“Contemporary Institutional Arrangements for Managing Political Appointments and the Historical Processes of Depoliticization: The Experience of the United States at the Federal Level and in Some States”

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Introduction:

The public service in the United States is often used as a model for successful anticorruption strategies in other parts of the world. Along with effective enforcement, corruption prevention measures, an independent legal system and a free press, a merit-based civil service is considered a critical element in anticorruption initiatives. The story of the development of a merit-based civil service in the U.S. is at best uneven, and the current status of the civil service stands in stark distinction to the model of merit many perceive. In point of fact, there are exponentially more patronage appointees in the United States than any other developed nation in the world.

This phenomenon is important globally because excessive politicization of the civil service is a common phenomenon among developing and middle-income countries with serious consequences for integrity and performance of the public sector. Donor-funded support for civil service reform has thus increasingly focused on introduction of a professional, merit-based civil service.1 However, our knowledge of the depoliticization process and institutional arrangements for managing political appointments is still limited.

This paper is intended to contribute to deepening our understanding of a particular case, the United States, which relies on a relatively large number of political appointees with a career civil service system. This “model” is particularly attractive for developing/middle-income countries with presidential systems of government given the political and cultural importance those systems lend to political appointments (e.g., Latin

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1 The Bolivia Institutional and Governance Review tried to develop a notion of “managed” depoliticization, but confronted the difficulty of the dearth of operational knowledge about actual experiences in managing such a process.
America). The seeming relevance of the U.S. model can be abused, however, if its application is based on superficial knowledge of how the U.S. system actually works. This paper will provide insights on the American model, its successes and failures, and lessons that can be learned from it. Specifically, the paper will address two related questions in order to develop a paradigm that can be applied to a global context:

1. How the U.S. civil services at the federal level and in some states went through a gradual depoliticization process from the 19th century to the early 20th century; and

2. How the U.S. government is organized today to manage its relatively numerous political appointees, while controlling the risks of excessive politicization and abuse (e.g., patronage, corruption), which afflict many of the developing/middle-income countries.

In addressing these questions, the paper will discuss the historical processes of depoliticization at both the federal and state levels, and the varied paths of select states, such as Florida, which sought protection for the patronage system; Wisconsin, which implemented a merit system; and California, which has a mixed system. The contemporary institutional arrangements for managing political appointments will also be examined.

U.S. Civil Service Reform: From Patronage to Merit?

The Early Republic:

In drafting and debating the Constitution of the United States (1787-1789) the founders provided future generations with the advantage of not only having the constitutional document, but the “users manual”; often referred to as the “Federalist Papers.” These are a series of published editorials during the period, written by those who wrote the Constitution, explaining and defending, clause by clause (and sometimes
line by line), what the authors meant. Hamilton, Madison, and Jay (the three authors of
the Federal Papers) emphasized three basic tenets when discussing the administration of
government: checks and balances; competence; the need for systems to protect against
human fallibility.

Checks and balances in the new government would be accomplished through an
elaborate series of oversight powers of one branch of government over the others.
Competence, especially of the senior officers in the executive function, would be
accomplished through the requirement that the Senate vote to approve executive branch
appointments. Finally, the writers of the Constitution were very aware that democratic
governments are very vulnerable to corruption. In Federalist #51, James Madison writes:

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.2

Government in the early American republic used merit as a basis of political
appointments but not in the way we currently mean this term. During the Federalist and
Jeffersonian period, merit referred to white males from an elite class, appointed because
of their connections with family or their friends. Government was quite small and the
responsibilities of these individuals were broad and overlapping.

Because of this “clubby” environment the perception is that there was efficiency
and an absence of corruption. This is far from the truth. Contrary to the perspective held
by many, problems with conflicts of interest did not originate with the Jacksonian spoils
system. The nagging problem of financial conflict of interest begins in the very first term of
the Washington administration. Perhaps the most visible problem in the Washington administration was Secretary of War Henry Knox. He was not only an incompetent administrator, but he entertained far beyond his means and his finances were further strained by the gambling debts of his wife. In 1791, attempting to cope with these debts, he entered highly questionable land speculation in Maine. This led to a series of lawsuits. He then turned to recommending friends for public office who in turn “helped” with his legal difficulties.

Additionally, the first president had several collectors for the treasury who were dismissed for delinquency in handling funds. Oliver Bowen, marshal of Georgia, was indicted in 1799 for selling influence and was subsequently discharged from office. The previous year, Secretary of State Timothy Pickering had to dismiss the chief clerk and passport clerk in the State Department. Pickering’s concerns are best described in the following excerpt from a letter he wrote at that time:

I called in two of my clerks, in succession, & handed them the paper to read: the second at once acknowledged that he had taken the five dollars [a gratuity reported by a newspaper] - but thought no harm, the payment being a free gift. I told him the act was glaringly improper, and that he must quit my office. He pleaded his innocence of intention, - and that he had never done an immoral act. - Persisting in my first sentiment, he said he did not stand alone. This alarmed me still more; for I saw it would affect my chief clerk, with whom I had always left blank passports . . . I am therefore constrained to dismiss both. I have consulted all my colleagues, & they concur with me in the necessity of this painful step . . .

Since the federal government was relatively small, it was possible to have standards of conduct that were unwritten because they were easily ingrained as part of the culture. This character was reflected throughout the first quarter of the nineteenth century. These
standards often carried concerns that are quite modern in character. Secretary of Treasury William H. Crawford in speaking before the House of Representatives in 1819 stated: “It is extremely desirable that the conduct of officers of the government, especially those who have charge of the public money, should not only be correct, but that there should be no possible cause of suspecting them to be incorrect.”

Embezzlement in the early republic was far more common than most analysts recognize. A pointed example was the embezzlement case of Dr. Tobias Watkins, a close friend of President John Quincy Adams and a high-ranking officer in his administration. His very public trial and subsequent imprisonment by the Jackson administration was an embarrassment to the President. John Quincy Adams was disconsolate:

That an officer under my Administration, and appointed partly at my recommendation, should have embezzled any part of the public moneys is a deeper affliction to me than almost anything else that has happened; that he was personally and warmly my friend aggravates the calamity…

**The Jacksonian Period: an Uneven Path**

The cure for this corruption by the elites turned out to be worse than the disease. In fact, a professional bureaucracy was considered anti-democratic. As an alternative, newly elected President Andrew Jackson, the first truly populist president, was an advocate for the rotation of offices:

No man has any more intrinsic right to official station than another... The duties of all public officers are, or at least admit of being made, so plain and simple that men of intelligence may readily qualify themselves for their performance.
The idea that almost anyone was qualified for public office was not true in 1829, and was certainly not true fifty years later when the first merit-based system for the federal government was created. The concept of “rotation of office” created a federal government barely able to function. Constant turnover provided no institutional memory; government workers panicked at every election and had little sense of loyalty to their jobs, because their tenure was often of such short duration. Over the years, the flaws became more serious and obvious. Political leaders required their patronage appointees to devote time and money to political parties. The role of public administration quickly became providing labor for political party fundraising and other activities.

After each election winners were besieged by hungry office-seekers, and wrangling between the president and Congress over patronage became endemic. By the 1880s, one could open a Washington newspaper after an election and find many advertisements like this one:

“WANTED—A GOVERNMENT CLERKSHIP at a salary of not less than $1,000 per annum. Will give $100 to any one securing me such a position.”

The situation was compounded by the growth of the federal bureaucracy. In Jackson’s time there had been 20,000 persons on the federal payroll. By end of the Civil War the number had increased to 53,000; by 1884, 131,000; and by 1891, 166,000. Moreover, new government jobs required special skills. The use of typewriters, introduced in the early 1880s, meant that mere literacy and decent penmanship were no longer enough for a clerk’s job. With the creation of administrative agencies like the Interstate Commerce Commission and specialized agricultural bureaus, one needed scientific expertise. The spoils system was not the way to secure them.
The Pendleton Act: Halfway House to Reform

Although there was much public sentiment to create a merit-based civil service, especially in New York City and Chicago, it was the assassination of President James Garfield by a disappointed office-seeker, Charles Guiteau, which actually led to the passage of the Pendleton Act (1883). [See Appendix A] The Pendleton Act created the concept of job classification for certain jobs and removed them from the patronage ranks. It also created the U.S. Civil Service Commission to administer those who would fall under this merit based system. The classified list was expanded over time. In 1883 fewer than 15,000 jobs were classified; by the time McKinley became president in 1897, 86,000--almost half of all federal employees--were in classified positions.³

Most scholars simply assume that the positions falling under the merit system continued to increase linearly throughout the twentieth century. These same commentators implicitly suggest that all but a few positions are left to patronage, and that these are distributed evenly throughout the levels of the civil service. The reality is quite different.

There were actually several plateaus in the increasing numbers of persons who would fall under the umbrella of civil service protections. The exceptions were most notable during the administrations of Woodrow Wilson, Calvin Coolidge and Dwight Eisenhower. In addition to these plateaus, there were also removals of certain “classes” of people from the civil service. For example, although Wilson had a number of admirable traits, he was also the first southerner elected president since the civil war. He brought in with him a number of individuals with strong prejudices especially against

African Americans. The head of one government agency was quoted as saying “A Negroe's place is not in the government, but in the fields.” One historian estimates that in 1912, almost ten percent of the civil service was African-American. By the end of Wilson’s administration less than a thousand were still in federal public service.  

