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No. 95-170

PUBLIC OFFICIALS INTEGRITY  
ACT OF 1977

REPORT

OF THE

COMMITTEE ON GOVERNMENTAL AFFAIRS  
UNITED STATES SENATE

TO ACCOMPANY

S. 555

TO ESTABLISH CERTAIN FEDERAL AGENCIES, EFFECT CER-  
TAIN REORGANIZATIONS OF THE FEDERAL GOVERNMENT, TO  
IMPLEMENT CERTAIN REFORMS IN THE OPERATIONS OF THE  
FEDERAL GOVERNMENT AND TO PRESERVE AND PROMOTE  
THE INTEGRITY OF PUBLIC OFFICIALS AND INSTITUTIONS,  
AND FOR OTHER PURPOSES



MAY 16, 1977.—Ordered to be printed

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PUBLIC OFFICIALS INTEGRITY ACT OF 1977

MAY 16, 1977.—Ordered to be printed

Mr. RIBICOFF, from the Committee on Governmental Affairs,  
submitted the following

REPORT

[To accompany S. 555]

The Committee on Governmental Affairs, to which was referred the bill (S. 555) to establish certain Federal agencies, effect certain reorganizations of the Federal Government, to implement certain reforms in the operation of the Federal Government and to preserve and promote the integrity of public officials and institutions, and for other purposes, having considered the same, reports favorably thereon with an amendment in the nature of a substitute, and recommends that the bill as amended do pass.

I.—PURPOSE OF LEGISLATION

The purpose of this legislation is to preserve and promote the accountability and integrity of public officials and of the institutions of the Federal Government and to invigorate the Constitutional separation of powers between the three branches of Government.

Title I of the bill establishes a stand-by mechanism for the appointment of a temporary special prosecutor when needed and establishes an Office of Government Crimes within the Department of Justice.

Title II of the bill establishes an Office of Congressional Legal Counsel to represent the vital interests of Congress in matters before the courts.

Title III of the bill requires the public disclosure of the financial interests of high-level officers and employees of the Federal Government.

Title IV of the bill establishes an Office of Government Ethics within the Civil Service Commission.

Title V of the bill sets forth certain restrictions on the post employment activities of officers and employees of the Executive Branch of the Federal Government.

## II.—NEED FOR LEGISLATION

### A. TITLE I—REORGANIZATION OF THE DEPARTMENT OF JUSTICE

#### HISTORY OF PROPOSALS FOR AND REASONS FOR REORGANIZATION OF THE DEPARTMENT OF JUSTICE

##### *Introduction*

On occasion during the history of our country, a special prosecutor has been appointed to investigate alleged criminal wrongdoing by high-level Federal Government officials. During President Grant's Administration, a special prosecutor was appointed to investigate the so-called "whiskey ring," a network of tax-evading whiskey distillers. The ring, which allegedly included the President's personal secretary and close friend, Orville E. Babcock, was accused of diverting hundreds of thousands of dollars in Federal tax revenues to members of the ring. The Teapot Dome scandal in the early 1920's involved large-scale and corrupt leasing of oil reserves by high-level government officials. A special prosecutor was appointed to investigate these serious allegations after Congress passed a joint resolution requiring the appointment of a special prosecutor by the President with the advice and consent of the Senate. A special prosecutor was also appointed during the Truman Administration to investigate allegations of tax fixing and malfeasance in the letting of government loans which involved officials in the Tax Division of the Justice Department and the Internal Revenue Service, and at least one high-ranking White House staffer.

Current interest in the need for an independent special prosecutor to investigate alleged wrongdoing by high-level government officials was revived at the time the first revelations surfaced about what later became known as the "Watergate" scandal. During the spring of 1973, the Senate Judiciary Committee explored the need for a special prosecutor during the confirmation hearings on the appointment of Elliot Richardson to be Attorney General. During the course of those hearings, President Nixon made a commitment to permit Richardson to appoint such an independent special prosecutor. Richardson eventually appointed Archibald Cox.

After the firing of Cox by Acting Attorney General Robert Bork, President Nixon took the position that the Department of Justice could handle the investigation. As a result, the Judiciary Committees of the House of Representatives and the Senate held extensive hearings on legislation to require the appointment of a temporary special prosecutor by the courts or the President. In response to the public outcry over the Cox firing and the likelihood of Congressional action requiring the appointment of a special prosecutor, President Nixon appointed Leon Jaworski special prosecutor with appropriate assurances of independence.

In the Spring of 1974, the Subcommittee on Separation of Powers of the Senate Judiciary Committee, chaired by Senator Sam Ervin, held hearings on proposals for removing politics from the administration of justice. Among the proposals considered were the establishment of the Department of Justice as an agency independent of Presidential control and the creation of a special commission to study the establishment

of an independent permanent mechanism for the investigation and prosecution of official misconduct by high-level government officials.

Every study of the problem of how to handle criminal investigations and prosecutions of high-level government officials has concluded that the problem goes beyond the Watergate scandal. In June of 1974, the Senate Select Committee on Presidential Campaign Activities recommended that a permanent Office of Public Attorney be established, independent of the President, with jurisdiction to prosecute criminal cases in which there is a real or apparent conflict of interest.

The Watergate Special Prosecution Force Final Report concluded that: "No one who was watched 'Watergate' unfold can doubt that the Justice Department has difficulty investigating and prosecuting high officials, or that an independent prosecutor is freer to act according to politically neutral principles of fairness and justice" (p. 137-8).

The report recommended the creation of a Division of Government Crimes within the Justice Department and the creation of a temporary independent prosecution office by the President, or, if necessary, the Congress, when such an office is needed.

In June of 1973, the American Bar Association established a special committee to study Federal law enforcement agencies. After over two years of study, the House of Delegates of the American Bar Association endorsed the recommendations of their Select Committee which, among other things, included a proposal to establish a Division of Government Crimes and a recommendation that Congress enact legislation authorizing the appointment of a temporary special prosecutor by the Attorney General or by a special court under carefully defined circumstances and standards. The Select Committee concluded that the issue was not whether a special prosecutor is needed, but rather how, under what circumstances, under what authority, and at what time a special prosecutor should be activated. The Committee stated that history has taught us that the existing system permits extreme situations to develop which mandate the ad hoc appointment of a special prosecutor long after one should have been appointed.

A study done with the assistance of the Congressional Research Service of the Library of Congress identified a number of instances over the last twenty years where, due to a serious conflict on the part of the Attorney General or the President, an investigation handled outside the Justice Department would have been appropriate. Such incidents involved allegations of wrongdoing against a top assistant to a President, criminal conduct by a close associate and employee of a President prior to the time the President took office, and the investigation and prosecution of a sitting Vice President.

During the extensive hearings this Committee held on S. 555 and similar legislation in the 94th Congress, there was little, if any, dispute about two crucial facts: (1) the Department of Justice has not in the past allocated sufficient departmental resources to handle official corruption cases and cases arising out of the Federal election laws; and (2) that the Department of Justice has difficulty investigating and prosecuting crimes allegedly committed by high-ranking executive branch officials because the Department as an institution poorly equipped to handle cases involving senior executive branch officials.

The solution to these problems is not merely the enactment of more criminal laws. It is essential that the President, the Attorney General and other top officials in the Department of Justice be men of unquestioned integrity. However, it is also essential that we have a system of controls and institutions which make the misuse and abuse of power difficult, if not impossible.

As James Madison stated in the 51st Federalist Paper :

If men were angels, no government would be necessary. If angels were to govern men, neither external nor internal controls on government would be necessary. In framing a government which is to be administered by men over men, the great difficulty lies in this: you must first enable the government to control the governed, and in the next place oblige it to control itself. A dependence on the people is, no doubt, the primary control on the government, but experience has taught mankind the necessity for auxiliary precautions.

S. 555, as amended, contains such auxiliary precautions.

S. 555, as amended, would establish a new statutory office within the Justice Department with explicit jurisdiction over criminal violations committed by officers and employees of the Federal Government. This new office is called the Office of Government Crimes. S. 555 also provides for a mechanism for the appointment of a temporary special prosecutor by a special division of the United States Court of Appeals for the District of Columbia in those situations where the President or Attorney General has a conflict of interest or the appearance thereof. This would cover investigations of high-level government officials and close personal or political associates of the President or Attorney General.

#### *Division of Government crimes*

Some of the reasons for the establishment of a Office of Government Crimes are summarized as follows:

(1) An Office of Government Crimes would ensure an allocation of resources to the investigation and prosecution of government corruption and election law violations. With the battle for resources in government, what gets done depends to a great degree on whether there is a budget to do it. An Office of Government Crimes would at least result in some resources devoted exclusively to this problem.

The Watergate Special Prosecution Force Report stated that only one reported prosecution under the Corrupt Practices Act (recently repealed) was ever brought (in 1934) and the Justice Department had long followed a policy, enunciated by Attorney General Herbert Brownell in 1954, of not initiating investigations except upon referral by the Clerk of the House of Representatives or the Secretary of the Senate, the officials to whom reports were required to be made under the Act. Evidently, such referrals rarely occurred.

The report went on to state that no reported prosecutions had ever been brought under the statute prohibiting contributions by Government contractors (18 U.S.C. 611). In the case of the prohibition against corporate or labor union contributions (18 U.S.C. § 610), the record was somewhat better with respect to charges against unions or corporations, but generally the individual corporate officers responsible for making the illegal contributions had not been charged.



The Watergate Special Prosecution Force Report concluded that it is important to the integrity of both law enforcement and the electoral process that the Department of Justice use its resources and make the effort necessary to monitor actively areas of possible abuse and begin investigations without waiting for formal referrals or complaints.

While the Public Integrity Section has recently been established and is a step in the right direction, this non-statutory unit is not a substitute for a statutory office with a Presidentially-appointed director, subject to confirmation by the Senate, who can report directly to the Attorney General.

(2) An Office of Government Crimes would serve as a deterrent to would be corrupt government officials and election law violators.

(3) The handling of prosecutions of government corruption and election law cases should be done by an individual who was not a high-level campaign official in the President's campaign.

(4) The existence of an Office of Government Crimes would enhance Congressional oversight. The American Bar Association stressed the advantage of having an Office which "would be specifically considered as part of the appropriations process and having an assistant attorney general who would have to be confirmed by the Senate."<sup>1</sup>

#### *Temporary special prosecutor*

Some of the reasons that were presented to the Committee for a statute which would provide for an independent special prosecutor who would handle the investigation and prosecution of alleged criminal wrongdoing by high-level government officials are summarized as follows.

(1) The Department of Justice has difficulty investigating alleged criminal activity by high-level government officials.

(2) It is too much to ask for any person that he investigate his superior. As Former Special Prosecutor Cox said during consideration of S. 495 in the 94th Congress, of the investigation and prosecution of crimes which might involve the White House:

The pressures, the divided loyalty are too much for any man, and as honorable and conscientious as any individual might be, the public could never feel entirely easy about the vigor and thoroughness with which the investigation was pursued. Some outside person is essential.

The Supreme Court has also noted this problem when it stated that "one who holds his office only during the pleasure of another, cannot be depended upon to maintain an attitude of independence against the latter's will."<sup>2</sup>

The responsibility for law enforcement is placed upon the executive branch of the Federal Government. In carrying out that responsibility there are of necessity policy judgment even in the area of criminal prosecution. The President and the Attorney General must have policy control to make discretionary enforcement decisions. However, where the alleged criminal conduct of high-level administration officials is involved, this argument must bow to the fundamental principle that no man can be a prosecutor or judge in his own case.

<sup>1</sup> Hearings, Part I, p. 334.

<sup>2</sup> *Humphrey's Executor v. United States*, 295 U.S. 602 (1935).

(3) It is a basic tenet of our legal system that a lawyer cannot act in a situation where he has a conflict of interest or the appearance thereof. This is not a question of the integrity of the individual. In situations where men of integrity find they have a conflict of interest—and men of integrity can have a conflict of interest—it is commonly agreed that it is their duty to disqualify themselves and have someone else undertake the representation. This is done even though they may be men of such high character that they are capable of overcoming the conflict and discharging their responsibilities conscientiously. This principal is the basis of Canon 9 of the American Bar Association Code of Professional Responsibility which states:

A lawyer should avoid even the appearance of impropriety. The American Bar Association's Standards Relating to the Prosecution and Defense Function apply this principal to the situation of an individual serving as a prosecutor and conclude:

It is of utmost importance that the prosecutor avoid participation in a case in circumstances where any implication of partiality may cast a shadow over the integrity of his office.<sup>3</sup>

In testimony before the Committee supporting the special prosecutor provisions of S. 555, John Harmon on behalf of the Justice Department endorsed this tenet, "We must not only do justice, but be able to assure the public that justice has been done."

The Attorney General and his principal assistants are appointees of the President and members of an elected administration. It is a conflict of interest for them to investigate their own campaign or, thereafter, any allegations of criminal wrongdoing by high-level officials of the executive branch. The appearance of conflict is as dangerous to public confidence in the administration of justice as true conflict itself. Having men of integrity operate in the face of a conflict is an insufficient protection for a system of justice.

It was repeatedly reiterated by the American Bar Association and other witnesses that such a conclusion in no way reflects upon the integrity of any individual. It does reflect the legal profession's constant concern with whether or not justice is administered with complete impartiality and, equally important, whether or not there is an appearance of such impartiality.

(4) It is not sufficient to rely on the President or the Attorney General to appoint a temporary special prosecutor the next time the Attorney General or the President has a conflict of interest or the appearance thereof. It is not at all obvious that such an appointment will occur.

It was only after an extraordinary sequence of events in the Spring of 1973 and because of the fact that the nomination of Elliot Richardson as Attorney General was before the Senate that President Nixon finally authorized the Attorney General to name a special prosecutor.

A statutory mechanism providing for the appointment of a temporary special prosecutor would ensure that in the next national emergency such an office would come into existence at an early stage.

<sup>3</sup> 46 ABA Project on Standards for Criminal Justice (Approved Draft 1971).

(5) Temporary special prosecutors may result in the investigation and prosecution of some matters which in the past were not even known to the public and were never pursued. When we have used a temporary special prosecutor every few decades, they have discovered and prosecuted additional crimes that we might never have known about if they had not been appointed.

(6) The mere existence of an authority outside the Department of Justice and the Executive Branch which can make the appointment of a temporary special prosecutor will act as a substantial deterrent to extreme situations such as Watergate. There are those who believe that campaign misconduct and misconduct by high-level government officials are not rare but simply flourish when there is little reason to fear prosecution.

Support for this position can be found in the testimony of individuals who held high-level positions in the Nixon Administration during the Watergate cover-up. These witnesses made the similar assumption that "their" Department of Justice would not investigate actions condoned and conducted by employees of the White House or the Committee to Re-Elect the President. No matter how unfounded these comments may be as a prediction of Justice Department conduct, the existence of the authority for the court to appoint a temporary special prosecutor would be a deterrent to such an attitude by high-level government officials.

(7) The appointment of a temporary special prosecutor would be of assistance to the Attorney General in a situation where the proper exercise of discretion calls for a decision not to prosecute a high-level government official publicly accused of criminal wrongdoing. The use of an independent temporary special prosecutor free from any conflict of interest would result in the public acceptance of a decision not to prosecute that may be entirely justified on the merits; whereas the same decision made by an Attorney General who has a conflict of interest, or the appearance thereof, might breed public distrust of the decision not to prosecute.

In addition, the lack of a procedure for the handling of investigations of allegations of criminal wrongdoing by high-level government officials independent of the Department of Justice does harm to the morale and self-esteem of the employees of the Department. This harm is caused when the senior attorneys in the Department feel compelled to act in the face of a conflict of interest instead of abstaining as our normal principles of ethics require.

(8) Any individual who is charged with investigating alleged criminal wrongdoing by high-level officials of the incumbent administration must have independence. A temporary special prosecutor appointed pursuant to a statutory procedure, would have that independence.

A statute, such as S. 555, providing that a temporary special prosecutor could only be discharged by the Attorney General for extraordinary improprieties, would ensure future temporary special prosecutors the independence they need.

## B. CONGRESSIONAL LEGAL COUNSEL

### 1. NEED FOR A CONGRESSIONAL COUNSEL

It is not widely known that Congress presently relies on the Justice Department for representation in litigation arising out of the exercise by Congress of its constitutional powers. Although Congress has been the object of litigation throughout its existence, such litigation has been more frequent and particularly threatening in recent years. Meanwhile, the reliance of the legislative branch on the Department continues despite an increasing conflict of interest in the Department providing this representation.

Although this conflict of interest has not resulted in any charges of corruption, failure by Congress to remedy this conflict may have consequences which will seriously affect the vitality and independence of Congress. In order to assure that Congress will have the capacity for vigorous and effective representation before the courts, Congress should establish its own Office of Congressional Legal Counsel to represent Congress and congressional interests in litigation. The Justice Department supports the establishment of such an office and the bill has been modified in certain respects to meet all objections raised by the Department.

The need for creating an Office of Congressional Legal Counsel is clear. It is not surprising that the exercise by Congress of its constitutional powers is frequently challenged in and affected by various court proceedings. As Alexis de Toqueville observed during his travels in America in 1831, "Scarcely any political question arises in the United States that is not resolved, sooner or later, into a judicial question." *Democracy in America*, volume I—Vintage Books: page 290. Congress can no longer ignore this fact.

Unlike the executive branch of Government, Congress does not generally attempt to effectuate its will and perform its duties by initiating lawsuits in the courts. With a few notable exceptions, Congress should rely on its legislative, oversight, and impeachment powers—rather than initiate lawsuits—to fulfill its constitutional responsibilities. However, through no choice of the Congress, many matters vitally affecting Congress end up in the courts. Most of these cases arise where lawsuits have been brought against Congress to challenge an official action of the Congress, a Member or employee of Congress, or a committee or agency of Congress. In cases where Congress is not named as a party, the powers of Congress are often at issue and are interpreted by a court.

For example, Congress has not been named as a party in the Common Cause franking privilege case, but Congress has an interest in the case even more substantial than that of the Postmaster, who is the named defendant. Indeed, the House has recently intervened in this case.

In each of these types of cases, the vital interests of Congress will be affected whether or not Congress chooses to advocate its position to the court. Because our judicial system relies on adverse parties to sharpen the issues in order for the court to make the best decision, it is essential that the courts have the opportunity to evaluate congressional interests based upon the vigorous and effective presentation of

those interests to the court by an attorney representing the Congress.

At present, representation of Congress and congressional interests in these cases is provided on an ad hoc basis by the Justice Department and private legal counsel. Because no permanent office has ever been given the responsibility to monitor and defend these interests, Congressional interests are often inadequately represented or are not represented at all.

The Justice Department's practice of defending Members, officers, and committees of Congress in civil cases has developed gradually, until at present the Congress is almost wholly dependent on the Department for such representation. This practice began as far back as December 29, 1818, when the House adopted a resolution authorizing the Speaker to hire private counsel to defend the Sergeant at Arms in the landmark case of *Anderson v. Dunn*, the first case upholding Congress contempt power. Acting as a private citizen, the Attorney General argued the case on behalf of Congress and was paid a fee of \$500. Since 1818 the Attorney General and—after its creation in 1870—the Justice Department have frequently served as defense counsel to Congress.

The only direct statutory basis for the practice is 2 U.S.C. 118, enacted in 1875, which requires that upon request the Department defend an "officer" of either House of Congress for acts performed in the "discharge of his official duty." This statute was enacted after the Speaker of the House, James Blaine, had been sued for having enforced an order of the House. See 36 Congressional Record 2016-2017 (March 1, 1875); *Representation of Congressional Interests in Court*, Hearings before the Subcommittee on Separation of Powers, 1976 (hereafter "Representation") at 38. The Department does, however, represent Members and committees of Congress as well, but there is no direct statutory basis for the practice. Of course, the Department handles congressional cases only when requested to do so.

On occasion, Congress has chosen instead to retain private counsel to defend itself; for example, in the civil action brought against Congress by former Congressman Adam Clayton Powell—see 113 Congressional Record 6040-6049 (March 9, 1967) and in connection with the subpoenas issued to Members and staff in the Common Cause franking privilege case. See 120 Congressional Record H9668-H9670; (September 30, 1974); 120 Congressional Record H11497-H11498 (December 10, 1974); 120 Congressional Record H12291-H12292 (December 18, 1974); 121 Congressional Record H11877-H11878 (December 4, 1975); 122 Congressional Record H1699-H1702 (March 9, 1976). Committees sometimes defend themselves using existing staff counsel, such as did the Senate Watergate Committee when three cases were brought to restrain its probe of corruption in the executive branch and as has the General Counsel to the House Clerk in a number of recent cases involving the Clerk's supervisory functions.

In recent years, Congress has involuntarily been subjected to extensive litigation to defend its constitutional powers. Indeed, in the last 6 years the Justice Department alone has defended Members, officers and committees of Congress in at least 70 cases. Representation at 20. This total does not even include the 60 legal matters before the courts in which the Senate Watergate Committee became involved

(Senate Report 93-981), Final Report of the Senate Select Committee at 1079) nor at least ten other recent cases in which private counsel has been retained, nor numerous other legal proceedings in which subpoenas for Congressional documents have been issued. All told, Congress has been involved in no less than 200 legal proceedings in recent years.

These cases include civil actions brought to enjoin enforcement of committee subpoenas or issuance of committee reports; civil actions related to the enforcement of the campaign finance laws by officers of Congress; civil actions related to attempts to hold demonstrations on the Capitol Grounds; a civil action to invalidate the seniority system; a civil suit to recoup salaries paid to Members while absent from Congress; and a civil suit to invalidate the qualifications for membership in the Senate Press Gallery. The court papers of the Watergate Committee alone run almost 2,200 pages. Legal Documents Relating to the Select Committee Hearings, appendix to the hearings of the Senate Select Committee—June 28, 1974—two parts.

Not included in this number are actions involving allegations of criminal conduct, abuse of the franking privilege by an individual Member or contested elections, which the Department and the proposed Congressional Legal Counsel will not handle.

Not only is the number and variety of these lawsuits impressive, but many of them have been so complex that it has required years to resolve them in the courts.

However, more significantly, the importance of the precedents being established in these cases cannot be ignored. In *Powell v. McCormack*, 385 U.S. 486 (1969), the Supreme Court limited the right of the Congress to judge the qualifications of its Members: in *United States v. Gravel*, 408 U.S. 606 (1972), and in *Doe v. McMillan*, 412 U.S. 306 (1973), it limited the ability of Congress to inform the public: in *Buckley v. Valeo*, 424 U.S. 1 (January 30, 1976), it limited Congress' ability to appoint officers to the Federal Election Commission. Indeed, Senator Ervin warned that the *Gravel* decision alone poses "a clear and present threat to the continued independence of Congress as a coordinate branch of Government and constitutes a further deterioration of its power and prerogatives in relation to the executive and judicial branches." 59 *Virginia Law Review* 175 (1973).

In each case, the precedents established by the courts have an impact on Congress as an institution, not just on the specific Members, officers, or committees involved. Therefore, Congress as an institution cannot be indifferent to the legal precedents which are established in these cases, even if Congress may have no interest in their effect on individual parties involved. By representing the individual Member in a case involving his performance of official duties, in a very real sense Congress represents itself.

Court challenges to the exercises by Congress of its constitutional power will continue to occur. For example, officers of Congress have been named defendants in a suit by Ramsey Clark to invalidate the congressional veto over regulations of the Federal Election Commission. This lawsuit may determine the constitutionality of literally hundreds of such provisions in existing statutes.

Similarly, criminal defendants recently have issued various subpoenas to congressional committees demanding access to documents, raising the issue of the constitutional power of Congress to control access to its papers. These types of subpoenas have been and will be issued to the new Intelligence Committee in attempts to declassify information. The executive branch threatened to issue subpoenas for House travel records, until the House voluntarily turned over the materials. The nature and novelty of other challenges to Congress power cannot be predicted, but these challenges are sure to occur with regularity.

In cases of interest to Congress where Congress is not a party, the Department of Justice will not intervene or file an amicus brief on behalf of Congress. In such cases, however, congressional interests have occasionally been represented by private counsel retained on an ad hoc basis. For example, the Senate retained private counsel to represent it as amicus curiae in *Gravel v. United States*, where the scope of legislative immunity was at issue. See 118 Congressional Record 9902-9921 (March 23, 1972). Private counsel has also been retained to intervene on behalf of a subcommittee of the House of Representatives in *Ashland Oil v. FTC*, a case where the subcommittee is opposing an attempt by Ashland Oil to bar the FTC from complying with the subcommittee's subpoena. See 121 Congressional Record H12918-19 (December 18, 1975); Representation at 404. Private counsel is now representing a House subcommittee in the case of *United States v. A.T.T.* See House Report 94-1422; 122 Congressional Record H9128-9137 (August 26, 1976). Private counsel is representing Senator Proxmire in a case involving important issues regarding Congress' function of informing the public. See 122 Cong. Rec. S13965-S12975 (August 9, 1976). Private counsel appeared on behalf of the Congress in the *Lovett* case as far back as 1943. See Representation at 380-381, 412-414.

The variety and importance of this litigation demonstrates that the interests of Congress as an institution make its present reliance on the ad hoc services of the Justice Department and private counsel wholly unsatisfactory. These institutional interests make it inappropriate as a matter of principle and of the constitutional separation of powers for the legislative branch to rely upon and entrust the defense of its vital constitutional powers to the advocate for the executive branch, the Attorney General.

Despite its long history in representing Congress in court, the Department of Justice supports the establishment of an Office of Congressional Legal Counsel. This support for Congress defending itself in litigation before the courts recognizes that Congress, as a co-equal branch of government, should represent itself in court. The Department recognizes also the legitimacy and constitutionality of vesting the functions and powers in title II with a Congressional Counsel Office.

In testimony during the 94th Congress before the Senate Government Operations Committee and the Senate Judiciary Committee's Subcommittee on the Separation of Powers, representatives of the Department of Justice have unequivocally stated the obvious: The

Department of Justice is a part of the executive branch and its first and foremost responsibility is to represent the interests of the President and the executive branch. Where the interpretation of the powers of the Congress before the courts is entrusted to the executive branch, the Congress relies on a branch of government with which Congress has, under the constitutional system of checks and balances, an adverse relationship. Without in any way questioning the good will or intentions of the Department, it is clear that the integrity and independence of Congress as a coequal branch of government requires that Congress defend itself through its own counsel.

More specifically, the Department of Justice acknowledges that it is placed in an untenable conflict of interest situation when called upon to handle certain cases on behalf of Congress. In such cases, the Department states that it will decline to provide representation and will assist in the hiring of outside private counsel. However, the Department's position as to what constitutes a conflict of interest is very limited and covers only those situations where the Department is taking a position in one case which is directly inconsistent with a position the Department simultaneously is advocating in another matter then also in litigation in the same court.

The Department also acknowledges a conflict where the substantive position of Congress in the case would in the Department's view result in an infringement of a power of the President. However, it is clear that a conflict may also exist whenever the Department of Justice is in the position of defending a congressional power which may in the future be exercised by Congress against the executive branch. Most cases presently being handled by the Department on behalf of Congress involve precisely such powers and precisely this conflict of interest.

When the Department is able in advance to perceive a conflict in representing Congress, it will, of course, not commence such representation. It is, however, sometimes difficult to determine in advance exactly when the Department will decline to handle a congressional case. Other than in thoughts expressed by the Department in correspondence with various Members and committees, there are no written or formal guidelines applied by the Department in making this determination. The determination is subjective, is made on a case-by-case basis, and requires in essence that the Department prejudge whether the congressional defendant was acting within the scope of his official duty. Because of this uncertainty, Congress already must make ad hoc provisions for retaining private counsel when the Department perceives a conflict.

Unfortunately, in three recent cases the conflict did not become apparent to the Department until after the Department had entered its appearance on behalf of Congress. In fact, in *Doc v. McMillan* and *Eastland v. United States Servicemen's Fund*, the Department withdrew its representation of congressional committees just as the litigation reached the Supreme Court, after having represented Congress in the district court and court of appeals. As a result, Congress then had to hire private counsel at this advanced and crucial stage of the litigation. See Representation at 67 and 375. In the *McMillan* case, the Supreme Court remanded the case back to the district court, at which



time the Department determined that the conflict had ceased to exist and defended the remaining defendants. Although the Department will normally withdraw when a conflict arises, in the case of *Buckley v. Valeo* the Department did not formally withdraw its appearance as counsel to the Secretary of the Senate and the Clerk of the House even when it proceeded to argue that the statute creating the Federal Election Commission—on which the Secretary and Clerk served—was unconstitutional. The Department has recently been forced to withdraw as Congressional Counsel in *Pressler v. Simon*.

Because of the wide range of responsibilities which are assigned to the Department, there are many ways in which such a conflict can suddenly arise for the Department in the midst of defending a congressional client. The conflict which arose in the *Servicemen's Fund* case occurred when the Department of Justice voluntarily chose to appear as amicus curiae in opposition to the suit by the Senate Watergate Committee to enforce its subpoena for the White House tapes. See Representation at 374. The Department's narrow definition of what constitutes a conflict of interest did, however, enable the Department to continue representing other congressional defendants in cases pending in other courts in which speech and debate clause immunity was also a defense. But the point remains, one cannot predict when a conflict will arise which will force the Department to terminate its services.

The problem of anticipating conflicts is compounded by the fact that it is the Department's official position that even though it has undertaken to represent Congress, if an agency of the executive branch subsequently asks the Department for representation which will create a conflict of interest with the Department's representation of Congress, the Department will automatically force the congressional client to obtain other counsel. With a law firm, such conflicts are easily avoided because the firm will simply refuse to take on the new client. However, the executive branch is always the priority client of the Department. When a conflict arises in representing a congressional defendant, it is clear that the Department does not and can not continue to represent its congressional clients and, as importantly, when a conflict arises, it is in Congress' best interest to obtain other counsel.

As a result of these experiences in a number of congressional cases, committees which were or are being represented by the Department have also retained counsel to protect themselves in the event the Department suddenly feels compelled to withdraw. There is obvious waste when taxpayers must pay for Justice Department attorneys to handle a congressional case and pay as well for a private lawyer to insure that the Department vigorously defends congressional interests and to be ready to undertake the representation of Congress if the Justice Department should choose to withdraw from the case. However, faced with the policy of the Department of Justice with respect to conflicts of interest, it is prudent for Congress to retain these private attorneys.

Further compounding the inherent conflict of interest when the Department serve as the advocate for the Congress, the Department "insists on retaining control of the litigation and making the litigation decisions." Representation at 32. The Department asserts the same

degree of control over congressional cases as it asserts over its own executive branch cases. The Department's position on control of the litigation was dramatically illustrated at hearings before the Subcommittee on Separation of Powers. The following exchange occurred between the subcommittee and Irving Jaffe, Deputy of the Civil Division:

**STAFF.** If the Justice Department has no authority to take a congressional case unless it is requested to do so, why does it have, at that point when it is requested, complete control over the case?

**Mr. JAFFE.** Because we do it in the interest of the United States. That interest is vested in us.

**STAFF.** Even to the distinction of the interest of the client?

**Mr. JAFFE.** In many instances, yes.

**Senator ABOUREZK.** Then it is a matter of definition between you and the client as to what is in the interest of the United States.

**Mr. JAFFE.** Except that we have the ultimate determination.

**Senator ABOUREZK.** Your definition overrides his. (Representation at 77.)

The result of this Department policy is that when Congress wishes to make arguments with which the Department is in disagreement, the Department will take the position that Congress must retain private counsel if it wants to make such arguments. This position can have the effect of inhibiting congressional defendants from asserting proper control over their Department attorney, except on crucial issues.

This description of the conflicts of interest for the Department of Justice when it represents congressional interests is not intended as a criticism of the Department. The Department only represents congressional interests at the request of its congressional clients. In turn, Congress makes these requests of the Department because there is no adequate alternative but for Congress to do so. Indeed, when Members or committees are faced with litigation, the Members or committees may place substantial pressures on the Department to handle the case despite possible long-term disadvantages for Congress as an institution. In its efforts to maintain cordial relations between the branches, the Department will make every effort to honor congressional requests. The conflicts of interests which inevitably arise are of an institutional nature.

Although no conflict of interest is involved, serious problems also arise with congressional reliance on the use of private counsel when Department representation is not available. First, the use of private counsel is very expensive. One reason for this expense is that few if any private counsel have experience or expertise with the unique substantive and procedural legal issues which arise in congressional cases. It can be very expensive repeatedly to subsidize private counsel for the time it takes for them to gain this expertise. Even then private counsel will lack invaluable experience.

Second, the retention of different private counsel to handle different cases provides for little if any consistency among the legal posi-

tions and approaches taken in the different cases. A private attorney will only be intimately knowledgeable about the case he is handling—and not with the full range of litigation involving Congress. One attorney might, therefore, inadvertently make an argument or concede a point in one case which has an adverse precedential impact on another case involving Congress. Similarly, individual private attorneys are likely to have little perspective or interest in how the long-range interests of Congress may be affected by any given litigation. They may have little sensitivity to any political implications of a given law suit. They will not have inclination or the ability to establish contacts with the broad spectrum of congressional views which may exist on various issues. They will have no ongoing relationships with the leadership.

Finally, when faced with a law suit, Members, officers and committees often have no time to locate, interview, and retain private counsel. This is why in such cases there is little alternative but to request Department of Justice representation, even when they may be aware that retaining private counsel would be preferable. A simple phone call from a committee chairman to the Department, for example, often suffices to arrange for the Department to handle a case. If, however, private counsel is to be employed, an attorney must be found who is willing and able to handle the case, a fee arrangement must be negotiated and arrangements must be made for payment of the fee. Furthermore, to compensate private counsel it will often be necessary for the congressional parties to request appropriations from the contingent fund, a time-consuming and unpredictable process. A committee or Member must, therefore, be willing to endure substantial additional inconvenience if they choose not to rely on the Department of Justice.

In addition to mitigating these conflicts and practical problems resulting from reliance on the Department or private counsel, there are substantial benefits which would result from the establishment of an Office of Congressional Legal Counsel which cannot otherwise be achieved. A first-class litigating office in Congress will make available to Congress advice on how to avoid or anticipate litigation and continuous monitoring of congressional interests in cases where Congress is not a party. Increasingly, the prospect of litigation must be considered whenever Congress exercises its constitutional powers. The adverse consequences of failing to consider the possibility of litigation has been most notable when criminal contempt of Congress charges are dismissed by the courts on technicalities. This occurred in the recent perjury case of then Lieutenant Governor of California Edward Reinecke—*United States v. Reinecke*, 524 F. 2d 435 (D.C. Cir. 1975)—because a committee had not published its rules in the Congressional Record. Neither the Department nor private counsel can, will, or should perform these advisory functions. The Department acknowledges that this function is quite properly lodged in the Congress itself.

Similarly, when a committee undertakes an investigation, there is a constant need for advice on how properly to frame and issue subpoenas and how to utilize other congressional investigative powers so that the committee's actions will, if necessary, be sustained by the courts. Again, it would not be constitutionally proper for the Justice Department or feasible for private counsel to provide such an advisory service.

Existing legislative and staff counsel readily admit that they do not have the time or training to litigate or to provide advice in anticipation of litigation. Staff of one committee might gain some litigation experience but then will be unavailable to assist the next committee in need of counsel. Other than the Clerk of the House, the Secretary of the Senate, and the Permanent Investigations Subcommittee of the Senate Governmental Affairs Committee, no one body in Congress has developed any litigation expertise.

The Congressional Legal Counsel would also continuously monitor congressional interests in cases where Congress is not a party. For example, in the litigation concerning the custody of former President Nixon's tapes and papers, the Justice Department is defending an act of Congress which denies Mr. Nixon custody of these materials even though the Justice Department, at the time of the Nixon pardon, issued a written legal opinion that Mr. Nixon had the legal right to custody of the materials. Congress has not chosen to intervene or appear *amicus curiae* in this law suit. However, the testimony submitted to the Government Operations Committee by Senator Nelson concerning the conduct of the case—1976 Hearings, part II, page 142—illustrates the need for an office of Congress with the ability to represent Congress in a legal action, if necessary, and to closely monitor such legal actions. Again, neither the Department nor private counsel can or should perform this role. To the extent that existing legislative or staff counsel presently monitor the course of such litigation, it would still be necessary to retain counsel if congressional interests were being adversely affected.

Finally, if the Congress adopts the jurisdictional statute, discussed in detail below, to enable Congress to enforce its subpoenas by civil court actions, attorneys will be necessary to bring the actions. Neither the Justice Department nor private attorneys should be given this responsibility.

## 2. NEED FOR CIVIL ENFORCEMENT OF SUBPENAS

Presently, Congress can seek to enforce a subpoena only by use of criminal proceedings or by the impractical procedure of conducting its own trial before the bar of the House of Representatives or the Senate. However, if the Congress or a committee is interested in compelling compliance with a subpoena rather than merely punishing the subpoenaed party, civil subpoena enforcement will often be preferable to certifying a criminal contempt complaint. Unlike a civil enforcement action, in a criminal contempt action the defendant cannot purge himself of the contempt by finally producing the documents. In addition, with a criminal contempt action, expediting the litigation is more difficult than in a civil enforcement action, committee compliance with its procedures is more strictly reviewed, and the subpoenaed party's rights are given greater weight. The Justice Department first supported a civil enforcement mechanism in 1962 and has reiterated that support this session. The Department has stated also that Congress may bring the subpoena enforcement actions without infringing on any Executive Branch powers.

The reluctance of Congressional committees to enforce their subpoenas under the criminal contempt statute was graphically demonstrated by debate in the Senate Judiciary Committee in 1962.

The Subcommittee on Antitrust and Monopoly had subpoenaed cost data from the 12 largest steel companies. Four of these companies refused to produce the subpoenaed data or even to appear before the Subcommittee. The Subcommittee then voted 5 to 2 to report a criminal contempt citation to the full Judiciary Committee.

In the debate before the Subcommittee all parties agreed that the steel companies' refusals were based on a good faith belief that the cost data was confidential. Senator Hart stated that what all parties were seeking was "to establish a priority among principles." The steel companies declared their unwillingness to comply "until required to do so through established Judicial procedures." One member of the committee speculated that—contrary to the law of criminal contempt—if the companies were held in contempt "the steel company executives (could) produce the records \* \* \* (and) purge themselves from contempt."

At the request of the steel companies, the Judiciary Committee held 3 days of hearings on the events before the full committee. Steel Companies (Subpenas), Hearings before the Committee on the Judiciary, September 12, 14, and 20, 1962. It was again clear that the companies' refusal was their "instrument or \* \* \* approach of testing which of these two principles—of Congressional power and business confidentiality—ultimately would prevail." *Id.* at 38 (Senator HART). Senator Keating stated his preference for a civil contempt statute (*Id.* at 55), a preference shared by Senator Ervin. (*Id.* at 75). Senator Keating declared flatly that it was "wrong in cases in which there is no criminal intent to be forced to resort to a criminal prosecution in order to test the validity of a committee's questions or requests for documents." (*Id.* at 77.)

The dilemma facing the committee was made apparent by the subcommittee chairman, Senator Estes Kefauver, who said:

I would like to make perfectly clear that the subcommittee has no interest in punishing individuals. What we want is the subpoenaed material. (*Id.* at 85).

It is apparent from the committee debate that the availability of a civil enforcement statute could have alleviated the dilemma. Ultimately no criminal contempt citation was voted.

During this same period the U.S. Court of Appeals for the District of Columbia was reviewing the conviction of Austin J. Tobin, the executive director of the Port Authority of New York, under the criminal contempt status. *Tobin v. U.S.*, 306 F.2d 270 (D.C. Cir.) cert. denied 371 U.S. 902 (1962). Tobin had been cited for contempt in refusing to produce certain documents subpoenaed by the House Judiciary Committee in an investigation of the 1921-22 interstate compacts between the States of New York and New Jersey. The Port Authority argued that after having approved the compact Congress did not have the constitutional power to rescind it. The Governors of both affected States instructed Tobin not to respond to the subpoenas. Tobin did not

prevail in his constitutional argument about the committee's jurisdiction but his conviction was nonetheless reversed on the grounds that the Judiciary Committee had been given no power to issue subpoenas for the internal memos of the authority.

When the district court considered the case, Judge Youngdahl pleaded for Congress to provide an alternative to criminal contempt. The Court of Appeals in reversing Tobin's conviction quoted Judge Youngdahl's plea and added its own. It specifically noted that—

A contempt of Congress prosecution is not the most practical method of inducing courts to answer broad questions broadly.

At the end of its opinion the court made an extraordinary appeal to Congress:

Especially do we say this in view of the unusual nature of the present case, where we are asked to decide essentially civil and jurisdictional issues at the same time that we establish criminal precedent. The conflicting duality inherent in a request of this nature is not particularly conducive to the giving of any satisfactory answer, no matter what the answer should prove to be. Should this controversy be resumed, it is hoped that Congress will give sympathetic consideration to Judge Youngdahl's eloquent plea. 306 F. 2d at 275-276.

Eight years later the same court renewed this appeal in *United States v. Fort*, 443 F. 2d 670, 677-678 (D.C. Cir. 197 ), cert. denied, 403 U.S. 932 (1971).

Congress should be able to enforce its subpoenas expeditiously and with due respect for the constitutional rights of a witness. The criminal contempt statute is inflexible, giving a party no incentive to comply with a subpoena. Enactment of the civil subpoena enforcement statute will give Congress the option of punishing recalcitrant witnesses or bringing a civil action to secure compliance with the subpoena. This flexibility will reduce the reluctance of Congress to take action when a subpoena is not complied with.

PAST CONGRESSIONAL CONCERN WITH OFFICE OF CONGRESSIONAL  
LEGAL COUNSEL AND CIVIL ENFORCEMENT OF SUBPOENAS

*Office of Congressional Legal Counsel*

Congressional concern with the need to establish an Office of Congressional Legal Counsel has often been expressed over the last decade. In 1965 the Joint Committee on the Organization of Congress considered the litigation needs of Congress and recommended that a Joint Committee on Congressional Operations be established and given the "continuing responsibility for determining, with the approval of the leadership of both Houses, whether Congress should be appropriately represented" in cases of vital interest to Congress. The Joint Committee found that "representation of the Congress with respect to its vital interests is unsatisfactory and the effect upon Congress of court decisions should be a matter of continuous concern for which some agency of Congress should take responsibility."

Building on this proposal, on March 23, 1967, Senator Vance Hartke introduced S. 1384, a bill to establish an Office of Congressional Gen-

eral Counsel. Then on May 3, 1967, Senator Vance Hartke attempted to offer his bill, S. 1384, as an amendment to S. 355, the Legislative Reorganization Act of 1967. S. 355 already included a provision which authorized the proposed Joint Committee on Congressional Operations, with the approval of the President Pro Tempore, Speaker, and majority and minority leaders, "to provide for appropriate representation on behalf of Congress or either House thereof in any proceeding or action" which, "in the opinion of the Joint Committee, is of vital interest to Congress, or to either House of the Congress." The principal objection to Senator Hartke's bill and amendment was that it authorized the Congressional General Counsel to be the "authoritative source for interpretation of legislative intent." The Senate considered it to be unwise to establish a quasi-legal office of Congress having the power to issue binding legal opinions whether or not requested by a committee to do so. Accordingly, Senator Hartke's amendment was tabled by a vote of 66 to 16. When the Joint Committee on Congressional Operations was finally established in 1970, it was given the power only to "identify" court proceedings of vital interest to Congress.

In July of 1967 one of the subjects of the Subcommittee on Separation of Powers' first hearings under the chairmanship of Senator Sam Ervin was the Hartke proposal, S. 1384.

In 1973 the Joint Committee on Congressional Operations held 4 days of hearings on the "Constitutional Immunity of Members of Congress." In these hearings the Joint Committee explored the Justice Department's policy in representing Congress and in particular the conflict of interest faced by the Department of Justice when it defended Congress in *Doe v. McMillan*. The Senate's decision to file an amicus brief in *Gravel v. United States* was also discussed. In 1973, hearings by the Subcommittee on Separation of Powers on "Removing Politics From the Administration of Justice" again focused on the Council for Congress proposal.

The Senate Select Committee on Presidential Campaign Activities participated in over 60 different matters before the courts during the course of its Watergate investigations in 1973 and 1974. The court filings, which comprise most of the "Legal Documents Relating to the Select Committee Hearings," run to over 2,100 pages. As a result of its experience, the Select Committee recommended that the Congress give careful consideration to a bill then pending before the Senate (S. 2569) that would establish a Congressional Legal Service and thus give Congress "a litigation arm that would allow it to protect its interest in court by its own counsel." As Senator Baker, Vice Chairman of the Select Committee, stated: "These are numerous instances in which the interests of Congress and Congressional committees are divergent from those of the President and the various departments, and in which the existence of a permanent Congressional litigating staff would be both helpful and appropriate. The Select Committee on Presidential Campaign Activities certainly was engaged, albeit unsuccessfully, in extensive litigation; and a Congressional Legal Service would have been of great utility to the Committee." S. 2569 had been introduced by Senator Walter Mondale on October 11, 1973. Similar proposals to establish an Office of Congressional Legal Counsel had been introduced by Senator Jacob K. Javits, including S. 3877 on June 4, 1974.

On December 11, 1974, Senator Ervin introduced S. 4277 which was based upon the recommendations of the Watergate Committee and which contained Senator Mondale's proposal.

In the fall of 1975 and the spring of 1976, the Subcommittee on Separation of Powers held hearings on "Representation of Congressional Interests Before the Courts." The chairman of the subcommittee, Senator James Abourezk, had earlier introduced S. 2731 which refined previous proposals for an Office of Congressional Legal Counsel. The subcommittee compiled a detailed hearing record, focusing specifically on the conflict of interest which occurs when the Justice Department represents Congress and generally on the inadequacy from Congress' institutional point of view of the present ad hoc provisions for representation of Congress.

*Civil enforcement of subpoenas*

Historically Congress has made various provisions for enforcing its subpoenas and orders. The contempt power of Congress was affirmed in the 1821 case of *Anderson v. Dunn*, 19 U.S. 204 (1821). During its early period Congress brought contumacious witnesses for trial before the House and Senate and confined those found in contempt in the Capitol guard house. Variations of this practice continued until 1945.

In 1857 Congress grew dissatisfied with the fact that it could imprison a person only until the end of a legislative session. In that year Congress passed a statute, still in effect in amended form as 2 U.S.C. 192, making it a criminal offense to refuse to divulge information demanded by Congress. Even after passage of the 1857 statute, Congress preferred to enforce its own punishment rather than turn a witness over to the United States attorney. However, as courts more frequently began to review Congressional contempt trials, Congress came to rely entirely on the criminal sanction. Using both procedures, Congress has held approximately 400 persons in contempt since 1789, most of the contempts having occurred since 1945.

While investigating the contested election of Senator William S. Vare in 1928, a Senate committee sought to enforce a subpoena for certain ballot boxes and various documents by bringing a civil suit. The Supreme Court held that the Senate did not intend or authorize the committee to bring suit. (*Reed v. the County Commissioners of Delaware County*, 277 U.S. 376 (1928)). The day the Supreme Court decision was rendered, the Senate enacted a standing order authorizing all Senate committees to "bring Suit . . . if the Committee is of the opinion that the suit is necessary to the adequate performance of the powers vested in it." (69 Cong. Rec. 10596 (May 29, 1928)). That Order has, however, been held not to confer jurisdiction on the courts to hear a subpoena enforcement action. *Senate Select Committee v. Nixon*, 366 F. Supp. 51 (D.D.C. 1973)

The original proposal for enacting a jurisdiction statute for civil enforcement of Congressional subpoenas was introduced on May 4, 1953, by then Congressman Kenneth Keating. Four days of hearings were held on H.R. 4975 on June 8, July 19, 26, and 31, 1954. The bill passed the House on August 4, 1954 and again the next session of Congress on March 15, 1955. The Senate took no action on either occasion.

The Congress has had recent experience in court enforcement of a committee subpoena. Confronted by President Nixon's refusal to honor



its subpoena for certain White House tape recordings, the Senate Watergate Committee brought a civil action for a declaratory judgment that President Nixon's claim of executive privilege was unlawful. The committee found the prospect of criminal contempt or trial before the Senate inadequate and inappropriate remedies. Judge Sirica, however, held that the court had no jurisdiction to hear the action. *Senate Select Committee v. Nixon*, 366 F. Supp. 51 (D.D.C. 1973). Senator Ervin then introduced and the Congress soon passed a statute (Public Law 93-190) giving district court jurisdiction over that suit and others the Watergate Committee might bring to enforce subpoenas issued by it to the executive branch. The original version of this statute would have confined jurisdiction on the courts to hear suits by all congressional committees to seek subpoena enforcement. This provision was deleted prior to passage of the law. Eventually the court of appeals dismissed the Committee's suit due to the pending House Impeachment inquiry.

### C. TITLE III—FINANCIAL DISCLOSURE

#### 1. REASONS FOR PUBLIC FINANCIAL DISCLOSURE

Existing financial disclosure requirements vary throughout the Federal government. Under rules recently adopted by the House of Representatives and the Senate, full and complete financial disclosure is required for Members and certain officers and employees of those bodies. Executive branch regulations require confidential disclosure of the financial interests of certain high-level employees to those employees' agencies. Members of the judiciary are subject to voluntary confidential disclosure requirements which call for the disclosure of very limited financial information. Some top government officials, such as the President, Vice President, and Justices of the Supreme Court, are not required to make any financial disclosures whatsoever.

It was the opinion of the majority of witnesses who testified before the Committee on this subject that any requirements for public financial disclosure should apply uniformly across-the-board to high-level officials in the executive, judicial and legislative branches of the government.

Some of the reasons for public financial disclosure stated by witnesses who appeared before the Committee during consideration of S. 555 this year and its predecessor, S. 495, in the 94th Congress, are summarized below:

(1) Public financial disclosure will increase public confidence in the government. Numerous national polls of voter confidence in officials of the Federal government, and the low turnout of voters in recent elections, were cited for the proposition that public confidence in all three branches of the Federal government has been seriously eroded by the exposure, principally in the course of the Watergate investigation, of corruption on the part of a few high-level government officials. Public financial disclosure was seen as an important step to take to help restore public confidence in the integrity of top government officials, and, therefore, in the government as a whole.

(2) Public financial disclosure will demonstrate the high level of integrity of the vast majority of government officials. Only a very

small fraction of a percent of all government officials have ever been charged with professional impropriety.

(3) Public financial disclosure will deter conflicts of interest from arising. Disclosure will not tell an official what to do about outside interests; it will ensure that what he does will be subject to public scrutiny.

(4) Public financial disclosure will deter some persons who should not be entering public service from doing so. Individuals whose personal finances would not bear up to public scrutiny, whether due to questionable sources of income or a lack of morality in business practices, will very likely be discouraged from entering public office altogether, knowing in advance that their sources of income and financial holdings will be available for public review.

(5) Public financial disclosure will better enable the public to judge the performance of public officials. By having access to financial disclosure statements, an interested citizen can evaluate the official's performance of his public duties in light of the official's outside financial interests.

## 2. PAST FEDERAL GOVERNMENT CONCERN WITH FINANCIAL DISCLOSURE

From time to time since the late 1940's, individuals in the federal government have expressed concern over the absence of official standards of conduct and financial disclosure regulations for employees of the federal government.

Within the Congress, Senator Wayne Morse was an early advocate of such disclosure legislation. In 1946 he introduced a resolution which would have required Senators to file annual statements of income and financial transactions. In subsequent years, Morse expanded this legislation to cover not only Members of Congress, but also all persons receiving salaries from the Federal government in excess of \$10,000 annually. President Harry Truman endorsed Morse's proposals in principle, and, in a special message to Congress on September 17, 1951, Truman recommended conflict-of-interest legislation which included a requirement that all employees of the federal government receiving salaries of \$10,000 or more annually file annual statements of their total incomes, including the amount and sources of outside income. Despite Truman's concern, none of the Morse proposals were enacted or even reported to the Senate.

In 1951, Senator J. William Fulbright introduced a resolution to establish a Congressional Commission on Ethics in the Federal Government which would make recommendations to the executive and legislative branches regarding standards of conduct for public officials. A subcommittee of the Senate Labor and Public Welfare Committee, chaired by Senator Paul Douglas, incorporated features of the Fulbright resolution in its study of ethical problems in the legislative and executive branches, including proposals for a code of ethics for government employees, a revision of the conflicts codes, and financial disclosure legislation. No action was taken on the subcommittee's proposals.

In 1961, President John Kennedy asked Congress to review and consolidate existing Federal bribery and conflict-of-interest laws. Congress enacted such legislation in 1962, but the law did not give agency heads the authority to issue ethical standards or to take disciplinary

actions, provisions which the President had requested. Nor did the measure contain any financial disclosure provisions.

In the early 1960's, there was increasing concern over the conduct of Members and employees of Congress. Disclosure in the Senate of the activities of Robert G. (Bobby) Baker, Secretary to the Democratic Majority, is generally regarded as the event that precipitated the creation of the Senate Select Committee on Standards of Conduct. Faced with serious charges of professional misconduct against one of its former employees and no specific rules or regulations in existence governing the scope of activities of officers and employees, the Senate directed its Rules and Administration Committee to hold hearings in this area. Extensive hearings were held and investigations were conducted from October 1963 to March 1965. The Senate considered various resolutions from the Rules Committee which called for the establishment of standards of conduct and financial disclosure requirements for Members, officers, and employees of the Senate, but failed to adopt any of these proposals. Instead, the Senate created the Select Committee on Standards and Conduct on July 24, 1964, and authorized it to recommend additional rules and regulations to ensure proper standards of conduct for Members, officers, and employees of the Senate.

On March 1, 1967, the 90th Congress refused to seat Representative Adam Clayton Powell of New York, following an investigation into his activities while he was a Member of Congress. This action precipitated the creation, in April 1967, of the House Committee on Standards of Official Conduct, which was directed to make recommendations to the full House concerning the official conduct of House Members and employees. In 1968, both Houses of Congress adopted rules establishing standards of conduct and requiring annual disclosure of certain financial information (a portion of which is available for public inspection) by Members and officers of Congress, senatorial candidates, and certain legislative branch employees.

On May 26, 1970, the House amended its financial disclosure regulations to require Members, officers, and certain employees to report publicly the source of any honoraria of \$300 or more and the identity of creditors to whom \$10,000 or more in unsecured loans was owed for 90 days or longer. The amount of the income from honoraria and the amount of the indebtedness are reported confidentially.

The Subcommittee on Privileges and Elections of the Senate Committee on Rules and Administration held additional hearings in November of 1971 on two bills requiring further public disclosure by Federal Government employees. No other action was taken on these measures.

In July, 1976, the House of Representatives agreed to House Resolution 1368 establishing the Commission on Administrative Review which was mandated to report to the House of financial ethics among other areas. On February 14, 1976, the Commission recommended amendments to the Rules of the House establishing financial disclosure requirements and a code of conduct for members, officers and employees. On March 2, 1977, the House of Representatives agreed to House Resolution 287 amending its rules to require public financial disclosure for Members, officers and principal assistants.

On January 18, 1977, the Senate agreed to S. Res. 36, establishing a Special Committee on Official Conduct. The Committee was in-

structed to report to the Senate a resolution setting forth, by way of proposed amendments to the Standing Rules of the Senate, a code of official conduct for members, officers and employees. On April 1, 1977, the Senate adopted Senate Resolution 110, amending its rules to establish such a code of conduct together with full and complete financial disclosure requirements for Members, officers and high-level staff. (The details of this code are discussed in the section below.)

With respect to the executive branch, President Lyndon Johnson issued Executive Order 11222 on May 8, 1965, establishing ethical standards and requirements for confidential financial disclosure by officers and designated employees of the executive branch, excluding the President and Vice President. Pursuant to this Executive Order, standards of conduct and guidelines for confidential financial disclosure governing officers and employees in the Executive Office of the President were published in the Federal Register.

With respect to the judicial branch, the Judicial Conference of the United States adopted resolutions on June 10, 1969, prohibiting Federal judges from accepting compensation for non-judicial services and requiring them to file periodic financial disclosure statements. The conference rescinded these resolutions on November 1, 1969, and replaced them with a requirement that Federal judges file a quarterly report with a panel of three United States judges, listing any compensation in excess of \$100 earned for nonjudicial services.

On August 17, 1972, the American Bar Association issued a "Code of Judicial Conduct," which it considered applicable to Federal judges. The ABA Code requires judges to remain free from involvement in commercial enterprises, stipulates disqualification of judges from cases in which they own a single share of stock in a party involved in a dispute before their court, and requires judges to disclose publicly gifts worth \$100 or more and income from nonjudicial sources, except private investments. On November 1, 1972, Chief Justice Warren Burger stated that the ABA Code would apply to all Federal judges. On April 6, 1973, the Judicial Conference directed all Federal trial and appellate judges and full-time United States magistrates and bankruptcy judges to file semiannual public reports disclosing gifts of more than \$100 and income from nonbench work. Witnesses from the Judicial Conference testified that while there is general compliance with this limited disclosure requirement, there is no authority to enforce this requirement with respect to a few non-complying officials.

In 1973, 1974, and 1976 the Senate attempted to establish uniform public financial disclosure regulations for the three branches of government when it passed various amendments to the Federal Election Campaign Act applying to government officials and candidates for certain elective offices. All of these amendments, however, were deleted in conference with the House.

In July 1976, the Senate passed S. 495, the "Watergate Reorganization and Reform Act of 1976" which proposed the establishment of financial disclosure requirements for high-level officials in the executive, legislative and judicial branches of the federal government. Failing action in the House of Representatives, however, this legislation was not enacted.

## 3. EXISTING FINANCIAL DISCLOSURE REGULATIONS FOR FEDERAL EMPLOYEES

*Legislative branch**Senate*

Senate Rule XLII, "Public Financial Disclosure," as amended by S. Res. 110, requires all Senators, declared candidates for the Senate, and employees compensated at a rate in excess of \$25,000 a year to file an annual financial disclosure statement with the Secretary of the Senate. Senators and candidates must also file with the Secretary of State in the state which the Senator represents or from which the candidate is seeking office. These reports are public documents and the Secretary of the Senate is instructed to make these reports available to the public within fifteen days of the date on which they are filed. Each financial disclosure report must include the following information:

the source and amount of all items of earned income in excess of \$100 from a single source;

the source, amount, and date of each honoraria received;

the source, value and a brief description of gifts, aggregating \$100 or more, and gifts-in-kind, aggregating \$250 or more, received from a single source (except that gifts from relatives, gifts of personal hospitality, and gifts of \$35 or less need not be reported and, in aggregating gifts, an individual may deduct from the amount of gifts received from a single source the value of gifts given by the reporting individual to that source);

the source and category of value of each item of unearned income from a single source aggregating \$100;

the identity and category of value of interests in real property, property held in a trade or business for investment or the production of income and personal property held during the preceding calendar year, which had a value in excess of \$1,000;

the identity, category of value, and date of transactions in securities, commodities, or real property during the preceding calendar year which had a value in excess of \$1,000;

the identity of and category of value of personal liabilities owed during the preceding year in excess of \$2,500; and

the identity of interests in patent rights, agreements for future employment and positions held with private organizations.

