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CONFLICT OF INTEREST AND THE REVOLVING DOOR

BY

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USAWC Class of 1991



U.S. ARMY WAR COLLEGE, CARLISLE BARRACKS, PA 17013-5050

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REPORT DOCUMENTATION PAGE				Form Approved OMB No. 0704-0188		
1a. REPORT SECURITY CLASSIFICATION Unclassified			1b. RESTRICTIVE MARKINGS			
2a. SECURITY CLASSIFICATION AUTHORITY			3. DISTRIBUTION / AVAILABILITY OF REPORT Approved for public release; distribution is unlimited			
2b. DECLASSIFICATION / DOWNGRADING SCHEDULE						
4. PERFORMING ORGANIZATION REPORT NUMBER(S)			5. MONITORING ORGANIZATION REPORT NUMBER(S)			
6a. NAME OF PERFORMING ORGANIZATION U.S. Army War College		6b. OFFICE SYMBOL (If applicable)	7a. NAME OF MONITORING ORGANIZATION			
6c. ADDRESS (City, State, and ZIP Code) Carlisle Barracks, PA 17013-5050			7b. ADDRESS (City, State, and ZIP Code)			
8a. NAME OF FUNDING / SPONSORING ORGANIZATION		8b. OFFICE SYMBOL (If applicable)	9. PROCUREMENT INSTRUMENT IDENTIFICATION NUMBER			
8c. ADDRESS (City, State, and ZIP Code)			10. SOURCE OF FUNDING NUMBERS			
			PROGRAM ELEMENT NO.	PROJECT NO.	TASK NO.	WORK UNIT ACCESSION NO.
11. TITLE (Include Security Classification) Conflict of Interest and the Revolving Door						
12. PERSONAL AUTHOR(S) LTC Frederick G. Fox III						
13a. TYPE OF REPORT Individual		13b. TIME COVERED FROM _____ TO _____		14. DATE OF REPORT (Year, Month, Day) 1 March 1991		
15. PAGE COUNT 18						
16. SUPPLEMENTARY NOTATION						
17. COSATI CODES			18. SUBJECT TERMS (Continue on reverse if necessary and identify by block number)			
FIELD	GROUP	SUB-GROUP				
19. ABSTRACT (Continue on reverse if necessary and identify by block number) The Department of Defense routinely finds itself coming under Congressional and public scrutiny over the "revolving door", especially in relation to defense acquisition and procurement. In spite of legislation and top level emphasis, accusations of conflict of interest stemming from this issue have increased public cynicism over the ability of American society to keep government clean. It is for this reason that an examination of the conflict of interest issue, especially as it relates to the "revolving door," is relevant. There have been many laws placed on the books to address ethics in government. The intent of much of this legislation was to keep both elected and non-elected officials accountable to the public as discretionary government increased. However, there are costs to more stringent controls and additional ethics in government laws. The question is can we reach a point of diminishing returns as additional constraints are put in place? If that is the case, and the revolving door is one such constraint, closing or even slowing the door may not necessarily produce better government in the long run. I believe that in our						
20. DISTRIBUTION / AVAILABILITY OF ABSTRACT ☐ UNCLASSIFIED/UNLIMITED ☐ SAME AS RPT ☐ DTIC USERS				21. ABSTRACT SECURITY CLASSIFICATION		
22a. NAME OF RESPONSIBLE INDIVIDUAL			22b. TELEPHONE (Include Area Code)		22c. OFFICE SYMBOL	

Block 19. ABSTRACT (Cont)

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USAWC MILITARY STUDIES PROGRAM PAPER

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CONFLICT OF INTEREST AND THE REVOLVING DOOR

AN INDIVIDUAL STUDY PROJECT

by

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AUTHOR: Frederick G. Fox III, Lt Col, USA

TITLE: Conflict of Interest and the Revolving Door

FORMAT: Individual Study Project

DATE: 1 March 1991 PAGES: 18 CLASSIFICATION: Unclassified

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SEARCHED	INDEXED
SERIALIZED	FILED
MAR 1991	
FBI - [illegible]	
By	[illegible]
Special Agent	[illegible]
Available to Office	[illegible]
Available to [illegible]	[illegible]
Not [illegible]	[illegible]
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INTRODUCTION

The subject of ethics in government and public service has enjoyed a roller coaster existence. One reason for this appears to be the American public's penchant for ignoring history and reacting with outrage, and a demand for reform, at every revelation of scandal in an administration. This emotional outburst eventually subsides as the public turns its attention to other matters perceived to be of greater importance, only to resurface during the next assault on the public interest. The fundamental issue of public service ethics confronts each administration and has remained basically unchanged.