Second, the vast majority of patronage appointees are at the most senior levels of government. They serve as cabinet level heads, administrators or Commissioners. They also serve as Deputy Secretaries, Assistant Secretaries, Deputy Assistant Secretaries, Associate Deputy Administrators, General Counsels, Inspectors General, etc. Over a thousand of these positions are “advise and consent employees”; that is they require Senate confirmation. On the surface, this looks like an effective protection against abusive political appointments. However, it looks far more shallow when you take into account the following appointment calculation: the average political appointee serves only 18 months; that there are more than 500 appointments that require Senate confirmation; and the few number of Senate committees (23) that hold hearings. The inadequacy of this kind of oversight is clear. In one especially egregious case, a senior political appointee, who was subsequently forced to resign her position for multiple ethics violations, had only one question asked of her at the confirmation hearing: “Is your mother in the hearing room?”

Additionally, there are significant numbers of political appointees who are sprinkled throughout the rest of the bureaucracy. The most recent Office of Personnel Management 2001 data book reports only 2,073 political appointees in the executive branch of the federal government. However, this data appears to conceal more than they

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4 Richard Kluger, *Simple Justice*
reveal. First, this statistic represents the number of appointments actually made by President Bush in his first seven months in office. Second, it includes very few of the almost one thousand federal commissions, and ignores the actual role of many “exempt” employees. The term exempt refers to those who do not fall under the merit service. Third, this same document reports that 23% of all government employees are categorized as exempt as well as senior executive service (SES) members. This is a 2% increase from just two years before. It is important to note that not all exempt or SES employees are patronage. However, a significant percentage of the SES are political appointments and a significant percentage of the exempt employees are as well. In some cases the latter serve only as part-time commissioners in the more than a thousand permanent and temporary federal commissions, but a number are also secretarial, administrative assistants, or executive assistant appointments. The reported numbers do not include the almost ten thousand employees of the United States Congress (very few of whom have any civil service protection). It also excludes another five thousand employees of the federal judiciary, only half of whom are selected, and protected, by a merit system. Finally, the impact of privatization and contracting out cannot be ignored. A recent study suggests that the federal government has contracts (or sub-contracts) that result in an additional 13 million people to the federal rolls. Certainly, these shadow employees cannot be considered patronage appointments. The procurement and contracting process

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5 Comparative data from other agencies should lend caution about the accuracy of these numbers. For example, only the President, Vice-President, political appointees, general officers in the military (approximately 1500), the SES (approximately 5000, including political appointees) are required to file the public financial disclosure form (the SF-278), yet more than 20,000 disclosures were filed in 2002. (Per phone conversation with a senior official at the U.S. Office of Government Ethics.)

6 http://opm.gov/feddata/02factbk.pdf

in the U.S. is one of the most transparent in the world. Rather, these additional people act on behalf of the government and in so doing put additional strains on the integrity systems in the federal government.

**The Design and Maintenance of an Integrity System:**

From this discussion, it is reasonable to argue that the transparency and relative lack of corruption within the U.S. bureaucracy is not causally linked to a merit-based system. In fact, compared with the majority of OECD countries, the U.S. would be ranked with Mexico as having the largest number of non-civil service appointments. So what accounts for the relative lack of corruption and the objectivity of effective public administration at the federal level in the United States?

There is no simple answer to this question. As in any complex form of administration, there are many facets. However, there is no mono-causal link between merit and effective corruption control. Rather the U.S. has developed a rather different mixed model of administration. It does have the vast majority of public administrators under the civil service system. However, there is a strong belief in the U.S. that the president, being the only elected official in the executive branch of government\(^8\), should have the right to select his (or her) policy team. Unlike Westminster regimes, where cabinet officials who are independently elected make policy under the concept of collective responsibility, all appointed officials in the federal executive branch report to the president and can be removed by the president.

The residual problem was how to inculcate in this mixed system a commitment to the highest standards of public service? The initial ground of this integrity system is

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\(^8\) It is incorrect to suggest that the Vice-President of the United States is independently elected. In fact, the bizarre outcome of the 1800 presidential election led to the 12\(^{th}\) amendment that forever link the vice-president’s selection to the president’s election.
almost embarrassingly simple. All government employees take an oath of office not to support the President, the Congress, or the head of the agency. Rather, they swear to uphold the Constitution of the United States. Constitutional government in the United States is founded on the principle that government authority is derived from the consent of the governed. This is reflected in the Preamble to the US Constitution which begins by saying that “We the people . . . do ordain and establish this Constitution for the United States of America.” The notion that public officials, whether they hold elective or non-elective office, must be accountable to the citizenry thus has constitutional underpinnings. Public confidence is vital to successful democratic governance.

Much of the rest of the integrity system was the result of tinkering with laws and administrative processes to deal with specific problems of corruption. It is a prime example of what political scientist Charles Lindbloom has called the “science of muddling through.” This essay provides an in-depth description and analysis of the federal integrity systems. However, it is important to note that these extensive, and by and large effective, integrity systems have not been accompanied by a more positive attitude on the part of the public toward public servants.

There is not a broad consensus on the part of citizens on the honesty and integrity of the federal civil service. Certainly, by most objective measures of performance, the Federal civil service today is more effective, productive and professional than at any time in its history. Paradoxically, there is a broad consensus about the negative state of public confidence in the Federal government and its institutions. There is little agreement, however, as to the cause. Some public opinion polls reported in the media suggest that there has been a decline in public confidence in the Federal government. The dilemma is
determining the target of the public's ire. For example, when referring to the Federal government most Americans do not distinguish between the executive and legislative branches; or within the executive branch, between the political and career civil servants. Since most publicized “scandals” concern political appointees or Congressmen, it is easy to see why the entire government is often broad-brushed as corrupt.

With respect to the career civil service, the criticism that is perhaps most often expressed is that the civil service, like the Federal Government in general, is too large, too powerful, and should be trimmed back. This is probably a more typical criticism than that there has been a decline in the ethical standards of the average Federal employee. In fact, empirical measures of ethical violations at both the Federal and State level suggest that there are a relatively small number of such cases.

Nevertheless, certain highly publicized cases involving senior appointed or elected officials can have a very detrimental effect on public confidence in Government. There is intense scrutiny of Government officials and programs not only by the media but also by various public interest groups. Finally, charges of ethical violations have more and more frequently been used as a weapon against a political opponent. Related to this is the fact that campaigning against the bureaucratic establishment in Washington has been a feature of electoral politics for several decades. The cumulative effect of this rhetoric has been to generate a degree of skepticism about government and government officials.

The U.S. Federal System: the States as Alternate Models

For most non-Americans, and for many Americans, it is hard to grasp how broadly
decentralized the American federal system is. For example, the vast majorities of
criminal trials, from robbery to murder, fall under state law; and are handled by police,
prosecutors, and judges who are employees of a particular state or locality. Federal
jurisdiction is surprisingly limited to Constitutional issues and certain very specific
crimes, most often crimes that involve multiple states. Because states can and do differ
so much, many observers see the individual states as laboratories of democracy. That is,
many national systems – including merit-based civil service systems – began with
multiple versions in the states. Technically, the intended result is that any nationwide
approach takes advantage of these experiences and develops qualitatively better
programs. The reality is that results are mixed.

A primary example of these differences is the widely varied merit systems in the
states. Certainly, all U.S. states have some form of merit-based administration.
However, the scope of these programs, who is included, what the selection processes are,
and what rights civil servants have under these programs, differ from state to state.
The federal system in the U.S. also has another artifact that seems to belie the idea of
merit at the state level. Current estimates suggest that there are over one hundred
thousand political appointments at the state and local levels in the U.S. These are over
and above the appointments at the federal level. This is certainly a small, but significant,
percentage of government employees below the state level. Again, most of the patronage
appointments are at the most senior levels of government, or to advisory commissions.
This can either be viewed as a distortion of the merit system, or how the U.S. maintains
democratic accountability.
The dynamic of how these systems function within the states will be explored more fully in the state integrity section below. However, it ought to be obvious from our analysis so far that as important as a merit system is in the United States, it is not a necessary and sufficient element to prevent corruption. In fact, the U.S. has far more patronage appointments than many western countries and yet manages to effectively control corruption. The reason for this is the complimentary integrity systems present within the U.S. government that recognize the importance of democratic representativeness, yet also acknowledge the vulnerabilities that come with it. For this reason it is important to provide a full explication of how the integrity systems in the U.S. interface with the government employment and appointment process.

**Current Forces Impacting the Public Service Environment**

In order to affect this description it is important to understand the public service environment and the social, political and economic pressures that have been placed upon it. One factor currently affecting the environment in which public servants operate is the effort to reduce the size of the government at the federal, state and local levels. This has been a political drumbeat for more than two decades. There are proposals to reorganize department structures, to consolidate agency operations, to privatize certain functions, or to integrate several entire agencies. As an example, the Department of Homeland Security has absorbed dozens of different agencies, several of which were as large as departments. In addition, the rights of those employees to organize - even though unions existed in the previous agencies – were legislated away. Closely related to this structural initiative is the effort to reduce government expenditures. Government is being asked to
maintain its level of services and operations with fewer resources. Organizational structures have been flattened. Personnel levels have been reduced.

