United States General Accounting Office

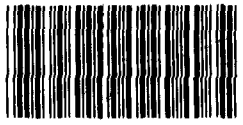
GAO

Report to Congressional Requesters

September 1993

PERSONNEL PRACTICES

Retroactive Appointments and Pay Adjustments in the Executive Office of the President



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GAO

United States
General Accounting Office
Washington, D.C. 20548

General Government Division

B-254766

September 9, 1993

The Honorable Jim Lightfoot
Ranking Minority Member
Subcommittee on Treasury, Postal Service
and General Government
Committee on Appropriations
House of Representatives

The Honorable Frank Wolf
House of Representatives

The Honorable Ernest J. Istook, Jr.
House of Representatives

On April 22, 1993, you asked us to review various matters relating to new personnel at the Executive Office of the President (EOP).[1] You were particularly interested in our assessment, since January 20, 1993, of (1) the propriety of retroactive personnel appointments and salary adjustments and (2) compliance with public financial disclosure reporting requirements.

You asked us to provide information on these matters for the Subcommittee's consideration of a supplemental appropriations bill, subsequently enacted as P.L. 103-50, July 2, 1993. We provided preliminary information to your offices in May and June 1993 as we obtained this information from White House Office and Office of Administration (OA) officials. In July 1993, you also asked us to examine whether any new employees had received compensation from both EOP and the presidential transition team for the same period. This report provides our assessment of the information obtained in response to your request.

[1]EOP agencies included in this review were the White House Office, the Office of the Vice President, OA, the Office of Management and Budget (OMB), the Council of Economic Advisers, the Council on Environmental Quality, the Office of Policy Development, the National Security Council, the Office of the U.S. Trade Representative, the Office of Science and Technology Policy, and the Office of National Drug Control Policy.

Results in Brief

From January 20, 1993, through April 24, 1993, EOP made 611 new personnel appointments.[2] Of these appointments, 230 (38 percent) were retroactive and, of those, 136 (59 percent) were retroactive to the first pay period of the new administration. Of the 230 retroactive appointments, 185 (80 percent) were one pay period late. The signed appointing documents for the retroactive appointments were processed by the OA personnel office from one to nine pay periods[3] after the effective dates of the appointments. Retroactive salary payments totaled about $335,800 and ranged from $88 to $11,500. On the basis of our review of documentation provided by White House Office and OA officials and supervisors' certifications that selected individuals had actually worked during the retroactive periods, we concluded that the individuals appointed retroactively were entitled to receive pay for their work.

During the same period, 56 employees received salary increases, and 11 received salary decreases after their initial appointment dates. Of the increases, 22 were made retroactive, and the payments to employees for retroactive salary increases totaled $16,116. Of the 11 decreases, 8 were made retroactive, and the employees repaid $6,724 to the federal government for salaries previously paid.

We agreed with White House Office and OA officials that of the 22 retroactive increases granted, the 2 granted to title 5[4] employees were proper because they corrected administrative errors that prevented the initial salaries from being set in accordance with nondiscretionary administrative policies. Similarly, we found that 12 of the 20 retroactive increases granted to title 3 employees were proper. We accepted appointing officials' certifications[5] in the absence of contemporaneous documentation that they made employment offers at specified salaries or

[2]Initiation of a personnel action usually starts with the execution of an appointment document (i.e., a Standard Form 52; a WHP-1, an alternative form used by the White House; or a memorandum) by an authorized appointing official. These documents identify, among other data, the effective date of the appointment and the employee's salary. According to White House officials, office and unit heads were authorized appointing officials, although almost all new appointments required final approval by the Assistant to the President for Management and Administration before appointment documents were processed by the OA's personnel office.

[3]One individual was appointed nine pay periods late. Otherwise, four pay periods late was the longest time frame.

[4]Title 5 is the statutory authority used for the appointment and pay setting for most federal employees. Title 3 is the statutory authority used by the President and Vice President to appoint and set the pay of employees in the White House Office, the Office of the Vice President, the Office of Policy Development, and a limited number in OA without regard to other laws regulating the employment and compensation of federal employees but subject to limitations regarding maximum rates of pay.

[5]A certification for one employee was pending at the time we completed our report.

forwarded written requests for salary increases as evidence that the salary decisions were not implemented as originally intended or were delayed awaiting action by other EOP, White House Office, or OA officials. For similar reasons, we believe the eight retroactive decreases were proper.

We also had questions regarding the retroactive salary increases for the remaining eight title 3 employees. In these cases, the pay adjustments were made retroactive to a date before the approving official made the decision, although the work in question had already been performed at an approved salary rate. Rationales were provided to us for these cases, and the White House provided us copies of Justice Department legal opinions concluding that such retroactive adjustments are proper within the President's authority under title 3, which is very broad.

However, because retroactive salary adjustments are usually prohibited unless specifically authorized in statute, these eight retroactive payments focused our attention on the larger issue of the breadth of the President's authority under title 3. According to the White House and the Justice Department, the President has absolute authority over the compensation of title 3 employees and need not justify his actions, so long as the compensation is for services performed and does not exceed the title 3 pay cap. Under this interpretation, the title 3 authority could conceivably be used in unreasonable or abusive ways. We have reservations about whether the broad interpretation of the statute clearly reflects congressional intent.

We identified several irregular personnel and pay actions in the course of our work. First, 25 new EOP appointees received compensation from both EOP and General Services Administration's (GSA) presidential transition appropriations for the same period. The White House and OA officials are in the process of determining if these employees have been unduly compensated. Within EOP, we also found one case of an improper advance of annual leave, one case in which an individual was retained on the payroll beyond the expiration of his temporary appointment, and nine cases in which employees were improperly overpaid. OA has taken, or is in the process of taking, action to resolve these matters.

Finally, of the 147 new EOP employees White House Office officials identified as being required to file public financial disclosure reports, all had filed reports, but 14 of these reports were not filed within the time requirements contained in Office of Government Ethics (OGE) regulations.

Background

EOP employees are appointed under title 3 and title 5 of the U.S. Code. Title 3 provides the President and Vice President with the authority to appoint and fix the pay of certain EOP employees without regard to any provision of law regulating the employment or compensation of federal government employees but subject to limitations regarding maximum rates of pay. This authority was used exclusively in the White House Office, the Office of the Vice President, and the Office of Policy Development, which constituted the majority of new EOP appointments. Title 5, which contains specific requirements relating to the pay and position classification of most executive branch employees, was the authority used to appoint most of the remaining EOP employees to career and excepted service positions.

Most of the EOP appointments were approved by the Assistant to the President for Management and Administration who, between January 20, 1993, and February 28, 1993, was also designated by the President as Acting Director, OA. OA is responsible for processing the appointment documents prepared by EOP authorizing officials and maintaining the personnel records of all EOP employees. By virtue of his position and given the practices of past administrations, the Assistant to the President for Management and Administration was considered to be the authorized appointing official, as was his assistant through a verbal delegation of authority, according to White House Office and OA officials. These officials subsequently told us that individual office and unit heads and some of their staff also had verbal delegations of authority to authorize appointments as long as they stayed within their budgets and obtained the signed approval of the Assistant to the President or his assistant.

