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LOBBYING DISCLOSURE: AN OVERVIEW

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"In recent years, Congress has taken important strides toward reforming government and restoring the confidence of the people in the institutions of our democracy. But so far, lobbying reform has been the missing link. It is perhaps the most important remaining item on the unfinished agenda of government reform. We urge the Senate and the House to close the gap by enacting effective lobbying reform legislation this year." Joint Statement of Senators Kennedy, Clark, and Stafford on the Lobbying Reform Act of 1977 proposal.

Lobbying is a multi-billion dollar enterprise. But under the current Federal Regulation of Lobbying Act,[2] meaningful information about those who attempt to influence legislation is not available to legislators or the public. However, examples of the source and dimensions of lobbying campaigns show that the pressures exerted by lobbyists are enormous. Those who are not aware of these pressures may discover, unhappily, that their parochial interests or the interests of the public are less than zealously guarded by the legislative process.

For example, the American Telephone and Telegraph Company (AT&T) recently told the Federal Communications Commission that during a three-month period in 1976, it spent over one million dollars lobbying a bill that would secure AT&T dominance in the communications field. AT&T did not report this activity to Congress or the public. Also, the El Paso Natural Gas Company spent nearly one million dollars in 1971 on pipeline divestiture legislation. Yet only $6,227 was reported to Congress under the lobbying law. As another example, the Calorie Control Council undertook a comprehensive effort to reverse the Food and Drug Administration's ban on saccharin. The Council characterized its campaign as an "experiment in democracy," but the Council's composition remained a mystery until an attorney learned that its membership consisted of corporate dietary product manufacturers, not consumers. The Council did not register as a lobbyist, nor was it required to under the lobbying law.[3] These are not isolated examples. So widespread is the practice of underreporting and nondisclosure, a 1975 estimate indicated that not more than 1/10 of one percent of lobbying activity is reported under present law.[4]

Efforts to overhaul the 33-year old Federal Regulation of Lobbying Act have been continuous and intense. Despite the intensity of these efforts, however, the goal of lobbying reform remains elusive, the Federal Regulation of Lobbying Act remains unamended, and vast amounts of lobbying activity remain unreported and undisclosed. Efforts to repeal the present law are nevertheless proceeding apace in the 96th Congress. Because GAO may be responsible for administering and, to a somewhat lesser extent, enforcing a new lobbying law, this article provides an overview of the present law, and the pending House and Senate lobbying disclosure proposals.[5]

The Federal Regulation of Lobbying Act became law in 1946. But aside from the suggestive implications of its title, the Act does not actually regulate lobbying. Instead, it directs disclosure of certain lobbying activities and, as sanctions for noncompliance, carries misdemeanor penalties and an apparently automatic three year post-conviction moratorium on a violator's lobbying activities.[6]

In general, the law provides that lobbyists who work for pay must register as lobbyists, and disclose every purpose for which hired, all articles or publications for which they are responsible, all legislation they were hired to support or oppose, and all money received and from whom. Also contributions that a lobbyist receives in excess of $500 are reportable, and individuals who receive in excess of $10 from a lobbyist must be identified and the amount received disclosed.[7]

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[1] Attorney-Adviser, Special Studies and Analysis, Office of the General Counsel, GAO. This article provides a general overview of pending lobbying disclosure legislation, and should not be construed to be an interpretation of the proposed law as it might apply in the context of an individual lobbying organization's registration and reporting responsibilities. The views expressed herein are those of the author, and are not necessarily those of the General Accounting Office.

[2] 2 U.S.C. §§261 *et seq.* (1976).

[3] *See* Comment, *Federal Lobbying Disclosure Legislation*, 26 AM. U. L. Rev. 972 (1977).

[4] *Lobby Reform Legislation: Hearings on S. 2477 Before the Senate Committee on Government Operations*, 94th Cong., 1st Sess. 497 (1975) (remarks of Senator Muskie).

[5] S. 1564, 96th Cong., 1st Sess. (1979); H.R. 4395, 96th Cong., 1st Sess. (1979).

[6] 2 U.S.C. §§262-66, 269 (1976).

[7] 2 U.S.C. §§262-67 (1976).

If appearances could be relied on, the Federal Regulation of Lobbying Act would be a very comprehensive and strict law indeed. The present law contains three serious defects, however, and these deficiencies have had a debilitating effect on efforts to administer and enforce lobbying disclosure.

First, the Act applies only to those whose "principal purpose" is lobbying. Under this test, an organization is free to claim that its communications with congressmen do not have lobbying as their principal purpose, but are, instead, primarily intended to provide information, to educate, to express a general societal concern, or to advocate (rather than lobby) the defeat or passage of legislation. An organization may contend as well that it is not subject to the law, since it engages in many activities other than lobbying, and lobbying therefore is not the organization's principal purpose.[8]

Second, the Act applies only to a lobbyist's "direct" communications with congressmen. Direct lobbying of congressional staff members is excluded from coverage.[9] The Act also does not apply to "indirect" or "grassroots" lobbying, by which a lobbyist spends money to solicit or urge others to communicate a particular position on legislation to the Congress.[10]

And third, the current law has a weak and inadequate administrative and enforcement mechanism. The Department of Justice has exclusive authority for enforcement of the present law. Although the Clerk of the House and the Secretary of the Senate administer the law, these officials are self-acknowledged repositories of information they cannot verify, they have no authority to issue implementing regulations, and they lack investigative and compliance authority.

A 1975 GAO report on the present law confirmed the near total ineffectiveness of this enforcement scheme and the crippling effects of that scheme on the lobbying law's administration.[11] The report shows, for example, that of the nearly 2,000 lobbyists who filed in one 3-month period in 1974, over 60 percent filed late and nearly 50 percent of the filings were defective on their face. Unlike most other disclosure statutes, the administering officials have no authority to require correction of the most minor of these inadequacies. And the Justice Department—the agency responsible for enforcement—investigated only five matters over a 4-year period, 1972-1975.

[8] 2 U.S.C. §266 (1976); *See* United States v. Harriss, 347 U.S. 612 (1954); United States v. Slaughter, 89 F. Supp. 876 (D.D.C. 1950).

[9] United States v. Harriss, *supra.*

[10] On a very general level, "direct" lobbying refers to a lobbyist's actual oral or written communications with congressmen or their staff. Direct lobbying communications can be made by the lobbying organization itself or by a paid and retained third party acting on the organization's behalf. Indirect or grassroots lobbying generally means encouraging the general public, usually through a solicitation (mass mailings, etc.), to communicate a position on legislation to the Congress.

SIGNIFICANT FEATURES OF PENDING LOBBYING LEGISLATION

H.R. 4395, the principal House lobbying disclosure proposal, and S. 1564, the Senate lobbying bill, are not, with the several major exceptions noted below, markedly different. If enacted, these bills would correct the bulk of the present law's shortcomings.

As of this writing, hearings are being held on S. 1564, and H.R. 4395 is pending before the full House Committee on the Judiciary. The discussion that follows considers H.R. 4395 as reported from the Subcommittee on Administrative Law and Government Relations of the House Judiciary Committee and S. 1564 as that bill was introduced. Both bills almost certainly will be modified in full committee and in floor debate.

Applicability of Legislation. Under both H.R. 4395 and S. 1564, only an "organization" can become a lobbyist. Entities ranging from a corporation to a group of individuals may satisfy the bills' definition of "organization." Federal agencies and Government corporations are excluded from the definition and therefore can never become lobbyists. An individual citizen can never become a lobbyist subject to the bill unless he is a foreign agent.

Thresholds. An organization can only become a lobbyist subject to the lobbying legislation's requirements if it engages in prescribed amounts of lobbying activity, called thresholds, during a calendar quarter. There are several proposed thresholds; any one, if crossed, will subject the lobbying organization involved to registration and reporting obligations.

One threshold would trigger if just one employee of an organization engaged in direct, but not indirect (solicitations, grassroots lobbying, etc.) lobbying activity on

[11] Comptroller General, "The Federal Regulation of Lobbying Act—Difficulties in Enforcement and Administration" GGD-75-79, April 2, 1975.

any part of each of any 13 days in a calendar quarter and spent a prescribed amount of money in the process. Another threshold, proposed in both bills, would trigger if an organization's retained lobbyists received a prescribed amount of money to engage in direct lobbying activity during a quarter.[12] If an organization only engaged in indirect lobbying, it would not become a lobbyist under either bill.