This restructuring of the Federal Government has a direct impact on the civil service. Downsizing creates insecurity to the extent that Federal employees view their positions as being at risk. Reduced resources may create greater work demands. Tighter agency budgets may mean delayed promotions or compensation levels that fall behind those of the private sector. All of this can have an adverse effect on employee morale. Downsizing also has ethical implications. At the programmatic level, there is a risk that agencies may not devote adequate resources to their ethics programs as they are forced to make hard budget choices. Reduced resources (both funding and personnel) would then place a greater (or impossible) burden on agency ethics officials as they seek to maintain the quality of their ethics programs. In addition, complex ethics issues are raised by privatization and reductions in personnel. These include conflicts of interest and seeking employment issues, as well as post-employment questions for former Government employees. The irony is that these initiatives create a need for more counseling and guidance at a time when agencies are trimming ethics programs.

One ongoing development in the United States has been the establishment of new Government offices or agencies to promote ethics and financial integrity in Government programs and operations. Following their establishment, a number of these agencies have subsequently been strengthened and given enhanced authority. The 1970s saw the creation of the Federal Elections Commission, the Office of Government Ethics (OGE), the Merit Systems Protection Board (MSPB), and the Office of Special Counsel (OSC). Also in the late 1970s a system of Inspector General offices was created. The 1980s
witnessed the establishment of the President’s Council on Integrity and Efficiency, and the strengthening of OGE and OSC. The 1990s have seen the establishment of the Office of Federal Financial Management within the Office of Management and Budget and the reauthorization of the independent counsel law.

A second development has been the use of disclosure as a tool for achieving greater accountability on the part of public officials. A public financial disclosure system for all three branches of Government was established by law in 1978. The 1989 Ethics Reform Act provided for an improved system of confidential financial disclosure. These financial disclosure systems, which apply the principle of transparency to the financial interests of public officials, are a basic tool for identifying potential conflicts of interest and working out appropriate remedies.

A third development has been the promulgation of more detailed rules to govern the conduct of Government officials in both the executive and legislative branches. Standards of Conduct for the executive branch recently issued by the Office of Government Ethics provide specific guidance on such questions as gifts, conflicting financial interests, impartiality, seeking employment, misuse of position and outside activities.

Finally, a current development that affects all Federal Government programs, including the ethics program, is the effort in all of the programs and operations of the executive branch to find ways of making Government more efficient and responsive, more performance-driven. As it applies to executive branch ethics, this initiative builds on past efforts to eliminate fraud, waste and mismanagement of Government programs and operations through a system of inspectors general, through protection provided to
whistleblowers, and through heightened importance of chief financial officers. The challenge now is to develop measures of effective performance of the ethics programs. (A summary of specific ethics initiatives is provided in Appendix A.)

Some legislative initiatives developed out of a high level crisis in Government such as Watergate in the early 1970s. Watergate led to a number of political reform measures including the Ethics in Government Act of 1978. In other instances the driving force was the highly publicized actions of certain individual Government officials. This was particularly true for legislation dealing with post-employment restrictions on former Government officials. In yet other instances widespread abuse revealed the vulnerability of a particular Government system, which led to its reform. This was the case with Government procurement abuses, which led to a reform of procurement law. In the case of the Ethics Reform Act of 1989, an earlier Presidential commission on ethics was a strong influence leading to subsequent reform. Finally, a general influence on Government ethics is the efforts of public interest groups to focus public attention on certain issues and to arouse the media's vigilant scrutiny.

The most vulnerable, and volatile, ethical arena is campaign finance. Although the McCain-Feingold Bill was signed into law just last year, it is under significant attack from a variety of quarters. The battle will now be fought out in the federal courts, and probably resolved by the U.S. Supreme Court. Given the court’s prior position in Buckley vs. Valeo, that interpreted the expenditure of money as protected by the free speech provision in the Bill of Rights, it is likely that McCain-Feingold will be eviscerated. For this reason, it should come as no surprise that the vast majority of ethical (and legal) improprieties will continue to occur around issues of campaign finance.
The Ethics Infrastructure: Legal Framework

The ethics infrastructure in the United States is in large measure dictated by the Governmental framework ordained by the US Constitution. Because the Constitution establishes a Federal system of Government, there are distinct systems of ethics laws and regulations at the Federal, State and local government levels. At the Federal level, for example, laws and regulations apply in such areas as financial disclosure, conflict of interest, employee conduct, and mismanagement and fraud in Federal programs. Each of the States also has its own statutes and regulations, covering many or all of these areas, which apply within their jurisdictions. In addition, many local government bodies have regulations, ordinances or policies that address issues of ethics and accountability at the local level.

At the Federal level, in a number of areas, separate legal requirements apply to, and are independently administered by, each of the three branches of Government: legislative, judicial, and executive. In the legislative branch, for example, each of the Houses of Congress has established its own rules of conduct that are administered by its own committees. In the Senate, ethics matters fall within the scope of the Select Committee on Ethics; in the House, this responsibility falls to the Committee on Standards of Conduct in the House of Representatives. Similarly, in the judicial branch, the Judicial Conference of the United States administers ethics matters, such as the financial disclosure system. In the executive branch, the Office of Government Ethics is responsible for providing overall direction for the individually administered ethics programs of the Federal departments and agencies.
Elements of an Ethics Infrastructure

(a) Capacities in investigation and prosecution

*Criminal justice system*

The basic conflict of interest laws in the United States are criminal statutes that appear in title 18 of the United States Code. These laws include prohibitions on bribery, conflict of interest, supplementation of salary, representation of private interests in matters in which the United States has an interest, and an extensive array of post-employment restrictions on former Federal officials after they have left Government service. The penalty for violation of these criminal statutes includes imprisonment for up to five years. Violations may also be processed civilly with civil penalties of up to $50,000. The law also provides for injunctive relief to prohibit specific conduct.

Possible violations of the criminal code are handled by the Department of Justice. They may be investigated and prosecuted either by the Public Integrity Section within the Criminal Division of the Justice Department or by the various United States Attorney’s Offices throughout the United States. The Inspector General within the various agencies also has authority to investigate possible criminal violations. Federal law requires that a matter that may involve violation of the criminal conflict of interest laws be referred to the Department of Justice. If the Justice Department decides to prosecute, it may proceed either civilly or criminally. Whenever such cases are tried, they proceed through the regular processes of the Federal court system with appeals to the Federal circuit courts and ultimately, of course, to the United States Supreme Court.

*Administrative Sanctions System*
If the Justice Department declines prosecution, agencies may nevertheless proceed administratively and impose administrative sanctions as warranted. The Office of the Inspector General within an agency would typically be used to investigate any such matters. In addition to possible follow-up on matters in which criminal prosecution has been declined, the various agencies of the executive branch also investigate matters that originate solely as a possible violation of administrative standards of conduct. Again these matters are handled under the regular administrative procedures for discipline of executive branch employees. The usual range of disciplinary sanctions, such as reprimand, suspension, or dismissal, may be imposed depending on the offense. Appeals on certain more serious sanctions imposed by an employing agency may be taken to the Merit Systems Protection Board. Appeals from MSPB decisions may be taken to the Federal court system.

(b) Special bodies responsible for ethics

The Office of Government Ethics (OGE)

The Office of Government Ethics was created by the Ethics in Government Act of 1978 as an office within the Office of Personnel Management. In 1989, Congress established the Office of Government Ethics as a separate agency within the executive branch. OGE is administered by a Director who is appointed by the President, with the consent of the Senate for a 5-year term.

OGE provides policy leadership and direction for the ethics program in the executive branch. The system is a decentralized one with each department or agency having the responsibility of managing its own ethics program. That responsibility rests with the head of each agency who, in turn, determines a Designated Agency Ethics
Official or “DAEO” who is responsible for the day-to-day management of the ethics program.

OGE maintains a close liaison with the ethics officials at the 129 agency ethics offices throughout the executive branch through its desk officer system. Each OGE desk officer has a portfolio of client agencies that he or she serves by providing information, advice, and program assistance. OGE also regularly conducts reviews of agency ethics programs and makes appropriate recommendations for improvement of financial disclosure systems, counseling and advice, training, and other program matters.

OGE regularly conducts training workshops for ethics officials both in Washington, DC and at cities throughout the United States. OGE has established an ethics information center at its office that makes educational materials available to executive branch agencies. Other ways of communicating with agency ethics officials are through an OGE newsletter and through the regular issuance of memoranda on a broad range of issues.

And OGE holds an annual ethics conference to exchange information and build a strong ethics community. In 1994, OGE participated in the sponsorship of an international conference on ethics in government. Finally, OGE maintains an electronic bulletin board that provides an abundance of information to the ethics community in a fast, convenient, direct way.

*Other Executive Branch Agencies With Ethics Responsibilities*

Within the executive branch, no single office or agency has jurisdiction for the entire array of laws and regulations that come to mind when we think of Government ethics and accountability. Rather there are a number of agencies and officials that have significant responsibility for maintaining Government ethics, accountability, and
employee discipline, either at the policy or the programmatic level. In some areas, responsibility may overlap to some extent. OGE interrelates with these agencies in a variety of ways, including through consultation and referral of certain matters. (A detailed description of other executive branch agencies with ethics responsibilities is provided in Appendix B)

**Effective Accountability and Control Mechanisms: The Context for Ethics**

The authority that defines the boundaries of administrative discretion and responsibility in the executive branch is the Administrative Procedure Act (APA). The APA establishes standards against which the exercise of administrative action may be judged. There are specific requirements for both adjudicative and rulemaking proceedings, some of which have constitutional foundations. Where an affected party believes that there has been a violation of the standards set forth in the APA, an appeal may be taken to the Federal courts, which have the authority to set aside abuses of administrative discretion. The ultimate judicial review of questions of the legality of administrative agency action is provided by the United States Supreme Court.