Under the Presidential Transition Act of 1963, as amended, P.L. 88-277, GSA receives funding to provide administrative support requested by the Office of the President-elect and the Vice President-elect during the transition period (from the day after Election Day until 30 days after Inauguration Day). Funds may be used to compensate members of office staffs,[6] obtain and equip suitable office space, procure services from experts and consultants, and pay such other expenses as allowances for travel and amounts for communication services. GSA is responsible for processing personnel actions for staff designated by the President-elect or Vice President-elect, maintaining payroll records for these individuals, and providing those accounting services requested by the Office of the President-elect.

[6]Persons receiving compensation as members of the transition team are not considered to be federal employees, except for those employees who are detailed from federal agencies.

The Ethics in Government Act of 1978, as amended, requires that certain employees with 1993 annual rates of pay at or above $79,930 and certain other classes of employees must file public financial disclosure reports. They are to be filed within 30 days of the effective date of the appointment, unless extensions are granted. Agencies' reviewing officials may grant up to a 45-day extension, and OGE may grant an additional extension, which may not exceed 45 days. Individuals who do not file within 30 days after the date the report is required to be filed or on the last day of an extension are to be fined $200, unless the fine is waived.

Approach

We examined EOP personnel and payroll records to identify all new appointments made in EOP between the start of the administration on January 20, 1993, and the end of the ninth 2-week pay period in the current EOP payroll year, which was April 24, 1993. We also reviewed official personnel folders for (1) all employees whose effective dates of appointment were two or more pay periods earlier than the dates the personnel actions were processed; (2) a sample of employees whose effective dates of appointment were one pay period earlier; and (3) employees whose payroll records showed evidence of a change in salary or payment of an amount greater than would normally have been due as a biweekly salary payment. Finally, we reviewed and compared presidential transition payroll records with EOP payroll data to determine whether individuals received dual compensation.

We also reviewed documents provided by White House Office and OA officials to identify whether (1) employees appointed retroactively were actually working during the period for which they were paid and (2) employees required to file financial disclosure reports did so in a timely manner. The specific steps we followed and documents we reviewed are detailed in appendix I.

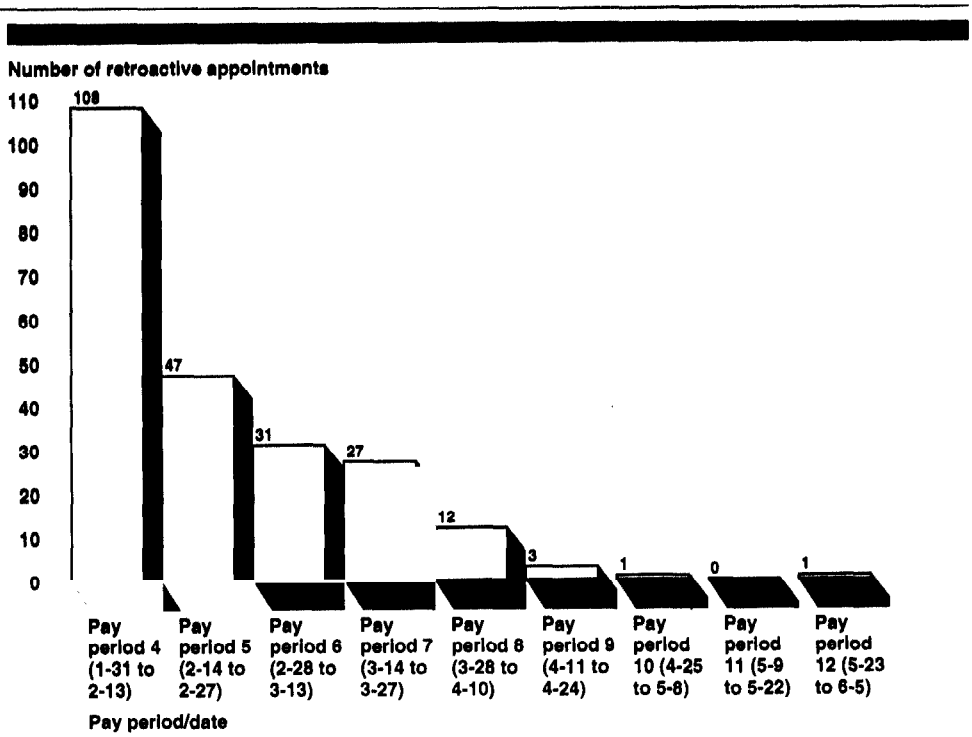
With the exception of presidential transition employment termination dates obtained from GSA, we relied primarily on White House Office and OA officials to provide us with documentation, excerpts thereof, or third-party certifications on new EOP appointees and changes in their pay.

EOP Officials Authorized Retroactive Personnel Actions

During the period between January 20, 1993, when President Clinton was inaugurated, and April 24, 1993, a total of 611 new appointments were made to positions in EOP. Of these 611 appointments, 230 (38 percent) were for an effective appointment date that was one or more biweekly pay periods earlier than the date the personnel action was processed by the personnel office. These 230 employees generally received lump sum payments included in their first regular pay checks for back pay covering the period between the effective dates of their appointments and the pay period their appointments were entered into the payroll system. Some others, primarily for reasons of timing, received a separate manually processed check for their back pay.

As shown in figure 1, 108, or almost 50 percent, of the retroactive appointments were processed during pay period 4, which was the first full pay period after the start of the new administration. Another 78 retroactive appointments, or 34 percent, were processed during pay periods 5 and 6.

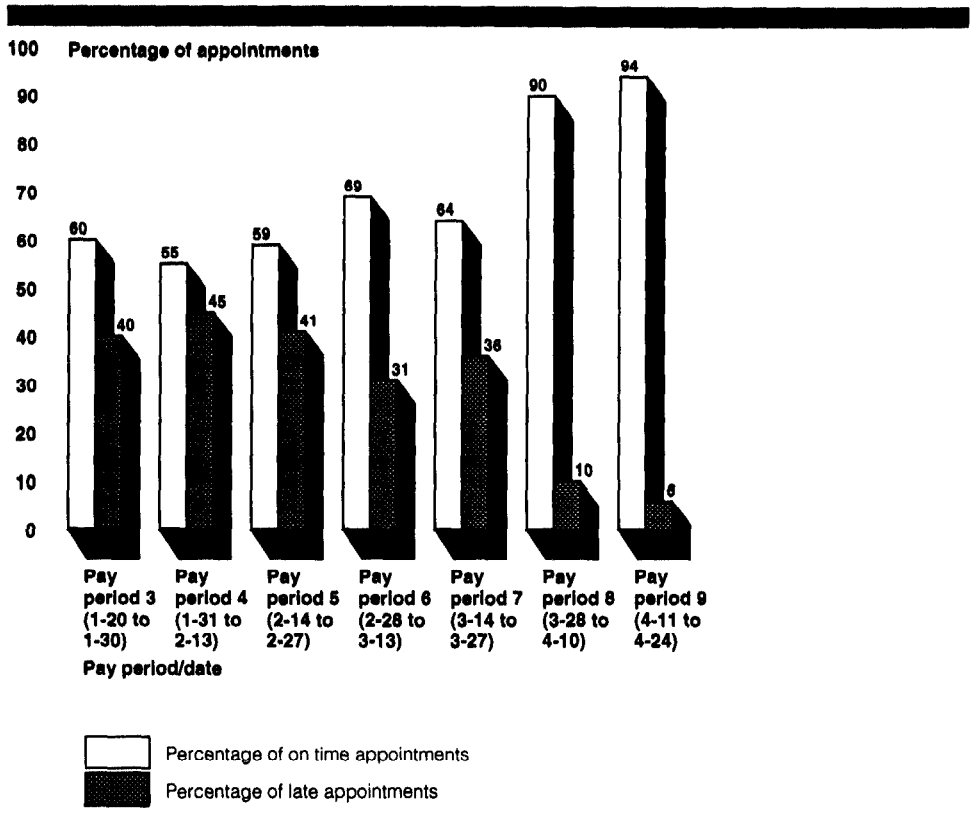
Figure 1: Pay Periods In Which Retroactive Appointments Were Processed