Similar information regarding the financial interests of a spouse or dependent must be included in the disclosure statement of the reporting individual unless the interests of a spouse are outside the constructive control of the individual.

*House*

House Rule XLIV, "Financial Disclosure," as amended by H. Res. 287, requires Members, officers, principal assistants to Members, and professional staff of committees to file an annual financial disclosure statement with the Clerk of the House of Representatives. The Clerk is instructed to send copies of these reports to the Secretary of State in the state which the Member represents and to make reports available for public inspection. The following information must be included in each financial disclosure report:

the source and amount of all income, from any source, aggregating \$100 or more;

the source and value of gifts, aggregating \$100 or more, and gifts-in-kind, aggregating \$250 or more, from a single source (except that gifts from relatives, gifts of personal hospitality, and gifts of \$35 or less need not be reported);

the source and amount of items of reimbursement, aggregating \$250 or more, from a single source;

the identity and category of value of any property held in a trade or business for investment or the production of income which had a value of at least \$1,000 at the close of the preceding year;

the identity and category of value of each liability exceeding \$2,500 at the close of the preceding year (except that mortgages of a Member's personal residences in Washington and congressional district are exempted);

the identity, date, and category of value of any transaction in securities or commodities futures exceeding \$1,000;

the identity, date, and category of value of any purchase or sale of any interest in real property during the preceding year which exceeded \$1,000 (excluding a personal residence).

The financial interests of spouses must be reported if those interests are within the constructive control of the individual.

#### *Executive branch*

Executive Order 11222, "Prescribing Standards of Ethical Conduct for Government Officers and Employees," which was issued on May 8, 1965, by President Lyndon Johnson, requires confidential financial disclosure by officers and designated employees of the executive branch, excluding the President and Vice President who remain unaffected by any financial disclosure requirement. Pursuant to this Executive Order, the Civil Service Commission and agency heads have promulgated regulations to enforce its provisions.

The Executive Order requires heads of agencies, Presidential appointees in the Executive Office of the President, and full-time members of committees, boards or commissions appointed by the President to file financial statements with the Civil Service Commission.

The regulations issued by the Civil Service Commission require executive branch employees compensated pursuant to the Executive Salary Schedule and certain other executive branch employees compensated at a level of GS-13 or above to file similar financial statements with their agency heads. These statements must be amended on a quarterly basis.

The Executive Order and the civil service regulations require that financial statements be held in confidence and that no information on the statements be disclosed to the public, except as the Chairman of the Civil Service Commission or the head of an agency concerned may decide to disclose.

The confidential financial statements filed by the above officers and employees must contain: (1) the names of all business enterprises, non-profit organizations and educational or other institutions in which the individual serves as an employee, officer, owner, director, trustee, partner, adviser or consultant or in which he has a financial interest through a pension, retirement, or other similar plan or through the ownership of stocks, bonds or securities; (2) the names of all credi-

tors, excluding those resulting from a home mortgage or ordinary living expenses; and (3) a list of interests in real property, excluding a personal residence.

All special government employees in the executive branch are required to submit to their agency heads a statement listing all current Federal government employment, the names of all organizations and institutions in which an individual serves as a paid or volunteer officer or employee, the names of all corporations in which he holds stocks or bonds, and the names of all partnerships in which he is engaged. These statements must also be updated quarterly.

In March, 1975, President Ford issued guidelines requiring disclosure to the Counsel to the President of financial information by White House staff members paid at a level equivalent to GS-13 or above. These statements are also kept confidential and no information in them may be disclosed, except by direction of the President for good cause shown. Under President Carter, this requirement has been extended to all employees of the White House. In addition, the President has required that all nominees, subject to confirmation by the Senate, make available for public inspection a listing of their assets, liabilities and sources of income.

#### *Judicial branch*

Although Supreme Court Justices are not presently required to make any financial disclosures, Federal judges are covered under guidelines adopted by the American Bar Association and the Judicial Conference of the United States. The Code of Judicial Conduct, adopted in 1972 by the ABA, and a similar code adopted by the Judicial Conference in 1973, require the judges to file semi-annual reports with the Judicial Conference, the judicial council of their circuit or the appropriate court, and the clerk of the court of which the judge is a member. These reports will be public and will disclose gifts of more than \$100 and income from non-judicial work. The Judicial Conference, however, cannot enforce the provisions of these codes.

In December 1974, the President signed a comprehensive Federal law dealing with judicial disqualifications. It bars Supreme Court Justices and Federal judges from participating in cases involving companies in which they own as little as one share of stock.

#### 4. INADEQUACY OF EXISTING FINANCIAL DISCLOSURE REQUIREMENTS

The existing financial disclosure requirements for members of the executive, legislative and judicial branches of the Federal government are inadequate for the following reasons:

(1) Existing financial disclosure requirements are inconsistent throughout the Federal government. Even with the recent enactment of similar financial disclosure requirements for Members, officers and employees of the Senate and House of Representatives, the requirements for financial disclosure vary throughout the Federal government.

(2) Some of the highest government officials are not now covered by any financial disclosure requirement. The President, Vice President, and Justices of the United States Supreme Court are all exempt from any reporting requirements whatsoever.

(3) No officials of the executive branch are currently required to make public financial disclosure statements. Executive Order 11222 and the pertinent Federal regulations state that the information required of executive branch officials and employees shall be submitted to the Chairman of the Civil Service Commission, or the agency head in appropriate cases—and that such information “shall be held in confidence.”

(4) Public financial disclosure requirements for judges are limited and unenforceable. The only items which members of the judicial branch are directed to report are the sources of income and gifts. The identification of assets which could present a conflict of interest is excluded from coverage. Furthermore, even the limited financial statements are voluntary, and, as stated above, no disclosure requirements are applicable to Justices of the Supreme Court.

#### D. TITLE IV.—OFFICE OF GOVERNMENT ETHICS

##### CURRENT ENFORCEMENT OF STANDARDS OF CONDUCT REGULATIONS

Current standards of ethical conduct and requirements for disclosure of the financial interests of officers and employees of the executive branch are governed by Executive Order 11222 and various implementing rules and regulations issued by the Civil Service Commission and executive departments and agencies.

Issued in 1965, the expressed intent of the Executive Order is that: . . . employees avoid any action, whether or not specifically prohibited . . . which might result in, or create the appearance of—

- (1) using public office for private gain;
- (2) giving preferential treatment to any organization or person;
- (3) impeding government efficiency or economy;
- (4) losing complete independence or impartiality of action;
- (5) making a government decision outside official channels; or
- (6) affecting adversely the confidence of the public in the integrity of the government.

Section 203 of the Executive Order states that employees may not have financial interests which conflict substantially, or appear to conflict substantially, with their responsibilities and duties or may not engage in financial transactions relying upon or as a result of information obtained in the course of the employment. Each agency head, full-time member of a committee, board, or commission appointed by the President is required to file a statement of financial interests with the Chairman of the Civil Service Commission.

Under the Executive Order, the Civil Service Commission was directed to establish a financial disclosure system for employees subordinate to agency heads. In addition, the Commission was directed to issue an executive branch regulation implementing the order, and was authorized to approve and review supplementary agency regulations, and recommend revisions in the order to the President.

Pursuant to implementing regulations, the Civil Service Commission developed a model financial disclosure form and gave the agencies authority to require more detailed information to reveal actual or apparent conflicts of interest. Ethics counselors were established in each agency and were responsible for all regulations relating to employee



conduct, including the financial disclosure system. Procedures for dealing with conflicts of interest were established, including divestiture of a conflicting financial interest, change in assigned duties, disqualification, or disciplinary action.

*Deficiencies in current system*

In a 1976 report to the Congress entitled, "Action Needed to Make the Executive Branch Financial Disclosure System Effective," the General Accounting Office detailed the deficiencies in existing procedures designed to disclose potential or actual conflicts of interest. The following are among the problem areas which were enumerated:

(1) Inadequate interpretation of standard-of-conduct regulations: In developing their standard-of-conduct regulations, most agencies have adopted the general guidelines of the Civil Service Commission, thereby failing to tailor their regulations to individual agency and employee responsibilities. Some agencies have also failed to incorporate statutory restrictions on employee conduct or financial interests into their financial disclosure regulations. The result of these inadequacies has been a lack of definitive information available to the employee and officials responsible for review of financial statements concerning what may constitute a conflict of interest, inadequate interpretation of conflict of interest laws and regulations, inconsistent and frequently subjective judgments, and inadequate review of disclosure reports. The consequence is that violations frequently occur. For example, although statute provides that employees of the U.S. Geological Survey shall not have personal or private interests "in the lands or mineral wealth of the region under survey, and shall execute no surveys for private parties or corporations," the GAO, in 1975, found 49 apparent employee violations.

(2) Ineffective procedures to ensure collection, review, and control of statements: The GAO survey of three executive departments and 13 agencies disclosed that ten percent of the financial disclosure statements required to be filed had not been filed and many statements were missing or filed late. Some agencies could not identify the number of employees required to file because employee and position lists had been inadequately referenced. Guidelines for reviewing officials were often inadequate, lacking direction for identifying financial interests or activities which could constitute conflicts of interest. Frequently, employees' job descriptions were too vague or outdated to determine the potentiality of a conflict of interest. Another deficiency discovered by the GAO included the inadequate devotion of agency resources to review disclosure statements:

Many reviewing officers were not trained, and their duties as ethics counselors or reviewers were usually in addition to their full-time responsibilities. In some agencies, first-line reviewing officials were personnel employees removed from the main agency operations. Thus, they were not familiar with employees' duties or with companies that employees conducted official business with.

(3) Ineffective and untimely resolution of conflicts of interest: Executive Agencies lack adequate procedures for monitoring employee disclosure statements and resolving actual or apparent conflicts of interest when discovered. The GAO reported that as much as

a year would elapse before a question concerning a financial interest or activity was resolved.

In other cases, GAO reported inadequate monitoring of disqualification requirements and few controls to assure disqualification or divestiture of top management officials within agencies.

A major and perhaps the most substantial contributing factor to the inadequate performance of the executive branch conflict of interest enforcement system has been the decided lack of a centralized supervisory authority. While the Civil Service Commission was given responsibility for implementing Executive Order 11222, it was not given the mandate necessary to direct agency enforcement. It has no power to monitor compliance of agencies, to investigate whether agencies are performing their responsibility, nor does it have authority to direct and order agencies and individuals to take remedial actions necessary to comply with existing regulations. The cause-effect relationship between this lack of muscle and the inability to deal effectively with executive enforcement of standards of conduct remains unclear. This could be the reason why the Civil Service Commission has made no effort to allocate resources to enforcement and has failed to publish advisory opinions to achieve some type of uniformity.

As a result of its lengthy studies of the enforcement of financial disclosure and standard of conduct regulation, the GAO recommended the establishment of an Office of Ethics in the Executive branch:

An executive branch office of ethics is needed if the objective of Executive Order 11222—the maintenance of the highest standard of ethical conduct—is to be met. The actions needed to achieve this objective are many and varied and will require the continual efforts of a full-time staff to manage and direct the program.

President Carter, in his May 3, 1977 message to the Congress, called for the establishment of such an office within the Civil Service Commission. Public financial disclosure is the first step toward a self-monitoring ethics system. However, it is concluded that there must exist within the executive branch a cohesive infrastructure for the enforcement of current statutes, executive orders, and regulations dealing with standards of conduct. Primary responsibility for overseeing agency enforcement of these regulations must be given greater priority and adequate staff resources. In 1975, the Civil Service Commission designated responsibility for overseeing the entire executive branch conflict of interest enforcement system to only one full-time attorney who was given the assistance of one part-time secretary. This minimal allocation of resources is indicative of the lack of priority given ethics enforcement in the past.

The Committee agrees with witnesses from Common Cause who testified that, “. . . a fundamentally revitalized Civil Service Commission must be the basic vehicle on which to build a sound Executive Branch conflict of interest system.”

An Office of Ethics within the Civil Service Commission would centralize executive branch responsibility for enforcement; provide

guidance to agencies on standard procedures to ensure the collection, review and monitoring of financial disclosure statements; issue clear and understandable standards of conduct regulations; provide advisory opinions to agencies; and develop financial disclosure forms tailored to obtain all relevant information necessary to make conflict of interest determinations. Perhaps, most importantly, the ethics office would also bear responsibility for conducting an ongoing program to inform employees of those laws and regulations which govern their conduct.

The Committee agrees with the President that the vast majority of federal employees have followed the highest ethical standards. The Committee believes that to a large degree the violations which the GAO has discovered in the course of its studies were the result of a program which was ineffectively managed, inadequately staffed, and subject to incoherent regulations.

#### E. TITLE V.—RESTRICTIONS ON POST-SERVICE ACTIVITIES BY OFFICIALS AND EMPLOYEES OF THE EXECUTIVE BRANCH

The fundamental character of the men and women who serve in Federal office is, as it should be, a matter of great importance to the American public; and conflict of interest statutes are a reflection of that interest and concern. Title V is a revision of 18 USC 207, one of the major statutes on conflict of interest. It restricts the activities in which a former Executive Branch official may become involved after leaving federal service.

The revisions of 18 USC 207 were submitted to Congress by President Carter; and in consultation with Administration officials, the Committee effected certain changes in the measure as originally submitted. The Administration concurred in those changes and supports Title V as reported by the Committee.

Title V of this bill has several important objectives. The restrictions are imposed to insure government efficiency, eliminate official corruption, and promote even-handed exercise of administrative discretion. Former officers should not be permitted to exercise undue influence over former colleagues, still in office, in matters pending before the agencies; they should not be permitted to utilize information on specific cases gained during government service for their own benefit and that of private clients. Both are forms of unfair advantage. Honest government, and decisions made in an impartial manner, are the objectives of this Title.

Title V is an attempt to prevent corruption and other official misconduct before it occurs, as well as penalizing it once it is uncovered. The criminal sanctions of fine and imprisonment already in the statute and the administrative remedy we propose to add will, we are convinced, deter unlawful conduct and encourage officials to exercise a higher degree of caution in their subsequent activities as private citizens. A realistic potential for punishment and disciplinary action is an important mechanism.

But Title V does more than establish a crime and provide for administrative discipline: it is also a general standard for what is to be con-

sidered proper ethical conduct by former government officials. Agency and department regulations and rules will be modeled after its contents; other federal laws, such as executive orders, will reflect its mandate. In short it is a statement of federal policy on this aspect of conflict of interest.

18 USC 207, like other conflict of interest statutes, seeks to avoid *even the appearance* of public office being used for personal or private gain. In striving for public confidence in the integrity of government, it is imperative to remember that what appears to be true is often as important as what is true. Thus government in its dealings must make every reasonable effort to avoid even the appearance of conflict of interest and favoritism.

But, as with other desirable policies, it can be pressed too far. Conflict of interest standards must be balanced with the government's objective in attracting experienced and qualified persons to public service. Both are important, and a conflicts policy cannot focus on one to the detriment of the other. There can be no doubt that overly stringent restrictions have a decidedly adverse impact on the government's ability to attract and retain able and experienced persons in federal office.

We have given those considerations very deliberate thought. Indeed, for nearly 18 months, the Committee was involved in a detailed study of federal conflict of interest questions and has issued a report dealing with those issues this past February. We have concluded that the revisions contained in Title V will not adversely affect the attraction of federal office to properly motivated individuals.

However, the revisions are more stringent than existing law. We close a major loophole in the present statute that allowed former officials to aid and assist private parties on matters in which they were intimately involved during government service. We extend the prohibition against representing private parties on matters within the official's former responsibility from one to two years. Finally, we prevent contact on matters of business between the official and his former agency for a period of one year to avoid the potential for, or the appearance of, undue influence over former colleagues and employees.

The more stringent requirements are justified. Today public confidence in government has been weakened by a widespread conviction that federal officials use public office for personal gain, particularly after they leave government service. There is a sense that a "revolving door" exists between industry and government; that federal officials "go easy" while in office in order to reap personal gain afterward. That in turn leads to a suspicion that personal profit was the motivation for the appointment in the first instance. All of this is repulsive to universally held principles of public service.

There is a deep public uneasiness with officials who switch sides—who become advocates for and advisors to the outside interests they previously supervised as government employees. After all, there are reasons why private clients so frequently hire former officials, and the attraction explains why some of them do so well in subsequent careers in the private sector. Private clients know well that they are hiring persons with special skill and knowledge of particular departments and agencies. That is also the major reason for public concern. It is

feared that officials may use information, influence, and access acquired during government service at public expense, for improper and unfair advantage in subsequent dealings with that department or agency.

Reflecting that popular concern, steps have already been taken throughout the government in recent months to strengthen conflict of interest requirements. Part of that new approach specifically concerns post-service activities. President Carter has informally exacted commitments from his appointees concerning length of service with the government and tougher restrictions on subsequent activities. Both Houses of Congress have recently adopted new codes of conduct to prevent actual or potential conflicts of interest. The Senate code contains very specific provisions on post-service conduct and contact. For one year, a former member may not lobby the Senate on pending matters of business; and Senate staff members are barred for an equal length of time from lobbying the Senators or Committees by whom they were employed. Therefore, it can be fairly and accurately stated that the revisions contained in Title V are but a logical extension of action already taken by the executive and legislative branches of our government.

Those actions and the need for legislative revision of existing statutes were emphasized by the President in his recent message on this bill to Congress:

During my campaign I promised the American people that as President I would assure that their government is devoted exclusively to the public interest . . . This bill will establish far-reaching safeguards against conflicts of interest and abuse of the public trust by government officials. The bill incorporates the standards I have required of my own appointees, and extends their coverage to other high-ranking officials. . . . It also parallels the unprecedented efforts the Congress has made to strengthen ethical standards for its members.

The President also noted:

All too often officials have come into government for a short time and then left to accept a job in private industry, where one of their primary responsibilities is to handle contacts with the former employer . . . These rules reflect a balance. They do not place unfair restrictions on the jobs former government officials may choose, but they will prevent the misuse of influence acquired through public service.

We share that same hope—although it merits emphasis that in our opinion, the vast majority of public office-holders have the proper motivation for public service and do not unconscionably use that experience for personal gain in subsequent careers. Yet it is clearly in the public interest that reasonable and effective standards be imposed on a former official's dealings with the same agency of which he or she was once employed. We believe the provisions of Title V accomplish that objective.

There are further justifications for the proposed revisions. First, the sanctions contained at present in 18 USC 207 are entirely criminal in

nature; a violator, once proven guilty in a court of law, may be sentenced to federal penitentiary or fined. Yet criminal prosecutions under this statute are almost unheard of. There is, it would seem, a great reluctance to bring a criminal indictment against a former high level official on the basis of this statute. What that means is that the statute has become almost unenforceable. What is needed, and what we provide in this revision, is an administrative mechanism so that departments and agencies can determine violations and then impose a meaningful penalty on the violator. Title V contains what we believe is an effective administrative sanction. The former official who violates the statute may be barred from practice or contact before his or her former agency for a period not to exceed 5 years.

Finally, in making these revisions, we have been especially conscious of the matter of clarity of language and terminology. There is, as the Committee's review of conflict of interest found, "too much ambiguity, confusion, inconsistency, and obscurity" in the existing law. In this area, as much as in any other, it is critical that the law be understood in order that it be followed. We believe that our revisions reflect that concern.

In summary, we are convinced that Title V presents a comprehensive and satisfactory policy governing post-service activities. Former officials and employees will be prohibited for life from aiding, assisting or representing anyone other than the United States on matters involving specific parties in which they had personal and substantial involvement while in office. For a period of two years following government service, former officers would also be prohibited from appearing before or communicating with any agency or court on any matter involving specific parties which was within their official responsibility during their final year in government service. Finally, for a period of one year, a former official would not be permitted to have any contact with his former agency or department on any matter than pending before the agency.

### III. SUMMARY AND NATURE OF PUBLIC OFFICIALS INTEGRITY ACT

#### A. TITLE I.—REORGANIZATION OF THE DEPARTMENT OF JUSTICE

##### APPOINTMENT OF TEMPORARY SPECIAL PROSECUTOR

Title I of the legislation requires the appointment of an independent temporary special prosecutor for certain limited cases where the Department of Justice may have a conflict or interest with respect to a particular investigation of prosecution and, the interests of justice would be better served if such investigation or prosecution was conducted by an individual outside of the Department of Justice.

The bill contains two standards defining when the Department has such a conflict of interest. Under the first standard, the Attorney General must apply to a special division of the United States Court of Appeals for the appointment of a temporary special prosecutor whenever, after conducting a preliminary investigation, he determines that a matter deserves further investigation or prosecution and the subject

NCJ#

PUBLIC OFFICIALS INTEGRITY ACT OF 1977

United States Senate Committee on  
Governmental Affairs

1977, 204 p.

U.S. Senate  
Committee on Governmental Affairs  
Washington, D.C. 20510

Ord: 12-11-79, COLL, JRB

Rec:  
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GOVERNMENTAL AFFAIRS COMM.  
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December 11, 1979

U.S. Senate  
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of such investigation is one of the following: The President, Vice President, a cabinet member, a person in the Executive Office of the President compensated at a level IV of the Executive Schedule or greater; a person in the Department of Justice compensated at a level III or greater, an Assistant Attorney General involved in criminal law enforcement, the Director or Deputy Director of Central Intelligence, the Commissioner of Internal Revenue, or any person who is a national campaign manager or the chairman of any national campaign committee seeking the election or reelection of the President. Under this standard, upon receiving and application from the Attorney General, the court must appoint a special prosecutor and define the prosecutorial jurisdiction of the special prosecutor.

Under the second standard, the Attorney General must apply to the division of the court for appointment of a temporary special prosecutor whenever the continuation of an investigation or the outcome of any prosecution may directly and substantially affect the partisan political or personal interests of the President, the Attorney General, or the President's political party. Under this standard, the Attorney General is required to make two determinations: (1) whether, after a preliminary investigation, an allegation of wrongdoing is so unsubstantiated that it does not further warrant further investigation and (2) whether a conflict of interest exists under the standard. Any determination which the Attorney General makes not to continue an investigation or prosecution because the allegations of criminal conduct are unsubstantiated or frivolous is not reviewable by the division of the court. However, if, following a preliminary investigation, the Attorney General decides that a matter warrants further investigation, he must then make a determination with respect to whether or not a conflict of interest exists. If he decides a conflict of interest exists, he must apply for the appointment of a special prosecutor. Should he conclude that a conflict of interest under this standard does not exist, the Attorney General must file a memorandum with the court explaining his reasons for that decision. The court may review such a decision by the Attorney General, and, if the court determines that a continuation of the investigation by the Department of Justice would create a conflict of interest or the appearance of a conflict of interest, the court must appoint a temporary special prosecutor.

A special prosecutor appointed by the division of the court under this statute has all of the authority and powers which are vested in the Attorney General with respect to the conduct of a criminal investigation except the power to approve wiretaps. The prosecutorial jurisdiction of a temporary special prosecutor is defined by the court and the court retains the authority to refer new or related matters to the special prosecutor. In addition, the special prosecutor can accept referral from the Attorney General of additional matters which are related to his prosecutorial jurisdiction.

A special prosecutor appointed under this statute is authorized to report from time to time to Congress and the public on his activities, and is authorized to advise the House of Representatives of any substantial and credible information which he receives that may constitute grounds for an impeachment of a President, Vice President, or

a Justice or judge of the United States. In any event, at the conclusion of his duties, or upon his removal from office, a special prosecutor must submit a detailed final report to the division of the court setting forth a full and complete description of his work as special prosecutor, including the disposition of all cases and the reasons for not prosecuting any matter within his prosecutorial jurisdiction. The division of the court may release to Congress or the public such portions of the report as it deems appropriate.

A temporary special prosecutor may be removed from office only by the Attorney General and only for extraordinary improprieties. An action may be brought in the division of the court to challenge the action of the Attorney General in removing a special prosecutor. The division of the court must cause such an action to be expedited in every way possible.

The United States Court of Appeals for the District of Columbia is the court which is assigned the responsibility for the appointment of temporary special prosecutors. Priority in assignment to the division of the court which will make the appointments must be given to retired circuit judges and retired justices. There is also a provision prohibiting any judge or justice sitting on this division from sitting on any other matter involving a temporary special prosecutor whom that panel appointed other than an action for reinstatement should that prosecutor be removed by the Attorney General.

With respect to any of the functions assigned to the court under this legislation, the three-judge division of the court established by this title is sitting as a panel of appointment making an appointment of an officer of the United States as authorized under Section 2 of article II of the Constitution.

Title I also contains a general provision requiring the Attorney General to promulgate rules and regulations which will require any officer or employee of the Department, including a U.S. attorney or a member of his staff, to disqualify himself from participation in a particular investigation or prosecution if such participation may result in a personal, financial, or partisan political conflict of interest or the appearance thereof. This applies to all Department of Justice employees and cases, not just the matters requiring the appointment of a special prosecutor.

#### *Office of Government Crimes*

Title I of this legislation also establishes an Office of Government Crimes within the Department of Justice. The Office is to be headed by a director who shall be appointed by the President and confirmed by the Senate. In performing his responsibilities, the director may report directly to the Attorney General.

An individual cannot be appointed director of the Office of Government Crimes if that individual has, during the five years preceding his appointment, held a high-level position in the campaign for office of the current President or Vice President. This statutory standard will be interpreted and applied solely by the Senate in the process of confirmation of the director.

The jurisdiction of the Office of Government Crimes includes all criminal allegations against top level officers or employees of the federal government and jurisdiction over criminal allegations against lower level government employees if the violation of federal law is

related to the government work or compensation of the employee. The jurisdiction of the Office of Government Crimes would also include criminal violations of Federal laws relating to lobbying, conflicts of interest, campaigns, and election to public office. This jurisdiction covers offenses in the above categories no matter who commits the offense. In addition, the Office of Government Crimes is given the authority to supervise any investigation and prosecution of criminal violations of Federal law by any state or local government official if the alleged crime is related to the government work or compensation of the employee.

The Attorney General shall determine the organizational placement of the Office of Government Crimes and may concurrently delegate a matter within the jurisdiction of that Office, with the approval of the Director, to any other unit of the Department of Justice, including any United States Attorney. In the event of any concurrent delegation of jurisdiction, the director of the Office of Government Crimes must still direct the performance of these duties.

## B. TITLE II.—CONGRESSIONAL LEGAL COUNSEL

### 1. SUMMARY

Title II of the Public Officials Integrity Act establishes the Office of Congressional Legal Counsel, an office with responsibility for defending Congress in litigation involving the vital interests of Congress. The office will be headed by a Congressional Legal Counsel. A bipartisan Joint Leadership Group is given general responsibility for oversight of the activities of the Office.

The Congressional Legal Counsel and a Deputy Congressional Legal Counsel will be appointed by the President Pro Tempore of the Senate and the Speaker of the House of Representatives from among recommendations submitted by the Majority and Minority Leaders of the Senate and the House of Representatives. Appointments to these positions must be made without regard to political affiliation and solely on the basis of fitness to perform the duties of the position.

An appointment of a Congressional Legal Counsel or Deputy Congressional Legal Counsel must be approved by a concurrent resolution of the Senate and the House of Representatives. Both the Congressional Legal Counsel and Deputy Congressional Legal Counsel will be appointed for a period which will expire at the end of the Congress following the Congress during which the Congressional Legal Counsel is appointed. However, Congress may, by concurrent resolution, remove either the Congressional Legal Counsel or the Deputy Congressional Legal Counsel before the expiration of their term of employment.

There are three major types of litigation in which the Congressional Legal Counsel can be authorized to represent Congress. Authority to undertake such representation, with two exceptions, requires the concurrence of one or both Houses of Congress on a case-by-case basis.

The first responsibility of the Congressional Legal Counsel is to defend Congress, a House of Congress, an office or agency of Congress, a committee or subcommittee, or any Member, officer or employee of

a House of Congress in a civil action in which that individual or entity is a party defendant and in which an official Congressional action of that individual or entity is placed in issue. The Congressional Legal Counsel is also authorized to defend the same entities and individuals in any court proceeding with respect to a subpoena or order directed to that individual or entity in their official capacity. The Congressional Legal Counsel undertakes such representational activity only at the direction of Congress or the appropriate House of Congress or by a two-thirds vote of the Joint Leadership Group and, if the representation is of an individual, with the consent of that individual.

Secondly, the Congressional Legal Counsel may be directed to intervene or appear as *amicus curiae* on behalf of Congress in legal actions in which Congress determines that the powers and responsibilities of Congress under Article I of the Constitution are placed in issue. Intervention or appearance as *amicus* may be authorized only by adoption of a resolution or concurrent resolution. The Congressional Legal Counsel is given the ongoing responsibility to monitor major cases pending before the courts and is required to notify the Joint Leadership Group of any legal actions in which he believes Congress should intervene or appear. The Joint Leadership Group must then publish in the Congressional Record material received from the Congressional Legal Counsel describing the legal proceeding in which intervention or appearance is recommended. However, any intervention or appearance by the Counsel after such notice has been published must still be authorized by a resolution or concurrent resolution.

The third major responsibility of the Congressional Legal Counsel is to bring civil actions against an individual or corporation to enforce a subpoena or other order issued by a House of Congress, or a committee or a subcommittee authorized to issue such a subpoena or order. This procedure does not apply to attempts to obtain information from the executive branch. The discretion of Congress to punish contempt by existing procedures—namely, to refer a contempt to the United States attorney for criminal prosecution or to hold an individual or entity in contempt of a House of Congress by bringing that individual before the bar of the Congress—is specifically reserved.

Finally, the Counsel is authorized to represent committees in requests to courts for grants of immunity. Such representation does not need to be approved by Congress or by a House of Congress. Committees, by a two-thirds vote may approach the Counsel directly requesting representation. This is consistent with the procedure currently followed under the immunity statute.

The Congressional Legal Counsel is authorized to advise, consult and cooperate with relevant agencies and offices of Congress. For example, the Congressional Legal Counsel is directed to assist the Congressional leadership in responding to subpoenas or other requests for withdrawal of papers in the possession of the Senate or the House of Representatives.

The Congressional Legal Counsel may assist individual Members, officers or employees of Congress with regard to obtaining private legal counsel for such individual when such individual is not represented by the Congressional Legal Counsel.

The Congressional Legal Counsel is also directed to compile and maintain legal research files of materials from court proceedings which have involved the Congress. These materials will provide Congress with a valuable resource center containing information with respect to legal issues and legal actions involving the powers and responsibilities of Congress.

## 2. NATURE OF CONGRESSIONAL LEGAL COUNSEL

Title II of 555, as amended, has been drafted to establish a high quality legal office under the direct control of the Congress to represent the Congress in civil litigation of vital interest to Congress.

(1) The bill gives vitality to the constitutional doctrine of separation of powers. The independence of Congress as a co-equal branch of government will be enhanced if Congress is represented in the courts by full-time, professional legal counsel under its own control, whose primary loyalty is to defend the constitutional prerogatives of the Congress.

(2) Creation of an Office of Congressional Legal Counsel will not and should not encourage any party, including Congress itself, to resort to the courts to resolve issues of congressional power, nor will it impose any additional burden on the courts. Every type of legal proceeding in which the Congressional Legal Counsel may be authorized by Congress to participate is already pending before the courts, except for the bringing of civil actions to enforce Congressional subpoenas. The latter are already resolved in the courts in criminal contempt proceedings. There is no question that when Congress is involuntarily made a party to a court proceeding, it should defend itself vigorously. By such response, Congress may well discourage the filing of court challenges to its constitutional power. Creation of this office will better enable Congress to concentrate on carrying out its constitutional responsibilities by means of legislation, appropriations, oversight, and confirmations.

(3) The bill is drafted to assure that Congress will exercise firm and continuous control over all activities of the Office. The appointment of the Counsel is made by the joint leadership and must be approved by Congress. The Counsel serves for a term of service of four years, but may be removed at any time. Every representational activity undertaken by the Congressional Legal Counsel must be approved by a concurrent resolution of Congress or by a resolution of a House of Congress, except for representation of a Member or committee and for service as an authorized representative of a committee in requesting immunity for a witness. A bipartisan Joint Leadership Group is directed to oversee all activities of the Congressional Legal Counsel and may be a two-thirds vote authorize the Counsel to represent a member or committee. When engaged in any representational activities, the Counsel is required to defend vigorously all Congressional powers.

(4) The Office of Congressional Legal Counsel cannot be dominated by either House of Congress to the exclusion of the other. Each House or the part of the Joint Leadership Group from that House has the sole prerogative of authorizing the Counsel to represent Mem-

bers, officers, or committees of that House. One House acting alone cannot authorize the counsel to take any action in the name of Congress. In the event a conflict or inconsistency arises between the two Houses, the conflict or inconsistency must be resolved before the counsel can represent either House.

(5) The important duties to be formed by the Office are not, with minor exceptions, presently performed by any existing Congressional staff. The Office will assist Congress in taking steps to avoid or anticipate litigation. The cost of creating the Office should not exceed the amount presently expended by the Justice Department in representing Congress and by Congress in retaining private counsel.

(6) The bill fully respects the ethical principles which govern lawyer-client relationships. The Congressional Legal Counsel can be directed to represent an individual Member, officer or employee of Congress only with the consent of such individual. An individual who is not represented by the Congressional Legal Counsel is authorized to request reasonable reimbursement for the cost of retaining private counsel. The bill includes rational and detailed procedures for the resolution of any conflict or inconsistency between representation by the Counsel of any party and the carrying out of the Counsel's duties under the provisions of this title or the compliance with professional standards and responsibilities.

(7) The bill enhances the ability of a Member of Congress acting as an individual to bring any kind of civil action arising out of the performance of official duties he or she might desire to bring. The Counsel may advise, consult, and cooperate with such individual with respect to retaining private counsel although the counsel may not represent such Member. The title preserves the ability of a Member to intervene or appear as *amicus curiae* in a legal proceeding, even when the Congressional Legal Counsel is already appearing on behalf of Congress and even if the Member is taking a different position from that taken by the Congressional Legal Counsel. The Counsel will also assist individual members by making relevant legal research materials available to them.

(8) The bill specifically precludes the Congressional Legal Counsel from defending any individual Member of Congress who has been charged with criminal activity or from representing any member in any other proceeding which is unrelated to the performance of official duties.

### 3. NATURE OF COURT ENFORCEMENT OF CONGRESSIONAL SUBPENAS

Section 205 of Title II provides a mechanism for court enforcement of congressional subpoenas, through civil, rather than criminal proceedings. Subsection (b) of the jurisdictional statute gives guidance to the courts on the applicable procedure in enforcing congressional subpoenas. The procedures insure that this new statute will give congressional committees the power to expeditiously and effectively enforce their subpoenas.

In commencing an action under the new section 1364 of Title 28, set forth in section 205 (f) (1) of the bill, Congress invokes the aid

of the court to enforce congressional subpoenas and orders. Such actions will be commenced only once it is evident that a party will not comply with a congressional subpoena or order. The court will first review the validity of the subpoena or order and then, when finding it valid, issue an order to the recalcitrant party demanding compliance. If the party remains recalcitrant, Congress or the court itself may initiate a proceeding to require the party to appear to show cause why he should not be held in contempt of the court's order to comply. After a hearing the party may be held in contempt of the court fined or imprisoned until such time as compliance is forthcoming. At any point in this chain of events, including after having been held in contempt, the party may terminate his liability by complying with the court's order. The party, therefore carries the keys to the jail in his own pocket and is given every incentive to comply with the court order. Upon compliance all sanctions against the witness are suspended.

The courts already review the validity of congressional subpoenas and orders under the two present enforcement procedures: trial before a House of Congress and criminal contempt. When Congress imprisons a party in the Capitol jail after a trial before a House of Congress, the courts will review the validity of the congressional procedure in a habeas corpus proceeding brought by the imprisoned party. In criminal contempt cases the courts conduct trials under 2 U.S.C. 192, et seq. Under this statute Congress has established contempt of Congress as a criminal offense. In contrast a civil contempt proceeding under section 1364 would be for contempt of the court's order, not for contempt of the Congress itself. In both cases the court will first determine the validity of the congressional proceeding before it will impose a sanction on the party. Commencing a civil action to enforce a subpoena or order, therefore, creates no new dependence by Congress on the courts and no new right of a court to review congressional actions. It does provide flexibility in enforcing congressional subpoenas.

The statute specifically provides that any contempt proceeding arising from a refusal of a party to obey a court order enforcing a congressional subpoena or order shall be a civil contempt proceeding, the purpose of which is to secure compliance with the court order. By instituting a civil enforcement action under this statute, rather than certifying a criminal contempt of Congress to the Justice Department, Congress seeks to secure compliance with its subpoena or order rather than merely punish the contumacious party or deter future contempts. Indeed, the major problem in instituting a criminal contempt of Congress proceeding is that, once the initial refusal has occurred and a criminal contempt proceeding has begun, the recalcitrant witness has no incentive to comply with the subpoena. A witness cannot purge himself of criminal contempt.

Congress is then given a clear choice. If the only remedy Congress seeks is compliance with its subpoena or order it will institute a civil enforcement action. When it desires to punish a party in contempt or deter future violations it should certify the contempt to the Justice Department for criminal prosecution under 2 U.S.C. 192, et seq.

### C. TITLE III.—FINANCIAL DISCLOSURE

Title III of the legislation is a comprehensive statute requiring full and complete public financial disclosure by high-level officials in all three branches of the Federal government. It does not in any way regulate permissible conduct or prohibit the holding of any financial interest.

The bill may be divided into three main portions. The first portion defines who must file financial disclosure statements, the second specifies what information must be provided, and the third provides regulations for the enforcement of this statute and for public access to the reports.

#### *Individuals required to file reports*

The individuals who must file an annual public financial disclosure report are the President; Vice President; Member of Congress; justices and judges of the United States and the District of Columbia Government; officers and employees of the executive branch classified at a grade GS-16 or greater; officers and employees of the legislative and judicial branches, compensated at a rate equal to or greater than the rate of pay for grade GS-16; and members of a uniformed service compensated at a rate equal to or greater than the rate of pay for grade 0-7. In addition, candidates for federal elective office as well as Presidential appointees subject to the advice and consent of the Senate are required to file financial disclosure reports.

#### *Contents of reports*

The financial disclosure statements required under this statute are uniform for all individuals and must contain the following information:

(1) The amount and source of each item of earned income (except honoraria) received during the previous calendar year which exceeds \$100 in amount or value.

(2) The source, amount, and the date of each honoraria received during the preceding calendar year and an indication of which honoraria, if any, were donated to a charitable organization.

(3) The source and category of value of each item of unearned income received during the previous calendar year.

The categories of value for purposes of listing unearned income are as follows:

- (A) not more than \$1,000;
- (B) greater than \$1,000 but not more than \$2,500;
- (C) greater than \$2,500 but not more than \$5,000;
- (D) greater than \$5,000 but not more than \$15,000;
- (E) greater than \$15,000 but not more than \$50,000;
- (F) greater than \$50,000 but not more than \$100,000;
- (G) greater than \$100,000.

(4) The source, a brief description of, and the value of any gifts of transportation, lodging, food, or entertainment aggregating \$250 or more from any one source during the previous calendar year.

(5) The source, a brief description of, and the value of all other gifts aggregating \$100 or more from any one source during the previous calendar year unless, in an unusual case, a waiver is granted.

For purposes of reporting gifts, and gifts-in-kind, those having a value of less than \$35 need not be reported, nor is reporting required



for gifts received from a relative or gifts of personal hospitality. In addition, in aggregating gifts, an individual may deduct from the amount of gifts received from a single source the value of gifts given by the reporting individual to that source.

(6) The identity and category of value of each item of real property held, directly or indirectly, during the preceding calendar year which has a fair market value in excess of \$1,000 as of the close of such calendar year.

(7) The identity and category of value of each item of personal property held, directly or indirectly, during such calendar year in a trade or business for investment or the production of income which has a fair market value in excess of \$1,000 as of the close of such calendar year.

(8) The identity and category of value of each personal liability owed, directly or indirectly (other than to a relative), which exceeds \$2,500 at any time during such calendar year;

(9) The identity, date, and category of value of any transaction, directly or indirectly, in securities or commodities futures during such calendar year exceeding \$1,000 (except for transactions between an individual, and his spouse, or dependents, or donations to charitable organizations).

(10) The identity, date, and category of value of any purchase, sale, or exchange, directly or indirectly, of any interest in real property if the value of the property involved exceeds \$1,000 as of the date of purchase, sale or exchange (except for transactions between an individual, and his spouse or dependents or donations to charitable organizations).

(11) The identity of and a description of the nature of any interest in an option, mineral lease, copyright, or patent right held during the previous calendar year.

(12) The identity of all positions held as an officer, director, trustee, partner, proprietor, agent, employee, representative, or consultant of any private or non-Federal government organization, other than positions held in religious, social, fraternal or political entities.

(13) A description of the parties to, and the terms of any contract or agreement between the reporting individual and any person regarding the individual's employment after he leaves government service, including a description of any agreement under which an individual is taking a leave of absence to work for the Federal government, or any agreement providing for the continuation of payments or benefits from a prior employer other than the United States Government.

Government officials required to file a report under this statute must also include in their reports the identity of any prior non-federal government employer by whom they were paid over \$5,000 in any of the two years preceding the reporting year and must describe the nature of such employment and position held.

With respect to reporting assets, liabilities and transactions under items (6) through (10) above, the exact amount or fair market value of each item need not be reported. It is sufficient to report which of the following categories of value each is within:

- (1) not more than \$5,000;
- (2) greater than \$5,000 but not more than \$15,000;
- (3) greater than \$15,000 but not more than \$50,000;
- (4) greater than \$50,000 but not more than \$100,000;

- (5) greater than \$100,000 but not more than \$250,000;
- (6) greater than \$250,000, but not more than \$500,000;
- (7) greater than \$500,000 but not more than \$1,000,000;
- (8) greater than \$1,000,000 but not more than \$2,000,000;
- (9) greater than \$2,000,000 but not more than \$5,000,000; or
- (10) greater than \$5,000,000.

Under this statute an individual will be required to report the financial interests of a spouse and dependents, with the exception that exact amounts of income earned by a spouse or dependent need not be specified. The requirement to report the financial assets, liabilities and transactions of a spouse and dependent differs substantially from the provision previously adopted by the Senate in the Code of Official Conduct. Under the Code of Official Conduct, the Senate requires the reporting of only those interests of a spouse which are within the constructive control of the reporting individual.

*Filing of reports*

This statute creates the following supervising ethics offices which are responsible for monitoring compliance with this statute;

The office of Government Ethics for most members of the Executive Branch;

The President for Civil Service Commissioners and the Director of the Office of Government Ethics;

A committee designated by the House of Representatives for Members, officers and employees of the House of Representatives and officers and employees of the Architect of the Capitol, the Botanic Gardens, the Government Printing Office, and the Library of Congress;

A committee designated by the Senate for Members, officers, and employees of the Senate and officers and employees of the General Accounting Office, the Cost Accounting Standards Board, Office of Technology Assessment and the Office of the Attending Physician;

A committee designated by the Judicial Conference of the United States for justices, judges, officers and employees of the judiciary and judges of the District of Columbia.

Government officials required to file financial disclosure statements under this legislation must report all items, except income, within thirty days after assuming office and file a full report on or before May 15 of each year thereafter. A presidential nominee, subject to confirmation by the Senate, must file a financial disclosure report within five days of the time his nomination is transmitted by the President. A candidate for Federal office must file within 30 days after he becomes a candidate or by May 15, whichever is later.

Financial disclosure reports must be filed with the following offices:

Officials of executive agencies, with their agency;

The President, Vice President, Executive Schedule officials and executive branch officials who are not part of an agency must file with the Office of Government Ethics;

The Director of the Office of Government Ethics and Civil Service Commissioners, with the President and the Office of Government Ethics;

Officials of the legislative branch whose supervising ethics office is a committee of the Senate, with the Secretary of the Senate;

Officials of the legislative branch whose supervising ethics office is a committee of the House of Representatives, with the Clerk of the House;

Members, officers and employees of the Judiciary with their supervising ethics office;

Candidates, with the supervising ethics office for the position for which he is a candidate; and

Nominees, with the supervising ethics office for the position for which he is nominated and with the committee considering his nomination.

In addition, a Member of Congress is required to file a copy of his disclosure report, as a public document, with the Secretary of State or equivalent officer in the state which he represents. Justices and judges must file a copy of their disclosure report with the clerk of the court on which they sit.

The President is authorized to exempt undercover agents dealing with intelligence activities from filing public financial reports, but those individuals must still file a financial disclosure form with the head of their agency.

Extensions of time up to ninety days may be granted for the filing of financial disclosure reports. However, in the case of Presidential nominees, these statements must be filed prior to confirmation.

*Failure to file reports or falsifying reports*

Criminal penalties are established for knowing and willful falsification of any information in a report or omission of information from a report. Civil penalties are established for failure to file a report or omission of information from the report or inaccurate reporting of information in the report. The supervising ethics office is required to refer to the Attorney General the name of any individual it has reasonable cause to believe has violated the provisions of this statute. In the case of the President, Vice President, or any justice or judge of the United States, the supervising ethics office must refer this matter to the Committee on the Judiciary of the House of Representatives.

Each report filed with the legislative or judicial branch is required to be made available to the public within 15 days after receipt. Reports filed with the executive agencies must be reviewed for compliance with applicable laws and regulations and made available to the public within 45 days. The name of the reviewing official must be noted on the public report, his finding as to whether any conflict exists, and a description of the action taken to correct the conflict.

A person receiving or requesting copies of financial disclosure reports will be required to furnish his name and address, the name of the person or organization on whose behalf he is requesting a report, and to pay a reasonable fee to cover the costs of reproducing the document, unless this fee is waived. A civil penalty, not to exceed \$5,000, may be assessed against any person who obtains or inspects a report for an unlawful or commercial purpose, for use in establishing a credit rating, or for use in a solicitation.

*Audits*

Each supervising ethics office must conduct random audits of a sufficient number of reports filed in order to ensure the accuracy and completeness of the information filed in the reports. In any event, the Comptroller General must audit at least one report of each Member of Congress every six years and the Office of Government Ethics must audit a report filed by the President, Vice President, and Civil Service Commissioners, at least once during a term of office, and the report of the Director of the Office of Government Ethics at least once every four years.

## D. TITLE IV.—OFFICE OF GOVERNMENT ETHICS

## ESTABLISHMENT OF THE OFFICE OF GOVERNMENT ETHICS

Title IV of this statute creates an Office of Government Ethics within the Civil Service Commission. This Office is to be headed by a Director, appointed by the President, with the advice and consent of the Senate. The Director of the Office of Government Ethics will have a primary responsibility for implementing the financial disclosure provisions of this legislation and for coordinating policies and monitoring enforcement of standards of conduct laws, rules, and regulations for the executive branch.

*Authority and functions*

In performing his responsibilities under this statute, the Director of the Office of Government Ethics is subject to the general supervision of the Civil Service Commission. His responsibilities include the following:

- (1) developing and recommending to the Commission, in consultation with the Attorney General, rules and regulations, to be promulgated by the Commission or the President, pertaining to conflicts of interest and ethics, including regulations for the filing, review, and public availability of financial disclosure statements required under Title III;
- (2) developing and recommending to the Commission, in consultation with the Attorney General, rules and regulations pertaining to the identification and resolution of conflicts of interest;
- (3) monitoring and investigating compliance with the public financial disclosure requirements by executive branch officials required to file and executive agency officials responsible for receiving, reviewing, and making such statements available;
- (4) establishing a system whereby each financial disclosure statement filed, whether public or confidential, is promptly reviewed, is signed and dated by the reviewing official, and that a notation is made indicating whether or not a conflict of interest exists and what corrective action was taken;
- (5) conducting random audits of financial disclosure reports filed with the executive branch to determine the completeness and accuracy of such reports;
- (6) conducting a random review of at least 5 percent of the statements filed with the executive branch to determine whether any conflict of interest or ethical problem exists;

(7) monitoring and investigating individual and agency compliance with any additional disclosure or internal review requirement imposed by law or regulation;

(8) interpreting rules and regulations issued by the President or the Commission governing conflict of interest, ethics, and the filing of financial statements;

(9) consulting, upon request, with agency ethics counselors regarding the resolution of conflict of interest problems in individual cases;

(10) establishing a formal advisory opinion service to render opinions on matters of general applicability and compile, publish, and make such opinions available.

(11) ordering corrective action on the part of agencies and employees;

(12) requiring reports from agencies as the Director deems necessary;

(13) assisting the Attorney General in evaluating the effectiveness of conflict of interest laws and recommending appropriate legislative action;

(14) evaluating, with the assistance of the Attorney General, the need for changes in agency and Commission rules and regulations governing conflict of interest;

(15) cooperating with the Attorney General in developing an effective system for reporting allegations of violations of conflicts of interest laws to the Attorney General.

(16) providing information on and promoting ethical standards in the executive branch;

(17) reporting to the Civil Service Commission recommendations which shall be submitted to Congress by February 1, 1979 on which executive officials are required to file confidential disclosure statements and whether additional officials should be required to file public financial disclosure reports; and

(18) reporting annually to the President and the Congress on the activities of the Office, the effectiveness of the executive branch system for prevention of conflicts of interest, and recommendations in applicable laws.

## E. TITLE V: RESTRICTIONS ON POST-SERVICE ACTIVITIES BY OFFICIALS AND EMPLOYEES OF THE EXECUTIVE BRANCH

### 1. SUMMARY

Title V is a revision of 18 USC 207, which is the major statute concerning restrictions on post service activities by officials and employees of the Executive Branch. It covers, unless otherwise noted, all officials and employees of the Executive Branch and of the District of Columbia, including special government employees and the independent agencies. The statute as proposed contains four major subsections.

Subsections (a) and (b) establish restrictions based upon the degree of personal knowledge and association a former official or employee had with a particular matter: a lifetime bar for certain matters in which the official participated *personally and substantially* while in

office; and a two year ban for certain matters under the officer's *official responsibility* during the last year of government service. The length of those prohibitions are unchanged from present law, except for increasing the "official responsibility" prohibition from one to two years. The more intimate and extensive the involvement of the official, the greater the restriction is on the official's later involvement in those matters, after leaving government service, on behalf of private parties. For a period of one year, subsection (c) prohibits a former officer or employee from contacting his former department or agency on matters of business pending before that department or agency, regardless of the nature of that proceeding or the degree of association the official had with that matter. Subsection (d) is unchanged in substance from the present law. Title V also contains criminal sanctions, and a provision allowing an administrative remedy, for violations of its provisions.

*Subsection (a)*

The prohibition in subsection (a) is permanent in nature: a former official is barred for life from acting in matters in which he was personally and substantially involved at any time during his government service. On those matters, the former official cannot aid, assist or represent any private party in connection with a court, department or agency proceeding in which the government has a direct and substantial interest. In addition to barring actual contact with a court or agency, this provision also prohibits a former official from informally aiding or assisting or consulting on matters he personally considered while in office. However subsection (a) does not extend to every matter the official personally considered while in office: only those involving specific parties are included. Therefore general rule-making, formulation of general policy or standards, other similar administrative matters, and legislative activities—none of which typically involve specific parties—are not within the ambit of this prohibition. In addition to subsequent practice by a lawyer on behalf of clients, subsection (a) is intended to include consultants and expert witnesses, and self-representation.

*Subsection (b)*

Subsection (b) covers a much broader range of matters than subsection (a), but for a shorter period of time. For a period of two years after leaving office, a former official cannot be involved in matters that were under his official responsibility during his final year of service with a particular agency or department. Unlike subsection (a), subsection (b) allows a former official to aid and assist private parties on such matters; provided he does not participate in an agency or court proceeding, or attempt to influence through written or oral communication, an agency or court on matters covered by this provision. Also the subsection (b) prohibition applies only to matters involving specific parties. As such, it does not include general rule-making, formulation of general policy or standards, other similar administrative matters, and legislative activities. In that regard, it is the same as subsection (a). In addition to subsequent practice by a lawyer, subsection (b) also includes consultants and expert witnesses, and self-representation.

*Subsection (c)*

Subsection (c) is new. It provides for what we consider to be a reasonable "cooling off" period between the time an officer or employee leaves office and when they reappear before the same agency or department on behalf of private clients or themselves. Subsection (c) states that, for a period of one year following termination of government service, a former top-level official shall have no contact with his former agency or department on *any* matter—new or old—then pending before that agency or department. The former official is free to aid and assist and consult on matters covered by subsection (c), as long as there is no contact by the former official with his former agency. (Provided, of course, that there is no violation of 18 USC 207(a) as we propose to amend it.) Also it does not apply to legislative activities by former officials. Finally subsection (c) excludes contact concerning matters of a personal and individual nature, such as personal income taxes and pension benefits.

Subsection (c) also authorizes the director of the Office of Government Ethics of the Civil Service Commission to classify department agencies and bureaus, exercising functions wholly distinct and separate from the rest of the department, as a separate department for the purposes of the one year "no contact" ban.

*Sanctions, waivers and partners of current officials*

Title V restates the criminal sanctions contained at present in 18 USC 207. In addition, Title V establishes a new administrative disciplinary remedy for violations of the statute. If a violation is determined after due process, a department or agency head may prohibit the violator from making any appearance or attendance before said department or agency for a period not to exceed five years.

All of the provisions contained in subsections (a), (b) and (c) may be waived, but only for persons of "outstanding scientific or technological qualifications" and only if the exemption is in connection with a matter in a "scientific or technological field." That provision is unchanged from the present law.

*Application and effective date*

The provisions of Title V will take effect upon adoption. All affected officers or employees who are in office or employed on the effective date or thereafter will be subject to the provisions of this Title. Former officers or employees who have left government service prior to the effective date of this Title shall be subject to the former provisions of 18 USC 207.

## IV—HISTORY OF LEGISLATION

At the end of the 93rd Congress, Senator Sam J. Ervin, Jr. introduced S. 4227 on December 11, 1974. This bill embodied the legislative recommendations of the Senate Select Committee on Presidential Campaign Activities. An identical bill, S. 495, the Watergate Reorganization and Reform Act, was introduced in the 94th Congress by Senator Abe Ribicoff on January 30, 1975. S. 495, as introduced, established an Office of Public Attorney and created an Office of Congressional Legal Counsel.

The Committee on Government Operations held seven days of public hearings on S. 495 and related legislation during the 94th Congress (July 29, 30, and 31, and December 3, 4, and 8, 1975, and March 11, 1976). During its consideration of S. 495, the Committee heard testimony from 17 witnesses and received written evaluations of the legislation from 17 distinguished members of the American legal and academic communities, in addition to the comments of a number of federal agencies.

On April 9, 1976 the Committee unanimously approved S. 495, as amended, and reported it to the Senate. The amended bill contained three titles. Title I established provisions for the appointment of a special prosecutor for cases involving high-level executive branch officials and created a Division of Government Crimes in the Justice Department to handle matters related to official corruption of government officials. Title II created an Office of Congressional Legal Counsel and Title III required the public disclosure of the financial interests of high-ranking officials in all three branches of the Federal government.

Title I of S. 495 was rereferred to the Judiciary Committee which held one day of public hearings on May 26, 1976 and was discharged from further consideration of the bill on June 15, 1976. S. 495 was debated in the Senate on July 19, 20, and 21, 1976. On the floor, Title I was substantially amended to provide for a permanent special prosecutor. Titles I and II remained unchanged. S. 495, as amended, was adopted by a vote of 91-5 on July 21, 1976.

Two bills similar to Titles I and III of S. 495, H.R. 15634 and H.R. 3249, were favorably reported by subcommittees of the House Judiciary Committee on September 17 and 23 respectively. However, the House of Representatives was unable to take final action on these bills in the short time remaining before adjournment sine die.

S. 555, incorporating many of the provisions of S. 495, was introduced on February 1, 1977, by Senators Ribicoff and Percy and presently has 24 cosponsors. At the time of introduction, the bill contained two titles; the first established procedures for the appointment of temporary special prosecutors and created an Office of Government Crimes in the Department of Justice, while the second title created an Office of Congressional Legal Counsel. On April 25, 1977, Senators Ribicoff and Percy introduced Senate Amendment 218 to S. 555 which established financial disclosure requirements for high-level officials in the three branches of government. On May 2, 1977, in a message to Congress, the President proposed (1) similar financial disclosure requirements for executive branch employees, (2) the establishment of an Office of Government Ethics within the Civil Service Commission and (3) more stringent restrictions on post employment activities of executive branch employees. The Administration's bill, S. 1446, was introduced by Senator Ribicoff on May 3, 1977 and public hearings were held on S. 555, Senate Amendment 218, S. 1446, and other related legislation on May 3, 4, and 5. The Committee heard testimony from 10 witnesses. The following is a list, in order of appearance, of those who testified before the Committee:

Senator Lowell Weicker (Republican of Connecticut)  
 John M. Harmon, Acting Assistant Attorney General, Office of  
 Legal Counsel, Department of Justice



Professor Livingston Hall, Chairman, American Bar Association,  
Special Committee to Study Federal Law Enforcement  
Agencies

Professor Herbert S. Miller, Member, American Bar Association,  
Special Committee to Study Federal Law Enforcement  
Agencies

Fred Wertheimer, Vice President for Operations, Common Cause  
Elmer B. Staats, Comptroller General of the United States

John Moore, President and Chairman of the Board, Export-  
Import Bank of the United States

Alan K. Campbell, Chairman, Civil Service Commission

Edward Tamm, Chairman of the Review Committee, The Judicial  
Conference of the United States

Jack Nard, U.S. Citizen, Pittsburgh, Pennsylvania

In addition, written statements were received from the following  
individuals and organizations:

Senator James Abourezk (Democrat of South Dakota)

Senator Clifford Case (Republican of New Jersey)

Kenneth T. Baylock, National President, American Federation of  
Government Employees

At these hearings, the Department of Justice supported both the  
provisions of Title I establishing a mechanism for the appointment of  
Congressional Legal Counsel.

