Overcoming Barriers to Public Service

A Report and Recommendations Prepared by the Legal Committee of the Aerospace Industries Association

August 2007

August 2007

Overcoming Barriers to Public Service

The process for staffing senior leadership positions throughout the executive branch of the federal government is broken.

Extensive and extended vacancies in key leadership posts, particularly in a time of war, raise significant public policy concerns — including potential harm to the economic well-being of America, risk to national security, and a weakening of global competitiveness. In addition, vacancies can affect the checks and balances that maintain integrity in our government.

Focused on those issues, the Executive Committee of the Board of Governors of the Aerospace Industries Association of America asked the association's Legal Committee last year to research and report on the barriers to public service that make recruitment of political appointees difficult. While the study largely focuses on the Defense Department, the problems discussed are prevalent throughout the federal government.

Our resulting recommendations include actions that would simplify the appointment and confirmation process, adjust financial reporting requirements, provide political appointees with pay comparable to that received by career employees, create a single, unified term for post-employment restrictions, and update the threshold for Procurement Integrity Act violations.

History has demonstrated that it is the exceptional leadership of individuals in our democracy that has made America great. Excessive bureaucracy and unneeded rules should not prevent qualified men and women from serving their country.

It is our hope that the conclusions and recommendations of this report will encourage the administration and Congress to fix the problem.

Sincerely,

John W. Douglass
President and Chief Executive Officer

Overcoming Barriers to Public Service

The Aerospace Industries Association study "Overcoming Barriers to Public Service" was researched and written by the following members of AIA's Legal Committee:

Paul W. "Whit" Cobb, Jr.
Vice President and Deputy General Counsel
BAE Systems, Inc.

David L. Fowler
Senior Vice President, General Counsel, and Secretary
Raytheon Technical Services Company LLC

David P. Handler
Senior Counsel, Military Systems and Government Business
GE Aviation

Maryanne Lavan
Vice President, Internal Audit
Lockheed Martin Corporation

Also participating in the research and preparation of the study were these Aerospace Industries Association staff members:

Robert T. Marlow
Vice President, Acquisition Policy

Cord Sterling
Vice President, Legislative Affairs

Elaine Guth
Assistant Vice President, Procurement and Finance

Kirsten Koepsel
Director, Intellectual Property and Industrial Security

The Aerospace Industries Association of America (AIA) was founded in 1919, only a few years after the birth of flight.

Today, more than 100 major aerospace and defense companies are members of the association, embodying every high-technology manufacturing segment of the U.S. aerospace and defense industry from commercial aviation and avionics, to manned and unmanned defense systems, to space technologies and satellite communications.

In addition, the association has nearly 180 associate member companies, all of which are leading aerospace and defense suppliers.

AIA represents the nation's leading designers, manufacturers, and providers of:

- Civil, military, and business aircraft
- Helicopters
- Unmanned aerial vehicles
- Space systems
- Aircraft engines
- Missiles
- Materiel and related components
- Equipment
- Services
- Information technology

Table of Contents

I. Introduction and Executive Summary....................1
II. Appointment and Confirmation Process....................2
Overview of Process....................2
Barriers Created by the Process....................3
Recommendations....................4
III. Financial Disclosure....................5
Background....................5
Recommendations....................7
IV. Pay Differential....................7
Background....................7
Recommendations....................8
V. Post-Government Employment Restrictions....................8
Statutory Restrictions....................9
Barriers Created....................10
Recommendations....................11
VI. Conclusion....................11
End Notes....................12
AIA Member Companies....................14
AIA Associate Member Companies....................15

Overcoming Barriers to Public Service

I. Introduction and Executive Summary

Many observers believe that the process of staffing senior leadership positions in government is severely broken. As the *Wall Street Journal* noted, "One strength of our political system is that it can tap the talents of private citizens who want to serve their government. But a growing problem is that the political class has been raising ever more barriers to such service…"[1]

These barriers are reflected in extensive vacancies within presidentially appointed, Senate-confirmed (PAS) positions at the Department of Defense (DoD). These leadership positions are chronically vacant, filled by individuals in an acting capacity or filled by individuals who received recess appointments.

In addition to PAS positions, there are many politically appointed positions (non-career Senior Executive Service and Schedule C positions that do not require Senate confirmation) that are unfilled in DoD. And this situation is not unusual.

Perhaps needless to say, vacancies in key leadership positions within DoD during a time of war could have significant public policy consequences. Vacancies make executing important government initiatives more difficult because officials who are in place must also handle the responsibilities of the vacant positions. Employee morale might suffer due to uncertainty about who is going to fill the leadership roles. And corruption might even take place. For example, commentators noted that a prominent, senior, career Air Force employee who pleaded guilty in 2004 to conflict of interest charges was supervised only sporadically by political appointees due to the frequent vacancies in Air Force PAS positions.

At the request of the Executive Committee of the Aerospace Industries Association (AIA), a working group of the AIA Legal Committee researched the reasons for the vacancies and turnover within DoD. The working group reached the following key conclusions:

- The appointment and confirmation process itself is a significant barrier to public service, given its convoluted and lengthy nature.
- The financial reporting requirements are burdensome and invade candidates' privacy, yet they also serve important public policy goals.
- The significant pay differential between the public and private sectors contributes to limiting the pool of candidates for political appointments and shortening the tenures of political appointees.
- Post-government employment restrictions deter an unquantifiable number of seasoned defense industry personnel from competing for political appointments, due in part to the potential that an appoint ment could be a "trap for the unwary" with respect to compliance with conflict-of-interest laws.

