings to see what the impact of what we are thinking about might be on particular segments of a particular industrial grouping. Are you telling me those meetings would have to be open?

Mr. WALDEN. Not if the Government—if the Government agency decides to invite some people from an industry in to meet with them and give the Government agency the perspective from the private sector, that by itself would not trigger the Federal Advisory Committee Act. But where an entity is set up and structured to develop consensus recommendations for Government action, then the Federal Advisory Committee Act applies.

Mr. HORN. Well, we welcome your thinking here and the legal terms to get some generic language that covers it but doesn't restrict Presidents from having the advice they ought to have if they want it.

Mr. WALDEN. Yes.

Mr. HORN. Anything else in the bill in particular that bothered you besides that section?

Mr. WALDEN. That is the only section I focused on based on my experience in the Bush White House.

Mr. HORN. That is very helpful.

Either Ms. Boyd or Ms. Gelak, do you have any other parts of the bill you would like to reference?

Ms. BOYD. Not at this time.

Ms. GELAK. I would just stress the importance of moving forward with White House coverage with respect to the employment laws.

For example, under the Family Medical Leave Act, it would be very helpful if the White House staff was closer to the issue and had a practical understanding of some of the day-to-day implications of the law.

Mr. HORN. Well, I agree with you. Being a strong supporter of that act, I think all areas ought to have that flexibility.

We thank you all very much. There might be some followup questions. We would appreciate it if you would put the answers in. We will put it at this point in the record.

Thank you very much for coming. We appreciate it.

We now have the Honorable Franklin S. Reeder, the Director of the Office of Administration in the Executive Office of the President.

Mr. Reeder, if you will—is anyone going to testify along with you, Mr. Reeder, so we know?

Mr. REEDER. No, sir.

Mr. HORN. If you would raise your right hand.

[Witness sworn.]

Mr. HORN. The gentleman has affirmed, and you may proceed.

STATEMENT OF FRANKLIN S. REEDER, DIRECTOR, OFFICE OF ADMINISTRATION, EXECUTIVE OFFICE OF THE PRESIDENT

Mr. REEDER. Thank you, Mr. Chairman and Mrs. Maloney. It is a pleasure to be here on behalf of the administration to address our views on H.R. 3452, the Presidential and Executive Office Accountability Act.

If, with your permission, Mr. Chairman, my statement be made part of the record.

Mr. HORN. It is automatic with all witnesses.

Mr. REEDER. Thank you, sir.

What I would like to do, rather than repeat the excellent testimony that has already been given, is touch briefly on some of the

main points and perhaps elaborate on the few in the interest of advancing this rather important discussion.

If I may be permitted a personal note, as I mentioned to you privately earlier, this marks the end of—today, in fact, marks the end of my 35 years of public service. So I find it particularly auspicious to be here before you today to be permitted to testify on behalf of the administration on a piece of legislation that in many ways breaks important new ground.

While clearly, as other witnesses have indicated, the Congress has legislated frequently with respect to the President and the Presidency, this, I would argue, is a unique legislative initiative in that it deals specifically with the operation of the Office of the President in ways that the Congress hasn't previously legislated.

If I may then, I would like to just touch on a few points, some of which are in my testimony, and in an effort to not repeat what has gone before.

It is important, as previous witnesses and questions have suggested, to describe what constitutes the Executive Office of the President. It isn't a single entity organization. It is not an agency or department. It has no formal legal standing in the sense that a Cabinet department or independent agency does.

The term came into use in the 1930's under President Franklin Roosevelt as the demands of the Government and Presidency required an expansion in the offices that directly supported his activities. Collectively, these offices now employ approximately 700—1,700 employees, and it is important again to note that the vast majority of these, approximately two-thirds, are title V employees, civil service employees covered by the same protection and rights as other career executive branch employees under title V of the U.S. Code.

One-third, however, approximately 550, work in the four offices closest to the President—the White House office, the Office of the Vice President, the Office of Policy Development, and Executive Residence. By long tradition and express statutory authority, employees in these four offices have served at the pleasure of the President.

If I may, I would like to summarize briefly the effects of the statute on the Executive Office. There has been much discussion, and while I think you, Mr. Chairman, and Mr. Mica, in your descriptions of the statute have been quite precise, there is a general impression that the Executive Office of the President currently operates in some sort of environment not subject to workplace laws or, some would suggest, not subject to laws at all. That simply is wrong.

In fact, if one looks at the 12 entities that comprise the Executive Office of the President, 8 are title V agencies, and in those 8 agencies, 10 of the 11 workplace laws in the first portion of the bill, in fact, already apply either as a matter of law or as a matter of practice.

The one that applies as a matter of practice is the shutdown notice provision, which as a matter of law doesn't apply to title V agencies, but under civil service laws there are similar provisions which are equally, if not more, prescriptive with respect to advanced notification.

The only one of workplace laws that doesn't apply to those 12 agencies is the Employee Polygraph Protection Act, which indeed currently does not apply to any agency in the executive branch.

Now to the four agencies that are not title V agencies, so-called title III agencies, whose employees serve at the pleasure of the President. Even in those——

Mr. HORN. You might define the difference between title III and title V for the record, because a lot of people reading this aren't experts on personnel.

Mr. REEDER. Fair enough. Title V is the chapter to the United States Code which generally defines—actually, this includes a number of things, including information law, but one of its chapters deals with the whole range of responsibilities and rights of Federal employees and covers the so-called career civil service as well as political appointees who are appointed in agencies that are largely title V agencies.

Title III is a relatively recent creation, at least the provision with respect to employment, and covers specifically and only employees of the Executive Office of the President who serve at the pleasure of the President.

In 1978, as I believe the Congress and the administration, working together, sought to regularize certain rules with respect to the terms and conditions under which those individuals who serve at the pleasure of the President operate are a shorthand term for that—and I appreciate your drawing me out on that. We refer to those as title III employees or title III agencies. And those employees do not enjoy many of the rights and protections that typical civil servants enjoy with respect to tenure and retention and the like. Those, again, are the Office of the Vice President, the White House Office, the Executive Residence, and the Office of Policy Development.

But even in those 4 entities, Mr. Chairman, 76 workplace laws apply either as a matter of law or a matter of practice. The five that apply as a matter of law are essentially the antidiscrimination and occupational safety and health provisions, those five.

Correcting the record, I believe a misimpression may have been created by a previous witness. While it is correct that the Family and Medical Leave Act does not apply to title III employees as a matter of law, this President has made it clear that, without exception, the provisions of the Family and Medical Leave Act will apply as a matter of policy to all of those who are not otherwise obliged to follow it in the Executive Office.