The Committee on Governmental Affairs met on May 12, 1977 and,  
by a unanimous vote, approved S. 555, as amended, and ordered it re-  
ported to the Senate.

#### SECTION-BY-SECTION ANALYSIS

#### A. TITLE I—AMENDMENTS TO TITLE 28 U.S.C.

##### SPECIAL PROSECUTOR

Section 101(a) of title I contains a new chapter, Chapter 39, to be  
added to title 28 of the United States Code. The new chapter 39 is  
entitled "Special Prosecutor".

Chapter 39 provides two different methods for determining when  
a special prosecutor should be appointed. The first, contained in section  
591 and subsections (a) (b) and (c) of section 592 requires the appoint-  
ment of a special prosecutor when nonfrivolous allegations are re-  
ceived by the Department of Justice against any individual holding  
certain named high-level positions in the government. The second  
method for determining whether the appointment of a special prose-  
cutor is required is described in subsection 592(e) which requires such  
an appointment whenever the continuation of any prosecution or the  
outcome thereof may directly and substantially affect the partisan  
political or personal interest of the President, the Attorney General  
or the interests of the President's political party. These provisions will  
be discussed in the order they appear in chapter 39.

##### SECTION 591—APPLICABILITY OF PROVISIONS OF THIS CHAPTER

Subsection (a) of section 591 directs the Attorney General to con-  
duct an investigation pursuant to the provisions of this new chapter

39 whenever the Attorney General receives specific information that any of the persons described in subsection (b) of this section may have violated any Federal criminal law other than a petty offense. The term "specific information" is used so that the provisions of this chapter will not apply to a generalized allegation of wrongdoing which contains no specific factual support. For example, if the Attorney General receives a letter saying that a particular member of the President's cabinet is a "crook"; but the letter provides no further information or factual support regarding alleged criminal activity, such a letter would not constitute specific information and the Attorney General would therefore not be required to take any action under this chapter.

The reference to "any Federal criminal law" is intended to cover any of the laws which are under the jurisdiction of the Department of Justice, United States Attorney's and any other Federal law enforcement authorities. A narrow exception is made for petty offenses. In using the term petty offense the Committee intended to use the term as it is defined in section 1 of title 18 of the United States Code. In that statute, a petty offense is defined as a misdemeanor, a penalty for which does not exceed imprisonment for a period of six months or a fine of not more than \$500 or both. It was the feeling of the Committee that the special apparatus for the appointment of a special prosecutor should not be invoked with regard to the type of minor violations which are punishable as petty offenses.

Subsection (b) of section 591 describes the persons referred to in subsection (a). It is specific information with respect to a potential violation of any Federal criminal law other than a petty offense by the individuals holding these named positions which requires the Attorney General to follow the procedures outlined by this chapter. Paragraph (1) states that an individual holding the position of President or Vice President is covered by subsection (b). Paragraph (2) states that any individual serving in a position listed in the section 5312 of title 5 of the United States Code is covered by subsection (b). Section 5312 of title 5 describes positions classified at Level I of the Executive Schedule, which generally includes positions of cabinet rank.

Paragraph (3) states that any individual working in the Executive Office of the President and compensated at a rate not less than the rate provided for Level IV of the Executive Schedule under section 5315 of title 5 of the United States Code is covered by subsection (b). This covers the top assistants to the President who are not listed in the sections of title 5 which describe the named positions compensated at levels I, II, III or IV of the Executive Schedule. However, the President is given the statutory authority to employ and compensate a certain number of individuals in the Executive Office of the President at Executive Schedule level IV or above. This provision covers those individuals.

Paragraph (4) states that subsection (b) covers any individual working in the Department of Justice and compensated at a rate not less than the rate provided for Level III of the Executive Schedule under section 5314 of title 5 and any Assistant Attorney General involved in criminal law enforcement. Paragraph (4) also covers the Director of Central Intelligence, the Deputy Director of Central

Intelligence and the Commissioner of Internal Revenue. The individuals working in the Department of Justice and classified at level III of the Executive Schedule or above include the Deputy Attorney General, the Solicitor General of the United States, the Director of the Federal Bureau of Investigation and the Administrator of Law Enforcement Assistance. The Assistant Attorney Generals involved in criminal law enforcement at the present time would include the Assistant Attorney Generals in charge of the Criminal Division, the Antitrust Division, the Tax Division and the Civil Rights Division of the Department of Justice.

All of the above named or covered individuals are those which the Committee felt were closest to the Attorney General and the President and would, therefore, present the most serious conflict of interest of an institutional nature if the Department of Justice were to have to investigate and prosecute serious criminal allegations against any of these individuals.

Paragraph (5) states that the bill also covers any individual who held any office or position described in any of paragraphs (1) through (4) of subsection (b) during the term of the President in office on the date the Attorney General receives the information under subsection (a), or during the period the President immediately preceding such an incumbent President held office, if such preceding President was of the same political party as the incumbent President.

Finally, Paragraph (6) states that the bill also covers a national campaign manager or a chairman of any national campaign committee seeking the election or reelection of the President. An individual is only covered by this paragraph if the individual is then serving as a national campaign manager or chairman of any national campaign committee seeking the election or re-election of the President. (However, subsection 592(e) described below might require the appointment of a special prosecutor with regard to a former campaign manager or national chairman.) There are few individuals who are as important to an incumbent President running for re-election or a serious candidate for President than that individual's campaign manager or the chairman of any of his national campaign committee of his or of his party. Thus, the potential for a conflict of interest or the appearance thereof if the Department of Justice, under the control and supervision of an incumbent President of either party, handles an investigation of such an individual during an election period justifies the use of the special prosecutor mechanism.

#### SECTION 592—APPLICATION FOR APPOINTMENT OF A SPECIAL PROSECUTOR

Subsection (a) of section 592 directs the Attorney General, upon receiving specific information that any of the individuals described in section 591(b) may have violated any Federal criminal law other than a petty offense, to conduct such preliminary investigation of the matter as the Attorney General deems appropriate. The Attorney General is given a period not to exceed 90 days to conduct such a preliminary investigation (or 120 days in the case of an extension) but there is no requirement that the Attorney General use that entire time period. A "preliminary investigation" is the type of initial investigation which is conducted to determine whether a case warrants fur-

ther investigation. A preliminary investigation might involve contacting the complainant and checking out certain facts mentioned or alluded to in the allegations of criminal conduct.

Subsection (a) attempts to give the Attorney General the time and the latitude to conduct whatever kind of preliminary investigation he deems appropriate to weed out the frivolous cases from those cases of some substance. At the point when it is decided that a more complete investigation is required, such as involving the subpoenaing of documents, the preliminary investigation stage has been completed.

The purpose of allowing the Justice Department to conduct a preliminary investigation is to allow an opportunity for frivolous or totally groundless allegations to be weeded out. The Committee does not expect a special prosecutor to be appointed whenever a single note or telephone call is received suggesting that a high-ranking official is a "crook". A mechanism is needed to enable the Justice Department to weed out the totally unsubstantiated allegations—if the bill did not provide such a mechanism, special prosecutors might be appointed needlessly on many occasions. On the other hand, as soon as there is any indication whatsoever that the allegations involving a high level official may be serious or have any potential chance of substantiation, a special prosecutor should be appointed to take over the investigation. The mechanism of the preliminary investigation, which this section provides, is designed for this purpose.

Subsection (a) provides that the Attorney General, upon notifying in writing the division of the court specified in section 593(a) of chapter 39, (hereinafter referred to as the "division of the court") of the need for additional time to complete a preliminary investigation and the reasons why additional time is needed, will have 30 additional days—that is a total of 120 days—to complete the preliminary investigation.

The statute contains a time limit on the period permitted for a preliminary investigation because the Committee did not want serious allegations of criminal wrongdoing against individuals described in subsection 591(b) to remain in the Department of Justice and not be referred to the court for the appointment of a temporary special prosecutor simply because the Department had not even begun to conduct an investigation of the matter. Similarly, the Committee did not want the Department of Justice to conduct the full investigation of serious criminal allegations against the individuals described in subsection (b) of section 591 since the premise of the statute is that there is an institutional conflict of interest for the Department of Justice to conduct the investigation and prosecution of such cases. Therefore, such matters should be referred to the court for the appointment of a special prosecutor as soon as a preliminary investigation has indicated that the matter warrants further investigation and prosecution.

It should also be noted that the Attorney General is not authorized to conduct whatever investigation the Attorney General can fit into a 90 or 120 day period. The Attorney General does not have the authority to conduct a full investigation, including calling witnesses before a grand jury, during the period provided for a preliminary investi-

gation nor does he have the authority to enter into a plea bargaining agreement. As soon as the Attorney General is satisfied that a matter justifies further investigation, then the purpose of a preliminary investigation has been completed and the matter should be immediately referred to the court for the appointment of a special prosecutor.

Subsection (b) states that if the Attorney General, upon completion of the preliminary investigation, finds that the matter under investigation is so unsubstantiated that no further investigation or prosecution is warranted, the Attorney General is directed to so notify the division of the court. Once the division of the court is so notified, the division of the court has no power to appoint a special prosecutor.

This subsection is intended to apply to those cases which, after a preliminary investigation, the Attorney General is able to say are frivolous. There may be cases which cannot be substantiated to the degree necessary to obtain an indictment after a preliminary investigation but with respect to which there is some factual information which justifies further investigation to see if a sufficient case for indictment can be obtained. Such a case would not properly fall within this subsection. The Committee has been informed that the vast majority of allegations of criminal wrongdoing against high-level officials received by the Department of Justice are allegations which on their face, or after very little investigation, are clearly frivolous. For example, if someone charges that a cabinet secretary took a bribe on July 1, 1976 in New Orleans and it can be quickly established that the secretary was in Albany, New York on that day and that the person making the allegation has a known history of mental disorder, the allegation is clearly frivolous and warrants a finding by the Attorney General that it is so unsubstantiated that no investigation or prosecution is warranted. It is worth repeating that the finding under subsection (b) made by the Attorney General is not a finding as to whether or not an indictment should be returned. It is simply a finding, at an initial stage of an investigation of allegations of criminal wrongdoing, as to whether the allegations and information which have been accumulated in the course of the preliminary investigation provide no substantiation, or so little substantiation of the alleged violations or criminal law, that the matter should be dropped and no further investigation or prosecution by the Department of Justice or anybody else is warranted.

Upon making the finding under paragraph (1) of subsection (b) described above, the Attorney General is required under paragraph (2) of that subsection to notify the division of the court of his decision by filing a memorandum with the court containing a summary of the information received and a summary of the results of any preliminary investigation. The term "summary" was used in this paragraph so that the Attorney General would not have to file with the court all of the raw investigative files or the total work product of the Federal Bureau of Investigation or the Department of Justice attorneys. Obviously, the degree of detail of the summary filed will depend on the type of case involved. The memorandum in the case of a crank letter might simply consist of a memorandum, with a copy of the letter attached, which memorandum states that the writer of

the letter had a known history of mental disorder and that the Department was able to verify by interviews with three named reliable witnesses that the subject of the allegations was not in the geographical vicinity of the alleged crime on the date the crime was alleged to have taken place. In every instance, however, the memorandum filed with the court should contain a summary detailed enough so that the court knows the essence of the information or allegations received by the Department concerning possible criminal conduct, and a detailed enough summary of the results of any preliminary investigation so that the court can determine what efforts the Department made to determine the truth of the allegations and what efforts the Department made to uncover additional evidence with respect to the matter. The court, of course, has the power to make such memorandum or summary public if it decides at the appropriate time that it would be proper and useful to do so.

Paragraph (3) of subsection (b) states that the memorandum filed by the Attorney General under subsection (b) cannot be revealed to any individual outside the court or the Department of Justice without leave of the division of the court.

Paragraph (1) of subsection 592(c) provides for the procedure which the Attorney General must follow if, upon completion of the preliminary investigation, he finds that a matter warrants further investigation or prosecution. Paragraph (1) also applies in the event that 90 days (120 days in the case of an extension) elapse from the receipt of the information by the Department without a determination by the Attorney General (under subsection (b)) that the matter is so unsubstantiated as not to warrant further investigation or prosecution. In either of the situations described immediately above, the Attorney General is required to apply to the division of the court for the appointment of a special prosecutor.

Paragraph (2) of subsection (c) states that the application for the appointment of a special prosecutor must contain sufficient information to enable the division of the court to select a special prosecutor and to define the special prosecutor's prosecutorial jurisdiction. This chapter provides for court appointment of a temporary special prosecutor in order to have the maximum degree of independence and public confidence in the investigation conducted by that special prosecutor. However, the Committee recognizes that in many cases the Attorney General might have suggestions as to the names of individuals who would make good special prosecutors, which information would be of assistance to the division of the court. Similarly, a very important part of the responsibility of the division of the court is to define the prosecutorial jurisdiction of the special prosecutor. The prosecutorial jurisdiction of the special prosecutor is one of the most important devices for the control of the special prosecutor and the accountability of such a special prosecutor. The prosecutorial jurisdiction can only be properly defined if the Attorney General provides complete and detailed information to the court about the true nature of the allegations of criminal wrongdoing, any related criminal investigation which are presently being conducted by the Department, and any information or leads collected as a result of the preliminary investigation which would indicate the potential that further investigation will involve additional related matters.

As with regard to the memorandum to the court required under subsection (b), paragraph (3) of subsection (c) requires that the application to the court for the appointment of special prosecutor may not be revealed to any individual outside the court or the Department of Justice without leave of the division of the court.

Subsection (d) of section 592 makes it clear that the Attorney General's responsibilities under this chapter are not completed upon the submission of a memorandum under subsection (b) of this section to the court stating that a matter is so unsubstantiated that it does not warrant further investigation or prosecution.

Paragraph (1) of subsection (d) states that if, after the filing of a memorandum under subsection (b), the Attorney General receives additional specific information about the matter to which the memorandum related; *and* if the Attorney General determines, after such additional investigations as the Attorney General deems appropriate that such information warrants further investigation and prosecution, then the Attorney General has the responsibility to apply to the division of the court for the appointment of a special prosecutor. The Attorney General is directed to make such an application not later than 90 days after receiving the additional information mentioned above. Thus, the Attorney General's responsibility with respect to criminal allegations received involving an individual described in subsection 591(b) is a continuing one.

As in the case of preliminary investigation conducted under subsection (a), the additional investigation conducted under subsection (d) should be of the type conducted in the course of a preliminary investigation. The source of the additional information can be checked and other inquiries by the FBI and others can be made to attempt to substantiate the initial allegations based on the additional specific information received and whatever other information can be collected in the course of such additional investigation. However, it is not the intent of the Committee that the Attorney General will use the time and authority granted under subsection (d) to circumvent the purpose of this chapter by conducting any investigation of the allegations beyond the type of investigation normally undertaken in a preliminary investigation. It would clearly be contrary to the intent of this chapter if the Department of Justice were to subpoena witnesses before a grand jury, grant immunity to witnesses, seek indictments or enter into plea bargaining agreements with respect to matters covered by subsection (d). The Attorney General's responsibility which is under subsection (d) is to conduct whatever additional preliminary investigation justified.

Paragraph (2) of subsection (d) states that each application for the appointment of a special prosecutor made under subsection (d) must contain sufficient information to enable the division of the court to select a special prosecutor and to define that special prosecutor's prosecutorial jurisdiction. This paragraph is identical to paragraph (2) of subsection (c).

Paragraph (3) of subsection (d) which is identical to paragraph (3) of subsection (c), states that such an application may not be revealed to any individual outside the court or the Department of Justice without leave of the division of the court. This provision requiring

the confidentiality of such an application unless the court directs otherwise is crucial to the general scheme of this chapter. The Committee desires to ensure that all but the frivolous allegations of a criminal conduct are handled by an individual who does not have a conflict of interest or the appearance thereof. However, the Committee is very cognizant of the rights of the criminal defendant. Just because a person holds a high-level position does not justify making unsubstantiated allegations of criminal conduct public, nor does it justify publicly announcing the initiation of a criminal investigation at a very early stage of that investigation. The Committee believes that there will be many situations in which a temporary special prosecutor will be appointed under this chapter when the public is not at all aware that a criminal investigation is underway. This is as it should be. It should be possible for the special prosecutor to take over such investigation, and to conclude after appropriate further investigation that the matter does not warrant further investigation or prosecution. At that stage, the temporary special prosecutor would make his final report as required by subsection 595(b) and the office of the temporary special prosecutor would no longer exist. It is conceivable that this whole process could take place without the public even knowing that there were serious allegations against such a high-level official. There, of course, will be other situations where the public will be aware of the allegations of criminal wrongdoing and there will be a great deal of public attention centered on whether a special prosecutor will be appointed, who that special prosecutor will be, and what the jurisdiction of that special prosecutor will be. In such cases, there does not appear to be any purpose to keeping the fact that application for a special prosecutor has been made confidential, although there may still be justification for keeping the contents of an application for a special prosecutor under this subsection confidential because of unsubstantiated allegations and other information which may be contained in the application for appointment. The Committee felt that it was appropriate for such decisions as to what should and should not be made public to be made by the division of the court.

Up to this point, this chapter has identified certain positions, the holders of which have such a relationship to the Attorney General and the President that there is a conflict of interest or the appearance thereof if the Department of Justice conducts a criminal investigation of an individual occupying any of these identified positions. The positions involved are described in subsection 591(b). If, after a preliminary investigation, the Attorney General finds that the information in the possession of the Department of Justice is substantiated enough to warrant further investigation or prosecution, the Attorney General has no choice but to apply for the appointment by the court of a special prosecutor. However, the Committee was certainly aware that there can be situations not covered by section 591 which present just as serious a conflict of interest or the appearance thereof as do the situations involving the holders of the positions described in section 591(b). It simply is not possible to identify every such potential conflict of interest by listing certain high-level government positions.

However, there are other situations which justify the appointment of a temporary special prosecutor which do not fit within the outline



of section 591. For example, the investigation of the break-in at the Democratic National Committee Headquarters in June of 1972 would not have required the appointment of a special prosecutor under section 591 since the individuals initially arrested in that case did not hold any of the positions described in subsection 591(b). However, very soon after the initiation of that investigation, it was clear that the President's National Campaign Committee, and employees thereof, were the subject of allegations tying that Campaign Committee to the burglary. Clearly, any such criminal investigations within 5 months of a Presidential election would be of great concern to a President up for reelection, and an investigation of those allegations by the Department of Justice which is under the control of that President presents at the least an appearance of a conflict of interest. Similarly, a President may be greatly concerned with the outcome of a criminal investigation, and the outcome of a criminal investigation may have more impact on the President's political future, if the allegations of criminal wrongdoing involve a close personal friend or attorney, such as Herbert Kalmbach during the Nixon Presidency. For these reasons, the Committee felt that all the situations where a temporary special prosecutor is justified could not be specified simply by identifying certain high-level positions in the incumbent Administration. For that reason, subsection (e) establishes a procedure for the appointment of a temporary special prosecutor in certain other situations.

Paragraph (1) of subsection (e) states that, for the purpose of section 592, a conflict of interest or the appearance thereof is deemed to exist whenever the continuation of an investigation, or the outcome thereof, may directly and substantially affect the partisan political or personal interests of the President, the Attorney General or the interests of the President's political party. The paragraphs which follow in subsection (e) provide a procedure for the appointment of a temporary special prosecutor in situations where such a conflict of interest exists and the allegations or information which are the basis of the investigation are not so unsubstantiated that no further investigation or prosecution is warranted.

In drafting the standard in paragraph (1) of subsection (3) for when a conflict of interest or the appearance thereof is deemed to exist, the Committee was aware that the standard is much narrower than traditional conflict of interest standards. The Committee did not intend to state that a conflict of interest or the appearance thereof does not exist if a particular case does not meet this standard. However, it was the Committee's view that in such a situation, personal recusal by the President and by the Attorney General, and possibly even by other administration officials directly involved in the matter or personally associated with the person who is the subject in the investigation, would create a situation where the Department of Justice could continue to conduct the investigation without there being a conflict of interest or the appearance thereof. The conflict of interest standard defined in paragraph (1) was intended to deal with institutional conflicts of interest: that is, those cases where the conflict of interest or the appearance thereof is of a nature that the recusal of one individual or another is not sufficient to remove at least the appearance of the conflict of interest.

The standard contained in paragraph (1) is very narrow because the use of the terms "directly and substantially affect" eliminate the possibility that any matter which may tangentially affect the interests of the President or the Attorney General or the interests of the President's political party would be covered by this standard. The Committee does not intend that anything that involves a Republican or Democrat would meet the standard under paragraph (1). The Committee considers that only matters which involve the reputation and conduct of the national political party of the President, or of an individual so important in that political party that investigation or prosecution of the individual could have an impact on the President or the political party's fortunes. For example, just because a Congressman of the same party as the President is indicted on a criminal charge does not mean that this standard has been met. However, if that Congressman happens to be the majority or minority leader and, therefore, the person responsible for implementing or concurring in the President's policies in the particular House of Congress, absent other special circumstances, the standard set forth in paragraph (1) would be satisfied and a conflict of interest or the appearance thereof would exist.

In contrast to the very narrow language contained in the operative part of the standard set forth in paragraph 1, that is, "directly and substantially affect," "a conflict of interest or the appearance thereof is deemed to exist whenever the continuation of an investigation or the outcome thereof may directly and substantially affect . . .". The Committee felt that the operative standard for when a conflict of interest existed should be drawn very narrowly; however, if the Attorney General determines that such a conflict of interest *may* exist, the Committee feels that that is enough to justify the appointment of a special prosecutor. In a matter as important as the institutional conflicts of interest described above like this, even when there is some doubt, it is best to avoid even the appearance of the conflict of interest and appoint a temporary special prosecutor.

In determining whether a conflict of interest exists under the standard set forth in paragraph (1) of section 592(e), a significant consideration is whether the interests of the Attorney General, the President, or the President's political party may be so directly and substantially affected by an investigation that the impartiality or propriety of the Department of Justice's continuing to conduct such an investigation would be adversely affected. There are some cases that involve the interests of the Attorney General, such as a criminal anti-trust case involving the officers of a company in which the Attorney General holds a large amount of stock, where personal recusal by the Attorney General is sufficient; there is no need to disqualify the entire Department. However, in a case where a close political associate of the Attorney General is involved, an investigation of that case by the Department would call into serious question the impartiality of the Department and the propriety of the Department conducting such a case.

Paragraph (2) of subsection (e) states that whenever it reasonably appears that a conflict of interest, as defined in paragraph (1), exists with respect to an investigation of specific information that an indi-

vidual may have violated any Federal criminal law other than a petty offense, the Attorney General is required to conduct a preliminary investigation as is required by subsection (a). Frivolous allegations of conflict of interest do not trigger the procedures in this subsection and may be discarded (for the purposes of this chapter) by the Attorney General. The Attorney General has 90 days to conduct the preliminary investigation, but he can apply for an automatic 30-day extension of that time period if needed according to the procedures set forth in subsection (a).

Paragraph (3) of subsection (e) sets forth the responsibility of the Attorney General upon the completion of the preliminary investigation undertaken pursuant to paragraph (2). Clause (A) of paragraph (3) states that if the Attorney General finds that the matter is so unsubstantiated that no further investigation or prosecution is warranted, the Attorney General is required to notify the division of the court of that finding pursuant to the procedures set forth in subsection (b). Thus, the Attorney General will be filing a memorandum with the court containing a summary of the information received and a summary of the results of any preliminary investigation.

Just as in any other matter where a notification is provided to the division of the court under subsection (b), that notification terminates the Department's responsibility with respect to that case (unless additional specific information with respect to the case is received at a later time) and the division of the court has no authority to appoint a special prosecutor.

Clause (B) of paragraph (3) describes the alternatives the Attorney General has if, upon completion of a preliminary investigation, he finds that the matter warrants further investigation or prosecution, or if 90 days (120 days in the case of an extension) has elapsed from the time of the Attorney General's finding in paragraph (2) without a determination by the Attorney General that the matter is so substantiated as to not warrant further investigation or prosecution. In either of the situations described immediately above, the Attorney General must either (i) apply to the division of the court for the appointment of a special prosecutor pursuant to subsection (c) or (ii) submit a memorandum to the division of the court setting forth the reason why a special prosecutor is not required under the standard set forth in paragraph (1) of this subsection. If under subclause (i) the Attorney General determines to apply for the appointment of a special prosecutor, the procedures for filing the application for the appointment, the contents of the application, and the confidentiality of that application would be the same as are set forth and described under subsection (e). If, however, the Attorney General determines that a special prosecutor is not required under the standard in paragraph (1) of subsection (e), he must file a memorandum with the division of the court setting forth his reasons for that conclusion. This memorandum must discuss the information and facts necessary to make the determination as to whether a conflict of interest in paragraph (1) exists. This memorandum should not discuss matters involving prosecutorial discretion such as whether or not further investigation or prosecution is warranted. If further investigation or prosecution is not warranted, the Attorney General should have filed the memorandum under clause (3)(A) of this subsection and that

would end the matter without any possibility of court review. A memorandum discussing whether a conflict of interest exists only is appropriate in cases where the Attorney General has determined after the completion of a preliminary investigation that the matter does warrant further investigation and prosecution. In such cases, the question which the Attorney General must decide, and which the court may review, is whether a conflict of interest, as defined in paragraph (1), exists, making it inappropriate for the Department of Justice to conduct such an investigation.

Clause (C) of paragraph (3) directs the division of the court to review the information provided by the Attorney General with respect to whether a conflict, as described in paragraph (1), exists, in those cases in which the Attorney General concludes that the appointment of a special prosecutor is not required under the standard set forth in paragraph (1) of this subsection. Again, the court is reviewing whether a conflict of interest exists. This is a task which does not at all get the court involved in decisions with respect to prosecutorial discretion, such as whether an investigation should continue, or whether an investigation should begin at all. Rather, the only matter the court is reviewing is whether the Department of Justice has a conflict of interest as defined in the statute which makes it inappropriate for it to conduct the investigation. This is a type of determination a court is faced with all the time when it decides whether a judge should recuse himself, or whether an attorney has a conflict of interest which should bar him from handling a particular matter. A prosecutor, as well as any other attorney, is an officer of the court. It is the proper role of the court to make sure that an officer of the court does not practice before that court when he has a conflict of interest, because permitting him to do so reflects on the integrity of the entire judicial system.

Under clause (C), the Attorney General, upon the request of the division of the court, is required to make available to the division all documents, materials and memoranda which the division finds necessary to carry out its duties under this subsection. If the division of the court reviews the Attorney General's memorandum explaining why the Attorney General felt a conflict of interest did not exist, and the court determines that certain additional material is necessary for the court to review that memorandum, upon the request of the court, the Attorney General must provide that additional information. If at the conclusion of the review by the division of the court, the court finds that continuing the investigation by the Department of Justice would create a conflict of interest or the appearance thereof, as defined in paragraph (1), the division is required to appoint a special prosecutor.

As with the other memorandum which the Attorney General files under sections 591 and 592 of this title, the Attorney General's memorandum to the court setting forth the reasons why a special prosecutor is not required must be kept confidential and will only be revealed to an individual outside the court or the Department of Justice with leave of the division of the court (see subsection (h) of 592 discussed below). Thus, in most cases, review of the Attorney General's memorandum, describing why a special prosecutor is not required under this subsection, will be conducted ex parte and without the public

being aware that the review is taking place. The court of course, has the inherent power to seek assistance from other appropriate parties or individuals in conducting this review. In very unusual cases where substantial public attention has been focused on a particular criminal investigation in its very early stages, the fact that the Attorney General has filed a memorandum with the court under this subsection setting forth its reasons why a special prosecutor is not needed may be a matter of general public knowledge. In such cases, if the division of the court chooses, it would be appropriate for the court to hear argument from other parties or even to permit other interested parties to submit briefs and oral argument. However, the Committee anticipates that in most cases the submission by the Attorney General will not be the public and the review by the court of that memorandum will be *ex parte*.

Because of the nature of any ongoing criminal investigation, it is important that the division of the court review such a memorandum from the Attorney General as expeditiously as possible. However, once the Attorney General submits such a memorandum, the Department of Justice may continue the investigation of the matter involved unless and until it hears to the contrary from the division of the court. Of course, it would be a violation of the intent of the statute, and an act not taken in good faith, if the Attorney General were to file the memorandum one day, and make an important and irreversible decision with respect to the criminal prosecution before the division of court had a reasonable opportunity to review the memorandum. Such an important action might include accepting a plea bargaining agreement or granting immunity to a crucial witness. Before taking any such action, the Attorney General should permit a reasonable period of time for the division of the court to review the memorandum.

Subsection (f) of section 592 provides that any determinations or applications required to be made under this section by the Attorney General must be made by the Director of the Office of Government Crimes if the information or allegations involved the Attorney General. The entire scheme of this title permits the Attorney General to participate in conducting a preliminary investigation and decision at the conclusion of that preliminary investigation whether a matter warrants further investigation or prosecution, even though, under the statutory standards established in this chapter, the Attorney General has a conflict of interest. However, when the actual information or allegations of potential criminal wrongdoing personally involve the Attorney General, the Attorney General should not even be involved in the supervision of the preliminary investigation nor should he participate in the decision as to whether the matter is so unsubstantiated as to not warrant further investigation or prosecution.

The Director of the Office of Government Crime was chosen as the appropriate individual to assume the Attorney General's responsibilities in such a situation because he will generally be more removed from day-to-day contact with the Attorney General than is the Deputy Attorney General, and he will be the one who will most likely be conducting the preliminary investigation.

Subsection (g) of section 592 states that the Attorney General's alternative determination under subsections (c), (d), or (e) to apply to

the division of the court for the appointment of a special prosecutor, are not reviewable in any court. This provision would also cover the determination made by the director of the Office of Government Crimes under subsection (f).

Subsection (h) of section 592 requires that documents, materials and memoranda supplied to the court by the Department of Justice under subsection (e) not be revealed to any individual outside the court or the Department of Justice without leave of the division of the court. This provision is analagous to the provisions providing for the confidentiality of the memoranda filed by the Attorney General under subsections (b), (c) and (d) of this section.

#### SECTION 593—DUTIES OF THE DIVISION OF THE COURT

Section 593 specified the responsibilities and duties of the division of the court.

Subsection (a) of this section states that the division of the court which is referred to in this chapter and to which functions are given by this chapter is the division established under section 49 of this title. The provisions establishing the division of the court are contained in section 102 of title I of this Act.

Subsection (b) requires the division of the court, upon receipt of an application under subsections (c), (d), (e) or (f) of section 592, to appoint an appropriate special prosecutor and to define the jurisdiction of that special prosecutor. In line with subsection (g) of section 592, application by the Attorney General for the appointment of a special prosecutor is not reviewable by any court including the division of the court referred to in this chapter.

Therefore, the division of the court has a mandatory responsibility to appoint a special prosecutor upon receipt of such an application.

The Division of the court is also required to appoint a special prosecutor and define the prosecutorial jurisdiction of that special prosecutor when the division of the court decides that the appointment of a special prosecutor is required under clause 592 (e) (3) (C).

In defining the prosecutorial jurisdiction of a special prosecutor, the division of the court is given the authority to define that jurisdiction to extend to related matters. For example, if allegations of criminal wrongdoing involve a cabinet secretary, and for that reason an application is made for the appointment of a special prosecutor under subsection 592(c), the court would probably want to define the prosecutorial jurisdiction to include any potential co-conspirators of the cabinet secretary, if any existed.

Since the memoranda and applications filed with the court by the Attorney General are confidential unless the court decides otherwise, it is probable that the general public will not even be aware that a special prosecutor is going to be appointed. As discussed previously, in many cases this is desirable to protect the rights of a defendant. However, subsection (b) provides that a special prosecutor's identity and prosecutorial jurisdiction will be made public upon request of the Attorney General or upon determination by the division of the court that disclosure of the identity and prosecutorial jurisdiction of a special prosecutor would be in the best interest of justice. The Committee

felt that it was best to leave a decision such as this up to the Attorney General and the division of the court. However, the identity and prosecutorial jurisdiction of a special prosecutor in any event must be made public when any indictment is returned. This is obviously necessary to avoid the appearance of star chamber proceedings or secret criminal prosecutions.

Subsection (c) of section 593 authorizes the division of the court, upon request of the Attorney General, to assign new matters to an existing special prosecutor or to expand the prosecutorial jurisdiction of an existing special prosecutor to include related matters. Such a request by the Attorney General may be incorporated in an application for the appointment of a special prosecutor under this chapter.

If a special prosecutor has been appointed to handle a particular investigation and the Attorney General requests the appointment of a special prosecutor to handle a related matter, the Attorney General may request that the case be assigned to the existing special prosecutor. This would appear to be in the best interest of justice unless there are special circumstances which militate against such a decision, since such an assignment to an existing special prosecutor will reduce the number of special prosecutors which are appointed and possibly gain economies from not having to set up a new office of special prosecutor. Of course, even if the Attorney General should not request that related matters be assigned to an existing special prosecutor, the court has the authority to do so under subsection (b) of this section. The Committee's intent to specifically grant the court that authority is indicated by the first sentence of subsection 594(e) which gives the special prosecutor the authority to request that the division of the court refer matters related to the special prosecutor's prosecutorial jurisdiction to the special prosecutor. The court's responsibility in defining the prosecutorial jurisdiction of an existing special prosecutor is a continuing one.

Subsection (c) of section 593 also permits the division of the court, upon the request of the Attorney General, to assign totally unrelated matters to an existing special prosecutor. Again, in particular situations this may be felt to be desirable in order to reduce the number of special prosecutors; however, in making a decision of that kind the division of the court should consult with the existing special prosecutor to make sure that the assignment of the additional matters does not make it impossible for the special prosecutor to carry out his initial responsibility and to make sure that such an assignment does not convert a temporary special prosecutor into a permanent special prosecutor. The assignment of a new matter to an existing special prosecutor may be especially appropriate in a situation where the public is not aware of the fact that an on-going criminal investigation is taking place and the use of an existing special prosecutor, whose jurisdiction to investigate another matter is publicly known, would raise the least public suspicion concerning the new matter the special prosecutor would be assigned.

Subsection (d) of section 593 states that the division of the court may not appoint as a special prosecutor any person who holds or recently held any office of profit or trust under the United States. The entire purpose of appointing a temporary special prosecutor is to get

someone who is independent, both in reality and in appearance, from the President and the Attorney General. Obviously, an employee of the Justice Department, including a United States attorney, could not satisfy that goal. Such an employee would have been appointed by the President or the Attorney General, could be removed by the President or the Attorney General, and would be under the day-to-day supervision of the Attorney General and, less directly, the President. Similar problems would be presented if the individual were an employee of the legislative or judicial branches. Therefore, the Committee feels that subsection (d) is essential so that a person is appointed special prosecutor who, in both appearance and reality, is not connected with the United States government. For that very reason, subsection (d) also covers people who recently held a position with the United States government. No time period was specified in this section; however, the Committee felt that it would defeat the purposes of this title if, for example, someone could resign their position as United States attorney or a member of the Justice Department one day, and be appointed a special prosecutor the next. A person appointed special prosecutor who formerly was an employee of the United States government should have left the government a long enough period of time prior to being appointed special prosecutor so that there is the reality and the appearance that such individual is totally independent from that government.

#### SECTION 594—AUTHORITY AND DUTIES OF SPECIAL PROSECUTOR

Section 594 provides in some detail the authority, powers, responsibilities and duties of a special prosecutor. The whole purpose of this chapter is defeated if a special prosecutor is not independent and does not have clear authority to conduct a criminal investigation and prosecution without interference, supervision or control by the Department of Justice.

Subsection (a) sets forth the basic powers of a special prosecutor. These powers were generally patterned on the grant of authority given to the Watergate Special Prosecution Force. However, unlike the authority of the Watergate Special Prosecutor, this section makes such powers and authority statutory. Subsection (a) provides that notwithstanding any other provision of law, a special prosecutor appointed under this chapter will have, with respect to all matters in that special prosecutor's prosecutorial jurisdiction established under this chapter, full power and independent authority—

- (1) to conduct proceedings before grand juries and other investigations;
- (2) to participate in court proceedings and engage in any litigation including civil and criminal matters, as he deems necessary;
- (3) to appeal any decision of a court in any case or proceeding in which the special prosecutor participates in an official capacity;
- (4) to review all documentary evidence available from any source;
- (5) to determine whether to contest the assertion of any testimonial privilege;



(6) to receive appropriate national security clearances and, if necessary, to contest in court, including, where appropriate, participation in in camera proceedings, any claim of privilege or attempt to withhold evidence on grounds of national security;

(7) to make applications to any federal court for grant of immunity to any witness consistent with applicable statutory requirements or for warrants, subpoenas, or other court orders, and, for the purposes of section 6003, 6004 and 6005 of title 18 dealing with the granting of immunity to witnesses, a special prosecutor is authorized to exercise the authority vested in a United States attorney or the Attorney General;

(8) to inspect, obtain or use the original or a copy of any tax return in accordance with the applicable statutes and regulations, and, for purposes of section 6103 of title 26 and the regulations issued thereunder, a special prosecutor may exercise the powers vested in a United States attorney or the Attorney General; and

(9) to initiate and conduct prosecutions in any court of competent jurisdiction, frame and sign indictments, file informations and handle all aspects of any case in the name of the United States.

In addition, paragraph (10) of subsection (a) provides that a special prosecutor is authorized to exercise all other investigative and prosecutorial functions and powers of the Department of Justice, the Attorney General and any other officer or employee of the Department of Justice. This catch-all phrase and this entire subsection should be interpreted broadly to give the special prosecutor any and all independent power and authority which is needed to conscientiously conduct an investigation which is in reality and in appearance independent from any control or supervision by the Department of Justice. Therefore, for example, the authority given in paragraph (3) to appeal any decision of a court includes taking an appeal to the Supreme Court without the permission of the Solicitor General; and the power given in paragraph (9) to initiate and conduct prosecutions in any court includes all the different powers and responsibilities which are part of conducting a prosecution, such as making the recommendations on behalf of the United States for bail, making applications for search warrants, etc. The one and only exception to the total independence granted to a special prosecutor under this subsection is the clause in paragraph (10) of subsection (a) which states that the Attorney General must continue to exercise direction and control as to those matters which specifically require the Attorney General's personal action under section 2516 of title 18 (dealing with the authorization of the interception of wire or oral communications). In balancing the need for a special prosecutor to have independence, with the desire to adequately control the use of wiretaps and the policy of section 2516 of title 18 to centralize the responsibility for approving such wire taps with the Attorney General, the Committee decided that this narrow exception to the special prosecutor's total independence was justified and desirable.

Subsection (b) of section 594 states that a special prosecutor appointed under this chapter will receive compensation at a per diem

rate equal to the rate of basic pay for Level IV of the Executive Schedule under section 5315 of title 5. This is the same rate of pay provided for an assistant attorney general in the Department of Justice. While this rate of pay alone will not attract the highly qualified lawyers which would be desired as a special prosecutor, the Committee is confident that the combination of the temporary nature of the special prosecutor's office and the importance of the cases which will be referred to special prosecutors will make it possible for the division of the court to recruit exceptional well-qualified attorneys to serve as special prosecutors.

Subsection (c) grants to a special prosecutor the authority, for the purposes of carrying out the duties of the office of special prosecutor, to appoint, fix the compensation of, and assign the duties to such employees as the special prosecutor deems necessary (including investigators, attorneys and part-time consultants). The positions of all these employees are exempted from the competitive service. The only condition placed on the hiring or compensation of these employees is that none of the employees be compensated at a rate exceeding the maximum rate provided for GS-18 of the General Schedule under section 5332 of title 5.

Subsection (d) requires that the Department of Justice provide to a special prosecutor assistance if it is requested by a special prosecutor. That assistance is to include full access to any records, files, or other materials relevant to the special prosecutor's prosecutorial jurisdiction and providing to such special prosecutor the resources and personnel required to perform his duties. The special prosecutor may choose to hire his own investigators or may choose to make some use of the Federal Bureau of Investigation or other federal investigative services.

If the special prosecutor requests the services of the Federal Bureau of Investigation or any federal investigative service, the Department of Justice is directed to provide the personnel and resources needed. While being dependent on the Department of Justice for resources and personnel could potentially influence the independence of a special prosecutor, the Committee feels that the experience in the recent past of the Department of Justice providing adequate resources for the Watergate Special Prosecution Force, and the fact that a special prosecutor can at any time inform the Congress of any problems he is having getting adequate resources from the Department of Justice, will ensure that a special prosecutor will get the resources and personnel he needs to perform his duties.

Subsection (e) of section 594 authorizes a special prosecutor to ask the Attorney General or the division of the court to refer matters to that special prosecutor's prosecutorial jurisdiction to the special prosecutor. The subsection also provides that a special prosecutor is authorized to accept such a referral from the Attorney General whether or not the special prosecutor requested such a referral if the matter referred relates to a matter within the special prosecutor's prosecutorial jurisdiction as originally established by the division of the court. However, whenever the special prosecutor does accept such a referral of a related matter directly from the Attorney General, the special prosecutor is required to notify the division of the court of that fact. This

subsection recognizes that once a special prosecutor is appointed and actively involved in conducting a criminal investigation, the case he is pursuing may develop information with regard to related criminal matters. In addition, the special prosecutor may conclude that it is necessary to handle a criminal investigation which the special prosecutor has been assigned in conjunction with other ongoing criminal investigations being handled by the Department of Justice. Therefore, it is particularly appropriate that the special prosecutor have the authority to ask the Attorney General or the division of court to assign related matters to the special prosecutor. The Committee expects that there will have to be coordination between the special prosecutor and the Attorney General to sort out the jurisdiction of the special prosecutor as it relates to the ongoing investigations of the Department of Justice. If these adjustments require the referral of related matters from the Department of Justice to a special prosecutor, there is no need to involve the division of the court other than to inform the division of the court that such an arrangement has been reached. The other side of this necessary cooperation will take place under subsection 597(a) which permits the special prosecutor to agree in writing that certain portions of the investigations assigned to him by the division of the court continue to be conducted by the Department of Justice.

Subsection (f) of section 594 states that, to the maximum extent practicable, a special prosecutor must comply with the written policies of the Department of Justice respecting enforcement of the criminal laws, which policies have been promulgated prior to the special prosecutor's appointment. This section should be interpreted more as a goal than as a command. The Department of Justice has written policies with respect to dual prosecution, granting of immunity to witnesses, and other important matters respecting enforcement of criminal laws. These written policies are generally made available to the United States Attorneys as part of the United States Attorneys' Manual and are important in ensuring that there is some degree of uniformity and fairness of treatment involved in all prosecutions brought by the executive branch of the federal government. However, the Committee is also aware that there may be a particular situation where the special prosecutor would not be able to conscientiously carry out his responsibilities if he were bound by these written policies of the Department. Rather than to provide procedures whereby the special prosecutor could get permission from the Attorney General or the court not to follow such Departmental policies, it was the decision of the Committee that the best procedure was to leave the question of when such written policies of the Department of Justice are to be followed in the discretion of the special prosecutor. This was done by stating that he must follow these policies to the maximum extent practicable. The special prosecutor's decision as to whether it is practicable to comply with the written policies of the Department of Justice should include such factors as his perception of fundamental fairness and justice, his perception of what is required to conscientiously conduct the investigation and prosecution assigned to him by the division of the court, and other relevant factors. However, it is expected that on the key matters where the Department has set down written policies respecting the

enforcement of criminal laws, the special prosecutor will seriously consider those policies and have a legitimate reason for departing therefrom if it is necessary or desirable to do so.

It is important to note that the Committee is not intending to unalterably tie a special prosecutor to following the written policies of the Department of Justice respecting the enforcement of criminal law. The Committee sought to find a concise statement of what those policies were and was not able to do so. While the U.S. Attorneys' Manual may contain many or most of these policies, they are mixed in with large amounts of other material in that manual. In spite of that fact, the Committee felt it was desirable to give the special prosecutor the general direction contained in subsection (f) so that, to the extent possible, a special prosecutor will apply the same policies in conducting the investigation that the Department of Justice would apply.

#### SECTION 595—REPORTING AND CONGRESSIONAL OVERSIGHT

Subsection (a) of section 595 simply authorizes the special prosecutor appointed under this chapter to make public or send to Congress any statements or reports on his activities as special prosecutor as he deems appropriate. No reports are required by this section. In determining what statements, reports or information to make public, the special prosecutor will, of course, be bound by the canons of ethics of the legal profession and the basic principles of our criminal justice system which protect the rights of the innocent.

Subsection (b) provides for the filing of a mandatory final report in addition to any reports or statements a special prosecutor may choose to make under subsection (c). This mandatory final report is considered by the Committee to be very important to ensure the accountability of a special prosecutor. The Committee is well aware of the enormous power and responsibility which a special prosecutor has because of all the protections provided in this chapter to make sure that the special prosecutor is independent. This final report will provide a detailed document to permit the evaluation of the performance of a special prosecutor at an appropriate time.

The report required by subsection (b) must be submitted by each special prosecutor to the division of the court at the conclusion of such special prosecutor duties. Paragraph (2) provides that that report must set forth a full and complete description of the work of the special prosecutor, including the disposition of all cases brought and the reasons for not prosecuting any matter within the prosecutorial jurisdiction of the special prosecutor. This report must be in sufficient detail to allow a determination of whether the special prosecutor's investigation was thoroughly and fairly completed.

One of the serious problems with the appointment of a truly independent special prosecutor is that there is no one supervising the activities of the special prosecutor. Inherent in such a situation is the possibility of a runaway prosecutor or a special prosecutor who does not bring the prosecutions which should be brought. While this report will not necessarily be contemporaneously reviewed by the Department of Justice, the court, the public or Congress, this will be a

detailed and official record of the activities of the special prosecutor which may be reviewed and analyzed at the appropriate time.

Paragraph (3) provides that the division of the court may release portions of the report to Congress, the public, or to any appropriate person, but that the Court may not comment on the content of the report. Again, this latter proviso was added to make it perfectly clear that it is not the responsibility of the court to supervise or judge the conduct of a special prosecutor or the exercise of the special prosecutor's prosecutorial discretion. The division of the court is directed to make such orders as appropriate to protect the rights of any individual named in the report and to prevent undue interference with any pending prosecution. The division of the court is also authorized to make any portion of the report available to any individual named in the report for the purpose of receiving within a time limit set by the division of the court any comments or factual information the individual may submit. The comments and factual information submitted, in whole or in part, may, in the discretion of the court, be included as an appendix to the report.

Thus, the handling of the report, its release and the opportunity for rebuttal are within the control and discretion of the court. The Committee feels that there may be situations where the release of the report or parts of the report would not prejudice the rights of any individual or prejudice any ongoing prosecution and could be public at the time it is submitted or soon thereafter. Experience has shown that a special prosecutor who is very well respected in the legal community often is willing to make information equivalent to what would be contained in such a report public in the form of memoirs or other writings within a few short years of serving as special prosecutor. The Committee strongly feels that this type of detailed information about the activities of the office of special prosecutor should be recorded and preserved and made available to the public and the Congress when the court deems appropriate.

Subsection (c) authorizes the special prosecutor to advise the House of Representatives of any substantial and credible information which the special prosecutor receives that may constitute grounds for impeachment of the President, Vice President, or a justice or judge of the United States. This provision is permissive because the Committee did not want to imply that such a special prosecutor would be the final judge of what information should be turned over for an impeachment investigation or be the judge of what constituted an impeachable offense. For that reason also, the last sentence of subsection (c) provides that nothing in the new chapter 39 created by this title, or section 49 added to title 28 by this statute, should be interpreted to prevent the Congress or either House thereof from obtaining information in the course of an impeachment investigation.

Subsection (c) simply gives the special prosecutor, who has information which he wants to turn over to the House of Representatives because it involves potentially impeachable offenses against the individuals named in this subsection, the authority to so turn over that information.

This section should in no way be interpreted as identifying individuals who are not subject to criminal prosecution prior to being im-

peached and removed from office. In fact, a number of persons holding the positions identified in this subsection have been subject to criminal prosecution while still holding such an office.

Subsection (d) of section 595 provides the procedure whereby certain specified Members of Congress can request that a special prosecutor be appointed by the Attorney General under section 592(e) of this chapter. If the Attorney General decides not to make such a request, he is required to specify the specific reasons why he felt a special prosecutor was not required. This subsection states that a majority of majority party members or a majority of all non-majority party members of the Judicial Committee of either House of Congress may request in writing that the Attorney General apply for the appointment of a special prosecutor under section 592(e) of this chapter. Thus, while an individual Member of Congress cannot trigger the process under this subsection, it is possible for members of the minority party, as well as the majority party, to trigger such a request. This becomes especially important in the situation where the Congress and the Executive branch are controlled by the same political party.

Not later than 30 days after the receipt of such request, or not later than 30 days after the Attorney General has completed the preliminary investigation conducted pursuant to section 592(e), whichever is later, the Attorney General is required to provide written notification of any action he has taken under this chapter in response to the request from the Members of Congress. Thus, the Attorney General might respond that he has already applied for the appointment of a special prosecutor or he might respond that upon the conclusion of a preliminary investigation, he made a finding and filed the requisite memorandum indicating that the matter was so unsubstantiated as to not warrant further investigation or prosecution. If no application for the appointment of a special prosecutor has been made to the division of the court, the Attorney General is required to explain the specific reasons why a special prosecutor is not required under the standard set forth in section 592(e). If the reason for not appointing a special prosecutor is the fact that the matter is so unsubstantiated as to not warrant further investigation or prosecution, the Attorney General's explanation under this subsection need only state that fact. The Committee does not intend that the Attorney General go into any detail with regard to the basis for the decision made in the exercise of his prosecutorial discretion that a matter simply did not warrant any further investigation or prosecution after the conclusion of a preliminary investigation. The explanation and specific reasons required by this subsection relate to the Attorney General's decision under clause 593(e) (3) (C) that a conflict of interest as defined in paragraph (1) of subsection 592(e) exists. Thus, the Attorney General will be describing specific reasons why he felt a conflict of interest did not exist. The Attorney General's explanation should contain special information and facts with respect to the possible existence of a conflict of interest, and not just a conclusory statement repeating the decision reached by the Attorney General.

The written notification required by this subsection must be sent by the Attorney General to the committee on which the persons making the request serve. The Attorney General's written notification will not

be revealed to any third party except that the committee receiving the notification may either, on its own initiative, or upon the request of the Attorney General, make public such portion or portions of such notification as will not in the committee's judgment prejudice the rights of any individual. As with memoranda and applications filed by the Attorney General with the division of the court under section 592, it is possible that there will be notifications provided to a congressional committee under this subsection involving cases which are not generally known to the public. In such a case, the Committee may decide to keep such notification confidential or may decide to delete the names of individuals mentioned in the notification especially if those individuals are not the subject of the alleged criminal activity. However, it is much more likely that there will be great public interest, awareness, and attention focused on the criminal investigations which precipitate a request by Members of Congress under subsection (d) for the appointment of a special prosecutor. For example, there could be a well-publicized ongoing investigation with respect to abuses by intelligence agents which is being conducted by the Department of Justice; and the Members of Congress authorized under this subsection may wish to request the appointment of a special prosecutor in that case because they believe a conflict of interest, as defined in subsection 592(e) exists. In such case, the Attorney General may want all or almost all of the notification he provides to Congress to be made public as his explanation to the American public of why a special prosecutor under this chapter is not needed.

#### SECTION 596—REMOVAL OF SPECIAL PROSECUTOR; TERMINATION OF OFFICE

Subsection (a) of section 596 states that a special prosecutor may be removed from office other than by impeachment and conviction, only by the personal action of the Attorney General and only for extraordinary improprieties, for malfeasance in office or willful neglect of duty, for permanent incapacitation, or for any conduct constituting a felony. In deciding that removal of a special prosecutor should only be for the causes described above, and should only be accomplished by the personal action of the Attorney General, the Committee was attempting to balance the need for independence for a special prosecutor with the desire, for constitutional and other reasons, that the division of the court not be engaged in supervision of the special prosecutor. In order to exercise the removal power, a certain degree of supervision is required and the Committee felt it appropriate that this supervision be conducted by the Attorney General, who is a member of the executive branch of the government. However, the special prosecutor was appointed in the first place because of a statutory finding that the Attorney General had a conflict of interest. Therefore, removal can only be accomplished if certain specified causes for removal exist. Subsection (a) also provides that an action may be brought in the division of the court to challenge the action of the Attorney General under this subsection by seeking reinstatement or other relief. The division of the court is directed to cause such an action in every way to be expedited. Therefore, the division of the court is given the authority to review the removal of the special prosecutor

to see if any of the statutory causes did exist. If such cause did not exist, and the removed special prosecutor so requests, the court may reinstate such a special prosecutor.

Obviously, upon the removal of a special prosecutor, the division of the court is going to have to make a decision whether to temporarily stay the removal of the special prosecutor until the court has a chance to review the matter (assuming the removed special prosecutor is interested in being reinstated), or the court must appoint a new special prosecutor. For that reason, it is appropriate that the court which has the responsibility of selecting the person who would replace the removed special prosecutor, also handled the review of whether the removal was proper under the statutory standard.

Another aspect of the delicate balance struck by the statute between the independence and accountability of a special prosecutor, and the removal authority given to the Attorney General, is that this subsection requires the Attorney General, upon removing a special prosecutor, to promptly submit to the Judiciary Committees of the Senate and House of Representatives a report describing with particularity the grounds for such action. The committees are directed to make this report available to the public, except that each committee may, if necessary to avoid prejudicing the legal rights of any individual, delete or postpone the publishing of such portions of the report or the whole report or any name or identifying detail. It is possible, although not likely, that a special prosecutor could have been appointed and removed without there being any public knowledge of the matter under criminal investigation. If that is the case, the Judiciary Committees may decide not to make the Attorney General's report immediately public. However, if there is a well-publicized investigation of high level criminal wrong-doing, there will probably be a great deal of public interest in the Attorney General's reasons for removing a special prosecutor. The report required by this subsection will provide the Congress and the public with a detailed written statement setting forth the grounds for the Attorney General's decision to remove a special prosecutor.

Subsection (b) of section 596 provides for the termination of the office of the special prosecutor. The office will terminate upon the submission by the special prosecutor of a written notification to the Attorney General stating that the investigation of all matters in the prosecutorial jurisdiction of that special prosecutor, or accepted by that special prosecutor under section 594(e), and any resulting prosecution, have been completed or so substantially completed that it would be appropriate for the Department of Justice to complete such investigations or prosecutions. However, this subsection specifically states that no submission under this subsection will have the effect of terminating the office of special prosecutor until after the completion and filing of the final report required under sub-section 595(b) of this title. There will be situations where the principal responsibilities of a special prosecutor have been completed but there are relatively minor peripheral matters to be finished which can properly be handled by the Department of Justice. In such a case, an office of special prosecutor



may terminate prior to the completion of all prosecutions and investigations under its jurisdiction. However, a decision to so terminate the office of special prosecutor should be made very carefully. A tremendous amount of work and effort put into the investigation and prosecution of a case by a special prosecutor, and the public confidence created as a result of that effort, could all be wasted if the convictions obtained by a special prosecutor were thrown out on appeal and the appeal of the prosecutions were handled by the Department of Justice. All the same doubts which are raised when someone with a conflict of interest is handling a key part of an investigation and prosecution would result from such a situation, and the initial appointment of a special prosecutor would have served no useful purpose. There is no requirement that service as a special prosecutor be a full time position. The compensation for a special prosecutor is provided at the per diem rate.

It may be that after the completion of a complicated investigation, the size of the office of the special prosecutor will be reduced drastically and might just include the special prosecutor himself and one or two part-time assistants. However the fact that there is a relatively small amount of work left to be accomplished should not be the motivating factor for terminating an office of special prosecutor. The motivating factor should be the nature of the responsibilities which remain to be carried out by that office.

Paragraph (2) of subsection (b) provides for the termination of the office of special prosecutor by the division of the court either on its own motion or upon the personal recommendation of the Attorney General. This paragraph provides for the unlikely situation where a special prosecutor may try to remain as special prosecutor after his responsibilities under this chapter are completed. The division of the court is given the authority to terminate the office of special prosecutor under this paragraph on the grounds that the investigation of all matters within the prosecutorial jurisdiction of the special prosecutor, or matters accepted by such special prosecutor under section 594(e), and any resulting prosecutions, have been completed or so substantially completed that it would be appropriate for the Department of Justice to complete such investigations or prosecutions. The drastic remedy of terminating the office of special prosecutor without the consent of the special prosecutor should obviously be exercised with caution. This paragraph also provides that at the time of termination the special prosecutor must file the final report required by section 595(b) of this title.

In order for a special prosecutor to be able to complete such report, it may be necessary for the division of the court to set a date certain for the termination of the office of special prosecutor a reasonable time in the future so that the special prosecutor has an opportunity to complete this report while still serving as special prosecutor.

This provision should not be interpreted as a substitute for removing a special prosecutor under subsection (a) of section 596. The key factor in a decision whether to terminate the office of special prosecutor under this paragraph is the state of the investigation of the matters within the prosecutorial jurisdiction of the special prosecutor, and not the conduct of the special prosecutor.

## SECTION 597—RELATIONSHIP WITH THE DEPARTMENT OF JUSTICE

Section 597 sets forth the relationship between the Department of Justice and a special prosecutor. Subsection (a) of that section requires the Department of Justice, the Attorney General, and all other officers and employees of the Department of Justice to suspend all investigations and proceedings regarding a matter in the prosecutorial jurisdiction of a special prosecutor, as that is defined by the division of the court or as has been accepted by the special prosecutor under section 594(e). Accordingly, this provision does not prevent the Department of Justice from providing the assistance to the special prosecutor required by section 594(d). Also, this subsection does not prevent the Department of Justice from continuing any investigation or proceeding insofar as the special prosecutor agrees in writing that such investigations or proceedings may be continued by the Department of Justice. As was discussed with respect to section 594(e), there will have to be a certain amount of coordination and cooperation between a special prosecutor and the Department of Justice so that the lines of jurisdiction between the Department and the special prosecutor are clear and adequately encompass any peripheral matters related to the special prosecutor's jurisdiction. Therefore, while the special prosecutor may agree to permit the Department of Justice to continue to conduct certain investigations or proceedings which are peripherally related to the jurisdiction of the special prosecutor, it would be a total subversion of the intent of this chapter if the special prosecutor agreed to permit the Department of Justice to conduct any important or substantial portion of the investigation under the responsibility of the special prosecutor.