Exemptions. Certain communications that would otherwise qualify as lobbying are exempt from disclosure and from inclusion in a threshold test tally. Under the House bill, lobbying performed specifically at the request of a Congressman will neither trigger a threshold nor be subject to disclosure. Lobbying communications made to a Senator or Representative representing the State where the organization has its principal place of business are exempt under both bills.

Scope of Coverage. Communications made to influence the content or disposition of executive branch reports, investigations, rules, hearings, etc., ordinarily would not qualify as lobbying. Unless eligible for one or more of the bills' exemptions, communications made to so-called "Federal officers or employees" to influence the content or disposition of any legislative matter would qualify as lobbying.

A Federal officer or employee in the generic sense is not necessarily a "Federal officer or employee," as that term is defined in the legislation. All Congressmen and all congressional employees are, by definition, "Federal officers or employees." Executive branch officials paid at levels I-V of the Executive Schedule also qualify as "Federal officers and employees." In the case of GAO, coverage extends to the Comptroller General, Deputy Comptroller General, GAO's General Counsel, and others paid at a rate equivalent to level IV of the Executive Schedule.

Registration. Once an organization meets one of the threshold tests, that organization must register as a lobbyist. Unless withdrawn, a registration statement will be effective for the remainder of the calendar year. A registration statement, in addition to identifying the registrant as a lobbyist, would disclose the identity of the registering organization's chief executive officer and directors and certain of the registrant's retained and employed lobbyists.

Quarterly Reports. All registered lobbying organizations will file quarterly reports detailing the lobbying activities they engaged in during the calendar quarter to which the report relates. A lobbying organization that crossed a threshold in the first calendar quarter (January, February, or March) would file four quarterly reports for that calendar year.

A quarterly report would disclose, among other matters, the following: (1) the identity of the reporting organization, (2) the identity of the organization's retained and employed lobbyists and expenditures for retainer fees and salaries, (3) expenditures in excess of $35 made to or for the benefit of a Federal officer or employee, (4) the top 20 (top 15 under H.R. 4395) issues directly lobbied by the reporting organization or by a retainee on the reporting organization's behalf, (5) expenditures for receptions, dinners, and similar events that are held for the benefit of a Federal officer or employee, where the cost of the event to the reporting organization exceeds $500, (6) the source and amount of organizational contributions in excess of $3,000 that are used in whole or in part for direct lobbying by the reporting organization.[13] Unlike H.R. 4395, S. 1564 also directs disclosure of indirect lobbying campaigns that cost in excess of $500. This disclosure requirement would not apply, however, if the reporting organization's aggregate quarterly indirect lobbying expenditures did not exceed $2,500.

ADMINISTRATION AND ENFORCEMENT

Under S. 1564, the Comptroller General would be reponsible for administering and, to a somewhat lesser extent, enforcing the new lobbying disclosure law. Summarized below are the major responsibilities, duties, and powers the Comptroller General may, as S. 1564 is presently drafted, be expected to assume.[14]

Rules and Regulations. If S. 1564 becomes law, the Comptroller General, following consultation with the Attorney General, would promulgate implementing rules and regulations. Rules and regulations would cover such matters as definitions, registration, reports, recordkeeping, public access to lobbying records,

[12] S. 1564's direct lobbying quarterly expenditure threshold is set at $500; the comparable threshold in H.R. 4395 is set at $5,000.

[13] Lobbyists that qualify for "religious organization" status under the Internal Revenue Code would be exempt from the bills' contributor disclosure requirements.

[14] As reported from Subcommittee, H.R. 4395's administrative and enforcement provisions were substantially identical to those of S. 1564. However, the House Judiciary Committee designated the Clerk of the House as the official responsible for administration.

recordkeeping forms, complaint procedures; guidance to lobbyists and certain aspects of enforcement. Persons or organizations knowingly violating lobbying disclosure rules and regulations would be subject to a maximum civil fine of not more than $100,000. The bill does not contain criminal sanctions.

Registration and Reporting. Lobbying organizations would begin to register and file quarterly reports within several months after the rules and regulations take effect. The registration and reporting provisions of the lobbying legislation implicitly direct the establishment of a central repository where registration and quarterly statements may be mailed, filed, and indexed. A public reading room, equipped with copying equipment, also will be essential because the public will have the right to inspect and make copies of registration statements and quarterly reports.

Quarterly Summation of Registration Statements and Reports. Following the close of each calendar quarter, GAO will publish a master listing of all registered lobbyists and a summary of the information contained in the registration statements and reports. The listing and summary must be available to the public for inspection free of charge and for purchase at cost.

S. 1564 does not require the preparation and publication of separate and individual summaries for each registration and report on file with the Comptroller General. Instead, the Comptroller General in all likelihood will have the discretion necessary to prepare a general cumulative and combined summary of lobbying activity reported by registered lobbying organizations during a given calendar quarter.

Cross-Indexing Responsibilities. S. 1564 contains a provision that would require GAO to establish a minimum of two publicly available cross-indexes.

The first cross-index would exclusively concern lobbying and would list persons and organizations identified in the registration statements and quarterly reports filed by lobbying organizations. If John Doe is reported by three lobbying organizations as a retainee who lobbies, this information will be centrally retrievable from the cross-index.

A second cross-index will be developed in cooperation with the Federal Election Commission. It will contain a listing of the names of all campaign contributors reported under the Federal Election Campaign Act who were also reported as registered lobbyists or retainees.

Some have suggested a third cross-index, to be developed in cooperation with the Department of Justice. This index would contain a listing of the names of registered foreign agents who also are lobbyists for registered lobbying organizations.

Advisory Guidance. The Comptroller General and the Attorney General would jointly establish the procedures for obtaining the guidance GAO will furnish to lobbying organizations on the recordkeeping, registration, and reporting requirements of the new law. Guidance provided by the Comptroller General under this authorization technically would not be binding, but if it is adhered to in good faith, the fact of adherence could constitute a defense to any later civil prosecution.

Reviews of Registration Statements and Quarterly Reports. S. 1564 designates the Comptroller General as the official responsible for ensuring the "completeness, accuracy, and timeliness" of filed registration statements and filed quarterly reports. The Comptroller General would be authorized to make such "supplemental verifications or inquiries" as he considers necessary to discharge that responsibility. Irregularities identified in the review and verification process may later be the subject of civil conciliation or civil prosecution.

Civil Conciliation and Civil Prosecution. S. 1564 would authorize the Comptroller General to conciliate and correct certain violations administratively. The purpose of this procedure is to correct as many violations as practicable without resort to litigation. When the Comptroller General has reason to believe an organization has knowingly violated the lobbying law, the case must be referred to the Attorney General. If, within 90 days of the referral, the Attorney General does not specifically request an alternative disposition of the matter, the Comptroller General may attempt to correct the matter administratively. Cases for which civil conciliation fails to work or would otherwise be inappropriate would be referred to the Department of Justice (DOJ) for prosecution. Although the DOJ must periodically report to the Comptroller General on action taken respecting this type of referral, the decision to prosecute remains discretionary with the Attorney General.

S. 1564 contains civil, but not criminal sanctions, and the bill's civil penalties range to a maximum of $100,000 for a single violation. The Attorney General will have responsibility for prosecuting violations of the Act that are not appropriate for administrative resolution.

The Attorney General also may engage in precomplaint discovery by issuing a Civil Investigative Demand (CID). A CID is analogous to a subpoena in terms of the records it may reach, but dissimilar to a subpoena in terms of the circumstances in which it may be issued and the conditions under which records may be reviewed and examined. For example, a CID cannot be issued unless the facts and circumstances indicate that the lobbying law has been violated, and a lobbying organization that is served with a properly issued CID may insist that its records be reviewed *in camera* by a court.