The seventh law is the provision dealing with veterans' reemployment, which, while it does not apply to title III employees, there is a long-standing tradition that, in the event that an individual is called to service, he or she will be entitled to reemployment.

Most recently, President Bush, in connection with the gulf war, afforded those rights to all title III employees, and I have every reason to expect the same in the event the same situation arises, although we hope it is not the case, that this or any future President would certainly do the same.

The two other provisions of the act are the CFO's Act, which would apply the provisions of the Chief Financial Officers Act to the Executive Office of the President.

While we have delved in previous testimony on the specific issue of the establishment of CFO's, it is important to note that this provision would not only require the establishment of the chief financial officer but would require all the financial accounting, reporting, and audit provisions in that very important act.

Finally—and I will touch on this at some length later in my statement—the act creates a new definition of special Government employee that would only apply in the Executive Office of the President.

We have some concerns, Mr. Chairman, but let me put these into some kind of context. It is our view that our concerns are rather narrow and, in fact, the area on which we are in agreement with the proponents of this legislation are far broader than the few areas which we believe are readily fixable on which we might disagree, but before turning to those, I would like to state for the benefit of the committee how we came to our position, and I noted with interest that the principles that drove our review, while not symmetrical with, are largely consistent with those articulated by Congressman Shays and embraced by members of the committee on both sides.

Clearly, there is merit to the proposition that the leaders of the Nation should abide by the same laws that the people must follow. Again—and I think Congressman Shays said this as well—such laws must be enacted in such a way that doesn't violate basic constitutional principles, including separation of powers, a concern I note that Congress clearly shared when it enacted the Congressional Accountability Act.

Finally, if I may be allowed to add a new principle, there ought to be symmetry to the degree it makes sense or is practical to do so. The Congress or Executive Office, regardless of which party is in control, should operate under generally the same rules and laws, and we are committed to work with you on legislation that is consistent with those principles.

There are, however, several provisions of the act that are troublesome but I believe in each case remediable. The first deals with the question of judicial review and the extent to which that would infringe on the President's appointment authority.

In its letter to you, I note that the American Law Division of the Congressional Research Service suggests the possibility of a constitutional difficulty. In fact, the Office of Legal Counsel has opined that these remedies are unconstitutional under the appointments clause of article II when applied to Presidentially appointed officers or any other constitutional officers.

Now, I would hasten to point out that we are not objecting to the application of laws banning discrimination in the Executive Office of the President. Certainly this President—and I don't mean to suggest comparisons to his immediate predecessors, and anybody I know of on the public scene supports an employment environment in the White House and elsewhere that doesn't discriminate. And we would support provisions that would give affected employees who believe they have been aggrieved the full range of remedies, including back pay, compensatory damages, and even punitive damage.

Our only concern is with respect to injunctive relief under which a court could direct a President to appoint or to reappoint an individual, and we believe an alternative that is modeled somewhat on the approach in the Congressional Accountability Act and Office of Compliance that reports to the President would remedy this problem.

Our second concern has already been discussed at great length with respect to the impact the Fair Labor Standards Act would have on the employment of volunteers. I would suggest a distinction that wasn't made in the previous testimony between those who volunteer in public activities and those who volunteer in the private sector.

While it is true that the Fair Labor Standards Act permits the use of volunteers in for-profit activities, it contains broad exceptions that permit, for example, us to work in our public libraries or local hospitals that permit all of us to engage in a whole range of activities that have come to be known as the voluntary sector.

We think it would indeed be unfortunate if public-spirited Americans who want to have the opportunity to serve their President were denied that opportunity, apart from its operational impact on that, and I certainly wouldn't want to minimize that, Mr. Chairman.

There are literally hundreds of individuals, some of whom only serve a day a month, and some of whom come in faithfully every day who assist in answering the President's mail, who assist in the myriad of social activities in the White House, and, as others have suggested, it is not just my contemporaries with a little bit of gray hair, but Boy Scouts and Girl Scouts and classes who come in.

I would point out for the benefit of the committee, these are individuals, some of whom are certainly here to serve this President, but a vast number of whom serve from administration to administration, who have worked in the White House for 20 or 30 years faithfully because they are interested in doing their bit regardless of who sits in the Oval Office. We hope we can preserve this tradition of selfless service in some fashion without running afoul of other principles.

I won't dwell on, I think the committee has heard ample testimony on, the question of political preference in hiring. I would presume that was an oversight. I believe Mr. Mica himself indicated he would have no objection to perfecting an amendment that corrected oversight with respect to the provisions in the CFO's Act.

Again, I would emphasize that the provisions governing financial accounting reporting and auditing we think are excellent provisions. We believe that the White House is already doing a great deal to ensure financial accountability but certainly had no objections to the substantive provision of the CFO's Act.

Our concern here is a very, very narrow one, and that goes to the workability of creating a chief financial officer, both the cost, administrative complexity, and the question as to whether that would add value. This is a matter we would commend to the committee's consideration and hope we can develop an alternative to.

The question of special Government employees has consumed probably the most time of the committee this morning and probably bears some elaboration. The essential concern that underlies the

administration's objection to this provision as it is currently formulated is the effect it would have on the ability of this or any future President to obtain advice, not because it would expressly exclude or preclude the giving of that advice but because, as currently crafted, it would subject individuals to a broad range of not only disclosure requirements but also to limitations pertaining to conflict of interest that we think would have—and I think Mrs. Maloney used the term—a chilling effect on the willingness of individuals to come forward.

We believe the Congress wisely chose not to apply this provision to itself. I think it would have an equally deleterious effect on the operation of this body if you and your colleagues were not in a position to obtain the advice of individuals without being subjected to these requirements.

I would hasten to add that there are several provisions of law that already deal with potential abuses. There is the requirement in the 1995 Anti-Lobbying Disclosure Act which specifically requires individuals advocating on behalf of their own interest first to register and to disclose such activities.

Second, the operation of the current special Government employees do go a long way toward requiring individuals who, in Mr. Walden's words, meet the functional test.

I think Mr. Walden's concept is an excellent one, and certainly he has brought to the attention of this committee some of the particularly troublesome implications of the provision. I would respectfully disagree with his overly broad suggestion on how a special Government employee ought to be defined.