Subsection (b) of section 597 makes it clear that the Attorney General or the Solicitor General may, to the extent provided under existing law, make a presentation to any court as to issues of law raised by any case or proceeding in which a special prosecutor participates in an official capacity or any appeal of such a case or proceeding. The Attorney General or Solicitor General might want to present the position of the President on a particular case or he might want to present an interpretation of a particular criminal statute or the manner in which that statute has been applied by the Department of Justice. This subsection does not in any way give the Attorney General or Solicitor General the authority or right to make such a presentation to the court if they do not have that right under existing law; but the subsection does make clear this chapter in no way attempts to limit or abridge the authority of the Attorney General or Solicitor General to make such a presentation.

## SECTION 598—TERMINATION OF THE EFFECT OF CHAPTER

Section 598 is a sunset provision which states that all of the provisions of the new Chapter 39 created by title I of S. 555 will cease to have effect five years after the date on which it takes effect. The chapter, however, does not terminate with respect to the completion of then pending matters which in the judgment of the division of the court require the chapter to continue in effect. With respect to those matters, the chapter continues in effect until the division of the court

determines that the matters have been completed. Five years is a reasonable period to permit the provisions of this chapter to operate and then to review those provisions to see if too many or too few special prosecutors have been appointed, to determine whether there is a need for a revision of the standards defining when a conflict of interest exists, or to determine if there is a need to revise the method of appointment, the method of removal, or any other significant portion of this chapter.

Subsection (b) of section 102 of Title I of S. 555 amends the table of chapters for Title 18 in the United States Code and for Part II of such Title 28, by inserting immediately after the item relating to chapters 37 the title to new chapter 39, namely: "39. Special Prosecutor".

Subsection (c) of section 102 authorizes there to be appropriated for each fiscal year such sums as may be necessary for the use of any special prosecutors appointed under the new chapter 39 of Title 28 of the United States Code in carrying out any of the functions under this chapter. This subsection provides that these funds are to be held by the Department of Justice as a contingent fund for that purpose. Obviously, it is very difficult in advance to predict how much money will need to be appropriated for the use by special prosecutors since it is very difficult to predict how many serious allegations of criminal wrongdoing by high level government officials, and other individuals closely related to the President or Attorney General, will come to the attention of the Attorney General. However, experience should give guidance to the amount of the contingent fund needed in normal times and the supplemental appropriations process is always available to meet any unforeseen circumstances.

SECTION 102---ASSIGNMENT OF JUDGES TO DIVISION TO APPOINT SPECIAL PROSECUTORS

Section 102(a) amends chapter 3 of title 28 of the United States Code by adding a new section 49 which provides for the assignment of judges to a division in the United States Court of Appeals for the District of Columbia for the purposes of appointing temporary special prosecutors when needed.

Subsection 49(a) of section 49 requires the chief judge of the United States Court of Appeals for the District of Columbia every two years to assign three judges to a division of that court to determine all matters arising under chapter 39 of this title. The court of appeals presently decides most questions by the use of three judge divisions of the court. This section is different from present court procedure only in that a division is appointed for a period of two years, not appointed for shorter period of time, to hear a number of assigned cases. This provision was needed because under chapter 39, a number of memoranda and applications from the Attorney General will be filed with the court. While the number of occasions when the court will be called upon to appoint a special prosecutor or review the decision of the Attorney General most probably will be rare, it would be administratively burdensome to appoint a different panel of three judges each time a memorandum or application was filed by the Attorney General.

Section 49(b) states that assignment to the division established in subsection (a) shall not be a bar to other judicial assignments during the period of time a person is assigned to the division. The one exception to this is subsection (f) of section 49 prohibiting a judge or justice who is a member of the division established in subsection (a) from participating in a decision involving a temporary special prosecutor they appointed.

Section 49(c) directs the chief judge of the United States Court of Appeals for the District of Columbia to give priority to senior retired circuit court judges and senior retired justices when assigning judges or justices to sit on the division established in subsection (a). By giving priority to senior retired circuit court judges and senior retired justices, the members of the special division will not be sitting on matters involving the Department of Justice on a day-to-day basis. This provision is a safeguard against the possibility of conflicts of interest on the part of a judge where the judge is involved in reviewing memoranda under chapter 39 and then is called upon to sit on a case involving the special prosecutor or the Department of Justice. By using senior retired circuit court judges or justices, the possibility of conflict is reduced. Another correlative consideration is that the deliberations of the special division established in subsection (a) will be dealing with very sensitive matters of great concern to the present Administration and other elected officials. As retired judges their ambitions would have been largely achieved and their activities would be less likely to involve them in any conflict situation. Also, the use of retired judges would minimize any dislocations in judicial backlogs.

Section 49(d) authorizes the Chief Judge of the United States Court of Appeals for the District of Columbia, without presenting a certificate of necessity, to request that the Chief Justice of the United States designate and assign retired circuit court judges of another circuit or retired justices to the division established under subsection (a). Such designation and assignment of judges must be in accordance with section 294 of title 28 United States Code which presently governs the designation and assignment of retired judges to sit outside the circuit to which they are permanently assigned. Thus any assignment or designation would be voluntary and only with the approval of the judge or justice being assigned. A request by the Chief Judge of the United States Court of Appeals for the District of Columbia for the designation or assignment of retired judges from other circuits need not be based on the fact that there is no judge of the United States Court of Appeals for the District of Columbia who could possibly perform the task.

Since the matters to be determined by this division are not of a local nature, it is advantageous to have retired circuit court judges from other circuits assigned to this division where appropriate.

Section 49(e) provides that any vacancy in the division established under subsection (a) shall be filled only for the remainder of the two-year period in which the vacancy occurs. Thus, if the division has been appointed and been sitting for a period of one year and a vacancy occurs, the person assigned to sit on the division shall sit on the division for one year at which time the Chief Judge of the United States Court

of Appeals for the District of Columbia will assign three judges to sit on the division for the following two years. Vacancies must also be filled in the same manner as initial assignments to the division.

Section 49(f) states that no judge or justice who as a member of the division established in subsection (a) participated in a function conferred on the court by chapter 39 involving a special prosecutor shall be eligible to participate on a court of appeals division deciding a matter involving that special prosecutor. This prohibition applies while the individual appointed special prosecutor is serving in that office. This prohibition also applies to any case which involved the exercise of a special prosecutor's official duties regardless of whether that individual is still serving in the office of special prosecutor. Thus, if a judge participated in the appointment of a special prosecutor and that special prosecutor brought a prosecution, the judge would not be eligible to sit on any case involving that prosecution even if the special prosecutor which he appointed had resigned and another individual had taken his place.

Section 102(b) amends the table of sections of chapter 3 of Title 28, United States Code, to add the title of the new section 49 to the table of sections. The new section 49 is entitled: "49. Assignment of judges to division to appoint special prosecutors."

Section 103 amends chapter 31 of title 28 of the United States Code by adding at the end the new sections 528 and 529.

SECTION 528—DISQUALIFICATION OF OFFICERS AND EMPLOYEES OF THE  
DEPARTMENT OF JUSTICE

Section 528 requires the Attorney General to promulgate rules and regulations which require every officer or employee of the Department of Justice, including a United States Attorney or a member of his staff, to disqualify himself from participation in a particular investigation or prosecution if such participation may result in a personal, financial or partisan political conflict of interest, or the appearance thereof. Presently, the Department of Justice has rules and regulations requiring the disqualification of employees if the employee has a financial conflict of interest. This section requires the Attorney General to broaden those regulations to require disqualification of employees who have personal and partisan political conflicts of interest, in addition to those who have financial conflicts of interest.

Chapter 39 created by this title specifically deals with those conflicts of interest which involve such high-level personnel that a re-assignment of personnel within the Department of Justice will not eliminate the conflict—that is, conflicts on the part of the President or the Attorney General. Section 528, however, is intended to deal with all the conflicts of interest by any of the personnel in the Department of Justice.

The last sentence gives the Attorney General flexibility in drafting and promulgating rules and regulations pertaining to conflicts of interest. However, Congress is on record that if the problems being dealt with in these rules and regulations are serious enough, then the Attorney General is fully authorized to provide that serious violations of important parts of these rules and regulations will result in removal from office.

## SECTION 529—OFFICE OF GOVERNMENT CRIMES

Paragraph (1) of subsection 529(a) establishes an Office of Government Crimes within the Department of Justice which is headed by a Director appointed by the President, by and with the advice and consent of the Senate. While the Director reports directly to the Attorney General on a regular basis, the Attorney General is able to place this Office wherever he deems it appropriate. The Committee has always assumed that the Office will be placed within the Criminal Division so that there will be an assurance of consistency in the application of federal criminal laws to public employees and public citizens alike. This organizational flexibility was included in the bill at the suggestion of the Department of Justice under former Attorney General Edward Levi.

Paragraph (2) of subsection (a) states that a person can not be appointed Director of this Office if he has at any time during the five years preceding his appointment held a "high-level position of trust and responsibility" in a campaign organization or a political party working for a candidate for any elected federal office. In order to avoid any subsequent court challenge to the validity of an appointment, this section provides that confirmation by the Senate of a presidential nominee to be Director of this Office constitutes a final determination on this question.

Paragraph (1) of subsection 529(b) states that the Office of Government Crimes has jurisdiction over: (1) federal criminal violations by any elected or appointed federal employee related directly or indirectly to his government position, employment, or compensation; (2) federal criminal violations related to lobbying, conflicts of interest, campaigns, and election to public office committed by any person with the exception of civil rights offenses; (3) the supervision of investigations and prosecutions of criminal violations of federal law involving state or local government officials or employees; and (4) any other matter that the Attorney General deems appropriate.

Paragraph (2) of subsection (b) states that the Attorney General may with the approval of the Director concurrently delegate the jurisdiction over certain matters to United States Attorneys or other units of the Department of Justice as well as to the Office of Government Crimes. This section makes it clear, however, that in the case of such concurrent jurisdiction the Director of the Office of Government Crimes would have the authority to supervise the United States Attorneys or other units within the Department of Justice involved in the case in the performance of their duties. This provision is designed to ensure that greater consistency exists in the application of federal laws dealing with conflicts of interest and electioneering.

Paragraph (2) of subsection (b) also makes it clear that the creation of an Office of Government Crimes does not in any way limit the authority conferred upon the Attorney General, the Federal Bureau of Investigation, or any other department or agency of government to investigate any matter.

Paragraphs (1) and (2) of subsection 529(c) require that the Attorney General report to the Congress at the beginning of each regular session on the activities and operations of the Office of Government

Crimes for the preceding fiscal year. These reports must indicate the number and type of investigations and prosecutions undertaken but need not include any information which would impair the work of the Department of Justice or would constitute an improper invasion of personal privacy. This provision is designed to ensure that the Congress will have a complete grasp of any activity of the Office of Government Crimes. The details of individual cases and the strategies used in various investigations and prosecutions need not be included in these annual reports.

There is now a Public Integrity Section within the Criminal Division of the Department of Justice. It was created in March, 1976, by a letter written by the Assistant Attorney General for the Criminal Division, Richard Thornburgh. The Committee feels that while the special prosecutor provisions of this title can ensure that cases of alleged criminal violations by high-level federal officials will receive the attention they deserve, a statutorily-created Office within the Department of Justice, headed by a presidential appointee is absolutely necessary for the vigorous investigation and, if necessary, prosecution of the cases within the jurisdiction of that office not assigned to a special prosecutor.

Subsection (b) of section 103 amends the table of sections for chapter 31 of title 28 of the United States Code by adding at the end of the titles for new sections 528 and 529 discussed above.

Subsection (c) of section 103 amends section 5315 of title 5, United States Code, to add "(114) Director, Office of Government Crimes, Department of Justice".

#### SECTION 104—SEPARABILITY

Section 104 states that if any part of this title is held invalid, the remainder of the title should not be affected by that holding. Similarly, if any part of the title or its applications to any person or circumstance is held invalid, the provisions or other parts of the title and their application to other persons or circumstances shall not be affected thereby.

### B. TITLE II—CONGRESSIONAL LEGAL COUNSEL

#### SECTION 201—ESTABLISHMENT OF OFFICE OF CONGRESSIONAL LEGAL COUNSEL

Section 201 provides for the establishment, personnel qualifications, appointment, compensation and general structure of the Office of Congressional Legal Counsel.

Paragraph (a) (1) of section 201 establishes an Office of the Congressional Legal Counsel to be headed by a Congressional Legal Counsel. A Deputy Congressional Legal Counsel who will perform duties assigned by the Congressional Legal Counsel is also provided for. The Deputy Congressional Legal Counsel is authorized to serve as Acting Congressional Legal Counsel during any absence, disability or vacancy in the position of Congressional Legal Counsel.

The Office of Congressional Legal Counsel is a support office for Congress similar to the Congressional Budget Office and the Office of

Technology Assessment. The Congressional Legal Counsel, the Deputy Congressional Legal Counsel and other employees of the Office of Congressional Legal Counsel are employees of the Congress. They are not officers of the Congress or of the United States. They perform functions on behalf of Congress under the direction of Congress and only to the extent that Congress requests their assistance.

Paragraph (2) of the subsection (a) provides that the appointment of the Congressional Legal Counsel and the Deputy Congressional Legal Counsel is to be made by the President pro tempore of the Senate and the Speaker of the House of Representatives from among recommendations submitted by the Majority and Minority Leaders of the Senate and the House of Representatives. The President pro tempore of the Senate and the Speaker of the House of Representatives must reach agreement on the final selection for each of these positions and the appointment must be jointly made. This paragraph requires that the appointment be made without regard to political affiliation and solely on the basis of fitness to perform the duties of the position. Persons appointed Congressional Legal Counsel or Deputy Congressional Legal Counsel must be learned in the law, members of the bar of a State or the District of Columbia, and must not engage in any business, vocation or employment during the term of their appointment.

The success of the Office of Congressional Legal Counsel will depend on its being staffed by first rate professionals. Both the Counsel and the Deputy must have sufficient stature and litigation experience to effectively represent Congress in any court, including the United States Supreme Court. All attorneys in the office, particularly the Counsel and Deputy Counsel, must have a sensitivity to the unique institution for which they work and the need for extensive consultations with congressional clients and other persons interested in litigation or other legal matters for which the office is responsible.

Paragraph (3) (A) of subsection (a) provides that the appointments described above will become effective upon approval by a concurrent resolution of the Senate and the House of Representatives. The Congressional Legal Counsel and Deputy Congressional Legal Counsel will both have terms of service which shall expire at the end of the Congress following the Congress during which the Congressional Legal Counsel or Deputy Counsel, respectively is appointed.

However, the Congress again by concurrent resolution is given the power to remove either the Congressional Legal Counsel or the Deputy Congressional Legal Counsel prior to the expiration of his or her term of employment. Both the Counsel and the Deputy Counsel may be reappointed at the termination of any term of service. No person should be appointed to begin with who does not agree to serve at least one term.

Paragraph (3) (B) of section (a) provides that the first Congressional Legal Counsel and Deputy Congressional Legal Counsel shall be appointed, approved and take office within 90 days after the enactment of this title. Future Congressional Legal Counsels and Deputy Congressional Legal Counsels are to be appointed, approved, and assume their responsibilities within thirty days after the beginning of the session of Congress immediately following the termination of the Congressional Legal Counsel's or Deputy Counsel's term of Service.



If a vacancy in either position occurs prior to the expiration of the relevant term, a new Counsel or Deputy Counsel should be appointed, approved and assume office within sixty days after such vacancy occurs.

Upon the resignation or removal of the Congressional Legal Counsel before the end of this term of employment, a new Congressional Legal Counsel and Deputy Congressional Legal Counsel must be chosen. The new appointees will have terms of service which expire at the end of the Congress following the Congress during which the Counsel or Deputy Counsel is appointed.

Paragraph (4) of subsection (a) sets the pay scale for the Counsel and Deputy. The Counsel is to receive compensation at the rate provided in 5 U.S.C. 5314. The Deputy is to receive compensation at the rate provided in 5 U.S.C. 5315.

Paragraph (1) of section 201(b) authorizes the Counsel to appoint and fix the compensation of such Assistant Congressional Legal Counsel and of such other personnel, within the limits of available appropriations, as may be necessary to carry out the provisions of the title. The same qualifications apply to these appointments as the appointment of the Counsel and Deputy. The Counsel may prescribe the duties and responsibilities of personnel in the office and may remove any of these personnel. The level of compensation set by the Counsel for the Assistant Counsels may not be in excess of that provided in 5 U.S.C. 5316, which is the rate of compensation for individuals at Level V of the Executive Schedule.

Paragraph (2) of subsection (b) provides that for purposes of pay (other than the rate of pay of the Counsel and Deputy and employment benefits, rights, and privileges, all Assistants and other personnel of the office shall be treated as if they were employees of the Senate.

Subsection (c) of section 201 authorizes the Counsel to hire consultants in the same manner as may any standing committee of the Senate or House. The hiring of all such consultants must be approved by the Committee on Rules and Administration in the Senate. The Office may find it desirable to hire consultants to assist it with legal research on constitutional issues involving the powers of Congress. The Office may also wish on occasion to hire private attorneys of national reputation to argue certain cases before the courts.

Subsection (d) of section 201 authorizes the office to transmit official mail under the frank.

Subsection (e) provides that the Congressional Legal Counsel may establish such procedures as may be necessary to carry out the provisions of this title. These may include internal office procedures for the clearance and signing of court papers as well as procedures for public access to legal memoranda and other legal research materials regarding the powers of Congress compiled and maintained pursuant to section 208(b). None of these procedures may alter the substantive provisions of the title which limit the authority of the Counsel.

Subsection (f) permits the Congressional Legal Counsel to delegate authority for the performance of any function imposed by this title, except that the Congressional Legal Counsel is prohibited from delegating his responsibility under section 206(b) to notify the Joint Leadership Group of any legal proceeding in which the Counsel is of

the opinion that it is in the interest of Congress to intervene or appear as *amicus curiae*. Because this latter function is the only one in the title which permits the Congressional Legal Counsel to recommend consideration of any action by Congress, it is appropriate that only the Congressional Legal Counsel be able to make such a recommendation to the Joint Leadership Group.

Subsection (g) makes it clear that the Counsel and other employees of the office must maintain the attorney-client privilege with respect to all communications between it and any Member, officer, or employee who becomes a client.

#### SECTION 202—ACCOUNTABILITY OF OFFICE

Section 202 delegates to a Joint Leadership Group the general responsibility to oversee the activities of the Office of Congressional Legal Counsel.

Subsection (a) makes the Office directly accountable to the Joint Leadership Group in the performance of its duties.

By placing oversight responsibilities in a single body, section 202 assures greater coordination and continuity in the policies and performance of the Office. The Counsel and Office will know precisely to whom they are accountable and with whom they should consult when policy decisions are made.

Subsection (b) specifies the membership of the Joint Leadership Group. The Group includes the Speaker of the House and the President pro tempore of the Senate, the majority and minority leaders of both Houses, the Chairman and ranking minority member of the judiciary committees of both Houses, and the Chairman and ranking minority member of the committee of the House and of the Senate which has jurisdiction over the contingent fund of that body. Presently the House Committee on House Administration and the Senate Rules Committee have this jurisdiction. The President pro tempore is given the authority to designate the Deputy President pro tempore to serve in his place on the Joint Leadership Group.

The membership of the Joint Leadership Group is bipartisan. The purpose of the Office is to serve the institution of Congress rather than the partisan interests of one party or another.

The membership of the Joint Leadership Group includes the Chairman and ranking minority member of the judiciary committees because of their expertise in legal matters. The Chairman and ranking minority member of the House Administration and Senate Rules Committee are included because their committees have gained expertise in litigation matters through their supervision of the contingent funds.

The Office will be accountable to the Joint Leadership Group for decisions made regarding the conduct of litigation in which the Office is involved. For example, important decisions will have to be made on occasion concerning the arguments which will be presented to a court as well as concerning the tactics of how to proceed with a particular case. It is not expected that the Joint Leadership Group will undertake to instruct the Congressional Legal Counsel on how to practice law or to clear all briefs before they are filed. A Congressional Legal Counsel should be chosen for his established ability as a litigator; however, the Joint Leadership Group must take an active role in

advising the Congressional Legal Counsel with regard to the resolution of major policy questions as they arise in the course of litigation.

Subsection (c) provides that the Secretary of the Senate and the Clerk of the House shall assist the Joint Leadership Group in the performance of its duties.

SECTION 203—REQUIREMENTS FOR AUTHORIZING REPRESENTATION  
ACTIVITY

Section 203 sets forth the procedures by which the Joint Leadership Group, the Congress or a House of Congress may direct the Counsel to undertake representational activity. These procedures must be adhered to for the Counsel to be authorized to represent a Member, officer, committee, or employee in the types of cases specified in sections 204, 205, 206, and 207. Sections 204 through 207 provide substantive limitations on the types of cases the Counsel may be authorized to undertake which cannot be abridged even if the procedures in section 203 are followed. Basically sections 204 through 207 provide that the Counsel may be directed to defend a Member, officer, committee, or employee in a civil action arising from the performance of official duties, bring a civil action to enforce a committee subpoena, intervene or appear as amicus on behalf of Congress, or serve as the duly authorized representatives of a committee in obtaining an order granting immunity.

Subsection (a) establishes the procedure for authorizing the office to defend a Member, officer, committee or employee under section 204. Such representation may be authorized only by a two-thirds vote of the appropriate members of the Joint Leadership Group or by the adoption of a resolution. If the case involves only one House or the Members, officers, committees, or employees of only one House, only the seven members of the Joint Leadership Group of that House may vote on the question of authorization. If only one House is involved, a resolution adopted by that one House is sufficient to authorize the Counsel to represent that House. By this provision a House takes no part in the decisions of the other when only that other House is involved. When both Houses are involved, two-thirds of all fourteen members of the Joint Leadership Group must approve or a concurrent resolution must be adopted by both Houses.

The provisions of subsection (a) on the procedure for authorizing representation in section 204 defense cases is the only provisions which authorizes the Joint Leadership Group to directly authorize any representational activity. Representational activity under section 205, 206 and 207 cannot be authorized by the Joint Leadership Group. The need for this one exception is twofold. First, emergencies are likely to arise, particularly when Congress is in recess or adjournment, when it will be necessary for the Counsel immediately to begin defending one House, or a Member, officer, committee, or employee. These types of emergencies are not as likely to occur in section 205, 206, and 207 type cases. Second, there are certain routine and noncontroversial cases where defense of a House, Member, officer, committee, or employee should be authorized without the need to schedule debate and a vote of the body. There is no requirement that the Leadership Group fail to authorize representation before a resolution authorizing representation is introduced for consideration by the body.

The Joint Leadership Group may authorize representation in section 204 cases only by a two-thirds vote of the appropriate members. Therefore, if only one House is involved, five of the seven Members of the Joint Leadership Group of that House must vote to authorize representation. If both Houses are involved, a vote of ten of the fourteen Members is required to authorize representation. In either case the affirmative vote of at least one Member of the Joint Leadership Group from the minority party would be needed before representation can be authorized by the Joint Leadership Group. The two-thirds vote requirement, therefore, serves to protect the interests of the minority party. Such votes may be taken by telephone or by proxy.

Subsection (b) provides that the Counsel may be directed to bring a civil action to enforce a subpoena under section 205 only by the adoption of a resolution of the appropriate House of Congress. The Joint Leadership Group may not by itself authorize the bringing of such an enforcement action.

Subsection (c) provides that the Counsel may only be directed to intervene or appear as *amicus curiae* under section 206 by the adoption of a resolution of a House of Congress, or a concurrent resolution of both Houses. The Joint Leadership Group cannot itself authorize such intervention or appearance. Section 206 places substantive limits on the parties in whose name intervention or appearance may be made. Such intervention or appearance may only be made in the name of Congress, a House of Congress, or an officer, committee, subcommittee or committee or subcommittee chairman. In each case the appropriate House or Houses must authorize the action by adoption of a resolution or concurrent resolution.

Subsection (d) provides that the Counsel may serve as the duly authorized representative in obtaining an order granting immunity to a witness under section 207 when authorized by a majority vote of a House of Congress or by a two-thirds vote of a committee, depending on where the witness is to appear. These voting requirements are taken verbatim from the immunity statute, 18 U.S.C. 6005. Neither House has ever required that a committee receive authorization from the body itself before an immunity order is requested from a court.

Subsection (e) makes it clear that the Counsel is to make no recommendation when Congress considers a resolution or concurrent resolution to direct the Counsel to undertake representational activity. The House or the Joint Leadership Group may, however, request the Counsel to provide legal analysis of issues which will aid in the Joint Leadership Group's or the body's determinations.

SECTION 204—DEFENDING CONGRESS, A HOUSE, COMMITTEE, MEMBER,  
OFFICER, AGENCY OR EMPLOYEE OF CONGRESS

Section 204, 205, 206 and 207 describe the basic types of legal actions in which the Counsel may be directed to participate. Authorization under the procedures in section 203 is required before the Counsel may represent Congress, a House of Congress or committee member, officer, agency, or employee of Congress.

Section 204 covers cases in which the Counsel is directed to defend Congress, a House of Congress, an office or agency of Congress, a committee, subcommittee, Member, officer, or employee of a House of Congress or an officer or employee of an office or agency of Congress.

When directed to do so pursuant to section 203, the Congressional Legal Counsel may be directed to undertake the defense of individuals or entities associated with the Congress. The individuals and entities which may be represented by the Congressional Legal Counsel are the Congress, a House of Congress, any office or agency of the Congress, a committee or subcommittee or any Member, officer or employee of a House of Congress, or an officer or employee of an office or agency of Congress. Such representation may involve either a case in which these entities and persons are made party defendants or a proceeding in which they are subpoenaed to appear or produce documents.

With respect to cases where Congress, a House, officer, Member, employee, committee, subcommittee, or agency is made a party defendant, the Counsel may be directed to represent the defendant only if it is a civil case and only if the case arises from that defendant's performance of official duties.

The Counsel may not be directed to represent a defendant in a criminal action or an action involving the unofficial activity of the defendant. For example, no representation may be provided in contested election cases.

This section requires that in any case to be handled by the Congressional Legal Counsel under this section, the validity of a proceeding or action, including issuance of any subpoena or order, taken by any of the individuals or entities in its or his official or representative capacity be at issue. This language only covers the validity of actions taken by the individual or entity in their official or representative capacity. Official capacity will cover any actions a Member of Congress or employee takes in the normal course of his employment. It is not necessary that the action being challenged have been taken on the floor of Congress or at a formal committee meeting. A challenge to any action taken by a Member when performing his legislative duties, including actions he takes to express his views on issues or to communicate with constituents, would fall within the definition of an action taken by the Member in the course of his official duty. However, if an employee of the Congress is driving to work and is in an automobile accident on the way to work, a tort action arising out of that accident would not normally constitute a challenge to the validity of any official action. The section does not, therefore, create a free legal defense funds for personal legal matters of Members of Congress or their employees.

In each case a preliminary judgment must be made whether or not the action of the Member, officer, committee, or employee which gives rise to the proceeding is within the scope of that individual's or entity's official duties. In making that judgment, the committee intends that those duties properly lie within the scope of the legislator's or aide's official duties be broadly construed.

The failure to construe broadly what constitutes official duties would be serious because Members and their staff will often be justified in raising the defense of speech and debate clause immunity. Therefore, the crucial issue raised by much of the litigation involving Congress is whether the type of actions challenged are part of the individual's official duties. In order to preserve the ability of Congress as an institution to function and to prevent harassment and undue financial burden and inconvenience to Members, officers and employees, Congress must vigorously defend its Constitutional im-

munity from suit. Therefore, if there is a close question as to whether a particular action is within the official duties of the individual, Congress must have the option of authorizing representation by the Congressional Legal Counsel. Congress may on occasion even desire to challenge existing court precedent which has the effect of unduly limiting Congress' constitutional powers and immunities.

With respect to proceedings involving a subpoena to Congress, the Counsel may be directed to defend Congress, a House, office, agency, committee, subcommittee, Member, officer or employee if the case is civil or criminal in nature but only if the subpoena arises from the performance of official duties. Grand jury subpoenas for congressional documents and testimony are a matter of routine. Most such subpoenas arise when Congress investigates conduct which results in a criminal indictment. Again, this section only applies to subpoenas or orders which relate to the official duties of the individual or entity. If, for example, an employee of the Senate is the subject of a subpoena requesting the production of documents he has collected for use in a committee oversight hearing, the Congressional Legal Counsel could be directed to provide that employee with representation even though the subpoena may have been issued by a grand jury. However, if a Member of the House of Representatives is issued a subpoena with respect to documents relating to a financial investment made by that Member, the Congressional Legal Counsel would not ordinarily be directed to provide representations.

Subsection (b) provides that the Congressional Legal Counsel may only be directed to undertake the representation of a Member, officer, or employee under section 204(a), if the Member, officer or employee has consented to such representation. It is a basic principal of the American Bar Association's Canons of Ethics that a client be given the freedom to choose the attorney who will represent him. Accordingly, while this bill provides that, with respect to committees, or any officer or agency of Congress, the representation by the Congressional Legal Counsel will be mandatory, with respect to the representation of an individual, the Counsel can provide representation only if the individual to be represented consents.

In this regard, section 208(a)(4) below authorizes the Counsel to advise an individual not represented under this section with respect to retaining private counsel. Furthermore, section 210(d) specifically authorizes Congress to reimburse the individual for the costs of retaining private counsel. It should not be likely, however, that many individuals will feel the need to retain private counsel. In each case in which private counsel is retained, the appropriate House must judge whether the reasons for doing so justify reimbursement.

SECTION 205—INSTITUTING A CIVIL ACTION TO ENFORCE A SUBPENA OR ORDER

Section 205 permits the Congress or the appropriate House of Congress to authorize the Congressional Legal Counsel to bring a civil action to enforce a subpoena or order issued by Congress, a House of Congress, a committee or a subcommittee of a committee authorized to issue a subpoena. Subsection (c) sets forth special procedures which

are applicable to the subpoena enforcement mechanism and subsection (f) contains a statute providing the U.S. District Court for the District of Columbia with jurisdiction to hear the subpoena enforcement actions.

Subsection (a) provides that when directed to do so pursuant to the procedures in section 203(b), the Counsel must bring a civil action to enforce a subpoena issued by a House, committee, subcommittee, or joint Committee of Congress, to secure a declaratory judgment concerning the validity of the subpoena, or to prevent a threatened failure or refusal to comply with the subpoena.

Section 205 (a) only authorizes the Congressional Legal Counsel to undertake representation in such a legal action. This section must be read in conjunction with section 205 (f) for the District of Columbia with jurisdiction to hear such cases to enforce a subpoena. It must also be read in conjunction with section 205 (c) setting forth certain procedures which a committee and each House of Congress must follow in considering any resolution to authorize the Counsel to bring a civil action to enforce the subpoena.

Section 205 (a) authorizes the appropriate House of Congress to direct the Congressional Legal Counsel to bring a civil action under any statute conferring jurisdiction on any court of the United States including 28 U.S.C. 1364, to enforce a subpoena issued by a Congressional committee or subcommittee. Section 205 (f) of this title contains a new section 1364 to title 28 which expressly confers jurisdiction on the United States District Court for the District of Columbia to hear cases brought by the Congressional Legal Counsel.

The words "Statute conferring jurisdiction" are intended to refer specifically to the statute set forth in Section 205 (f) to become 28 U.S.C. 1364, and to any statute which Congress may choose to enact in the future. Such a future statute might specifically give the courts jurisdiction to hear a civil legal action brought by Congress to enforce a subpoena against an executive branch official. This bill, however, does not provide any authority for enforcement of subpoenas against executive branch officials. Indeed, the jurisdictional statute in Section 205 (f) specifically provides that it does not apply to an action to enforce, to secure a declaratory judgment, or to prevent a threatened failure or refusal to comply with a subpoena issued to an officer or employee of the Federal Government acting within his official capacity.

Subsection (a) does not limit or redefine which congressional committees, subcommittees, or joint committees have the authority to issue a subpoena or order. However, subsection (a) expressly applies only to those committees, subcommittees, or joint committees, will be able to use the new civil action as an alternative means of enforcing that subpoena or order. (For the purposes of this section, the Technology Assessment Board is considered a committee. See, section 211(b) *infra*.)

Both subpoenas and orders may be the subject of an action brought under section 205(a). Similarly, under this section Congress may ask a court to directly order compliance with such subpoena or order or may merely seek a declaration concerning the validity of such subpoena or order. By first seeking a declaration, Congress gives the party an opportunity to comply before actually ordered to do so by a court.

Congress has the complete discretion of whether or not to utilize such a two-step enforcement process.

Congress may also act before a party refuses or fails to comply with a subpoena or order if that party threatens not to comply. Such threat could be communicated to the House or committee in a number of ways. Any acts by a party indicating an intent to flee from the country or to destroy subpoenaed documents would justify the bringing of an action to prevent such acts. Civil actions should not be authorized merely as a precaution or as a matter of routine, but if the progress of a committee investigation would be seriously impaired by a party delaying in responding to a subpoena, that fact would be relevant in determining whether bringing a civil action would be justified.

Subsection (b) makes it clear that a directive to the Congressional Legal Counsel to bring a civil action pursuant to 205(a) in the name of a committee, subcommittee, or joint committee of Congress to enforce a subpoena by a civil action will constitute authorization for the committee, subcommittee or joint committee to bring such action within the meaning of any statute conferring jurisdiction on any court of the United States. The issue of whether a committee, subcommittee, or joint committee has been authorized by the Congress to engage in litigation to enforce a subpoena has been raised in some prior litigation. This section will make it clear that when Congress authorizes the Counsel to bring a civil action to enforce a subpoena, Congress is also authorizing the committee, subcommittee, or joint committee to bring such an action.

Subsection (c) provides a specific procedure for committee consideration of the desirability of bringing a civil action to enforce a subpoena. This subsection does not apply to civil enforcement of any subpoenas issued by a House of Congress.

The subsection provides that it will not be in order for the Senate or the House of Representatives to consider a resolution to direct the Congressional Legal Counsel to bring a civil action to enforce a committee subpoena unless the resolution has been reported by a majority vote of the members voting, a majority being present of such committee or of the committee of which such subcommittee is a subcommittee and unless the report filed by the committee contains certain information set forth in detail in this subsection.

Under the criminal contempt statute, committees of both Houses are required under various court cases to report the contempt resolution by a majority vote of at least a quorum of the members of the committee. This subsection also requires a subcommittee to gain the approval of the full committee of which they are a subcommittee before bringing a civil action to enforce a subpoena under the procedures set forth in this title. Presently, Senate and House subcommittees would be required to secure a favorable vote in their committees to report any resolution of contempt for criminal prosecution.

The report which the committee files with the House of Congress which will consider the resolution authorizing a civil action to enforce a subpoena must contain a statement of (A) the procedure followed in issuing the subpoena; (B) the extent to which the party subpoenaed has complied with the subpoena; (C) any objections or privileges raised by the subpoenaed party; and (D) the comparative effectiveness of



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bringing civil action to enforce a subpoena, certification of a criminal action for contempt of Congress, or initiating a contempt proceeding before a House of Congress. Clause (C) institutionalizes a procedure whereby the objections and privileges raised by the subpoenaed party will be placed before the House of Congress for its consideration. This will ensure that the House of Congress will have all relevant information before it when making its determination. By requiring a committee to note both objections as well as privileges, all arguments made by the subpoenaed party with respect to the subpoena will be presented for consideration—whether or not legally dispositive. The Congress is thus assured of being appraised of all factors relevant to its considerations. Finally, clause (D) requires the committee to consider the alternative means of enforcing the subpoena so that the considerations which favor each form of enforcement will be put before the appropriate House of Congress each time a decision is made with respect to bringing civil enforcement action. These requirements are enacted as an exercise of the rulemaking power of the two Houses and as such may be modified by either House.

Subsection (e) makes it clear that compliance with the reporting requirements of subsection (c) are not to be matters which will be reviewed by a court of law. It was especially important to make this clear so that technical noncompliance with these reporting requirements would not be used by individuals who refused to comply with Congressional subpoenas as another technicality to defeat the enforcement of a subpoena. However, as a matter of Senate or House procedure, any consideration of a report which fails to conform to these requirements is subject to a point of order.

Subsection (f) (1) adds a new section to chapter 85 of title 28 of the United States Code. Subsection (a) of the new section gives the District Court for the District of Columbia original jurisdiction without regard to the sum or value of the matter in controversy, over any civil action brought on behalf of Congress, a House of Congress or a committee of Congress to enforce a subpoena or order issued by that entity. Since at least one court has taken the position that without new legislation the Federal courts do not have jurisdiction to hear a civil action to enforce a Congressional subpoena (see various proceedings in *Senate Select Committee on Presidential Campaign Activities v. Nixon* 366 F. Supp 51 (D.D.C. 1973)), this new section is being enacted to leave no question that Congress intends for the District Court for the District of Columbia to have jurisdiction to hear civil actions to enforce Congressional subpoenas.

This jurisdictional statute applies to a subpoena directed to any natural person or entity acting under color of state or local authority. By the specific terms of the jurisdictional statute, it does not apply to a subpoena directed to an officer or employee of the Federal government acting within his official capacity. In the last Congress there was pending in the Committee on Government Operations legislation directly addressing the problems associated with obtaining information from the executive branch. (See S. 2170: "The Congressional Right to Information Act"). This exception in the statute is not intended to be a Congressional finding that the Federal courts do not now have the authority to hear a civil action to enforce a subpoena against an officer

or employee of the Federal Government. However, if the Federal courts do not now have this authority, this statute does not confer it.

The exemption in the statute with respect to actions to enforce subpoenas against Federal government officers or employees acting within their official capacity should be construed narrowly. Therefore, a subpoena against Federal government officers or employees not acting within the scope of their official duties is not excluded from the coverage of this jurisdictional statute.

The jurisdictional statute applies to actions to enforce, secure a declaration concerning the validity of or prevent non-compliance with a subpoena or order issued by a House of Congress, or a committee of Congress to secure the production of documents or other materials of any kind, to secure the answering of any deposition or interrogatory, or to secure testimony or any combination of the above.

The Court is given jurisdiction to enforce subpoenas on behalf of committees only when the committee is authorized to seek enforcement. This section expresses the requirement of standing which a court must consider before hearing a case.

Subsection (b) and (c) of the jurisdictional statute in section 205 (c) (1) give the district court detailed guidance on the procedures which are applicable to a civil enforcement action. There is no doubt that Congress may regulate the inherent power of the courts to punish for contempt. *Michaelson v. United States, ex rel. Chicago St. P.M. and O.R. Co.*, 266 U.S. 42, 65-67 (1924). Congress has already given the courts general statutory authority to punish parties who refuse to comply with court orders. See 28 U.S.C. 1826 (civil contempt). The procedures in subsection (b) supplement these general procedures already applicable to court contempt proceedings.

First, section (b) of the jurisdictional statute makes it clear that to enforce on congressional subpoena pursuant to this new section, a House, committee, or subcommittee must apply to the District Court for an order to direct a recalcitrant party to comply with the subpoena or order forthwith. Compliance with the court order should normally be made before the court, not to the House of Congress or committee. If the party has been subpoenaed to produce documents, the court should turn over any documents produced to it to the House or committee. In cases where a witness has been subpoenaed to give testimony, it may be more expeditious for the witness to appear before the House or committee, rather than before the court. In either case the court should avoid requesting the committee to convene any meeting when it appears that the recalcitrant party will remain recalcitrant.

Section (b) of the jurisdictional statute then makes explicit the intention of the Congress that once a court has ordered a party to obey a congressional subpoena, any refusal or failure of that party to obey the court order will result in that party being held in contempt of the court order. This enforcement procedure parallels that of numerous sections of the Federal code which authorize Federal agencies to seek the aid of the courts in enforcing their subpoenas through the contempt power of the courts. See, for example, 15 U.S.C. 687a(e)—Small Business Administration; 19 U.S.C. 1333(b)—(2)—National

Labor Relations Board; and 42 U.S.C. 405(e)—Social Security Administration. The constitutionality of such a procedure has been clear since the case of *I.O.O. v. Brimson*, 154 U.S. 447 (1894). A similar jurisdictional statute has been implicitly upheld *Senate Select Committee v. Nixon*, 498 F.2d 725 (D.C. Cir. 1974).

Section (b) further provides that any contempt of court proceeding under this section shall be commenced by an order to show cause before the court why the party refusing or failing to obey the court order should not be held in contempt of court. Courts have held that such notice is required of the pendency of a contempt proceeding by the due process clause of the fourth amendment when proceeding under 28 U.S.C. 1826. *Parker v. U.S.*, 153 F.2d 66 (1st Cir. 1946). Such notice need not be formal but may be inherent in the proceeding itself. *United States v. Handler*, 476 F.2d 709, 712-713 (2d Cir., 1973). Although notice would be required in the contempt proceeding, notice might not be necessary in the initial proceeding to obtain the court order when, for example, Congress seeks an order to restrain a party from destroying documents which order might be ineffective is issued after notice.

Upon such notice the party must be given sufficient time in which to prepare his defense. The amount of time which a defendant in the contempt action is given to prepare his defense will depend on the circumstances. *Id.* at 713; *United States v. Weinberg*, 439 F. 2d 743, 746 (9th Cir., 1973); *In re Vigil*, 524 F. 2d 209, 218-219 (10th Cir. 1972); *In re Tierney*, 465 F. 2d 806 (5th Cir. 1972). Rule 6(d) of the Federal Rules of Civil Procedure provides for 5 days notice but a different period may be fixed by the Court. In *Weinberg*, supra, contempt proceedings were conducted immediately after a witness' refusal to testify. See *United States v. Alter*, 482 F. 2d 1016, 1022 (9th Cir., 1973).

Section (b) further provides that the contempt proceedings will be tried before the judge. The Supreme Court has expressly held that in a civil contempt proceeding, a defendant has no right to a jury trial. *Shillanti v. United States*, 384 U.S. 364 (1966). Under subsection (b) and 28 U.S.C. 1826 the trial would be "summary" in nature; that is, requiring no evidentiary hearing. *In re Bart*, 304 F. 2d 631, 637 (D.C. Cir., 1962); *In re Allis*, 531 F. 2d 1391 (9th Cir. 1976); *United States v. Danenza*, 528 F. 2d 390, 392 (2d Cir. 1975); *In re Sadin*, 509 F. 2d 1252, 1255-56 (2d Cir. 1975).

In providing that civil contempt has occurred, it is not necessary to prove that the party intends to violate the court's order. *McComb v. Jacksonville Paper Co.*, 336 U.S. 187 (1949). It would, however, be necessary to show that the defendant had knowledge of the court's order. *Baglin v. Cusenier Co.*, 221 U.S. 580 (1910). Similarly, proof beyond a reasonable doubt is not required to prove civil contempt as it would be in a criminal contempt. *McComb, Supra*, 336 U.S. at 191. See *United States v. Greyhound Corp.*, 363 F. Supp. 525 (N.D. 111. 1973).

The nature of defenses which can be raised in such a hearing might include a privilege against self-incrimination, lack of compliance with the applicable congressional procedures, or an inability to comply.

*Watkins v. United States*, 354 U.S. 178 (1957); *Yellin v. United States*, 374 U.S. 109 (1963); and *Maggio v. Feitz*, 333 U.S. 56, 76 (1948). By enacting a separate contempt statute rather than merely relying on 28 U.S.C. 1826, Congress intends to signify that the array of defenses which could normally be raised under that statute may well be inapplicable to a proceeding involving a congressional subpoena. The words "just cause shown" in section 1826, and similar statutes are not carried forward in subsection (b) for precisely this reason.

It is clear that in a contempt proceeding, the defendant may not challenge the validity of the initial order disobedience of which led to the contempt proceeding. *Oliett v. Hammonds*, 305 F. 2d 565, 570 (5th Cir. 1962). *U.S. v. Leyva*, 513 F. 2d 774, 776 (5th Cir. 1975).

Section (b) provides that the purpose of any sanctions imposed upon a defendant be to compel compliance with the court order. This means that a defendant may be held only in civil—rather than criminal—contempt of court. When proceeding under a statute the purpose of which is to enforce an agency or congressional subpoena, civil contempt generally has been held to be the appropriate remedy. *Penfield Co. v. SEC*, 330 U.S. 585 (1947). Absent the provision in subsection (b), however, sanctions for criminal contempt of court could be imposed. See *Cheff v. Schnackenberg*, 384 U.S. 373, 378 (1966). Civil contempt is distinguished from criminal contempt by the fact that its purpose is not punitive *per se*. *Gompers v. Bucks Stove and Range Co.*, 221 U.S. 418, 441 (1911).

"Imprisonment in such cases is not inflicted as a punishment, but is intended to be remedial by coercing the defendant to do what he had refused to do." *Id.* at 442. If a defendant is imprisoned "he carries the keys to his prison in his own pocket." *In re Nevitt*, 117 F. 451, 461 (8th Cir. 1902). As soon as the defendant purges himself of contempt, all coercion is suspended.

In the case of an act of contempt which occurs in the actual presence of the court and which obstruct the administration of Justice, such as disruption in the court room, the provisions of subsection (b) do not, of course, limit the power of a court to punish a party for criminal contempt by way of a summary proceeding. See 18 U.S.C. 402; Rule 42 (a), Federal Rules of Criminal Procedure; *Ex Parte Terry*, 128 U.S. 289, 314 (1888); and *Cooke v. United States*, 267 U.S. 517 (1925). Cf. *Harris v. United States*, 382 U.S. 162 (1965).

Subsection (b) of the jurisdictional statute gives the District Court the power to serve process in any judicial district.

Subsection (b) also makes it clear that if in the process of reviewing a congressional subpoena or order the court finds that it does not meet the applicable legal standards for enforcement, the court cannot act upon this finding to affect by injunction or otherwise the congressional proceeding out of which the subpoena enforcement action has arisen. When Congress petitions the court in a subpoena enforcement action, Congress does not waive its immunity from court interference with its exercise of its constitutional powers. When the court is petitioned solely to enforce a congressional subpoena, the court's jurisdiction is limited to the matter Congress brings before it, that is whether or not to aid Congress in enforcing the subpoena or order.

Although section (b) leaves to the discretion of the court the nature of the particular sanctions to be imposed if a party remains recalcitrant, the use of the contempt power is always held to "the least possible power adequate to the end proposed." *Anderson v. Dunn*, 19 U.S. 204, 231 (1821). Section 1826 specifically limits the sentences which might be imposed on a recalcitrant witness. For example under 28 U.S.C. 1826, a prison term may not exceed the life of the court proceeding, the term of the grand jury, or 18 months. Although no similar limitation is specified in subsection (b), the term of any confinement should never exceed the pendency of the congressional investigation. Once this period has expired, confinement can no longer serve the remedial purposes of civil contempt. See *Schillitanti v. United States*, 384 U.S. 364, 371-372 (1966). The courts should generally defer to the Congress in determining when an investigation has terminated.

Recalcitrant witnesses may well argue that proceedings to enforce a House subpoena should automatically terminate upon adjournment sine die at the end of a Congress. This argument would be based on the fact that it is said in some contexts that the House—unlike the Senate—is not a continuing body. See generally "Constitution, Jefferson's Manual," and "Rules of the House of Representatives," House Document No. 416, 93d Congress, 2d session, rules Xi, clause 2 (M) (1) (A), Rule XXVI and paragraphs 386, 388, 710, and 901; "Riddick's Senate Procedure," Senate document No. 93-27, 93d Congress, 1st session, Rule XXV (4), XXXII (2) and page 776.

For this reason subsection (b) contains a provision that an action, contempt proceeding or sanction brought or imposed pursuant to this section does not terminate upon sine die adjournment at the end of a Congress if the committee involved certifies to the court that its interest in enforcement continues. The provision relates only to sine die adjournment at the end of a Congress because sine die adjournment at the end of the first session of a Congress raises no issue of continuity. The inclusion of this provision does not concede that such proceeding would otherwise automatically terminate upon such adjournment, but merely provides a mechanism for notifying the court that it does not.

If an action automatically abated upon sine die adjournment at the end of a Congress, Congress would be faced with two undesirable alternatives; one, certify a criminal contempt action instead of undertaking a civil enforcement action or two, institute one civil proceeding before Congress adjourns and then reinstitute the same case when the Congress reconvenes. The first alternative undercuts the effectiveness and availability of the civil enforcement mechanism and the second will squander judicial resources. By requiring a committee to take affirmative action to certify its continued interest in enforcement, the provision assures that recalcitrant witnesses will not languish in jail just because a committee has failed to notify a court that its investigation has terminated.

Once a committee investigation has terminated, a criminal contempt of Congress citation under 2. U.S.C. 192, et. seq., might still be referred to the Justice Department if the Congress finds this appropriate. Such prosecution for criminal contempt would present no double jeopardy problem. *In re Chapman*, 1566 U.S. 211 (1895); *Yates v. United States*,

355 U.S. 66 (1957); *United States v. Rollerson*, 449 F.2d 1000 (D.C. Cir. 1971); *City of Macon V. Massey*, 106 SE 2d 33 (1958).

In addition to incarceration, civil fines may also be imposed by a court as one means of coercing compliance with the court order; however, the purpose of such fines should never be to attempt to compensate the Congress for the unavailability of the subpoenaed information.

If an appellate court finds that a court has unlawfully issued an order to compel compliance with a congressional subpoena and wrongfully held a party in civil contempt of that order, any sanctions against the party would be withdrawn or withheld. *Oliett v. Hammond*, 305 F.2d 565, 570 (5th Cir. 1962); *Hyde Construction Co. v. Kochring Company*, 388 F.2d 501, 511 (10th Cir. 1968), Cf. *Walker v. City of Birmingham*, 388 U.S. 307 (1967) (criminal contempt not vitiated by holding that injunction improperly issued). There is simply no purpose in continuing to impose civil sanctions once there is no order with which to coerce compliance.

Section (c) of the jurisdictional statute emphasizes the importance of expeditious consideration of all enforcement actions. If the courts are unable to adjudicate civil enforcement actions with dispatch, the utility of the civil enforcement mechanism will be diminished, if not eliminated.

While the Congressional Legal Counsel may be authorized to bring a civil action under this jurisdiction statute pursuant to the procedures set forth in section 203 of this title, subsection (d) of the jurisdiction statute provides that the entity of Congress bringing the civil action to enforce the subpoena or order may be represented in such action by any attorneys it may designate. Thus, this jurisdictional statute does not require a House of Congress or a committee of Congress to use the Congressional Legal Counsel in bringing such an action.

However, in subsection (e) of the jurisdictional statute the standing order of the Senate which gives Senate committees standing authority to bring any legal action is limited to exclude actions under this jurisdictional statute. Otherwise, the voting, reporting, and approval required under section 205(c) to enforce a committee subpoena could be easily circumvented. Subsection (e) of the new section 1364, therefore, provides that a civil action commenced or prosecuted under this section may not be authorized pursuant to the Standing Order of the Senate "authorizing suits by Senate Committees" (S. Jour. 572, 70-1, May 28, 1928).

Finally, the last subsection of the jurisdictional statute, subsection (f) makes it clear that the civil enforcement mechanism may be used by any standing, select, or special committee, or the Technology Assessment Board, which also has subpoena power.

Subsection (e) (2) of section 213 simply adds the description of the new jurisdictional statute, namely: "1364, Congressional Actions" to the analysis of chapter 85 of title 28, United States Code.

Subsection (g) expressly provides that the enactment by Congress of a mechanism for the civil enforcement of a subpoena does not affect the power and authority and absolute discretion of Congress or an appropriate House of Congress, to choose to enforce a subpoena by either of the two existing methods rather than by initiating a civil enforcement action. The first of these two existing methods is certification by



the President Pro Tempore of the Senate or the Speaker of the House of Representatives to the United States Attorney for the District of Columbia of a matter pursuant to section 104 of the revised statutes (2 U.S.C. 194). This procedure provides for a criminal prosecution brought by the United States Attorney to punish an individual or entity for refusing to comply with a congressional subpoena or order. The second existing method of enforcement is for either House of Congress to hold an individual or entity on contempt of such House of Congress. This method is commonly referred to as trial before the bar of Congress. While historically this method has been used numerous times, it is generally considered to be time consuming and not very effective. No one has been tried for contempt of Congress before the bar of Congress since 1945.

In exercising its discretion with respect to enforcing a subpoena or order, Congress may decide that it is important to secure production of the subpoenaed documents or compliance with the order and that a civil action is quicker and more effective in achieving these purposes. In other cases, Congress may decide that it is more important to punish the individual or entity who has refused to comply with a Congressional demand and thereby to deter violations by others. In that case the contempt should be certified to the United States Attorney for the District of Columbia for criminal prosecution. This title provides Congress with another method to enforce its subpoenas and orders—a method which should prove less cumbersome to use—without restricting the discretion of Congress to utilize other enforcement mechanisms available to Congress.

#### SECTION 206—INTERVENTION OR APPEARANCE

Section 206 provides that the Congressional Legal Counsel may be directed to intervene or appear as *amicus curiae* on behalf of Congress in a pending legal action.

There are a number of legal actions in which Congress is not a party, but where the vital interests of Congress will be affected by the decision in that action. In such cases, it is desirable for Congress to have an opportunity to consider whether it is in its interests to intervene as a party or appear as *amicus curiae* to present the legal position of Congress for the consideration of the court.

Under section 206 Congress may, by resolution or concurrent resolution, direct the Congressional Legal Counsel to intervene or appear *amicus curiae* in a legal action. Congress may direct such intervention or appearance to defend the powers and responsibilities of Congress under the Constitution of the United States.

In litigation in which the powers and responsibilities of Congress are placed in issue, Congress' vital interests are directly at stake and the vigorous representation of those interests should not be left to others. If it is Congress which will be directly affected by any court interpretation of the powers and responsibilities of Congress, Congress should have the discretion to authorize its attorney to appear in such a legal action and vigorously defend the powers and responsibilities of Congress under the Constitution. If another party already appearing in a case—including the Justice Department—is already vigorously defending the powers and responsibilities of Congress and

intervention by Congress will not increase the likelihood that the court will broadly construe these powers and responsibilities, Congress may determine not to intervene.

The powers and responsibilities which Congress may intervene or appear as amicus to defend may include the congressional veto or cases in which a third party is attempting to interfere with compliance with a congressional subpoena. Such intervention or appearance may involve defense of the constitutionality of an Act of Congress.

Subsection (a) makes it clear that when Congress determines to intervene in a case—rather than appear as amicus—Congress must have standing under Article III, Section 2 of the Constitution. In determining whether to authorize the Counsel to intervene in a case, the Congress must make a determination of whether it believes constitutional standing exists. Sections 206 and 213 express Congress' intent to grant the court standing for Congress to intervene to the extent Congress can do so under the Constitution. Of course, the determination of whether or not standing actually exists must be made by the court before which the Counsel appears. Section 213(a) makes it clear that Congress may intervene only where the court determines that Congress, in fact, has constitutional standing to do so.

Section 206, therefore, directs Congress to address this question before the Counsel is directed to attempt to intervene and section 213 directs the court to determine whether Congress in fact has the standing that the counsel asserts.

Whether or not Congress is determined to have standing to intervene, Congress has the right to appear as amicus curiae unless such appearance is untimely and would significantly delay the pending action. Whether or not Congress chooses to intervene or appear as amicus will depend on whether it is in the interests of Congress to have all of the rights of a party such as the right to engage in discovery, to call or cross-examine witnesses, or to appeal. These rights are generally only extended to intervenors. In many cases appearance as amicus curiae will suffice for Congress to protect its powers and responsibilities.

The Counsel may only be directed to intervene or appear as amicus in the name of Congress, a House of Congress, an officer, committee or subcommittee or a committee or subcommittee chairman. The counsel may not be directed to intervene or appear in the name of an individual Member or any group of Members. Primarily the Counsel should represent the institutional interest of Congress. Individual Members have often brought successful legal actions in their own names which have benefitted Congress as an institution, but for the Counsel to represent such individual Members is likely to involve partisan considerations. Such Members generally have little difficulty in finding attorneys willing to intervene or appear in their name at no fee or at a fee which the Members, co-intervenors or co-amicus can pay. On occasion Congress has and should continue to reimburse individual members for their legal fees in representing congressional interests. In contrast, Congress, a House of Congress, an officer or a committee or subcommittee will be authorized to intervene or appear when the intervention or appearance is intimately involved with the performance of their official duties or

with subject matter clearly within their jurisdiction. The cost of retaining private counsel for each such case will often be substantial. Normally, such intervention or appearance has an essentially defensive purpose, such as restraining a third party from interfering with the enforcement of a congressional subpoena. Normally, intervention in the name of an entity like a committee should be couched in terms of the name of the chairman thereof.

Subsection (b) imposes upon the Congressional Legal Counsel the responsibility to notify the Joint Leadership Group of any legal action in which the Congressional Legal Counsel believes that intervention or appearance as *amicus curiae* by Congress in the interests of Congress. Therefore, the Congressional Legal Counsel has the responsibility to continually monitor legal actions which might be of interest to Congress. The notification by the Congressional Legal Counsel to the Joint Leadership Group must contain a description of the legal proceeding together with the reasons that the Congressional Legal Counsel believes call for intervention or appearance as *amicus curiae* by Congress. It is the responsibility of the Joint Leadership Group to have his notification published in the Congressional Record for the information of the Senate and the House of Representatives. By this procedure, the Congressional Legal Counsel can bring the existence of legal actions to the attention of the Congress and Congress can then decide when intervention or appearance *amicus curiae* is appropriate. In no case can the Counsel intervene or appear as *amicus* unless directed to do so by at least one House of Congress.

Subsection (c) makes it clear that when the Congressional Legal Counsel is directed to intervene or appear as *amicus curiae* in a legal action, the intervention or appearance as *amicus curiae* by the Congressional Legal Counsel must be limited to argumentation with respect to the constitutional issues relating to the powers and responsibilities of Congress. Thus, if the Congressional Legal Counsel is not authorized to represent a Member, officer or employee of Congress under section 204, the Congressional Legal Counsel may still be directed to intervene or appear as *amicus curiae* in that action. However, when this occurs, the Congressional Legal Counsel may not take a position on behalf of the Member, officer or employee with respect to any issues in the litigation other than those relating to the powers and responsibilities of Congress. This clear limitation would make it possible for Congress to determine to intervene or appear in a criminal case affecting Congressional interests, without directly representing the defendant.