Source: GAO analysis of EOP data.

Of the 341 appointments effective between January 20 and 30, 205 (about 60 percent) were processed on time. Of the 230 retroactive appointments, 185 (or 80 percent) were one pay period late. However, one retroactive appointment with a January 20 effective date was processed as late as June 5. The proportion of timely to untimely appointments by pay period is shown in figure 2.

Figure 2: Percentage of All Appointments That Were Retroactive by Pay Period



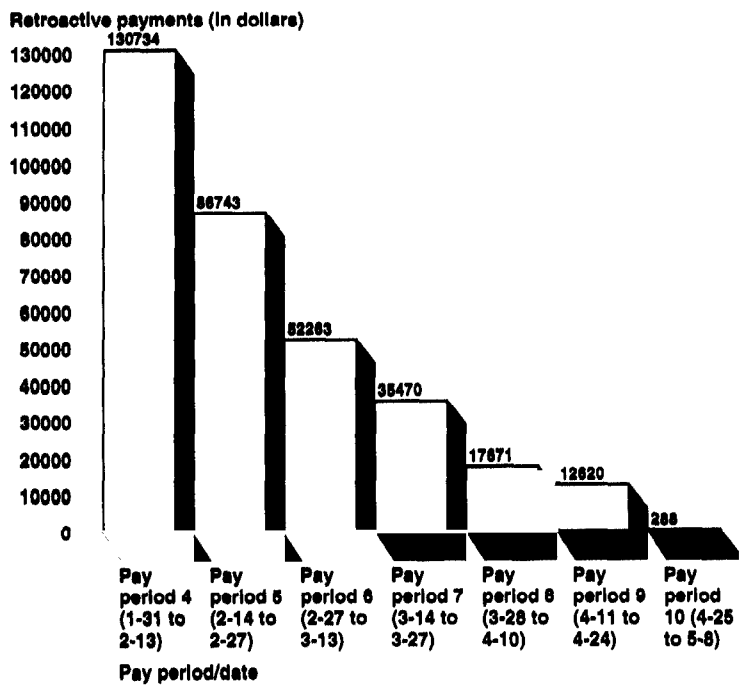
Note 1: Two retroactive appointments made in subsequent pay periods were not included in these percentages.

[a]Pay period 3 started January 17, 1993.

Source: GAO analysis of EOP data.

The 230 retroactive appointments resulted in back payments totaling $335,787. Figure 3 shows the amount of back pay issued in each of the pay periods we examined.

Figure 3: Amount of Retroactive Payments by Pay Period Appointed



Source: GAO analysis of EOP data.

Table 1 shows the pay periods in which retroactive appointments were made and how many pay periods late they were. Of the 230 retroactive appointments, 136 (59 percent) were retroactive to pay period 3, the first pay period of the new administration.

Table 1: Late Processing of New Appointments by Pay Period of Appointment

Date pay period ended	Pay period number	Pay periods late				
		One	Two	Three	Four	Nine
February 13	4	108	•	•	•	•
February 27	5	28	19	•	•	•
March 13	6	20	6	5	•	•
March 27	7	16	8	0	3	•
April 10	8	10	0	1	1	•
April 24	9	2	0	1	0	•
May 8	10	1	0	0	0	•
May 22	11	0	0	0	0	•
June 5	12	0	0	0	0	1
Total		**185**	**33**	**7**	**4**	**1**

Source: GAO analysis of EOP data.

We did not determine whether retroactive appointments have historically been made in EOP. However, it does appear that the new administration did not initially intend to make retroactive appointments. We obtained an undated memorandum from the Assistant to the President for Management and Administration to all department heads announcing a deadline of January 28, 1993, for the submission of information (i.e., name, title, salary, and starting date) for all employees who they wanted to pay for the period from January 20 to January 30, 1993. The memorandum advised, "Please note that there is no backdating in the Federal Government."

White House Office and OA officials told us that the instructions in the memorandum were not carried out because appointing officials were too busy to take care of these personnel matters. This memorandum was issued for the purpose of monitoring employment levels in anticipation of the February announcement of the planned 25-percent cut in staffing levels. They also said that the overload of existing processes and procedures contributed to the need for retroactive appointments.

We noted that although the number of retroactive appointments decreased over time, their percentage relative to timely appointments in each pay period did not significantly decrease until about 2 months after the inauguration. In the cases we reviewed, untimely appointments resulted primarily from (1) failure of the originating EOP office to forward appointing documents or memoranda to the Office of the Assistant to the

President for Management and Administration, (2) the need to obtain that office's final approval, and (3) the time needed by OA to process documents once this approval was obtained.

Employees Appointed Retroactively May Be Paid for Their Services

Our decisions related to employees appointed under title 5 have long held that a valid appointment is effective from the date the authorized appointing official approves the appointment and the employee performs work under supervision, unless a later date is stated in the appointment. Appointments are not considered valid when made retroactively to cover services previously rendered.[7] However, where employees performed their duties in good faith without fraud for a period prior to the approval of their appointment, they are considered to be de facto employees and may be paid for their services.[8] This rationale would also apply to title 3 employees.

Payment of back pay in cases of retroactive appointments is justified when the employees actually worked or were in an authorized pay status such as annual or sick leave for the workdays covered by the appointments. For 8 of the 185 individuals appointed one pay period later than their effective dates and most of the employees appointed more than one pay period late,[9] White House Office staff provided, at our request, certifications signed by individuals identified as immediate supervisors, or other employees in a position to know, that these employees worked during the periods of their retroactive appointments.

Retroactive Pay Adjustments for EOP Employees

We also identified 56 new appointees who received salary increases and 11 who received salary decreases with effective dates from January 20 to April 24, 1993. Of the salary increases, 22 were retroactive. That is, the increases had an effective date at least one pay period earlier than the pay period in which the increase was processed. Eleven of these were made retroactive to the employees' appointment dates, which were from 1 to 11 pay periods earlier. The 22 salary increases ranged from $1,000 to $25,000 per annum. The retroactive pay totaled $16,116 and ranged from $58 to $3,720. For the eight retroactive decreases, employee repayments totaled $6,724 and ranged from $192 to $1,456.