In addition to the Administrative Procedure Act, which establishes boundaries for administrative action, there are a number of other laws that are intended to promote greater transparency in official decision-making. Most notable is the Sunshine Act that requires that meetings of administrative agencies be open to the public unless certain specified exceptions apply, and notice of meetings must be provided to the public in the Federal Register. Another major mechanism for open Government is the Freedom of Information Act, which provides that Government records must be made available upon request unless certain specific exceptions may be applied. This transparency mechanism
is so widely accepted that bureaucrats and NGOs use the acronym of the law as a verb: i.e. “the document was FOIA’ed (pronounced Foy’yud). Finally, there is the Federal Advisory Committee Act, which governs the activity of the many advisory groups that serve executive branch agencies.

The public interest is also protected by an array of laws that provide for financial controls and accounting systems. An elaborate body of law dealing with the proper use of appropriated funds has developed over the years. The Office of Inspector General in each agency has authority to investigate misuse of public funds. Most recently a system of Chief Financial Officers has been put into place to provide for greater accountability. Finally, the General Accounting Office, an agency in the legislative branch, provides oversight of Federal executive branch programs and operations.

**Regulations:**

**Code of Conduct/Ethics**

The Office of Government Ethics has issued Standards of Ethical Conduct for Employees of the Executive Branch that apply to all officers and employees in executive branch agencies and departments. These regulations contain a statement of 14 general principles that should guide the conduct of Federal employees. Central to these principles is the concept that public service is a public trust. Federal employees must be impartial in their actions and not use public office for private gain. These regulations also contain specific standards that provide detailed guidance in a number of areas: gifts from outside sources, gifts between employees, conflicting financial
interests, impartiality, and seeking employment. At the same time, individual agencies may supplement the executive branch-wide standards with limited rules that are tailored to meet individual misuse of position and outside activities.

The rules are enforced through the regular disciplinary process and provide for a uniform, clear set of standards for employees throughout agency needs. Areas addressed in supplemental agency standards include prohibited financial interests, prohibited outside activities, and prior approval of outside activities.

**Professional Socialization Mechanisms**

Each executive branch agency is required to maintain a program of ethics training to ensure that all of its employees are aware of the requirements of the conflict of interest laws and the standards of conduct. Agencies are required to provide one hour of ethics training for all new agency employees to acquaint them with the ethical obligations of public service. In addition, certain covered employees (approximately 250,000 in number) are required to receive one hour of ethics training annually.

Finally, although not required by regulation, many agencies provide ethics briefings to employees who are leaving Government service, particularly with respect to their obligations under the post-employment laws.

The Office of Government Ethics provides assistance to agencies by conducting ethics training for agency ethics officials, a so-called “train the trainers” program. OGE also develops ethics training materials, such as ethics pamphlets and videotapes. Each year OGE plans and supports an annual Government ethics conference.
The Conditions of Public Service

Although the pay of Government employees lags behind that of persons in comparable positions in the private sector, low pay is probably not as significant a factor in the civil service as the general public perception of public servants. Hostile criticism of Government in general over the past decades has taken its toll on the civil service. Recently Government downsizing and restructuring has had a significant impact. Ironically, salaries generally are not as critical an issue for career civil servants, as those who are presidential appointees. In addition, ethical questions related to salary appear to be inversely related to the salary--so that in the U.S. ethics issues become more manifest with those making the highest salaries. There are several reasons for this. Many political appointees must take major reductions in salary to join the government for what is in effect a temporary position. Because of the salary issue, many political appointees are both very young and very inexperienced. For this reason, political appointees across the executive branch seem to represent a U shaped curve. That is, the majorities of political appointees are old enough to afford to leave lucrative positions or are young enough to see such positions as a career building appointments.\footnote{These conclusions are the result of my 17 years of experience in the federal government and many conversations with senior leadership in the federal bureaucracy. It is obviously in no agency’s interest in collecting such politically volatile information.}

Political Support—Statements from Top Leadership

Support from the heads of agencies is absolutely critical to the effective functioning of the executive branch ethics program. This support is important not only in terms of setting the tone or climate within an agency but also in ensuring that the agency devotes adequate resources to the ethics program. This is especially true because the ethics program in the executive branch is decentralized with each agency head having...
responsibility for that agency’s ethics program.

**Overall responsibility for ethics function**

The overall responsibility for providing leadership and direction for the ethics program in the executive branch resides with the US Office of Government Ethics. The actual management of agency ethics programs is the individual responsibility of each agency head and is carried out by the Designated Agency Ethics Official in each agency.

**Change in the balance of tools**

In the Federal Government, the recent trend has been toward more specific guidelines for employee conduct. This is reflected in the Standards of Conduct issued by the Office of Government Ethics. The importance of general principles, however, is recognized in the Standards, which begin with a broad statement of 14 general principles of public service. The training efforts in the executive branch seek not only to familiarize employees with their obligations under the specific rules, but also to develop sound ethical judgment.

**General principles/values**

The general principles or values that are sought for public servants are reflected in the statement of general principles in the executive branch standards of conduct. The foremost obligation of the Federal public servant is a responsibility to the United States Government and its citizens to place loyalty to the Constitution, laws and ethical principles above private gain. Public service is regarded as a public trust. Employees are expected to act impartially and to not give preference to any private organization or individual. Public office is not to be used for private gain. Employees should preserve the confidentiality of non-public information and not use such information for private gain.
Finally, employees are expected to avoid any actions that would create even the appearance of a violation of law or ethical standards. *Boundaries of relationships*

The public service in the executive branch has a number of components. The Secretaries of the cabinet level departments, the agency heads and administrators, as well as certain other top-level officials, are political appointees. There are also a number of other employees who serve in a confidential capacity to the political appointees who hold their appointments outside the permanent career civil service. The political appointees establish the policy goals for their agencies and departments consistent with the policy and philosophy of the incumbent Administration. The non-political career service includes career members of the Senior Executive Service. These senior managers interact with the political appointees in the formation of policy and in turn administer the programs of their agencies. As might be expected, questions regarding the proper boundaries between the political and non-political components of the public service do occur.

The US Constitution defines the boundaries between the three branches of Government. Unlike parliamentary governmental systems, the executive and legislative branches are separate and distinct. There is, of course, substantial liaison between the executive and legislative branches that involves both political and career executive branch officials. *Whistle blowing*

US Federal law provides protection for persons who make appropriate disclosures of violation of law, gross mismanagement, gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety. The law makes it a prohibited
personnel practice to retaliate against a whistleblower. The primary role of the Office of Special Counsel is to protect employees, former employees, and applicants from prohibited personnel practices.

Level of centralization of the ethics program

As already noted, OGE provides overall direction for the executive branch ethics program and has promulgated a uniform set of ethical standards for all officers and employees of the executive branch, whether political appointees or career employees. Individual agencies (with OGE concurrence) may supplement these standards with rules that meet their own unique program needs. The actual administration of an ethics program, however, is decentralized and is the responsibility of each agency head.

The Office of Government Ethics consulted with the Department of Justice, the Office of Personnel Management and the White House in developing a proposed regulation that would establish a new set of ethical standards for executive branch employees. The proposed regulation was then published in the Federal Register in 1991 and all interested persons were invited to comment. This proposed regulation generated 1,068 sets of comments. Comments were submitted by executive branch agencies, including agency Inspectors General, and more than a thousand individuals and organizations, including Government employee organizations and unions. Following a review of this extensive public comment, OGE issued a final regulation in 1992 with an effective date of February 3, 1993. Where appropriate, the final regulation incorporated the suggestions made in the comments.

Complexity in Pursuit of Virtue
The complexity of the above system must look daunting from outside the government. Perhaps what is most surprising is how well it generally works inside the government. There are literally tens of thousands of inquiries handled by ethics officers. Inspectors general recover hundreds of millions of dollars through prosecution or administrative procedures. Whistle-blowers are protected, and the American public ends up with one of the most transparent national systems of government available. Yet the system is far from perfect. It can be burdensome and duplicative. It can also be extraordinarily expensive. However, if understood in the context of the number of political appointments, and their ebb and flow in and out of government positions, the necessity of such a system becomes clear.
The States: Merit and Integrity, an uneven system
All government institutions in the United States seem to relish the collection of data, both about their constituents and themselves. Yet the ability to find data on the number of civil servants in a state is simply not available in print form. Even more frustrating is any attempt to find out how many patronage appointees each state has. In the former case the size of government has been a major political issue for the past thirty years. For that reason, both at the federal and the state level go out of their way not to collect data, and when they do, they create artifices that conceal more than they reveal.\(^\text{11}\)

In the case of patronage appointees, several of the state offices were insulted at even being asked the question no matter how it was phrased (e.g. patronage appointments, political appointments, gubernatorial appointments). For this research, it took multiple phone calls to even get the data expressed below. It should be noted that although Wisconsin had actual data on the number of civil servants, both California and Florida seem to not even have a data-base that would allow them to answer the question: How many government workers are employed by the state?

As a data note for those unfamiliar with the organization of American government: the number of state employees, merit service or political, does not include the number of employees at the city or county level. Unlike European governments, the number of counties in any individual state varies—from thirty to over one hundred. Although city and county employees fall under the constitutional authority of their individual states, they are also often given independent status in the design of their merit

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\(^{11}\) One example of this at the federal level is the desperate exercise of each president since 1978 to claim that they have shrunk the number of employees in the White House (which actually comprises nine different administrative structures, including the Office of Management and Budget). Yet the actual number of individuals working in these structures increases with every president. This “magic” is achieved by “requesting” key personnel to be detailed to the White House or other offices.
employment systems. They will vary not only in terms of salaries, but also in the conditions of employment (e.g. retirement plans, health plans, performance evaluation.).