Based on these conclusions, we recommend consideration of a number of changes to lower barriers to public service in DoD. These changes include:

- Simplifying the appointment and confirmation process by modifying the Executive Branch forms so that information required by the Senate Armed Services Committee can be easily extracted and sent to the Senate for its use rather than continuing the process of two separate and distinct questionnaires, establishing deadlines for vetting candidates, and consolidating duplicative information requests.

- Adjusting financial reporting requirements.
- Providing political appointees with signing bonuses to mitigate the costs of transitioning to government service and with at least the same pay and benefits that are available to career government employees.
- Creating a single, unified term for post-employment restrictions and updating the threshold for Procurement Integrity Act violations.

The changes we recommend are discussed in detail on the following pages.

II. Appointment and Confirmation Process

The process of being appointed and confirmed to a PAS position within DoD requires the candidate to run a veritable gauntlet of interviews, forms, investigations, hearings, and votes. Embedded within this gauntlet are a number of particularly significant barriers to public service, including 1) the inherent uncertainty of making it successfully through the appointment and confirmation process, 2) the length of time that the process puts candidates in limbo, 3) burdensome financial divestiture requirements, 4) conflict requirements that apply to spouses, and 5) duplicative forms that ask for similar information in different formats.

Overview of Process

The appointment and confirmation process for a senior DoD civilian leadership position typically begins with contact from a search committee appointed by the secretary of defense. The search committee meets with candidates and performs some preliminary vetting. The secretary of defense next meets with the candidate(s) recommended by the search committee. The candidate will then meet with the DoD Standards of Conduct Office (SOCO) to discuss relevant conflicts and financial issues and to determine if there are any apparent government ethics "show stoppers."

If a candidate passes the screens at DoD, the Presidential Personnel Office (PPO) at the White House will then consider the appointment. One former PPO director described his responsibilities thusly: "I find people. I check for capability. I check for competence. I check references. I check their political backgrounds. I check their sponsors. But I don't clear people. I don't check their tax histories or their criminal histories. The people upstairs in the White House Counsel's Office do that, along with the FBI and the IRS."[2] The PPO will then present a recommendation to the president.

If the president accepts the recommendation of DoD and the PPO, the candidate is thoroughly vetted by the White House Counsel's office. Putative nominees are required to complete a lengthy personal questionnaire that is used in the vetting process as well as security clearance (SF 86) and financial disclosure (SF 278) forms. Candidates are required to authorize the IRS to release information about their tax returns to the White House Counsel's Office. In addition, the FBI performs a full-field background investigation, which includes a criminal and credit check as well as interviews of family members, neighbors, supervisors, friends, and acquaintances. The Office of Government Ethics (OGE) reviews the candidates' information and provides an ethics clearance opinion. The White House Counsel's office coordinates this process and works to resolve or mitigate any issues or conflicts that are identified.

Assuming the candidate makes it through the White House Counsel's clearance process, the White House will announce the nomination publicly and send the nomination to the Senate. In the case of DoD nominees, the Senate Armed Services Committee (SASC) will have jurisdiction over the nominations. The

SASC will then require the nominee to answer its own questionnaire and might conduct an investigation into any issues raised by the nomination. The nominee will typically meet with members and staff of the SASC individually, and then the SASC will conduct a hearing.

In addition, the SASC has developed separate requirements for financial divestiture for DoD nominees that are different from those that are generally applicable to the executive branch. In order to avoid any appearance of a conflict of interest, the SASC requires that nominees divest any financial interest in any of the thousands of companies that do more than $25,000 in business annually with DoD. Unlike the exemption provided at 5 CFR § 2640.202 for interests in securities less than $15,000, the SASC requires that nominees divest all assets in any company that does more than $25,000 worth of business with DoD.

Because many companies that are not in any sense defense contractors do at least that level of business with DoD, this requirement sweeps extremely broadly. Also, the requirement can be very costly to the nominee if the financial interest is in options because appointees cannot defer taxes on the sale of options that are required to be divested (unlike the sale of stock, which appointees can exchange for "permitted property" on which taxes are deferred until the permitted property is sold).

Until recently, another SASC requirement was that nominees had to insure any retirement benefits provided by companies doing more than $25,000 in business annually with DoD. The concept was that if the appointee is faced with a decision that could cause the former employer to go bankrupt, the appointee should not be influenced in making the decision by the possibility of jeopardizing his or her retirement benefits. This requirement held up the confirmation of the Hon. Gordon R. England as the deputy secretary of defense for months because the only company that offered this insurance stopped offering the insurance and no other company was willing to offer the insurance at reasonable rates.

The SASC waived this rule temporarily and now requires that appointees with private sector pensions worth over $1 million clear any decisions that would impact their former employer with DoD ethics officials.[3] The SASC requested that DoD continue to look for a new pension insurance provider, however.

Once a nominee receives a committee vote, the full Senate must decide whether to confirm the nominee. At this point, the nomination might be subject to a hold placed by an individual senator or to filibuster by at least 41 senators. A senator could place a hold on a nomination if the senator has concerns regarding the nominee's qualifications or philosophy. A senator could also place a hold on a nominee even for reasons that are unrelated to the nominee in order to gain leverage on other issues. Once the Senate confirms the appointment, the appointee will receive a commission signed by the president and will be sworn into office.

Barriers Created by the Process

It almost goes without saying that the appointment and confirmation process itself is a significant barrier to attracting highly qualified candidates.