[7]20 Comp. Gen. 267 (1940) and 18 Comp. Gen. 907 (1939).

[8]Donald G. Stitts, B-216369, March 5, 1985, and B-191397, September 6, 1978.

[9]After we completed this step, we identified several other employees whose appointments were more than one pay period late.

Our review of EOP personnel files and payroll records raised questions about the validity of the retroactive pay increases and decreases. In explaining their decisions to make the pay adjustments retroactive, White House Office or OA officials told us that they were made retroactive due to (1) administrative delays in processing the required paperwork to effect the approved pay adjustments, (2) errors in the initial processing of approval documents, (3) administrative staff not receiving clear guidance on whether the adjustments were intended to be retroactive, or (4) lessening budgetary uncertainties in the early days of the new administration that enabled them to raise salaries to levels they would have initially preferred to pay. White House Office and OA officials also told us that the legal basis for such adjustments was their broad authority to set and adjust pay under 3 U.S.C. 105 and 107.

For each of the employees who received retroactive pay adjustments, we obtained and discussed additional facts with White House Office and OA officials.

Pay Increases for Two Title 5 Employees

Our decisions and numerous court cases have held that an employee of the federal government is entitled only to the salary of the position to which the employee has been appointed.[10] Thus, a personnel action may not be made retroactive so as to increase the rights of an employee to compensation. The exceptions to the general rule against retroactive salary increases that would warrant the payment of back wages under the Back Pay Act, 5 U.S.C. 5596 (1988), are where clerical or administrative errors occurred that (1) prevented an approved personnel action from taking effect as originally intended, (2) deprived an employee of a right granted by statute or regulation, or (3) would result in the failure to carry out a nondiscretionary administrative regulation or policy. The effective date of a change in salary is the date the action is taken by the administrative officer vested with approval authority or a subsequent date specifically fixed by that officer.[11]

White House Office and OA officials told us that administrative errors were the cause of these two title 5 employees not being paid the proper salaries. These officials stated that according to long-standing policy, the

[10]United States v. Testan, 424 U.S. 392, 402, 406 (1976); United States v. McLean, 95 U.S. 750 (1878); Goutos v. United States, 212 Ct. Cl. 95 (1977); Peters v. United States, 208 Ct. Cl. 373 (1976); Bielec v. United States, 197 Ct. Cl. 550 (1972); Dianish v. United States, 183 Ct. Cl. 702 (1968); Lee v. United States, 45 Ct. Cl. 57 (1910); and Jackson v. United States, 42 Ct. Cl. 39 (1906). See also Agnes Mansell, 64 Comp. Gen. 844 (1985); 54 Comp. Gen. 263 (1974); and 21 Comp. Gen. 95 (1941).

[11]Agnes Mansell, 64 Comp. Gen. 844, 845, supra, and 21 Comp. Gen. 95, supra.

employees should have been initially paid at the higher rates, which they eventually received. In one case, an employee was supposed to have been paid a salary equal to her past congressional salary, but the salary included on the appointing documents did not reflect a recent January pay increase because incorrect congressional pay information was transmitted. In the other case, a college senior was appointed as a grade GS-3 intern, the pay rate for college juniors, rather than as a grade GS-4 intern, the pay rate for seniors. When these administrative errors were discovered, retroactive pay adjustments were made.

On the basis of our discussions with, and documentation provided by, White House Office and OA officials, we agree that these two retroactive pay increases were consistent with our prior decisions. Since long-standing policies to appoint the two employees at the higher salary levels were not followed, the personnel actions could be retroactively corrected so as to conform to those policies.

Retroactive Pay Decreases for Eight Appointees

With respect to the eight retroactive pay decreases, White House Office and OA officials explained that there was no intention to appoint the employees at the higher salary rates and that data entry errors occurred during the preparation and/or processing of appointment documents. They also told us that these salary decreases were discussed with the eight employees before they took effect.

For four employees, a White House Office official told us that their appointing officials were no longer EOP employees. For two of the remaining four employees, we requested and received appointing officials' certifications stating that errors resulted in these employees being paid at higher salaries than originally intended. On the basis of these certifications and our discussions with White House Office and OA officials, we agreed that the retroactive decreases would be allowed even under title 5 standards.

Retroactive Increases for Title 3 Employees

The other 20 retroactive increases were granted to employees appointed under 3 U.S.C. 105(a)(1), which provides as follows:

"[T]he President is authorized to appoint and fix the pay of employees in the White House Office without regard to any other provision of law regulating the employment or compensation of persons in the Government service."

Similar language is contained in 3 U.S.C. 107(a)(1) and (b)(1) relating to the Domestic Policy Staff and OA.

Little or no reason for the employees' pay adjustments appeared in their respective personnel files. Some of the retroactive adjustments were for a few days, and one involved a payment covering 11 biweekly pay periods.

In 12 of the 20 retroactive increases, we found that errors occurred in the implementation of appointing officials' decisions. Nine of the 12 cases involved salary rates agreed to between the prospective employees and the appointing officials that were incorrectly noted on the appointing documents. The other three cases involved the lack of follow-through on decisions authorizing the salary increases. The decisions were originally communicated verbally or in writing by office or unit heads for processing on or before the effective dates of the increases but were not implemented in a timely manner.

For a number of the cases, White House Office or OA officials asserted that the pay adjustments were done retroactively because (1) original appointing documents erroneously contained lower salaries than originally agreed to between the appointing officials and prospective employees or (2) appointing officials' decisions were not implemented by administrative staff responsible for preparing the necessary appointment documents. These situations apparently occurred because for title 3 appointments, unlike under title 5, appointing officials acted under verbal delegations of authority and generally did not always prepare, sign, date, or review original appointment documents or subsequent changes containing the specific data on salaries and effective dates.

These types of situations would seldom occur under title 5 appointment procedures, which generally require that appointing officials sign and date the appointment documents. Although we believe that sound personnel management practices would generally dictate that appointing officials document their decisions by reviewing and signing official requests for personnel actions, we have no basis to conclude that such documentation is required for title 3 appointments. Nevertheless, in deciding this legal issue for the first time, we wanted to obtain the most relevant factual evidence available to us. Accordingly, we requested and White House Office officials obtained for us signed certifications by appointing officials that the retroactive pay changes were made for the reasons described above. On the basis of this additional documentation, we found that these pay adjustments were consistent with our prior decisions.

The salary increases for the remaining eight title 3 employees were made retroactive to a date before the approving official decided the level of the salary increase, although the work in question had already been performed at an approved lower salary rate. In seven cases, White House Office and OA officials said these actions were taken to follow through on a previous commitment to raise the pay of these employees after they had worked a specified period of time. The seven increases ranged from $58 to $1,844 for the retroactive periods. In the remaining case, White House Office and OA officials said that administrative staff processed the increase retroactively because the staff did not receive clear guidance on the intentions of the office head. This increase totaled $134 for the retroactive period.