**Wisconsin: Merit Based Exemplar**

Wisconsin has been a leader for good government for the past one hundred years. Generally thought of as a progressive government and one of the leaders in state civil service reform. Nonetheless of the approximately 37,000 civil servants on the payroll almost two thousand are appointed by the governor. These positions vary from cabinet level appointments to part-time service on commissions. However, again it must be emphasized that these positions are at the highest level of policy making and administrative oversight in the state government.

Wisconsin has also been a leader in integrity systems at the state level. It led the way with one of the first ethics boards. Initially created in 1973 (and enhanced legislatively in 1977) the ethics system in Wisconsin is considered a model. The governor with the consent of the Wisconsin senate appoints the six-member board. The Board is assiduously non-partisan. No member of the board may be a candidate for political office, a member of a political party or organization, or an employee of state or local government.

The Wisconsin Ethics Code is one of the most effective compared to any of the other states. It should be emphasize that other states have “stronger” codes with more

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12 Phone interview with Sharon Lachman (Central Payroll Office - under the domain of the Dept. of Administration) stated that there are 37,034 civil servants and limited-term employees in Wisconsin. This figure is somewhat skewed by the inclusion of limited-term employees (foster parents, prisoners who are paid for work while incarcerated). Phone: (608) 266-5430. According to Samantha Earnest (phone interview), the Assistant in the Appointments Office, there are 2000 political appointees by executive order. Phone: (608) 266-1212
draconian penalties. However, as will be noted below, these states only appear more vigilant when in fact the systems are designed to fail.\textsuperscript{13} In Wisconsin the system are designed to succeed and are provided leadership that is both respected and independent.

As one would expect, Wisconsin has a robust ethics code as well. The Ethics Code covers all elected state officials, officials of the University of Wisconsin system, gubernatorial appointees, municipal judges, and division administrators in the classified civil service. The code provides a positive guide as well as allowing the opportunity to contact the staff of the commission to ask questions and receive advice. This preventative tool is widely used in the state and is perceived as a litmus test not only for political appointees but for those who would run for public office as well.\textsuperscript{14}

\textit{California: The Mystique of the Golden State}

The state of California is often viewed as the most progressive in the nation. The reality is that it has a tradition of a large number of patronage appointments. With over 200,000 government employees in California\textsuperscript{15} it is the second largest state bureaucracy in the U.S. Although no one in the executive branch of the government would even offer an estimate as to the number of political appointees, a staff member for the California Senate stated that there are 3600 appointees by the governor and seven hundred that must

\textsuperscript{13} See Fredrich Hermman, “Making Bricks Without Straw,: The New Jersey Ethics Commission, “

\textsuperscript{14} For further information see: \url{http://ethics.state.wi.us/}

\textsuperscript{15} Phone interview with the California Secretary of State’s Office ( (916) 653-7244)). This data was derived after three different phone calls to this office, where none of the individuals would identify themselves, and only the last would offer the data.
be approved by the California Senate.\textsuperscript{16} This number does not include appointments to commissions or part-time posts.

To accompany this, California has a relatively weak ethics system. It does have a Code of Ethics, but with very little machinery to ensure compliance. California does require that officials complete on-line training on ethics every two years. However, it does no evaluation of the effectiveness of this training or the ethics program. And, it seems to have little focus on prevention of ethical misconduct. Ethics Training falls under the Attorney General of California’s Public Inquiry Unit. This unit is also responsible for prosecuting public officials for misconduct.\textsuperscript{17}

\textit{Florida: The Almost Sunshine State}

The state of Florida is also one of the most populous in the union. Certainly, its reputation, after the presidential election of 2000, was tainted. In fairness, the most criticized official in the 2000 public spectacle, the Secretary of State, is typically a patronage appointment throughout the rest of the states. The role of the Secretary of State is not foreign policy, but usually the regulation of political appointments and management. The irony of a political appointee, responsible for other political appointees, making a determination in such a critical election is obvious. My point here is not to suggest that the process was corrupt. But rather, the process suffered from the appearance of impropriety no matter the rectitude and seriousness of the individuals involved.

There are approximately 120,000 civil servants at the state level in Florida. Because Florida is currently in the process of outsourcing most of its clerical staff, it has

\textsuperscript{16} Phone interview with Ms. Jackie Forbes, staff member of the Senate Rule’s Committee Appointment’s Office.

\textsuperscript{17} For further details on this system see \url{www.ca.gov/state/}
been difficult to obtain exact figures. According to the Workforce Report compiled and issued by the Department of Management Services, there are 119,748 civil servants in three categories: selected career service (98,322), exempt service (20,899), and senior management (527). An official for the State of Florida Appointment’s Office estimated that they had between 8,000 and 10,000 patronage appointments.

To manage the integrity of this system, Florida has a 9-member Ethics Commission. The governor appoints five members of the Commission, and no more than three may be from the same political party. At least one of these members must be a former city or county official. Two members of the ethics commission are appointment by the President of the Florida Senate, and the Speaker of the Florida House of Representatives appoints the final two members. No member may hold any public employment, nor may they serve more than two full terms on the commission.

The Ethics Commission can render legally binding advisory opinions and is responsible for implementing state financial disclosure laws. They provide guidance on both state law and the state Code of Ethics. The Commission has a professional staff and a longer serving executive director. Although the number of political appointees in Florida is daunting, the Ethics Commission plays an active role in attempting to minimize ethical lapses. In addition to the state ethics office, Florida has a large number of city ethics offices including Jacksonville and Miami.

This brief thumbnail of the public administration systems in Wisconsin, California and Florida is obviously limited. The discussion has focused entirely on the preventative ethics systems in these states. There are multiple complimentary systems in these states

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18 http://www.state.fl.us/dms/hrm/reports/workforce_01.pdf
19 Telephone interview with Mavis Knight an analyst in the Florida Appointment’s Office
20 http://ethics.state.fl.us/
as well, including special offices in the attorneys-general office to examine public corruption, whistle-blower protection systems, and inspectors general. However, one should not conclude that these systems all work equally as well. There are spectacular failures. For example, although the state of Kentucky had passed one of the strongest ethics laws in the nation a decade ago, it has so modified the law and institutions that the legislature had created, that the systems are considered to be worse now than before the laws were originally passed.\(^{21}\) These laboratories of democracy continue to experiment and tinker with merit and integrity systems. There are profound lessons to be taken away from these experiences, but they must be understood as part of the broader federal system in the United States.

**Conclusion:**

This paper has explored the myth of merit in the United States. By that I do not mean that the U.S. has no merit-based system. Rather, there is a mystique that suggests that the United States has an entirely merit based civil service system. And, the unstated corollary to this is that this merit system is the reason that corruption is kept under control. As was suggested earlier, this is too simplistic and when applied to other countries could actually be counterproductive.

It would also be wrong to take away from this argument that merit based systems are not part of an effective anticorruption strategy. In fact, a merit-based system is a necessary, but not sufficient, condition. Critical to the success of such a program are effective anti-corruption systems. The United States has been able to balance the large number of non-civil service personnel with effective anticorruption programs for the

executive branch of the federal government. This paper has not mentioned either the legislative or judicial branches. Although systems exist they are not as extensive or as effective as the executive branch programs.

Also, it is clear from the brief state examples that the scope and effectiveness of these programs vary widely. And, many of these programs have been designed to be defective, or as in the state of Kentucky have been modified to ensure their ineffectiveness. For those who are familiar with Transparency International’s Bribery Index, it has always been a puzzle as to why the U.S. with its many laws and programs has never made it to the “top ten” of clean countries. It is reasonable to claim that if Transparency International could control for states in the U.S. one would find the federal government in the top ten, and the American states dropping to the second or third quintile.

The essence of the argument in this essay was to isolate the nature of merit systems in the U.S. and to demonstrate the critical role of integrity programs in making this system work. It would be wrong to argue that these are the only two variables involved in creating an effective government administration, absent of corruption. There are many elements that contribute. However, the essence of good public service is not only competence but also integrity. As Woodrow Wilson wrote,

And human nature is much the same in government as in the dry-goods trade. Power and strict accountability for its use are the essential constituents of good government. A sense of highest responsibility, a dignifying and elevating sense of being trusted, together with a consciousness of being in an official station so conspicuous that no faithful discharge of duty can go unacknowledged and unrewarded and no breach of trust undiscovered and unpunished....²²

²² Woodrow Wilson, Congressional Government
Appendix A:

THE PENDLETON ACT (1883)  [Abridged]

An act to regulate and improve the civil service of the United States.

Be it enacted...That the President is authorized to appoint, by and with the advice and consent of the Senate, three persons, not more than two of whom shall be adherents of the same party, as Civil Service Commissioners, and said three commissioners shall constitute the United States Civil Service Commission. Said commissioners shall hold no other official place under the United States.

Sec. 2. That it shall be the duty of said commissioners:

First. To aid the President, as he may request, in preparing suitable rules for carrying this act into effect, and when said rules shall have been promulgated it shall be the duty of all officers of the United States in the departments and offices to which any such rules may relate to aid, in all proper ways, in carrying said rules, and any modifications thereof, into effect.