CONCLUSION

Lobbying disclosure ranks as a priority issue with the Administration and almost all special interest groups. On the one hand, advocates of the legislation believe a substantial public interest would be served if the actual source and intensity of lobbying efforts were made known to the entire Congress and the public. At the other end of the spectrum, there is considerable concern whether lobbying disclosure, particularly disclosure of contributors and indirect lobbying, would abridge or at least chill the exercise of First Amendment freedom of speech and petition rights.

Historically, accommodation of these interests has been an extraordinarily complex and formidable task. Whether the 96th Congress, unlike its predecessors, will enact a new and comprehensive disclosure measure is a matter of conjecture. Lobbying disclosure is in any event a unique legislative initiative, and the fact that this initiative would directly reach all major lobbyists is probably the most important reason for the still uncertain conclusion to the long saga of lobbying reform.

THE SENIOR EXECUTIVE SERVICE: BOLD EXPERIMENT IN MANAGING THE GOVERNMENT

221276

Robert L. Higgins[1]

On July 13, 1979, the Senior Executive Service (SES) came into being. SES was created by title IV of the Civil Service Reform Act of 1978 (Act)[2], "to provide the flexibility needed by agencies to recruit and retain the highly competent and qualified executives needed to provide more effective management * * *."[3] Or, as otherwise stated in the Reform Act, its purpose is "to ensure that the executive management of the Government of the United States is responsive to the needs, policies, and goals of the Nation and otherwise is the highest quality."[4] Alan K. Campbell, Director of the Office of Personnel Management (OPM), calls SES "the cornerstone of our efforts to improve the Federal personnel management system * * *."[5]

These are high-sounding phrases indeed, but the legislative history of SES shows that not everyone shared these lofty views of its purpose. Some members of Congress said that it was nothing more than a device to politicize the top career ranks of the Federal Government to the advantage of the party in power.[6] Others harkened back to the efforts of former President Nixon to make the bureaucracy more "responsive" to his wishes.[7] Despite these misgivings about SES, it survived challenges in both the House and the Senate and was enacted as part of the Reform Act.

What then is the truth about the new system? Is it a significant step forward that will improve the quality of public service, or is it a new political spoils system that will primarily improve the patronage benefits available to the administration in power at any given time? Alas, dear reader, do not expect the answer here. It is obviously too soon to tell.

STATUTORY PROTECTIONS FOR CAREER EXECUTIVES

As a result of the reservations expressed about SES, a number of safeguards were built into the legislation to protect career executives and guard against undue politicization. Perhaps the most important safeguard is that the total number of noncareer executives is limited to 10 percent of the total SES positions. Although proportions of noncareer appointments may vary among agencies within the overall 10 percent limit, no agency may have more than 25 percent noncareer SES positions.[8] The Act also permits "limited term" appointments (for 3 years or less to positions which will then expire) and "limited emergency" appointments (for 18 months or less to meet bona fide, unanticipated, urgent needs). These limited appointments are not renewable and may not exceed 5 percent of the total number of SES positions Government-wide.

Therefore, at least 85 percent of the Senior Executives will be "career appointees." But what is a "career appointee?" The Act defines the term as an individual whose appointment to SES "was based on approval by the Office of Personnel Management of the executive qualifications of such individual."[9]

The Act also provides that qualification standards for each SES position shall be established by the agency head. Further, not more than 30 percent of SES positions may at any time be filled by persons who did not have 5 continuous years in the civil service immediately prior to their initial SES appointments, unless the President certifies to the Congress that this limitation would hinder the efficiency of the Government. The latter exception, permitting the President to overcome the 5-year service requirement, weakens this protection for career executives.

Another important safeguard is that the Reform Act establishes a category of "career reserved positions" which are required to be filled by career appointees. The number of career reserved positions may not be less than the number required to be filled competi-

[1] Assistant General Counsel, Personnel Law Matters I, Office of the General Counsel, GAO.

[2] Pub. L. No. 95-454, 92 Stat. 1111 (1978).

[3] Pub. L. No. 95-454, § 3(6), 92 Stat. 1113 (1978).

[4] 5 U.S.C.A. § 3131 (1979).

[5] Office of Personnel Management, *Senior Executive Service, Conversion Information for Federal Executives,* preface, February, 1979.

[6] Minority views of Senators Mathias and Stevens, S. Rep. No. 95-969, 95th Cong., 2d Sess. 133-39 (1978).

[7] Individual views of Rep. Benjamin Gilman, H.R. Rep. No. 95-1403, 95th Cong., 2d Sess. 418-22 (1978).

[8] An exception is made for any agency which had more than 25 percent political executives on October 13, 1978, the date of enactment. 5 U.S.C.A. § 3134(d) (1979).

[9] 5 U.S.C.A. § 3132(a)(4) (1979).

tively before the passage of the Reform Act. OPM estimates that approximately 40 percent of current SES positions are required to be career reserved.

OPM will prescribe the criteria and regulations governing the designation of career reserved positions. The Act states that the purpose for limiting these positions to career executives is to ensure impartiality, or the public's confidence in the impartiality, of the Government. In other words, certain positions must be shielded from the appearance of political influence. The examples given by OPM are those involving the administration of the Internal Revenue Code and the awarding of public contracts. Each agency head will designate the career reserved positions in such agency, subject to review by OPM, and publish a list of those positions in the Federal Register each year. The remaining positions are "general" positions and may be held by career or noncareer persons, subject to the limitations in the Act on the number of noncareer appointees.

There are other protections as well. The panels (Performance Review Boards) which will evaluate the performance of career executives must have a majority of career members. Performance cannot be evaluated within 120 days after a new President takes over. Each performance appraisal must be fully documented and the executive will be given an opportunity to respond before a decision is made. Finally, the Comptroller General is required from time to time to review agency performance appraisal systems to assure compliance with the statutory provisions. He must report thereon periodically to OPM and Congress.

The career official is also protected against involuntary reassignments within 120 days after the appointment of a new agency head or a new noncareer supervisor. He may not be involuntarily transferred to another agency and he is entitled to 15 days advance notice of reassignment within his own agency.

In these ways Congress sought to ensure that SES will be free of political manipulation and partisan favoritism. Even the best written safeguards, however, are subject to abuse and the true test of the new system will be how it is administered and how well Congress monitors the actual operations to ensure that the built-in statutory safeguards are followed.

CONVERSION TO SES

SES has met the first challenge it faced, namely, whether the present career managers would elect to join its ranks. Under the Reform Act, the incumbents of positions designated for SES were given 90 days after notification to elect to be appointed to a SES position or to decline and retain his or her current appointment and pay. When the Act was passed there was much speculation that most Federal officials would decline conversion to SES, thus scuttling the new system before it began. These fears have proven groundless. As of July 13, 1979, some 5,619 offers were made to incumbents, of which 5,388 (about 96 percent) were accepted.

The reasons for this overwhelming acceptance by career officials are not hard to find. Despite the increased risks, the Civil Service Reform Act and its implementing regulations provide tremendous benefit to SES officials. The following listing will illustrate the point.

—The salary of those electing to join initially will never be reduced below their salary at the time of entry (this guarantee does not apply to those joining later).

—Once a year, the salaries of those in SES may be increased any number of rates, but it may be lowered only one rate per year.

—An annual performance award may be given to career executives with "fully successful" ratings. The award may be up to 20 percent of base pay, but is limited to 50 percent of SES positions in an agency.

—Awards of Presidential Ranks may be made to career executives. A Meritorious Executive rank, carrying a lump-sum stipend of $10,000, may be awarded to up to 5 percent of SES members. A Distinguished Executive rank, with a stipend of $20,000, may be awarded to up to 1 percent of SES members. However, an executive's total aggregate compensation of base pay, awards, and ranks may not exceed the salary of Level I of the Executive Schedule (now $66,000).

—Executives may receive sabbaticals of 11 months with pay after 2 years in SES with a total of 7 years at the supergrade level (limited to one every 10 years).

—Executives may accumulate unlimited amounts of unused annual leave without forfeiture.

On the other hand, an incumbent executive who declined conversion within the 90-day period remains in status quo. He retains his present salary and grade, but has very little chance for promotion because most positions at that level are in SES. Furthermore, admission to SES at a later date is subject to competition, qualifications approval by OPM, and a 1-year probationary period. None of these requirements apply to those who joined within the 90-day period. It is a small wonder that only about 240 incumbents out of the more than 5,600 eligible declined the initial conversion offer.