Issues Concerning the Scope of the Title 3 Authority

Because retroactive salary adjustments are generally prohibited without specific authorization in statute, the eight retroactive pay adjustments described above raise a question about the scope of the President's title 3 authority. White House Office officials view the President's authority under title 3 as very broad. They provided us with two memoranda prepared by the Department of Justice's Office of Legal Counsel (OLC), dated July 30, 1993, and September 1, 1993, which stated that retroactive salary increases are authorized under title 3, so long as they do not exceed the statutory salary limitations and are in the form of compensation for work performed (see app. II). The OLC memoranda cite the sweeping language of the statute as well as the legislative history which refers to the President's "total discretion" in appointing personnel and setting rates of compensation. The opinions also argue that such retroactive payments are analogous to performance bonuses and incentive awards, which are commonly found in both the public and private sectors.

While the types of retroactive pay increases provided in the eight cases above might not be questioned in the private sector, in the federal government these kinds of actions have generally been prohibited except when specifically authorized in statutes. Thus, these retroactive increases would not be consistent with generally applicable federal personnel rules. However, we do not question their legality in view of the President's broad authority under title 3 to fix the pay of White House employees "without regard to any other provision of law regulating the employment or compensation of persons in the Government service."

We do, however, have reservations as to whether the broad interpretation of the statute clearly reflects congressional intent concerning the scope of the President's authority. According to the White House and the Justice

Department, the President has absolute authority over the compensation of title 3 employees and need not justify his actions, so long as the compensation is for services performed and does not exceed the title 3 pay cap. Under this broad interpretation, the title 3 authority could conceivably be used in unreasonable or abusive ways. We believe some clarification of the intended scope of title 3 may be desirable.

Overlapping Compensation Received by Some EOP Appointees

Of the 611 individuals appointed to EOP positions during the period of our review, 25 received compensation from GSA for their work as nonfederal employees on the presidential transition team and from EOP for the same time period. Of these 25 individuals, 10 had made repayments to GSA. However, 9 of the 10 repayments did not cover the complete periods that overlapped. For the most part, the days involved were from January 20, 1993, to February 6, 1993.

According to GSA officials, EOP staff notified GSA of the possibility of overpayments in mid-March. Between the end of April and the end of June 1993, 10 individuals had returned net pay totaling $7,100. For the remaining 15 individuals and for the 9 individuals whose repayments did not cover the complete overlapping period, we estimated the gross pay that these individuals may owe is $9,676.

White House Office and OA officials told us that they were in the process of determining whether the 24 employees had been unduly compensated. In which case, the White House would assist GSA in collecting any amounts these employees erroneously received.

Irregular Personnel Actions Occurred

During the course of this review, we identified personnel-related matters affecting 11 employees that we brought to the attention of White House Office and OA officials for their resolution. These matters involved one employee who was improperly advanced annual leave, one employee who was improperly retained on the payroll after the appointment expired, and nine employees who were overpaid. The White House Office or OA either took or are in the process of taking appropriate corrective actions.

Improper Authorization of Advanced Annual Leave

An OMB employee subject to the Annual and Sick Leave Act was given a 30-day temporary appointment beginning April 5, 1993. However, on April 14, 1993, the employee was advanced 40 hours of annual leave even though the employee would not have accrued sufficient annual leave to

cover the advance during the temporary appointment. According to a memorandum for the record, this advance of annual leave was made in the expectation that the employee would soon receive a permanent appointment and would accrue sufficient annual leave by the end of the leave year to cover this absence. The employee subsequently received the permanent appointment.

Federal employees with less than 3 years of service accrue 4 hours of annual leave each biweekly pay period. At the discretion of the employing agency, employees may be advanced an amount of annual leave that is equal to or less than the amount of leave the employee would be able to accrue during the term of the appointment or through the end of the leave year, whichever is less. The 1993 EOP leave year ends on January 1, 1994.

The advance of annual leave to the employee in this situation was improper because annual leave may only be advanced up to that amount that the employee would have accrued during the appointment period.[12] Although the advance of leave was improper at the time the employee had a temporary appointment, we think OA took appropriate corrective action by establishing a negative leave balance that the employee would be able to reduce through subsequent leave accruals once appointed to the new permanent position.

Employee With Expired Appointment Retained on the Payroll

The temporary appointment of a title 5 National Security Council employee expired, yet the employee continued to receive pay for about a month. Subsequently, the employee received a permanent appointment. EOP and OA officials maintained that the employee worked during this period under an authorized appointment because the appointment document (Standard Form 52) was signed by the office head, an authorized appointing official. Although this document was signed, we do not believe a valid appointment existed because a final decision by the Assistant to the President had not been made as to whether to make the appointment temporary or permanent. We requested and received a supervisory certification that the employee did, in fact, work. Accordingly, we considered the employee a de facto employee who may be compensated for services extending beyond the appointment limitation.[13]

[12]Monideep K. De, 67 Comp. Gen. 594 (1989).

[13]Donald G. Stitts, B-216369, Mar. 5, 1985, and B-191397, Sept. 6, 1978.

Nine Employees Were Overpaid

The overpayments for eight of the nine employees occurred because their effective appointment dates, used to determine the number of work days for which they were paid, were subsequently changed to a more recent date to reflect the dates they actually began working and to avoid overlap with presidential transition team employment. As a result, they received pay for periods for which they did not work for EOP agencies. White House Office and OA officials recognized that these eight payments were made erroneously and assured us that collection actions have been started.

The appointment of one of the nine employees was initially processed with an effective date of January 20, 1993. According to White House Office officials, a cancellation of that effective date was apparently done incorrectly because although the employee's correct effective date was February 5, which was near the middle of the pay period, he was paid from February 1, the first Monday of the pay period. Payment for the 4 days prior to entrance on duty was improper because the employee performed no services and held no appointment to justify the compensation. White House Office officials recognized that this payment was made erroneously and assured us that collection action has been started.

Most EOP Employees Filed Their Public Financial Disclosure Reports When Required

For the 147 employees identified by EOP who had a public financial disclosure report filing requirement, we reviewed the cover sheet (which contained, among other things, their name, signature, and the date signed)[14] to determine whether their reports were filed within 60 days of the effective date of their appointment or within 30 days of an approved extension period. We found that 133 employees filed their financial disclosure reports within acceptable time frames.

Of the 14 employees who did not meet their filing requirements in a timely manner, the White House Office requested, and OGE approved, waivers of penalties for 6 employees who were not aware of their filing requirements. The White House Office is requesting waivers for five additional employees. Two employees have paid the $200 late filing penalty, and the status of the remaining employee was pending at the time we finalized this report.

Conclusions

Retroactive appointments were a frequent occurrence during the early months of the new administration, but information was not available to

[14]We did not review the disclosure reports themselves because such a review was outside the scope of our work.

make comparisons with previous administrations. Although some volume of retroactive appointments may be unavoidable during any change in administrations, several irregular personnel actions also occurred, and actions to correct the problems we identified are under way.