First, from the candidate's perspective the complexity of the process and the number of power centers in the process mean that it is difficult to predict whether the candidate will ever make it through. The candidate can be rejected at multiple points in the process, including by DoD, the White House PPO, the White House Counsel's Office, the president, the FBI, OGE, the SASC, and the full Senate. The uncertain probability of success lowers the value of taking the position.

Second, the length of time it takes to move through the process is a significant disincentive to offering to serve. The process, from start to finish, can easily take six months to a year or more. During this time, most candidates cannot afford to put their jobs on hold. Yet candidates might become lame ducks at work as soon as word gets out about their nominations. It is frequently necessary for candidates to recuse themselves from all matters with their current employers that might conflict with the government and to refrain from developing new business relationships. Candidates who reside outside the Washington, D.C., area will face difficult decisions as to whether and when to move their households and enroll their children in new schools.

Third, the process is inherently intrusive and requires the disclosure of detailed personal information. As a result of revelations that have embarrassed previous presidents over their nominees, even minor peccadilloes will be exposed to intense scrutiny. Much of this information could become public if included in official documents.

Fourth, financial divestiture requirements are likely to drive away a substantial percentage of potential public servants. The requirement to divest all interests in companies that do business with DoD could be extremely costly. Candidates who are required to divest stock options have to leave them on the table if the options are underwater or not vested yet. Exercising stock options prematurely could be costly, as well. Divestiture requirements are thus a strong disincentive to leaving the private sector for DoD.

Fifth, a candidate whose spouse works faces high-conflict clearance burdens. Because all of the spouse's conflicts are attributed to the candidate, the candidate must find a way to clear the spouse's conflicts before being confirmed. Such conflicts are especially difficult to resolve if the spouse works at a large professional services firm, such as a law firm or accounting firm, that has many clients whose interests might conflict with the government.

Sixth, the paperwork required by the process is difficult to complete, and the questionnaires candidates are required to complete are duplicative. Individuals with significant financial assets frequently must hire lawyers and accountants to complete the financial disclosure forms. Moreover, the questionnaires required by the White House, the FBI, the OGE, and the Senate ask for much of the same information but in different ways that prevent simply repeating answers given on other forms.

It is difficult to conceive of a more convoluted system than the one the United States government employs for the nomination and confirmation of its senior executive branch leadership. The process seems designed to deter all but the most stout-hearted.

Recommendations

Many of the factors that contribute to the arduousness of the nomination and confirmation process are perhaps unavoidable either because they are part of the constitutional structure of the government or because of the need for high ethical standards for government officials. Nevertheless, there are some aspects of the process that are ripe for reform.[4] These include:

1. Impose discipline on the process. The administration and the Senate should seek to impose strict timelines on their internal vetting processes.
2. Minimize information requests. While the vetting process naturally inclines the vetting agencies to request every conceivable piece of information about a candidate, the cost of achieving perfect information is high. Each agency in the process that requests information from a candidate should

focus its requests on issues that are likely to cause controversy and be flexible about the nature and quantity of the information provided. For example, instead of requesting candidates to provide information about each and every lawsuit they have been involved in, agencies could require candidates to provide information only about lawsuits in which their personal behavior or decisions were at issue.

3. Rationalize financial divestiture requirements. The SASC's requirement that candidates divest all interests in companies doing more than $25,000 of business with DoD is very broad. The SASC could increase the contract threshold to a material amount, such as $25 million. The SASC could also provide an exemption for *de minimis* holdings (e.g., less than $15,000), similar to that provided in the regulations applicable to other executive branch officials. (See 5 CFR § 2640.202.)
4. Permanently eliminate the pension insurance requirement. DoD has benefited from the leadership of many former defense industry executives. They bring invaluable expertise and realism to the defense process. These executives frequently have earned pensions from their former employers. Given the excessively high cost of insuring the pension benefits, the requirement is a financial burden on those willing to serve the public. Moreover, it is not clear that the insurance protects the integrity of the procurement process any better than recusal. A reasonable approach — and one that the SASC has adopted on at least a temporary basis — would simply be to require the recusal of any government executive whose decision could implicate his or her private pension benefits.
5. Provide flexibility for spousal conflict matters. The reality of modern professional services firms is that they represent numerous clients, many of whom have interests adverse to the government. As long as the spouse is not personally and substantially involved in a matter adverse to the government, clearance processes should provide flexibility for a candidate whose spouse's work creates conflicts with the government.
6. Consolidate information reporting requirements. The repetitive requests for similar information from the various entities involved in the nomination and confirmation process should be consolidated. At a minimum, the White House, the FBI, and the Senate should be able to agree on a common set of information that a candidate is required to supply. Although having to fill out multiple forms is unlikely to deter serious candidates, having a consolidated application form would simplify the process for everyone.