I would also commend to the committee's attention—and I know you have introduced it into the record, Mr. Chairman—the letter you received yesterday from the Office of Government Ethics. It raises several concerns, including a specific concern that this committee not legislate specifically with respect to the EOP but consider broader legislation that might, if indeed it chooses to deal with this question, deal more broadly with perfecting the special Government employee language.

I would add, lest anybody doubt the credentials of the Office of Government Ethics, while an agency in the executive branch, it is a separate agency and operates on a nonpartisan basis. Indeed, Mr. Potts, the current director of the Office of Government Ethics, is an appointee of Mr. Bush, so I don't think there should be much question about his motivations in this regard.

We have two other minor technical concerns that are almost in the nature of questions. One relates to whether it is administratively wise to subject the EOP to the private sector version of OSHA and ADA. We believe that that which applies to the Federal Government is title V and already works, but I think that is an administrative matter we can certainly work out.

And finally, as I believe has already been noted in the questioning, while we realize we live in tight times and that is, no new money, the implementation of this act would not be without its costs, and I believe Mrs. Maloney noted the Congress, which admittedly has a much larger challenge than we would face, proposed $3.2 million and 23 staff to see to the enactment or implementation of the Congressional Accountability Act in 1997.

I thank you, Mr. Chairman, for the opportunity to appear before you today. We look forward to working with you and the members of the subcommittee in advancing this very important legislation, and we believe that with very minor changes, essentially technical in nature, that the administration will be able to work with you on a bill that we can all support, and I will be happy to answer any questions you might have.

[The prepared statement of Mr. Reeder follows:]

FOR RELEASE UPON DELIVERY

STATEMENT OF

FRANKLIN S. REEDER

DIRECTOR, OFFICE OF ADMINISTRATION
EXECUTIVE OFFICE OF THE PRESIDENT

BEFORE THE

SUBCOMMITTEE ON GOVERNMENT MANAGEMENT, INFORMATION AND TECHNOLOGY

OF THE

HOUSE GOVERNMENT REFORM AND OVERSIGHT COMMITTEE

JUNE 25, 1996

Mr. Chairman, members of the Subcommittee, it is a pleasure to appear before you on behalf of the Administration to express our views on H.R. 3452, the Presidential and Executive Office Accountability Act (PEOAA).

First, I would like to explore what we mean by the term "Executive Office of the President," and then touch on the workplace rules that apply to the employees of the various agencies and offices of the Executive Office. I would then like to raise some of the serious practical concerns that we have regarding how this bill, as drafted, would affect the work of the employees and the agencies and offices of the Executive Office of the President. We raise these concerns in the spirit of working constructively toward perfecting the legislation without altering the thrust of what is intended by H.R. 3452.

<u>What is the Executive Office of the President, and who works there</u>?

The Executive Office of the President is not a single entity or unitary organization. It is not an agency or department, and has no formal legal standing. Rather, it is the name given to the loose collection of offices and agencies that directly surround and support the President of the United States. The term originally came into being in the 1930's under President Franklin Roosevelt, and has continued to this day as a useful shorthand for an otherwise disparate collection of agencies and offices.

The Executive Office of the President is generally thought to include the following twelve agencies and offices:

The White House Office
Office of the Vice President
Office of Policy Development
Executive Residence
Council of Economic Advisers
Council on Environmental Quality
National Security Council
Office of Administration
Office of Management and Budget
Office of National Drug Control Policy
Office of Science and Technology Policy
Office of the United States Trade Representative

Collectively, these agencies and offices employ approximately 1700 employees. The vast majority of these employees -- two-thirds or more -- are civil service employees covered by the same protections and rights as other career executive branch employees under Title 5 of the U.S. Code.

About one-third -- approximately 550 -- of this number work in the four offices closest to the President: the White House Office, Office of the Vice President, Office of Policy Development, and Executive Residence. By long tradition and express statutory authority, employees in these four offices have served at the pleasure of the President. As Congress mandated in the provisions of Title 3 of the United States Code, these employees are hired "without regard to any other provision of law regulating the employment or compensation of persons in the Government service." These employees are often referred to in shorthand as "Title 3 employees."[1]

This long tradition and express statutory authority flow from the structure of the federal government established by the United States Constitution. The unfettered ability of the President to

[1] The Office of Administration is also authorized by Title 3, but its employees are, by design, virtually all career civil servants hired under Title 5 authority. A small number of Office of Administration employees are Title 3 employees who serve at the will of the President, on the same standing as employees in the White House Office and the other three Title 3 offices. <u>See</u> 3 U.S.C. § 107(b)(1)(A). Accordingly, the Office of Administration is more properly treated as a "Title 5" agency for purposes of the applicability of employee workplace laws.f

choose his closest advisers -- and to choose when to dismiss them -- is a necessary outgrowth of the separation and balance of the branches of government established in the Constitution. Congress has recognized and endorsed the President's freedom in this regard. When Congress acted most recently to effect a comprehensive change in the workings of the Executive Office of the President, in the White House Personnel Authorization Act of 1978 (Pub. L. 95-570), the House and Senate committees expressed the view in identical language that the President should have "total discretion in the employment, removal, and compensation (within the limits established . . .)" of persons in the White House and the other three offices. See H.R. Rep. 95-979, p. 6; S. Rep. 95-868, p. 7.

Within the Executive Office of the President, then, there are two categories of employees:

> Title 3 employees, who work in the four offices that most directly support the President and who are characterized by the immediate and confidential nature of their relationship with the President, making up less than one-third of the total number of EOP employees; and
>
> Title 5 employees in the remaining EOP agencies, who make up the vast majority of the EOP staff and who receive the same

rights and protections as civil servants elsewhere in the executive branch holding similar positions.

It may also be useful to touch briefly on the authority structure of the Executive Office of the President. As noted earlier, the EOP is not an administrative entity like a cabinet department. It consists of free-standing entities the head of each of which is appointed by the President. While senior White House staff provide, on behalf of the President, overall policy direction, there is no central administrative hierarchy within the EOP in the same sense that the secretary or administrator of a department or agency directs the operation of subordinate entities.

The PEOAA and its Effect on the Executive Office of the President

Let me turn now to how the provisions of H.R. 3452 would affect the EOP. The bill essentially falls into three parts: (1) provisions applying some eleven workplace laws to the EOP; (2) provisions making the EOP subject to the Chief Financial Officers Act of 1990 and requiring the establishment of a Chief Financial Officer (CFO) within the EOP; and (3) provisions creating a definition of "special government employee" that would be uniquely applicable to the EOP.