Although the language of the President's authority under 3 U.S.C. 105 and 107 is very broad, certain retroactive pay increases have focused our attention on the issue of the extent to which the President has authority to make retroactive pay adjustments. The White House and Justice Department believe that the President has absolute authority and need not justify his actions, so long as the compensation is for services performed and does not exceed the title 3 pay cap.

On the basis of that authority, we concluded the retroactive pay increases were proper. However, we have reservations about whether the broad interpretation of the statute clearly reflects congressional intent concerning the scope of the President's authority. Under this interpretation, the title 3 authority could conceivably be used in unreasonable and abusive ways. Further clarification of the President's title 3 authority may be desirable.

Matter for Congressional Consideration

Because retroactive salary adjustments are usually not permitted without specific statutory authority and the breadth of the President's authority as described by the White House and the Justice Department leaves room for possible abuse, the Congress may wish to consider amending title 3 to provide greater specificity as to the intended scope of the President's authority.

White House Comments and Our Response

The Assistant to the President for Management and Administration provided written comments on a draft of this report (see app. III). In its comments, the White House agreed with the facts presented in the report, restated its reasons for making the retroactive appointments and pay adjustments, and expressed its belief that there is no need for legislative action regarding the President's authority under title 3. In the White House's view, the scrutiny given to presidential action as well as the statutory caps on salary levels curb the possibility for abuse. In addition, the White House expressed concern that limiting the President's authority in this area could inhibit future presidents in responding to changing needs and demands, especially during the start of new administrations.

We recognize that in enacting title 3 the Congress intended that the President have broader authority and flexibility to appoint and set the pay of his employees than is the case with other executive branch employees. However, we have reservations about the White House's position that the only limits on the President's authority relate to salary pay caps and the requirement that employees actually worked. Thus, we continue to believe that clarification of the intended scope of the President's authority may be desirable.

We are sending copies of this report to the Chairman, House Appropriations Subcommittee on Treasury, Postal Service and General Government; the Republican Leader of the House of Representatives; the Assistant to the President for Management and Administration; the Director of OA; the Director, Office of Personnel Management; and other interested parties. We will also make copies available to others on request.

The major contributors to this report are listed in appendix IV. If you have any questions on this report, please call Nancy Kingsbury, Director, Federal Human Resource Management Issues, on (202) 512-5074.

Johnny C. Finch

Johnny C. Finch
Assistant Comptroller General

Objectives, Scope, and Methodology

Our objectives were to determine for new EOP appointees (1) the length of time any appointments were delayed and the amount of retroactive payments these appointees received; (2) whether appointees had their pay increased or decreased retroactively after their initial appointments and, if so, the appropriateness of such actions; (3) whether new appointees received overlapping compensation; and (4) the timeliness with which employees filed their financial disclosure reports.

We identified all EOP appointments made from January 20, 1993, to April 24, 1993, to determine the timeliness of personnel actions involving new EOP appointments. We examined personnel and payroll reports produced by the Defense Business Management System (DBMS)[15] —formerly the Automated Payroll Cost and Personnel System (APCAPS). OA staff had annotated some of these records to indicate the number of pay periods individuals' appointments were delayed. To help ensure that we identified all new EOP appointments between the above dates, we also reconciled that information with a DBMS report with enter-on-duty (EOD) dates before January 20, 1993, and DBMS reports that were prepared after April 24, 1993. During an explanation and demonstration of certain DBMS operations by OA staff, we obtained these reports as a means of confirming data previously provided.

We examined the official personnel files of all individuals with retroactive appointments that were made two or more biweekly pay periods after their EOD dates. For appointees whose appointments were made either on time or one pay period late, we used interval sampling[16] to select the files for review. For the cases reviewed, we used data from the personnel files to confirm appointees' EOD dates and the dates these personnel transactions were entered into DBMS. We also identified the EOP officials who had approved these individuals' appointments and, where available, the dates of these approvals. We considered the appointments to be retroactive if the appointing documents were signed and dated after the appointees' EOD dates and were entered into DBMS in pay periods after these dates.

Using the database showing new appointees through April 24, 1993, we obtained supervisors' certifications for 30 of the 33 individuals with

[15]All EOP personnel and payroll transactions are processed through DBMS. DBMS is operated by Defense Finance and Accounting Service personnel at the Defense Electronic Supply Center in Dayton. OA staff have access to DBMS data through computer terminals located in their offices in Washington, D.C.

[16]From a DBMS report of new EOP appointments, we selected for review every tenth case for the on-time appointments and every seventh case for those that were one pay period late.

retroactive appointments who were appointed two or more pay periods after their EOD dates and for several other individuals with retroactive appointments whose appointments were delayed by one pay period. In some cases, these certifications were signed by employees' immediate supervisors; in other cases, they were signed by higher level supervisors. We also analyzed a June 5, 1993, database to determine whether additional retroactive appointments or changes to EOD dates were made during the period of our review. For any such additions or changes, we determined whether their pay was calculated accurately but did not obtain supervisory certifications.

To determine the total amount of retroactive payments made to individuals, we analyzed automated payroll history information from DBMS and calculated the amount of back pay that was included in biweekly pay checks. We also identified and analyzed retroactive payments that were manually processed through DBMS rather than during the processing of biweekly payrolls.

To identify how many appointees had their pay adjusted after they were appointed and the amounts of these adjustments, we used DBMS payroll history records to identify which appointees had their salaries increased or decreased. For employees who received retroactive salary increases, that is, their salary increases were effective in a pay period preceding the one in which the increases were processed, we calculated the portion of their pay that was retroactive.

In determining the appropriateness of the retroactive salary increases and decreases made to EOP appointees, we reviewed the laws and legislative histories relating to EOP appointments and reviewed prior court and Comptroller General decisions concerning retroactive personnel actions. We also obtained explanations for these retroactive pay adjustments from White House Office and OA officials and clarifications of the timing of selected appointees' personnel and pay transactions from OA staff.

To determine which individuals received compensation for working the same days for both the President-elect's transition team and EOP, we compared a transition team report that contained the termination dates of the employees' transition team activities with EOP records that contained EOD dates of new EOP appointees.

To determine if EOP appointees filed their Public Financial Disclosure Reports (Standard Form 278) on time, we compared the dates these

employees filed their forms with their EOD dates and any extension periods granted. For employees who did not meet the reporting requirement discussed in 5 C.F.R. 2634.201(b) and 2634.704(i), we determined if they asked for and received an extension for filing their reports. We did not review the contents of these reports.

Because of the anticipated time frames involved with comparing EOP payroll data with disbursement data from the U.S. Department of the Treasury, we did not verify the amounts paid to new EOP appointees or seek to identify whether any additional salary payments by the Treasury were not included in the documents provided to us.

We did our work from May 1993 to August 1993 in accordance with generally accepted government auditing standards.