III. Financial Disclosure

Background

Concerns have escalated in recent years that the level and extent of financial disclosures imposed by the Ethics in Government Act (EIGA), as amended, discourage highly qualified candidates from entering public service. These concerns prompted Congress to instruct the Office of Government Ethics to evaluate the financial disclosure process for executive branch employees.[5]

As Senator Collins stated in introducing the amendment that became § 8403, "The financial disclosure requirements have been in effect for almost 25 years. Unfortunately, in some cases, they have deterred very good people from serving in the Federal Government. I hope this will lead to more effective, more efficient, and simpler requirements so it no longer will deter potential nominees from serving or force them to go through great expense in order to comply with overly burdensome laws and regulations."[6]

As evidence of the rising level of concern, the resulting OGE report to Congress in March 2005 listed more than four pages of recent studies and related materials on the subject.[7]

Several commentators have discussed the burden of the regulations and their impact on the process. In a 2000 report, the Senate Committee on Governmental Affairs concluded that "there is no question that filling out the informational forms, including the various financial disclosure documents, imposes burdens on appointees and creates delays in the appointment process."[8] The Senate report cited some sobering statistics from a survey conducted among 435 Reagan, Bush, and Clinton administration appointees by the Brookings Institution and the Heritage Foundation in 1999:

- Substantial numbers of the appointees found the forms difficult to complete and a source of delay in nomination and confirmation.
- Nearly one-third of the appointees characterized the forms as either somewhat or very difficult to complete.
- Almost one-half of the appointees sought outside help for accounting or financial aspects, one-fifth reported spending more than $6,000 on outside help, and another one-fifth reported spending between $1,000 and $5,000.
- More than one-third of the appointees stated that the process of filling out the financial disclosure forms took longer than necessary, compared to slightly more than one-tenth who served from 1964-1984.
- Almost 40 percent of the appointees said that the disclosure process either goes too far or is not very reasonable.

The privacy intrusions and burden imposed by the EIGA must be balanced against the legitimate public interest in requiring financial disclosures. The Senate report[9] issued in connection with the EIGA identified some of the interests:

- Public financial disclosure increases public confidence in the government.
- Public financial disclosure demonstrates the high level of integrity of the vast majority of government officials.
- Public financial disclosure deters conflicts of interest from arising.
- Public financial disclosure deters some persons who should not be entering public service from doing so.
- Public financial disclosure better enables the public to judge the performance of public officials.

After OGE requested comments in support of its charge from Congress, some individuals and organizations recommended wholly eliminating the transactions reporting requirement or permitting most public filers to file confidential reports instead.[10] While we agree that a public disclosure process serves as a valuable check against conflicts of interests, we recommend that the process be streamlined and modernized. Radical change might not be as necessary, effective, or politically feasible as incremental change.

On May 16, 2006, OGE published final revisions to the financial disclosure regulations as they pertain to confidential filers. Included within the revisions were provisions to: 1) move the filing date to February 15 and thereby allow confidential filers more time to complete the disclosure forms, 2) more accurately define which federal employees are required to file confidential financial disclosure reports, and 3) encourage agencies to use procedures alternative to the standard OGE financial disclosure form.

More substantively, the revisions also eliminated from the mandatory report contents certain information determined to be unnecessary for a conflict of interest review or too burdensome to justify the limited value it provides. Specifically, the revisions no longer require the reporting of: 1) diversified mutual funds,

2) student loans, credit debt, and other loans from financial institutions based on market rate terms, 3) the dates on which honoraria are received, 4) the dates on which agreements and arrangements — other than for future employment — were entered, and 5) the type of income earned on reportable assets.

While these revisions are more modest in scope than the recommendations contained within OGE's March 2005 report to Congress, they are an improvement over the previous regulatory requirements and are, therefore, a step in the right direction. While OGE has the regulatory authority to modify confidential filing requirements, changes to the requirements placed upon public financial disclosure filings must be adopted by Congress as an amendment to the statute.

We endorse OGE's revisions and encourage Congress and OGE to further reduce the burden that accompanies federal employment by adopting the recommendations enumerated below.

Recommendations

Most of the recommendations that follow are entirely consistent with the OGE's recommendations:

- Raise the dollar thresholds for certain disclosure requirements. We note below some, but not all, of the thresholds that warrant change.
  - The current asset reporting threshold of $1,000, established with the EIGA's enactment in 1978, has never been adjusted for inflation. We recommend that the amount be increased to $10,000.
  - Similarly, we recommend raising the reporting threshold for transactions to $10,000.
- Reduce the number of valuation ranges. The asset, transaction, income, and liability reporting requirements all contain numerous, separate ranges of valuation. We find little to support the need for a filer to identify, for example, whether a transaction falls within the $15,001 to $50,000 valuation category or within the $50,001 to $100,000 category. OGE recommended three valuation categories whose ranges varied depending upon the disclosure at issue.
- Fully implement and expand to public filings the simplifications applied to confidential reports, including eliminating the reporting of diversified mutual funds and student loans, credit card debt, and other loans from financial institutions based on market rate terms. As OGE has noted, diversified mutual funds are exempted from conflict of interest laws by 5 CFR 2640.201(a), and market rate loans do not represent a conflict of interest. Therefore, we agree with OGE that the reporting of this information provides insufficient value "to justify the resulting burden on filers and their agencies."[11]

IV. Pay Differential

Background

The issue of pay differentials between public and private sectors as a barrier to public service was dealt with extensively in two reports by the Brookings Institution that were commissioned by the Presidential Appointee Initiative: "How Much Is Enough? Setting Pay for Presidential Appointees" and "Problems on the Potomac: How Relocation Policies for Presidential Appointees Can Help Win the Talent War."