COVERAGE OF SES

In anticipation of your next question, I will state here that GAO is expressly excluded from the Senior Executive Service.[10] A number of other agencies are also excluded by statute,[11] and the President is authorized to exclude (1) an agency or unit principally engaged in foreign intelligence activities and (2) any agency or unit on the recommendation of OPM, provided that the agency or unit makes a sustained effort to conform to SES, and, further, the President, upon recommendation of OPM, may at any time revoke the exclusion.[12] Otherwise, the clear intent of Congress is to bring in all executive branch departments and agencies and all positions in the "supergrades" and in Levels IV and V of the Executive Schedule, or equivalent positions, which involve directing, managing, or supervising units or activities which exercise important policymaking functions.

Determining which positions belong in SES and which agencies should be excluded fell to OPM. It has interpreted the Act broadly as covering almost all executive positions in the Government except those expressly excluded by Congress. A number of agencies contended that they were not covered by the SES statute, but OPM concurred only with respect to two agencies: the Smithsonian Institution and the Advisory Committee on Intergovernmental Relations. The chart below shows the current total picture for Executive Positions under OPM's purview:

1) Total SES positions	8,394
2) Non-SES General Schedule and equivalent positions[13]	902
Total allocated positions	9,296

The Act set an overall ceiling of 10,777 positions [14] for the General Schedule grades 16, 17, 18 and the Senior Executive Service. To date 1,482 positions remain unallocated.

GAO'S ROLE IN SES

As noted above, the Civil Service Reform Act requires GAO to monitor the performance appraisal systems set up by each agency for the senior executives. In addition, to assist Congress in overseeing the Federal personnel management system, the Reform Act calls for GAO to conduct audits and reviews to assure compliance with the laws and regulations governing employment in the executive branch and to assess the effectiveness and soundness of Federal personnel management. The Act also requires GAO to prepare and submit an annual report to the President and the Congress on the activities of the Office of Personnel Management and the Merit Systems Protection Board.

To accomplish these statutory requirements, the Federal Personnel and Compensation Division (FPCD) has established a new line-of-effort entitled "Civil Service Reorganization and Reform Implementation." With specific regard to the Senior Executive Service, FPCD, with the assistance of the Washington Regional Office, is performing several major reviews designed (1) to assess the effectiveness of OPM in discharging its responsibilities for SES and (2) to review agency processes in converting to SES and progress toward improving executive development and establishing required SES performance appraisal systems.

The assignment is unique in providing assistance to the Congress at the time of SES system implementation rather than evaluation at some later date. The responsible House and Senate Committees have expressed their views of the importance of the initial period of the Senior Executive Service and have asked

[10] 5 U.S.C.A. § 3132(a)(1) (1979).

[11] The FBI, CIA, Defense Intelligence Agency, and National Security Agency are expressly excluded. 5 U.S.C.A. § 3132(a) (1)(B) (1979).

[12] The Act also exempts Foreign Service positions, Administrative Law Judges, and certain positions in the Drug Enforcement Administration. 5 U.S.C.A. § 3132(a)(2) (1979).

[13] This category includes e.g., GAO, D.C. Government, VA doctors, parts of State Department, AID, Assistant U.S. Attorneys.

[14] OPM has informed us the 10,777 figure has been changed to 10,778 because of a legislative action creating an additional executive position.

GAO to monitor this period closely. The audit teams have already provided significant assistance to the legislative committees in carrying out their oversight responsibilities during conversion. The first formal reports to the Congress are expected to be made in early 1980.

After the initial implementation period, GAO's role in auditing and reviewing the operation of SES is expected to become even more important to the Congress. The reason is that the Reform Act contains a "sunset" provision for SES. In 1984, 5 years after the beginning of SES on July 13, 1979, the Congress will have the opportunity to terminate SES by adopting a concurrent resolution to that effect. Unless the Congress adopts such a resolution within the first 60 days of continuous session after July 13, 1984, SES will continue. GAO's evaluation of the effectiveness of SES could be of major importance at that time because of the short time that will be available to the Congress in which to act.

CONCLUSION

Will the bold new experiment in executive management for the Federal Government live up to the expectations of President Carter and OPM Director Campbell? Or will SES prove to be merely a device for political favoritism and for a dismantling of the career executive service? As we said at the beginning of the article, only time will tell. But, because the Congress wisely has provided for a sunset review after 5 years of SES operation, the experiment can be stopped easily if it does not work well. If it does work well, of course, it can be allowed to continue. The GAO's role should be very important in determining which course of action Congress decides to take in 1984.

We must not make a scarecrow of the law,
Setting it up to fear the birds of prey,
And let it keep one shape, till custom make it
Their perch and not their terror.
—SHAKESPEARE, MEASURE FOR MEASURE, Act II, Scene 1, ll. 1-4.

CONTRACT DISPUTES ACT OF 1978 721277

Seymour Efros [1]

The Contract Disputes Act of 1978 (Act) [2] provides comprehensive procedures to settle claims relating to executive agencies' contracts. Those sponsoring the legislation felt that the old claims settlement process was outdated and that legislation was needed to improve it. The major provisions of the Act provide contracting officers authority to decide all contract disputes, allow contractors direct access to court, give the government the right to seek judicial review of an administrative decision, and allow contractors interest on disputed claims. This discussion will highlight some of these changes to the Government contract claims settlement procedures introduced by the 1978 Act.

The All Disputes Provision

The contract disputes procedure in existence prior to the Act covered only disputes arising *under* the contract. If, for example, the contract contained a provision allowing changes in the contract specifications, a dispute concerning the amount due the contractor because of the change was subject to the disputes procedure. If, on the other hand, the contractor charged the Government with violating the terms of the contract, the claim was then outside the scope of the disputes procedure and the contractor was required to seek its remedy by direct suit in court.

The distinction between a claim arising under a contract and a breach of contract claim was not always easy to make. Instances arose where claims were brought to the wrong forum and appeals were dismissed, resulting in loss of time and money by the contractor. Also, it seemed wasteful to have different forums for deciding different types of contract claims.

For these reasons, Congress provided contracting officers with the authority to decide all contract disputes by eliminating the distinction between claims arising under a contract and breach claims. Under the Act, all claims relating to the contract can now be settled administratively.

Direct Access to Court

The Act also allows contractors direct access to court as an alternative to appealing the contracting officer's decision through the administrative disputes procedure. Formerly, the contractor was required to appeal a contracting officer's decision to the head of the contracting agency. Usually the appeal was made to a board of contract appeals.

Over the years the agency boards had developed a reputation for impartiality and fairness in resolving contract disputes. At the same time, however, witnesses at the congressional hearings on the 1978 Act underscored the need to allow the contractor direct access to court as a necessary trade-off for providing contracting agencies the authority to decide breach of contract claims.[3] Cognizance was also taken of the Procurement Commission Report "reflecting a widespread feeling among contractors and their attorneys that contractor claimants should be afforded the right to proceed directly in court following an adverse contracting officer's decision as an alternative to proceeding before an administrative contract appeals board."[4] These considerations, plus the feeling that in certain complex cases time and expense would be saved by allowing contractors direct access to court, persuaded the congressional committees to endorse this recommendation.

The Government's Right to Seek Judicial Review

Congress also included a provision in the 1978 Act giving the Government the right to seek judicial review of an administrative decision.

Under the old procedure, the right of the contracting agency to appeal an adverse board decision was unsettled. The Department of Justice and GAO had previously attempted to challenge a contracting agency board decision in favor of a contractor. That challenge eventually resulted in a Supreme Court decision which held that neither the GAO nor the Justice Department could interfere with a contracting agency's board decision in favor of the contractor absent fraud.

In considering this legislation, Congress concluded that the Government and the contractor should have

[1] Associate General Counsel, Procurement Law, Office of the General Counsel, GAO.

[2] Pub. L. No. 95-563. 92 Stat. 2383 (1978).

[3] S. Rep. No. 95-1118, 95th Cong., 2d Sess. 5 n.2 (1978).