Department of Justice Office of Legal Counsel Memoranda

U. S. Department of Justice

Office of Legal Counsel

Washington, D.C. 20530

July 30, 1993

MEMORANDUM FOR BERNARD NUSSBAUM
Counsel to the President

Re: Presidential Authority under 3 U.S.C. § 105(a) to Grant Retroactive Pay Increases to Staff Members of the White House Office

This memorandum responds to your request for our opinion on whether 3 U.S.C. § 105(a) authorizes the President to grant retroactive pay increases to staff members of the White House Office. We conclude that retroactive pay increases are authorized as long as they do not exceed the statutory salary caps set forth in section 105(a)(2) and are in the form of compensation for employees' work as members of the White House Office staff.

I.

Section 105(a) provides that:

> (1) Subject to the provisons [sic] of paragraph (2) of this subsection, the President is authorized to appoint and fix the pay of employees in the White House Office without regard to any other provision of law regulating the employment or compensation of persons in the Government service. Employees so appointed shall perform such official duties as the President may prescribe.
>
> (2) The President may, under paragraph (1) of this subsection, appoint and fix the pay of not more than--
>
> (A) 25 employees at rates not to exceed . . . level II of the Executive Schedule of section 5313 of title 5; and in addition
>
> (B) 25 employees at rates not to exceed . . . level III of the Executive Schedule of section 5314 of title 5; and in addition

> (C) 50 employees at rates not to exceed the maximum rate of basic pay then currently paid for GS-18 of the General Schedule of section 5332 of title 5; and in addition
>
> (D) such number of other employees as he may determine to be appropriate at rates not to exceed the minimum rate of basic pay then currently paid for GS-16 of the General Schedule of section 5332 of title 5.

(Emphasis added).

The text of section 105(a) expressly exempts the President from other laws regulating the pay of government employees. It provides that the President may set staff members' pay "without regard to any other provision of law" as to the employment or compensation of government employees, as long as the President observes the upper limits on the number of White House staff members at certain salary levels. We believe that, in view of this sweeping language, section 105(a)(1) allows the President complete discretion to adjust the pay for White House Office employees' work in any manner that he chooses, as long as he complies with the salary limits of section 105(a)(2).

The legislative history of section 105 supports this interpretation. Although the legislative history is sparse, it reveals Congress's intent to grant the President complete discretion, within the overall salary caps of sections 105(a)(2), regarding the compensation of White House Office staff members. The Senate committee report on the current version of section 105[1] explained that the bill would have the following effect:

> Subsection (a)(1) of section 105 authorizes the President to appoint and fix the pay of employees in the White House Office without regard to any other provisions of law regulating the employment or compensation of persons in the Government service. The language . . . expresses the committee's intent to permit the President total discretion in the employment, removal, and compensation (within the limits established by this bill) of all employees in the White House Office.

[1] In 1948, Congress passed an earlier version of section 105 when it enacted title 3 of the U.S. Code. Act of June 25, 1948, ch. 644, 62 Stat. 678. The current version of section 105 was enacted in 1978 as section 1(a) of Pub. L. No. 95-570, 92 Stat. 2445. We have examined the legislative history of both statutes.

S. Rep. No. 868, 95th Cong., 2d Sess. 7 (1978) (emphasis added). See also 124 Cong. Rec. 10112 (1978) ("Given the awesome responsibilities of the [O]ffice, a President has to have considerable leeway in selecting and compensating responsible staff personnel.") (remarks of Rep. Derwinski). Moreover, there is nothing in the legislative history to suggest that the President's discretion in adjusting the pay of members of the White House Office is limited in any manner other than as set forth in section 105(a)(2).

Thus, both the text and legislative history of section 105(a) support the conclusion that the President has complete discretion to adjust the pay of the White House Office staff as he sees fit, provided that he complies with the salary caps set forth in section 105(a)(2).

II.

We now turn specifically to retroactive pay increases. Section 105(a) contains one restriction on such increases, in addition to salary caps. We believe that, within the meaning of section 105(a)(1), the term "the pay of employees in the White House Office" is limited to compensation for employees' work as staff members of the White House Office. This limitation is implied by the statutory reference to fixing the "pay of employees," as well as by the dispensation from other laws governing "employment or compensation of persons in the Government service." In each instance, the statute focuses on the employment relation and suggests that payments must be based on government service.

However, as long as the payment is intended as compensation for an employee's work as a White House Office staff member (and the President complies with the salary limits in section 105(a)(2)), we believe the President is authorized to grant a retroactive pay increase. Under section 105(a)(1), the President has "total discretion" to choose methods of compensation. The President may determine the pay suitable for the level of responsibility actually undertaken by an employee and the quality of performance actually achieved. Such action is well within the President's discretion, especially because this form of compensation, as well as analogous types of compensation in the form of performance bonuses and incentive awards, increasingly may be found in both the public and private sectors. See, e.g., 5 U.S.C. §§ 5344 (authorizing retroactive pay increases for Executive Branch employees pursuant to a wage survey); 4502 (incentive awards); 4503 (agency incentive awards); 4504 (Presidential incentive awards); 4505 (incentive awards to former employees); 4507 (incentive awards to SES employees); 4512-4513 (agency and Presidential awards for cost savings disclosures); 5384 (performance awards to SES employees); 5406 (performance awards for non-SES employees); 5407 (cash award program); Steven

H. Appelbaum and Barbara T. Shapiro, Pay for Performance: Implementation of Individual and Group Plans, MANAGEMENT DECISION, Nov. 1992 at 86 ("paying someone extra for performance beyond the normal expectations . . . ha[s] become so pervasive . . . that few question [its] validity or efficacy"); John Grossmann, Pay, Performance and Productivity, SMALL BUSINESS REPORTS, Oct. 1992 at 50 ("Many U.S. business owners are finding that . . . [performance awards are] a good way to spur sales, boost productivity, and improve employee morale.").

As we have been informed by your Office, the General Accounting Office (GAO) takes the position that all payments having the effect of a retroactive pay increase are "in the nature of a gratuity" and are impermissible unless expressly authorized by statute. See 2 Comp. Gen. 515, 516 (1923) ("the Comptroller General opinion"). We disagree with the GAO's position.

Even assuming that some forms of "unearned" gratuities (e.g., gifts) are impermissible under section 105(a)(1), we believe that retroactive pay increases are permissible if they reflect a determination about the value of the work performed. To be sure, the employee may not have a legally enforceable right to receive such payments, but they still are "compensation" for work actually performed. See Appelbaum and Shapiro, supra at 86. In addition, such a payment is not a mere gratuity (or gift) with respect to the employee who receives the payment because the payment is often designed, at least in part, to encourage that employee to stay in government employment and to continue to render extraordinary service in the future. It may also be designed to correct an error in classifying the job that the employee has performed. Furthermore, a system of compensation that includes retroactive pay increases and other lump sum payments (such as bonuses and awards) is not designed exclusively, or perhaps even primarily, for the benefit of the employee who receives the award. A system of compensation such as this is designed for the benefit of the government, at least in part, because it fosters better office morale and encourages other employees to perform superior work. See Grossmann, supra at 50. Retroactive pay increases in the employment context are distinguishable, for example, from a mere gratuity paid in a one-time service transaction because the latter situation does not present any of these additional reasons for making the payment.