Most of the Workplace Laws Included in the PEOAA
Already Apply to the Executive Office of the President

Although some have suggested that the eleven workplace laws within the scope of the PEOAA do not presently apply to the Executive Office of the President, this is simply wrong.

If we look only to the eight EOP agencies employing Title 5 employees, we find that 10 out of 11 of the workplace laws within the scope of the PEOAA already apply to those employees. The single exception is the Employee Polygraph Protection Act of 1988, which was limited to private sector employers and which has no comprehensive equivalent in the federal sector.

The 1700 employees in the Executive Office of the President are thus in a materially different posture than the 27,000 employees of the legislative branch before the enactment of the Congressional Accountability Act. According to the report of the Senate Governmental Affairs Committee, existing law prior to the CAA "create[d] a patchwork of rights and protections for employees of the Senate, the House of Representatives, and the congressional instrumentalities." S. Rep. 103-397, p. 2. Few of these rights and protections could even be said to apply to all congressional employees. Id., p. 69. By contrast, two-thirds of EOP employees already enjoy all of the rights and protections afforded by 10 out of 11 of these workplace laws.

Moreover, there is broad coverage even within the so-called Title 3 offices, where the employees serve at the pleasure of the President. Fully 7 out of 11 of these workplace laws already apply to these Title 3 employees. Specifically, as a matter of law, these offices and employees are already subject to the following five provisions:

Title VII of the Civil Rights Act of 1964
Age Discrimination in Employment Act,
Americans with Disabilities Act
Rehabilitation Act of 1973
Occupational Safety and Health Act

Further, as a matter of policy this Administration has chosen to apply the provisions of the Family and Medical Leave Act of 1993 to all Title 3 employees. Finally, within recent memory previous Administrations have as a matter of policy applied the provisions of the veterans' employment and reemployment provisions of Chapter 43 of Title 38, and this President and presumably any future President would do the same for any staff member called into military service.

In summary, because of the already strong workplace protections within the Executive Office of the President, enactment of the workplace provisions of the PEOAA will not require dramatic changes in the policies and practices of the EOP. It will have

more impact on the employees and offices that directly support the President -- WHO, OVP, OPD, and Executive Residence -- but even these are already covered by the most significant workplace protections, such as the anti-discrimination employment laws and OSHA.

The Provisions of the CFO Act

The CFO provisions of the PEOAA would create the positions of Chief Financial Officer and Deputy Chief Financial Officer within the Executive Office of the President. Further, they would subject the EOP to the financial management and auditing requirements of the Chief Financial Officers Act of 1990, which mandates financial plans, annual financial statements, and independent audits of those statements, including audits by the General Accounting Office.

Although there is no existing CFO within the EOP, the Financial Management Division of the Office of Administration provides centralized financial management and accounting services for all of the EOP offices and agencies. The staff of FMD carry out many of the functions of a CFO, including financial reporting and internal controls reviews.

Changing the Definition of "Special Government Employee" Within the Executive Office of the President

The third major provision of the PEOAA would create a definition of "special government employee" for ethics and conflict of

interest purposes that would apply only within the Executive Office of the President.

All employees of the Executive Office of the President -- including both Title 3 and Title 5 employees -- are bound by the provisions of the government-wide Standards of Ethical Conduct for Employees of the Executive Branch, promulgated by the Office of Government Ethics, a separate agency of the executive branch. Further, all employees are covered by the criminal conflict of interest provisions of Title 18. The agencies and offices of the EOP, and the White House in particular, are careful to adhere to the financial reporting and conflict of interest provisions governing special government employees. Under existing law, these procedures apply to all temporary employees (not expected to serve more than 130 days in the next 365) who exercise a government function and direct the activities of government employees or are directed by government employees.

The PEOAA provision would change the definition of "SGE" -- within the Executive Office of the President only -- to include, among other things, all persons who provide advice, counsel or recommendations to EOP employees and who are registered lobbyists or who provide advice on a wide range of matters affecting the EOP, congressional hearings or proceedings, and the like. All persons who would fit within the revised definition of SGE would

be required to submit financial disclosure forms and to abide by a variety of criminal and civil conflict-of-interest provisions.

Specific Concerns and Proposed Solutions

I will now turn to a discussion of our specific concerns with particular provisions of H.R. 3452. Before I do so, allow me to set forth the principles that underlay our analysis. If we can find common ground as to principles, then agreeing on the details of a legislative proposal should not be difficult.

First, there is merit to the proposition that the leaders of the nation should abide by the same laws that the people must follow;

Second, such laws must be enacted in a way that they do not infringe on basic constitutional principles including separation of powers, a concern that Congress apparently shared when it enacted the Congressional Accountability Act; and

Third, we need to consider balance or symmetry. The same laws should be applied to the separate branches of government in the same way, insofar as practicable and constitutional.

With those principles in mind, there are a few perfecting amendments that the Administration believes are essential to make the PEOAA provisions workable in the Executive Office of the President. We believe that these amendments would in no way diminish the thrust of the bill. Indeed, they would strengthen it.

Amendment to the remedies provisions of the antidiscrimination laws. Proposed Section 411, among other things, would give courts and administrative bodies the power to order the President to reinstate, hire, or promote a prevailing employee or prospective employee. We have been advised by the Office of Legal Counsel that these remedies are unconstitutional under the Appointments Clause of Article II when applied to presidentially appointed officers, or any other constitutional officers. In addition, these remedies violate the constitutional doctrine of separation of powers when applied to close presidential aides and advisors. According to OLC, giving outside bodies the authority to order the President to reinstate, hire or promote an individual will place an unconstitutional burden on the President's constitutional powers.

Rather than provoke a constitutional confrontation, we propose that the bill be amended to eliminate the authority of outside bodies to issue injunctive orders requiring the hiring, reinstatement or promotion of Presidential appointees. Far from

being left remediless, a prevailing employee or prospective employee would still have the full range of monetary damages -- including back pay and compensatory and punitive damages -- available in proposed Section 411. At the same time, the principle that all employees, including those in the White House, should be protected from unlawful discrimination on the job will be left intact.

A second approach flows from the provisions of the Congressional Accountability Act itself. Congress faced a similar separation-of-powers dilemma in developing the Congressional Accountability Act . . . and solved it in an ingenious way. Congress established a new body within the legislative branch -- the Office of Compliance -- that could exercise adjudicatory and enforcement functions in a manner that did not raise constitutional separation of powers problems. A second solution to the constitutional problems raised by this provision of the PEOAA would be to follow the Congressional Accountability Act and to create an Office of Compliance for the Executive Office of the President that would exercise the powers that the PEOAA gives to outside courts and administrative bodies.