It is the responsibility of the leaders of government and top level executives to establish the limits of acceptable behavior for their organizations. This is especially applicable to our form of government which relies heavily upon the public trust for its legitimacy. President George Bush's first executive order outlined the ethical standards he expected everyone serving within his administration to follow. He expressed his philosophy by stating "High ethical standards are central to this administration, and we will enforce them - strictly, comprehensively, fairly and to the letter of the law."¹ This philosophy provided the basic guidance to the Department of Defense (DOD) and other elements of the Executive Branch for the establishment of an ethical climate.

However, ethics in government is a very complex issue because it depends upon individual judgments made by different people in many different situations. Not all will agree to what is right and wrong

when they are confronted with new or unfamiliar circumstances. Ethics is far more than a clear compilation of regulations or laws telling people what to say and do, or what is prohibited and to be avoided. Ethics involves personal judgments that only those facing the issue can make. This is not to say that there should be no attempt to establish laws which outline personal responsibilities and provide acceptable standards of conduct. The simple truth is that laws and rules can never completely describe what an ethical person should or should not do. This is because there is a moral element of ethical conduct that cannot be legislated.

In spite of legislation and top level emphasis, conflict of interest issues have increased public cynicism over the ability of American society to keep government clean. It is for this reason that an examination of the conflict of interest issue, especially as it relates to the "revolving door," is relevant.

DEFINITION OF THE PROBLEM

The growth of government in general and the executive branch in particular has created a huge bureaucracy with ever increasing discretionary powers. This will logically increase the opportunity for public officials to use their positions to enhance their own financial position. The fact that so many decisions with far reaching and significant implications are made behind closed doors only increases the potential for promoting self-interest, or at least the appearance of self-interest. The pursuit of self-interest by public officials can destroy the public's confidence in the fairness of government decision making. It should be obvious to even the

casual observer that public respect for government and its institutions is of critical importance to a democracy.

At this point it is useful to define our terms. According to the Association of the Bar of the City of New York, conflict of interests

is a clash between two interests: one is the interest of the government official (and of the public) in the proper administration of his office; the other is the officials's interest in his private economic affairs. A conflict of interest exists whenever these two interests clash, or appear to clash.²

This is a fairly broad and generic definition whereas Edmond Beard narrowed it slightly by stating

that conflict of interest which is to be criticized normally applies to public acts benefiting private financial interests where the conflict was avoidable and where it distorted the public acts.³

The term "revolving door" refers to the phenomenon in which you have movement of government employees into the private sector and movement of private sector employees into government service. Beard's definition implies that there may be a conflict that is not to be criticized. These are the obvious and unavoidable conflicts between an official's political interests and public interests. Beard also felt that most conflict of interest issues centered on the three general areas of self-dealing by a public official, bribery, and post-government employment activities by public officials. To these we could add influence and information peddling, acceptance of

inappropriate gifts, improper outside employment, and questionable practices when dealing with one's relatives. It is important to note that the New York Bar definition called it a conflict of interest when official duties and personal economic interests clash or "appear to clash." This takes on added significance because even the appearance of wrong doing can be just as damaging to the public trust as if the act had in fact happened.

It is the area of post-government employment, or the "revolving door," that many observers feel most vulnerable to abuse and this is the area on which the remainder of this paper will concentrate.

IMPLICATIONS FOR DOD

The Department of Defense routinely finds itself coming under Congressional and public scrutiny over the "revolving door" issue especially in relation to defense acquisition and procurement. This is primarily because of the extremely large expenditures for sophisticated weapons, ships, planes, and other defense related equipment. The Congress has been particularly concerned about military officers and high ranking DOD civilian employees leaving government service and taking jobs with civilian contractors. It is feared that this situation could lead to conflicts of interest. The situation could also affect public confidence in the government by creating the perception that Defense personnel who anticipate future employment with a defense contractor may use their position to gain favor with the contractor; or that former Defense personnel might use

their contacts with former colleagues to the benefit of the contractor and to the detriment of the public interest.