#### SECTION 207—IMMUNITY PROCEEDING

Under section 207 a House or a committee may direct the Congressional Legal Counsel to assist such House or committee or subcommittee in requesting the United States District Court to issue an order granting immunity, pursuant to section 201(a) of the Organized Crime Control Act of 1970 (18 U.S.C. 6005). Under that statute, a procedure is established whereby a House of Congress or a committee or subcommittee may request that a witness be ordered to testify or provide other information which he refuses to give or provide on the basis of his privilege against self-incrimination.

## SECTION 208—ADVISORY AND OTHER FUNCTIONS

Section 208(a) requires the Congressional Legal Counsel to advise, consult and cooperate with other individuals and entities which provide assistance to Congress.

Paragraph (1) of subsection (a) requires the Counsel to advise, consult, and cooperate with the United States Attorney for the District of Columbia with respect to any criminal proceeding for contempts of Congress certified pursuant to section 104 of the revised statutes (2 U.S.C. 194). Since the Congressional Legal Counsel will advise and cooperate with committees in the course of their investigations and with the leadership in the course of a consideration of a citation for contempt of Congress, it is appropriate for the Congressional Legal Counsel to cooperate with the United States Attorney for the District of Columbia when a matter is referred to the United States Attorney for criminal prosecution for Contempt of Congress. The Congressional Legal Counsel may, for example, serve as liaison with the United States Attorney and assist him in transferring evidence needed to prosecute such a case. At the same time, the Congressional Legal Counsel can monitor the activities of the United States Attorney and insure that the interests of Congress are vigorously represented.

Paragraph (2) of subsection (a) requires the Counsel to advise, consult and cooperate with the appropriate committee in each House with responsibility for identifying court proceedings or actions which are of vital interest to Congress or to either House of Congress. The Senate Rules Committee and Select House Committee on Congressional Operations are presently responsible to identify such proceedings.

The court is empowered to grant such an order, in which case the testimony given by the individual under the order may not be used against the individual in any criminal case except a prosecution for perjury. Such a grant of immunity may be issued by a court "upon the request of a duly authorized representative of the House of Congress or the committee concerned." Section 203(d) of this title authorizes the Congressional Legal Counsel to serve as the duly authorized representative of a House of Congress or a committee or subcommittee if that committee or subcommittee or House of Congress has complied with all the necessary requirements of section 201(a) of the Organized Crime Control Act of 1970.

18 U.S.C. 6005(b) (2) requires that any request for immunity made by a committee or subcommittee of a House of Congress has complied with all the necessary requirements of section 201(a) of the Organized Crime Control Act of 1970. 18 U.S.C. 6005(b) (2) requires that any request for immunity made by a committee or subcommittee of a House of Congress "must be approved by an affirmative vote of two-thirds of the members of the full committee." This same two-thirds voting requirement is applied to any directives from a committee or subcommittee to the Counsel in section 203(d), above.

A request by a committee under section 207 and the emergency and routine authorization procedure in section 203(e) are the only occasions when the Congressional Legal Counsel may undertake any

representational activities without being specifically directed to do so by at least one House of Congress.

Paragraph (3) of subsection (a) requires the Congressional Legal Counsel to advise, consult and cooperate with the agencies and offices which provide assistance to Congress of a nature which often involves legal issues; namely the Comptroller General, the General Accounting Office, the Office of Legislative Counsel of the Senate, the Office of Legislative Counsel of the House of Representatives and the Congressional Research Service. None of these organizations are presently performing any of the responsibilities assigned to the Congressional Legal Counsel. However, while drafting legislation or researching legal questions on behalf of committees or Members of Congress, the agencies should have access to and the cooperation of the Congressional Legal Counsel.

A proviso has been added to paragraph (3) to make it explicit that the authority granted to the Congressional Legal Counsel in this statute should not be construed to affect or infringe upon any functions, powers, or duties of the Comptroller General of the United States.

Paragraph (4) of subsection (a) requires the Congressional Legal Counsel to assist a Member, officer or employee of Congress in obtaining private legal counsel if that Member, officer or employee is not represented by the Congressional Legal Counsel. The Congressional Legal Counsel is authorized to assist the individual in obtaining private counsel without respect to the reason the individual chooses not to be represented by the Congressional Legal Counsel or the reason that Congress or the appropriate House of Congress may have chosen not to authorize such representation.

To be of assistance under this section, the Congressional Legal Counsel should take steps to determine which attorneys are experienced in dealing with different types of cases involving Members, officers and employees of Congress and with defending the powers of the legislative branch of the government. The assistance required of the Counsel under this section is in conformity with the canons of ethics of the American Bar Association which require an attorney to assist an individual in obtaining private legal counsel when that attorney is not able to provide legal representation for the individual.

Paragraph (5) of subsection (a) requires the Congressional Legal Counsel to advise, consult and cooperate with the President Pro Tempore of the Senate, the Speaker of the House of Representatives, the Parliamentarians of the Senate and House of Representatives, the Secretary of the Senate, the Clerk of the House of Representatives, and the Sergeant-at-Arms of the Senate and House of Representatives regarding subpoenas, orders or requests for withdrawal of papers presented to the Senate, or the House of Representatives or which raise a question of the privileges of the Senate or the House of Representatives. Receipt of such subpoenas or orders have become frequent in recent years. Over 100 such subpoenas or orders have been reported to the House of Representatives over the last five years.

Increasingly, defendants in criminal actions are subpoenaing information in the possession of committees of Congress, then using a refusal of that committee to turn over the information as a ground for

seeking the reversal of their convictions. Similarly, parties to legal actions have issued numerous subpoenas to Congressional employees in the course of widespread discovery efforts. The removal of papers and documents in the possession of the Congress thus presents a serious constitutional and practical question for the Senate or the House of Representatives.

The Congressional Legal Counsel would be authorized under paragraph (5) to advise, consult, and cooperate with the leadership in developing a systematic and consistent response to such subpoenas or orders and in identifying the legal consequences associated with the decision to comply or not to comply with such a subpoena or order.

Paragraph (6) of subsection (a) requires the Congressional Legal Counsel to advise, consult and cooperate with committees and subcommittees in the promulgation and revision of their rules and procedures for the use of Congressional investigative powers and with respect to questions which may arise in the course of any investigation. The conduct of a proper Congressional investigation is complex and fraught with many legal technicalities. Knowledge of court rulings in this area is essential to make sure that the investigation is conducted so as to avoid or anticipate litigation and to ascertain that Congressional interests will prevail. An example of this problem is the criminal prosecution of Edwin Reinecke for perjury before a Congressional committee. The indictment of Mr. Reinecke was dismissed by a Federal court because the committee before which Mr. Reinecke testified had not published its rules and procedures in the Congressional Record as required. Other contempt actions have been dismissed because of the failure of Congressional committees to follow proper procedures with respect to quorum requirements, notice and other technical matters.

The advice of the Congressional Legal Counsel at an early stage of the Congressional investigatory process will be as valuable or more valuable than representational assistance on behalf of the committee after the committee has taken actions which later become the subject of the legal action. Of course, the effectiveness of the Congressional Legal Counsel in performing this preventative function will be directly dependent on the desire and willingness of the committees and subcommittees to utilize the assistance of the Congressional Legal Counsel. In no sense will the Counsel be able to substitute his judgment for that of the committee or subcommittee.

The Committee on Governmental Affairs received testimony last session from attorney's involved in the work of the Senate Select Committee on Presidential Campaign Activities (the "Watergate" Committee) that when they undertook their investigative efforts, there was little or no expert advice available in the Congress with respect to how to proceed with a Congressional investigation. The matters which arose, such as the drafting of committee procedures and the proper manner in which to issue and enforce subpoenas, each had to be researched by the Committee anew. The litigation experience of a Congressional Legal Counsel should be of invaluable assistance, not only to standing committees and subcommittees, but to the select and temporary committees of both Houses of Congress.

Subsection (b) of section 207 requires the Congressional Legal Counsel to compile and maintain legal research files of materials from

court proceedings which have involved Congress or an entity or individual associated with Congress. Presently, committees in both Houses compile and maintain files of materials to assist it in identifying court proceedings of vital interest to Congress; however, the files are not compiled or maintained for active use in litigation, which is the purpose of the requirement of this section. The Department of Justice does not index their research files and materials on the basis of whether or not they involve Congress, nor does the Department make its research files available on a routine basis.

Subsection (b) also provides that public court papers and other research memoranda which do not contain information of a confidential or privileged nature will be made available to the public. The manner and extent to which this material will be made available to the public must be consistent with the applicable procedures set forth in any rules of the Senate and the House of Representatives which may apply, and must be consistent with the interest of Congress. For example, a memorandum prepared in the course of an ongoing litigation matter might be withheld from public inspection during the course of the litigation if the information in the memorandum has not been incorporated in public court papers and if the public release of the memorandum might adversely affect the Congressional position in the pending litigation. Memoranda of a factual nature which contain information of a confidential nature could not be released. Section 201(g) makes it clear that the attorney-client privilege applies to all contacts between the office and its clients. The access to research materials of a non-confidential nature by private attorneys representing Members or other individuals not represented by the Counsel will be very much in the interests of Congress.

Subsection (c) provides that the Congressional Legal Counsel shall perform such other duties consistent with the purposes and limitations of this title as the Congress may direct. Under no circumstances is it intended that this subsection be utilized to authorize the Counsel to bring any action against the executive branch either to compel an officer of the executive branch to enforce the law or to challenge a claim of executive privilege.

In contrast, it would be proper for Congress to authorize the Counsel to intervene in a case to modify a court protective order which controlled access to documents under subpoena by a committee or subcommittee. The Senate Intelligence Committee has sought precisely this kind of relief in one case.

#### SECTION 209—DEFENSE OF CERTAIN CONSTITUTIONAL POWERS

Section 209 sets forth certain substantive legal positions which the Congressional Legal Counsel must take when he is performing representational duties under this title. The section states that whenever the Congressional Legal Counsel is performing a function under sections 204, 205, 206 or 207, the Congressional Legal Counsel must defend vigorously, when placed in issue, the Constitutional powers and responsibilities of Congress. Paragraphs (1) through (5) of section 209 itemize specific constitutional powers of Congress which

the Congressional Legal Counsel must always vigorously defend when they are placed in issue in a legal matter in which the Congressional Legal Counsel is participating. Paragraph (6) requires the Congressional Legal Counsel to defend all constitutional powers and responsibilities of Congress which have not been specifically enumerated. Paragraph (7) requires the Congressional Legal Counsel to vigorously defend the constitutionality of statutes enacted by Congress when the question of the constitutionality of the statute arises in the course of a litigation matter in which the Congressional Legal Counsel is involved.

The purpose of this section is to prevent the Congressional Legal Counsel from taking a position on behalf of a particular client which is adverse to the constitutional powers and responsibilities of Congress or the constitutionality of a statute enacted by Congress. If such a situation should present itself, under section 210, the Counsel would be required to notify the Joint Leadership Group that he has a conflict between the interest of his client and the specific requirements of section 209 and to request that the Joint Leadership Group determine how the conflict should be resolved under the procedures in section 210 below. Resolution of such a conflict must be consistent with the requirements of Section 209. The express requirements of section 209, therefore, serve to notify any individual or entity to be represented by the Counsel of the substantive positions he must take. Give this notice, the occurrence of conflicts between these substantive positions and the best interest of given individuals should be rare. Finally, section 209 will impress on the Legislative Counsel that his ultimate client is always the Congress itself.

#### SECTION 210—CONFLICT OR INCONSISTENCY

Section 210 establishes a procedure for the resolution of any conflicts or inconsistencies which may occur between the representation of a party by the Congressional Legal Counsel and the other responsibilities of the Congressional Legal Counsel as set forth in this title or as set forth in the professional standards and responsibilities of the legal profession. If any such conflict should arise, the Congressional Legal Counsel is required to notify the Joint Leadership Group and any party the Congressional Legal Counsel is representing or who is entitled to representation under this title, of the existence and nature of the conflict or inconsistency. Because at least one House of Congress must direct the Counsel to undertake any representational activities, Congress should be able to avoid most conflicts or inconsistencies. The substantive requirements of section 209 should further reduce the incidence of conflicts. Finally, section 210 is drafted so that the Counsel must notify the Joint Leadership Group if he becomes aware of the possibility of a conflict even before the Counsel is directed to commence such representation.

Subsection (b) provides that upon receipt of that notification, the Joint Leadership Group is required to recommend what action should be taken to avoid or resolve the conflict or inconsistency. If the recommendation of the Joint Leadership Group is made by a two-thirds vote, the Counsel must take the steps recommended to resolve the conflict or inconsistency. Otherwise, the Joint Leadership Group must



take steps to publish in the Congressional Record of the appropriate House or Houses of Congress the Congressional Legal Counsel's notification of conflict or inconsistency and the recommendation of a majority of the Joint Leadership Group with respect to how to avoid or resolve that conflict or inconsistency. At this point, the Congress or the appropriate House of Congress has a period of 15 days from the date of publication of this material in the Record to direct the Congressional Legal Counsel to resolve the conflict or inconsistency in a manner other than that recommended by a majority of the Members of the Joint Leadership Group from the appropriate House or House of Congress. If the Congress or the appropriate House of Congress takes no action, or if it endorses the recommendation of the Joint Leadership Group, the Congressional Legal Counsel must avoid or resolve the conflict or inconsistency in the manner recommended by the Joint Leadership Group. Otherwise, the Congressional Legal Counsel must comply with the directive of Congress or the appropriate House of Congress.

The procedures set forth in this section are intended to be internal checks on the operation of the Office of Congressional Legal Counsel and any instruction or determination with respect to a conflict or inconsistency made pursuant to this subsection may not be reviewed in a court of law. This section does not create rights in any party to contest actions under this section in a court of law. Rather, this section is a procedure for the internal control of an employee of the Congress.

Subsection (c) describes how the time periods referred to in subsection (b) are to be computed.

Subsection (d) restates the present procedure for authorizing the reimbursement of any Member, officer or employee of the Congress for the cost of his legal counsel. If a Member, officer or employee chooses not to be represented by the Congressional Legal Counsel, or for some other reason is not represented by the Congressional Legal Counsel, the appropriate House of Congress has the option of reimbursing that individual for the cost reasonably incurred in obtaining representation. This provision does not require the House of Congress to reimburse the individual and does not set any standards for reimbursement. Where, however, the operation of section 210 results in the Counsel withdrawing his representational services, Congress may wish to give special weight to any subsequent request for reimbursement. Reimbursement would be less appropriate if no reason other than personal preference motivates the choice of private counsel.

Section 211(a) contains detailed procedures for the consideration of any resolution or a concurrent resolution which is intended to authorize representational activity by the Congressional Legal Counsel under this title. The effect of subsection (a) is to limit debate on such a resolution or concurrent resolution to a period of 10 hours. With respect to any resolution except one involving the enforcement of a subpoena by a civil action, the resolution or concurrent resolution may not be referred to a committee for consideration. The procedures for consideration of such a resolution are patterned after those procedures contained in the Congressional Budget Act. Any use of these procedures in a wholly unrelated matter to delay consideration of that other matter would be improper under this title.

Subsection (b) defines the term "committee" for the purposes of this title as including standing, select, special and joint committees established by law or resolution as well as the Technology Assessment Board. The definition of committee is intended to be broadly interpreted and inclusive of all committees, board, commissions and agencies composed of Members of Congress.

Subsection (c) specifies that the rule changes contained in section 211(a) are enacted pursuant to the rulemaking authority of the Senate and the House of Representatives. It recognizes that under the Constitution either House retains the full right to subsequently change the rules established by section 211 insofar as they apply to such House, regardless of the actions of the other House.

#### SECTION 212—ATTORNEY GENERAL RELIEVED OF RESPONSIBILITY

Section 212 establishes a procedure which will avoid any conflicts between the Department of Justice and the Congressional Legal Counsel or any overlap during the transition period between these two offices with respect to providing legal services for the defense of Congressional interests. The section provides that upon receipt of a written notice from the Congressional Legal Counsel that the Congressional Legal Counsel has undertaken a form of representational service under section 204(a) of this title, the Attorney General will no longer have any responsibility or authority to represent the Congressional interest in that proceeding.

The Congressional Legal Counsel must clearly specify the action and proceeding involved and the specific party which the Congressional Legal Counsel will be representing. With respect to these parties and actions, the Attorney General is relieved of any responsibility to provide representational service and the Attorney General has no authority to perform any such representational service except with the approval of the Congressional Legal Counsel or either House of Congress. Finally, the Attorney General is required to transfer to the Congressional Legal Counsel all materials relevant to the representational services undertaken by the Congressional Legal Counsel as authorized under section 204(a).

The proviso in subsection (a) makes clear that nothing in this section alters any existing rights of the Attorney General to intervene or appear as amicus in an action in which the Congressional Counsel is already appearing.

Subsection (b) of section 212 sets forth a rational procedure for communication between the Attorney General and the Congress in a vital area where communication presently exists on an ad hoc basis. Presently, when the constitutionality of a statute enacted by Congress is challenged in a legal proceeding where the United States is not a party, notice of this fact is given to the Attorney General and the Attorney General is given an opportunity to intervene in that action on behalf of the United States. The clear intent of Congress in giving the Attorney General that responsibility was for the Attorney General, on behalf of the United States, to defend the constitutionality of that statute.

However, it is not unusual for the United States to be a party in a legal action in which the constitutionality of a statute is at issue and

for the Attorney General or Solicitor General to make a determination not to appeal a court decision adversely affecting the constitutionality of that statute. Very often this decision is made for legitimate tactical reasons such as the fact that the case before the court did not present the best fact situation for defending the statute. However, it is possible for the Department of Justice to base its decision not to appeal a finding adversely affecting the constitutionality of a statute upon a consideration with which Congress, as a co-equal branch of the government, would not agree. Therefore, subsection (b) requires the Attorney General to notify the Congressional Legal Counsel with respect to any proceeding in which the United States is a party or has intervened and the Attorney General or Solicitor General has made a decision not to appeal a court decision adversely affecting the constitutionality of a statute enacted by Congress. The Attorney General must so notify the Congressional Legal Counsel in such time as will enable the Congressional Legal Counsel to attempt to intervene in that legal proceeding pursuant to the procedures for intervention set forth in section 206 of this title. This procedure will give the Congress notice of the instances in which the Justice Department decides not to defend the constitutionality of a statute by failing to appeal an adverse decision and, thereby, permit the Congress to make arrangements for intervention. Upon intervention in such action, Congress may appeal such adverse finding with respect to constitutionality.

Of course, Congress must establish that it has standing to intervene. All subsection (b) does is make sure that Congress is aware of the government's decision not to appeal. Nothing in the subsection implies whether or not Congress would have standing to intervene. Section 213 governs the question of standing and makes clear that it is the court—not the Attorney General or Congress—which must make that determination as far as constitutional requirements are concerned.

#### SECTION 213—PROCEDURAL PROVISIONS

Subsection (a) of section 213 establishes the standards a court is to apply in determining whether the Congressional Legal Counsel may intervene as a party or file a brief *amicus curiae* on behalf of Congress under section 206 of this title. This section states that such intervention as a party or participation as *amicus curiae* is of right and not a matter for the discretion of the court. However, such participation may be denied by the court upon an express finding that such intervention or filing is untimely and would significantly delay the pending action, or that Congress does not have standing under Article III of the Constitution to intervene as a party.

The power of Congress to determine the proper parties to participate in litigation or as a friend of the court is unquestioned as long as the basic constitutional requirements of case or controversy are complied with.

By stating that Congress may intervene or appear as of right, this section directs its attention to the discretionary and statutory considerations that courts apply in determining who may intervene or file a brief *amicus curiae*. It is the intention of Congress to give itself that

right under section 206 of this title unless such intervention or appearance as amicus curiae would significantly delay the pending action, or no standing under Article III of the Constitution is established. Congress does not need standing to appear as amicus curiae.

Under subsection (b) the attorneys working in the Office of Congressional Legal Counsel are entitled to enter an appearance in any proceeding before a court of the United States without compliance with any requirement for admission to practice before that court. This authority only applies to proceedings in which the attorney is performing functions authorized under this title, and is not applicable to an appearance before the United States Supreme Court.

Subsection (c) specifies that nothing in this title can be construed by a court of law to confer standing on any party seeking to bring an action against an individual or entity associated with Congress. Thus, a provision permitting Congress to utilize a civil proceeding to enforce a subpoena does not in turn give an individual any standing or a court any jurisdiction to consider legal actions against Congress if such standing or jurisdiction did not exist prior to the enactment of the statute.

#### SECTION 214—TECHNICAL AND CONFORMING AMENDMENTS

Section 214 contains certain technical and conforming amendments.

#### SECTION 215—SEPARABILITY

Section 215 contains a separability clause which states that if any part or application of this title is held invalid, the remaining parts, provisions or applications of the title shall not be affected thereby.

#### SECTION 216—AUTHORIZATION OF APPROPRIATIONS

Section 216 authorizes appropriations for each fiscal year through September 30, 1982 in such sums as are necessary to carry out the provisions of this title. A limited authorization period was chosen so that Congress can review the operations of the Office of Congressional Legal Counsel after an approximately four-year period and make a determination whether such an office has been effective in accomplishing the purposes for which it was established.

Until sums are first appropriated, but for a period not to exceed one year, the expenses of the Office are to be paid from the contingent fund of the Senate upon vouchers approved by the Counsel. During this period the Counsel and the committees which will approve the budget for the Office can gain a firm understanding of the extent of the activities of the Office.

### C. TITLE III—FINANCIAL DISCLOSURE

#### SECTION 301—INDIVIDUALS REQUIRED TO REPORT

Section 301 sets forth which individuals must file a public financial disclosure report. Subsection (a) states that any individual who is an officer or employee designated under subsection (b) and who performs

the duties of his position or office for a period in excess of 60 days in any calendar year must file on or before May 15 of the next year a report as required by section 302 containing a full and complete financial statement for that calendar year. An officer or employee who holds a covered position for only part of a year must file a financial disclosure report covering the entire year if he held a covered position for in excess of 60 days during the year. The report would have to be filed by May 15 of the next year.

Paragraphs (1) through (6) of subsection (b) describe which officers and employees are referred to in subsection (a) described above. The first four paragraphs state that the following individuals are covered: (1) the President, (2) the Vice President, (3) each Member of Congress, and (4) each justice or judge or other adjudicatory official of the judicial branch of the United States and of the judicial branch of the government of the District of Columbia. Therefore, in addition to a justice or judge appointed under Article III of the Constitution for a life term, this provision covers other adjudicatory officials of the judicial branch such as bankruptcy judges and magistrates, whether or not such officials are paid at a rate equal to or in excess of that set for an employee holding a grade of GS-16 (as are covered under paragraph (5) described below).

Paragraph (5) of subsection (b) is the general provision covering officers and employees of all three branches of the Federal government. Paragraph (5) states that each officer and employee of an executive agency, as defined in section 105 of title 5, United States Code, whose position is classified at a grade of GS-16 or above of the General Schedule prescribed by section 5332 of title 5, United States Code, is covered by this subsection, and, therefore has to file a public financial disclosure report. Thus, anybody in the executive branch classified at levels GS-16, GS-17 or GS-18 of the General Schedule would be covered.

In addition, paragraph (5) covers any officer or employee of an executive agency who is in a position at a comparable or higher level to an employee classified at the grade of GS-16. In the executive branch, there are a number of pay schedules other than the General Schedule used to determine the reimbursement of officers and employees. One such schedule is the Executive Schedule provided for in subchapter II of title 5. Any officer or employee whose position is classified at levels I through V of the Executive Schedule would be covered by this subsection because they are in positions in the executive branch at a comparable or higher level than GS-16 of the General Schedule. There are also a number of other pay schedules used by the Foreign Service, Veterans Administration and other agencies within the executive branch. It will be the responsibility of the Office of Government Ethics in the Civil Service Commission to establish which grade levels in these other pay schedules are equivalent to or higher than level GS-16 of the General Schedule. The Committee has been informed by the Civil Service Commission that the following are the comparable pay levels for some of the other executive branch pay schedules: the Foreign Service—grade 0-2; the Veterans Administra-

tion—Director grade; ERDA—grade GG; AID—grade FC-13; Tennessee Valley Authority—SM Level 8.

Generally each of these grades of the respective pay schedules compensate an individual (at step 1 of that grade) at a rate of approximately \$39,600 a year. The Committee has been informed by the Administration that approximately 13,000 executive branch employees would be covered by this title.

Whether or not officers and employees of an executive agency are covered by this subsection is determined by whether their pay grade is comparable to or greater than GS-16. Therefore, some employees classified at GS-15 who earn more money than an employee at GS-16, step 1, will not have to file a financial disclosure statement. It is the level of an executive branch employee's responsibility, as determined by the grade at which he is classified, rather than the amount of pay, that is the determining factor. However, with respect to the legislative and judicial branches, which generally do not utilize pay schedules classified by grade, it was necessary to define the employees covered by this subsection by the rate of compensation which that employee receives. (The General Accounting Office, which is a legislative branch agency but is an executive agency, as defined in section 105 of title 5, is the exception to this statement. GAO officers or employees at level GS-16 or a comparable or higher level are covered by this title.)

Paragraph (5) of subsection (b) provides that each officer or employee of the United States not employed by an executive agency must file a public financial disclosure report if they are compensated at a rate equal to or in excess of the minimum rate of pay prescribed for employees holding the grade of GS-16. The minimum rate for an employee at GS-16, step 1, is presently \$39,600 a year. Therefore, anybody who is employed by the judicial or legislative branches of the government and is paid at a yearly rate in excess of \$39,600 a year is required to file a financial disclosure statement. It should be noted that the key factor is the rate of compensation and not the actual amount of money earned during a calendar year.

The definition of which judicial and legislative branch employees were covered by this title was pegged to grade GS-16 in the General Schedule because the rate of compensation for this level will increase with inflation; thus, more and more employees will not be covered by the public financial disclosure requirement over the years simply because the amount of money they are paid increases due to inflation. It will be the responsibility of the supervising ethics offices of the legislative and judicial branches to inform employees what pay level requires the filing of a financial disclosure report each year based on the rate of pay for employees holding the grade of GS-16 under the General Schedule that year.

Paragraph (6) of subsection (b) provides that a member of a uniformed service whose pay grade is at or in excess of O-7 under section 1009 of title 37, United States Code, is also covered by this title. It was the Committee's feeling that the grade of O-7 was roughly comparable to the grade of GS-16 of the General Schedule. Any members of a uniformed service who are not compensated pursuant to the same pay schedule of which "O-7" is a part will be covered if their pay grade is at or in excess of that of O-7.

Subsection (c) of section 301 provides for the filing, within 30 days of the day on which an officer or employee first assumes the position described in subsection (b), of an abbreviated financial disclosure form by that officer or employee. The public financial disclosure report required by subsection (a) is filed by May 15 and covers the previous calendar year. Thus, it is possible that a new employee would not have to file a public financial disclosure report under subsection (a) until as much as 18 months after first occupying a position covered by subsection (b). Therefore, the Committee felt it appropriate to require an abbreviated public financial disclosure report to be filed within 30 days of an individual first occupying a position designated under subsection (b). Contents of the abbreviated financial disclosure report required under this subsection are described in section 303(f).

Subsection (c) only requires an individual to file the report upon assuming a position covered by subsection (b) if that individual has not left another position designated in subsection (b) within 30 days prior to assuming his new position. Simply put, if someone was already covered by subsection (b) and, therefore, has already had to file a public financial disclosure statement pursuant to this statute, there is no need for that individual to file the abbreviated public financial disclosure statement upon assuming a different position also covered by subsection (b).

The same type of abbreviated public financial disclosure report is required in subsection (d) of "Presidential nominees". A Presidential nominee is defined in paragraph 308(13) as any individual appointed by the President to an office for which confirmation by and with the advice of the Senate is required or an individual nominated by the President to serve as Vice President pursuant to the 25th Amendment of the Constitution of the United States. Thus, all nominees for a position as a justice or judge of the United States will be covered, as will executive branch officials who are nominated by the President and require the advice and consent of the Senate. In addition, certain legislative branch officials who are chosen in the same manner, such as the Comptroller General and the Architect of the Capitol, would also be subject to this provision. Subsection (d) requires that these Presidential nominees file the abbreviated public financial disclosure report required by section 303(f) within 5 days of the transmittal by the President to the Senate of the nomination of that individual. However, this subsection states that, in any event, this public financial disclosure report must be filed by the Presidential nominee prior to confirmation of that individual by either House of Congress.

Subsection (d) specifically states that nothing in this Act shall prevent any Senate committee from requesting, as a condition of confirmation, any additional financial information from any person whose nomination has been referred to that committee. In the past, many Senate committees have requested financial information well beyond what will be contained in the abbreviated public financial disclosure report required under subsection (d). However, in all cases this information was not made readily available for public inspection. By including a report by Presidential nominees in this title, the Committee intends to increase the amount of information about a potential nominee which is made available to the general public in a timely fashion.

This provision does not in any way affect the authority or ability of a Senate committee (or for that matter, a committee of the House in the case of a nomination of an individual for Vice President) to obtain additional financial information on a confidential basis, nor does it affect the discretion or authority of a committee to make additional information available to the public.

Subsection (e) requires that an individual who is candidate seeking nomination for election or election to the office of the President, Vice President or Member of Congress must file a complete public financial disclosure statement as required by section 302 within 30 days of becoming a candidate or on or before May 15 of that calendar year, whichever is later. The report filed would cover the preceding calendar year. In addition, such a candidate would have to file a full public financial disclosure report on or before May 15 of each successive year the individual continues to be a candidate. Thus, if an individual becomes a candidate for President in February of 1979, that individual would have to file a full public financial disclosure report on or before May 15 of 1979 covering calendar year 1978. In addition, if that individual is still a candidate for President in 1980 (since the election is not until November of 1980) that individual would also have to file a full public financial disclosure statement on or before May 15, 1980 covering calendar year 1979. This requirement will place a candidate for any Federal elective office in the exact same position with respect to financial disclosure as an incumbent holder of that office.

Subsection (f) requires the filing of a full public financial disclosure statement as required by section 302 within 30 days after a person leaves a position designated in subsection (b) unless the individual is accepting employment in another position designated in subsection (b). Thus, a person leaving a position designated in subsection (b) in November of a calendar year, must file a full public financial disclosure report within 30 days of his departure covering the portion of that calendar year up to the date on which he left such office or position.

#### SECTION 302—CONTENTS OF REPORT

Section 302 sets out what information must be included in a full public financial disclosure report as is required to be filed under subsections 301(a), (e) and (f). The supervising ethics office (as defined in section 304(a)) for the filing individual is required to prescribe the manner and form for filing the information required by this section.

Each of the specific disclosure requirements described in detail below require disclosure of the described item held, received, owed, etc., any time during the calendar year for which the report is filed. Thus, if each holding of real property must be disclosed, any interest in real property held at any time during the calendar year for which the report is filed must be listed.

Paragraph (1) of subsection 302(a) requires a reporting individual to list the amount and the identity of each source of earned income (exclusive of any honoraria) received which exceeds \$100. The term "earned income" (as defined in subsection 308(6)) means any income



earned by an individual which is compensation received as a result of personal services actually rendered. For example, if an employee earns \$935 teaching a law school course, the employee would list \$935 received from John Jones Law School.

Paragraph (2) of subsection 302(a) requires the listing of the identity of the source, the amount and the date of each honorarium received. For example, if a reporting individual received \$1,000 as an honorarium for giving a speech, he would list the name of the group or organization paying the honorarium, the date of the speech and amount of the honorarium. Each honorarium received must be listed and described separately.

The honorarium amount listed is the net honorarium. Amounts received for the reimbursement of necessary expenses and agent's fees may be deducted to reach the honorarium amount reported. If a reporting individual received \$1,000 for a speech of which \$200 was actually spent for his transportation to and from the site of the speaking engagement and \$200 went to the agent who arranged the speaking engagement, the amount of the honorarium listed under this clause would be \$600. It should be noted that reimbursement received for expenses not related to the speaking engagement may constitute a gift which would have to be reported under subsections (b) or (c) described below. For example, if a reporting individual travels to California to make a speech, his expenses to and from California and for a reasonable time in California are reimbursable expenses associated with the speech. However, if the reporting individual stays on for a week or two in California and he is reimbursed for the expenses of that stay by the sponsor of the one speech he gave during that period, that part of the reimbursement that is for expenses other than those necessary for giving the speech is a gift and must be reported under subparagraph (b) or (c) if it exceeds the minimum thresholds specified in those paragraphs.

Honoraria received by government officials but donated to charity have in the past received special treatment. For example, an honorarium which is donated to charity and from which no tax benefit accrues to the reporting individual is not counted in the limits on honoraria contained in Senate Rule XLIV (Outside Earned Income). However, such honoraria are counted in the limit of \$25,000 under the Federal Election Campaign Act. Therefore, when an honorarium is received and donated to a charitable organization, paragraph (2) requires that that fact must be disclosed when the honorarium is reported in the public financial disclosure report required by this title.

Paragraph (3) of subsection 302(a) requires the listing of the identity of each source of income other than earned income which exceeds \$100 in amount or value, and the category of amount or value that the income received is within. This principally includes passive or investment income. When listing income other than earned income on this disclosure statement, the reporting individual might list income from IAC Stock of more than \$5,000 but not more than \$15,000. The categories of value which must be used to identify the approximate value of each item of income other than earned income are:

(A) not more than \$1,000, (B) greater than \$1,000 but not more than \$2,500, (C) greater than \$2,500 but not more than \$5,000, (D)

greater than \$5,000 but not more than \$15,000, (E) greater than \$15,000 but not more than \$50,000, (F) greater than \$50,000 but not more than \$100,000, or (G) greater than \$100,000.

Categories of value, rather than the exact value, are required when reporting investment or passive income in keeping with the use of categories of value for listing the assets which generate this income (see subsections (e) through (h) of section 302. As with the use of categories of value for identifying the value of an investment holding, a category of value for investment income provides enough information to determine the relative magnitude of any potential conflict of interest without unnecessarily invading the privacy of the reporting individual.

Paragraph (4) of subsection 302(a) explicitly states that those items defined as gifts under the special sections dealing with the reporting of items considered gifts in the scheme of this title (subsections (b) and (c) of this section) need not be reported as income under paragraphs (1) or (3) even though they may fit within the definition of income in the Internal Revenue Code.

Subsections (b) and (c) of section 302 describe what gifts must be reported. The term gift is defined (in section 308(8)) as anything of value, including food, lodging, transportation or entertainment and reimbursement for other than necessary expenses, unless consideration of equal or greater value is received. Thus, \$100 received for painting a friend's house is not a gift but is earned income. Similarly, reimbursement for transportation (or actual transportation) to and from a speech provided by the organization before which the speech was given is reimbursement for a necessary expense, and, therefore is not a gift and need not be reported.

A number of items are specifically excluded from the definition of the term "gift" for the purpose of this title: (1) a political contribution otherwise reported as required by law, (2) a loan made in a commercially reasonable manner (including requirements that the loan be repaid and that reasonable rate of interest be paid), (3) a bequest, inheritance or other transfer at death, and (4) anything of value given to a spouse or dependent in recognition of the service provided by such spouse or dependent.

Thus, a loan made to a reporting individual which required repayment but did not require the payment of interest would be a reportable gift (if received from anyone other than a relative). It is the interest foregone on the loan which is the measure of the amount of the gift. Thus, if interest on such a loan at the lowest publicly available rate for such a loan would exceed \$100 in the year covered by the financial disclosure report, the interest on the loan must be reported under subsection (c) of section 302.

Gifts received by a spouse or dependent from his employer in recognition of his service provided to that employer are excluded because such items are more closely associated with income than a gift. For example, if a spouse is given a trip for two to Mexico in recognition of being the best salesperson in the Jones Corporation, the value of that trip would not be reported as a gift.

The other key term used in the provisions requiring the reporting of gifts is "relative". This term is defined in subsection 308(14) very broadly. Gifts received from a relative, regardless of the value, do not

have to be reported. The term "relative" is only used for the purpose of excluding items from reporting requirements—it is never used to require the reporting of any income, gift, interest or holding of a relative.

Subsection (b) requires the listing of the identity of the source, a brief description of, and the value of any gifts of transportation, lodging, food or entertainment aggregating \$250 or more from one source during a calendar year, except as provided below. Thus, if a reporting individual spent a weekend at a corporate hunting lodge and the reasonable value of the lodging, food and entertainment that person received exceeded \$250, then that person would have to list on the financial disclosure statement that he received lodging, food and entertainment with an approximate value of \$300 from the H&H Company. As stated above, this subsection specifically provides that any gifts of transportation, lodging, food or entertainment from a relative need not be reported regardless of the value.

In addition, any food, lodging or entertainment received as part of the personal hospitality of an individual need not be reported. This exemption only covers food, lodging or entertainment at a personal residence of the person providing the hospitality. So, if a reporting individual visits someone at that person's summer home for a week, the value of the food and lodging received would be personal hospitality and need not be reported even if the value of such hospitality exceeds \$250. Travel on a boat or airplane owned by an individual is included in the exemption for personal hospitality unless such travel is substituting for commercial transportation. Also, entertainment in a "house" owned by a corporation, not an individual, would not constitute personal hospitality.

When reporting gifts under this subsection (and under subsection (c) covering all other gifts), gifts received from the same source must be aggregated for the purpose of determining if the value of the gift from any one source is great enough to require reporting. If one person (who is not a relative) pays for a trip of a covered employee and his spouse to New York for a weekend which trip costs \$200, no reporting is required. However, if the same individual also pays for tickets to professional football games for that covered employee which tickets have a value of over \$50, then the covered employee must report the name of the individual providing these gifts and the total value of the gifts received from the individual during the year for which the report is filed. When aggregating gifts for the purpose of determining if the \$250 minimum has been reached, any gift with a fair market value of less than \$35 need not be aggregated, and, therefore, need never be reported. So, if a covered employee received 15 \$20 lunches from the same source, nothing would have to be reported.

When an individual required to report under this title is reimbursed for (or is provided) transportation, lodging or food, such reimbursement need not be reported. For example, an individual goes to Denver to give a speech to a trade association and receives no honorarium for speaking at that trade association but is reimbursed for the individual's actual and necessary expenses, no report of that reimbursement need be made. However, if the individual is reimbursed for expenses other than necessary expenses—a would be the case if the individual spent

a week in Denver after having given the speech and then took a side trip to Aspen and the expenses for the stay in Denver and the side trip were paid by the trade association—then the reporting individual would have to list the reimbursement for other than necessary expenses as a gift under this subsection. Therefore, the individual would list the name of the trade association and the approximate value of the other-than-necessary expenses which the trade association paid for if those expenses exceeded \$250.

Subsection (c) of section 302 requires the listing of the identity of the source, a brief description of, and the value of all gifts other than those covered by subsection (b) above (gifts of transportation, lodging, food or entertainment) if the gifts aggregate \$100 or more from any one source other than a relative. Thus, if a covered employee receives a watch worth \$200, the employee would have to list that he received a watch, the name of individual or organization which gave him the watch, and the approximate value of the watch. Also, if the employee received three gifts from the same individual during the period of a year, each of which gifts was worth approximately \$50, the employee would have to list the identity of the individual who gave the gifts, a brief description of the gifts, and the approximate total value of the gifts the employee received. As with gifts of transportation, food, lodging and entertainment, gifts with a fair market value of less than \$35 need not be aggregated for the purposes of subsection (c). (Subsection (d) exempts gifts with a value of less than \$35 from the reporting requirements of subsections (b) and (c)).

The \$100 reporting requirements applies separately to each person covered by this title. Thus the reporting individual and his spouse can accept up to \$100 worth of gifts from the same source before there is any obligation to report the receipt of such gifts. However, if an item is not readily divisible and is given jointly to the reporting individual and another person, the gift must be reported as if the entire gift was given to the reporting individual. Thus, one person can give the reporting individual a \$60 statue and give another \$60 statue to the individual's spouse and there is no reporting requirement. However, if a \$120 statue is given the reporting individual and his spouse, the receipt of that gift must be reported. Each supervising office is authorized to grant waivers of the reporting requirements of subsection (c) in an unusual case. The Committee intends that this waiver authority be used very sparingly and infrequently. However, there will be situations where the motivation for a gift is obviously personal and it would be embarrassing to list either the source of the gift or the value of the gift on a public financial disclosure form. This might occur as a result of a dating relationship or other relationships of a very personal nature. In such cases a waiver of the public disclosure of such gifts should be granted by the supervising ethics office.

Paragraph (1) of subsection 302(d) provides that gifts with a fair market value of less than \$35 need not be aggregated for purposes of subsections (b) and (c).

Paragraph 2 provides that the reporting individual may deduce from the total value of gifts received from any source during the calendar year the total value of gifts given by the reporting individual to that source during the calendar year. The main purpose of this

provision to exempt the typical personal relationship from the requirements that gifts be reported.

This allows the value of gifts from a covered individual to another person to be deducted from the total of gifts received from that person. It is therefore, the net figure which is used to determine whether a report must be filed under subsections (b) and (c). However, paragraph (2) also states that if gifts with a fair market value of less than \$35 received from any source are not aggregated then gifts with a fair market value of less than \$35 given to that same source may not be deducted.

The primary purpose for reporting gifts received is to disclose any gift that might have been given to influence the official performance of a government employee's responsibilities. However, if a government employee receives \$150 in gifts from John Jones but that government employee gives \$200 in gifts to John Jones during the calendar year, it is extremely unlikely that there is an effort being made to influence anyone. This provision presumes that any reporting individual who intends to take advantage of this netting-out provision will keep accurate records of the transactions covered by this provision so that if a question does arise the records may be made available to his supervising ethics office.

Subsection (e) of section 302 requires the listing of the identity and category of value of certain property. In this subsection and a number of subsequent subsections, the concept of a category of value is used instead of requiring the disclosure of the exact value of the property, liability or transaction involved. This was done for a number of reasons. Since the purpose of the disclosure of holdings, liabilities and transactions is to identify potential conflicts of interest or situations that might present the appearance of a conflict of interest, the exact value of the holdings, liability or transaction is not needed. However, some range of value is needed to identify the magnitude of a conflict.

For example, a holding of less than \$1,000 need not even be reported because it is considered unlikely to present a conflict of interest or the appearance thereof. However, there is a significant difference between the conflict of interest, or the appearance thereof, presented by a \$2,000 holding and by a holding worth \$1,000,000. Therefore, the use of categories of value fully meets the legitimate public purpose of identifying potential conflicts and the magnitude of those conflicts, while not requiring a yearly appraisal of each holding and also minimizing the invasion of privacy involved.

The categories of value (as set forth in subsection 303(a)) used for the reporting of real property, investment holdings, liabilities and transactions (described in subsections (e) through (h)) and (1) not more than \$5,000, (2) greater than \$5,000 but not more than \$15,000, (3) greater than \$15,000 but not more than \$50,000, (4) greater than \$50,000 but not more than \$100,000, (5) greater than \$100,000 but not more than \$250,000, (6) greater than \$250,000 but not more than \$500,000, (7) greater than \$500,000 but not more than \$1,000,000, (8) greater than \$1,000,000 but not more than \$2,000,000, (9) greater than \$2,000,000 but not more than \$5,000,000, or (10) greater than \$5,000,000.

Subsection (e) (1) of section 302 requires the listing of the identity and category of value of each item of real property held, directly or in-

directly, during such calendar year, which has a fair market value in excess of \$1,000 as of the close of the calendar year for which the report is filed. Thus, any interest in real property held at any time during the calendar year for which the filing is made, even if the interest is not retained at the close of the calendar year, must be reported.

Subsection (h) (2) of section 302 describes the detail in which a holding of real property must be described. In listing real property, the reporting individual must disclose the number of acres of property (if there is more than one acre), the exact street address (except with respect to a personal residence of the reporting individual), the town, county, and state in which the property is located, and if there are substantial improvements on the land, a brief description of the improvements (such as "office buildings"). Thus, a holding of farmland might be listed as 300 acres of land on Rural Route #1 in Pine Bluff, Madison county, Wisconsin. The report might also state that there is a barn and a personal residence on the land. Then the category of value of the real property would be indicated. There is a special provision discussed below found in subsection 303 (b) with respect to the valuing of real estate.

Subsection (e) (2) of section 302 requires the reporting of the identity and category of value of each item of personal property held, directly or indirectly, during such calendar year, in a trade or business or for investment or the production of income which has a fair market value in excess of \$1,000 as of the year for which the report is filed. An item of personal property held at any time during the year must be listed; however, the value of the property is calculated as of the end of the calendar year. The phrase "directly or indirectly" refers to the holder of the property. If the personal property is in the name of a fiduciary or agent but is held for the benefit of the reporting individual, that property must be listed on the public financial disclosure statement. This subsection is intended to cover all personal property other than property in the nature of household goods, furniture, clothing, and other personal property which is not principally held for the production of income. Thus, a painting in a home would not have to be listed even though the painting when sold might produce substantial income.

However, if a reporting individual is in the business of buying and selling paintings for profit, that individual would have to list that he held a certain number of paintings with the category of value of that holding being indicated. This paragraph does not require the listing of a life insurance policy even if the policy has a cash value since the policy is held for the principal purpose of life insurance protection and not the production of income. However, a savings account would have to be reported under this paragraph even though there might be other purposes for the savings account other than the production of interest income. A typical loan made by the reporting individual to another person must be listed since such an arrangement involves personal property held for the production of income. The subjective purpose for the loan is not important—the controlling factor is whether such a financial arrangement is typically for the production of income. The one exception to the responsibility to report is with respect to a personal loan to a relative. In such a case, the typical loan is not for the production of income.

In reporting under this paragraph, a person could have one listing for "farm equipment" and it would not be necessary to list each tractor or combine separately. However, it would not be acceptable to simply list "stocks"—the name of each company in which stock worth over \$1,000 is held must be listed separately. Similarly, it is not acceptable to simply list "John Jones Trust"—the identity of each investment holding in the trust must be listed separately.

Subsection (f) of section 302 requires the listing of the identity and category of value of each liability owed directly or indirectly, which exceeds \$2,500 at any time during the calendar year covered by the financial disclosure report. Excluded from this requirement, however, are loans which are advanced to a reporting individual from a relative (as defined in section 308(14)). This requires the listing of all loans over \$2,500, whether secured or not, and regardless of the repayment terms or interest rates. The identity of a personal liability owed should include the name of the person or corporation to which the liability is owed. If the liability is nominally placed in the name of a fiduciary or agent of the reporting individual, that liability and the identity of the person to whom it is owed to must be reported. However, an owner of an interest in a corporation need not list a loan on which he is not personally liable. Similarly, a limited partner in a real estate partnership would not have to list a liability of the general partners if that limited partner is not personally liable on the loan, even though the limited partner's interest in the land held by the real estate partnership is part of the security for the loan.

Subsection (g) of section 302 requires the listing of the identity, date, and category of value of any transactions in securities or commodities futures exceeding \$1,000. The identity of the recipient of any gift to a tax-exempt organization described in section 501(c)(3) of the Internal Revenue Code of 1954 need not be reported under this subsection. Such a transaction would still be reported but the recipient of the gift would not be listed. It is also not necessary to report any transaction solely by and between the reporting individual, his spouse, and dependents.

A typical report under this subsection would state that IAC stock had been purchased on September 3, 1976, and the category of value of the purchase was between \$50,000 and \$100,000. The amount listed is the value of the total purchase price or sales price and is not related to any capital gain or loss on the transaction. The receipt of a bequest or inheritance would not fit the definition of a transaction under this rule and, therefore, would not have to be reported under subsection (g) of section 302. However, any real or personal property received might qualify for listing under subsection (e) of section 302 described above which covers holdings of certain property rather than transactions in securities and commodity futures.

Subsection (h) (1) of section 302 requires the listing of the identity, date and category of value of any purchase, sale, or exchange, directly or indirectly, of any interest in real property if the value of the property involved exceeds \$1,000 as of the date of the purchase, sale, or exchange. If a person holds a piece of real property worth \$50,000 for the entire calendar year and that property is not involved in any purchase, sale or exchange, the property would not be listed under this

paragraph but would be listed as a holding of real property under subsection (e) (2) of this section (as described above). A typical listing under subsection (h) (1) would be that a 10% interest in an office building at 10 Farragut Square, Washington, D.C., was purchased on December 2, 1976, and that the reporting individual's interest in that property had a category of value of between \$250,000 and \$500,000. As in the case of transactions covered by subsection (g), the identity of the recipient of a gift of real property to a tax-exempt organization described in section 501(c) (3) of the Internal Revenue Code of 1954 need not be reported under subsection (h). It is also not necessary to report any real property transaction solely by and between the reporting individual, his spouse and dependents.

Subsection (h) (2) of section 302 describes the manner in which the identity of an item of real property must be described when that is required under paragraph (1) of subsection (h) and paragraph (1) of subsection (e). The identity of an item of real property must include the number of acres of property (if there is more than one acre); the exact street address, (except with respect to a personal residence of a reporting individual), the town, county, and state in which the property is located, and if there are substantial improvements on the land, a brief description of the improvements (such as "office buildings"). If the real property purchased or held is a personal residence of the reporting individual, then all that must be listed is that a personal residence in the town of Bethesda, County of Montgomery, in the State of Maryland, with a category of value of over \$100,000, but not more than \$250,000 was purchased or held, and the date of the purchase if it occurred during the calendar year covered by the financial disclosure report. A street address with regard to the reporting of a personal residence is not required.

Subsection (i) of section 302 requires the listing of the identity of and a description of the nature of any interest in an option, mineral lease, copyright or patent right held during such calendar year, regardless of the value of that interest.

Subsection (j) of section 302 requires the listing of the identity of all positions held as an officer, director, trustee, partner, proprietor, agent, employee, representative or consultant of any corporation, company, firm, partnership, or other business enterprise, any non-profit organization and any educational or other institution. This subsection specifically states that positions held in any religious, social, fraternal or political entity need not be reported. This subsection also does not require the listing of any monetary value; however, if any income over \$100 is received as a result of the holding of such a position, that income would be listed under subsection (a) of section 302.

Subsection (k) of section 302 requires the description of the parties to and the terms of any contract or agreement for future employment. One form such an agreement might take is a contract between a covered employee and his former employer that upon leaving the Government at any time within the next five years, that employee can return to the Jones Company at a salary of \$25,000 or more. This subsection also requires a description of, and the parties to, any agreement providing for the continuation of payments or benefits from a prior employer other than the United States Government. If, as a



result of an employee's prior employment with an airline, the employee continues to receive the right to free transportation on that airline, the name of the airline and the description of the benefits provided would be required. Similarly covered would be the parties to and the terms of any buy-out agreement or severance payments which are received by the covered employee during his service in the Government.

A reporting individual is also required to list the identity of any person other than the United States Government from which that person received in excess of \$5,000 in compensation in any of the two preceding calendar years. This requirement does not require the listing of how much money was received from any prior employer but simply (1) the name and address of each source of such compensation; (2) the period during which the reporting individual was receiving such compensation from each such source; (3) the title of each position or relationship the reporting individual held with each compensating source; and (4) a brief description of the duties performed or services rendered by the reporting individual in each such position. For example, a reporting individual might report that he worked for the Jones Company from January 1976 through October of 1976 and that at that time the Jones Company was located at 10 Elm Street in Toledo, Ohio. The individual might report that he served as a draftsman for the Jones Company and he was in charge of drawing up the plans for the foundation and superstructure of a nuclear power plant that the Jones Company was building for the David Power Company in Newton, Virginia.

If a reporting individual were a professional and received more than \$5,000 from any client and it was not a violation of any privilege or professional code of ethics to reveal the identity of that client, then the individual would be required to reveal the identity of any client that paid that individual more than \$5,000 during any of the preceding two years. This requirement only applies if the reporting individual actually did work for that client. If the reporting individual had worked for an engineering firm but did no work for a client, but other members of the firm did work for that client who paid the firm more than \$5,000, the reporting individual would not have to list the identity of that client.

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Subsection (a) of section 303 simply states that the requirements contained in subsections (e) through (h) of section 302 which call for the listing of a category of value and not the actual value or amount, only requiring one of the following categories: (1) more than \$5,000, (2) greater than \$5,000 but not more than \$15,000, (3) greater than \$15,000 but not more than \$50,000, (4) greater than \$50,000 but not more than \$100,000, (5) greater than \$100,000 but not more than \$250,000, (6) greater than \$250,000 but not more than \$500,000, (7) greater than \$500,000 but not more than \$1,000,000, (8) greater than \$1,000,000 but not more than \$2,000,000, (9) greater than \$2,000,000 but not more than \$5,000,000, or (10) greater than \$5,000,000.

Subsection (b) of section 303 provides an exception to the requirement that property be identified by the appropriate category of value.

Where the current value of an interest in real property (or an interest in a real estate partnership) is not ascertainable without an appraisal, an individual is permitted the option of listing the purchase price of the property at the time of purchase and the date of purchase instead of specifying the category of value. Thus, an individual can choose to list either a category of value relating to the current value of the real property or the purchase price of the property at the time of purchase. It is assumed that in any arms length transactions, the fair market value of the interest at the time of purchase will equal the purchase price. Similarly, with respect to personal property where it is difficult without an appraisal to value the worth of an enterprise with sufficient accuracy to place an individual's holding in that enterprise in a category under subparagraph (a), the reporting individual may list in the appropriate category the book value of a corporation whose stock is not publicly traded, the net worth of a business partnership, the equity value of an individually owned business, or, with respect to other holdings, any recognized indication of value—but the individual must include in his report a full and complete description of the method used in determining the value the lists. Each of the methods specifically listed above for indicating the value of an enterprise was chosen because it is a concept or calculation which is easily arrived at from information which a business will normally have for accounting purposes or for the purpose of obtaining normal business loans.

It is understood that valuations arrived at by these methods will not necessarily equal the fair market value of the enterprise, but should give an appropriate value of the enterprise sufficient to identify the magnitude of the potential conflict of interest. This procedure is totally optional and a reporting individual may choose to list the category of value based upon his good faith estimate of the fair market value of the enterprise involved.

Subsection (c) of section 303 describes to what degree the income and interest of the spouse or dependent of the reporting individual must be included in the public financial disclosure.

Paragraph (1) of subsection (c) sets out a limited number of situations where the report required with respect to the interest of a spouse or dependent need not be as detailed as that of the reporting individual. Specifically for the purposes of subsections (a) through (c) of section 302 the individual is only required to report the source but need not report the amount of any earned income over \$1,000 or gifts over \$100 (\$250 in the case of transportation, lodging, food or entertainment) received by a spouse or minor dependent. Thus, if a spouse worked for a construction firm and earned over \$1,000 a year the amount the spouse earned would not have to be listed but the name of the construction firm the spouse worked for would have to be listed. The reporting individual only has to list the source but need not report the amount of gifts of over \$500 received by an adult dependent. The amount or source of earned income received by an adult dependent need never be reported. With respect to reporting the source of earned income, if the reporting individual's spouse or minor dependent is self-employed in his or her own business or profession, only the nature of such business or profession need be reported.

Thus, if a spouse were an attorney with a large law firm, the individual would only have to list that his spouse's employer was Case and Jones Law Firm. If the spouse is a self-employed engineer, there is no need to list the name of each client of the spouse; it is sufficient that the individual describe the nature of the business in which the spouse is engaged. With respect to gifts received by a spouse or a dependent, if a gift is received jointly by the reporting individual and the spouse, the gift must be reported and the approximate fair market value of the gift must be reported. Only if a gift is given solely to the spouse and dependents and not the reporting individual is there no requirement to list the value of the gift.

Paragraph (2) of subsection (c) states that for the purposes of subsection (a)(3) and subsection (e) through (i) of section 302 a reporting individual must also report the interests of the spouse or dependents of that individual. The interests of a spouse or dependent must be listed with the same degree of detail as that required for the reporting individual. There is no requirement that the reporting individual identify in his public financial disclosure statement which holdings or non-earned income are those of his spouse or dependents. However, the reporting individual may note that a member of the immediate family is the owner of each interest if the reporting individual so desires.

This provision is significantly different than the provision contained in rule XLIII of the Senate Code of Official Conduct with respect to the reporting of the financial holdings of a spouse or dependent. In the Senate Code of Official Conduct, the approach was taken to only require the reporting of those interests of a spouse or dependent which were under the constructive control of the reporting individual. While the statutory definition of "constructive control" and the legislative history accompanying the adoption of that provision very broadly defined "constructive control," there can be no question that the provision in this title requiring the reporting of all financial holdings of a spouse or dependent with the same degree of detail as that of the reporting individual is substantially broader than the comparable provision in the Senate Code of Official Conduct.

Paragraph (3) of subsection 303(c) states that a reporting individual is not required to report the interests of a spouse living separate and apart from the reporting individual. This section is intended to cover situations where a couple is legally separated, has signed an agreement of separation, or are living separate and apart and have reached a decision that they intend to terminate the normal relationship of a married couple. This exemption is to be construed narrowly to cover those situations where some action has been taken or decision made to break up the marriage, but there is no requirement that there be a court order or legal separation agreement. The phrase "living separate and apart" refers to the state of the marriage and not to the actual location of the spouse. Thus, if a reporting individual's spouse remains in Nebraska and the reporting individual principally resides in Washington, but returns home to live with his spouse on weekends, the interests of the spouse would still have to be reported as required under paragraphs (1) and (2) of subsection 303(c).

Subsection (d) of section 303 deals with the question of blind trusts. It is the underlying philosophy of this title that public disclosure is

required with respect to all financial holdings and sources of income of the covered individuals. A number of public officials have created blind trusts in recent years because it was their sincere feeling that such instruments were the best way to avoid potential conflicts of interest. Often, blind trusts established by high-level executive branch officials are reviewed by the official's agency, the Civil Service Commission or the Department of Justice and in the case of Presidential nominees, by the relevant Senate Committee as well. However, at the present time, blind trusts are not a concept based in the common law or statutory law. There is not yet general agreement on the appropriate attributes of a blind trust, nor are there any ways of enforcing adherence to any minimum standards of what is a truly blind trust. Therefore, the Committee felt that full public disclosure was preferable to a blind trust, at least until statutory standards defining what is a blind trust are enacted. Under this title, the actual holdings of a trust, whether blind or not, must be publicly disclosed.

The Committee on Governmental Affairs is under directions from the Senate to study the question of blind trusts and report back to the Senate by September 28, 1977. The Committee intends to hold hearings on this question in the near future and to report back to the Senate as soon as possible. However, at the time the Committee considered S. 555, it could not agree with the position of President Carter that blind trusts approved by the Civil Service Commission, under such regulations as the Commission may issue, should be permitted to substitute for full public financial disclosure.