Second. And, among other things, said rules shall provide and declare, as nearly as the conditions of good administration will warrant, as follows:

First, for open, competitive examinations for testing the fitness of applicants for the public service now classified or to be classified hereunder. Such examinations shall be practical in their character, and so far as may be shall relate to those matters which will fairly test the relative capacity and fitness of the persons examined to discharge the duties of the service into which they seek to be appointed.

Second, that all the offices, places, and employments so arranged or to be arranged in classes shall be filled by selections according to grade from among those graded highest as the results of such competitive examinations.

Third, appointments to the public service aforesaid in the departments at Washington shall be apportioned among the several States and Territories and the District of Columbia upon the basis of population as ascertained at the last preceding census...

Fourth, that there shall be a period of probation before any absolute appointment or employment aforesaid.
Fifth, that no person in the public service is for that reason under any obligations to contribute to any political fund, or to render any political service, and that he will not be removed or otherwise prejudiced for refusing to do so.

Sixth, that no person in said service has any right to use his official authority or influence to coerce the political action of any person or body. Seventh, there shall be non-competitive examinations in all proper cases before the commission, when competent persons do not compete, after notice has been given of the existence of the vacancy, under such rules as may be prescribed by the commissioners as to the manner of giving notice...

Third. Said commission shall, subject to the rules that may be made by the President, make regulations for, and have control of, such examinations...

Sec. 3...The commission shall, at Washington, and in one or more places in each State and Territory where examinations are to take place, designate and select a suitable number of persons, not less than three, in the official service of the United States, residing in said State or Territory, after consulting the head of the department or office in which such persons serve, to be members of boards of examiners...Such boards of examiners shall be so located as to make it reasonably convenient and inexpensive for applicants to attend before them and where there are persons to be examined in any State or Territory, examinations shall be held therein at least twice in each year...

Sec. 6. That within sixty days after the passage of this act it shall be the duty of the Secretary of the Treasury, in as near conformity as may be to the classification of certain clerks now existing under...[Section 163]...of the Revised Statutes, to arrange in classes the several clerks and persons employed by the collector, naval officer, surveyor, and appraisers, or either of them, or being in the public service, at their respective offices in each customs district where the whole number of said clerks and persons shall be all together as many as fifty. And thereafter, from time to time, on the direction of the President, said Secretary shall make the like classification or arrangement of clerks and persons so employed, in connection with any said office or offices, in any other customs district. And, upon like request, and for the purposes of this act, said Secretary shall arrange in one or more of said classes, or of existing classes, any other clerks, agents, or persons employed under his department in any said district not now classified; and every such arrangement and classification upon being made shall be reported to the President.

Second. Within said sixty days it shall be the duty of the Postmaster-General, in general conformity to said...[Section 163]...to separately arrange in classes the several clerks and persons employed, or in the public service, at each post-office, or under any postmaster of the United States, where the whole number of said clerks and persons shall together amount to as many as fifty. And thereafter, from time to time, on the direction of the President, it shall be the duty of the
Postmaster-General to arrange in like classes the clerks and persons so employed in the postal service in connection with any other post-office; and every such arrangement and classification upon being made shall be reported to the President.

Third. That from time to time said Secretary, the Postmaster-General, and each of the heads of departments mentioned in...[Section 158]...of the Revised Statutes, and each head of an office, shall, on the direction of the President, and for facilitating the execution of this act, respectively revise any then existing classification or arrangement of those in their respective departments and offices, and shall, for the purposes of the examination herein provided for, include in one or more of such classes, so far as practicable, subordinate places, clerks, and officers in the public service pertaining to their respective departments not before classified for examination.

Sec. 7. That after the expiration of six months from the passage of this act no officer or clerk shall be appointed, and no person shall be employed to enter or be promoted in either of the said classes now existing, or that may be arranged hereunder pursuant to said rules, until he has passed an examination, or is shown to be specially exempted from such examination in conformity herewith. But nothing herein contained shall be construed to take from those honorably discharged from the military or naval service any preference conferred by...[Section 1754]...of the Revised Statutes, nor to take from the President any authority not inconsistent with this act conferred by... [Section 1758]... of said statutes; nor shall any officer not in the executive branch of the government, or any person merely employed as a laborer or workman, be required to be classified hereunder; nor, unless by direction of the Senate, shall any person who has been nominated for confirmation by the Senate be required to be classified or to pass an examination.

Sec. 8. That no person habitually using intoxicating beverages to excess shall be appointed to, or retained in, any office, appointment, or employment to which the provisions of this act are applicable.

Sec. 9. That whenever there are already two or more members of a family in the public service in the grades covered by this act, no other member of such family shall be eligible to appointment to grades.

Sec. 10. That no recommendation of any person who shall apply for office or place under the provisions of this act which may be given by any Senator or member of the House of Representatives, except as to the character or residence of the applicant, shall be received or considered by any person concerned in making any examination or appointment under this act.

Sec. 11. That no Senator, or Representative, or Territorial Delegate of the Congress, or Senator, Representative, or Delegate elect, or any officer or employee of either of said houses, and no executive, judicial, military, or naval
officer of the United States, and no clerk or employee of any department, branch
or bureau of the executive, judicial, or military or naval service of the United
States, shall, directly or indirectly, solicit or receive, or be in any manner
concerned in soliciting or receiving, any assessment, subscription, or contribution
for any political purpose whatever, from any officer, clerk, or employee of the
United States, or any department, branch, or bureau thereof, or from any person
receiving any salary or compensation from moneys derived from the Treasury of
the United States...

Source: *U.S. Statutes at Large 22 (1883): 403.*
APPENDIX B

LEGISLATIVE AND EXECUTIVE BRANCH INITIATIVES

The following is a description of some of the specific ethics developments at the Federal Government level in the United States. Legislation from the 1970’s is included in order to provide background information regarding the statutory basis for the ethics infrastructure in the Federal Government. The discussion of executive branch initiatives treats only the more recent developments.

Legislative Initiatives

Federal Elections Campaign Act of 1974

The principal catalyst for Federal ethics legislation in recent United States history was the Watergate crisis of the early 1970s. As a direct result of reports of financial abuses in the 1972 Presidential election campaign, Congress amended Federal election law by passing the Federal Elections Campaign Act of 1974. This statute set limits on contributions by individuals, by political parties, and by political action committees known as PAC’s. It also established an independent agency, the Federal Elections Commission, to enforce the law, facilitate disclosure, and administer a public campaign-funding program.

Ethics in Government Act of 1978

The influence of Watergate continued to be felt in the passage of the Ethics in Government Act of 1978. The 1978 Act established the Office of Government Ethics within the Office of Personnel Management and charged it with providing overall leadership and direction for the ethics program within the executive branch. The 1978 Act established a comprehensive public financial disclosure system for all three branches of the Federal Government. It also enacted procedures for the appointment of a special prosecutor with authority to conduct independent investigations and prosecutions of Government officials and thereby remove politics from the administration of justice in certain highly sensitive cases. Finally, the 1978 Act strengthened the post-employment restrictions on former officials of the executive branch.

Inspector General Act of 1978

The year 1978 saw the enactment of another important ethics-related law. The Inspector General Act of 1978 established Offices of Inspector General within a number of executive branch departments and agencies. The Inspectors General were given a significant degree of independence (as well as subpoena power) to carry out their responsibility for the detection and prevention of fraud, waste and mismanagement in Government programs.

Civil Service Reform Act of 1978
Another 1978 legislative enactment that had important ethics-related provisions was the Civil Service Reform Act of 1978. The Civil Service Reform Act created the Merit Systems Protection Board to oversee the personnel practices of the executive branch and protect the integrity of the Federal merit systems. It prohibited a number of improper personnel practices including acts of reprisal against an employee who “blew the whistle,” i.e., made a lawful disclosure of mismanagement, waste or abuse in Government programs and operations. The Civil Service Reform Act also enlarged the functions and powers of the Office of Special Counsel, an investigating and litigating office within the MSPB that was authorized to receive whistleblower complaints.

Federal Managers’ Financial Integrity Act of 1982

This Act required ongoing evaluations and reports of the adequacy of the systems of internal accounting and administrative control of each executive agency. The purpose of the Act was to avoid waste in Federal resources, funds, and property by a system of more stringent and effective internal auditing controls. Agencies were required to report on any material weaknesses in their internal control systems. Budget requests of the Offices of Inspector General were given close review and any changes in original requests were required to be noted in the President’s budget submitted to Congress.

Office of Government Ethics Reauthorization Act of 1988

The late 1980s witnessed further efforts by Congress to strengthen the ethics infrastructure within the executive branch. In 1988, Congress passed the Office of Government Ethics Reauthorization Act of 1988. This law removed OGE from the Office of Personnel Management and established it as a separate executive agency. The purpose of this legislation was to ensure the effectiveness of the executive branch ethics program, to clarify OGE’s mandate and to increase its stature, independence, and effectiveness.

Whistleblower Protection Act of 1989

In 1989, Congress took further action to strengthen the ethics Organizational infrastructure by passing the Whistleblower Protection Act of 1989. This law established the Office of Special Counsel as an independent agency within the executive branch that litigates before the Merit Systems Protection Board. The 1989 enactment stated that the primary role of OSC was the protection of Federal employees, especially whistleblowers, from prohibited personnel practices.