Amendment preserving the White House Volunteer Program. The provisions that impose the Fair Labor Standards Act (FLSA) on the White House have the surely unintended effect of abolishing the White House Volunteer Program. Over the course of several

Administrations and many decades, ordinary citizens have volunteered their services to the Presidency. Certain routine tasks such as answering the public's correspondence with the President, and special occasions such as the annual Christmas and Easter Egg Roll festivities, would grind to a halt without the hundreds of volunteers -- typically, senior citizens or schoolchildren -- who give generously of their time. But the FLSA provisions require that the minimum wage must be paid to all persons doing the White House's work -- even volunteers who seek nothing but the satisfaction of service. The FLSA provides an exemption for volunteers in state governments and other public institutions, but does not provide for a general volunteer exemption for the federal government. Moreover, although the PEOAA specifically exempts interns from the FLSA provisions -- thus preserving the White House Intern Program -- no exemption is provided for volunteers.

In order to preserve this rich tradition of selfless service, the Administration suggests that the bill be amended to exempt volunteers, like interns, from the FLSA coverage of the EOP. Other federal institutions that exercise a strong pull on the volunteer spirit of the citizenry, like the National Park Service, have specific authority permitting them to accept volunteer labor, and the White House should as well. This minor change will honor the labor of the hundreds or thousands who give their time to their White House. The full FLSA provisions --

including wage, hour and overtime provisions -- will still be applied to all employees of the White House and EOP agencies and offices.

Amendment to affirm the President's right to hire and fire based on party affiliation or political compatibility. When Congress passed the Congressional Accountability Act in 1993, it made clear in Section 502 that party affiliation and political compatibility, as well as domicile, could properly be considered in employment decisions in leadership, member and committee offices.

The PEOAA includes no similar provision for White House employment decisions. The President and Vice President surely should be assured of the same freedom to consider political compatibility and party affiliation.

We propose that the bill be amended in a manner substantially identical (except for the domicile provisions) to Section 502 of the CAA, with regard to employment decisions in the White House Office, Office of the Vice President, Office of Policy Development and Executive Residence, and those regarding employees of the Office of Administration who are hired under the President's authority pursuant to 3 U.S.C. § 107(b)(1)(A).

<u>Amendment to eliminate unworkable portions of CFO Act provisions while preserving financial accountability provisions</u>. Section 3 of the PEOAA creates the position of Chief Financial Officer "within the Executive Office of the President," and applies the financial reporting and accountability provisions of the Chief Financial Officers Act to the agencies of the EOP.

While the financial reporting and accountability provisions of Section 3 are worthy, the proposed CFO position poses practical problems and concerns. Principally, there is no such legal entity as the Executive Office of the President -- this is merely the name given to the loose collection of agencies and offices surrounding and supporting the Presidency. There is thus no institutional framework in which to place a CFO -- except by making the CFO and his or her staff a separate agency entirely, compounding rather than simplifying the bureaucratic structure. Finally, the Executive Office of the President agencies, even taken together, are far smaller -- in size and in budget -- than virtually all of the departments and agencies which presently have Chief Financial Officers under the CFO Act.

Given the small size of the EOP and of its component agencies, and given the practical institutional problems with creating a CFO "within the Executive Office of the President," the Administration recommends that this particular provision be struck. At the same time, the Administration has no objection to

applying the financial reporting and accountability provisions of the CFO Act to the agencies and offices of the EOP.

Amendment to eliminate the proposed change to the definition of "Special Government Employee". We understand that the Subcommittee is in receipt of a letter from the Office of Government Ethics strongly opposing this provision. The Office of Government Ethics is a separate agency of the executive branch; its current director was originally appointed by President Bush, and was reappointed by this Administration in recognition of the vital importance of keeping the office above politics. The Administration urges the Subcommittee to give the views of the Office of Government Ethics the weight that its expertise and status deserve.

The Administration joins the Office of Government Ethics in expressing deep concern about this proposed provision. There are sufficient safeguards in existing law to ensure that persons who are exercising government functions or are directing or being directed by government employees comply with reporting and conflict of interest provisions. In addition, the proposed definition of special government employee would make it almost impossible for a President to consult with a wide range of advisers outside the government. Congress has (in our view wisely) not extended a similar definition to itself. If members of Congress were to consider applying this new definition of SGE

to their advisers outside the government, with all the disclosure and other restrictions applicable to executive branch employees, we are sure that the problems with this provision would readily become apparent. In short, this provision thus seems far outside the scope of a bill whose announced purpose is to apply to the President the same rules that Congress has applied to itself.

Additional concerns

Before closing, let me also touch on two other concerns that we urge the Subcommittee to weigh in considering this bill.

The first relates to the type of workplace laws that the bill proposes to apply to the Executive Office of the President. As we understand the legislative intent, the drafters of the PEOAA deliberately chose to apply the private sector version of workplace laws to the EOP, even where comparable federal sector statutes already apply. This mirrors the provisions of the Congressional Accountability Act, which did the same. Within the EOP, however, this change from federal sector to private sector laws creates needless confusion and ambiguity, and creates a class of executive branch employees (including many Title 5 career civil servants) who will have different rights and protections than the rest of the executive branch.

For example, where the (private sector) Americans with Disabilities Act provides a different standard than the (federal

sector) Architectural Barriers Act, which applies? For another example, GSA is not an EOP agency and so is not affected by the PEOAA, but it is the landlord for the EOP agencies. When GSA follows the federal sector version of OSHA, and that differs from the private sector version of OSHA that applies to its tenants, which version applies? These confusions and ambiguities are unnecessary, and we urge the Subcommittee to consider the merits of applying to the EOP the same federal sector workplace laws that already apply in most of its agencies and throughout the executive branch.

The second concern I raise before closing relates to funding and personnel authorizations. The PEOAA, unlike the Congressional Accountability Act, fails to provide funding or personnel to implement its many provisions. Yet under its terms the President is required to promulgate extensive regulations, to ensure that the EOP is in compliance with complex OSHA and building access requirements, and to provide counseling and mediation services to its employees, among other requirements. The Administration urges the Subcommittee to consider, as Congress did in the Congressional Accountability Act, authorizing additional funds and personnel to permit the President to exercise his new responsibilities under this bill if it is enacted.

Conclusion

The Administration supports the goals of the Presidential and Executive Office Accountability Act. While we adhere to the view that the government should follow the same laws and regulations that apply to the private sector, as the Congress itself discovered in attempting to apply these laws to itself, there are constitutional and practical concerns that must be considered.