Witnesses on behalf of the President indicated that the President's proposal contemplated that the Civil Service Commission would issue regulations to insure the insulation of the reporting individual from knowledge of trust assets and transactions. The Committee intends to give full consideration to the President's proposal at the time it holds hearings on the blind trust issue. However, the Committee decided to require full public disclosure at this time, pending the completion of hearings and further study of this issue. Therefore, paragraph (1) of subsection (d) requires, except as provided elsewhere in this subsection, that the holdings of and income from a trust or other financial arrangement from which the reporting individual, or his spouse or dependents receive income or has equity interest in, must be reported according to the provisions of section 302.

This paragraph provides one exception where the identity of the holdings of a trust and the source of the trust's income need not be disclosed. In such a case (1) the trust must not have been created directly or indirectly by the reporting individual, his spouse or dependents; (2) the reporting individual, his spouse and his dependents must have no knowledge of the contents or sources of income of the trust; and (3) the reporting individual must have requested the trustee to provide information with respect to the holdings and sources of income of the trust and the trustee must have refused to disclose such information. However, even in such a case, the reporting individual must still list that he has an interest in a trust with a description of the names of the trust and the trustee and he must place a category of value on the total cash value of his interest in the trust assets. The reporting individual must also list the category of amount of the income he receives from the trust each year.

Paragraph (2) of subsection 303(d) states that since it is the policy of the United States that individuals covered by this title make full and complete public disclosure of financial holdings, trusts established for the purpose of being blind trusts, whether revocable or irrevocable, must be dissolved by the creating party to permit the disclosures required by this title on or before May 15, 1978 (or within 3 months after the date an individual becomes subject to this title if such date is after May 15, 1978) unless, prior to either such date, the minimum requirements for a blind trust are defined by statute and the trust meets the requirements of that statute. Such a statement is necessary because some public officials who have created blind trusts made those trusts irrevocable, usually for the period of government service. Irrevocability of a trust insured total removal of the government official from the handling of his financial interests. The Committee feels that this statement of public policy will permit anyone who has set up an irrevocable trust principally for the purpose of creating a blind trust to request that the appropriate authority permit him to dissolve that trust.

Subsection (e) of section 303 grants authority to the President, the Judicial Conference, the Senate, and the House of Representatives to require the disclosure of gifts received by an individual, his spouse and dependents, in addition to that required by section 302 if it is determined that such information is necessary for the effective enforcement of the conflict of interest laws or regulations. This subsection was added at the request of the Administration which felt that more complete disclosure of gifts received by executive branch officials may be necessary in order to enforce existing standard of conduct regulations. Under this section the President may require through executive order the additional gifts disclosure which he deems necessary. Likewise, the Senate or House of Representatives may by resolution amend their respective rules regarding disclosure of gifts, as can the Judicial Conference.

Subsection (f) of section 303 requires that each report filed by individuals pursuant to subsections 301(c) and (d) must include certain specific information in a manner and form prescribed by the individual's supervisory ethics office. Basically, this subsection provides that the disclosure reports filed by government officials within 30 days of assuming a position covered under section 301(b) and presidential nominees must include certain information but need not be a complete report otherwise required under this title. At a minimum these individuals must disclose financial holdings and liabilities (as of the date of filing) as described in subsections 302(e), (f), and (i); the identity of all positions held with nongovernmental organizations required by subsection 303(j); a description of any agreement for future employment required by subsection 303(k); and the identity of any nongovernmental employer required by subsection 303(1). In addition, an individual required to file a report under subsection 301(c) and (d) must include the source and amount of any payments, over and above normal salary, received from a prior employer or partner. This would include any severance, bonus, buy-out or other monetary payment which an individual has received, other than salary, as a reward for services rendered. This would also include the receipt or purchase, be-

tween the time he accepted a position in government service and the date on which this report is filed, of any stock in the individual's prior employing company, subsidiary or affiliate, and any stock option which entitles the individual to obtain stock in a prior employing company, subsidiary, or affiliate.

#### SECTION 304—FILING OF REPORTS

Section 304 specifies where the public financial disclosure reports required by this title are to be filed. Subsection (a) of section 304 introduces the term "supervising ethics office" and specifies what the supervising ethics office is for each of the employees in the three branches of the Federal government which are covered by this legislation.

Paragraph (1) states that a committee designated by the Senate of the United States is the supervising ethics office for Members, officers and employees of the Senate, candidates seeking election to the Senate, and officers and employees of the General Accounting Office, the Costs Accounting Standards Board, the Office of Technology Assessment, and the Office of the Attending Physician. At the present time, the Senate Select Committee on Ethics performs this function for the Members, officers and employees of the Senate. However, there are a number of offices or agencies which are not subject to the jurisdiction of the Ethics Committees of the Senate or the House of Representatives. The Committee felt that it was important that the few high-level officials in these offices or agencies who would have to file public financial disclosure forms under this title should file them with the legislative branch since these offices and agencies are part of the legislative branch. Therefore, one-half of these offices and agencies of the Congress were arbitrarily assigned to be supervised by a committee designated by the Senate and the other half assigned to be supervised by a committee designated by the House of Representatives.

It is important to note that this section only assigns those officers to the jurisdiction of the Senate or House committees for the purpose of the filing of a public financial disclosure statement, and the review of that statement in order to determine whether the statement is complete and in the proper form, and the conducting of the random audits of public financial disclosure statements, as prescribed by section 306 below. This section does not in any way require that the Ethics Committees of the Senate or the House of Representatives supervise these offices in any other way, nor does it submit the employees of these offices to any of the codes of conduct adopted by the Senate and House for their own Members, officers and employees. It should also be noted that other Congressional offices are treated for purposes of policy and other benefits as if they were a part of either the House or the Senate. These offices under this legislation will be responsible to the supervising ethics office for that House of Congress. For instance, the employees of the Congressional Budget Office under section 201(b) of P.L. 93-344, are treated as if they were employees of the House of Representatives. Therefore, employees of the Congressional Budget Office, are for the purposes of this statute, subject to the supervising ethics office for the House of Representatives.

Paragraph (2) states that a committee designated by the House of Representatives is the supervising ethics office for the Members, officers and employees of the House of Representatives, candidates seeking election to the House of Representatives, and officers and employees of the Architect of the Capitol, the Botanic Gardens, the Government Printing Office, and the Library of Congress.

Paragraph (3) states that a committee designated by the Judicial Conference of the United States shall be the supervising ethics office for justices and judges of the United States, any officer or employee of the judicial branch of the government, or judges, officers and employees of the judicial branch of the District of Columbia government, and any Presidential nominee for any such position. During the hearings on S. 555, the Governmental Affairs Committee was informed by witnesses representing the Judicial Conference that such a committee of the Judicial Conference has already been established and is presently active in supervising the present voluntary financial disclosure requirements for judges and in working to improve the conflict of interest prevention program of the judicial branch.

Paragraph (4) states that the President is the supervising ethics office for the Commissioners of the Civil Service Commission and the Director of the Office of Government Ethics of the Civil Service Commission. As is stated below, public access to the financial disclosure reports of these individuals will be at the Office of Government Ethics of the Civil Service Commission. However, this section seeks to make it clear that no individual in the government will be responsible for the supervision and enforcement of ethical standards with respect to himself. Therefore, a copy of the financial disclosure statement of the Commissioners of the Civil Service Commission and the Director of the Office of Government Ethics will be provided to the President and it will be the President's responsibility to see that these disclosure statements are reviewed and any appropriate action is taken in the event of failure to comply with this statute or executive branch conflict of interest regulations.

Paragraph (5) states that the Office of Government Ethics of the Civil Service Commission is the supervising ethics office in the case of any other individual not covered by paragraphs (1) through (4) above who is required to file a report under section 301. This basically includes all officers and employees of the executive branch and specifically includes the employees of independent regulatory agencies and other agencies specified in section 105 of title 5 of the United States Code, which employees are not specifically referred to above.

Subsection (b) of section 304 establishes the procedures for the filing of public financial disclosure forms for covered officials in the executive branch other than the Commissioners of the Civil Service Commission and the Director of the Office of Government Ethics. Clause (A) specifies that each such executive branch official is required to file the report required by this title with the designated official in his agency. Thus, an employee compensated at grade GS-17 in the Interior Department would file his financial disclosure report with a designated official in the Interior Department. Presumably, this would be with an ethics counselor trained by the Office of Government Ethics

to review such financial disclosure form to be sure that it does not reveal any conflicts of interest.

Clause (B) of paragraph (b) (1) requires that a copy of the public financial disclosure report also be filed with the Office of Government Ethics if the reporting individual is the President, the Vice President, a presidential appointee in the Executive Office of the President who is not subordinate to the head of an agency in that office, a full-time member of a committee, board or commission appointed by the President, or an individual whose pay rate is specified in subchapter II of chapter 53 of title 5, United States Code.

A number of the individuals referred to above are not part of any agency and, therefore, the only place that the public financial disclosure report will be filed and available to the public is at the Office of Government Ethics. Others, such as those individuals who are compensated under the executive schedule (as set forth in subchapter II of chapter 53 of title 5, United States Code) are probably part of an agency and therefore file their financial disclosure reports with their agency and are also required to file a copy of their report with the Office of Government Ethics.

In the financial disclosure legislation reported by this Committee last year (S. 495), all financial disclosure reports for executive branch officials were required to be filed with the employee's agency and with the General Accounting Office. This was done so that the agency would have the primary responsibility for reviewing the financial disclosure statement and enforcing conflict of interest laws, while at the same time the general public would be able to easily obtain such statements from a single centrally located office. However, such duplicate filing results in avoidable duplication of effort and paper work, and would create serious problems in maintaining financial disclosure statements up-to-date. The latter is true since an indication of who reviews a financial disclosure statement and what action, if any, is taken to eliminate any conflicts of interest which do exist is required to be recorded on the public financial disclosure statement pursuant to paragraph 402(a)(4) of this statute. Therefore, at the request of the Administration, the Committee eliminated the requirement for duplicate filing in a central office except for the limited number of executive branch officials who are compensated under the Executive Schedule. It was felt that it was these top level officials whose financial disclosure statements would be of most interest to the public. Therefore, this limited requirement for central filing will both satisfy the public interest in having the forms readily available in a central location and eliminate unnecessary paperwork.

The central filing requirement for all executive branch financial disclosure forms was eliminated upon the expressed assurances from officials of the Office of Management and Budget and the Civil Service Commission that the public financial disclosure statements would be required to be available in each of the executive branch agencies in a single office, and that standard procedures for public access to those statements would be applied throughout the executive branch. Further, the Committee was assured that the Office of Government Ethics would be staffed and trained so that it could quickly and easily direct any citizen to the exact office and individual in the executive branch of the government which could provide that individual with the financial disclosure statement that individual is seeking.



It is clearly the intention of the Committee that access to public financial disclosure statements required under this legislation be made as easy as possible. Therefore, it is assumed that the office handling these public financial disclosure statements in each agency and making these statements available to the public will be located in a readily accessible office of each agency in Washington, D.C. and not relegated to an obscure annex or an office geographically distant from downtown Washington.

Paragraph (2) of subsection (b) provides a limited exemption from the requirement that financial disclosure statements be made available to the public for the reports filed by certain executive branch officials. Specifically, the President is given authority to exempt any individual in the Central Intelligence Agency, the Defense Intelligence Agency, or the National Security Agency, or any individual engaged in intelligence activities in any agency of the United States from the requirement to file a report with the supervising ethics office if the President finds that, due to the nature of the office or position occupied by such individual, public disclosure of such report would reveal the identity of an undercover agent of the Federal government. Obviously, it is not in the best interests of the United States if the identity of an undercover intelligence officer is revealed by the public disclosure of that individual's financial statement which would indicate that the individual is a government agent. However, this paragraph does provide that an individual exempted by the President from the requirement that his financial statement be available to the public must still file a financial disclosure report as required by this title with the head of the agency for which he works. However, that report will not be made available to the public. Of course, the head of that agency still retains the responsibility to see that that report is reviewed and that any conflicts of interest identified by the report are eliminated.

This exemption does not cover every government official involved in intelligence activities. Simply because an individual works for the CIA, or any other intelligence agency, should not exempt him from complying with the same financial disclosure requirements applicable to other government employees unless the act of disclosure itself would prevent the official from performing his government duties. The Committee felt that this paragraph exempting disclosures of financial disclosure reports by undercover agents accomplished that goal.

Subsection (c) of section 304 requires the Commissioners of the Civil Service Commission and the Director of the Office of Government Ethics to file their public financial disclosure reports required by this title with the President and a copy with the Office of Government Ethics. Since the President is their supervising ethics office, he should have a copy of their public financial disclosure reports and it is his responsibility to review those reports and take appropriate action. A copy is filed with the Office of Government Ethics because that is a much more logical and convenient place for the public to have access to such reports.

Subsection (d) provides for the filing of public financial disclosure reports by Presidential nominees. Paragraph 1 of this subsection states that each individual identified in subsection 301(d) who is nominated for a position, the supervising ethics office for which is the Office of Government Ethics, shall file the report required by this title with the Senate committee (and in the case of a nominee for Vice President, the

Senate and the House committees) considering his nomination and a copy of such report with the agency in which he will serve and with the Office of Government Ethics.

Paragraph (2) provides that each Presidential nominee identified in subsection 301(d) who is not referred to in paragraph (1) of this section (that is who is not supervised by the Office of Government Ethics) shall file the financial disclosure report required by this title with the Senate Committee considering his nomination and a copy of such report with the supervising ethics office for the position for which he is nominated. This basically refers to Presidential nominees who will serve in the legislative and judicial branches of the government and nominees for the position of Civil Service Commissioner and Director of the Office of Government Ethics.

Subsection (e) of section 304 requires each individual identified in subsection 301(e) (candidates for Federal elective office) to file the public financial disclosure report required by this title with the supervising ethics office for the position for which the individual is a candidate. Therefore, candidates for the Senate will file with the committee designated by the Senate, candidates for the House of Representatives with the committee designated by the House, and candidates for President and Vice President with the Office of Government Ethics.

Subsection (f) of section 304 provides for the filing of the public financial disclosure reports of officers and employees of the legislative branch and candidates for legislative branch positions. Paragraph (1) requires each Member, officer, employee or candidate whose supervising ethics office is a committee designated by the Senate or House of Representatives to file the report required by this title with the Secretary of the Senate or the Clerk of the House of Representatives, respectively. Thus, while subsection (e) requires a candidate for Congress to file with the supervising ethics office for that House of Congress, this paragraph of subsection (f) supercedes that requirement and states that the actual filing will take place with the Secretary of the Senate or the Clerk of the House of Representatives, respectively.

Paragraph (2) of subsection (f) requires a Member of the House of Representatives or the Senate or a candidate for such a position to also file a copy of the financial disclosure report required under this title as a public document with the Secretary of State (or if there is no office of Secretary of State, the equivalent state officer) in the state which the individual represents or is a candidate. This will provide an easy means of public access to the public financial disclosure reports in the state which the candidate or representative represents or seeks to represent.

Subsection (g) of section 304 provides for the filing of the public financial disclosure statements by members of the judicial branch. Paragraph (1) of subsection (g) requires a justice, judge, officer or employee of the judicial branch or of the judicial branch of the District of Columbia to file the report required by this title with his supervising ethics office, which will be a committee designated by the Judicial Conference.

Paragraph (2) of subsection (g) requires that each justice or judge or adjudicatory official of the judicial branch of the United States, in addition to the filing with the Judicial Conference, file a copy of his financial disclosure as a public document with the clerk of the court

on which he sits. Again, this requirement is to ensure that the report is available in the state or district in which the judge sits so that litigants and private citizens will have easy access to such a report.

Subsection (h) of section 304 authorizes each of the supervising ethics offices to grant one or more reasonable extensions of time for filing any report required under this title other than a report required by subsection 301(d) from a Presidential nominee. However, the total length of such extensions may not exceed 90 days. With respect to Presidential nominees, the congressional committee considering the individual's nomination may grant one or more reasonable extensions of time for filing any report required to be filed under subsection 301(d), but in no event may any extension delay the time for filing the report beyond the time that such nominee is confirmed. This is obviously important to ensure that the information on this public financial disclosure report is available to the public and to the Congress prior to the time that the Senate or the House of Representatives votes on the confirmation of the nominee.

#### SECTION 305—CUSTODY OF AND PUBLIC ACCESS TO REPORTS

Section 305 sets forth where, when and under what conditions the public financial disclosure reports required to be filed under this title will be available to the public.

Subsection (a) of section 305 deals with the reports filed by the legislative and judicial branches. This section states that the forms filed by judges, justices, Members of Congress and other officers and employees of the legislative and judicial branches must be made available to the public within 15 days after the receipt of a report from any individual. A copy of the report must be provided to any person upon written request. Subsection (a) applies to the reports of members of the legislative branch, filed with the Secretary of the Senate and the Clerk of the House of Representatives, and reports of members of the judicial branch filed with the committee designated by the Judicial Conference. In addition, this section applies to the copy of the public financial disclosure report which must be filed by a Member of Congress or a candidate for Congress with the Secretary of State of the State which the Member represents or where the individual is a candidate for Congress. This section also applies to the duplicate copy of the reports filed by judges, justices and other adjudicatory officials of the judicial branch, which must be filed with the clerk of the court where the official sits.

Subsection (b) of section 305 outlines significantly different procedures for the custody and access to reports filed by members of the executive branch with an executive agency, as defined in section 105 of title 5, United States Code, and with the Office of Government Ethics of the Civil Service Commission. Any report filed with such an agency or with the Office of Government Ethics must be available to the public within 45 days after the receipt of the report—not within 15 days as is required with respect to reports filed by members of the legislative and judicial branches. A copy of such a report must be provided to any person upon written request.

With respect to these executive branch reports, as opposed to the reports filed by members of the legislative and judicial branches, each report must be reviewed under procedures established by the Office of Government Ethics prior to the time when the reports are made available to the public; that is, prior to the expiration of 45 days after the reports were received by the executive agency or the Office of Government Ethics. (The Office of Government Ethics should coordinate with each agency so that the few reports filed with both the office and an agency (i.e., Executive Schedule employees) are reviewed only once and the results of such review are noted on both copies of the report.) The purpose of this review is to assure compliance with applicable laws and regulations with respect to conflicts of interest, financial disclosure and ethical conduct. This requirement, which was recommended by both the General Accounting Office, Common Cause and the Carter Administration, provides for a prompt review of each public financial disclosure statement by a trained official of the agency in which the individual works or, for a limited number of people, by the Office of Government Ethics.

The reviewing official should be familiar with the responsibilities and duties of the individual filing the report so that the interests and holdings of the reporting individual can be judged in light of that individual's duties as well as any statutory prohibitions against the holding of any particular financial interest. In addition, the contents of a financial disclosure report should be reviewed to monitor compliance with agency rules on outside employment and the receipt of gifts.

Upon the completion of this review, subsection (b) of section 305 requires that the name of the person who conducted this review, the date the review was conducted and the reviewing individual's indication that no conflicts exists, must be contained on the public financial disclosure report itself, and, therefore, must be made available for public inspection under the procedures set forth in this title in the same manner as the public financial disclosure report. If the reviewing official determines that certain conflicts do exist or did exist, then he must indicate on the public financial disclosure report a description of the action taken to eliminate any such conflicts. If the action taken to eliminate the conflict has not been completed within 45 days after the filing of the report, the findings of the reviewing individual and the actions taken to date will be indicated on the public financial disclosure report and it will still be made available at the end of the 45 day period. However, when action has been completed to eliminate any conflicts of interest which do exist, that action should be promptly indicated on the public financial disclosure report.

As mentioned before, the Committee felt strongly that a central filing system for public financial disclosure statements provided significant benefits in terms of the ease of public access to the statement. However, the principal factor in convincing the Committee that it was advisable to permit almost all executive branch employees to simply file with their agency, and, therefore, require the public to go to that agency to examine the report, was the assurances by the Administration (which are incorporated in subsection (b)) that the reports would be reviewed prior to being made available to the public and that a full and complete description of the actions taken to eliminate any conflicts of interest which were found to exist would be indicated on the

public disclosure report and made available to the public. It was because the agencies would be recording in the public report the actions taken to avoid conflicts of interest that the Committee determined that there was an advantage to having the reports publicly available in the agency where these reviews and notations about the review would be made. Taking this approach, therefore, ensures that the form available for public examination would be up-to-date, not only with respect to the reporting individual's finances, but also with respect to the action the agency had taken with respect thereto.

Subsection (c) of section 305 establishes certain conditions with which a member of the public must comply before receiving a public financial disclosure statement. It is the intent of the Committee that the process the public must go through to obtain a public financial disclosure statement be as uncomplicated, nonbureaucratic and inexpensive as possible. It is the feeling of the Committee that the public availability of financial disclosure statements filed by high-level officials in all three branches of the government is in the best interests of the United States government. Making these statements publicly available should not be viewed as a favor performed for the member of the public who seeks to examine such a report.

Any person receiving a copy of the report or inspecting a report which was filed under this statute must supply his name and address, and the name and address of a person or organization, if any, on whose behalf he is requesting the report. This provision, along with the provisions of subsection (a) and (b), require that the request for a report be in writing. In addition, the agency providing the report can ask for a simple form of identification to verify that the person requesting the report has given his accurate name and address.

Subsection (c) also provides that the names and addresses of the persons or organizations inspecting or receiving a copy of a report will be made available to the reporting individual and to the public. Thus, any government official required to file a public financial disclosure report can go into the agency or office where his report is publicly available and examine the names and addresses of the people who have requested his report, and the names of the persons or organizations, if any, on whose behalf the report was requested. Obviously, since the individual is providing a public financial disclosure report, there is not an expectation of privacy. However, this provision is included in the spirit of recent legislation which seeks to let individuals know who is inspecting the information they are required to provide to the government.

This provision hopefully will have the effect of deterring nosy neighbors and other similar individuals from inspecting the financial disclosure reports; however, it also may have the effect of deterring some private citizens with a legitimate interest in examining the financial disclosure report of their government officials from examining that report because of the fear, whether rational or not, of the power of such a government official. On balance the Committee felt that this provision was desirable and necessary in order to protect the rights of the reporting government individual.

Subsection (c) also provides that the individual requesting a copy of the report may be required to pay a reasonable fee for that copy in any amount which is found necessary to recover the cost of reproduc-

tion and mailing of that report, excluding the salary of any employee involved in such reproduction or mailing. The Committee specifically does not want the income derived from providing reports to the public to recover all the costs an agency incurs in providing such reports. It should be made clear that this provision does not require an agency or office to charge any fee at all; the provision specifically states that a copy of such a report may be furnished without charge or at a reduced charge if it is determined that a waiver or a reduction of the fee is in the public interest. In providing for the charging of a reasonable fee to recover the mailing costs, the Committee is expressing its clear intention that an individual not have to personally appear at the office of an agency in order to obtain such a report. The United States government serves over 200 million people. Financial disclosure reports should be available to any citizen who so requests, and, therefore, it is only reasonable that such forms be provided in response to written requests by mail. However, it is reasonable for an agency to require that a requesting individual fill out a form accurately providing his name, address and the name of the person or organization, if any, on whose behalf he is requesting a report.

The Committee is especially concerned that delay and bureaucratic requirements not make it difficult for private citizens to obtain these public financial disclosure reports. Therefore, the Committee believes it is the responsibility of each supervising ethics office to monitor the procedures followed by those who have custody of the reports to make the reports easily available to the public without an unreasonable delay between a request made by mail for a public financial disclosure report and a response to the requesting individual. Similarly, it is important that reports be made available in a clearly identified and easily accessible office of an agency or other depository of the financial disclosure statement, particularly with the respect to executive branch agencies. The Office of Government Ethics should assume the responsibility for assisting citizens in locating the appropriate agency office where financial disclosure reports, in which they are interested, may be found.

Subsection (d) of section 305 prohibits the inspecting or obtaining of a public financial disclosure report for certain specified reasons.

Paragraph (1) of that subsection provides that it shall be unlawful for any person to inspect or obtain a report for (A) any unlawful purpose, (B) for any commercial purpose, (C) for determining or establishing the credit rating of any individual, or (D) for use, directly or indirectly, in the solicitation of money for any political, charitable, or other purpose. This provision is basically self-explanatory. It reflects the Committee's view that simply because a financial disclosure report is made public is not a license for anyone to inspect or obtain such a report for an unlawful purpose or for a commercial purpose or for the purpose of fund raising for political, charitable, or other purposes.

Paragraph (2) gives the Attorney General the authority to bring a civil action against any person who inspects or obtains a report for any purpose prohibited in paragraph (1). The court in which such an action is brought may assess against a person violating this subsection a penalty in any amount not to exceed \$5,000. The court also would

have the power to enjoin a violation of this subsection such as where there is an ongoing or threatened practice of obtaining or inspecting the reports for commercial purposes.

Subsection (c) of section 305 requires that any report received under this title by the offices referred to in subsections (a) and (b) must be kept by such office and made available to the public for six years after its receipt. After that six-year period, the report must be destroyed.

#### SECTION 306—AUDITS OF REPORTS

Section 306 requires that random audits of the public financial disclosure reports filed each year be conducted in order to monitor the accuracy and completeness of such reports. The Committee strongly feels that the auditing provisions provided in this section are necessary to ensure the integrity of the financial disclosure process and the public confidence in that process.

The Committee intends that the audits, to the extent practicable, be patterned after audits of federal income tax returns presently performed by the Internal Revenue Service. An audit should generally include a review of the reporting individual's federal income tax return and other supporting documentation which the auditor requests. The auditor, however, need not clarify the accuracy of every figure on the public financial disclosure statement. The auditor should use reasonable means to spot check the accuracy of the disclosure statement but, in the final analysis, the auditor may accept a figure on the disclosure statement unless, in the course of his review of the statement, a reasonable doubt is raised.

The Committee does not intend that a so-called "certification" audit be conducted where the auditor must vouch for the accuracy of each figure on the statement. Such an audit requires the auditor to examine complete documentation sufficient to verify every figure on the statement. Such an extensive or certification audit is not what the Committee intends.

The Committee has received oral opinions from Charles Horngrim, President of the American Accounting Association, Charles Hornbostle, President of the Financial Executive Institute, William Young, Executive Director of the National Association of Accountants and Mr. T. R. Lilly, president of the Financial Analysts Federation which reinforces the Committee's view of such audits. These noted accountants emphasized that the audit function does not in any way impugn the integrity of the government official who filed the report being audited, nor should it place a financial or psychological burden on such an individual. An independent audit of the public financial disclosure statements places an appropriate emphasis on the monitoring and enforcement of the financial disclosure rules. There should be an adequate number of audits conducted to ensure that the integrity of the financial disclosure process will be preserved.

Such audits are different and distinct from a review of a public financial disclosure statement to determine whether the statement reveals possible violations of applicable conflict of interest laws or regulations (as is required for executive branch officials under section 305(b)(2)). An audit is concerned with the completeness and accuracy of the information disclosed on the financial disclosure statement and

not whether the information which is disclosed in any way indicates a conflict. The audit can be accomplished by use of normal accounting procedures.

Subsection (a) of section 306 provides for audits of the public financial disclosure forms filed by executive branch officials. This subsection states that the Office of Government Ethics must, under such regulations as are prescribed by that Office, conduct audits in order to monitor the accuracy and completeness of the financial disclosure reports filed.

Paragraph (2) of subsection (a) requires that an audit be conducted of at least one report filed by an individual holding the office of President, Vice President or Civil Service Commissioner during the term of such person, and that an audit of the financial disclosure report filed by the director of the Office of Government Ethics be conducted at least once every four years. This paragraph also provides that no audit should be conducted during the calendar year in which any of the above described individuals is up for reelection. This latter provision is found here and with respect to the audits of the financial disclosure statements filed by Members of Congress. The provision was included so that the fact that a routine audit is being conducted will not be misunderstood or misinterpreted as an investigation of any wrongdoing. (The office should also consider this principle to the auditing of the reports filed by candidates.)

Even though an audit of each of the individuals described above must be conducted once every four years (once every six years with respect to Civil Service Commissioners), to the extent possible, the individual being audited should not know in advance during which year his public financial disclosure report will be audited.

The Committee initially considered having the General Accounting Office conduct audits of the financial disclosure reports filed by the President, Vice President, Commissioners of the Civil Service Commission and the Director of the Office of Government Ethics. However, due to concerns expressed by the Department of Justice and the Civil Service Commission that such a provision would do harm to the concept of separation of powers, the Committee, while not sharing that view, decided to assign responsibility for such audits to the Office of Government Ethics.

However, the Committee strongly believes that the audits must be independent audits if they are going to serve the intended function and preserve the integrity of the financial disclosure process. The Committee suggests that the Office of Government Ethics seriously consider the hiring of outside independent auditors to conduct these audits since the credibility of self-audit or an audit of one's superior is open to serious question. A similar situation was presented in the legislative branch with respect to the General Accounting Office auditing its own financial disclosure reports. In that case, the Committee chose to direct the supervising ethics office of the Senate (the Senate Select Committee on Ethics) to be responsible for conducting the audits of GAO officers and employees. One of the options open to the Senate Select Committee on Ethics is to have private auditors conduct such audits.



Paragraph (1) of subsection (a) directs the Office of Government Ethics to conduct audits on a random basis of the financial disclosure reports filed by executive branch individuals other than those discussed above whose supervising ethics office is the Office of Government Ethics. The Office of Government Ethics is directed to conduct a sufficient number of these audits as it deems necessary and appropriate in order to monitor the accuracy and completeness of such reports. In contrast to legislation passed by the Senate last year, the Committee decided not to specify an exact number of audits which must be conducted by the Office of Government Ethics under this paragraph. The Committee felt that based on the fact that approximately 13,000 executive branch officials would be filing public financial disclosure reports under this title, that an appropriate number might be approximately 100 audits.

The purpose of the audit is to make sure that reporting individuals know that somewhere along the line the accuracy of their financial disclosure form might be checked. The possibility of an audit therefore, gives the reporting individual some additional incentive to fairly disclose the information required under this title. A sufficient number of audits is the number of audits necessary to preserve the integrity of the financial disclosure process. The Committee is confident that such a limited number of audits will not result in a psychological or financial burden on those whose reports will be audited.

Subsection (b) provides for audits to be conducted of the reports filed by legislative branch officials. Except for audits of reports filed by officers and employees of the General Accounting Office, the audits of financial disclosure reports filed by individuals in the legislative branch of government will be conducted by the Comptroller General under rules and regulations that may be prescribed by him in consultation with the respective supervising ethics offices of the Senate and the House of Representatives. The Comptroller General must have latitude in establishing procedures for conducting these audits to ensure that the audits are complete and independent. However, it is also essential that the Comptroller General consult with the respective supervising ethics offices in the Senate and the House of Representatives so that there is a clear understanding of the type of audit to be conducted.

The supervising ethics offices will want to insure that the audit report provided by the Comptroller General is in a form which makes it possible for the offices to follow-up on the results of the audits. The Comptroller General will want the cooperation of the supervising ethics offices in obtaining subpoenas, when necessary. It is only with that kind of coordination and cooperation that the audits will be a useful device for monitoring the accuracy and completeness of the financial disclosure reports.

With respect to financial disclosure reports filed by an individual whose supervising ethics office is a committee designated by the Senate or the House of Representatives (other than the reports filed by a Member of Congress or an officer or employee of the General Accounting Office) the Comptroller General is directed to conduct, on a random basis, a sufficient number of audits in order to monitor the accuracy and completeness of the financial disclosure statements.

The number of audits which are sufficient to accomplish this task is to be determined by the respective supervising ethics office of the Senate and the House of Representatives in consultation with the Comptroller General. This division of responsibility was provided so that the General Accounting Office would not be put in the sensitive position of deciding how many audits to conduct of congressional employees. However, once the number of audits to be conducted is determined, the General Accounting Office must be given the total independence and latitude necessary to conduct credible, independent audits which will have the respect of the American public.

It should be noted that this paragraph covers financial disclosure forms filed by employees of offices in the legislative branch such as the Library of Congress and the Office of Technology Assessment, as well as the forms filed by candidates for the Senate and House of Representatives. While the financial disclosure forms of candidates are not excluded from the auditing requirements, necessary precautions should be taken not to put a candidate at a competitive disadvantage in relation to an incumbent, since, as is discussed in paragraph (2) below, the public financial disclosure report of an incumbent may not be audited during an election year.

Paragraph (2) requires the Comptroller General to conduct audits of public financial disclosure reports filed by Members of the Senate and the House of Representatives. The Comptroller General is required to conduct an audit of at least one report filed by each Member of the Senate and the House of Representatives during each six-year period beginning after December 31, 1977. However, the Comptroller General may not conduct an audit during the calendar year a Member is up for reelection. With respect to Members of the Senate, this requirement is not difficult to apply. During one year of each six-year period, the Member will be up for election and, therefore, an audit cannot take place. The Member should not know in advance during which of the other five years the audit of his public financial disclosure statement will take place. With respect to a Member of the House of Representatives, a Member is up for reelection every other year. Therefore, audits may only take place in odd numbered years.

It is also very possible that a Member who does not serve for at least three terms may never be subject to an audit; however, this is not a problem since paragraph (2) specifically states that the report of a Member who is not reelected or who does not serve out the term of his office shall not be subject to audit after he has left office. Therefore, if a Member of the House of Representatives serves for two terms and then is not reelected, the General Accounting Office has not violated this provision by not having conducted an audit of the financial disclosure report filed by that Member. Again, the Member should not be informed in advance that his financial disclosure report will be audited.

Subsection (c) provides for the audits of financial disclosure reports of members of the judicial branch to be performed by the supervising ethics office for the judicial branch. That office, which is a committee of the Judicial Conference, is required to conduct audits, under such regulations as it may prescribe, on a random basis, of a sufficient number of the public financial disclosure reports in order to monitor the

accuracy and completeness of such reports. Again, it is not the intention of the Committee that every public financial disclosure statement be subject to audit. However enough public disclosure statements should be audited so that justices, judges and officers and employees of the judicial branch and judges of the courts of the District of Columbia are aware that the form they file is subject to audit to determine its completeness and accuracy and so that the public will have confidence in the integrity of the public financial disclosure process.

Subsection (d) provides for auditing in the special case of the officers and employees of the General Accounting Office. The general principal underlying this legislation and intrinsic in the concept of an independent audit is that no one should be in the position of auditing his own financial disclosure statement. The officers and employees of the General Accounting Office are considered a part of the legislative branch. However, since the Comptroller General is directed to conduct the audits of other officers and employees in the legislative branch, this subsection specifically provides that the supervising ethics office of the Senate shall conduct, on a random basis, a sufficient number of audits of the reports filed with the Secretary of the Senate by officers and employees of the General Accounting Office in order to monitor the accuracy and completeness of such reports. The supervising ethics office of the Senate is directed to conduct such audits under the regulations prescribed by the Comptroller General under subsection (c) for the auditing of other legislative branch employees. However, the audits should either be conducted by the staff of the supervising ethics office of the Senate or be conducted by independent auditors under the supervision of that office. It is clearly the intent of the Committee that this function not be delegated by the supervising ethics office of the Senate to the Comptroller General or any other official in the General Accounting Office.

Subsection (e) requires that the findings of each audit conducted pursuant to this section be transmitted to the individual being audited and that individual's supervising ethics office. It is the intent of the Committee that the auditor in its final report state the factual conclusions it has reached based on its audit without making judgments as to whether or not any law or any conflict of interest standard has been violated. The Committee felt that this was especially important in the case of the Comptroller General since he would not be put in a position of deciding which Members of Congress and which offices and employees have violated the law or violated any provisions of the Senate Code of Conduct. The Comptroller General is required to make a factual report on the findings of his audit, and it will be up to the supervising ethics offices of the Senate and the House of Representatives to determine whether such findings constitute a violation of any law or code of ethics.

The question of how much information with respect to the findings of an audit will be made public was left to the supervising ethics offices to decide. The Committee did not intend to mandate that the audit findings be kept confidential nor did they intend to mandate that they may be made public. This will depend on what type of information is included in the final audit report and to what degree the supervising ethics offices believe that public access to those audit re-

ports is needed in order to protect the credibility of the audit process and the independence of the auditors.

Subsection (f) makes it absolutely clear that the audits required by this section are random audits done to spot check the accuracy and completeness of financial disclosure statements. They are in addition to, and do not at all affect, the authority of an supervising ethics office to conduct any audits of public financial disclosure reports filed under this title in the course of an investigation of allegations of wrongdoing. Therefore, if there are allegations of wrongdoing against a Member of Congress or the President, the relevant supervising ethics office may cause an audit of that individual's public financial disclosure report to be conducted in addition to the random audits required by this subsection. The same principal applies with regard to the financial disclosure statement filed by any other officer or employee under this title.

#### FAILURE TO FILE OR FALSIFYING REPORTS

Paragraph (a) (1) of section 307 provides a criminal penalty with respect to certain violations of this title. Specifically, any individual who knowingly and willfully falsifies or omits to report any material information that is required to be reported under section 302 or 303 shall be fined in any amount not to exceed \$5,000 or imprisoned for not more than one year or both. The Committee felt that there must be effective enforcement of any financial disclosure system. However, to the maximum extent possible, the Committee hopes that this enforcement will take place through the use of random audits and through conciliation.

If an individual inadvertently fails to report an item or improperly lists or classifies an item on a financial disclosure statement, it is the hope of the Committee that the supervising ethics office or agency which reviews the financial disclosure report upon filing will seek voluntary compliance with the requirements of this title. However, the Committee has provided a criminal penalty for the limited situation where an individual knowingly and willfully falsifies or omits to report any material information that he is required to report under sections 302 and 303.

Paragraph (2) of subsection 307 (a) provides the Attorney General with the authority to bring a civil action in any district court of the United States against any individual who fails to file a report which is required under section 301 or who fails to report or inaccurately reports any information which is required to be reported under section 302. The court is authorized to assess against such an individual a penalty in an amount not to exceed \$5,000. This civil penalty was provided so that most violations of the provisions of this title could be handled short of criminal penalties. The standard for when a civil action can be brought is substantially less stringent than that provided for a criminal action. However, even with respect to this section, it is the intention of the Committee that inadvertent or technical violation be handled by the supervising ethics office through informal means or administrative action short of either a civil penalty under this paragraph or a criminal penalty.

Subsection (b) requires the supervising ethics office to refer to the Attorney General the name of any individual such office has reason

to believe has falsified or failed to file information required to be reported, or has violated any law relating to conflicts of interest of officers or employees of the government. Obviously, in the case of the executive branch, where the reports are initially reviewed by the agency in which the officer or employee works, it will be the responsibility of the Office of Government Ethics to establish procedures which will ensure that either the agency involved or the Office of Government Ethics refers such matters to the Attorney General. Again, with respect to this subsection, it is the intent of the Committee that technical or inadvertent violations be corrected through informal means by the supervising ethics office without referral under this subsection.

Subsection (b) also provides that in the case of the President, Vice President or any justice or judge of the United States, the supervising ethics office must also refer such a matter to the Committee on the Judiciary of the House of Representatives. This is the Committee which has jurisdiction over any impeachment proceeding. While this subsection makes no conclusion as to what is an impeachable offense, it is the feeling of this Committee that this information should be provided to the Committee on the Judiciary of the House of Representatives.

Subsection (c) outlines a series of responsibilities for the supervising ethics office for the judicial branch. These responsibilities are to be conducted subject to such procedures and regulations as that office will prescribe. This provision in very general form outlines responsibilities similar to those that are imposed on the Office of Government Ethics and which have been undertaken by the supervising ethics offices of the Senate and House of Representatives. During the Committee hearings on this legislation, considerable question was raised as to whether the judicial branch had sufficient procedures and authority for self-regulation of the conduct of justices, judges, officers and employees of that branch of the government—especially with respect to ethical matters. While this subsection does not resolve that problem, it is the intent of the Committee to indicate that it expects the committee designated by the Judicial Conference to handle administration of the financial disclosure program, to take an active role in implementing that program, and to report back to the Congress if it does not have the authority to effectively accomplish that task.

Specifically paragraph (1) of subsection (c) provides that the supervising ethics office for the judicial branch review the reports filed with it under this title to assure that the reports are filed in a timely manner, are complete and in proper form. This type of review should be conducted upon the filing of the disclosure forms and is simply an examination of the face of the form to ensure that the forms are completed properly and all the information required with respect to an item listed on the form is reported. Special attention should be paid to ensuring that each and every judge, justice, officer and employee who is required to file a form does so in a timely manner.

Paragraph (2) of subsection (c) requires the supervising ethics office for the judicial branch to arrange for the audits required by subsection 306(c) of this title. The committee designated by the Judicial Conference is not required to conduct these audits itself. For example, the committee could decide to assign this task to the Division of Management and Review of the Administrative Office of the United States Courts. However, the ultimate responsibility for seeing that such

audits are conducted remains with the committee designated by the Judicial Conference as the supervising ethics office for the judicial branch.

Paragraph (3) of subsection (c) directs this office to investigate complaints with respect to alleged violations of this title. Paragraph (4) directs the office to take appropriate administrative action against employees of the judicial branch who violate this title. Paragraph (5) directs the office to refer matters to the Attorney General and the Committee on the Judiciary of the House of Representatives pursuant to subsection (b) of this section. Finally, paragraph (6) directs the office to report at least annually to the Congress on the activities of the Judicial Conference pursuant to this title and the effectiveness of the judicial branch system for the prevention of conflicts of interest. The Committee feels that this report from the committee designated by the Judicial Conference to administer the financial disclosure system would be useful in that it would give Congress an opportunity to evaluate whether the judicial branch system for the prevention of conflicts of interest is operating adequately or whether additional legislation is needed. With this specifically in mind, the report required under this paragraph should contain recommendations for changes or additions to applicable laws as the committee of the Judicial Conference feels necessary.

#### DEFINITIONS

Section 308 defines the key term used in this title.

Paragraph (1) of section 308 defines "agency" as any authority in the United States government.

Paragraph (2) of section 308 defines the term "candidate" to have the same meaning as set forth in section 301 of the Federal Election Campaign Act of 1971 (2 U.S.C. 431).

Paragraph (3) of section 308 defines the term "commodity future" to mean commodity future as defined in sections 2 and 5 of the Commodity Exchange Act, as amended (7 U.S.C. 2 and 5).

Paragraph (4) of section 308 defines the term "Comptroller General" to mean the Comptroller General of the United States.

Paragraph (5) of section 308 defines the term "dependent" to have the same meaning as set forth in section 152 of the Internal Revenue Code.

Paragraph (6) of section 308 defines the term "earned income" to mean any income earned by an individual which is compensation received as a result of personal services actually rendered. This will obviously include an individual's salary and any other compensation received as a result of personal services.

Paragraph (7) of section 308 defines the term "employee" to include any employee designated under section 2105 of title 5, United States Code, and any employee of the United States Postal Service or of the Postal Rate Commission.

Paragraph (8) of section 308 defines the term "gift" to mean a payment, subscription, advance, forbearance, rendering or deposit of money, services or anything of value including food, lodging, transportation or entertainment and reimbursement for other than necessary expenses unless consideration of equal or greater value is received. Thus if an individual is a guest speaker at a convention in

California and the sponsors of the convention pay for a one week stay for that individual in California, the cost of the individuals stay beyond the time reasonably necessary to give the speech is a reimbursement for other than a necessary expense and would have to be reported as a gift.

Paragraph 8 of section 308 specifically describes a number of items that are not "gifts" for the purpose of this title. First, a political contribution otherwise reported as required by law, need not be reported as a gift. Second, a loan made in a commercially reasonable manner (including requirements that the loan be repaid and that the reasonable rate of interest be paid) need not be reported as a gift. However, if an individual is loaned money and is not required to pay interest, then the amount of interest that would have to be paid at a reasonable rate of interest would have to be listed as a gift. Next, a bequest, inheritance or other transfer at death is not considered a gift for the purpose of this title. Finally, anything of value given to a spouse or dependent of a reporting individual by the employer of such spouse or dependent in recognition of the service provided by such spouse or dependent is not considered a gift. For example, if a spouse is given a free trip for two to California as a result of the spouse's superior sales record with his employer, that would not have to be reported as a gift since the assumption is that if the "gift" comes from the employer of the spouse or dependent in recognition of service provided by the spouse or dependent it is more in the form of compensation than a gift.

Paragraph (9) of section 308 defines the term "income" to mean gross income as defined in section 61 of the Internal Revenue Code of 1954.

Paragraph (10) of section 308 defines the term "Member of Congress" to mean a Senator, a Representative, a resident commissioner or a delegate.

Paragraph (11) of section 308 defines the term "officer" to include any officer designated under section 2104 of title 5, United States Code or any office of the United States Postal Service or of the Postal Rate Commission.

Paragraph (12) of section 308 defines the term "officer or employee of the Senate or the House of Representatives" to include any individual whose salary is disbursed by the Secretary of the Senate or the Clerk of the House of Representatives except the Vice President. While the Vice President's salary is disbursed by the Secretary of the Senate and the Vice President is considered an officer of Congress for many purposes, the Committee felt that for the purposes of this title, the Vice President should be considered a member of the executive branch and file his financial disclosure report as a member of that branch of government.

Paragraph (13) of section 308 defines the term "Presidential nominee" to mean an individual appointed by the President to an office for which confirmation by and with the advice and consent of the Senate is required or an individual nominated by the President to serve as Vice President pursuant to the twenty-fifth article of amendment to the Constitution of the United States. This covers the nomination by the President of persons for positions in the executive branch which requires Senate confirmation as well as individuals nominated to serve

as justices or judges in the judicial branch. In addition, this provision covers the situation where an individual is nominated by the President to serve as Vice President pursuant to the twenty-fifth article of amendments to the Constitution of the United States, which requires confirmation by both the Senate and the House of Representatives.

Paragraph (14) of section 308 defines the term "relative" to mean with respect to a person required to file a report under this title, an individual who is related to the person as father, mother, son, daughter, brother, sister, uncle, aunt, great uncle, great aunt, first cousin, nephew, niece, husband, wife, grandfather, grandmother, grandson, granddaughter, father-in-law, mother-in-law, son-in-law, daughter-in-law, brother-in-law, sister-in-law, stepfather, stepmother, stepson, stepdaughter, stepbrother, stepsister, halfbrother, halvesister, fiancée, or who is the grandfather or grandmother of the spouse of the person reporting.

Paragraph (15) of section 308 defines the term "security" to have the same meaning set forth in section 2 of the Securities Act of 1933 as amended (15 U.S.C. 77(b)).

Paragraph (16) of section 308 defines the term "transactions in securities and commodities futures" to mean any acquisition, transfer or other disposition involving any security or commodity future.

Paragraph (17) of section 308 defines the term "uniformed services" to mean any of the Armed Forces, the commission corps of the Public Health Services, or the commission corps of the National Oceanic and Atmospheric Administration.

#### SECTION 309—SEPARABILITY

Section 309 is a separability clause which provides that if any part of this title is held invalid the remainder of the title shall not be affected thereby. In addition, if any provision of any part of the title or the application thereof to any person or circumstance is held invalid, the provisions of other parts and their applications to other persons or circumstances will not be affected thereby.

#### SECTION 310—AUTHORIZATION OF APPROPRIATION

Section 310 authorizes to be appropriated such sums as may be necessary to carry out the provisions of this title.

#### SECTION 311—EFFECTIVE DATE

Section 311 provides that this title shall take effect on January 1, 1978. The first reports filed under section 301(a) on or before May 15, 1978 are only required to include the information required by paragraphs (e), (f), (i), (j), (k), and (l) of section 302 as of January 1, 1978. The Senate Code of Official Conduct contained an effective date which required the filing of the first public financial disclosure statement on or before May 15, 1978 which statement had to include information with respect to the last three months of 1977. However, the Committee decided that due to the uncertainty as to when this title would be enacted into law, and in order to make the transition to



reporting under this title as easy as possible, the title should go into effect on January 1, 1978. However, the Committee did not feel it was desirable to delay the first filing under this title until May 15 of 1979. The Committee also did not want to require filing with respect to periods prior to the effective day of this title, since that would require disclosure of income and transactions covering a period during which employees were not on notice that their financial matters would be subject to public disclosure.

Therefore, the effective date of this title is January 1, 1978, but, on or before May 15th of 1978, a financial disclosure report must be filed including information with respect to assets, liabilities, positions of responsibility, agreements for future employment and prior employees as of January 1, 1978. Therefore, in the reasonably near future, there will be public disclosure of the financial interests and associations which could potentially present a conflict of interest, but not retroactive disclosure of information, income or transactions which occurred prior to the effective date of the statute. However, with respect to the reports filed by newly covered officers and employees under subsection 301(c), Presidential nominees under subsection 301(d), or candidates under subsection 301(e), the report required to be filed by such individuals must include all the information required to be contained in that report even if some of that information applies to the period prior to January 1, 1978. Such individuals are aware of the public financial disclosure requirements at the time they decide to accept such a position or nomination or become a candidate, and, therefore, they are on notice in advance of the disclosure requirements with which they must comply.

#### D. TITLE IV—OFFICE OF GOVERNMENT ETHICS

##### SECTION 401—OFFICE OF GOVERNMENT ETHICS

Subsection (a) of section 401 creates an Office of Government Ethics within the Civil Service Commission. Subsection (b) states that the Office of Government Ethics will be headed by a Director who will be appointed by the President, by and with the advice and consent of the Senate.

##### SECTION 402—AUTHORITY AND FUNCTIONS

Subsection (a) of section 402 provides that the Director of the Office of Government Ethics will be responsible for the overall direction of executive branch policies related to the prevention of conflicts of interest on the part of officers and employees of executive branch agencies. The term "executive agency," as used in this title, means executive agency as defined in section 105 of title 5, United States Code, except that it does not include the General Accounting Office. In performing these responsibilities, the Director of the Office of Government Ethics is under the general supervision of the Civil Service Commission.

Subsection (b) of section 402 delineates the specific responsibilities of the Office of Government Ethics.

Paragraph (1) states that the Director, in consultation with the Attorney General, is responsible for developing and recommending to the Civil Service Commission rules and regulations to be promul-

gated by the President or the Commission relating to conflicts of interest and ethics in the executive branch. This responsibility includes the development of uniform regulations governing executive branch procedures for filing financial disclosure statements, agency review of such reports, and guidelines concerning the availability of financial disclosure reports for public inspection.

Paragraph (2) of section 402(b) gives the Director of the Office of Government Ethics, in consultation with the Attorney General, responsibility for developing and recommending to the Civil Service Commission rules and regulations to be promulgated, by either the President or the Commission, pertaining to the identification and resolution of conflicts of interest. It is the overall responsibility of the Director to monitor executive branch enforcement of all laws related to conflict of interest, as well as executive branch rules and regulations. To a large degree, the initial responsibility for screening financial disclosure statements will rest upon reviewing personnel in each agency. However, it will be incumbent upon the Director of the Office of Government Ethics to develop rules and regulations designed to assist agencies in identifying potential violations of applicable statutes. These rules and regulations are to be developed with the advice and assistance of the Attorney General. In addition, the Director of the Office of Government Ethics, in consultation with the Attorney General, must develop uniform procedures to be followed for the appropriate resolution of any actual or apparent conflicts of interest, including divestiture, disqualification from decisions the outcome of which would benefit an employee financially, and in appropriate cases, referral of violations to the Justice Department for prosecution. In performing his responsibility under this paragraph, the Director must develop procedures whereby the inadvertent or technical mistake made by an individual can be resolved through a civil action.

Paragraph (3) of section 402(b) states that the Director of the Office of Government Ethics is responsible for monitoring and investigating compliance by executive branch officials with the public financial disclosure requirements in title III of this statute. In addition, the Director is responsible for overseeing the manner in which agency officials are performing their responsibility to receive and review financial disclosure reports and make such reports available to the public.

Paragraph (4) of section 402(b) states that the Director is responsible for establishing a system whereby each financial disclosure statement required to be filed whether public or confidential, is promptly reviewed by the appropriate person within an executive branch agency. The Director must establish procedures whereby reviewing officials sign and date each financial disclosure statement to indicate that it has been reviewed, and note whether a conflict exists and what action has been taken to eliminate conflicts which are discovered. The procedures which are established under this paragraph must provide for review of each public financial disclosure report filed under title III of this statute within 45 days of the date on which the report is filed. In addition, the provisions of this paragraph requiring a system whereby there is a prompt review of financial disclosure statements filed also applies to confidential statements filed under any other authority.

Paragraph (5) requires the Director of the Office of Government Ethics to conduct random audits of financial disclosure statements to determine whether such statements are complete and accurate. In conducting these audits, the Director must comply with the procedures for audits set forth in section 306 of title III. Of course, in appropriate cases, the Director can fulfill this responsibility by causing others, such as an independent auditing firm under contract, to conduct certain of the audits.

Paragraph (6) requires that the Director of the Office conduct a random annual review of at least five percent of the public financial disclosure statements filed pursuant to title II of this Act to determine whether the statements reveal possible violations of applicable conflict of interest laws or regulations. This review differs from the audit procedures outlined in paragraph (5) in that it is solely to determine whether individuals have complied with applicable laws and regulations pertaining to conflicts of interest, and not to determine if the report itself is accurate. This review will be conducted in much the same manner as the review by the ethics officer within each agency; this is by comparing an individual's financial holdings and activities with his employment responsibilities and the decisions he is likely to make in the course of his official duties. If, during the course of such a review, the Director discovers an actual or apparent conflict of interest, he is directed to recommend appropriate administrative action to the agency. This action could include divestiture or disqualification from participation in decisions which would affect one's financial interests or those of a spouse or dependent. However, in the case of a more serious violation, the Director might recommend administrative action, up to and including removal from office, and referral to the Attorney General for prosecution.

Paragraph (7) requires that the Director monitor and investigate individual and agency compliance with any additional financial reporting and internal review requirements established by law for the executive branch.

Paragraph (8) gives the Director responsibility for interpreting rules and regulations issued by the President or the Commission governing conflicts of interest and ethical problems and the filing of financial statements. Such interpretations can take the form of interpretive rulings, advisory opinions or any other device the Director finds appropriate. However, it is especially important that the inevitable process of interpreting title III of this Act or other laws, rules and regulations be done in a way that encourages citizen participation and leads to uniformity of interpretation of these laws and regulations throughout the executive branch, where appropriate.

Paragraph (9) states that the Director will consult, when requested, with agency ethics counselors and other officials responsible for enforcement and review of conflict of interest and financial disclosure forms in individual cases.

Paragraph (10) mandates the Director to establish a formal advisory opinion service. This is in addition to the Director's responsibility to assist agency ethics counselors and to give informal advice and advisory opinions to individuals who file their financial disclosure

statements with the Director. The purpose of the formal advisory opinion service is to ensure that advisory opinions rendered by the Director on matters of general applicability or on important matters of first impression are handled pursuant to the special procedures set forth in this paragraph. These advisory opinions will have substantial impact on employees other than the individual requesting the opinion and might involve issues of interest to many employees throughout the executive branch and to interested private citizens.

This paragraph does not require the Director to render an advisory opinion to any executive branch employee who requests one. Most advisory opinions to employees will probably be rendered by agency ethics counselors. However, when an important matter of first impression or a matter of general applicability arises, the Director should be the one to render an advisory opinion, not an agency ethics counselor.

When the Director decides that such an issue is involved, he should, if at all possible, provide interested parties with an opportunity to transmit written comments with respect to the request for such an advisory opinion. This is so important since the natural tendency is for the Director to focus on the issues raised by the party requesting the advisory opinion, and to not be aware of other important issues or consequences of rendering such an advisory opinion.

Finally, it is very important that advisory opinions of the kind described in this paragraph be compiled, published and made available to agency ethics counselors and the public.

Paragraph (11) grants the Director the authority to order corrective action by agencies and employees as he deems necessary. In performing his responsibility to monitor compliance with the disclosure provisions of this statute, the Director might discover that an agency has failed to comply with this statute or related laws or regulations governing standards of conduct. In such cases the Director is empowered to order an agency to comply with applicable regulations and to direct the type of corrective action the agency must take. In other cases, the Director may discover that an employee has failed to take a necessary action to avoid a conflict of interest. In such an instance, the Director may order the employee to take such action and recommend appropriate administrative action to the individual's agency.

Paragraph (12) authorizes the Director to require such reports from executive agencies as he deems necessary. In performing his responsibility to review financial disclosure reports for compliance with conflict of interest laws and regulations, it will be necessary to have access to employee job description materials and other records which may assist in such an evaluation. Agencies must comply with this request.

Paragraph (13) requires the Director to assist the Attorney General in evaluating the effectiveness of conflict of interest laws and to recommend necessary legislative action. It is expected that the Director will be able to draw upon the experience and expertise which he has gained on a day-to-day basis in the enforcement of this statute to make appropriate recommendations to the Attorney General concerning the effectiveness of existing conflict of interest and standards of conduct laws.

Paragraph (14) requires that the Director, with the assistance of

the Attorney General, evaluate the need for changes in Commission and agency regulations governing conflicts of interest and ethical problems. The purpose of this paragraph is to make these rules and regulations, to the greatest extent practicable, consistent with, and an effective supplement to, conflict of interest laws. Among the problems discovered by the GAO with the existing system of executive branch enforcement of conflict of interest regulations is that statutory restrictions on conduct which have been incorporated into agency charters have never been incorporated into agency regulations and, therefore, employees have unknowingly violated such statutes.

Paragraph (15) requires the Director of the Office of Government Ethics to cooperate with the Attorney General in developing an effective system for reporting allegations of violations of conflict of interest laws to the Attorney General. Under section 535 of title 28 of the United States Code, any information, allegation, or complaint received in a department or agency relating to violations of standards of conduct law which are detailed in title 18 must be reported to the Attorney General by the agency head. It is the responsibility of the Director to cooperate with the Attorney General in the development of such a referral system.

Paragraph (16) requires that the Director provide information on and promote understanding of ethical standards in the executive agencies. It is anticipated that under this section the Director will conduct an ongoing program to inform executive branch employees of the requirements of the law and of regulations governing their conduct and establish procedures to promptly notify employees of any changes in such laws and regulations. The fact that such an informational program has been lacking in the past has been well documented. While it is possible that the Director might delegate responsibility for informing employees of individual agencies of rule changes by their employing agency to that agency head or ethics counselor, the Director retains the primary supervisory responsibility for ensuring that adequate notice is rendered to the individual employee. In addition procedures should be established for notifying employees individually of rule changes and these notices must precisely explain the regulation, its application, and the consequence of failure to comply.