In addition to these Organizational changes, Congress took significant actions in the late 1980s to amend substantive law. The Office of Federal Procurement Policy Act Amendments of 1988 contained new provisions to ensure the integrity of the Federal procurement process. These procurement provisions covered four areas: (1) post employment, (2) seeking employment, (3) gratuities and (4) disclosure of information.
With the exception of the post-employment restrictions, the law covered, not only officers and employees, but also contractors, subcontractors, consultants, experts and advisors acting on behalf of or providing advice to an agency regarding an agency procurement.

**Ethics Reform Act of 1989**

In late 1989, Congress enacted legislation that made a number of significant changes in the ethics laws of the United States by passing the Ethics Reform Act of 1989. The 1989 Act expanded the coverage of post-employment law so that it covered Members of Congress and top Congressional staff. A number of changes were made in existing post-employment law applicable to executive branch officials and new restrictions in the areas of trade and treaty negotiations and representation of foreign entities were added. The Act made changes in the existing public financial disclosure system and expressly authorized all three branches of Government to implement a system of confidential financial reporting. It also made amendments to the criminal conflict of interest statutes.

The Act prohibited officers and employees of all three branches from soliciting or accepting gifts from certain prohibited sources and authorized the supervising ethics office in each branch to issue implementing regulations. The Act also authorized executive branch agencies to accept payment from non-federal sources for travel expenses incurred by employees in attending meetings, conferences or other similar activities relating to official duties.

The Act also imposed certain outside earned income limitations and employment restrictions on covered senior officials in all three branches. Under the Act, covered officials shall not (1) receive outside earned income in excess of 15 percent of annual salary, (2) receive compensation from the practice of a profession that involves a fiduciary relationship or allow the use of their names by a firm or entity providing such services, (3) receive compensation for service as an officer or board member on any association, corporation or other entity, and (4) receive compensation for teaching without prior notification and approval of the appropriate ethics office. Finally, the Act banned the receipt of honoraria by a Member of Congress, or officer or employee of all three branches of Government regardless of salary level. Honoraria were defined as a payment of money or anything of value for an appearance, speech or article. This provision was challenged in court by a union of Government employees and, in 1995, the United States Supreme Court declared the honoraria restriction unconstitutional insofar as it applied to certain executive branch employees. See United States v. National Treasury Employees Union, 115 S.Ct. 1003 (1995).

**Chief Financial Officers Act of 1990**

In 1990, Congress enacted the Chief Financial Officers Act to improve the financial management within the executive branch and prevent losses through fraud, waste, abuse and mismanagement of Government programs. The Act made structural changes within the Office of Management and Budget by establishing an Office of Federal Financial Management to set Government-wide financial management policies.
The Act also established the position of Chief Financial Officer within the cabinet departments and certain large agencies.

**Hatch Act Reform Amendments of 1993**

In 1993, Congress reformed the Hatch Act, a law originally enacted in 1939 that places restrictions on the political activities of Government employees. The 1993 law relaxed some of the restrictions on Federal civilian employees to allow greater participation, as private citizens, in the political process. At the same time, it continued to protect Federal employees and the general citizenry from improper political solicitations.

**Congressional Resolutions on Gifts**

In 1995, both the House and the Senate amended their respective rules to drastically restrict the acceptance of gifts. Both Senate Resolution 158 and House Resolution 250 contain a broad prohibition on the acceptance of gifts by Members and staff. The definition of gift is comprehensive and covers any item of monetary value, including gifts of services, transportation, lodging and meals. The rules of both Houses take effect on January 1, 1996.

**Lobbying Disclosure Act of 1995**

In late 1995, the Lobbying Disclosure Act of 1995 was passed by both Houses of Congress and at the date of submission of this paper was awaiting the signature of the President. The bill is intended to address concerns about undue influence by special interests. It is the first major overhaul of Federal lobbying laws since the 1946 lobbying act, which was generally regarded as obsolete and inadequate to deal with lobbying activity. When enacted, the new law will require lobbyists to both the Congress and the executive branch to register and to report on the identity of their clients, the issues they are lobbying on, and the amount of money they are being paid. The law will also apply stringent post-employment restrictions on the US Trade Representative and the Deputy US Trade Representative. These officials will be barred for life from representation of certain foreign entities after they leave office.

**Executive Branch Initiatives**

**Executive Order 12668 of January 25, 1989**

In 1989, the Administration undertook a comprehensive review of Federal ethics laws. President Bush issued Executive Order 12668 which established a Commission on Federal Ethics Law Reform to review existing Federal ethics laws, regulations and policies and to “make recommendations to the President for legislative, administrative, and other reforms needed to ensure full public confidence in the integrity of all Federal public officials and employees.”
In March 1989, the Commission submitted its report to the President entitled “To Serve with Honor: Report of the President’s Commission on Federal Ethics Law Reform.” The Commission was guided by a number of principles in conducting its study: (1) ethical standards must be exacting enough to ensure that public officials act with the utmost integrity and fulfill the public’s confidence in them; (2) standards must be fair and objective; (3) standards must be equitable across all three branches of the Federal Government; and (4) standards must not be so unreasonably restrictive that they discourage able citizens from entering public service. The Commission made 27 recommendations dealing with issues during employment, post-employment restrictions, financial disclosure, structure of Federal ethics regulation, and remedies and enforcement mechanisms. The Commission recommended that a 1965 executive order prescribing the standards of conduct be revised and that the Office of Government Ethics be directed to consolidate all executive branch standards of conduct in a single set of regulations.

Executive Order 12674 of April 12, 1989

In April 1989, President Bush issued Executive Order 12674, “Principles of Ethical Conduct for Government Officers and Employees.” This executive order revised and superseded the President Johnson executive order that had governed the conduct of executive branch employees since 1965. The executive order sets forth 14 principles of ethical conduct. The first principle stated is that public office is a public trust, requiring employees to place loyalty to the Constitution, the laws, and ethical principles above private gain.

The order prohibited full-time non-career officials in the executive branch, including full-time employees in the White House Office and the Office of Policy Development, from receiving any earned income for any outside employment or activity performed during the Presidential appointment.

The order directed the Office of Government Ethics to promulgate a single, comprehensive, and clear set of executive branch standards of conduct that shall be objective, reasonable and enforceable. The order also directed OGE to promulgate regulations establishing a system of confidential financial disclosure to complement the system of public disclosure. The order directed executive branch agencies, in coordination with OGE, to develop annual ethics training plans and to conduct annual ethics training for certain covered employees.

Standards of Ethical Conduct of Employees of the Executive Branch

As noted above, Executive Order 12674 directed OGE to develop a single, uniform, and comprehensive set of ethical standards for officers and employees of the executive branch. In August of 1992, the Office of Government Ethics issued a final rule promulgating standards of conduct for executive branch employees. The rules became effective on February 3, 1993. The rules are codified in Part 2635 of Title 5 of the Code
of Federal Regulations. As noted above, the new standards grew out of the recommendations of the President’s Commission on Federal Ethics Law Reform and Executive Order 12674 which directed the Office of Government Ethics to promulgate a comprehensive uniform set of standards for executive branch employees and officials. The standards incorporate the statement of general principles contained in the executive order and set forth specific standards in the areas of gifts, conflicting financial interests, impartiality, seeking employment, misuse of position and outside activities. The standards replaced previous standards adopted by each agency based on a model rule promulgated by OPM pursuant to an executive order of 1965.

Executive Order 12834 of January 20, 1993

On the first day of his Administration, President Clinton signed Executive Order 12834, “Ethics Commitments by Executive Branch Appointees.” This order requires certain non-career senior appointees and trade negotiators to sign a pledge which establishes a contractual commitment regarding their post-employment activities. Persons covered by the order must sign pledges limiting their lobbying activities for a period of five years after the termination of employment or after personal and substantial participation in a trade negotiation. Subsequently, President Bush rescinded this order in 2001.
APPENDIX C

EXECUTIVE BRANCH AGENCIES WITH ETHICS RESPONSIBILITIES

The following is a brief description of other agencies within the executive branch that have ethics responsibilities.

The Executive Office of the President

OGE is involved with a number of offices and entities within the Executive Office of the President. OGE works closely with the White House Office in the process of clearing Presidential nominees to Senate confirmed positions, as well as on other ethics matters. OGE participates as a member of two interagency groups located within the Office of Management and Budget (OMB): the President’s Council on Integrity and Efficiency (PCIE) and the Executive Council on Integrity and Efficiency (ECIE). Both groups are charged with promoting integrity and effectiveness in Federal programs. Also located within OMB is the Office of Federal Procurement Policy (OFPP), which has responsibility for providing overall direction of procurement policy and leadership in the development of procurement systems of the executive agencies. OFPP plays a key role in formulating the uniform Federal procurement regulations that are issued by the Federal Acquisition Regulatory Council. OGE coordinates with the Council on the issuance of regulations under the Procurement Integrity Act. OGE also maintains a close liaison with OMB regarding pending legislation with ethics implications.

The US Department of Justice

The responsibility for bringing both criminal and civil actions to enforce the Federal conflict of interest statutes resides with the Public Integrity Section within the Criminal Division of the US Department of Justice and the Offices of the United States Attorneys. OGE, as are all agencies, is obligated by statute to refer to the Justice Department cases that may involve possible violation of the criminal conflicts statutes. OGE also consults with the Office of Legal Counsel (OLC) in the Department in connection with the issuance of OGE regulations. OGE regularly confers with OLC on issues of interpretation of the conflict of interest statutes when it issues informal advisory letters. Finally, the Department of Justice represents OGE in connection with any litigation that may arise out of the statutes and regulations that OGE administers.