We look forward to working with the members of this Subcommittee in the weeks ahead to engage in a constructive dialogue to craft changes in the legislation that address our concerns without diverting or weakening the thrust of this important measure. If our concerns are addressed, the Administration is prepared to support enactment of H.R. 3452.

Thank you for the opportunity to present our views on this important bill.

Mr. HORN. We appreciate your very thoughtful and detailed commentary on this. Your comments will be most helpful, and if White House counsel has suggestions for any language here, we would be glad to consider it.

Let me just go through some of the things. On page 2 of your testimony, the Office of the First Lady is not mentioned. Now, isn't that really considered about the same as the Office of the Vice President under several recent administrations?

Mr. REEDER. The reason the Office of the First Lady is not mentioned, it is not a separate entity within the Executive Office of the President, Mr. Chairman. The First Lady's Office is a portion of the White House Office.

If one were to attempt to draw an organizational chart—we keep trying to, and we can't come up with one that is comprehensible—it would be organizationally analogous to the Office of White House Counsel or the Office of the Press Secretary, and this is the way that Offices of the First Ladies have been—have structurally fit into the organization since First Ladies have become an active part of the Presidency.

Mr. HORN. Well, we might think about including that specifically. I notice some of these—as you recognize, since the committee of the thirties, you have got a real hodgepodge of which are in law and which aren't in law, and I think the President should have that kind of flexibility.

And I think some of this happened under President Nixon, which also resulted in more staff and so forth for a few things such as policy development and administration that used to be part of the White House Office essentially. Isn't that correct?

Mr. REEDER. That is correct.

Mr. HORN. Then they were specified out there. I don't know if that is good or bad, but there they are.

Then the polygraph on page 6. It seems to me the Executive Office of the President needs to be able to give the polygraph given the national security secrets that are involved in that office. And what is the feeling of the administration on that?

Mr. REEDER. The feeling of the administration on this, Mr. Chairman, as we looked at it was, this is a matter of practice, we already are largely compliant with the Polygraph Protection Act, and our view that the exceptions that the act permits for the administration of polygraphs in certain instances would give a President sufficient flexibility in the cases—in the sorts of instances you allude to.

We would be happy to go back and look at that, but our preliminary reading is that there are sufficient flexibilities in the act as it applies to the private sector to give the President needed discretion.

Mr. HORN. I want to make sure that is done because that is just silly if we don't do it, and given the nature of what a White House office is.

You know, you heard me mention the inspector general earlier in this discussion this morning. What is the reaction to having an inspector general within the Executive Office of the President?

Mr. REEDER. I am not prepared, Mr. Chairman, since it wasn't within the scope of the legislation that we were reviewing, to give you an administration position on that proposal.

Certainly there are a range of things that we are already doing to provide audit and oversight, both within the structure of the White House through the organization that I operate which has an audit function, and through much more enhanced management functions within each of the agencies.

I would point out that the White House is already subject to and frequently is the object of audits by the General Accounting Office. I would suggest—and this is more a cuff reaction, Mr. Chairman, and a studied one—that as I understand how inspectors general are constituted in the Cabinet Departments under the CFO's Act with which I am—or under the Inspector General's Act, of which I am somewhat familiar, the creation of a CFO on that model would certainly raise many interesting constitutional concerns regarding the direct reporting relationship that other statutory inspectors general have to the Congress and their requirement to report to the public. So that in any event we would have to examine closely how any inspector general proposal comported with basic constitutional principles.

Mr. HORN. We might want to explore that. I will tell you, as a university president, one of the smarter things I did my first day was tell the comptroller, "Look, there are two levels of administration between you and me; namely, a business manager and a vice president for administration. I don't care about that. If you see some voucher crossing your desk that will look terrible on page 1 of the Los Angeles Times, you walk into my office, never mind them." And that saved me.

And I have seen other presidents that let the bureaucracy run wild down there without somebody on alert that can cut through all the rest of the bureaucracy, and the White House has become a huge bureaucracy, as I think you will agree. I am not sure the President is well served by all the people down there. And that has nothing to do with this President. I felt that way since the Johnson administration for sure. And after the Eisenhower administration where he kept a fairly lean operation.

You look at every corporation that is successful. There is now a very lean office of the chairman, office of the chief executive operation. And when you have all these people moving around, you are sure to have somebody make mischief, be it an Ollie North under Reagan or Craig Livingstone, whatever, under Clinton, because you have a supervisorial problem and you have too many people using the phones and pretending to be important.

And that applies to Republican administrations as well as Democratic administrations. And I think how you get control of that—I feel sort of sorry for any President that tries to run that operation, because I think a lot of them have been ill-served by their staff personally. Some are scandals, and some aren't scandals, but that doesn't concern me as to who—you know, if you are sitting there as President, you have a million other things to do besides worry about who put what in what account, and you need somebody that can say, "Hey, wait a minute, this is crazy," and can cut through all the guys that might be some of your top assistants that

are causing the craziness, as in the North case, when the President found out about it, he fired him. Somebody should have fired him a couple of years earlier. And we might end up the same way with some of the things going on now.

But I just think you need to think of it down there from, how do you protect the President from what some of his own people do, and, as I say, it isn't limited to this administration.

I note the Fair Labor Standards Act is not among the laws you contend to apply to title III employees and the Executive Office of the President. Is that correct?

Mr. REEDER. Yes, sir, it is.

Mr. HORN. How many of these employees receive overtime when they work more than 40 hours a week?

Mr. REEDER. Under the current regime—and this again dates back several administrations, Mr. Chairman—the employees of the Executive Residence, most of whom are in blue-collar sorts of positions, maids, butlers, and others who work with their hands, have been treated as if they were title V employees and, in fact, earn overtime and otherwise are treated as if they were covered by the Fair Labor Standards Act.

Within the White House Office, which accounts for approximately 400 of the 550, we have treated about 80 of those employees as GS equivalents. Again, we treat them like title V employees, and there are approximately three dozen—I can get the precise number—who earn overtime. These are largely telephone operators who do shift work and work from administration to administration.

Clearly, the application of the Fair Labor Standards Act to the White House as a whole—that is, to all 550 title III employees—would have a significant effect on our operation, just as it did in this body. And I thought the answer of one of the witnesses on the previous panel I think was particularly telling.