[4] H.R. Rep. No. 95-1556, 95th Cong., 2d Sess. 12 n.2 (1978).

the right of appeal in view of the quasi-judicial nature of the board. However, Congress limited the agency head's right of appeal, conditioning it upon obtaining the approval of the Attorney General. They felt that giving the contracting agency an unfettered right to appeal any decision to the courts might prolong the litigation process unnecessarily in some cases.

The scope of the appeal from the board's decision is also limited. Section 10(b) of the Act provides that the decision of the agency board on any question of *law* is not final or conclusive, but the board's decision on questions of *fact* is "final and conclusive and shall not be set aside unless the decision is fraudulent, or arbitrary, or capricious, or so grossly erroneous as to necessarily imply bad faith, or if such decision is not supported by substantial evidence."

Interest On Contractor Claims

In recognition of the unique nature of a Government contract, a provision to allow interest to contractors on claims awarded under the diputes procedure was also adopted. A contractor, because of the provisions of most Government contracts, is required to continue working while his claim is being litigated. Since the contractor is required to continue performance with his own money, Congress felt that the cost to finance the work involved in the contractor's appeal is a legitimate cost of performing the contract if the claim ultimately is allowed. As provided in the Act, interest is paid from the date the claim is made to the contracting officer until payment occurs.

Other Provisions

In addition to the provisions discussed above, the 1978 Act grants the agency boards discovery and subpoena powers. It also establishes an expedited procedure for claims of $10,000 or less. Finally, the Act permits initial payment of agency board judgments from the same permanent appropriation available for judicial judgments and gives the court increased authority to dispose of contract claims.

Conclusion

While contracting with the Government can present contractors with lucrative opportunities, it also can present a wall of frustration sufficient to cause many contractors to swear-off doing business with the Government. The Contract Disputes Act of 1978 should help to alleviate some of the contractors' frustrations by affording them the opportunity of bypassing the administrative disputes process and proceeding directly to court. The Act should also alleviate some of the confusion involved in contracting with the Government by giving, for the first time, the contracting officer the authority to decide in the first instance any disputes arising under the contract. By a series of trade-offs, hopefully the Government contracting process has been improved.

COMMENT

FEDERALISM ISSUES IN THE CONTEXT OF GRANTS TO STATE AND LOCAL GOVERNMENTS

Stephen M. Sorett[1]

The author, a GAO attorney, was the principal speaker at a panel on Federal Grants Law at the 1979 Federal Bar Association's Annual Convention. Mr. Sorett agreed to put his views in writing for the *Adviser.* The editors note that the views expressed in the article are those of Mr. Sorett and not necessarily those of the General Accounting Office or the Office of the General Counsel.

An increasing number of States, counties, and cities have been going to court to challenge the imposition of grant conditions that accompany the flow of Federal assistance funds. The courts have begun to entertain more of these suits than before but generally are either unwilling to overturn the essentially political decisions of the Congress which imposed the conditions onto the grant programs or are unable to determine the nature and extent of the harm that these conditions cause. This article discusses some of the emerging judicial trends in this area and analyzes the limits of the existing judicial role.

Recently the courts have revealed an increasing sensitivity to States' efforts to remain free from excessive Federal regulation. This trend is perceived by many legal commentators to be a reaffirmation, if you will, of the Tenth Amendment which preserves a State's right to act as an independent sovereign within the context of a viable Federal system of government. At the same time, however, the courts have continued to adhere to the rule that the Federal Government, under authority of the Constitution's Supremacy Clause, may, unless barred by some controlling constitutional prohibition (such as a First Amendment freedom to exercise religious belief), impose the terms and conditions upon which its money allotments to the States shall be disbursed. Any State law or regulation found to be inconsistent with those terms and conditions is to that extent invalid. The grantee, of course, has the option of not taking the grant and thereby escaping those terms and conditions.

The legal significance that flows from these apparently competing philosophies is based on the distinction between imposing mandatory requirements and terms which the States can choose to reject. A mandatory requirement requires compliance, and the penalty for noncompliance is a fine or imprisonment. On the other hand, should a grantee violate a grant term, the penalty for noncompliance is only the denial of the grant or contract. From a constitutional perspective, the distinction is that under authority of the Commerce Clause, the Federal Government mandates compliance, whereas under authority of the spending power, the Federal Government can only encourage compliance.

The Supreme Court ruled, in *National League of Cities* v. *Usery*,[2] that there are limits in Federal Government regulation of the States. The Court held that the States could not be compelled under authority of the Commerce Clause to adopt the minimum wage, maximum hour, and overtime rate standards of the Fair Labor Standards Act. The application of the Act to the States was judged to have impermissibly interfered with the States' sovereignty because it operated to displace the States' freedom to structure integral operations in areas of traditional governmental functions. Although the case marked the first time since the era of the New Deal that the Supreme Court held that a congressional action taken under authority of the Commerce Clause was unconstitutional, the result reached was not altogether unexpected. A series of lower Federal court cases had arrived at similar results concerning the power of the Federal Environmental Protection Agency to compel State and local implementation of the Clean Air Act.[3]

The *National League of Cities* case presents a new approach to employ when determining whether the Federal Government impermissibly intrudes into State and local activities. The test has two tiers. First, a court must inquire whether the governmental activity is essential to the State and local governments' independent existence. Second, if the activity is essential, the court must determine the degree of interference imposed by the Federal regulation. If the regulation either imposes significant financial burdens or displaces the States' freedom to carry out its essential governmental activities, the regulation unconstitutionally interferes with State sovereignty. However, if

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[2] 426 U.S. 833 (1976).

[3] *See, e.g.,* District of Columbia v. Train, 521 F. 2d 971 (D.C. Cir. 1975).

the court finds it to be in the Federal interest, a regulation that is found to be an otherwise impermissible intrusion into State sovereignty will be upheld, as in the areas of environmental programs whose success depends on unanimous participation by the States.

Implicit in the *National League of Cities* decision is the Court's recognition that this approach could apply whenever it inquires whether Federal programs enacted under any constitutional authority violate a State's Tenth Amendment protection. It stopped short of extending the scope of its holding, however, choosing not to express a view "as to whether different results might obtain if Congress seeks to affect integral operations of state governments by exercising authority granted it under other sections of the Constitution such as the spending power * * * or §5 of the Fourteenth Amendment."[4] Nevertheless, *National League of Cities* appears to cast doubt on the extent to which the Federal Government, acting through conditions on Federal grants under authority of the spending power, constitutionally can intrude into areas traditionally governed exclusively by State and local governments.

To date the Supreme Court has not issued a written opinion in which it considered applying the *National League of Cities* test to a spending power program. However, in two cases the Court has summarily upheld or refused to review Federal requirements in the forms of conditions on Federal grants which required States in some cases to make fundamental changes in the way they carry out activities which appear to be essential. *North Carolina ex. rel Morrow* v. *Califano*, 435 U.S. 962 (1978); *Florida Department of Health and Rehabilitative Services* v. *Califano*, 449 F. Supp. 274 (N.D. Fla. 1978), *aff'd.*, 585 F. 2d 150 (5th Cir. 1978), *cert. denied*, 47 U.S.L.W. 3715, May 1, 1979.

The *North Carolina* case involved a Federal grant program's requirement that a State have a certificate-of-need program to qualify for Federal Health Planning and Resources Development Act assistance. The North Carolina Supreme Court construed the North Carolina Constitution to forbid the use of such a certificate-of-need mechanism. Even though North Carolina stood to lose $50 million in Federal funds for noncompliance, the Federal District Court that initially heard the case ruled:

> "Simply because one state, by some oddity of its Constitution may be prohibited from compliance is not sufficient ground, though, to invalidate a condition which is legitimately related to a national interest sought to be achieved by a Federal appropriation and which does not operate adversely to the rights of the other states to comply." 445 F. Supp. 532, 535 (E.D.N.C. 1977).

In the *Florida* case, the State had consolidated its administration to more efficiently deliver benefit and service programs, some of which were federally assisted. The Rehabilitation Act of 1973, however, required each recipient of Federal assistance under the act to maintain a discrete organizational unit within the State's governmental structure. The District Court that initially heard the case found the grant condition did not constitute an invalid encroachment upon Florida in derogation of the Tenth Amendment. The Supreme Court refused to review the lower court decision. The holding effectively requires Florida to revamp its organizational structure to remain eligible for these Federal funds.