The scope of the problem for the Department of Defense can be found in a 1987 General Accounting Office study which responded to a Congressional request to determine how often former DOD personnel worked for defense contractors on the same projects they worked on while within DOD. The study only focused on mid and high level personnel who left DOD during 1983 and 1984. Although none of the information was designed to identify specific legal improprieties, the information did show that some individuals leaving DOD and going to work for defense contractors may give the appearance of (1) not having acted in the best interests of the government because they viewed a defense contractor as a potential employer; (2) taking advantage of insider contacts to the detriment of the government; or (3) influencing contract decisions to obtain later employment. The study estimated that about 26 percent of the approximately 5100 former high and mid level DOD personnel had responsibilities while at DOD for defense contractors for whom they later worked. It was also estimated that about 21 percent subsequently worked on the same system, project, or program for a defense contractor that they worked on while with DOD. Finally, about 7 percent were responsible for DOD contracts that later supported their post DOD employment.⁴

ETHICS BY LEGISLATION

The beginning of the present type of statutory limitations to post government employment, specifically upon retired military personnel, was in the Naval Service Appropriation Act of 1896. A

provision of that law prohibited the payment of any appropriated money to naval officers on the active or retired lists when employed by any person or company furnishing naval supplies or war material to the government. In floor debate, Senator Bacon of Georgia discussed the confidential relationship officers held with the Secretary of the Navy and other officers and pointed out the intimate knowledge which such persons had "with reference to prices, how much they are willing to give, and what is the last limit to which they can be strained."⁵ That law remained in effect until 1935 when it was restated to make it unlawful and prohibit payment of retired pay while an officer was engaged in the selling, contracting for the sale of, or negotiating for the sale of naval supplies or war material. The first limitation for the Army appeared in 1923 in an appropriation act which prohibited the use of any money for payment to a retired officer while he was employed as a sale or contract agent for the sale, negotiating for the sale of, or furnishing to the Army any supplies, materials, lands, buildings, planes, vessels or munitions. This prohibition on retired officers was later limited to a period of two years in a 1950 change to the law.

In the post Watergate period of the 1970's there was a vast increase in interest in ethics in government which eventually resulted in the passage of the Ethics in Government Act of 1978. This law provided for financial disclosure and divestiture along with control of post-government reemployment. In addition, the Act created a new Office of Government Ethics. The intent of this and other laws dealing with conflict of interest was to keep both elected and non-elected officials accountable to the public as discretionary

government increased. In 1987, almost eight years after the passage of the ethics law, Michael Deaver was found guilty by a grand jury of three counts of perjury regarding his lobbying activities after leaving the Reagan White House. The independent counsel in the Deaver case claimed that the Ethics in Government Act had accomplished little to limit improper behind the scenes lobbying by former high level officials because it contained too many loopholes. The problem in Deaver's case was, in part, defining the "agency" for which he worked.

Fred D. Baldwin suggested in 1979 that this may have been the intent of the Office of Government Ethics' interpretation of the most restrictive portions of the law, specifically section 207 (b) (ii) of Title V. This is the section that deals with post-government employment and the very section that concerned so many top level officials when the law was passed. It basically placed a two year ban on helping or "consulting for any organization that might value relevant government experience." Many of the officials covered by the provisions of Title V were political appointees who came to government service from business, industry, universities, and the professions. They normally underwent financial and personal sacrifice while in government service. The great majority expected to return to their former employment eventually and expected the revolving door to remain open. Baldwin points out that the interpretation of the law by Office of Government Ethics lawyers shows how "lawyers verbal alchemy can transform leaden bars across a revolving door into golden turnstiles."⁶ The basic question is, the revolving door - do you slam it shut or keep it wide open?

Some would suggest that it is in the public interest for the revolving door to remain open. It raises questions of Constitutional balance, individual ambition, public and private ethics, and the need for good people in order to have good government. But, before we answer the above question, let's take a look at a few specific cases that illustrate the extremes of the matter that occurred before and after the passage of the 1978 law.