Paragraph (17) requires that the Director report to the Civil Service System recommendations which shall be submitted to Congress by February 1, 1979 as to which additional executive branch employees, if any, should be covered by the public financial disclosure requirement. In addition this report should include information regarding which executive branch officials are required to file confidential disclosure statements under any executive order, rule or regulation.

The Committee chose not to define which employees below level GS-16 should have to file confidential financial disclosure statements because the Administration asked that the Office of Government Ethics first be given an opportunity to make an evaluation of the present system and develop recommendations for needed changes. However, the Committee was very concerned that a systematic evaluation of this problem be done and that the results be reported to Congress so that necessary legislative action can be taken.

Paragraph (18) requires the Director to report to the Civil Service

Commission at least annually on the activities of the Office of Government Ethics and the effectiveness of the executive branch system for the prevention of conflicts of interest. The report must include the number of financial disclosure statements audited and the findings of such audits, as well as the findings of the reviews to be conducted under this section. In addition, it is anticipated that the Director will report on his performance of the responsibilities given him under this title. This report, together with suggested changes or additions to applicable laws, must be submitted to the President and the Congress.

Section 402 (c) requires that, in the development of policies, rules, regulations, procedures, and forms, the Director consult, as he feels appropriate, with the executive agencies affected and the Attorney General.

#### SECTION 403—ADMINISTRATIVE PROVISIONS

Section 403 establishes certain administrative provisions. Paragraph (1) of subsection (a) provides that, upon request of the Director of the Office of Government Ethics, each executive agency is directed to make its services, personnel, and facilities available to the Director to the greatest extent practicable for the performance of functions under this title. Paragraph (2) provides that, except when prohibited by law, each executive agency shall furnish to the Director all information and records in its possession which the Director may determine necessary for the performance of his duties. In conducting the reviews and audits required under Title III, and in performing his responsibilities which are enumerated in section 402, including those of monitoring and investigating compliance of agencies and individuals with the provisions of this statute or other applicable laws and regulations, the Director will require the assistance of agency personnel, services and facilities. For instance, when auditing a financial disclosure statement filed by an individual agency employee, he may wish to use an office within that agency. He will need access to the financial disclosure statements filed by agency employees. In addition, for purposes of performing his responsibilities, he will require access to relevant files and records of agency ethics counselors and other agency materials, information, and documentation necessary to monitor compliance with this statute and related conflict of interest laws and regulations.

Subsection (b) of section 403 amends section 5316 of title 5, United States Code, by adding at the end the following: "(141) Director, Office of Government Ethics, Civil Service Commission."

#### SECTION 404—AUTHORIZATION OF APPROPRIATIONS

Section 404 authorizes to be appropriated to carry out the provisions of this title \$3 million for fiscal year 1978, and \$3 million for each of the fiscal years 1979, 1980, 1981, and 1982.

#### SECTION 405—SEPARABILITY

Section 405 provides that if any part of this title is held invalid, the remainder of the title shall not be affected. It also provides that if any provision of this title, or the application of any provisions to

any person or circumstance, is held invalid, the provisions of other parts and their applicability to any other persons or circumstances shall not be affected.

Title V is a revision of 18 USC 207, the major federal statute concerning restrictions on post-service activities by former officers and employees of Executive Branch departments and agencies. The statute as proposed contains four major subsections.

#### SUBSECTIONS (a), (b) AND (c)—COVERAGE

The provisions of subsections (a) and (b) apply to all officers and employees of any department or agency within the Executive Branch or the District of Columbia government, including any independent agency. Special government employees are included in subsection (a) and (b).

On the other hand, subsection (c) applies *only to top-level officials* in the departments and agencies and *excludes* special government employees. It indicates the various grades and levels of officials who are intended to be included within this restriction. In addition, the director of the Office of Government Ethics of the Civil Service Commission is charged with the responsibility of determining what comparable positions under other authority ought to be included under subsection (c). Examples of those intended to be included within that reference are: classes 1 and 2 on the schedule for foreign service officers, foreign service reserve, and foreign service information officers established under 22 USC 868; grade 13 or above on the Foreign Compensation Schedule; the section 4103 schedule for those at director grade in the Physician and Dentist Schedule established for the Veterans Administration under 38 USC 4107; SM Levels 8-12 established by the Tennessee Valley Authority pursuant to 16 USC 8316; and level 34 or above for the officers and employees of the U.S. Postal Service.

Officers and employees of the Legislative and Judicial Branch of the Government are not covered by this Title.

#### SUBSECTION (a)—LIFETIME BAN ON CERTAIN MATTERS

Subsection (a) permanently bars a former officer or employee from acting on matters in which he was personally and substantially involved at any time during his government service. The participation must be personal and substantial, and may occur through decision, approval, disapproval, recommendation, the rendering of advice, or investigation of that particular matter while so employed as a government officer or employee. On those matters, the former official cannot aid, assist or consult anyone other than the United States in connection with a department, agency or court proceeding in which the government is a party of has a direct and substantial interest. Under this subsection, a former official may not be involved, either formally or informally, in such prohibited matters after leaving government office. However, subsection (a) only concerns particular matters involving specific parties. As such, it has no application to general rule-making, formulation of general policy or standards, other similar administrative matters, and legislative activities—none of which typically involve specific parties.

A former official may therefore appear before his own agency on behalf of a private client on, for instance, a new matter brought pursuant to an agency rule even though he participated in the promulgation of that rule. A former official is also allowed to appear before Congressional committees and give testimony even on particular matters involving specific parties in which he participated personally and substantially while in office. In addition to subsequent practice by a lawyer on behalf of clients, subsection (a) is intended to include consultants and expert witnesses, and self-representation.

SUBSECTION (b)—A 2-YEAR BAN FOR CERTAIN MATTERS

Subsection (b) provides that, for a period of two years after leaving office, a former official cannot become involved in any matter that was under his official responsibility during his final year of service with that particular department or agency. The term "official responsibility" is defined by 18 USC 202(b) to mean: "the direct administrative or operating authority, whether intermediate or final, and either exercisable alone or with others, and either personally or through subordinates, to approve, disapprove, or otherwise direct Government action". It includes only those matters under the former officer's or employee's official responsibility during his final twelve months of service with that agency or department.

Matters that occur and conclude prior to that time are excluded. On prohibited matters, the former official cannot appear before, or have any contact with, *any* court, department, or agency. It should be noted that subsection (b) (2) requires that oral or written communications must be made with the intent to influence that proceeding, but subsection (c) (1) on appearance and attendance has no such intent requirement. It does include both formal and informal appearances. However, unlike subsection (a), the former official is permitted to aid, assist and consult on those matters provided that he makes no contact of any sort with any court, department or agency considering that matter. Subsection (b) only concerns particular matters involving specific parties. As such, it has no application to general rule-making, formulation of general policy or standards, other similar administrative matters, and legislative activities—none of which typically involve specific parties. A former official may therefore appear before Congressional Committees and give testimony, even on particular matters involving specific parties which were under his official responsibility while in office. In addition to subsequent practice by a lawyer on behalf of private clients, subsection (b) is intended to include consultants and expert witnesses, and self-representation.

SUBSECTION (c) : 1 YEAR "NO CONTACT" BAN ON ALL MATTERS BEFORE CERTAIN DEPARTMENTS AND AGENCIES

Subsection (c) provides that, for a period of one year, a former top-level officer or employee cannot appear before, or have any contact with, his former department or agency on matters of business. That contact only includes matters actually pending before the official's former department or agency. It should be noted that subsection (c) (2) requires that oral or written communications must be made with the intent to influence that proceeding, but subsection (c) (1) on ap-



pearance and attendance has no such intent requirement. But some degree of contact is required, and therefore the former official is free to aid and assist and consult on matters covered by subsection (c), as long as there is no direct contact. (Provided there is no violation of 207(a) as we propose to amend it. It does not, however, apply to legislative activities and the former official is allowed to appear before Congress and testify on matters on which he could not contact his former department or agency. Special government employees are excluded from this subsection. In addition to subsequent legal practice, 207(c) also includes consultants and expert witnesses, and self-representation.

In several important regards, subsection (3) differs from the two preceding subsections. First, unlike subsections (a) and (b), the restriction applies regardless of the degree of association the former official had with a particular matter. Second, it covers all matters—including general rulemaking and formulations of general standards—that are pending before the department or agency for one year after the official leaves office. Third, unlike the prior subsections (that apply only to cases considered *during* agency service), this subsection includes new matters that arose after the official left the department or agency. Fourth, subsections (a) and (b) bar participation in any agency, department or court proceeding where the prohibited matter is considered; but subsection (c) bars contact only with the agency or department where the former official was employed. Finally, there are important limitations in the range of officials covered by subsection (c): special government employees are excluded from coverage, and only those persons holding top-level positions in the departments and agencies are subject to this prohibition.

The contact must be on a matter of business. Casual, social communication, such as "cocktail party" conversation, is not included unless it relates to a pending matter of business. Also while we do propose to prohibit contacts *made by a former official*, subsection (c) is not intended to apply when, upon the initiation of the department or agency, the former official is consulted for his technical or other special expertise. Also the provision does not apply during any part of that year that the former official is employed by the United States.

Subsection (c) further excludes contacts concerning matters of a personal and individual nature, such as personal income taxes and pension benefits. That form of self-representation is reasonable and to be expected. To illustrate this point further: a former staff person at the Internal Revenue Service would not be prohibited from filing his tax return or from contesting a tax determination made in his case or from taking any intra-agency appeals pursuant to that decision. Conceivably there also may be matters relating to the former official's employment at an agency, such as pension rights, which would require some agency contact within a year of leaving service.

All of those matters are obviously of a very personal and individual nature. They present no problem under subsection (c), which is directed at unfair influence being exerted by a former official with the persons with whom he had worked.

On the other hand, we do not exclude self-representation altogether from subsection (c). There are situations where such actions may be

objectionable. For example, within twelve months of his departure, a former official could not establish a business and then apply to his former agency for a funding grant; nor could a former commissioner apply, on his own behalf, for a license from his former agency within a year of his departure from office.

The final feature of subsection (c) concerns the treatment, for the purposes of the one year "no contact" ban, of former officials of agencies or major bureaus that are located within departments. Where warranted, subsection (c) authorizes the director of the Office of Government Ethics to limit the scope of that prohibition to particular statutory departmental agency or bureau, thereby allowing the former official to have contact with the remainder of the department. In order to issue that rule, the director must find that the statutory agency or bureau exercises functions that are distinct and separate from those of the rest of the department.

That determination can be made only in the case of statutory agencies and bureaus within departments; it has no application to the sub-units of agencies. For example for the purposes of subsection (c), the Internal Revenue Service exercises functions that are distinct and separate from those of other segments of the Department of the Treasury; the same is true of the Food and Drug Administration and the Department of Health, Education and Welfare. To cite another example, we would also include the Federal Aviation Administration and the Department of Transportation. It merits emphasis that such exceptions are to be made only in those kinds of exceptional and clear cases, where an agency—exercising wholly separate and distinct functions—happens to be contained within a department.

We believe, however, that the present complexity and size of Executive departments require occasional separate treatment of certain departmental agencies and bureaus. It would be patently unfair in some cases to apply the one year "no contact" prohibition to certain employees for the purpose of an entire department—when in reality the agency in which he worked was separate and distinct from the larger entity. Again it is useful to restate the principal objective of subsection (c): it is addressed to the problem of unfair or undue influence by former officials over their former colleagues and subordinates. As such, no valid purpose is served by making the subsection (c) restriction department-wide for a former official who worked in a wholly distinct and separate departmental bureau. In those instances, there is little or no potential of undue influence over officials in other units.

It should be noted, however, that the limitation of the scope of 207 (c) cannot be extended to those officers and employees of the department whose official responsibility included supervision of that departmental agency or bureau. The objective of subsection (c) requires that those officials be barred from contact with that sub-unit for a period of one year.

#### SUBSECTIONS (a), (b) AND (c): CRIMINAL AND ADMINISTRATIVE SANCTIONS

Title V restates the criminal sanctions contained at present in 18 USC 207: upon conviction, a defendant may be fined not more than \$10,000 or imprisoned for not more than two years, or both. In addition, Title V establishes a new administrative disciplinary remedy for violations of the statute. The provision states that the head of a de-

partment or agency may determine violations of subsection (a) or (b) or (c) by former officers and employees. That determination, however, may be made only after proper notice and opportunity for a hearing; it is our intention that constitutional requirements of due process be observed in that process. Once it is determined that a violation occurred, the head of the agency or department in which the former official served may prohibit that individual from making any appearance or attendance before that department or agency for a period not to exceed five years. Other appropriate disciplinary action, such as issuance of a formal reprimand may also be taken. The departments and agencies should promptly establish effective internal procedures to implement this disciplinary remedy. It is hoped that the Office of Government Ethics of the Civil Service Commission will provide assistance and guidelines on appropriate procedures to the various departments and agencies on this matter.

SUBSECTIONS (a), (b) AND (c) : WAIVER PROVISION

All of the prohibitions contained in subsections (a), (b) and (c) may be waived—but the waiver provision contained in 18 USC 207 has been left purposefully narrow. It provides that a former official may be exempted from any or all of restrictions if: he or she has “outstanding scientific or technological qualifications”, and if the exemption is in connection with a particular matter in a “scientific or technological field.” The department or agency head, upon determining that the “national interest” would be served by an exemption, must certify to that effect in writing, and the certification subsequently published in the *Federal Register*. It is our opinion that this waiver provision will be used in the future, as it has been in the past, only in exceptional cases.

SUBSECTION (d) : PARTNERS OF CURRENT OFFICER AND EMPLOYEES OF THE EXECUTIVE BRANCH

Subsection (d) is unchanged in substance from the present law. However the Committee, on the recommendation of the Department of Justice, did delete from Title V the concluding paragraph presently contained in 18 USC 207. That paragraph states that partners of present and former officers and employees of the Executive Branch shall be subject to the provisions of 18 USC 203, 205 and 207 only as expressly provided in what is proposed to be 207(d). Since only 207(d) makes any reference to partners, it was the opinion of the Department of Justice that the concluding paragraph was unnecessary.

VI. CHANGES IN EXISTING LAW

In compliance with subsection 4 of Rule XXIX of the Standing Rules of the Senate, changes in existing law made by the bill, as reported, are shown as follows (existing law proposed to be omitted is enclosed in black brackets, new matter is printed in *italic*, and existing law in which no change is proposed shown in Roman) :

CHAPTER 4 OF TITLE 2, UNITED STATES CODE

§ 118 Actions against officers for official acts.

[In any action brought against any person for or on account of anything done by him while an officer of either House of Congress in

the discharge of his official duty, in executing any order of such House, the United States attorney for the district within which the action is brought, on being thereto requested by the officer sued, shall enter an appearance in behalf of such officer; and all provisions of the eighth section of the Act of July 28, 1866, entitled "An Act to protect the revenue, and for other purposes", and also all provisions of the sections of former Acts therein referred to, so far as the same relate to the removal of suits, the withholding of executions, and the paying of judgments against revenue or other officers of the United States, shall become applicable to such action and to all proceedings and matters whatsoever connected therewith, and the defense of such action shall henceforth be conducted under the supervision and direction of the Attorney General.】

CHAPTER 53 OF TITLE 5, UNITED STATES CODE

§ 5315 Positions at Level III.

\* \* \* \* \*

(114) *Director, Office of Government Crimes, Department of Justice.*

\* \* \* \* \*

§ 5316 Positions at Level IV.

\* \* \* \* \*

(141) *Director, Office of Government Ethics, Civil Service Commission.*

\* \* \* \* \*

CHAPTER 11 OF TITLE 18, UNITED STATES CODE

**【§ 270. Disqualification of former officers and employees in matters connected with former duties or official responsibilities; disqualification of partners.**

【(a) Whoever, having been an officer or employee of the executive branch of the United States Government, of any independent agency of the United States, or of the District of Columbia, including a special Government employee, after his employment has ceased, knowingly acts as agent or attorney for anyone other than the United States in connection with any judicial or other proceeding, application, request for a ruling or other determination, contract, claim, controversy, charge, accusation, arrest, or other particular matter involving a specific party or parties in which the United States is a party or has a direct and substantial interest and in which he participated personally and substantially as an officer or employee, through decision, approval, disapproval, recommendation, the rendering of advice, investigation, or otherwise, while so employed, or

【(b) Whoever, having been so employed, within one year after his employment has ceased, appears personally before any court or department or agency of the Government as agent, or attorney for, anyone other than the United States in connection with any proceeding, application, request for a ruling or other determination, contract, claim, controversy, charge, accusation, arrest, or other particular matter involving a specific party or parties in which the United States is

a party or directly and substantially interested, and which was under his official responsibility as an officer or employee of the Government at any time within a period of one year prior to the termination of such responsibility—

【Shall be fined not more than \$10,000 or imprisoned for not more than two years, or both: *Provided*, That nothing in subsection (a) or (b) prevents a former officer or employee, including a former special Government employee, with outstanding scientific or technological qualifications from acting as attorney or agent or appearing personally in connection with a particular matter in a scientific or technological field if the head of the department or agency concerned with the matter shall make a certification in writing, published in the Federal Register, that the national interest would be served by such action or appearance by the former officer or employee.

【(c) Whoever, being a partner of an officer or employee of the executive branch of the United States Government, of any independent agency of the United States, or of the District of Columbia, including a special Government employee, acts as agent or attorney for any one other than the United States, in connection with any judicial or other proceeding, application, request for a ruling or other determination, contract, claim, controversy, charge, accusation, arrest, or other particular matter in which the United States is a party or has a direct and substantial interest and in which such officer or employee of the Government or special Government employee participates or has participated personally and substantially as a Government employee through decision, approval, disapproval, recommendation, the rendering of advice, investigation or otherwise, or which is the subject of his official responsibility—

【Shall be fined not more than \$5,000, or imprisoned not more than one year, or both.

【A partner of a present or former officer or employee of the executive branch of the United States Government, of any independent agency of the United States, or of the District of Columbia or of a present or former special Government employee shall as such be subject to the provisions of sections 203, 205, and 207 of this title only as expressly provided in subsection (c) of this section.】

#### CHAPTER 32 OF TITLE 39, UNITED STATES CODE

#### § 3210 Franked mail transmitted by the Vice President, Members of Congress, and congressional officials

\* \* \* \* \*

(b) (1) The Vice President, each Member of or Member-elect to Congress, the Secretary of the Senate, the Sergeant at Arms of the Senate, each of the elected officers of the House of Representatives (other than a Member of the House), [and the Legislative Counsels of the House of Representatives and the Senate] *the Legislative Counsels of the House of Representatives and the Senate, and the Congressional Legal Counsel*, may send, as franked mail, matter relating to their official business, activities, and duties, as intended by Congress to be mailable as franked mail under subsection (a) (2) and (3) of this section.

(2) If a vacancy occurs in the Office of the Secretary of the Senate, the Sergeant at Arms of the Senate, an elected officer of the House of Representatives (other than a Member of the House), [or the Legislative Counsel of the House of Representatives or the Senate] *the Legislative Counsel of the House of Representatives or the Senate, or the Congressional Legal Counsel*, any authorized person may exercise the franking privilege in the officer's name during the period of the vacancy.

\* \* \* \* \*

§ 3216 Reimbursement for franked mailings

(a) The equivalent of—

(1) postage on, and fees and charges in connection with, mail matter sent through the mails—

(A) under the franking privilege (other than under section 3219 of this title), by the Vice President, Members of and Members-elect to Congress, the Secretary of the Senate, the Sergeant at Arms of the Senate, each of the elected officers of the House of Representatives (other than a Member of the House), [and the Legislative Counsels of the House of Representatives and the Senate] *the Legislative Counsels of the House of Representatives and the Senate, and the Congressional Legal Counsel*; and

(B) by the surviving spouse of a Member of Congress under section 3218 of this title;

(2) those portions of fees and charges to be paid for handling and delivery by the Postal Service of Mailgrams considered as franked mail under section 3219 of this title;

shall be paid by a lump-sum appropriation to the legislative branch for that purpose and then paid to the Postal Service as postal revenue. Except as to Mailgrams and except as provided by sections 733 and 907 of title 44, envelopes, wrappers, cards, or labels used to transmit franked mail shall bear, in the upper right-hand corner, the sender's signature, or a facsimile thereof.

\* \* \* \* \*

§ 3219 Mailgrams

Any mailgram sent by the Vice President, a Member of or Member-elect to Congress, the Secretary of the Senate, the Sergeant at Arms of the Senate, an elected officer of the House of Representatives (other than a Member of the House), [or the Legislative Counsel of the House of Representatives or the Senate] *the Legislative Counsel of the House of Representatives or the Senate, or the Congressional Legal Counsel*, and then delivered by the Postal Service, shall be considered as franked mail, subject to section 3216(a)(2) of this title, if such Mailgram contains matter of the kind authorized to be sent by that official as franked mail under section 3210 of this title.

**“§ 207. Disqualification of former officers and employees; disqualification of partners of current officers and employees**

“(a) *Whoever, having been an officer or employee of the executive branch of the United States Government, of any independent agency*

of the United States, or of the District of Columbia, including a special Government employee, after his employment has ceased, knowingly aids, assists, or represents any one other than the United States, in connection with any judicial or other proceeding, application, request for a ruling or other determination, contract, claim, controversy, charge, accusation, arrest, or other particular matter involving a specific party or parties in which the United States or the District of Columbia is a party or has a direct and substantial interest and in which he participated personally and substantially as an officer or employee through decision, approval, disapproval, recommendation, the rendering of advice, investigation, or otherwise, while so employed, or

“(b) Whoever, having been so employed, within two years after his employment has ceased, knowingly—

“(1) acts as agent or attorney for or otherwise represents any one other than the United States in any formal or informal appearance before, or

“(2) makes any written or oral communication on behalf of anyone other than the United States to, and with the intent to influence the action of,

any court or department or agency, or any officer or employee thereof, in connection with any judicial or other proceeding, application, request for a ruling or other determination, contract, claim, controversy, charge, accusation, arrest, or other particular matter involving a specific party or parties in which the United States or the District of Columbia is a party or has a direct and substantial interest and which was under his official responsibility as an officer or employee within a period of one year prior to the termination of such responsibility, or,

“(c) Whoever, other than a special Government employee, having been so employed—

“(i) at a rate of pay specified in subchapter II of chapter 53 of title 5, United States Code, or a comparable or greater pay rate under another authority; or

“(ii) in a position classified at GS-16, GS-17, or GS-18 of the General Schedule prescribed by section 5332 to title 5, United States Code; in a position classified at O-7 or above under section 1009 of title 37, United States Code; or in a comparable executive branch position under another authority, as defined by the Director of the Office of Government Ethics, Civil Service Commission, within one year after his employment with the department or agency has ceased, knowingly—

“(1) makes any appearance or attendance before, or

“(2) makes any written or oral communication to, and with the intent to influence the action of,

the department or agency in which he served, or any officer or employee thereof, if such appearance or communication relates to any particular matter which is pending before such department or agency. Provided, That, the prohibition of this subsection shall not apply to appearances or communication by the former officer or employee concerning matters of a personal and individual nature, such as personal income taxes or pension benefits; Provided further, That, for the purposes of

*this subsection, whenever the Director of the Office of Government Ethics of the Civil Service Commission determines that a separate statutory agency or bureau within a department exercises functions which are distinct and separate from the remaining functions of the department, the Director shall by rule designate such agency or bureau, as a separate 'department or agency', except that this shall not apply to former officers and employees of the department whose official responsibilities included supervision of said agency or bureau—*

*"Shall be fined not more than \$10,000 or imprisoned for not more than two years, or both. In addition, if the head of the department or agency in which the former officer or employee served finds, after notice and opportunity for a hearing, that said former officer or employee violated subsection (a), (b), or (c) of this section, he may prohibit that person from making any appearance or attendance before that department or agency for a period not to exceed five years, or may take other appropriate disciplinary action: Provided, That nothing in subsection (a), (b), or (c) prevents a former officer or employee, including a former special Government employee, with outstanding scientific or technological qualifications from making any appearance, attendance, or written or oral communication in connection with a particular matter in a scientific or technological field if the head of the department or agency concerned with the matter shall make a certification in writing, published in the Federal Register, that the national interest would be served by such action or appearance by the former officer or employee.*

*"(d) Whoever, being a partner of an officer or employee of the executive branch of the United States Government, of any independent agency of the United States or of the District of Columbia, including a special Government employee, acts as agent or attorney for anyone other than the United States before and department, agency, court, court-martial, or any civil, military, or naval commission, of the United States or of the District of Columbia, or any officer or employee thereof, in connection with any judicial or other proceeding, application, request for a ruling or other determination, contract, claim, controversy, charge, accusation, arrest or other particular matter in which the United States is a party or has a direct and substantial interest and in which such officer or employee of the Government or special Government employee participates or has participated personally and substantially as a Government employee through decision, approval, disapproval, recommendation, the rendering of advice, investigation, or otherwise, or which is the subject of his official responsibility—*

*"Shall be fined not more than \$5,000, or imprisoned for not more than one year, or both."*

#### VII. ROLLCALL VOTES IN COMMITTEE

In compliance with section 133 of the Legislative Reorganization Act of 1946, as amended, the rollcall votes taken during committee consideration of this legislation are as follows:



Vote on Amendment to require the full disclosure of the financial interests of spouses and dependents, and to eliminate the requirement that an individual must report only those items of which he has knowledge: Adopted; 7 yeas—4 nays.

YEAS (7)	NAYS (4)
Eagleton	Metcalf
Chiles	Ribicoff
Glenn	Javits
Sasser	Stevens
Percy	
Mathias	
Heinz	

Final Passage: Ordered reported; 11 yeas—0 nays.

YEAS (11)	NAYS (0)
Metcalf	
Eagleton	
Chiles	
Glenn	
Sasser	
Ribicoff	
Percy	
Javits	
Stevens	
Mathias	
Heinz	
(Proxy)	
Muskie	
Danforth	

#### VIII. ESTIMATED COSTS

In accordance with section 252(c) of the Legislative Reorganization Act of 1970 (Public Law 91-510), the Committee estimates that the costs of implementation of S. 495 would be as follows:

##### TITLE I

There should be no additional cost as a result of the creation of an Office of Government Crimes in the Department of Justice to replace the existing Public Integrity Section. However, the Congressional Budget Office estimates that the creation of this Office will cost an additional \$200,000 a year.

It is impossible to estimate the cost which will be incurred as a result of the appointment of temporary special prosecutors because the frequency of such appointments cannot be determined in advance. However, most, if not all, of the cost involved in the appointment of a special prosecutor is offset by the savings realized by the Department of Justice because the investigation in question does not have to be conducted by the Department, as would be the case if a special prosecutor were not appointed.

## TITLE II

The Office of Congressional Legal Counsel will require the following expenditures:

Fiscal year:		
1978	-----	\$500,000
1979	-----	530,000
1980	-----	500,000
1981	-----	590,000
1982	-----	620,000

## TITLE III

The implementation of title III, other than the audits of executive branch disclosure reports provided for in the cost estimate for title IV of this legislation, will cost no more than \$100,000 each year.

## TITLE IV

The cost of implementing Title IV, assuming the full authorization level is appropriated each year, will be \$3 million a year for each of fiscal years 1978, 1979, 1980, 1981, and 1982.

## TITLE V

No cost is associated with this title.

The cost estimate for S. 555, prepared by the Congressional Budget Office pursuant to Section 403 of the Congressional Budget Act of 1974, is reprinted below in its entirety.

## CONGRESSIONAL BUDGET OFFICE—COST ESTIMATE

MAY 16, 1977.

1. Bill No.: S. 555.
2. Bill title: Public Official Integrity Act of 1977.
3. Bill status: As ordered reported by Senate Committee on Governmental Affairs, May 12, 1977.
4. Purpose of bill: The bill has five major provisions: Title I establishes procedures for the court appointment of a temporary special prosecutor and provides for the creation of an Office of Government Crimes within the Department of Justice; Title II establishes the Office of Congressional Legal Counsel; Title III requires certain officers and employees of the federal government to file financial disclosure statements to specified supervising ethics offices; Title IV creates the Office of Government Ethics in the Civil Service Commission and authorizes appropriations of \$3 million for each fiscal year beginning in fiscal year 1978 and ending in fiscal year 1982; and Title V defines restrictions on post-service activities by former federal officials. The bill authorizes the appropriation of such sums as are necessary to carry out various provisions of the bill.
5. Cost Estimate:

[In millions of dollars; fiscal years]

	1978	1979	1980	1981	1982
Authorization level (title IV).....	3.0	3.0	3.0	3.0	3.0
Estimated costs: Title I (function 750).....	.2	.2	.2	.2	.2
Title II (function 800).....	.5	.5	.6	.6	.6
Title III (function 800).....	.1	.1	.1	.1	.1
Title IV (function 800).....	2.7	3.0	3.0	3.0	3.0
Total cost.....	3.5	3.8	3.9	3.9	3.9

6. Basis for estimate: Title I. Because the Justice Department currently has resources to pursue criminal allegations of federal employees, it is assumed that the new Office of Government Crimes would require only marginal additional staff support. This estimate assumes that six executive and clerical positions would be created. The remaining administrative and professional support would be performed by the existing Public Integrity Section of the Department of Justice.

The costs of appointing a temporary special prosecutor are not included in this estimate because the frequency of such appointments cannot be determined at this time.

Title II. The estimate for the Office of Congressional Legal Counsel assumes an initial staff consisting of a congressional legal counsel, a deputy counsel, nine assistant legal counsels, two paralegal aids, and clerical support.

Title III. The majority of costs associated with the financial disclosure reporting and audit requirements contained in this title will be absorbed by the new Office of Government Ethics authorized under Title IV. However, the ethics offices of the Senate and the House will incur some administrative costs related to the collection and monitoring of reports. For the purposes of this estimate, it is assumed that an average of 1,500 reports will be filed with both the Senate and House ethics offices each year, and that one staff person at a salary of \$16,800 will be required in each office to handle the workload. It is further assumed that the existing financial reporting mechanism of the Judicial Conference of the United States will accommodate the administrative costs associated with the filing of reports under the judicial branch. If 25 of the approximately 750 judicial reports are audited each year, at an estimated cost of \$400 per audit, an additional \$10,000 could be incurred by the Judicial Conference. This estimate also assumes that the Comptroller General will audit an average of 125 reports per year filed with the Senate and House ethics offices, for a total cost of \$50,000 per year.

Title IV. This estimate assumes that the full authorization level will be appropriated each year and that the spendout rate will be 90 percent in the first year and 10 percent in the subsequent year applied to each year.

Title V. No cost is associated with this title.

7. Estimate comparison: None.

8. Previous CBO Estimate: On June 11, 1976, an estimate was prepared for S. 495, the Watergate Reorganization and Reform Act of 1976.

9. Estimate prepared by: Jim Manaro, Barbara Schilberg (225-7760).

10. Estimate Approved by: James L. Blum, Assistant Director for Budget Analysis.

#### IX. EVALUATION OF REGULATORY, PAPERWORK, AND PRIVACY IMPACT

In accordance with Rule XXIX of the Standing Rules of the Senate, the following is an evaluation of the impact of this statute:

##### *Regulatory impact*

There is no foreseeable economic impact of this legislation on businesses or classes of individuals outside of the Federal Government. Titles I and II have no regulatory impact whatsoever.

Insofar as Title III sets forth requirements that certain classes of high-ranking officers and employees of the Federal Government (numbering approximately 15,000 to 20,000) prepare annual public financial disclosure statements, there conceivably could be a minimal economic impact on these individuals. However, since the vast majority of individuals required to report their financial interests under this statute are already subject to existing public or confidential financial disclosure requirements, it is unlikely that they will incur any added costs due to the requirements imposed by this legislation.

Likewise, the Committee foresees limited additional regulation as a result of the enactment of Title IV, establishing an Office of Government Ethics. The Committee believes that such an office will improve the quality and promote the simplicity and uniformity of existing regulations. In addition, the Office will better inform employees of these legal requirements and more vigorously enforce these requirements.

Title V extends the existing restrictions on post employment activities of executive branch officials. The statute is basically self enforcing although the Office of Government Ethics is authorized by regulation to define certain terms used in the statute.

##### *Paperwork impact*

There will be limited additional paperwork generated within the federal government as a result of enactment of this statute. To a large degree, the committee believes that efficient implementation of the provisions of this statute will serve to keep additional paperwork to a minimal amount. Under Title I, the Attorney General is required to file memoranda with the special court when he receives allegations of wrongdoing by high-level government officials and when he seeks appointment of a temporary special prosecutor. The Committee feels that the interests of the public in preserving both the integrity and impartiality of our system of justice justifies this paperwork.

Title III will require the filing of financial disclosure statements by high level government officials. The actual impact of this requirement, when considered together with the creation of an Office of Government Ethics in Title IV, should not result in any significant increase in the amount of paperwork currently generated. Almost all of the officials required to file public financial disclosure reports under this title are already subject to some sort of disclosure requirement due to existing law, rule or regulation. In the past, there has been little uniformity in such requirements. The Committee believes that in the executive

branch, the uniform regulations and forms which will be prescribed by the Office of Government Ethics might even decrease the proliferation of duplicative agency regulations and varying financial disclosure forms currently existing.

*Privacy impact*

There is no doubt that the personal privacy of some 15,000-20,000 Federal officers and employes will be affected by enactment of the provisions of title III of this statute. The most substantial effect will be upon those officials in the executive and judicial branches of the Federal Government, as the Senate and House of Representatives have already imposed on their Members, officers and employees public financial disclosure requirements similar to those in this legislation.

The Committee believes that the restoration of public confidence in the men and women who make up the Federal Government is a matter of such importance that it justifies this invasion of privacy. The Committee has taken great care to insure that the disclosure required is limited to the minimum amount of information necessary to provide the public with the information necessary to determine whether a Government official has a conflict of interest. For that reason, the Committee decided not to require disclosure of a reporting individual's tax return or the disclosure of a complete net worth statement. Instead, it adopted a system for listing financial holdings by category of value, rather than the exact value of the holding.

The Committee concluded that there is no way to totally protect the privacy interests of public officials and, at the same time, grant the public a full accounting of those interests which could present conflicts of interest. Therefore, with respect to every provision in title III, the Committee carefully balanced the privacy interests of the reporting individual and his immediate family with the legitimate public interest in full disclosure.



TEXT OF S. 555 AS REPORTED

A bill to establish certain Federal agencies, effect certain reorganizations of the Federal Government, to implement certain reforms in the operation of the Federal Government and to preserve and promote the integrity of public officials and institutions, and for other purposes.

*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,* That this Act may be cited as the "Public Officials Integrity Act of 1977".

TITLE I—AMENDMENTS TO TITLE 28, UNITED STATES  
CODE

SPECIAL PROSECUTOR

SEC. 101. (a) Title 28 of the United States Code is amended by inserting immediately after chapter 37 the following new chapter:

**"Chapter 39.—SPECIAL PROSECUTOR**

"Sec.

"591. Applicability of provisions of this chapter.

"592. Application for appointment of a special prosecutor.

"593. Duties of the division of the court.

"594. Authority and duties of a special prosecutor.

"595. Reporting and congressional oversight.

"596. Removal of a special prosecutor; termination of office.

"597. Relationship with Department of Justice.

"598. Termination of effect of chapter.

**"§ 591. Applicability of provisions of this chapter**

"(a) The attorney General shall conduct an investigation pursuant to the provisions of this chapter whenever the Attorney General receives specific information that any of the persons described in subsection (b) of this section may have violated any Federal criminal law other than a violation constituting a petty offense.

"(b) The persons referred to in subsection (a) of this section are—

"(1) The President or Vice President.

"(2) Any individual serving in a position listed in section 5312 of title 5.

"(3) Any individual working in the Executive Office of the President and compensated at a rate not less than the rate provided for level IV of the Executive Schedule under section 5315 of title 5.

"(4) Any individual working in the Department of Justice and compensated at a rate not less than the rate provided for level III of the Executive Schedule under section 5314 of title 5; any assistant attorney general involved in criminal law enforcement; the Director of Central Intelligence; the Deputy Director of Central Intelligence; and the Commissioner of Internal Revenue.

“(5) Any individual who held any office or position described in any of paragraphs (1) through (4) of this subsection during the term of the President in office on the date the Attorney General receives the information under subsection (a) (hereafter in this subsection referred to as the ‘incumbent President’) or during the period during which the President immediately preceding such incumbent President held office, if such preceding President was of the same political party as the incumbent President.

“(6) A national campaign manager or chairman of any national campaign committee seeking the election or reelection of the President.

**“§ 592. Application of appointment of a special prosecutor**

“(a) The Attorney General, upon receiving specific information that any of the individuals described in section 591(b) may have violated any Federal criminal law other than a violation constituting a petty offense, shall conduct, for a period not to exceed ninety days, such preliminary investigation of the matter as the Attorney General deems appropriate. The Attorney General, upon notifying in writing the division of the court specified in section 593(a) (hereinafter referred to as the ‘division of the court’) of the need for additional time to complete a preliminary investigation and the reasons why additional time is needed, shall have thirty additional days to complete such preliminary investigation.

“(b) (1) If the Attorney General, upon completion of the preliminary investigation, finds that the matter is so unsubstantiated that no further investigation or prosecution is warranted, the Attorney General shall so notify the division of the court and the division of the court shall have no power to appoint a special prosecutor.

(2) The notification by the Attorney General of the division of the court shall be by memorandum containing a summary of the information received and a summary of the results of any preliminary investigation.

“(3) Such memorandum shall not be revealed to any individual outside the court or the Department of Justice without leave of the division of the court.

“(c) (1) If the Attorney General, upon completion of the preliminary investigation, finds that the matter warrants further investigation or prosecution, or if ninety days (one hundred and twenty days in the case of an extension) else from the receipt of the information without a determination by the Attorney General that the matter is so unsubstantiated as to not warrant further investigation or prosecution, then the Attorney General shall apply to the division of the court for the appointment of a special prosecutor.

“(2) Each application for the appointment of a special prosecutor shall contain sufficient information to enable the division of the court to select a special prosecutor and to define that special prosecutor’s prosecutorial jurisdiction.

“(3) Such application shall not be revealed to any individual outside the court or the Department of Justice without leave of the division of the court.



“(d) (1) If—

“(A) after the filing of a memorandum under subsection (b) of this section, the Attorney General receives additional specific information about the matter to which such memorandum related; and

“(B) the Attorney General determines, after such additional investigation as the Attorney General deems appropriate, that such information warrants further investigation or prosecution; then the Attorney General shall, not later than ninety days after receiving such additional information, apply to the division of the court for the appointment of a special prosecutor.

“(2) Each application for the appointment of a special prosecutor shall contain sufficient information to enable the division of the court to select a special prosecutor and to define that special prosecutor’s prosecutorial jurisdiction.

“(3) Such application shall not be revealed to any individual outside the court or the Department of Justice without leave of the division of the court.

“(e) (1) For the purpose of this section, a conflict of interest or the appearance thereof is deemed to exist whenever the continuation of an investigation or the outcome thereof may directly and substantially affect the partisan political or personal interests of the President, the Attorney General, or the interests of the President’s political party.

“(2) Whenever it reasonably appears that a conflict of interest, as defined in paragraph (1), exists, with respect to an investigation of specific information that an individual may have violated any Federal criminal law other than a violation constituting a petty offense, the Attorney General shall conduct a preliminary investigation as required by subsection (a).

“(3) (A) If the Attorney General, upon completion of the preliminary investigation, finds that the matter is so unsubstantiated that no further investigation or prosecution is warranted, the Attorney General shall so notify the division of the court pursuant to subsection (b).

“(B) If the Attorney General, upon completion of the preliminary investigation, finds that the matter warrants further investigation or prosecution or if ninety days (one hundred and twenty days in the case of an extension) has elapsed from the time of the Attorney General’s finding in paragraph (2) without a determination by the Attorney General that the matter is so unsubstantiated as not to warrant further investigation or prosecution, then the Attorney General shall—

“(i) apply to the division of the court for the appointment of a special prosecutor pursuant to subsection (c); or

“(ii) submit a memorandum to the division of the court setting forth the reasons why a special prosecutor is not required under the standard set forth in paragraph (1) of this subsection.

“(C) If the Attorney General concludes that appointment of a special prosecutor is not required under the standard set forth in paragraph (1) of this subsection, the division of the court shall review the information provided by the Attorney General with respect to whether a conflict, as described in paragraph (1), exists. Upon re-

quest of of the division of the court, the Attorney General shall make available to the division all documents, materials, and memorandums as the division finds necessary to carry out its duties under this subsection. If the division finds that continuing the investigation by the Department of Justice would create a conflict of interest, or the appearance thereof, as defined in paragraph (1), the division shall appoint a special prosecutor.

“(f) Any determinations or applications required to be made under this section by the Attorney General shall be made by the Director of the Office of Government Crimes if the information or allegations involve the Attorney General.

“(g) The Attorney General's determination under subsection (c), (d), or (e) to apply to the division of the court for the appointment of a special prosecutor shall not be reviewable in any court.

“(h) Documents, materials, and memorandums supplied to the court by the Department of Justice under this subsection shall not be revealed to any individual outside the court or the Department of Justice without leave of the division of the court.

#### “§ 593. Duties of the division of the court

“(a) The division of the court which is referred to in this chapter, and to which functions are given by this chapter, is the division established under section 49 of this title.

“(b) Upon receipt of an application under subsection (c), (d), (e), or (f) of section 592, the division of the court shall appoint an appropriate special prosecutor and shall define the jurisdiction of that special prosecutor. The court may define such jurisdiction to extend to related matters. A special prosecutor's identity and prosecutorial jurisdiction shall be made public upon request of the Attorney General or upon the determination of the division of the court that disclosure of the identity and prosecutorial jurisdiction of such special prosecutor would be in the best interest of justice. In any event the identity and prosecutorial jurisdiction of such prosecutor shall be made public when any indictment is returned.

“(c) The division of the court, upon request of the Attorney General, may assign new matters to an existing special prosecutor or may expand the prosecutorial jurisdiction of an existing special prosecutor to include related matters. Such request may be incorporated in an application for the appointment of a special prosecutor under this chapter.

“(d) The division of the court may not appoint as a special prosecutor any person who holds or recently held any office of profit or trust under the United States.

#### “§ 594. Authority and duties of a special prosecutor

“(a) Notwithstanding any other provision of law, a special prosecutor appointed under this chapter shall have, with respect to all matters in such special prosecutor's prosecutorial jurisdiction established under this chapter, full power, and independent authority—

“(1) to conduct proceedings before grand juries and other investigations;

"(2) to participate in court proceedings and engage in any litigation, including civil and criminal matters, as he deems necessary;

"(3) to appeal any decision of a court in any case or proceeding in which such special prosecutor participates in an official capacity;

"(4) to review all documentary evidence available from any source;

"(5) to determine whether to contest the assertion of any testimonial privilege;

"(6) to receive appropriate national security clearances and, if necessary, contest in court, including, where appropriate, participation in in camera proceedings, any claim of privilege or attempt to withhold evidence on grounds of national security;

"(7) to make applications to any Federal court for a grant of immunity to any witness, consistent with applicable statutory requirements, or for warrants, subpoenas, or other court orders, and for purposes of sections 6003, 6004, and 6005, of title 18, a special prosecutor may exercise the authority vested in a United States Attorney or the Attorney General;

"(8) to inspect, obtain, or use the original or a copy of any tax return, in accordance with the applicable statutes and regulations, and for purposes of section 6103 of title 26, and the regulations issued thereunder, a special prosecutor may exercise the powers vested in a United States Attorney or the Attorney General;

"(9) to initiate and conduct prosecutions in any court of competent jurisdiction, frame and sign indictments, file informations, and handle all aspects of any case in the name of the United States; and

"(10) to exercise all other investigative and prosecutorial functions and powers of the Department of Justice, the Attorney General, and any other officer or employee of the Department of Justice, except that the Attorney General shall exercise direction or control as to those matters that specifically require the Attorney General's personal action under section 2516 of title 18.

"(b) A special prosecutor appointed under this chapter shall receive compensation at a per diem rate equal to the rate of basic pay for level IV of the Executive Schedule under section 5315 of title 5.

"(c) For the purposes of carrying out the duties of the office of special prosecutor, a special prosecutor shall have power to appoint, fix the compensation, and assign the duties of such employees as such special prosecutor deems necessary (including investigators, attorneys, and part-time consultants). The positions of all such employees are exempted from the competitive service. No such employee may be compensated at a rate exceeding the maximum rate provided for GS-18 of the General Schedule under section 5332 of title 5.

"(d) If requested by a special prosecutor, the Department of Justice shall provide to such special prosecutor assistance which shall include full access to any records, files, or other materials relevant to matters within his prosecutorial jurisdiction, and providing to such special prosecutor the resources and personnel required to perform such special prosecutor's duties.

“(c) A special prosecutor may ask the Attorney General or the division of the court to refer matters related to the special prosecutor’s prosecutorial jurisdiction. A special prosecutor may accept referral of a matter by the Attorney General, if the matter relates to a matter within such special prosecutor’s prosecutorial jurisdiction as established by the division of the court. If such a referral is accepted, the special prosecutor shall notify the division of the court.

“(f) To the maximum extent practicable, a special prosecutor shall comply with the written policies of the Department of Justice respecting enforcement of the criminal laws which have been promulgated prior to the special prosecutor’s appointment.

**“§ 595. Reporting and congressional oversight**

“(a) A special prosecutor appointed under this chapter may from time to time make public, or send to the Congress, statements or reports on the activities of such special prosecutor. These statements and reports shall contain such information as that special prosecutor deems appropriate.

“(b) (1) In addition to any reports made under subsection (a) of this section, a special prosecutor appointed under this chapter shall, at the conclusion of such special prosecutor’s duties, submit to the division of the court a report under this subsection.

“(2) Such report shall set forth fully and completely a description of the work of the special prosecutor, including the disposition of all cases brought, and the reasons for not prosecuting any matter within the prosecutorial jurisdiction of such special prosecutor which was not prosecuted. The report shall be in sufficient detail to allow determination of whether the special prosecutor’s investigation was thoroughly and fairly completed.

“(3) The division of the court may release to the Congress, the public, or to any appropriate person, without comment on the contents of the report, such portions of a report made under this subsection as the division deems appropriate. The division of the court shall make such orders as are appropriate to protect the rights of any individual named in such report and prevent undue interference with any pending prosecution. The division of the court may make any portion of such report available to any individual named in such report for the purposes of receiving, within a time limit set by the division of the court, any comments or factual information that such individual may submit. Such comments and factual information, in whole or in part, may, in the discretion of such division, be included as an appendix to such report.

“(c) A special prosecutor may advise the House of Representatives of any substantial and credible information which such special prosecutor receives that may constitute grounds for an impeachment of the President, Vice President, or a justice or judge of the United States. Nothing in this chapter or section 49 of this title shall prevent the Congress or either House thereof from obtaining information in the course of an impeachment proceeding.

“(d) A majority of majority party members or a majority of all nonmajority party members of the judiciary committee of either House of the Congress may request in writing that the Attorney General

apply for the appointment of a special prosecutor under section 592(e) of this chapter. Not later than thirty days after the receipt of such a request, or not later than thirty days after the completion of the preliminary investigation conducted pursuant to section 592(e), whichever is later, the Attorney General shall provide written notification of any action he has taken under this chapter in response to such request. If no application for the appointment of a special prosecutor has been made to the division of the court, the Attorney General shall explain the specific reasons why a special prosecutor is not required under the standard set forth in section 592(e). Such written notification shall be sent to the committee on which the persons making the request serve, and shall not be revealed to any third party, except that such committee may, either on its own initiative or upon the request of the Attorney General, make public such portion or portions of such notification as will not in the committee's judgment prejudice the rights of any individual.

**“§ 596. Removal of a special prosecutor; termination of office**

“(a) A special prosecutor may be removed from office, other than by impeachment and conviction, by the personal action of the Attorney General only for extraordinary improprieties, for malfeasance in office, for willful neglect of duty, for permanent incapacitation, or for any conduct constituting a felony. An action may be brought in the division of the court to challenge the action of the Attorney General under this subsection by seeking reinstatement or other appropriate relief. The division of the court shall cause such an action in every way to be expedited. If a special prosecutor is removed from office, the Attorney General shall promptly submit to the judiciary committees of the Senate and the House of Representatives a report describing with particularity the grounds for such action. The committees shall make available to the public such report, except that each committee may, if necessary to avoid prejudicing the legal rights of any individual, delete or postpone publishing such portions of the report, or the whole report, or any name or other identifying details.

“(b)(1) An office of special prosecutor shall terminate upon the submission by the special prosecutor of written notification to the Attorney General that the investigation of all matters within the prosecutorial jurisdiction of such special prosecutor, or accepted by such special prosecutor under section 594(e), and any resulting prosecutions, have been completed or so substantially completed that it would be appropriate for the Department of Justice to complete such investigations and prosecutions. No such submission shall be effective to terminate such office until after the completion and filing of the report required under section 595(b) of this title.

“(2) The division of the court, either on its own motion or upon the personal recommendation of the Attorney General, may terminate an office of special prosecutor at any time on the ground that the investigation of all matters within the prosecutorial jurisdiction of the special prosecutor, or accepted by such special prosecutor under section 594(e), and any resulting prosecutions, have been completed or so substantially completed that it would be appropriate for the

Department of Justice to complete such investigations and prosecutions. At the time of termination, the special prosecutor shall file the report required by section 595(b) of this title.

**“§ 597. Relationship with Department of Justice**

“(a) Whenever a matter is in the prosecutorial jurisdiction of a special prosecutor or has been accepted by a special prosecutor under section 594(e), the Department of Justice, the Attorney General, and all other officers and employees of the Department of Justice shall suspend all investigations and proceedings regarding such matter, except as otherwise required by section 594(d) of this title, and except insofar as the special prosecutor agrees in writing that such investigations or proceedings may be continued by the Department of Justice.

“(b) The Attorney General or the Solicitor General may, to the extent provided under existing law, make a presentation to any court as to issues of law raised by any case or proceeding in which a special prosecutor participates in an official capacity, or any appeal of such a case or proceeding.

**“§ 598. Termination of effect of chapter**

“This chapter shall cease to have effect five years after the date on which it takes effect, except as to the completion of then-pending matters, which in the judgment of the division of the court require this chapter's continuance in effect, with respect to which matters this chapter shall continue in effect until such division determines that such matters have been completed.”

(b) The tables of chapters for title 28 of the United States Code and for part II of such title 28 are each amended by inserting immediately after the item relating to chapter 37 the following new item:

“39. Special prosecutor.”

(c) There are authorized to be appropriated for each fiscal year such sums as may be necessary, to be held by the Department of Justice as a contingent fund for the use of any special prosecutors appointed under chapter 39 (relating to special prosecutor) of title 28 of the United States Code in the carrying out of functions under such chapter.

ASSIGNMENTS OF JUDGES TO DIVISION TO APPOINT SPECIAL PROSECUTORS

SEC. 102. (a) Chapter 3 of title 28 of the United States Code is amended by adding at the end the following new section:

**“§ 49. Assignment of judges to division to appoint special prosecutors**

“(a) Beginning with the two-year period commencing on the date chapter 39 of this title takes effect, the chief judge of the United States Court of Appeals for the District of Columbia shall assign three judges or justices for each successive two-year period to a division of the United States Court of Appeals for the District of Columbia to be the special panel of the court for the purposes of chapter 39 of this title.

“(b) Except as provided in subsection (f) of this section, assignment to the division established in subsection (a) of this section shall not be a bar to other judicial assignments during the term of such division.

“(c) In assigning judges or justices to sit on the division established in subsection (a) of this section, priority shall be given to senior retired circuit judges and senior retired justices.

“(d) The chief judge of the United States Court of Appeals for the District of Columbia may make a request to the Chief Justice of the United States, without presenting a certificate of necessity, to designate and assign, in accordance with section 294 of this title, retired circuit court judges of another circuit or retired justices to the division established under subsection (a) of this section.

“(e) Any vacancy in the division established under subsection (a) of this section shall be filled only for the remainder of the two-year period in which such vacancy occurs and in the same manner as initial assignments to the division were made.

“(f) No judge or justice who, as a member of the division established in subsection (a) of this section, participated in a function conferred on the division under chapter 39 of this title involving a special prosecutor shall be eligible to participate in any judicial proceeding concerning a matter which involves such special prosecutor while such special prosecutor is serving in that office or which involves the exercise of such special prosecutor's official duties, regardless of whether such special prosecutor is still serving in that office.”

(b) The table of sections for chapter 3 of title 28 of the United States Code is amended by adding at the end the following item:

“49. Assignment of judges to division to appoint special prosecutors.”

DISQUALIFICATION OF OFFICERS AND EMPLOYEES OF THE DEPARTMENT OF JUSTICE AND OFFICE OF GOVERNMENT CRIMES

SEC. 103. (a) Chapter 31 of title 28 of the United States Code is amended by adding at the end the following:

“§ 528. **Disqualification of officers and employees of the Department of Justice**

“The Attorney General shall promulgate rules and regulations which require any officer or employee of the Department of Justice, including a United States Attorney or a member of his staff, to disqualify himself from participation in a particular investigation or prosecution if such participation may result in a personal, financial, or political conflict of interest, or the appearance thereof. Such rules and regulations may provide that a willful violation of any provision thereof shall result in removal from office.

“§ 529. **Office of Government Crimes**

“(a) (1) There is established within the Department of Justice an Office of Government Crimes, which shall be headed by a director appointed by the President, by and with the advice and consent of the Senate. The director may report directly to the Attorney General when he deems it necessary. The Attorney General shall determine the organizational placement of the office within the Department.

"(2) A person shall not be appointed director of the Office of Government Crimes if he has at any time during the five years preceding such appointment held a high level position of trust and responsibility on the personal campaign staff of, or in an organization or political party working on behalf of, a candidate for any elective Federal office. The confirmation by the Senate of a Presidential nomination of a director shall constitute a final determination that such officer meets the requirements of this subsection.

"(b) (1) The Attorney General shall, except as to matters referred to a special prosecutor pursuant to chapter 39 of this title, delegate to the Office of Government Crimes jurisdiction of (1) criminal violations of Federal law by any individual who holds or who at the time of such possible violation held a position, whether or not elective, as a Federal Government officer, employee, or special employee, which alleged violation related directly or indirectly to such individual's Government position, employment, or compensation; (2) criminal violations of Federal laws relating to lobbying, conflicts of interest, campaigns, and election to public office committed by any person except insofar as such violations relate to matters involving discrimination or intimidation on the grounds of race, color, religion or national origin; (3) the supervision of investigations and prosecutions of criminal violations of Federal law by any individual who holds or who at the time of such possible violation held a position, whether or not elective, as a State or local government officer or employee, which alleged violation related directly or indirectly to his government position, employment or compensation; and (4) such other matters as the Attorney General may deem appropriate.

"(2) Jurisdiction delegated to the Office of Government Crimes pursuant to paragraph (1) of this subsection may, with the approval of the director, be concurrently delegated by the Attorney General to, or concurrently reside in, the United States Attorneys or other units of the Department of Justice. In the event of such concurrent delegation, the director shall supervise the United States Attorneys or other units in the performance of such duties. This section shall not limit any authority conferred upon the Attorney General, the Federal Bureau of Investigation, or any other department or agency of government to investigate any matter.

"(c) (1) At the beginning of each regular session of the Congress, the Attorney General shall report to the Congress on the activities and operation of the Office of Government Crimes for the preceding fiscal year.

"(2) Such report shall specify the number and type of investigations and prosecutions subject to the jurisdiction of such unit and the disposition thereof, but shall not include any information which would impair an ongoing investigation, prosecution, or proceeding, or which the Attorney General determines would constitute an improper invasion of personal privacy."

(b) The table of sections for chapter 31 of title 28 of the United States Code is amended by adding at the end the following:

"528. Disqualification of officers and employees of the Department of Justice.  
"529. Office of Government Crimes."

(c) Section 5315 of title 5, United States Code, is amended by adding at the end thereof the following new paragraph:



“(114) Director, Office of Government Crimes, Department of Justice.”

SEPARABILITY

SEC. 104. If any part of this title is held invalid, the remainder of the title shall not be affected thereby. If any provision of any part of this title, or the application thereof to any person or circumstance, is held invalid, the provisions of other parts and their application to other persons or circumstances shall not be affected thereby.

TITLE II—CONGRESSIONAL LEGAL COUNSEL

ESTABLISHMENT OF OFFICE OF CONGRESSIONAL LEGAL COUNSEL

SEC. 201. (a) (1) There is established, as an office of the Congress, the Office of Congressional Legal Counsel (hereinafter referred to as the “Office”), which shall be headed by a Congressional Legal Counsel (hereinafter referred to as the “Counsel”); and there shall be a Deputy Congressional Legal Counsel (hereinafter referred to as the “Deputy Counsel”) who shall perform such duties as may be assigned to him by the Counsel and who, during any absence, disability, or vacancy in the position of the Counsel, shall serve as Acting Congressional Legal Counsel.

(2) The Counsel and the Deputy Counsel each shall be appointed by the President pro tempore of the Senate and the Speaker of the House of Representatives from among recommendations submitted by the majority and minority leaders of the Senate and the House of Representatives. Any appointment made under this paragraph shall be made without regard to political affiliation and solely on the basis of fitness to perform the duties of the position. Any person appointed as Counsel or Deputy Counsel shall be learned in the law, a member of the bar of a State or the District of Columbia, and shall not engage in any other business, vocation, or employment during the term of such appointment.

(3) (A) Any appointment made under paragraph (2) shall become effective upon approval, by concurrent resolution, of the Senate and the House of Representatives. The Counsel and the Deputy Counsel shall each be appointed for a term of service which shall expire at the end of the Congress following the Congress during which the Counsel or Deputy Counsel, respectively, is appointed except that the Congress may, by concurrent resolution, remove either the Counsel or the Deputy Counsel prior to the termination of any term of service. The Counsel and the Deputy Counsel may be reappointed at the termination of any term of service.

(B) The first Counsel and the first Deputy Counsel shall be appointed, approved, and begin service within ninety days after the date of the enactment of this Act and thereafter the Counsel and Deputy Counsel shall be appointed, approved, and begin service within thirty days after the beginning of the session of Congress immediately following the termination of a Counsel's or Deputy Counsel's term of service or within sixty days after a vacancy occurs in either position.

(4) The Counsel shall receive compensation at a per annum gross rate equal to the rate of basic pay for level III of the Executive Sched-

ule under section 5314 of title 5, United States Code. The Deputy Counsel shall receive compensation at a per annum gross rate equal to the rate of basic pay for level IV of the Executive Schedule under section 5315 of title 5, United States Code.