Nor do we believe that retroactive pay increases for the White House staff, even if they may be characterized as mere gratuities, must be expressly authorized by statute. As we have explained above, section 105(a) grants the President complete discretion to design a system of compensation for employees in the White House Office. Congress thus did not need to list every type of compensation that its general language would permit. Such a list would have been purely redundant at best, and at

worst might have led to an expresio unius est exclusio alterius argument, which would have conflicted with Congress's stated intent to allow the President "total discretion" in the compensation of employees in the White House Office.[2] As long as a payment is actual compensation, the statute permits it.

We therefore conclude that the President may grant retroactive pay increases to members of his White House Office staff as long as the payments are for the employees' work as members of the staff and the President complies with the limits set forth in section 105(a)(2).

Daniel L. Koffsky
Acting Assistant Attorney General
Office of Legal Counsel

[2] We believe that the facts of the Comptroller General opinion are distinguishable and that its reasoning is unpersuasive. The Comptroller General opinion addresses the question whether certain postal inspectors who resigned at a certain grade and were reinstated in the lowest grade could be promoted several grades at once (to one grade lower than the grade they were serving at the time they left the service). 2 Comp. Gen. at 516. The Comptroller General was construing a postal statute that authorized successive promotion only, and he concluded that the postal inspectors could not be promoted to one grade lower than their former grade, either retroactively to their reinstatement or at any time. Id. The postal statute at issue and the facts of that case are thus unrelated to the President's discretion under 3 U.S.C. § 105(a) to promote his White House Office staff and fix their compensation as he sees fit. Moreover, the Comptroller General opinion states its conclusion -- that reinstatement "at a higher grade would be in the nature of a gratuity which is not authorized under existing law," id. -- without any legal reasoning whatsoever. Such a cryptic decision is of limited persuasive value.

U. S. Department of Justice

Office of Legal Counsel

Office of the
Deputy Assistant Attorney General

Washington, D.C. 20530

September 1, 1993

MEMORANDUM FOR BERNARD NUSSBAUM
Counsel to the President

Re: Presidential Authority Under 3 U.S.C. § 105(a) to Grant Retroactive Pay Increases to Staff Members of the White House Office

In an earlier opinion, we concluded that the President may grant retroactive pay increases to staff members of the White House Office, as long as the increases are within statutory salary caps and are in the form of compensation for employees' work as members of the White House Staff. See Memorandum for Bernard Nussbaum, Counsel to the President, from Daniel L. Koffsky, Acting Assistant Attorney General, Office of Legal Counsel, "Presidential Authority Under 3 U.S.C. § 105(a) to Grant Retroactive Pay Increases to Staff Members of the White House Office" (July 30, 1993) (OLC Memorandum). You have asked whether a draft report of the General Accounting Office, "Personnel Practices: Retroactive Appointments and Pay Adjustments in the Executive Office of the President" (Draft Report), leads us to alter this conclusion. We stand by our previous view.

The Draft Report contends that

> while Title 3 may be viewed as allowing reasonable retroactive adjustments that are appropriately justified, they do not give the President unfettered discretion to pay an individual for services not performed or to retroactively increase or decrease an employee's pay without good reason.

Draft Report at 13 (original emphasis). We agree with part of this statement. We too concluded, on the basis of the language in 3 U.S.C. § 105(a), that any retroactive pay increase must be for services performed. OLC Memorandum at 3. However, the Draft Report also asserts that any retroactive pay increases must be "appropriately justified." Although the precise meaning of this assertion is unclear, the Draft Report appears to suggest that the President must give reasons for his decisions about retroactive pay increases. The Draft Report contrasts prospective action by the President, for which no documentation

is required, with retroactive adjustments. Draft Report at 13. In support of its position, the Draft Report does not cite any language in the statute or in the legislative history; indeed, it cites no authority at all.

As the statute and its legislative history show, Congress imposed no such requirement on the President when he decides whether an employee's work merits a retroactive pay increase. As long as the President observes statutory pay limits, he may fix the compensation of White House staff members "without regard to any other provision of law regulating the employment or compensation of persons in the Government service." 3 U.S.C. § 105(a)(1). The Senate committee report explained that this language "expresses the committee's intent to permit the President total discretion in the employment, removal, and compensation (within the limits established by this bill) of all employees in the White House Office." S. Rep. No. 868, 95th Cong., 2d Sess. 7 (1978) (emphasis added). The Draft Report, in apparently asserting that the President must present a justification for retroactive pay decisions, has made up a requirement that Congress did not impose. The Draft Report as much as concedes this point: it recommends that Congress "consider amending Title 3 to clearly set forth the President's specific authority regarding retroactive pay adjustments." Draft Report at 17. Whether such a change would be wise or not, the law at present gives the President complete discretion to decide when an employee deserves a retroactive pay increase.

We therefore adhere to our earlier opinion.

Daniel L. Koffsky
Acting Deputy Assistant Attorney General
Office of Legal Counsel

Comments From the White House

THE WHITE HOUSE

WASHINGTON

September 7, 1993

Ms. Nancy Kingsbury
Director
Federal Human Resource Management Issues
United States General Accounting Office
441 G Street, NW
Washington, DC 20548

Dear Ms. Kingsbury:

Thank you and your staff for your cooperation throughout the course of this audit. Although your report makes clear that there are no systemic problems in our personnel practices, it did identify a few issues that we, like you, wish had not arisen during the change in administrations and the transition process.

As the Report notes, we have already instituted procedures to correct the issues that you identified as occurring in the first two months of the Administration. In fact, we had essentially resolved these issues during those first sixty days, with later retroactive steps addressing those personnel concerns that arose in the earlier period.

To place the Report in context, it is important to recognize that most retroactive appointments discussed in the Report were taken to protect Executive Office of the President agencies, including the White House Office, from overextending their budgetary limits in response to the extreme demands of the Presidential transition. Until we knew exactly how many appropriated dollars remained from the previous Administration, we were necessarily cautious in authorizing staffing levels. As the budgetary facts were determined, we approved staffing levels and refined personnel procedures and budgetary controls.

As a matter of fairness, we also wanted to make sure that those who performed work were compensated at the appropriate levels. Thus, retroactive pay actions included both increases and decreases, as the Report finds. These corrections ensured that employees received due compensation for the work they had performed.

Finally, as the Report found, there were no violations of the law and any questionable actions have been or are being remedied. This evidence, therefore, does not support the suggestion that legislative action is needed to restrict the President's authority under Title 3.

Indeed, there is no need to upset the careful balance struck by Congress, which allows the President requisite flexibility in hiring and paying his immediate, personal staff. The scrutiny given Presidential action, as well as the statutory caps on salary levels, curb the possibility for abuse. On the other hand, limiting the President's authority in this area could gravely undermine the ability of future Presidents to respond to changing needs and demands, especially during the start of a new Administration.

We hope these comments contribute to a clear understanding of our transition effort.

Sincerely,

W. David Watkins
Assistant to the President for
Management and Administration

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