These reports establish that there is a growing pay and benefits gap between the federal and private sectors, so much so that the "federal government levies a 'public service tax' in exchange for appointees' willingness to serve."[12] The main conclusion of these reports was that presidential appointees are not only paid less than their counterparts in the private sector but also are underpaid in comparison to prior presidential appointees.[13] The Brookings Institution determined that the pay of top federal officials has declined, after considering inflation, and has slipped in comparison to the income of a median income American family.[14]

Adding to this burden is the high-priced housing market in the Washington, D.C., area.[15] This results in positions being filled by individuals from "inside the beltway," which can lead to a fairly insular expression of views and positions. As aptly stated by the Brookings Institution:

> *For the past quarter century top executives, doctors, lawyers, and scientists in the business and academic worlds have seen their compensation climb much faster than the wages of ordinary workers. Over the same period, top federal officials have seen their pay shrink, both in purchasing power and in relation to the pay of average workers. Talented people who are concerned about their families' well being may be deterred from accepting top federal jobs under these circumstances. If financial considerations play any role at all in candidates' decisions to serve an administration, the drop in top federal pay has deprived the federal government of an ever-larger fraction of the nation's most talented people.* [16]

In addition, the average tenure for a political appointee is 18-24 months. The limited tenure is due in large part to the financial sacrifices involved in working as a political appointee.[17]

Recommendations

Although the financial disparity between public and private sectors and the high-priced housing market in the Washington, D.C., area might not be the primary reason that individuals decide not to seek — or decide to leave — executive level positions in the government, these factors certainly are included in the decision-making process of the individuals involved. The following steps could address these issues:

- Provide for "signing bonuses" for individuals who accept government positions to offset, at least partially, the expenses of relocation as well as the pay differential.
- Because many government employees seek to leave the government so that they can pay for college for their children, provide federal subsidies for college tuition for families of federal government workers.
- Adopt some combination of the suggestions set forth in "Problems on the Potomac: How Relocation Policies for Presidential Appointees Can Help Win the Talent War," at pages 14-16, to include:
  - Apply the same travel reimbursement policies applicable to federal government transferees to presidential appointees.
  - Convert some of the discretionary travel reimbursement monies currently available for transferees to mandatory benefits.
  - Provide discretionary incentives to selective candidates.
  - Amend Section 5304 of Title 5 to allow officials paid under the Executive Schedule to be eligible for locality-based payments in addition to base pay (all other federal employees automatically receive such adjustments).
  - Provide job search assistance to spouses of presidential appointees.
- Review federal pay scales and upgrade salary considerations to more closely align with the skill set and pay grades of the private sector.

V. Post-Government Employment Restrictions

> *The presidential appointment process has many hurdles and disincentives that cumulatively deter potential nominees. It has become an ordeal that fewer and fewer of the most highly qualified [candidates] are willing to undergo. Many of those who do serve must make large financial sacrifices, suffer loss of privacy, and risk unjustified accusations of scandal. The major hurdles include: post-employment restrictions that are becoming too broad in application; the cost of complying with conflict-of-interest interpretations; the perception of inappropriate ideological "litmus tests"; inadequate compensation; the belief that it is much harder to accomplish anything in and through government; and the lengthier and more burdensome appointment process.*[18]

The opinions cited above are not of recent vintage. They are the opinions of a select panel convened to address this issue in 1992. Clearly, some progress has been made in lowering the statutory hurdles and in mitigating disincentives that might deter potentially qualified candidates from seeking government service, but the fact that this report has been commissioned confirms that many issues remain in this arena.

One senior official we interviewed from DoD involved in the recruitment and appointment process observed that very few of the people with whom he dealt seemed daunted by post-government employment restrictions when deciding whether or not to enter government service. We hope he is correct. But his observation actually begs the fundamental question underlying concerns regarding those restrictions: how many potentially qualified candidates voluntarily exclude themselves from consideration because they view post-government employment restrictions as being too onerous? It is impossible to answer that question with any certainty.

The following section will review the primary statutory restrictions impacting post-government employment, address some of the barriers created by those statutes, and offer recommendations on how those barriers might be mitigated.

Statutory Restrictions

There are three statutes that implement the majority of the relevant post-government employment restrictions:

1) 41 USC Section 423 (commonly known as the "Procurement Integrity Act").
2) 18 USC Section 207.
3) 18 USC Section 208.

Each statute is addressed in summary fashion below.

Procurement Integrity Act

This statute affects both activities relating to seeking employment with a non-federal entity and imposes a ban on the receipt of compensation from non-federal employers in certain instances.

Government officials who participate "personally and substantially" in an agency procurement with a value in excess of $100,000 have an affirmative duty to report employment discussions with a non-federal entity bidding on that procurement. The official must then either disqualify himself or herself from the procurement action or immediately (and conclusively) reject any possible employment with the affected bidder.

Additionally, if the official held a procurement-related position (contracting officer, program manager, source selection authority, etc.) relating to a contract action (award, modification, task order or claim, etc.) valued at $10 million or more, he or she is prohibited from receiving any compensation from the affected contractor for a period of one year. Pending legislation would increase this period to two years and would also prohibit former contractor employees from participating in the award of a contract to the former employer for a two-year period.[19]

18 USC Section 207

This statute implements what are commonly known as "work and tasking" or "representational" restrictions applicable to former government officials once they have been employed by a non-federal entity. The

intent is to prohibit former officials from effectively "switching sides" once they have obtained post-government employment. There are three relevant restrictions of varying terms:

1. A one-year restriction, known as the "cooling-off period," applies to senior former government officials. The restriction generally applies to former PAS officials, former general officers, and former government civilians who served in Senior Executive Service positions above a certain salary level. For one year following the end of their government service, these officials are prohibited from communicating with their former department with the intent of influencing any official actions by that department. The prohibition applies to any contemplated official action by the government department in which the official served during his or her last year in the government.
2. A two-year restriction relates to "particular matters" that were pending under the official's "responsibility" during the last year of his or her government service. The former government official cannot communicate with any federal department or employee thereof, with the intent to influence official action regarding that particular matter. The term "official responsibility" is interpreted broadly. "Behind the scenes" advice to the new employer is not prohibited, however.
3. This section also contains a "lifetime" ban on representational activity before any government agency regarding any "particular matter" that involved the new employer and in which the individual participated "personally and substantially" while in government service. Any communication (oral or written, formal or informal) made with the "intent to influence" violates this section of the statute. Again, however, "behind the scenes" advice is permissible.