James J. Needham moved from the Securities and Exchange Commission (SEC) to the presidency of the New York Stock Exchange. On the surface, this appears to be a classic example of someone leaving a regulatory agency to a position in an industry being regulated. In 1972, he was interested in finding a more challenging job than his position with the SEC. When the president of the New York Stock Exchange wanted to retire, he inquired about Needham's interest in coming to the Exchange. Needham responded positively. Needham then immediately informed William J. Casey of his position, sealed off his office from all SEC business, ceased work, and spent several days negotiating with the Exchange. Upon completion of the negotiations, Needham was offered the presidency and immediately resigned from the SEC. By isolating himself from the SEC during his negotiations, Needham avoided any charges of violation of law.

Douglas Toms, on the other hand, illustrates a quite different approach to conflict of interest and the revolving door. He resigned as administrator of the National Highway Traffic Safety Administration (NHTSA) to become a vice president of AMF Inc, a corporation with a large recreational vehicle business. He began discussions with AMF on 7 December 1972, and visited AMF headquarters

on 27 December to discuss future plans. On January 5, 1973, AMF indicated a definite interest in Toms because of the magnitude of its recreational vehicle business. He was sent a set of employment forms on 15 January which he filled out and returned on 20 January. On 9 February Toms told AMF's chairman by phone that he would join the firm. During this time there were active contract applications pending before NHTSA from AMF. Toms never disqualified himself from those issues. In fact, in early March Toms directed an assistant to prepare a status report that included several decisions improving AMF chances of obtaining a NHTSA contract. His last day on the job was March 30 and his first day at AMF was Monday, April 2.⁷

Several other examples from within the Department of Defense can be cited as instances where officials, both military and civilian, have achieved personal gain as a direct result of their previous government positions. Cases like those of LT. General Kelly Burke and Mary Ann Gilleece demonstrate revolving door conduct which lead to charges of conflict of interest and ethical misconduct. In the early 1980's, General Burke managed Air Force research, development, and procurement activities. He was involved in source selection, and helped decide whether to buy the F15 and F16 fighters and the B-1B bomber. In 1982, he left the Air Force and formed a consulting firm with two other retired general officers whose clients included six of the ten biggest defense contractors. Ms. Gilleece was a Pentagon senior executive responsible for supervising DOD procurement policy. In 1985, she wrote to Westinghouse and several other contractors, while still in her DOD executive position, offering to work for them when she left government service. She couldn't see anything wrong in

her actions and stated, "I have never used Department of Defense stationery to solicit future business."⁸ Congressional attention resulted in her ultimate dismissal. The unfortunate effect of acts like those cited above is that everyone becomes suspect and is treated like a thief.

There are many other cases available for review from both within and outside of DOD. Some blatantly illegal, as in the Toms' case, others legal but of dubious circumstances. They all tend to illustrate the importance of the public's impression of the way our public officials leave their positions and return to the private sector.

There is little debate that there are costs to more stringent controls and additional ethics in government laws. Are the costs worth it and will tougher laws and greater ethical constraints necessarily produce better government? It is both philosophically and politically expedient to link the highest standards of ethical conduct with the highest standards of good government. To be sure, I have already stated that the desire for ethical conduct in government affairs is essential to maintain the public trust and confidence in our democracy. But, can we reach a point of diminishing returns as additional constraints are put in place? If that is the case, and the revolving door is one such constraint, closing or even slowing the door may not necessarily produce better government in the long run. Of course, the issue would be totally academic "if a person is monastic in his inclinations, has few personal needs outside his work, takes a self imposed vow of poverty, renounces his worldly possessions, and has no family or an extremely supportive one..."⁹

But, of course, there is no such ideal or perfect public servant and we must constantly judge between a set of existing and often conflicting values. If it is important to have a stream of new people with new ideas coming into government, some would argue that we cannot require a promise that they remain for life in the name of ethics and expect many to come in. It may, therefore, follow that ethics-in-government laws, as they relate to the revolving door, could become too ethical.