(b) (1) The Counsel shall select and fix the compensation of such Assistant Congressional Legal Counsels (hereinafter referred to as "Assistant Counsels") and of such other personnel, within the limits of available appropriations, as may be necessary to carry out the provisions of this title and may prescribe the duties and responsibilities of such personnel. The compensation fixed for Assistant Counsels shall not be in excess of a per annum gross rate equal to the rate of basic pay for level V of the Executive Schedule under section 5316 of title 5, United States Code. Any selection made under this paragraph shall be made without regard to political affiliation and solely on the basis of fitness to perform the duties of the position. Any individual selected as an Assistant Counsel shall be learned in the law, a member of the bar of a State or the District of Columbia, and shall not engage in any other business, vocation, or employment during his term of service. The Counsel may remove any individual appointed under this paragraph.

(2) For purposes of pay (other than the rate of pay of the Counsel and Deputy Counsel) and employment benefits, rights, and privileges, all personnel of the Office shall be treated as if they were employees of the Senate.

(c) In carrying out the functions of the Office, the Counsel may procure the temporary (not to exceed one year) or intermittent services of individual consultants (including outside counsel), or organizations thereof, in the same manner and under the same conditions as a standing committee of the Senate may procure such services under section 202(i) of the Legislative Reorganization Act of 1946 (2 U.S.C. 72a (i)).

(d) The Office shall have the same privilege of free transmission of official mail as other offices of the United States Government.

(e) The Counsel may establish such policies and procedures as may be necessary to carry out the provisions of this title.

(f) The Counsel may delegate authority for the performance of any function imposed by this title except any function imposed upon the Counsel under section 206(b) of this title.

(g) The Counsel and other employees of the Office shall maintain the attorney-client relationship with respect to all communications between them and any Member, officer, or employee of Congress.

#### ACCOUNTABILITY OF OFFICE

SEC. 202 (a) The Office shall be directly accountable to the Joint Leadership Group in the performance of the duties of the Office.

(b) For purposes of this title, the Joint Leadership Group shall consist of the following Members:

(1) The Speaker of the House and the President pro tempore (or if he so designates, the Deputy President pro tempore) of the Senate;

(2) the majority and minority leaders of both Houses of Congress;

(3) the Chairman and ranking minority Member of the judiciary committees of both Houses of Congress; and

(4) the Chairman and ranking minority Member of the committee of the Senate, and the House, which has jurisdiction over the contingent fund of that body.

(c) The Joint Leadership Group shall be assisted in the performance of its duties by the Secretary of the Senate and the Clerk of the House.

#### REQUIREMENTS FOR AUTHORIZING REPRESENTATION ACTIVITY

SEC. 203. (a) The Counsel shall defend—

(1) a House of Congress or a committee, subcommittee, Member, officer, or employee of a House of Congress under section 204 only when directed to do so by two-thirds of the Members of that House serving on the Joint Leadership Group or by the adoption of a resolution by such House; and

(2) the Congress or a joint committee, office or agency of Congress, or an officer or employee of such an office or agency, under section 204 only when directed to do so by two-thirds of the Joint Leadership Group or by the adoption of a concurrent resolution by both Houses.

(b) The Counsel shall bring a civil action to enforce a subpoena of—

(1) a House of Congress, or a committee or subcommittee of a House of Congress, under section 205 only when directed to do so by the adoption of a resolution by the appropriate House of Congress; and

(2) a joint committee of Congress or the Technology Assessment Board under section 205 only when directed to do so by the adoption of a concurrent resolution of both Houses.

(c) The Counsel shall intervene or appear as amicus curiae under section 206 only when directed to do so—

(1) by a resolution adopted by a House of Congress when such intervention or appearance is to be made in the name of that House;

(2) by a resolution adopted by the appropriate House when such intervention or appearance is to be made in the name of an officer, committee, or chairman of a committee or subcommittee of that House; or

(3) by a concurrent resolution adopted by both Houses when such intervention or appearance is to be made in the name of Congress or a joint committee, a chairman of a joint committee, an office, or an agency of Congress.

(d) The Counsel shall serve as the duly authorized representative in obtaining an order granting immunity under section 207 of—

(1) a House of Congress when directed to do so by an affirmative vote of a majority of the Members present of that House, or

(2) a committee or subcommittee of a House of Congress, or a joint committee of Congress, when directed to do so by an affirmative vote of two-thirds of the members of the full committee.

(e) The Office shall make no recommendation with respect to the consideration of a resolution or concurrent resolution under this section.

DEFENDING CONGRESS, A HOUSE, COMMITTEE MEMBER,  
OFFICER, AGENCY, OR EMPLOYEE OF CONGRESS

SEC. 204. (a) Except as otherwise provided in subsection (b), when directed to do so pursuant to section 203(a), the Counsel shall—

(1) defend Congress, a House of Congress, an office or agency of Congress, a committee, subcommittee, Member, officer, or employee of a House of Congress, or an officer or employee of an office or agency of Congress in any civil action pending in any court of the United States or of a State or political subdivision thereof in which Congress, such House, committee, subcommittee, Member, officer, employee, office, or agency is made a party defendant and in which there is placed in issue the validity of any proceeding of, or action, including issuance of any subpoena or order, taken by Congress, such House, committee, subcommittee, Member, officer, employee, officer, or agency in its or his official or representative capacity; or

(2) defend Congress, a House of Congress, an office or agency of Congress, a committee, subcommittee, Member, officer, or employee of an office or agency of Congress in any proceeding with respect to any subpoena or order directed to Congress, such House, committee, subcommittee, Member, officer, employee, office or agency in its or his official or representative capacity.

(b) Representation of a Member, officer, or employee under subsection (a) shall be undertaken by the Counsel only upon the consent of such Member, officer, or employee.

INSTITUTING A CIVIL ACTION TO ENFORCE A SUBPENA

SEC. 205. (a) When directed to do so pursuant to section 203(b), the Counsel shall bring a civil action under any statute conferring jurisdiction on any court of the United States (including section 1364 of title 28, United States Code, as added by subsection (f)(1)), to enforce, to secure a declaratory judgment concerning the validity of, or to prevent a threatened failure or refusal to comply with, any subpoena or order issued by a House of Congress or a committee, or a subcommittee of a committee, of a House of Congress or of Congress authorized to issue a subpoena or order.

(b) Any directive to the Counsel to bring a civil action pursuant to subsection (a) of this section in the name of a committee or subcommittee of a House of Congress or of Congress shall constitute authorization for such committee or subcommittee to bring such action within the meaning of any statute conferring jurisdiction on any court of the United States.

(c) It shall not be in order in the Senate or House of Representatives to consider a resolution to direct the Congressional Legal Counsel to bring a civil action pursuant to subsection (a) in the name of a committee or subcommittee unless—

(1) such resolution is reported by a majority of the members voting, a majority being present, of such committee or committee of which such subcommittee is a subcommittee, and

(2) the report filed by such committee or committee of which such subcommittee is a subcommittee contains a statement of—

(A) the procedure followed in issuing such subpoena;

(B) the extent to which the party subpoenaed has complied with such subpoena;

(C) any objections or privileges raised by the subpoenaed party; and

(D) the comparative effectiveness of bringing a civil action under this section, certification of a criminal action for contempt of Congress, and initiating a contempt proceeding before a House of Congress.

(d) The provisions of subsection (c) are enacted by Congress—

(1) as an exercise of the rulemaking power of the Senate and the House of Representatives, respectively, and, as such, they shall be considered as part of the rules of each House, respectively, and such rules shall supersede any other rule of each House only to the extent that rule is inconsistent therewith; and

(2) with full recognition of the constitutional right of either House to change such rules (so far as relating to the procedure in such House) at any time, in the same manner, and to the same extent as in the case of any other rule of such House.

(e) The extent to which a report filed pursuant to subsection (c) (2) is in compliance with such subsection shall not be reviewable in any court of law.

(f) (1) Chapter 85 of title 28, United States Code, is amended by adding at the end thereof the following new section:

**“§ 1364. Congressional actions**

“(a) The District Court for the District of Columbia shall have original jurisdiction, without regard to the sum or value of the matter in controversy, over any civil action brought by a House of Congress, or any authorized committee or joint committee of a House of Congress or of Congress, or any subcommittee thereof, to enforce, to secure a declaratory judgment concerning the validity of, or to prevent a threatened refusal or failure to comply with, any subpoena or order issued by such House, committee, subcommittee, or joint committee to any entity acting or purporting to act under color or authority of State law, or to any natural person to secure the production of documents or other materials of any kind or the answering of any deposition or interrogatory or to secure testimony or any combination thereof. This section shall not apply to an action to enforce, to secure a declaratory judgment concerning the validity of, or to prevent a threatened refusal to comply with, any subpoena or order issued to an officer or employee of the Federal Government acting within his official capacity.

“(b) Upon application by a House of Congress, or any authorized committee or joint committee, or any subcommittee thereof, the District Court shall issue an order to a person refusing or failing, or threatening to refuse or not to comply, with a subpoena or order of such House, committee, joint committee, or subcommittee requiring such person to comply forthwith. Any refusal or failure to obey a lawful order of the District Court issued pursuant to this section may be held by such court to be a contempt thereof. A contempt proceeding

shall be commenced by an order to show cause before the court why the party refusing or failing to obey the court order should not be held in contempt of court. Such contempt proceeding shall be tried by the court and shall be summary in manner. The purpose of sanctions imposed as a result of such contempt proceeding shall be to compel obedience to the order of the court. Process in any such action or contempt proceeding may be served in any judicial district wherein the party refusing or failing, or threatening to refuse or not to comply, resides, transacts business, or may be found, and subpoenas for witnesses who are required to attend such proceeding may run into any other district. Nothing in this section shall confer upon such court jurisdiction to affect by injunction or otherwise the issuance or effect of any subpoena or order of a House of Congress, or a committee, joint committee, or subcommittee, or to review, modify, suspend, terminate or set aside any such subpoena or order. An action, contempt proceeding, or sanction brought or imposed pursuant to this section shall not abate upon adjournment sine die at the end of a Congress if the party which issued the subpoena or order certifies to the court that it maintains its interest in securing the documents, answers, or testimony during such adjournment.

“(c) In any civil action or contempt proceeding brought pursuant to this section, the court shall assign the case or proceeding for hearing at the earliest practicable date and cause the case or proceeding in every way to be expedited. Any appeal or petition for review from any order or judgment in such case or proceeding shall be expedited in the same manner.

“(d) Either House of Congress, any committee, subcommittee, or joint committee commencing and prosecuting a civil action or contempt proceeding under this section may be represented in such action by such attorneys as it may designate.

“(e) A civil action commenced or prosecuted under this section may not be authorized pursuant to the Standing Order of the Senate ‘authorizing suits by Senate Committee’s (S. Jour. 572, 70-1, May 28, 1928).

“(f) For the purposes of this section, when referred to herein, the term ‘committee’ shall include standing, select, or special committees established by law or resolution and the term ‘joint committee’ shall include the Technology Assessment Board.”

(2) The analysis of such chapter 85 is amended by adding at the end thereof the following new item :

“1364. Congressional actions.”

(g) Nothing in this section shall limit the discretion of—

(1) the President pro tempore of the Senate or the Speaker of the House of Representatives in certifying to the United States Attorney for the District of Columbia any matter pursuant to section 104 of the Revised Statutes (2 U.S.C. 194) ; or

(2) either House of Congress to hold any individual or entity in contempt of such House of Congress.

#### INTERVENTION OR APPEARANCE

SEC. 206. (a) When directed to do so pursuant to section 203(c), the Counsel shall intervene or appear as *amicus curiae* in the name

of Congress, a House of Congress, or an officer, office, agency, committee, subcommittee or chairman of a committee or subcommittee of a House of Congress or of Congress in any legal action pending in any court of the United States or of a State or political subdivision thereof in which the powers and responsibilities of Congress under the Constitution of the United States are placed in issue. The Counsel shall be authorized to intervene only if standing to intervene exists under section 2 of article III of the Constitution of the United States.

(b) The Council shall notify the Joint Leadership Group of any legal action in which the Counsel is of the opinion that intervention or appearance as *amicus curiae* under subsection (a) is in the interest of Congress or of a House of Congress. Such notification shall contain a description of the legal proceeding together with the reasons that the Counsel is of the opinion that intervention or appearance as *amicus curiae* is in the interest of Congress or of a House of Congress. The Joint Leadership Group shall cause said notification to be published in the Congressional Record for the appropriate House or Houses.

(c) The Counsel shall limit any intervention or appearance as *amicus curiae* in an action to issues relating to the powers and responsibilities of Congress.

#### IMMUNITY PROCEEDINGS

SEC. 207. When directed to do so pursuant to section 203(d), the Counsel shall serve as the duly authorized representative of a House of Congress or a committee or subcommittee in requesting a United States district court to issue an order granting immunity pursuant to section 201(a) of the Organized Crime Control Act of 1970 (18 U.S.C. 6005).

#### ADVISORY AND OTHER FUNCTIONS

SEC. 208. (a) The Congressional Legal Counsel shall advise, consult, and cooperate with—

(1) the United States Attorney for the District of Columbia with respect to any criminal proceeding for contempt of Congress certified pursuant to section 104 of the Revised Statutes (2 U.S.C. 194);

(2) the committees with the responsibility to identify any court proceeding or action which is of vital interest to Congress or to either House of Congress;

(3) the Comptroller General, General Accounting Office, the Office of Legislative Counsel of the Senate, the Office of the Legislative Counsel of the House of Representatives, and the Congressional Research Service, except that none of the responsibilities and authority granted by this title to the Congressional Legal Counsel shall be construed to affect or infringe upon any functions, powers or duties of the Comptroller General of the United States;

(4) any Member, officer, or employee of Congress not represented under section 204 with regard to obtaining private legal counsel for such Member, officer, or employee;

(5) the President pro tempore of the Senate, the Speaker of

the House of Representatives, the Secretary of the Senate, the Clerk of the House, the Sergeant-at-Arms of the Senate and House, and the Parliamentarians of the Senate and House regarding any subpoena, order, or request for withdrawal of papers presented to the Senate and House of Representatives or which raises a question of the privileges of the Senate or House of Representatives; and

(6) any committee or subcommittee in promulgating and revising their rules and procedures for the use of congressional investigative powers and with respect to questions which may arise in the course of any investigation.

(b) The Counsel shall compile and maintain legal research files of materials from court proceedings which have involved Congress, a House of Congress, an office or agency of Congress, or any committee, subcommittee, Member, officer, or employee of Congress. Public court papers and other research memoranda which do not contain information of a confidential or privileged nature shall be made available to the public consistent with any applicable procedures set forth in such rules of the Senate and House of Representatives as may apply and the interests of Congress.

(c) The Counsel shall perform such other duties consistent with the purposes and limitations of this title as the Congress or a House of Congress may direct.

#### DEFENSE OF CERTAIN CONSTITUTIONAL POWERS

SEC. 209. In performing any function under this title, the Counsel shall defend vigorously when placed in issue—

(1) the constitutional privilege from arrest or from being questioned in any other place for any speech or debate under section 6 of article I of the Constitution of the United States;

(2) the constitutional power of each House of Congress to be judge of the elections, returns, and qualifications of its own Members and to punish or expel a Member under section 5 of article I of the Constitution of the United States;

(3) the constitutional power of each House of Congress to exempt from publication such parts of its journal as in its judgment may require secrecy;

(4) the constitutional power of each House of Congress to determine the rules of its proceedings;

(5) the constitutional power of Congress to make all laws as shall be necessary and proper for carrying into execution the constitutional powers of Congress and all other powers vested by the Constitution in the Government of the United States, or in any department or office thereof;

(6) all other constitutional powers and responsibilities of Congress; and

(7) the constitutionality of Acts of Congress.

#### CONFLICT OR INCONSISTENCY

SEC. 210. (a) In the carrying out of the provisions of this title, the Counsel shall notify the Joint Leadership Group, and any party rep-



resented or person affected, of the existence and nature of any conflict or inconsistency between the representation of such party or person and the carrying out of any other provision of this title or compliance with professional standards and responsibilities.

(b) Upon receipt of such notification, the Members of the House or Houses affected serving on the Joint Leadership Group shall recommend the action to be taken to avoid or resolve the conflict or inconsistency. If such recommendation is made by a two-thirds vote, the Counsel shall take such steps as may be necessary to resolve the conflict or inconsistency as recommended. If not, the Members of the House or Houses affected serving on the Joint Leadership Group shall cause the notification of conflict or inconsistency and recommendation with respect to resolution thereof to be published in the Congressional Record of the appropriate House or Houses of Congress. If Congress or the appropriate House of Congress does not direct the Counsel within fifteen days from the date of publication in the Record to resolve the conflict in another manner, the Counsel shall take such action as may be necessary to resolve the conflict or inconsistency as recommended. Any instruction or determination made pursuant to this subsection shall not be reviewable in any court of law.

(c) For purposes of the computation of time in subsection (b)—

(1) continuity of session is broken only by an adjournment of Congress sine die; and

(2) the days on which either House is not in session because of an adjournment of more than three days to a date certain are excluded in the computation of the period.

(d) The appropriate House of Congress may by resolution authorize the reimbursement of any Member, officer, or employee who is not represented by the Counsel for fees and costs, including attorneys' fees, reasonably incurred in obtaining representation. Such reimbursement shall be from funds appropriated to the contingent fund of the appropriate House.

#### PROCEDURE FOR CONSIDERATION OF RESOLUTIONS TO DIRECT THE COUNSEL

SEC. 211. (a) (1) A resolution or concurrent resolution introduced pursuant to section 203 shall not be referred to a committee, except as otherwise required under section 205(c). Upon introduction, or upon being reported if required under section 205(c), whichever is later, it shall at any time thereafter be in order (even though a previous motion to the same effect has been disagreed to) to move to proceed to the consideration of such resolution or concurrent resolution. A motion to proceed to the consideration of a resolution or concurrent resolution shall be highly privileged and not debatable. An amendment to such motion shall not be in order, and it shall not be in order to move to reconsider the vote by which such motion is agreed to.

(2) If the motion to proceed to the consideration of the resolution or concurrent resolution is agreed to, debate thereon shall be limited to not more than ten hours, which shall be divided equally between, and controlled by, those favoring and those opposing the resolution or concurrent resolution. A motion further to limit debate shall not be debatable. No amendment to the resolution or concurrent resolution shall be in order. No motion to recommit the resolution or concurrent

resolution shall be in order, and it shall not be in order to reconsider the vote by which the resolution or concurrent resolution is agreed to.

(3) Motions to postpone, made with respect to the consideration of the resolution or concurrent resolution, and motions to proceed to the consideration of other business, shall be decided without debate.

(4) All appeals from the decisions of the Chair relating to the application of the rules of the Senate or the House of Representatives, as the case may be, to the procedure relating to the resolution or concurrent resolution shall be decided without debate.

(b) For purposes of this title, other than section 203, the term "committee" shall include standing, select, special or joint committees established by law or resolution and the Technology Assessment Board.

(c) The provisions of this section are enacted by Congress—

(1) as an exercise of the rulemaking power of the Senate and the House of Representatives, respectively, and, as such, they shall be considered as part of the rules of each House, respectively, and such rules shall supersede any other rule of each House only to the extent that rule is inconsistent therewith; and

(2) with full recognition of the constitutional right of either House to change such rules (so far as relating to the procedure in such House) at any time, in the same manner, and to the same extent as in the case of any other rule of such House.

#### ATTORNEY GENERAL RELIEVED OF RESPONSIBILITY

SEC. 212. (a) Upon receipt of written notice that the Counsel has undertaken, pursuant to section 204(a) of this title, to perform any representational service with respect to any designated party in any action or proceeding pending or to be instituted, the Attorney General shall—

(1) be relieved of any responsibility with respect to such representational service;

(2) have no authority to perform such service in such action or proceeding except at the request or with the approval of the Counsel or either House of Congress; and

(3) transfer all materials relevant to the representation authorized under section 204(a) to the Counsel, except that nothing in this subsection shall limit any right of the Attorney General under existing law to intervene or appear as *amicus curiae* in such action or proceeding.

(b) The Attorney General shall notify the Counsel with respect to any proceeding in which the United States is a party of any determination by the Attorney General or Solicitor General not to appeal any court decision affecting the constitutionality of an Act of Congress within such time as will enable the Congress or a House of Congress to direct the Counsel to intervene in such proceeding pursuant to section 206.

#### PROCEDURAL PROVISIONS

SEC. 213. (a) Permission to intervene as a party or to file a brief *amicus curiae* under section 206 of this title shall be of right and may

**CONTINUED**

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be denied by a court only upon an express finding that such intervention or filing is untimely and would significantly delay the pending action or that standing to intervene has not been established under section 2 of article III of the Constitution.

(b) The Counsel, the Deputy Counsel, or any designated Assistant Counsel shall be entitled, for the purpose of performing his functions under this title, to enter an appearance in any proceeding before any court of the United States without compliance with any requirement for admission to practice before such court, except that the authorization conferred by this subsection shall not apply with respect to the admission of any person to practice before the United States Supreme Court.

(c) Nothing in this title shall be construed to confer standing on any party seeking to bring, or jurisdiction on any court with respect to, any civil or criminal action against Congress, either House of Congress, a Member of Congress, a committee or subcommittee of a House of Congress, any office or agency of Congress, or any officer or employee of a House of Congress or any office or agency of Congress.

#### TECHNICAL AND CONFORMING AMENDMENTS

SEC. 214. (a) Section 3210 of title 39, United States Code, as amended—

(1) by striking out “and the Legislative Counsels of the House of Representatives and the Senate” in subsection (b)(1) and inserting in lieu thereof “the Legislative Counsels of the House of Representatives and the Senate, and the Congressional Legal Counsel”; and

(2) by striking out “or the Legislative Counsel of the House of Representatives or the Senate” in subsection (b)(2) and inserting in lieu thereof “the Legislative Counsel of the House of Representatives or the Senate, or the Congressional Legal Counsel”.

(b) Section 3216(a)(1)(A) of such title is amended by striking out “and the Legislative Counsels of the House of Representatives and the Senate” and inserting in lieu thereof “the Legislative Counsels of the House of Representatives and the Senate, and the Congressional Legal Counsel”.

(c) Section 3219 of such title is amended by striking out “or the Legislative Counsel of the House of Representatives or the Senate” and inserting in lieu thereof “the Legislative Counsel of the House of Representatives or the Senate, or the Congressional Legal Counsel”.

(d) Section 8 of the Act entitled “An Act making appropriations for sundry civil expenses of the Government for the fiscal year ending June thirtieth, eighteen hundred and seventy-six, and for other purposes,” approved March 3, 1875, as amended (2 U.S.C. 118), is repealed.

#### SEPARABILITY

SEC. 215. If any part of this title is held invalid, the remainder of the title shall not be affected thereby. If any provision of any part of this title, or the application thereof to any person or circumstance is

held invalid, the provisions of other parts and their application to other persons or circumstances shall not be affected thereby.

#### AUTHORIZATION OF APPROPRIATIONS

SEC. 216. There are authorized to be appropriated to the Office for each fiscal year through September 30, 1982, such sums as may be necessary to enable it to carry out its duties and functions. Until sums are first appropriated pursuant to the preceding sentence, but for a period not exceeding twelve months following the effective date of this title, the expenses of the Office shall be paid from the contingent fund of the Senate, in accordance with the paragraph relating to the contingent fund of the Senate under the heading "UNDER LEGISLATIVE" in the Act of October 1, 1888 (28 Stat. 546; 2 U.S.C. 68), and upon vouchers approved by the Counsel.

#### TITLE III—GOVERNMENT PERSONNEL; FINANCIAL DISCLOSURE REQUIREMENTS

SEC. 301. (a) Any individual who is an officer or employee designated under subsection (b), and who performs the duties of his position or office for a period in excess of sixty days during a calendar year, shall file on or before May 15 of the succeeding year a report as required by section 302 containing a full and complete financial statement for that calendar year.

(b) The officers and employees referred to in subsection (a) are—

- (1) the President;
- (2) the Vice President;
- (3) each Member of Congress;
- (4) each justice or judge or other adjudicatory official of the judicial branch of the United States and of the judicial branch of the government of the District of Columbia;
- (5) each officer or employee of an Executive agency, as defined in section 105 of title 5, United States Code, whose position is classified at a grade of GS-16 or above of the General Schedule prescribed by section 5332 of title 5, United States Code, or who is in a position at a comparable or higher level, and each officer or employee of the United States not employed by an Executive agency, as so defined, who is compensated at a rate equal to or in excess of the minimum rate prescribed for employees holding the grade of GS-16 of the General Schedule prescribed by section 5332 of title 5, United States Code; and

(6) each member of a uniform service whose pay grade is at or in excess of O-7 under section 1009 of title 37, United States Code.

(c) Within thirty days of assuming the position of an officer or employee designated under section (b), an individual shall file a report as required by section 303(f) unless such individual has left another position designated in subsection (b) within thirty days prior to assuming his new position.

(d) Within five days of the transmittal by the President to the Senate of the nomination of a Presidential nominee, as defined in section 308(13), but in any event prior to confirmation by either House of Congress, such nominee shall file a report as required by section 303(f).

Nothing in this Act shall prevent any Congressional committee from requesting, as a condition of confirmation, any additional financial information from any Presidential nominee whose nomination has been referred to that committee.

(e) Within thirty days of becoming a candidate seeking nomination for election, or election, to the office of President, Vice President, or Member of Congress, or on or before May 15 of that calendar year, whichever is later, and on or before May 15 of each successive year the individual continues to be a candidate, an individual shall file a report for the preceding calendar year as required by section 302.

(f) Any individual who occupies an office or position designated in subsection (b) shall, within thirty days after leaving such position, file a report as required by section 302 (covering the portion of that calendar year up to the date the individual left such office or position) unless such individual has accepted employment in another position designated in subsection (b).

#### CONTENTS OF REPORT

SEC. 302. Each report filed under subsections 301(a), (e), and (f) shall include a full and complete statement, in such manner and form as the supervising ethics office (as defined in section 304(a)) for the filing individual shall prescribe, which contains the following:

(a) (1) The amount and the identity of each source of earned income (exclusive of honoraria) received during such calendar year which exceeds \$100 in amount or value.

(2) The identity of the source, the amount, and the date, of each honorarium received during such calendar year and an indication of which honoraria, if any, were donated to a charitable organization.

(3) The identity of each source of income (other than earned income) received during such calendar year which exceeds \$100 in amount or value, and an indication of which of the following categories the amount or value of such item of income is within—

- (A) not more than \$1,000,
- (B) greater than \$1,000 but not more than \$2,500,
- (C) greater than \$2,500 but not more than \$5,000,
- (D) greater than \$5,000 but not more than \$15,000,
- (E) greater than \$15,000 but not more than \$50,000,
- (F) greater than \$50,000 but not more than \$100,000, or
- (G) greater than \$100,000.

(4) For purposes of paragraphs (1) and (3), any gift described in subsections (b) and (c) of this section shall not be considered as income.

(b) The identity of the source, a brief description of, and the value of any gifts of transportation, lodging, food, or entertainment aggregating \$250 or more provided by any one source other than a relative during the calendar year except that any food, lodging, or entertainment received as part of the personal hospitality of any individual need not be reported.

(c) The identity of the source, a brief description of, and the value of all other gifts aggregating \$100 or more from any one source other than a relative during the calendar year unless, in an unusual case, a waiver is granted by an individual's supervising ethics office.

(d) (1) Gifts with a fair market value of less than \$35 need not be aggregated for the purposes of subsections (b) and (c) of this section.

(2) In aggregating gifts for purposes of subsections (b) and (c) of this section, the reporting individual may deduct from the total value of gifts received from any source during the calendar year the total value of gifts given by the reporting individual to that source during the calendar year, except that, if gifts with a fair market value of less than \$35 received from that source are not aggregated, gifts with a fair market value of less than \$35 given to that source may not be deducted.

(e) (1) The identity and category of value of each item of real property held, directly or indirectly, during such calendar year which has a fair market value in excess of \$1,000 as of the close of such calendar year.

(2) The identity and category of value of each item of personal property held, directly or indirectly, during such calendar year in a trade or business or for investment or the production of income which has a fair market value in excess of \$1,000 as of the close of such calendar year.

(f) The identity and category of value of each personal liability owed, directly or indirectly, other than to a relative, which exceeds \$2,500 at any time during such calendar year.

(g) The identity, date, and category of value of any transaction, directly or indirectly, in securities or commodities futures during such calendar year exceeding \$1,000, except that (1) the identity of the recipient of any gift to any tax-exempt organization described in section 501(c)(3) of the Internal Revenue Code of 1954 involving such a transaction need not be reported, and (2) any transaction solely by and between the reporting individual, his spouse, and dependents need not be reported.

(a) (1) The identity, date, and category of value of any purchase, sale, or exchange, directly or indirectly, of any interest in real property during such calendar year if the value of the property involved in such purchase, sale, or exchange exceeds \$1,000 as of the date of such purchase, sale, or exchange, except that (1) the identity of the recipient of any gift to any tax-exempt organization described in section 501(c)(3) of the Internal Revenue Code of 1954 involving such a transaction need not be reported, and (2) any transaction solely by and between the reporting individual, his spouse, or dependents need not be reported.

(2) For the purposes of subsection (e)(1) of this section and paragraph (1) of this subsection, the identity of an item of real property shall include the number of acres of property (if there is more than one acre), the exact street address (except with respect to a personal residence of a reporting individual), the town, county, and State in which the property is located, and if there are substantial improvements on the land, a brief description of the improvements (such as "office building").

(i) The identity of and a description of the nature of any interest in an option, mineral lease, copyright, or patent right held during such calendar year.

(j) The identity of all positions held as an officer, director, trustee,



partner, proprietor, agent, employee, representative, or consultant of any corporation, company, firm, partnership, or other business enterprise, any nonprofit organization, and any educational or other institution, except that this subsection shall not require the reporting of positions held in any religious, social, fraternal or political entity.

(k) A description of, the parties to, and the terms of any contract, promise, or other agreement between such individual and any person with respect to his employment after such individual ceases to occupy an office or position described in section 301, including any agreement under which such individual is taking a leave of absence from an office or position outside of the United States Government in order to occupy an office or position described in section 301(b), and a description of and the parties to any agreement providing for continuation of payments or benefits from a prior employer other than the United States Government.

(l) If any person, other than the United States Government, paid the reporting individual compensation in excess of \$5,000 in any of the two calendar years prior to such calendar year, the individual shall include in the report—

- (1) the name and address of each source of such compensation;
- (2) the period during which the reporting individual was receiving such compensation from each such source;
- (3) the title of each position or relationship the reporting individual held with each compensating source; and
- (4) a brief description of the duties performed or services rendered by the reporting individual in each such position.

The preceding sentence shall not require any individual to include in such report any information which is considered confidential as a result of a privileged relationship, established by law, between such individual and any person nor shall it require an individual to report any information with respect to any person for whom services were provided by any firm or association of which such individual was a member, partner, or employee unless such individual was directly involved in the provision of such services.

SEC. 303. (a) For purposes of subsections (e) through (h) of section 302, an individual need not specify the actual amount or value of each item required to be reported under such subsections, but such individual shall indicate which of the following categories such amount or value is within:

- (1) not more than \$5,000,
- (2) greater than \$5,000 but not more than \$15,000,
- (3) greater than \$15,000 but not more than \$50,000,
- (4) greater than \$50,000 but not more than \$100,000,
- (5) greater than \$100,000 but not more than \$250,000,
- (6) greater than \$250,000 but not more than \$500,000,
- (7) greater than \$500,000 but not more than \$1,000,000,
- (8) greater than \$1,000,000 but not more than \$2,000,000,
- (9) greater than \$2,000,000 but not more than \$5,000,000, or
- (10) greater than \$5,000,000.

(b) For the purposes of subsection (e) of section 302, if the current value of an interest in real property (or an interest in a real estate partnership) is not ascertainable without an appraisal, an individual

may list the date of purchase and the purchase price of the interest in the real property instead of specifying a category of value pursuant to subsection (a) of this section. If the current value of any other item required to be reported under subsection (e) of section 302 is not ascertainable without an appraisal, such individual may list the book value of a corporation whose stock is not publicly traded, the net worth of a business partnership, the equity value of an individually owned business, or with respect to other holdings, any recognized indication of value, but such individual shall include in his report a full and complete description of the method used in determining such value.

(c) (1) For the purposes of subsections (a) through (c) of section 302, the individual shall report the source, but need not report the amount, of any earned income over \$1,000 or gifts over \$100 (\$250 in the case of transportation, lodging, food, or entertainment) received by a spouse or minor dependent, and of gifts of over \$500 received by an adult dependent, but with respect to earned income, if his spouse or any minor dependent is self-employed in his or her own business or profession, only the nature of such business or profession need be reported.

(2) For the purposes of subsection (a) (3) and subsections (e) through (i) of section 302, a reporting individual shall also report the interests of the spouse or dependents of that individual.

(3) No report shall be required with respect to the interests of a spouse living separate and apart from the reporting individual.

(d) (1) Except as provided in this subsection, the holding of and income from a trust or other financial arrangement from which the reporting individual, or the spouse or any dependent of such reporting individual, receives income or has an equity interest in, must be publicly reported according to the provisions of section 302, except that the identity of the holdings and the sources of a trust's income need not be disclosed if—

(A) the trust was not created directly or indirectly by the reporting individual, his spouse, or dependent,

(B) the reporting individual, his spouse, and dependent have no knowledge of the contents or sources of income of the trust, and

(C) the reporting individual has requested the trustee to provide information with respect to the holdings and sources of income of the trust and the trustee refuses to disclose the information.

However, where the identity of the holdings and the sources of income of a trust need not be disclosed, the reporting individual must list the category of the net cash value of his interest in the total trust holdings under subsection (e) of section 302, and must list the category of the amount of the income from the trust under subsection (a) (3) of section 302.

(2) Since it is the policy of the United States that individuals holding positions described in section 301 make full and complete public financial disclosure of financial holdings, trusts established for the purpose of being blind trusts, whether revocable or irrevocable, shall be dissolved or amended by May 15, 1978 (or within 3 months after the date an individual becomes subject to this title if such date is after May 15, 1978), by the creating party to permit the disclosures required

by this rule unless, prior to either such date, the minimum requirements for a blind trust are defined by statute and the trust involved meets the requirements of that statute.

(c) The President, the Judicial Conference of the United States, the House of Representatives, or the Senate may require the reporting and disclosure of information with respect to gifts received by reporting individuals under their supervision as designated in, section 304(a), and their spouses and dependents, in addition to that required by section 302 if it is determined that such information is necessary for the effective enforcement of the conflict of interest laws or regulations.

(f) Each report filed under subsections 301 (c) and (d) shall include a full and complete statement, in such manner and form as the individual's supervising ethics office shall prescribe, with respect to information required by subsections (c), (f), (i), (j), (k), and (l) of section 302, as of the date of filing, and the sources and amounts of any payments to date over and above normal salary (including but not limited to severance, bonus or buy-out payments) from a prior employer or partner for the year of filing and the preceding calendar year.

#### FILING OF REPORTS

SEC. 304. (a) For purposes of this title, the term "supervising ethics office" means—

(1) a committee designated by the Senate of the United States in the case of Members, officers, and employees of the Senate, candidates seeking election to the Senate, and officers and employees of the General Accounting Office, the Cost Accounting Standards Board, the Office of Technology Assessment, and the Office of the Attending Physician;

(2) a committee designated by the House of Representatives in the case of Members, officers, and employees of the House of Representatives, candidates seeking election to the House of Representatives, and officers and employees of the Architect of the Capitol, the Botanic Gardens, the Government Printing Office, and the Library of Congress;

(3) a committee designated by the Judicial Conference of the United States in the case of justices and judges of the United States, any officer or employee of the judicial branch of the Government or the District of Columbia government, and any Presidential nominee for any such position;

(4) the President in the case of any Commissioner of the Civil Service Commission and the Director of the Office of Government Ethics of the United States Civil Service Commission; and

(5) the Office of Government Ethics of the United States Civil Service Commission in the case of any other individual required to file a report under section 301;

(b)(1) Each officer or employee whose supervising ethics office is the Office of Government Ethics of the United States Civil Service Commission (hereinafter referred to as the "Office of Government Ethics"), other than an individual excepted under paragraph (2), shall—

(A) file the report required by this title with the designated official of his agency; and

(B) file a copy of his report with the Office of Government Ethics if such officer or employee is the President, the Vice President, a Presidential appointee in the Executive Office of the President who is not subordinate to the head of an agency in that Office, a full-time member of a committee, board, or commission appointed by the President or an individual whose pay rate is specified in subchapter II of chapter 53 of title 5, United States Code.

(2) The President may exempt any individual in the Central Intelligence Agency, the Defense Intelligence Agency, or the National Security Agency, or any individual engaged in intelligence activities in any agency of the United States from the requirement to file a report with his supervising ethics office if the President finds that, due to the nature of the office or position occupied by such individual, public disclosure of such report would reveal the identity of an undercover agent of the Federal Government. Each individual exempted by the President from such requirements shall file such report with the head of the agency in which he occupies an office or position and said report shall not be made public.

(c) Each Commissioner of the Civil Service Commission and the Director of the Office of Government Ethics of the Civil Service Commission shall file the report required by this title with the President and a copy with the Office of Government Ethics.

(d) (1) Each individual identified in subsection 301(d) who is nominated for a position the supervising ethics office for which is the Office of Government Ethics shall file the report required by this title with the Senate committee (in the case of a nominee for Vice President, the Senate and House committees) considering his nomination and a copy of such report with the agency in which he is nominated to serve and the Office of Government Ethics.

(2) Each individual identified in subsection 301(d) who is not referred to in paragraph (1) of this subsection shall file the report required by this title with the Senate committee considering his nomination and a copy of such report with the supervising ethics office for the position for which he is nominated.

(e) Each individual identified in subsection 301(e) shall file the report required by this title with the supervising ethics office for the position for which he is a candidate.

(f) (1) Each Member, officer, employee or candidate whose supervising ethics office is a committee designated by the Senate or House of Representatives shall file the report required by this title with the Secretary of the Senate or the Clerk of the House of Representatives, respectively.

(2) Each Member of the House of Representatives or the Senate or a candidate for such a position shall also file a copy of such report as a public document with the Secretary of State (or, if there is no office of Secretary of State, the equivalent state officer) in the State which the individual represents or in which he is a candidate.

(g) (1) Each justice, judge, adjudicatory official, officer, or employee of the judicial branch or the judicial branch of the District of Colum-

bia shall file the report required by this title with his supervising ethics office.

(2) In addition, each justice or judge or other adjudicatory official of the judicial branch of the United States shall file a copy of such report as a public document with the clerk of the court on which he sits.

(h) The individual's supervising ethics office may grant one or more reasonable extensions of time for filing any report (other than a report required by subsection 301(d)) but the total of such extensions shall not exceed ninety days. The congressional committee considering a nomination may grant one or more reasonable extensions of time for filing any report required to be filed under subsection 301(d) but in no event shall such extension extend beyond the time such nominee is confirmed.

#### CUSTODY OF AND PUBLIC ACCESS TO REPORTS

Sec. 305. (a) The Secretary of the Senate, the Clerk of the House of Representatives, each Secretary of State, the committee designated by the Judicial Conference, and each clerk of court shall make each report filed under section 304 available to the public within fifteen days after the receipt of such report from any individual and provide a copy of such report to any person upon a written request.

(b) Each executive agency, as defined in section 105 of title 5, United States Code, and the Office of Government Ethics of the Civil Service Commission shall—

(1) make each report filed under section 304 available to the public within forty-five days after the receipt of such report from any individual and provide a copy of such report to any person upon a written request; and

(2) prior to making such reports available to the public, cause each such report to be reviewed to assure compliance with applicable laws and regulations and indicate on the financial disclosure report the name of the person who conducted such review and the fact that no conflicts exist or a description of the action taken to eliminate any conflicts which do exist.

(c) Any person receiving a copy of a report or inspecting a report pursuant to subsection (a) or (b) shall be required to supply his name and address and the name of the person or organization, if any, on whose behalf he is requesting a report and may be required to pay a reasonable fee in any amount which is found necessary to recover the cost of reproduction or mailing of such report excluding any salary of any employee involved in such reproduction or mailing. A copy of such report may be furnished without charge or at a reduced charge if it is determined that waiver or reduction of the fee is in the public interest. The names and addresses of persons or organizations inspecting or receiving a copy of a report shall be made available to the reporting individual and to the public.

(d) (1) It shall be unlawful for any person to inspect, or obtain a report—

- (A) for any unlawful purpose;
- (B) for any commercial purpose;

(C) for determining or establishing the credit rating of any individual; or

(D) for use, directly or indirectly, in the solicitation of money for any political, charitable, or other purpose.

(2) The Attorney General may bring a civil action against any person who inspects or obtains a report for any purpose prohibited in paragraph (1). The court in which such action is brought may assess against such person a penalty in any amount not to exceed \$5,000.

(e) Any report received under this title by the offices referred to in subsections (a) and (b) shall be held and kept available to the public for a period of six years after its receipt. After such six year period, any such report shall be destroyed.

#### AUDITS OF REPORTS

SEC. 306. (a) The Office of Government Ethics shall, under such regulations as are prescribed by that Office in order to monitor the accuracy and completeness of such reports—

(1) conduct, on a random basis, a sufficient number of audits, as deemed necessary and appropriate, of the reports filed with that Office (other than the reports filed by the President, Vice President, a Commissioner of the Civil Service Commission or the Director of the Office of Government Ethics); and

(2) audit at least one report filed by an individual holding the office of President, Vice President, or Civil Service Commissioner during the term of such person, and at least once every four years audit one report filed by the Director of the Office of Government Ethics, except that no such audit shall take place during the calendar year any such individual is up for reelection.

(b) The Comptroller General shall, under such regulations as may be prescribed by him, in consultation with the respective supervising ethics office of the Senate or the House of Representatives, in order to monitor the accuracy and completeness of such reports—

(1) conduct on a random basis, a sufficient number of audits, as determined by the respective supervising ethics office, of the reports filed with such offices (other than those filed by a Member of the Senate or House of Representatives or an officer or employee of the General Accounting Office); and

(2) during each six-year period beginning after December 31, 1977, audit at least one report filed by each Member of the Senate and House of Representative, except that no such audit shall take place during the calendar year such Member is up for reelection and the report of any Member not reelected or who does not serve out the term of his office shall not be subject to audit after he has left office.

(c) The supervising ethics office for the judicial branch of the United States and the District of Columbia shall, under such regulations as are prescribed by that office, conduct, on a random basis, a sufficient number of audits of the reports filed with that office in order to monitor the accuracy and completeness of such reports.

(d) The supervising ethics office of the Senate shall, under the regu-

lations prescribed by the Comptroller General under subsection (c), conduct on a random basis, a sufficient number of audits of the reports filed with said office by officers and employees of the General Accounting Office in order to monitor the accuracy and completeness of such reports.

(e) The findings of each audit conducted pursuant to this section shall be transmitted to the individual being audited and that individual's supervising ethics office.

(f) Nothing in this section shall effect the authority of a supervising ethics office to conduct an audit of a report filed under this title in the course of an investigation of allegations of wrongdoing.

#### FAILURE TO FILE, FALSIFYING REPORTS; PROCEDURE

SEC. 307. (a) (1) Any individual who knowingly and willfully falsifies or omits to report any material information such individual is required to report under section 302 shall be fined in any amount not exceeding \$5,000, or imprisoned for not more than one year, or both.

(2) The Attorney General may bring a civil action in any district court of the United States against any individual who fails to file a report which such individual is required to file under section 301 or who fails to report or inaccurately reports any information which such individual is required to report under section 302. The court in which such action is brought may assess against such individual a penalty in any amount not to exceed \$5,000.

(b) The supervising ethics office shall refer to the Attorney General the name of any individual such office has reasonable cause to believe has failed to file a report, has falsified or failed to file information required to be reported, or has violated any law relating to conflicts of interest of officers and employees of the Government, and in the case of the President, Vice President, or any justice or judge of the United States, shall also refer such matter to the Committee on the Judiciary of the House of Representatives.

(c) The supervising ethics office for the judicial branch shall, subject to such procedures and regulations as the office shall prescribe—

(1) review the reports filed with it under this title to insure that the reports are filed in a timely manner, and are complete and in proper form;

(2) arrange for the audits required by section 306(c) of this title;

(3) investigate complaints with respect to alleged violations of this title;

(4) take appropriate administrative action against employees of the judicial branch who violate this title;

(5) refer matters to the Attorney General and the Committee on the Judiciary of the House of Representatives pursuant to section 307(b); and

(6) report at least annually to the Congress on the activities of the Judicial Conference of the United States pursuant to this title and the effectiveness of the judicial branch system for the prevention of conflicts of interest, with recommendations for changes or additions to applicable laws as necessary.

## DEFINITIONS

SEC. 308. As used in this title—

(1) the term "agency" means each authority of the Government of the United States;

(2) the term "candidate" has the meaning set forth in section 301 of the Federal Election Campaign Act of 1971 (2 U.S.C. 431);

(3) the term "commodity future" means commodity future as defined in sections 2 and 5 of the Commodity Exchange Act, as amended (7 U.S.C. 2 and 5);

(4) the term "Comptroller General" means the Comptroller General of the United States;

(5) the term "dependent" has the meaning set forth in section 152 of the Internal Revenue Code of 1954;

(6) the term "earned income" means any income earned by an individual which is compensation received as a result of personal services actually rendered;

(7) the term "employee" includes any employee designated under section 2105 of title 5, United States Code, and any employee of the United States Postal Service or of the Postal Rate Commission;

(8) the term "gift" means a payment, subscription, advance, forbearance, rendering, or deposit of money, services, or anything of value, including food, lodging, transportation, or entertainment, and reimbursement for other than necessary expenses, unless consideration of equal or greater value is received, but does not include (A) a political contribution otherwise reported as required by law, (B) a loan made in a commercially reasonable manner (including requirements that the loan be repaid and that a reasonable rate of interest be paid), (C) a bequest, inheritance, or other transfer at death, or (D) anything of value given to a spouse or dependent of a reporting individual by the employer of such spouse or dependent in recognition of the service provided by such spouse or dependent;

(9) the term "income" means gross income as defined in section 61 of the Internal Revenue Code of 1954;

(10) the term "Member of Congress" means a Senator, a Representative, a Resident Commissioner, or a Delegate;

(11) the term "officer" includes any officer designated under section 2104 of title 5, United States Code, and any officer of the United States Postal Service or of the Postal Rate Commission;

(12) the term "officer or employee of the Senate or the House of Representatives" includes any individual whose salary is disbursed by the Secretary of the Senate or the Clerk of the House of Representatives except the Vice President;

(13) the term "Presidential nominee" means an individual appointed by the President to an office for which confirmation, by and with the advice and consent of the Senate, is required, or an individual nominated by the President to serve as Vice President pursuant to the twenty-fifth article of amendment to the Constitution of the United States;



(14) the term "relative" means, with respect to a person required to file a report under this rule, an individual who is related to the person as father, mother, son, daughter, brother, sister, uncle, aunt, great uncle, great aunt, first cousin, nephew, niece, husband, wife, grandfather, grandmother, grandson, granddaughter, father-in-law, mother-in-law, son-in-law, daughter-in-law, brother-in-law, sister-in-law, stepfather, stepmother, stepson, stepdaughter, stepbrother, stepsister, half brother, half sister, fiancé, fiancée, or who is the grandfather or grandmother of the spouse of the person reporting;

(15) the term "security" has the meaning set forth in section 2 of the Securities Act of 1933, as amended (15 U.S.C. 77b);

(16) the term "transactions in securities and commodities futures" means any acquisition, transfer, or other disposition involving any security or commodity future;

(17) the term "uninformed services" means any of the Armed Forces, the commissioned corps of the Public Health Service, or the commissioned corps of the National Oceanic and Atmospheric Administration.

#### SEPARABILITY

SEC. 309. If any part of this title is held invalid, the remainder of the title shall not be affected thereby. If any provision of any part of this title, or the application thereof to any person or circumstance, is held invalid, the provisions of other parts and their application to other persons or circumstances shall not be affected thereby.

#### AUTHORIZATION OF APPROPRIATIONS

SEC. 310. There are authorized to be appropriated such sums as may be necessary to carry out the provisions of this title.

#### EFFECTIVE DATE

SEC. 311. This title shall take effect on January 1, 1978, and the first reports under section 301(a) shall be filed on or before May 15, 1978, and shall only include the information required by paragraphs (e), (f), (i), (j), (k), and (l) of section 302 as of January 1, 1978.

### TITLE IV—OFFICE OF GOVERNMENT ETHICS

#### OFFICE OF GOVERNMENT ETHICS

SEC. 401. (a) There is established in the United States Civil Service Commission (hereinafter referred to as the "Commission") an office to be known as the Office of Government Ethics (hereinafter referred to as the "Office").

(b) There shall be at the head of the Office a Director (hereinafter referred to as the "Director"), who shall be appointed by the President, by and with the advice and consent of the Senate.

#### AUTHORITY AND FUNCTIONS

SEC. 402. (a) The Director shall provide, under the general supervision of the Commission, overall direction of executive branch poli-

cies related to preventing conflicts of interest on the part of officers and employees of any executive agency, as defined in section 105 of title 5, United States Code, except the General Accounting Office.

(b) The responsibilities of the Director shall include—

(1) developing and recommending to the Commission, in consultation with the Attorney General, rules and regulations to be promulgated by the President or the Commission pertaining to conflicts of interest and ethics in the executive branch, including rules and regulations establishing procedures for filing, review, and public availability of financial statements filed by officers and employees in the executive branch as required by title III of this Act;

(2) developing and recommending to the Commission, in consultation with the Attorney General, rules and regulations to be promulgated by the President or the Commission pertaining to the identification and resolution of conflicts of interest;

(3) monitoring and investigating compliance with the public financial disclosure requirements of title III of this Act by officers and employees of the executive branch and executive agency officials responsible for receiving, reviewing, and making available such statements;

(4) establishing a system whereby each financial disclosure statement filed, whether public or confidential, is promptly reviewed by the Director, an ethics counselor, or a reviewing official under the supervision thereof, and that the individual conducting the review signs and dates the financial disclosure statement and indicates on the statement that it has been reviewed and that no conflicts exist or indicates the action taken to eliminate any conflicts which do exist;

(5) conducting the random audits required by title III of this Act of financial disclosure statements to determine whether such statements are complete and accurate;

(6) conducting a random annual review of not less than five per centum of the financial statements filed by officers and employees in the executive branch as required by title III of this Act to determine whether such statements reveal possible violations of applicable conflict of interest laws or regulations and recommending appropriate action to correct any conflict of interest or ethical problems revealed by such review;

(7) monitoring and investigating individual and agency compliance with any additional financial reporting and internal review requirements established by law for the executive branch;

(8) interpreting rules and regulations issued by the President or the Commission governing conflict of interest and ethical problems and the filing statements;

(9) consulting, when requested, with agency ethics counselors and other responsible officials regarding the resolution of conflict of interest problems in individual cases;

(10) establishing a formal advisory opinion service whereby advisory opinions which the Director renders on matters of general applicability or on important matters of first impression are rendered after, to the extent practicable, providing interested parties with an opportunity to transmit written comments to the

Director with respect to the request for such advisory opinion, and whereby such advisory opinions are compiled, published, and made available to agency ethics counselors and the public;

(11) ordering corrective action on the part of agencies and employees which the Director deems necessary;

(12) requiring such reports from executive agencies as the Director deems necessary;

(13) assisting the Attorney General in evaluating the effectiveness of the conflict of interest laws and in recommending appropriate legislative action;

(14) evaluating, with the assistance of the Attorney General, the need for changes in rules and regulations issued by the Commission and the agencies regarding conflict of interest and ethical problems, with a view toward making such rules and regulations consistent with and an effective supplement to the conflict of interest laws;

(15) cooperating with the Attorney General in developing an effective system for reporting allegations of violations of conflict of interest laws to the Attorney General, as required by section 535 of title 28, United States Code;

(16) providing information on and promoting understanding of ethical standards in executive agencies;

(17) reporting to the Commission recommendations which shall be submitted to the Congress no later than February 1, 1979, as to which additional executive branch employees, if any, should be covered by the requirements for public financial disclosure and a report on which executive branch officials are required to file confidential financial disclosure statements under any Executive order, rules, or regulations; and

(18) reporting to the Commission, which report shall be submitted to the President and the Congress at least annually, on the activities of the Office and the effectiveness of the executive branch system for the prevention of conflicts of interest, with recommendations for changes or additions to applicable laws as necessary. Such report shall include the number of financial disclosure statements annually audited by the Office pursuant to title III of this Act.

(c) In the development of policies, rules, regulations, procedures, and forms to be recommended, authorized, or prescribed by him, the Director shall consult, when appropriate, with the executive agencies affected and the Attorney General.

#### ADMINISTRATIVE PROVISIONS

SEC. 403. (a) Upon the request of the Director, each executive agency is directed to—

(1) make its services, personnel, and facilities available to the Director to the greatest practicable extent for the performance of functions under this Act; and

(2) except when prohibited by law, furnish to the Director all information and records in its possession which the Director may determine to be necessary for the performance of his duties.

(b) Section 5316 of title 5, United States Code, is amended by adding at the end thereof the following:

“(141) Director, Office of Government Ethics, Civil Service Commission”.

#### AUTHORIZATION OF APPROPRIATIONS

SEC. 404. There are authorized to be appropriated to carry out the provisions of this title—

- (1) not to exceed \$3,000,000 for the fiscal year ending September 30, 1978;
- (2) not to exceed \$3,000,000 for each of the fiscal years 1979, 1980, 1981, and 1982.

#### SEPARABILITY

SEC. 405. If any part of this title is held invalid, the remainder of the title shall not be affected thereby. If any provision of any part of this title, or the application thereof to any person or circumstance, is held invalid, the provisions of other parts and their application to other persons or circumstances shall not be affected thereby.

#### TITLE V—GOVERNMENT PERSONNEL; RESTRICTIONS ON POST SERVICE ACTIVITIES

SEC. 501. Title 18 of the United States Code is amended by deleting section 207 and inserting in lieu thereof the following:

##### “§ 207. Disqualification of former officers and employees; disqualification of partners of current officers and employees

“(a) Whoever, having been an officer or employee of the executive branch of the United States Government, of any independent agency of the United States, or of the District of Columbia, including a special Government employee, after his employment has ceased, knowingly aids, assists, or represents any one other than the United States, in connection with any judicial or other proceeding, application, request for a ruling or other determination, contract, claim, controversy, charge, accusation, arrest, or other particular matter involving a specific party or parties in which the United States or the District of Columbia is a party or has a direct and substantial interest and in which he participated personally and substantially as an officer or employee through decision, approval, disapproval, recommendation, the rendering of advice, investigation, or otherwise, while so employed, or

“(b) Whoever, having been so employed, within two years after his employment has ceased, knowingly—

“(1) acts as agent or attorney for or otherwise represents anyone other than the United States in any formal or informal appearance before, or

“(2) makes any written or oral communication on behalf of anyone other than the United States to, and with the intent to influence the action of,

any court or department or agency, or any officer or employee thereof, in connection with any judicial or other proceeding, application, request for a ruling or other determination, contract, claim, controversy,

charge, accusation, arrest, or other particular matter involving a specific party or parties in which the United States or the District of Columbia is a party or has a direct and substantial interest and which was under his official responsibility as an officer or employee within a period of one year prior to the termination of such responsibility, or,

“(c) Whoever, other than a special Government employee, having been so employed—

“(i) at a rate of pay specified in subchapter II of chapter 53 of title 5, United States Code, or a comparable or greater pay rate under another authority; or

“(ii) in a position classified at GS-16, GS-17, or GS-18 of the General Schedule prescribed by section 5332 to title 5, United States Code; in a position classified at 0-7 or above under section 1009 of title 37, United States Code; or in a comparable executive branch position under another authority, as defined by the Director of the Office of Government Ethics, Civil Service Commission, within one year after his employment with the department or agency has ceased, knowingly—

“(1) makes any appearance or attendance before, or

“(2) makes any written or oral communication to, and with the intent to influence the action of,

the department or agency in which he served, or any officer or employee thereof, if such appearance or communication relates to any particular matter which is pending before such department or agency: *Provided*, That, the prohibition of this subsection shall not apply to appearances or communication by the former officer or employee concerning matters of a personal and individual nature, such as personal income taxes or pension benefits; *Provided further*, That, for the purposes of this subsection, whenever the Director of the Office of Government Ethics of the Civil Service Commission determines that a separate statutory agency or bureau within a department exercises functions which are distinct and separate from the remaining functions of the department, the Director shall by rule designate such agency or bureau, as a separate ‘department or agency’, except that this shall not apply to former officers and employees of the department whose official responsibilities included supervision of said agency or bureau—

“Shall be fined not more than \$10,000 or imprisoned for not more than two years, or both. In addition, if the head of the department or agency in which the former officer or employee served finds, after notice and opportunity for a hearing, that said former officer or employee violated subsection (a), (b), or (c) of this section, he may prohibit that person from making any appearance or attendance before that department or agency for a period not to exceed five years, or may take other appropriate disciplinary action: *Provided*, That nothing in subsection (a), (b), or (c) prevents a former officer or employee, including a former special Government employee, with outstanding scientific or technological qualifications from making any appearance, attendance, or written or oral communication in connection with a particular matter in a scientific or technological field if the head of the department or agency concerned with the matter shall make a certification in writing, published in the Federal Register, that the na-

tional interest would be served by such action or appearance by the former officer or employee.

“(d) Whoever, being a partner of an officer or employee of the executive branch of the United States Government, of any independent agency of the United States or of the District of Columbia, including a special Government employee, acts as agent or attorney for anyone other than the United States before any department, agency, court, court-martial, or any civil, military, or naval commission, of the United States or of the District of Columbia, or any officer or employee thereof, in connection with any judicial or other proceeding, application, request for a ruling, or other determination, contract, claim controversy, charge, accusation, arrest, or other particular matter in which the United States is a party or has a direct and substantial interest and in which such officer or employee of the Government or special Government employee participates or has participated personally and substantially as a Government employee through decision, approval, disapproval, recommendation, the rendering of advice, investigation, or otherwise, or which is the subject of his official responsibility—

“Shall be fined not more than \$5,000, or imprisoned for not more than one year, or both.”

**END**