<u>18 USC Section 208</u>
This statute focuses directly on prohibited actions and involvement by government officials who are seeking post-government employment with non-federal entities. The statute's objective is to deter conflicts of interest that could arise when a government official is in a position to influence his or her personal financial situation through the exercise of his or her official duties. Actions most notably affected are the conduct of employment discussions or negotiations with non-federal entities. Simply meeting for lunch could be held to have amounted to conducting "discussions" or "negotiations."

Section 208 states that an agency official who has "personal and substantial" responsibility for any "particular matter" involving a contractor cannot engage in employment discussions with that contractor. The statute provides for only two options: 1) the official must immediately and conclusively reject any possibility of future employment with the non-federal entity or 2) the official must notify his or her agency supervisor of the employment discussions and obtain permission to disqualify (or recuse) himself or herself from any involvement with official actions impacting the particular entity.

Barriers Created
The statutory summaries above might appear straightforward, but the underlying statutes can have devastating impacts upon the individuals and companies involved. The government has not hesitated to investigate and prosecute violations of post-government employment restrictions.

Obviously, some of the most significant barriers to public service presented by the post-government employment restrictions discussed above are the fears potentially generated by the perceived risks and uncertainty of violating criminal laws. It can reasonably be assumed that the typical government official will not knowingly violate such statutes, but the risk for the unwary may well be sufficient to impede the beneficial flow of expertise and experience between the private sector and the government (and back again). In like fashion, the flow of experience and expertise between government and the defense industry

would be significantly impeded if the "one-year cooling-off period" was increased to two years or if behind-the-scenes consulting was totally banned.

Nevertheless, recommendations such as these are pending before Congress. The proverbial "revolving door" is not *per se* objectionable and, in fact, provides many benefits to the government when it is those with industry experience who bring that experience to the public sector. This fact is recognized by Section 133 of Title 10, United States Code, that requires that the under secretary of defense for acquisition, technology, and logistics "be appointed from among persons who have extensive management background in the private sector." The flow of personnel between government and industry should be encouraged within the bounds of reasonable and well-defined ethical and legal parameters. Some recommendations toward clarifying such parameters follow.

Recommendations

Effecting changes in the statutory regime that regulates post-government employment will not occur easily in today's environment. Clearly, the pendulum has swung in the direction of increased scrutiny and enforcement. We acknowledge both this reality and the government's right (indeed obligation) to ensure that personal gain is never placed above public trust. Even so, some changes or clarifications might be sought in this area that would encourage more qualified citizens to enter public service without experiencing inordinate concern about post-government employment:

- It would be helpful to impose a unified/universal term for all post-government employment restrictions. A simplified, "universal" one-year ban would encourage compliance by the individuals and contractors involved. Apply the relevant restrictions to matters involved in the last year of federal service and to the first year of post-government employment.
- Better define criteria regarding what does (and does not) constitute employment discussions or negotiations. A casual chat in an elevator should not place individuals at risk of committing statutory violations. Enhanced and universally accepted examples in the OGE regulations would be a good starting-point.
- Increase the dollar threshold of the Procurement Integrity Act prohibition to $25 million (but retain the one-year prohibition on compensation). Ten million dollars is too low a threshold in the age of "bundled acquisitions," "lead system integrator" programs, and multi-year, billion-dollar contracts.

VI. Conclusion

The process that has evolved in the United States for filling leadership positions in DoD — and the executive branch more generally — is broken and has been for some time. This process deters persons who could bring great skills and talents to public service. For those who are not scared away, the process is unacceptably long and uncertain. While each step in the process might add some marginal value, the overall result is unworkable as reflected in the high vacancy rate for DoD PAS positions.

This report recommends distinct, concrete changes that would measurably improve the process while preserving important public policy objectives relating to ethics and standards of conduct. We are hopeful that this report can play a role in effecting real change, which will require concerted effort on the part of Congress, the executive branch, and interested groups and individuals.

End Notes

I. Introduction and Executive Summary

1. "Free England," *Wall Street Journal*, 8 July 2005.

II. Appointment and Confirmation Process

2. Bob Nash, quoted in Presidential Appointee Initiative, "A Survivor's Guide for Presidential Nominees," 2000, p. 39.
3. George Cahlink, "SASC Changes Ethics Rules for Top Pentagon Officials," *Defense Daily,* 28 September 2005.

4. One of the recommendations made to the Defense Acquisition Performance Assessment panel was to streamline the confirmation process. The recommendation was to create a new confirmation process for a select group of DoD PAS appointees who are involved in acquisition decisions. This group could include the undersecretary of defense for acquisition, technology, and logistics (AT&L), the principal deputy undersecretary of defense for AT&L, and each of the military department assistant secretaries responsible for acquisition. Under this recommendation, a non-partisan qualifications review committee would review the qualifications of nominees for these positions. Once approved by the committee, the nominees would be placed on a confirmation fast track and subjected to an up or down vote by the full Senate. No single senator would be allowed to place a hold on the confirmation process.