Inspectors General

The investigation of fraud, waste and mismanagement is generally conducted by an agency Inspector General pursuant to the authority of the Inspector General Act of 1978. Most agencies have an Inspector General either by statute or by the agency’s own administrative determination. (There are approximately 70 inspectors general in the executive branch of the federal government.) An Inspector General may investigate allegations of violations of ethics rules and laws as well as other Federal statutes and
regulations. Where it is necessary and appropriate, OGE customarily refers allegations of ethics violations to an agency ethics official with a request that the ethics official ask the Inspector General of the agency to look into the matter. On occasion, OGE may refer a matter directly to the Inspector General office of an agency.

**Merit Systems Protection Board**

In keeping with a decentralized ethics program in the executive branch, it is the individual agency that initially reviews allegations of violations of ethics rules. As noted above, allegations of criminal misconduct must be referred to the Department of Justice. On the other hand, allegations of violations of administrative rules are handled by the agency. It is up to the individual agency initially to determine the appropriate administrative sanction. However, an employee may appeal an adverse action to the Merit Systems Protection Board (MSPB). MSPB administrative decisions establish authoritative precedent regarding the appropriate disciplinary sanction for violations of administrative rules, including violations of the standards of conduct.

**Office of Special Counsel**

Regulation of political activity, on the part of Federal employees, is carried out by the Office of Special Counsel (OSC). OSC investigates and rules on allegations that employees have violated restrictions on political activity. In addition, OSC investigates cases of reprisal for “whistle blowing” and other prohibited personnel practices.

**General Services Administration**

The General Services Administration establishes policy for and manages Government property and records. It has responsibility for regulations on the proper use of Government property, equipment and vehicles. GSA consults with OGE on regulations issued by GSA on the acceptance by agencies of gifts of travel. Agency reports regarding the use of travel reimbursement authority are filed with the Office of Government Ethics.

**Office of Personnel Management**

The Office of Personnel Management (OPM) has general responsibility for Federal personnel law throughout the executive branch. OPM has responsibility for certain conduct-related areas such as nepotism and gambling. OGE consults with OPM in connection with the issuance of regulations.

**Federal Elections Commission**

In the United States, the Federal election campaign process is subject to regulation by the Federal Election Commission (FEC). The FEC is an independent agency that administers and enforces the Federal Election Campaign Act of 1971, as amended, 2 U.S.C. 431 et seq., and the Revenue Act, 26 U.S.C. 1 et seq. The FEC oversees the public financing of Presidential elections, provides for public disclosure of
campaign finance activities, and administers the law with respect to limits and prohibitions on contributions and expenditures made to influence Federal elections, i.e., the Presidency, the US Senate, and the US House of Representatives. In addition, at the State level, each of the States has enacted its own state election laws.

**General Accounting Office**

Finally, one agency that is not in the executive branch, but which has a significant impact on ethics matters within the executive branch is the General Accounting Office. This investigating and auditing arm of the Congress issues opinions by the Comptroller General, which deal with a wide range of ethics-related subjects including frequent flyer benefits, appropriations law and various fiscal matters. GAO performs audits of Federal programs and issues reports on its findings and recommendations.

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. Ibid., p. 286.
. Ibid., p. 287.

**THE PENDLETON ACT (1883)**

An act to regulate and improve the civil service of the United States.

Be it enacted...That the President is authorized to appoint, by and with the advice and consent of the Senate, three persons, not more than two of whom shall be adherents of the same party, as Civil Service Commissioners, and said three commissioners shall constitute the United States Civil Service Commission. Said commissioners shall hold no other official place under the United States.

Sec. 2. That it shall be the duty of said commissioners:

First. To aid the President, as he may request, in preparing suitable rules for carrying this act into effect, and when said rules shall have
been promulgated it shall be the duty of all officers of the United States in the departments and offices to which any such rules may relate to aid, in all proper ways, in carrying said rules, and any modifications thereof, into effect.

Second. And, among other things, said rules shall provide and declare, as nearly as the conditions of good administration will warrant, as follows:

First, for open, competitive examinations for testing the fitness of applicants for the public service now classified or to be classified hereunder. Such examinations shall be practical in their character, and so far as may be shall relate to those matters which will fairly test the relative capacity and fitness of the persons examined to discharge the duties of the service into which they seek to be appointed.

Second, that all the offices, places, and employments so arranged or to be arranged in classes shall be filled by selections according to grade from among those graded highest as the results of such competitive examinations.

Third, appointments to the public service aforesaid in the departments at Washington shall be apportioned among the several States and Territories and the District of Columbia upon the basis of population as ascertained at the last preceding census...

Fourth, that there shall be a period of probation before any absolute appointment or employment aforesaid.

Fifth, that no person in the public service is for that reason under any obligations to contribute to any political fund, or to render any political service, and that he will not be removed or otherwise prejudiced for refusing to do so.

Sixth, that no person in said service has any right to use his official authority or influence to coerce the political action of any person or body. Seventh, there shall be non-competitive examinations in all proper cases before the commission, when competent persons do not compete, after notice has been given of the existence of the vacancy, under such rules as may be prescribed by the commissioners as to the manner of giving notice...
Third. Said commission shall, subject to the rules that may be made by the President, make regulations for, and have control of, such examinations...

Sec. 3...The commission shall, at Washington, and in one or more places in each State and Territory where examinations are to take place, designate and select a suitable number of persons, not less than three, in the official service of the United States, residing in said State or Territory, after consulting the head of the department or office in which such persons serve, to be members of boards of examiners...Such boards of examiners shall be so located as to make it reasonably convenient and inexpensive for applicants to attend before them and where there are persons to be examined in any State or Territory, examinations shall be held therein at least twice in each year...

Sec. 6. That within sixty days after the passage of this act it shall be the duty of the Secretary of the Treasury, in as near conformity as may be to the classification of certain clerks now existing under...[Section 163]...of the Revised Statutes, to arrange in classes the several clerks and persons employed by the collector, naval officer, surveyor, and appraisers, or either of them, or being in the public service, at their respective offices in each customs district where the whole number of said clerks and persons shall be all together as many as fifty. And thereafter, from time to time, on the direction of the President, said Secretary shall make the like classification or arrangement of clerks and persons so employed, in connection with any said office or offices, in any other customs district. And, upon like request, and for the purposes of this act, said Secretary shall arrange in one or more of said classes, or of existing classes, any other clerks, agents, or persons employed under his department in any said district not now classified; and every such arrangement and classification upon being made shall be reported to the President.

Second. Within said sixty days it shall be the duty of the Postmaster-General, in general conformity to said...[Section 163]...to separately arrange in classes the several clerks and persons employed, or ================in the public service, at each post-office, or under any postmaster of the United States, where the whole number of said clerks and persons shall together amount to as many as fifty. And thereafter, from time to time, on the direction of the President, it shall be the duty of the
Postmaster-General to arrange in like classes the clerks and persons so employed in the postal service in connection with any other post-office; and every such arrangement and classification upon being made shall be reported to the President.

Third. That from time to time said Secretary, the Postmaster-General, and each of the heads of departments mentioned in...[Section 158]...of the Revised Statutes, and each head of an office, shall, on the direction of the President, and for facilitating the execution of this act, respectively revise any then existing classification or arrangement of those in their respective departments and offices, and shall, for the purposes of the examination herein provided for, include in one or more of such classes, so far as practicable, subordinate places, clerks, and officers in the public service pertaining to their respective departments not before classified for examination.

Sec. 7. That after the expiration of six months from the passage of this act no officer or clerk shall be appointed, and no person shall be employed to enter or be promoted in either of the said classes now existing, or that may be arranged hereunder pursuant to said rules, until he has passed an examination, or is shown to be specially exempted from such examination in conformity herewith. But nothing herein contained shall be construed to take from those honorably discharged from the military or naval service any preference conferred by...[Section 1754]...of the Revised Statutes, nor to take from the President any authority not inconsistent with this act conferred by... [Section 1758]... of said statutes; nor shall any officer not in the executive branch of the government, or any person merely employed as a laborer or workman, be required to be classified hereunder; nor, unless by direction of the Senate, shall any person who has been nominated for confirmation by the Senate be required to be classified or to pass an examination.

Sec. 8. That no person habitually using intoxicating beverages to excess shall be appointed to, or retained in, any office, appointment, or employment to which the provisions of this act are applicable.

Sec. 9. That whenever there are already two or more members of a family in the public service in the grades covered by this act, no other member of such family shall be eligible to appointment to grades.
Sec. 10. That no recommendation of any person who shall apply for office or place under the provisions of this act which may be given by any Senator or member of the House of Representatives, except as to the character or residence of the applicant, shall be received or considered by any person concerned in making any examination or appointment under this act.

Sec. 11. That no Senator, or Representative, or Territorial Delegate of the Congress, or Senator, Representative, or Delegate elect, or any officer or employee of either of said houses, and no executive, judicial, military, or naval officer of the United States, and no clerk or employee of any department, branch or bureau of the executive, judicial, or military or naval service of the United States, shall, directly or indirectly, solicit or receive, or be in any manner concerned in soliciting or receiving, any assessment, subscription, or contribution for any political purpose whatever, from any officer, clerk, or employee of the United States, or any department, branch, or bureau thereof, or from any person receiving any salary or compensation from moneys derived from the Treasury of the United States...

Source: *U.S. Statutes at Large 22 (1883): 403.*