Currently, another case of the same magnitude of the *National League of Cities* litigation is working its way through the Federal courts. *County of Los Angeles* v. *Marshall* (No. 77-2138) was argued before the United States Court of Appeals for the District of Columbia Circuit on February 14, 1979. Regardless of the outcome, the case will most likely reach the Supreme Court. The Federal Unemployment Compensation Amendments of 1976 have been challenged by 1,431 plaintiffs. The amendments give Congress the authority to require that all States and local governments, as a condition of continued participation in the Federal-State unemployment compensation program, finance unemployment compensation benefits according to a uniform Federal standard. The amendments, in effect, require the States and local governments to tax themselves to meet the Federal standards. Should a State fail to conform to the Federal law, the Internal Revenue Service is authorized to enforce the collection of a five-fold increase in the Federal unemployment payroll tax paid by private employers in noncomplying States.

The mechanism is Machiavellian: under current law it is legal. If the *National League of Cities* test is extended to apply in the grants area, the mechanism would be struck down as an impermissible violation of

[4] 426 U.S. at 852 n. 17.

the Tenth Amendment inasmuch as the Congress has acted to regulate the States through the spending powers in a way that the Court has ruled it cannot under the Commerce Clause.[5]

It has been suggested that the Federal judiciary "should not decide constitutional questions respecting the ultimate power of the national government vis-a-vis the states; the constitutional issue whether federal action is beyond the power and thus violates states' rights should be treated as nonjusticiable, with final resolution left to the political branches."[6] It is very difficult for a governmental grantee to present a persuasive case to the courts that a grant condition or grant characteristic significantly displaces its freedom to carry out its essential functions. The facts are rarely readily available to support such a case and, even if they are, a grantee must still have a justiciable case. Even if a court does consider a case on its merits, sometimes it takes years to obtain a final decision. For example, the *Los Angeles* case is a complaint against a 1976 statute. An appeal to the Supreme Court probably will not be filed until late 1979 or early 1980, once the Court of Appeals hands down a decision.

One possible alternative to the courts is the establishment of a nonjudicial forum or several forums which could be located in either the executive or legislative branch or established as an independent agency. The forum would not replace the courts or deny a State access to them but would provide a mechanism for the orderly resolution of federalism issues which tend to be more political than legal in nature. Indeed, the courts' disposition of the *North Carolina* and *Florida* cases strongly suggests that the judiciary wants to remove itself from deciding these issues. The courts' actions, however, serve only to underscore the need for a viable mechanism to air federalism issues.

Federal grant programs are considered to be cooperative efforts, because a grantee's participation is purely voluntary. Yet, the dependency of the States on the Federal dollar is manifest. Grant outlays for fiscal year 1979 are estimated to be $85 billion which comprise over one-fourth of total State and local expenditures. The figure approaches one-third for the Nation's larger cities. While it is true that a State can choose not to accept the Federal grant dollar,[7] this avenue is seldom politically expedient since it could lead to wholesale reductions in essential or other governmental services or force an increase in State and local tax rates if Federal funds were withdrawn. In this vein, although admittedly grants are Federal funds because they flow from the U.S. Treasury, it should be remembered that they are gathered from constituencies of State and local governments. Accordingly, the grant dollar is everyone's dollar to some extent rather than just the Federal dollar.

While it is true as a matter of law that many grant requirements serve legitimate Federal needs and should be attached to a grant instrument as a condition for receipt of Federal assistance, it is equally true as a matter of wisdom that grantees should not be forced into a "take it or leave it" position when making a decision concerning accepting Federal assistance. Yet, that is precisely the situation in which grantees, especially governmental grantees, now find themselves. At least a nongovernmental grantee can turn to the courts in some limited instances for Constitutional Due Process protection,[8] but a governmental grantee is generally not considered a "person" within the context of the Fifth Amendment Due Process Clause. Therefore State and local governments are generally unable to avail themselves of procedural or substantive due process protection under the Fifth or Fourteenth Amendments.[9]

A recently published article by Paul L. Posner and this author, "A Crisis in the Fiscal Commons: The Impact of Federal Expenditures on State and Local Governments,"[10] explored some of the matters that a forum

[5] In an attempt to impose Federal standards on State and local governments without running afoul of the *National League of Cities* holding, Congress has attempted to base such "regulation" on the spending power. In addition to the Unemployment Compensation Amendments of 1976 discussed above, the 96th Congress is considering the feasibility of establishing Federal standards for State and local employee retirement systems.

[6] Choper, *The Scope of National Power Vis-a-Vis the States: The Dispensability of Judicial Review*, 86 Yale L.J. 1552, 1557 (1977).

[7] However, in *Angell* v. *Zissman*, No. H-79-229 (D. Conn. Filed May 11, 1979), the District Court granted a temporary restraining order that required the State grantee not to withdraw its grant application. If this temporary ruling is upheld in the form of a final decision its impact will be highly significant when read together with the *North Carolina* case, inasmuch as a grantee could be forced to apply for and receive Federal assistance and then be forced to change its Constitution or restructure its bureaucratic structure to fall into compliance with the grant's terms and conditions.

[8] *See, e.g.*, Southern Mut. Help Ass'n, Inc. v. Califano, 574 F. 2d 518 (D.C. Cir. 1978).

[9] Wallick & Montalto, *Rights and Remedies under Grant-Type Assistance Programs*, 46 GEO. WASH. U. L. Rev. 159, 184 n. 145 (1978).

[10] 10 Pub. Cont. L. J. 341 (1978).

of the type suggested here should review aside from the type of issues litigated in the above cases. As an example, a forum of the type suggested could review the categorical grant system—narrow purpose grants which allow the grantee little administrative discretion as opposed to block grants or general revenue sharing which allow the grantee to use more discretion in the manner in which grant funds are spent. Categorical grants comprise roughly three-fourths of the grant dollar going to State and local governments. When viewed in the aggregate, the categorical grant system has a number of undesirable effects on State and local governments. A reviewing forum could examine such issues as the following:

—The extent to which control of the accountability of State and local central managers to their chief executives is weakened by highly structured Federal requirements.

—Management problems that arise when a grantee attempts to package the variety of disparate, narrow purpose grant programs in its portfolio into a coordinated program to deal with a State or local problem.

—State and local governmental priorities that are distorted due to enticement into Federally-funded programs with marginal State or local interest.

—State and local funds which are directed into Federal program areas to take advantage of programs that match local dollars with Federal dollars resulting in the grantees oftentimes slighting or ignoring basic services such as police, fire, and sanitation which are not eligible for Federal grants.

—The extent to which maintenance of effort provisions (that ensure State and local governments do not substitute Federal funds for their own by requiring a grantee to maintain a fixed level of prior spending for the Federal program) create budgetary inflexibility and result in higher costs.

The issues listed above do not represent the type of clearly focused cases or controversies that a court is likely to entertain. Yet they are real concerns to governmental grantees and warrant considered attention by objective decisionmakers authorized to fashion an effective remedy.

Perhaps in recognition of the problems discussed above, two Federal agencies, the Environmental Protection Agency and the Department of Energy, recently announced their intent to establish assistance appeals boards whose functions include hearing and deciding matters concerning the award and administration of grants. This is a significant development especially for grantees who previously have been unable to present grantor-grantee issues to an objective decisionmaker. However, no steps have yet been taken on the part of the Congress or the Executive Branch to establish a forum empowered to hear, decide, and fashion an effective remedy concerning federalism issues bearing on the entire Federal-State-local assistance system.

The Advisory Commission on Intergovernmental Relations has suggested that the Office of Management and Budget (OMB) be responsible for resolving disputes between grant administrators and grantees over program management concerns and that OMB serve as a focal point for hearing grantees' problems that relate to more than one grant program.[11] These and other matters are currently being considered by OMB.[12] In particular, OMB recently issued draft working papers of its comprehensive study of assistance programs for public comment and in them suggests the creation of an Office of Federal Assistance Management which would have the authority to issue assistance regulations and to make substantive decisions in the case of interagency conflicts over guidance to grantees. Further, this body would be authorized to resolve disputes which might arise among Federal agencies and Federal assistance recipients.