III. Financial Disclosure

5. *Intelligence Reform and Terrorism Prevention Act of 2004*, PL 108-458, § 840, 17 December 2004.

6. Congress' other objective in requiring a review of the financial disclosure requirements was to address the September 11, 2001, commission finding that a catastrophic terrorist attack would be more likely to occur during the transition from one administration to another and the commission's recommendation to speed the process.

7. "Evaluating the Financial Disclosure Process for Employees of the Executive Branch and Recommending Improvements to It," Office of Government Ethics report, March 2005.

8. Report of the Senate Committee on Governmental Affairs to accompany S.2705, 18 July 2000.

9. Senate Report No. 95-170, pgs. 21-22.

10. OGE Report, *op. cit.*, pg. 4

11. Proposed Revisions to the Executive Branch Confidential Financial Disclosure Reporting Regulation, 70 *Federal Register* 47138, 47140, 12 August 2005 (amending 5 CFR part 2634).

IV. Pay Differential

12. "Presidential Appointees Pay a Price to Serve Their Country," press release by the Brookings Institution, 22 March 2002.

13. "How Much Is Enough? Setting Pay for Presidential Appointees," Brookings Institution report, pg. 7, 22 March 2002.

14. *Id.,* pgs. 11-12.

15. "Problems on the Potomac: How Relocation Policies for Presidential Appointees Can Help Win the Talent War," Brookings Institution report, 22 March 2002.

16. "How Much Is Enough?" *op. cit.,* pg. 23.

17. Comments of Charles E. Kolb, Brookings Institution, press briefing transcript, "Presidential Appointees Pay a Price to Serve Their Cluntry,"22 March 2002, pg. 10.

continued

End Notes continued

V. Post-Government Employment Restrictions

18. “Science and Technology Leadership in American Government: Ensuring the Best Presidential Appointments,” *National Academy Press*, 1992.

19. H.R. 1362, "The Accountability in Contracting Act," passed the House on March 15, 2007.

AIA Member Companies

3M Company
AAI Corporation
Accenture
Aerojet
AeroVironment, Inc.
AirLaunch LLC
Agilent Technologies, Inc.
Allfast Fastening Systems, Inc.
American Pacific Corporation
AMT II Corporation
Analytical Graphics, Inc.
Andrews Space
Armor Holdings Aerospace and Defense Inc.
ATK
Aurora Flight Sciences
AUSCO, Inc.
B&E Group, LLC
BAE Systems Inc.
Barnes Aerospace
B/E Aerospace, Inc
The Boeing Company
Celestica Corporation
Click Bond, Inc.
Click Commerce
Cobham plc
Computer Sciences Corporation
Crane Aerospace & Electronics
Curtiss-Wright Corporation
Curtiss-Wright Controls Systems, Inc.
Metal Improvement Company
Dassault Falcon Jet Corporation
Doncasters, Inc.
DRS Technologies, Inc.
Ducommun Incorporated
DuPont Company
Eaton Aerospace
Eclipse Aviation
EDO Corporation
EDS
Elbit Systems of America
Embraer Aircraft Holding Inc.
Erickson Air-Crane Incorporated
ESIS, Inc.
Esterline Technologies
Evergreen International
Exostar LLC
FlightSafety International Inc.
General Atomics Aeronautical Systems, Inc.
General Dynamics Corporation
General Electric Company
GKN Aerospace
Goodrich Corporation
Airframe Systems
Electronic Systems
Engine Systems
W. L. Gore & Associates, Inc.
Harris Corporation
Hawker Beechcraft Corporation
HEICO Corporation
Hexcel Corporation
HITCO Carbon Composites
Honeywell
IBM Corporation
ITT Corporation
Kaman Aerospace Corporation
L-3 Communications Holdings, Inc.
LAI International, Inc.
LMI Aerospace, Inc.
Lockheed Martin Corporation
Martin-Baker America Inc.
Micro-Coax, Inc.
MicroSat Systems, Inc.
McKechnie Aerospace
MOOG Inc.
Natel Engineering Co., Inc.
National Machine Group
National Machine Company
National Aviation Products, Inc.
National Technical Systems
The NORDAM Group
Northrop Grumman Corporation
NYLOK Corporation
Omega Air Inc.
Oracle USA
Orbital Sciences
Pall Aeropower Corporation
Parker Aerospace
Pinkerton Government Services, Inc
PRIMUS Technologies Corporation
Proficiency Inc.
The Purdy Corporation
Raytheon Company
Remmele Engineering, Inc.
Rockwell Collins
Rolls-Royce North America Inc.
RTI International Metals, Inc.
Satyam Computer Services Ltd
Science Applications International Corporation
Shaw Aero Devices, Inc.
SITA
Smiths Aerospace Mechanical Systems Los Angeles
Solectron Corporation
Space Exploration Technologies Corporation
Sparton Corporation
Spirit AeroSystems
Teleflex Inc.
Textron Inc.
United Technologies Corporation
Hamilton Sundstrand
Pratt & Whitney
Sikorsky
Vought Aircraft Industries, Inc.
Woodward Governor Company