The laws would not be too ethical if the avoidance of any appearance of conflict of interest was more important than all other values. This deontological approach with its categorical imperative would work if a clear consensus were reached that this one value was higher than all others. This value would then be pursued at their expense. However, there is no single value in American society that all will agree would qualify as the categorical imperative. This is the reason that present laws can be the constant topic for review and revision in a democracy. This is not to say that the noble goal of ethical conduct in performance of government service should be forgotten, diminished, or abandoned.¹⁰

In further examining the revolving door, it is obvious to me that it is undesirable to have a career bureaucracy at the higher levels of the executive branch. For all of its ills, our democratic system demands some degree of political responsiveness at the policy making level.

For more than one hundred and fifty years the United States has had a revolving door system of government service. Political and non-political appointees come and go every four to eight years as new

administrations are elected and take office. This is a fact of the U.S. political system not only at the highest cabinet level with their close political and policy advisers, but applies to thousands of Americans with numerous skills from manpower specialists to rocket science. We have done this with the intent to make government more responsive to politics and the will of the people. We have also done this to provide large numbers of highly qualified citizens the opportunity to contribute their skills to government and provide government service the benefit of fresh perspectives.

If a career bureaucracy is to be rejected at the higher levels, then it logically follows that public service for less than a lifetime is to be encouraged. It is also understandable that people qualified and capable of many significant contributions to quality public service have other alternatives to choose from. Government must therefore compete with the private sector for these people. Because we cannot force qualified people into public service, their participation must be voluntary. Laws pertaining to post-government employment are obviously part of the bargain. Although laws do not by themselves create virtue, they are necessary to provide reference points for the honest citizen by establishing minimal standards of conduct in wide categories of situations. If these laws are perceived as being too restrictive, then no deal will be made and the government does not receive the benefit from the capabilities of the people it needs and the public interest is not served.

This dilemma can be further clarified by reviewing some of the debate in Congress prior to the passage of the Ethics Reform Act of 1989. The Office of Government Ethics provided the following

statement to the Congress regarding the policies that should form the basis for proper post employment proscriptions:

Post employment proscriptions are a necessary tool in any effective government ethics program. For these proscriptions to be appropriate and to withstand challenge, they must delicately balance the competing interests of the government and the interests of the individual. Traditionally, the government has an interest in protecting the public from the misuse of confidential information by a former employee gained in the course of government employment and, for an appropriate period of time, the use of personal influence gained because of a past high level position in the government. The government also has an interest in seeing that the proscriptions attaching to post government service are not so onerous as to discourage highly qualified people from entering government service. Both of these interests are important to protect regardless of the branch of government an individual may serve and regardless of whether a former employee is compensated for his post government activities.¹¹

I stated earlier that a case can be made for the notion that ethics laws can be so restrictive as to be counter to the public good. In 1989 two high ranking NASA officials resigned their government posts. They left because of impending legislation that they perceived would have prevented all reasonable employment options in which they may be interested in after leaving government service. Critics to those who call for more and more legislation to dictate

ethical conduct believe that the wrong kind of signal is being sent. They believe that this message of a lack of trust in our public servants is wrong and not supported by the facts. This message will have a long term negative impact on the ability to recruit top college graduates for the government service and to fill critical appointive positions.

It can also be argued that critics of the revolving door are missing one important benefit to the government and the nation at large. The twenty-five or thirty years of experience, education, and expertise developed during someone's career is a unique asset that should be used to increase the government's effectiveness in providing public service. The skills, talents, and experience represented by retired military and government civilians should be channeled to support the public welfare and not thrown away as suspect or damaged goods.

On November 23, 1988, President Ronald Reagan vetoed the Post Employment Act of 1988. His Memorandum of Disapproval clearly articulated the belief that not all ethics laws are good. His message stated that public service is a public trust that demands high and exacting standards of conduct which requires far-reaching restrictions to insure that standards are always met. However, he felt that the final provisions of the bill were poorly drafted, would have applied unevenly, and would discourage from government service America's best talent because of the unfair burdens it would impose. He believed the bill was flawed, excessive, and discriminatory.