In conclusion, it is evident that the trend in resolving issues that bear on notions of federalism should be to look away from the courts. The courts, of course, do serve an important and useful function by establishing the outer boundaries of the law. But the courts inherently do not have the authority or capacity to consider the social, economic, and political concerns which any tribunal that might attempt to play a vital role in the

[11] Advisory Commission on Intergovernmental Relations, *Streamlining Federal Assistance* (1978).

[12] OMB is presently undertaking a study of the Federal assistance system pursuant to section 8 of the Federal Grant and Cooperative Agreement Act of 1977, Pub. L. No. 95-224, 92 Stat. 3.

structuring of a Federal assistance program must weigh when deciding questions of Federal encroachment on "States' rights." By establishing a nonjudicial forum that is authorized to consider these factors in deciding questions of federalism, Congress could do much towards lending an aura of objectivity and order to the amorphous universe of Federal assistance to State and local governments.

There is grim irony in speaking of the freedom of contract of those who, because of their economic necessities, give their service for less than is needful to keep body and soul together.

—*Morehead* v. *N.Y. ex rel. Tipaldo,* 298 U.S. 587, 632 (1936) (Stone, J.).

NOTES

SPECIAL STUDIES AND ANALYSIS REORGANIZATION

721278

Henry R. Wray[1]

Effective September 4, 1979, Dick Pierson and I implemented a reorganization for the Special Studies and Analysis (SSA) Section which should enhance our delivery of legal services to the audit divisions. This article explains our new structure and the major reasons for it.

New Organization

Before the reorganization, all audit division assignments and most other SSA responsibilities were divided among three subgroups within the Section, each headed by a senior attorney. SSA staff attorneys were assigned to one of the senior attorney groups. We have kept these three groups, but each now has fewer divisions and staff attorneys. We placed all other SSA responsibilities and attorneys in a new group directly under my supervision.

Senior Attorney groups. The three groups are headed by senior attorneys Rob Evers, Bob Hunter, and Gerry Rubar. They retain certain divisions, functions, and staff attorneys previously assigned to them. The new makeup of the three groups is as follows:

Senior Attorney: Rob Evers

Responsibilities:	PSAD
	ID
	Bob Parker
	Dayna Shah

Senior Attorney: Bob Hunter

Responsibilities:	HRD
	FGMSD
Attorneys:	Nancy Finley
	Ray Wyrsch

Senior Attorney: Gerry Rubar

Responsibilities:	CEDD
	Lobbying
	Legislation
Attorneys:	Bob Crystal
	Gary Kepplinger

[1] Assistant General Counsel, Special Studies and Analysis, Office of the General Counsel, GAO.

Assistant General Counsel's group. This new group handles the remaining SSA responsibilities and consists of attorneys not assigned to one of the senior attorney groups. Within the group, Dick Kasdan is responsible for EMD, and Ken Mead handles GGD (except for its tax and banking work). Two senior attorneys in the group serve as the initial SSA contact point for other divisions and offices as follows:

> Alan Goldberg: Claims Division, FPCD and PAD.
>
> Ralph Lotkin: LCD and assistance to the Office of Policy on requests for access to GAO records.

For the time being, I will serve as the direct contact for FOD and the regional offices, the Office of Policy generally, General Services & Controller, and GGD work in the areas of tax and banking.

The other attorneys in this group are: Tom Armstrong, Suzanne Fishell, Ernie Jackson, Jeff Jacobsen, Andrea Kole, Jessica Laverty, Karen Maris, and Doreen Stolzenberg. These attorneys are not formally tied to specific divisions or other functions, except that Jeff Jacobsen is taking on the Impoundment Control Act function previously handled by Ralph Lotkin.

Purposes of the Reorganization

The reorganization has three basic objectives: to enable us to work more closely with major "client" divisions, to increase our flexibility in handling work for all divisions, and to facilitate the development of attorneys within SSA.

Serving major client divisions. Based on our experience in recent years, we can fairly confidently predict that five audit divisions—CEDD, EMD, GGD, HRD, and PSAD will each occupy 2 or more full staff years of SSA attorney time. The same divisions also tend to have the most "legally intensive" projects, requiring long-term and frequently ongoing legal support. Therefore, we have in a sense "targeted" these five divisions as part of our reorganization. Each division now has one upper level SSA attorney whose primary or exclusive responsibility is to work with that division. These attorneys will serve as the focal point for their division's requests for SSA assistance. They will handle some of the division projects directly and monitor the provision of assistance for the other projects. In addition, they will be expected to keep a current perspective on the division's work as a whole, and to regularly consult with the division on how best to integrate legal services, through participation in planning sessions and ongoing contacts with key division officials.

There is nothing dramatically new in this approach; our senior attorneys have traditionally pursued close working relationships of this kind. The difference is that reducing the number of divisions assigned to each senior attorney enables them to concentrate more heavily on these working relationships. Also, with respect to the senior attorney groups, the staff members assigned to each senior attorney are generally experienced SSA attorneys who have already developed firm working relationships with the divisions they will continue to serve. We expect them to carry out their projects without the need for substantial supervision by the senior attorneys. In sum, the senior attorneys have much more time to devote to planning and facilitating the delivery of legal services.

Flexibility. The SSA workload fluctuates a good deal in terms of the mix of division requests and the level of effort required by individual requests at any given time. As noted above, we can anticipate *minimum* long-term needs of certain divisions. However, consistent long-term demand levels are less predictable for many other divisions. Perhaps more important, it is very difficult to gauge with any precision our short-term work requirements for any division. This is particularly true in the case of "crash" projects which are "due yesterday." We can be sure that they will arise frequently, but we can't predict when or from where they will come.

The reorganization takes these variables into account by maintaining a number of attorneys who are not limited to the work of any particular division or divisions. These attorneys provide the primary resource for audit divisions that are not assigned to a senior attorney group, thus helping us meet the demands of such divisions as they arise. These attorneys are also available as a backup resource for divisions assigned to a senior attorney group. They will be called upon when the demands of such a division exceed the senior attorney's own resources (as they almost certainly will). Flexibility is the primary consideration here. While the attorneys generally have no formal ties to particular divisions, we expect that ongoing working relationships between the attorneys and divisions (or parts of divisions) will evolve. In fact, formal assignments of attorneys to additional divisions may be made if warranted by the workload.

Staff development. The single most important factor in SSA's efforts to provide legal support to the divisions is the "on line" performance of individual staff attorneys. Our staff consists of a blend of experienced and relatively new lawyers. Most of the newer lawyers are assigned to my group. We believe that the variety of assignments given to these attorneys under the reorganization will benefit them in exploring subject area interests, gaining experience in different situations, and arriving at a work style that best suits them. Having these attorneys work directly under the Assistant General Counsel should also enhance our ability to evaluate their progress and assist their development. Likewise, the reorganization offers greater opportunities for upper level SSA attorneys to assume more responsibilities and gain managerial experience.

* * * * *

We will monitor the new system closely in the coming months and look forward to any reactions or suggestions that you may have.

...lawyers better remember they are human beings, and a human being who hasn't his periods of doubts and distresses and disappointments must be a cabbage, not a human being.

— Harvard Law School, Occasional Pamphlet No. 3 11 (1960).

GAO ON THE MOVE
HINTS WHEN MOVING YOUR HOUSEHOLD GOODS

Scott D. Feinstein[1]

When GAO employees move at the Government's expense and some of their household goods are lost or damaged by a carrier, what can they do? They can file a claim with GAO following GAO's procedures as authorized by the Military Personnel and Civilian Employees' Claims Act of 1964.[2] *This article answers questions about those procedures, and provides other tips on moving.*

Are there any documents that I should prepare for my own records prior to moving?

You should make a detailed list of everything that the carrier will be moving to your new address. If possible, have the carrier's driver sign it when the goods are loaded on the truck. At destination, this list will help identify any missing items. The list will supplement the inventory prepared by the carrier's driver to show the condition of your goods when picked up at origin.