AIA Associate Member Companies

Acromil Corporation
ADI American Distributors, Inc.
AirBorn Operating L.P.
Air Industries Machining Corporation
Airfasco Industries, Inc.
Albany Engineered Composites
Alcoa Fastening Systems
Alken Industries Inc.
Allegiant Global Services, LLC
Allen Aircraft Products, Inc.
AMETEK Aerospace & Defense
Anaren Microwave, Inc.
Angkor Machining Manufacturing, Inc.
Arkwin Industries, Inc.
Arrow/Zeus Electronics, *A division of Arrow Electronics*
Astronautics Corporation of America
Astronic
AVChem, Inc.
Avetec, Inc.
Avionics Specialties, Inc.
Avnet Electronics Marketing
Banneker Industries, Inc.
Blenheim Capitol Services
Blue Gill Consulting Group, LLC
Brogdon Tool & Die, Inc.
Brush Wellman Inc.
BTC Electronic Components
Burton Industries Aerospace Heat Treating, Inc.
California Manufacturing Technology Consulting
Capo Industries Inc.
Celltron Inc.
CFI-PAC Foundries
Chandler/May, Inc.
Cherokee Nation Distributors
Cincinnati Machine, A UNOVA Company
Circle Seal Controls, Inc.
CMC Electronics
Coalition Solutions Integrated, Inc.
Cohesia Corporation
Co-Operative Industries Defense, LLC
Cristek Interconnects, Inc.
CSSS.NET
Cytec Engineered Materials
Dassault Systems of America
Data Conversion Laboratory, Inc.
Dayton T. Brown Inc.
Delphi Electronics
Designed Metal Connections
Doyle Center for Manufacturing Technology
DynaBil Industries, Inc.
EDAG Inc.
Electronic/Fasteners, Inc.
Emhart Teknologies, A Black & Decker Company
Endicott Interconnect Technologies, Inc.
ENSCO, Inc.
Exotic Metals Forming Company LLC
Fastener & Hose Technology, Inc. *Mid-State Aerospace, Inc.*
Fenn Technologies
The Ferco Group
Ferguson Metals, Inc.
Ferguson Perforating and Wire Company
Forrest Machining, Inc.
Frontier Electronic Systems Corporation
GEAR Software
General Pneumatics Corporation
Greene, Tweed & Company
Gryphon Technologies, LLC
G.S. Precision, Inc.
GuardianEdge Technologies
Haas TCM
H&S Swansons' Tool Company
Harvard Custom Manufacturing
HCL Technologies America
HDL Research Lab, Inc.
Heart of Georgia Metal Crafters
Heartland Precision Fasteners Aerospace Plating Company
Heizer Aerospace
Hi-Temp Insulation Inc.
Hobart Machined Products, Inc.
Hughes Bros. Aircrafters, Inc.
iBASEt
IDD Aerospace Corp.
Industrial Metals International LTD
Ingersoll Machine Tools, Inc.
Inmedius
Integrated Sourcing
Ion Corporation
Jabil Defense & Aerospace
Jade Equipment Corporation
JRH Electronics, LLC.
KPMG LLP-Risk Advisory Services
Kulite Semiconductor Products, Inc.
L. Gordon Packaging
M/A-COM, Inc.
McCann Aerospace Machining Corporation
Meyer Tool Inc.
Microsemi Corporation
Millitech, Inc.
Mil Spec Sales Co.
Morris Machine Company, Inc.
MPC Products Corporation
Navigant Consulting, Inc.
Network Technologies, Inc.
New Breed Corporation
NMC Group, Inc.
Norfil Manufacturing, Inc.
North Cape RIM Manufacturing
NYF Corporation
O'Neil & Associates, Inc.
Onamac Industries, Inc.
Orion Industries
P3-North America, Inc.
Parkway Products, Inc.
Performance Software Corporation
Perillo Industries, Inc.
PGM of New England, LLC
Planar Monolithics Industries
Plymouth Extruded Shapes *Plymouth Tube Company*
Port Electronics Corporation
Precision Gear
Precision Aircraft Machining Company
Precision Machine & Manufacturing

AIA Associate Member Companies (continued)

QC Graphics, Inc.
QuEST
Radant Technologies, Inc.
Relli Technology Inc.
REMEC Defense & Space Inc.
Renaissance Services
Rockwell Scientific Company LLC
Rodelco Electronics Corporation
Safe Flight Instrument Corporation
Sargent
SAS Institute, Inc.
Satyam Computer Services, Ltd.
SC Integration, LLC
SEAKR Engineering, Inc.
Sechan Electronics, Inc.
Senior Aerospace
Service Steel Aerospace
Servotronics, Inc.
Shoreline Electronics
Sigma Metals, Inc.
Spectralux Corporation
Spincraft
Spirit Electronics, Inc.
Sunbelt Industrial Supply Co. Inc.
Sypris Electronics, LLC
Tedopres International, Inc.
Telephonics Corporation
Tek Precision Co. Ltd
Texas Composite, Inc.
Thayer Aerospace
Therm, Inc.
Thermal Solutions, Inc.
Thomas James International
TMX Aerospace
Triad Design Service, Inc.
TTI, Inc.
TW Metals
Tyco Printed Circuit Group L.P.
UFC Aerospace
UGS
Universal ID Systems, Division of Commerce Overseas Corporation
Unlimited Innovations
Vaupell Industrial Plastics
Vishay
Vulcanium Metals Incorporated
WAER Systems
Welding Metallurgy, Inc.
Wems Electronics
West Cobb Engineering & Tool Co. Inc.
Wind River Systems
Windings, Inc.
Xerox Corporation
X-R-I Testing
a division of X-Ray Industries

Aerospace Industries Association
1000 Wilson Boulevard
Suite 1700
Arlington, VA 22209-3928
1-703-358-1000

www.aia-aerospace.org