The experience of this body will be instructive for us. It will in some instances require us to pay overtime, and in other instances, as I think have been the case here, we will simply have to tell people who would like to work in the night, "You must go home, because under the Fair Labor Standards Act we would be required to pay your overtime and we are not prepared to do so;" that we believe, while clearly a cost and an impact on this operation, it is not so large as to warrant violating the basic principle that brought us together; namely, that we should, to the extent practicable, operate under the same rules as other sectors of the economy are obliged to operate under.

Mr. HORN. We don't want to stop people working 60 to 80 hours a week in either the legislative branch here or the executive branch, I can assure you, because it is the only way we get a number of things done, and office staffs frequently do that; a committee is a little more regularized and sometimes may work overnight just before the hearing, though.

Mrs. MALONEY. I would just like to add my voice with the chairman's on the volunteer aspect. I feel very strongly about volunteers. I am a strong supporter of President Bush's 100 points of voluntarism and really President Clinton's proposal for the AmeriCorps program that relies very strongly on volunteers.

As someone in the White House, could you really magnify and expand on the volunteer program—the Girl Scouts, Boy Scouts, and your feelings on the volunteer program?

Mr. REEDER. Thank you.

Mrs. Maloney, there are really two aspects of that, and I think the first is really, from a public policy perspective, the most important one; namely, that the opportunity to volunteer in the White House is an important way for individuals in our country to give expression to their desire to be of service in the same manner that individuals with appropriate skills work in their local public libraries or hospitals or for charitable organizations that are important to them.

If anything, our plea is based more on that than the operational impact. One only needs to see the dozens of enthusiastic young, and often not so young, people coming in in the morning who push me out of the way as I try to get in on their way to work on behalf of the President.

There are probably on the order of 1,300 individuals who volunteer at the White House. But as I indicated earlier, that isn't to suggest that on any given day there are more than 100 or 200 individuals there. Some work a day a month; some work—a few do work every day. As I mentioned earlier, they work from administration to administration.

The vast majority of them handle routine work. They handle the hundreds of thousands of letters. Now I think last year was 3.2 millions letters that this President received. His mail is about 20 percent heavier than the previous administration. I don't think that is a reflection on him; it is just a reflection on the fact that people are more and more comfortable communicating with their Government.

They handle the mail. In fact, some of our volunteers don't even come to the White House; they are residents at the Old Soldiers Home off North Capitol Street, and in many ways it is a form of occupational therapy for them. They are terrific folks. They make an important contribution to them. A lot of activities simply wouldn't happen. The President's routine mail wouldn't get answered. Events like the Easter egg role simply wouldn't happen if we didn't have the benefit of service of these individuals.

Mrs. MALONEY. Could you also comment very briefly on the funding for the President to carry out these regulatory duties? Where will you find the money for implementation? Would you have to come back to Congress for it?

Mr. REEDER. Having just testified on our appropriation, I would be remiss and ungrateful if I didn't express appreciation to the Appropriations Subcommittee which consistently treats the White House with great fairness.

These are very tight times, and to argue that the White House needs a million or two more to implement a law would probably be very difficult—a difficult argument to sustain in this tight budgetary climate.

We haven't gone back and done a financial assessment. Clearly, the cost of the White House would be on the order—certainly not be as large as the cost projected by this body, one, because we are

smaller and, second, because in many instances we have implemented some of the laws involved.

But assuming that we only were talking about a million people—a million dollars, four or five people—that is a made up number, Mrs. Maloney. To put that in perspective, that is 5 percent of the White House budget, and that is—that would, in effect, be a serious nick. We would have to look carefully at how we could finance that unless your good colleagues on the Appropriations Committee could find another million or so in these very tight times.

Mrs. MALONEY. Would you just elaborate a little bit on your position on the CFO?

There was a concrete difference of opinion between your statement and testimony by Mr. Shays and Mr. Mica. They put very clearly that they didn't think GAO's audits would be sufficient, that you needed a financial manager in the White House. And could you just hit that a little clearer, and why you feel you don't need it and why GAO would not be sufficient or is sufficient? Just clarify it.

Mr. REEDER. I would note that the Chief Financial Officers Act doesn't require the designation of a chief financial officer's entity of the size of the Executive Office of the President. It does require the substantive—that the substantive provisions be applied; namely, that rigorous accounting systems be developed, that there be full and complete financial reporting—and this is a terribly important point—that the financial statements be subject to an external audit, that there be an independent audit of financial statements.

We do not object to those provisions. We welcome those provisions. We have been taking steps to move that provision, and, consistent with the statement that the chairman just made, any responsible executive would want a strong independent financial review as well, as he indicated someone who could speak the truth to the person at the highest level of the organization.

Our concern here is a narrow administrative concern, that the creation of a chief financial officer, per se, doesn't necessarily add value commensurate with the cost and bureaucratic disruption. It is not that it couldn't be done. Our concern here doesn't rise to the level of some of the other concerns I have raised, but, rather, we see this as needless additional bureaucracy when the substantive provisions of the Chief Financial Officers Act would address, we believe, the concerns that Mr. Shays, Mr. Mica, and Chairman Horn have raised this morning.

Mrs. MALONEY. Thank you very much.

I have no further questions, Mr. Chairman. Thank you.

Mr. HORN. We thank you for those questions and the response. Let me ask: You mention on page 7 of your testimony that of the 7 of the 12 workplace laws we are discussing, 5 of those already apply to the title III employees, and one of those is the Occupational Safety and Health Act. And my own reaction when we applied that to ourself was that if OSHA ever came up here, they would close the Longworth Building within 2 hours, since I remember when I served my first 2 years there, 3½ years ago. The female staff in my office were all standing on chairs as I came in one morning because the mice were loose. This is in the walls.

I am wondering, when was the last time OSHA ever looked at the White House and the executive offices, and so forth?

Mr. REEDER. I don't know, Mr. Chairman, but I will be happy to get that information for you.

[The information referred to can be found in subcommittee files.]

Mr. HORN. If they do to you what they do to industry, they will probably close down a lot of your facilities and close down some of ours, which would cost a couple of billion dollars to replace given the cost of the Rayburn Building.

Mr. REEDER. I would add that we are in the Executive Office, at least with respect to the east wing, the west wing and the Executive Office Buildings, tenants of the General Services Administration. The mansion itself, the big building in the middle that people notice, of course is operated by the National Park Service.

With respect to the four office structures in which staff work and in which the President works, the General Services Administration has a rather rigorous regime to assure that we are fully compliant with various health and safety laws and regulations, and there is a continuous effort both with respect to safety and health laws and also with respect to accessibility.