Should the carrier move all of my belongings to my new address?

You should move any fragile items yourself so that you can insure their safe arrival. You should also take your jewelry, stamp or coin collections, or anything else of great value that could not easily be replaced if lost or damaged. It's a good idea to have any antiques appraised.

Should I take out insurance on my household goods?

First, if you have a homeowner's policy, check to see if it includes insurance of your household goods while they are in transit. If not, you should carry extra insurance with a $15,000 deductible since the maximum amount allowed under the Military Personnel and Civilian Employees' Claims Act of 1964 is $15,000. With today's rate of inflation, it might cost much more to replace your belongings.

What is the carrier's liability for my household goods?

The liability of household goods van carriers and freight forwarders engaged in interstate transportation of uncrated household goods generally is limited to 60 cents per pound per article unless you pay a valuation charge (when GAO moves your household goods they automatically are released at a valuation of 60 cents per pound per article). If you wish to be paid the full value for any lost or damaged items, you must declare a lump sum value (which must be at least $1.25 times the number of pounds in your shipment) and pay a valuation charge of 50 cents for each $100 of declared value. You must personally fill in and sign that portion of the carrier's commercial bill of lading covering valuation provisions. If this space is left blank, your shipment will automatically be subject to a valuation equal to $1.25 times its weight in pounds. You are responsible for paying the valuation charge.

What happens at destination?

The carrier is not required to make delivery on any exact date, but only within a reasonable time after loading. If the mover cannot meet the agreed delivery date, it must notify you and set a new delivery schedule. When the goods are delivered, you should carefully examine the condition of the furniture and other unpacked or uncrated articles to determine any change in the condition of the articles from the time they were picked up at origin. Do not sign any delivery papers until unloading is completed.

What do I do about loss and damage?

Do not refuse to sign the bill of lading or delivery receipt because of loss and damage. Instead, make an appropriate notation on the mover's inventory or on any other document you may be asked to sign detailing the exact nature of the loss or damage. Ask the driver to countersign the notation and be sure to retain a copy of the documents on which the exceptions have been noted.

What should I do then?

First, contact the agent of the delivering carrier and request that claim forms be furnished to you. Ask the agent to send a representative to inspect the damaged articles and to acknowledge, in writing, the damage as well as any lost or missing articles. Do not discard damaged property or have it repaired before it is

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[2] 31 U.S.C. §§240-43 (1976).

inspected. You should then file a claim with the carrier. The carrier is required by the Interstate Commerce Commission to acknowledge your claim within 30 calendar days from the time of its receipt. He must pay, decline, or offer a compromise settlement of your claim within 120 days after its receipt unless there are reasons beyond his control which prevent final settlement.

Second, you should also file a claim with GAO. You must submit GAO Form 287 before the claim may be considered for settlement. You should include a written estimate for repairs over $100, all paid bills of repair, a copy of orders authorizing transportation, the bill of lading and inventory of property shipped, an indication of action taken by you to locate missing property, and a copy of the delivery receipt which shows the loss or damage at time of delivery.

After the Office of Budget and Financial Management (OBFM) receives the completed GAO Form 287 (with accompanying evidence), an auditor will examine the file and determine the amount of loss or damage to property by computing the actual loss or damage for each item on the claim. The sum of the individual items is the total as determined by GAO. Upon approval of a claim against GAO by OBFM, GAO will pay you regardless of whether your claim against the carrier has been paid. You, in turn, assign to GAO, to the extent of any paymnt GAO makes to you, all your right, title, and interest in any claim you have filed against the carrier. GAO will then pursue the claim on your behalf. Once you have filed a completed GAO Form 287 with the accompanying evidence, you can get a check within 2 weeks.

What if I discover the damage later?

Contact the agent of the delivering carrier and furnish a list of the damage with an explanation of why it was not discovered at delivery. Also furnish GAO a copy of this list. There is a 2-year time limit for filing a claim with GAO, so to preserve your rights, it is important to notify the carrier and GAO of any later discovered loss or damage.

Who should I contact if I have any questions?

If you are planning a move and have any questions, contact Scott Feinstein at 275-5212.

There is an old story of blind men trying to describe an elephant. One felt the elephant's leg and declared that the creature was like a tree, another felt the enourmous side and said the elephant was like a wall, while a third, feeling the tail, was positive the animal was like a rope. Each man had a notion of reality that was limited by the number and kind of attributes he had perceived.
—MINNICK, WAYNE C., THE ART OF PERSUASION 98 (1957).

721279

FEDERAL RESERVE BOARD EXCLUDED FROM THE SENIOR EXECUTIVE SERVICE

While this issue of the Adviser *was being prepared, the Comptroller General issued a decision which held that the Federal Reserve Board was excluded from the Senior Executive Service (SES). After reading the SES article,*[1] *the following casenote should provide you with a better understanding of the scope of SES.*

One of the many difficult questions faced by the Office of Personnel Management (OPM) in implementing the Senior Executive Service was whether the provisions applied to the Board of Governors of the Federal Reserve System. Since Congress did not expressly exclude the Federal Reserve Board from SES, OPM concluded that the Board was included. The Board, however, had different ideas. It had been outside the jurisdiction of the Civil Service Commission and had run its own personnel operation ever since the enactment of the Federal Reserve Act ~~of 1913~~.[2] In fact, the Board's independence was strengthened by Congress in the Banking Act of 1933.[3] Because of its traditional independence, the Board did not even consider it necessary to ask Congress to expressly exclude its officials from SES. The Board strongly objected to being included in SES on the ground that the Congress had not given any indication of intent to change the Board's statutory exemption from the civil service system.

Because of this impasse, and because the Board was adamant and threatened to go to the White House to fight OPM, the General Counsel of OPM requested a ruling on the matter from GAO.

The case presented a dilemma. On one hand there was the obviously broad coverage of the Reform Act, and on the other hand there was the traditional independence of the Federal Reserve Board from the civil service system. Had the Congress expressed any intent as to the Board's status the decision would have been easy. Since the Board had not asked for an exclusion, however, the matter had not been brought to the attention of Congress.

The Comptroller General, on July 30, 1979, decided that the Federal Reserve Board is excluded from SES.[4] The decision held that the specific provisions of the Federal Reserve Act, as amended, which exempted the Board from civil service laws and regulations, had to be given priority over the general provisions of the Civil Service Reform Act in the absence of a clear indication that Congress intended otherwise.

A crucial factor in the decision was the history of events that occurred in 1940-41 when the Ramspeck Act[5] threatened to undermine the Board's independence. The Ramspeck Act authorized the President to place all exempt positions in the competitive service. Then, as now, the Federal Reserve Board did not want its personnel system to be under civil service laws and regulations and it went to the President.

President Roosevelt agreed with the Board and wrote the Civil Service Commission on December 27, 1940, that it was not his intention to exercise his authority under the Ramspeck Act to place the Board's employees under the classified civil service or the Classification Act of 1923, as amended. The President found that it would be undesirable for the Board's employees to be placed in a different status from those of the Federal Reserve Banks and their branches, and he also relied on the fact that the salaries of the Board's employees are paid from funds derived from assessments on Federal Reserve Banks and not from appropriations by Congress. The Civil Service Commission, by reply letter of January 3, 1941, advised the President that it would be guided by his intention to exclude the Board's employees from the Civil Service Act and the Classification Act.

We found this history to be persuasive in view of the absence of any express intent by Congress to place the Board within SES. At the same time we recognized the broad scope of SES and we certainly did not intend to open the door to widespread exemptions from SES. We doubt whether any other agency could make the same showing of independence as made by the Federal Reserve Board. And, as a practical matter, the overwhelming acceptance of SES conversion by the incumbent Federal executives makes it unlikely that other agencies will ask us to be taken out.

[1] Higgins, *"The Senior Executive Service: Bold Experiment in Managing the Government"* in this issue of *The Adviser.*

[2] 12 U.S.C. §248 (1) (1976).

[3] 12 U.S.C. § 244 (1976).

[4] *Matter of Federal Reserve Board—Applicability of Senior Executive Service*, B-195418.

[5] Pub. L. No. 76-880, 54 Stat. 1211 (1940).

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