We are working very hard to assure that we are in full compliance with all the provisions of the Americans With Disabilities Act with regard to physical facilities.

There is one concern that we do have but that we would have under any regime, and that is where we need to accommodate ADA requirements within the frame of historic structure.

There are instances, for example, where the installation of a ramp might require the ramp to extend beyond the east wing in order to make it up a few steps. We are trying to develop alternatives that are fully compliant with the spirit of the ADA not only to make buildings accessible but to allow those who are mobility or otherwise challenged to do so on their own.

As I am sure you have encountered in dealing with the ADA, it is not just a question of whether someone with a wheelchair, for example, can gain access but whether he or she can gain access without assistance, without the embarrassment of having to be carried or otherwise treated differently from others who aren't mobility impaired.

As a general rule, we are making very good progress. We have a task force working with the Park Service and GSA to ensure that we are compliant. We don't see any difficulties, although our setting admittedly is less complex and simply smaller in scale than the challenges that face the Congress.

Mr. HORN. Speaking of the Congress, we should state for the record that you did serve here from 1977 to 1980 as Deputy Director of House Information Systems, our computer arm in the House of Representatives, so you know a little bit about how we live up here, too.

Now in your comments on the overtime and the rest of it with these laws that you have either applied yourself now as a matter of policy, the President has, or it would be applied by this statue, there would obviously be additional costs. You mentioned that in relation to your friendly appropriations committees. I guess I would ask you the last question. Does that tell us something about the burden some of these law place on American small businesses that we now have to worry about?

Mr. REEDER. I don't hold myself up as an expert on the application of labor laws in the private sector, Mr. Chairman. Certainly we support the principle that underlies this statute that, both as a matter of fairness and also as a test of reality, by subjecting ourselves to the laws to which we would subject others, we learn about their impact on others and perhaps in the future act, if not more wisely, in a manner that is better informed.

Mr. HORN. I thank you, and I would agree that in some of these jobs both on the Hill and in the White House complex a lot of Americans would be willing to work free there for the experience, and that is a very valuable part of their lives, but then they go off generally and do something else somewhere.

But you are right, the permanent staff there that are doing things other Americans do, such as the electricians, the plumbers, and all the rest that make that establishment work, same as up here, and, as we said earlier, they could have served with no civil service protection really from 5, to 10, to 30, to 50 years on occasion, and families have done this, and that sort of thing.

In a way, it still is a little different than what the average business in America is doing, and if people work long hours, it is because they feel there is only so much time: One Presidential term, two Presidential terms; that is a time limit; one congressional term, that is a time limit; and they feel what they are doing is very important and perhaps changing their life.

I don't know if some of these things are going to change that atmosphere. It will be too bad. I look at this very closely. It is justice in one way for those normal functions, but the not so normal functions of development of policy and everything else, as I say, we would have a lot of volunteers if we said, "Welcome, the door is open," because people would like to have that experience.

Mr. REEDER. If I may, Mr. Chairman, a comment and one point of clarification, because I don't want to leave the committee with a misimpression. As I indicated, for purposes of the office complexes in which we operate, we are tenants of the General Services Administration, and all of the service professions, the blue-collar employees who work in the complex, are employees of the GSA are already accorded all of the protections of the Fair Labor Standards Act with respect to overtime.

So in that respect, again, the number of individuals who would be covered—newly covered, by the FLSA as a consequence of enactment of the provisions of the H.R. 3452 is far smaller than was the case here. And, as I indicated, in the Executive Residence we apply similar provisions to those individuals even though they are not required to be covered. So the cost to us would not be nearly as great, and therefore, while it would undoubtedly have an effect on the way we operate, the effect might not be as great as it was here.

Mr. HORN. Since you mentioned GSA and we are the oversight subcommittee for GSA, I am curious, do they charge you a rent for the space you use in the New Executive Office Building? In the Old Executive Office Building?

Mr. REEDER. Yes, sir, and the White House.

Mr. HORN. And the west wing and the east wing?

Mr. REEDER. Yes, sir.

Mr. HORN. But not the White House proper?

Mr. REEDER. White House, as I indicated, residence itself, the building between the wing, if you will, is operated on behalf of the—is operated as—by the National Park Service, and we don't pay rent on that.

I don't—since those consist largely of public rooms and the residence of the First Family, I believe the phrase is, "It comes with the job." But the office space, we pay a market-based rate on the same basis as every other Federal agency.

Mr. HORN. Do you pay a rent above the going market in the surrounding buildings to Lafayette Square?

Mr. REEDER. As I understand it, the rate is set based on a market survey that the General Services Administration does periodically. I don't know how frequently they do that survey to establish a prevailing rate.

Mr. HORN. I never figured out how they did it. To give you an example, the director or the Administrator of the GSA is tired of hearing me telling that, but I didn't move into my predecessor's quarters in the Federal building in Long Beach, beautiful new Federal building.

My predecessor was paying $80,000 a year. I thought this was silly because of the market for office space in southern California in 1993. We went out on the private market. We got much better space, free parking. They only had one space for parking in the Federal building, and guess who was the Congressman in the basement? What do you do with the constituents? We have hundreds visit us.

So we went in the private market. We have better space than you will find anywhere else under GSA jurisdiction, and we only pay $30,000 a year.

So you might want to look at the surrounding market and talk to them about reducing whatever they are charging you, because I will bet it is unreasonable. We will be looking at it. You might be a prime witness for that.

So thank you for coming. It has been very helpful. Do give us the language you think needs changing here and there. We don't say we will do it. We will just say we will carefully consider it, and we will carefully consider it.

Mr. REEDER. Thank you, sir.

Mr. HORN. Let me thank the people that have been involved in setting up this hearing. They have worked very hard. To my immediate left, your immediate right, is Anna Miller, the professional staff member that deals with some of the major institutional, financial, and other problems in the Government. And behind her, nearest me, is the staff director, J. Russell George, staff director and general counsel. And then we have Mark Uncapher, professional staff member; Garry Ewing, professional staff member from the Civil Service Subcommittee, which is Mr. Mica's committee, very knowledgeable; and our clerk Erik Anderson; and our two interns, Ian Davidson and Tom O'Brien. And with the minority staff, I think we have got everybody today. We have Bruce Quinn, senior policy analyst; Mark Stephenson; and Liza Mientus, both professional staff members; and Matt Pinkus, the professional staff member. And we have had two reporters Katie Stewart and Marcia Stein.

And with that, the hearing is adjourned.

[Whereupon, at 1 p.m., the subcommittee was adjourned.]