President Reagan stated that it was already difficult to recruit talented people into the senior ranks of government. He feared that

the Bill would have made former senior Federal employees unemployable in the private sector after their government service. This would have caused many of the most talented to never sign up to serve their country, and their country would be the worse for it.¹²

ALTERNATIVES

I have attempted to demonstrate that it is in the interest of good government to have a steady stream of qualified individuals from the private sector performing public service. I have also concluded that there are barriers to government service, the ethics-in-government laws being such a barrier. I will now turn briefly to a few ideas concerning possible changes to the barriers to entry into and exit from government service.

The financial disclosure portion of the current Ethics in Government Law is one area that should be revisited. The information that must be disclosed is understandable because the government should be able to make a determination of the existence, or the appearance, of conflict of interest. However, I am not sure that it is necessary to make this information public. The fundamental interest of the government would be served if the information were reviewed by an appropriate government agency which would then take whatever action deemed necessary. The interests of the media and some of the public would not be met, but public reporting without public disclosure seems to be a safe middle ground. The counter argument is that the public and the media help to take the place of a large bureaucracy to examine the financial disclosure reports. The very fact that they may be examined becomes a deterrent to

falsification. In the final analysis, a desire to preserve privacy concerning personal affairs is understandable, and if this interest and the interest of the government can be accommodated, they should be.¹³

A portion of the problem that arises with respect to ethics legislation, especially concerning post government employment and recruitment/retention of talented people, is that it must be considered in the context of all things happening in relation to public service. This is particularly true in terms of retention and recruitment of highly skilled scientific and technical people. The existence of double-dipping legislation for retired military officers and the pay cap are significant problems and effectively discourage those who can earn a good deal more with their scientific and technical credentials on the outside. If you add a large degree of restriction on post-government employment by people who are very much in demand by the private sector, you create a situation in which the Federal Government makes itself an unattractive employer. This is in addition to giving the impression that once hired by the Federal Government you are stuck.

CONCLUSION

This brings us back to the basic question concerning conflict of interest and the revolving door - should it be closed or greased? It cannot be ignored that most observers think the biggest problem in conflict of interest lies in employment after government service. Some of the problems may be solved by slight modification of existing laws, or more strict enforcement of existing ones. Some of the

problems may even be solved by instituting methods for selecting better people. I do not believe the solution lies in placing even more barriers to post public service employment. Americans want to believe that there are people who view public service as a sacred trust as opposed to a road to personal fortune. They are even willing to hold public officials to a standard far higher than they themselves are willing or capable of meeting. There will be times when this trust will be violated and those failures should be dealt with as they occur. There is no fool proof method of predicting which official will place self-interest for economic gain ahead of the public good. "The trick is to get the least expensive, most effective, most impartial, most wise, and least corruptible government."¹⁴

In summary, the revolving door is not the problem. As outlined above, there is an honorable tradition in this country of people coming into government service and later returning to private life. In our governmental system, the revolving door is crucial in facilitating the transition of power from one administration to the next. The involvement of American citizens as temporary public servants strengthens self-governance and, even more important, democracy itself.

The examination of this issue has led me to believe that the answer really lies somewhere on the continuum between the categorical imperative and the teleological extreme of relativity. You cannot proscribe a set of rules that will govern our public official's every act as he uses his discretionary authority. On the other hand, the public cannot give up all constraints in favor of some mystical

"philosopher kings" holding public office who would always act in the public interest. The bottom line is that we must allow an area along this continuum for our public officials to operate and exercise reasonable ethical autonomy. This is not a line that is drawn, but a zone in which to operate.

In his psychological approach to the study of ethics, Dr. Lawrence Kohlberg defined six stages of development of moral thought. These started at stage one where obedience to rules and punishment avoidance were the basis of decision. The highest stages are characterized by conformity to standards agreed upon by the whole society and where right is defined by the decision of conscience in accord with these ethical principles. The true challenge is to try to fill as many public service positions as possible with individuals that operate at stages 5 and 6 of Kohlberg's model for the development of moral thought.

ENDNOTES

1. Donald J. Atwood, "Living up to the Public Trust", Defense 90, July/August 1990, p. 10.
2. City of New York, Association of the Bar, Special Committee on the Federal Conflict of Interest Laws. Conflict of Interest and the Federal Service, p. 3.
3. Edmond Beard, "Conflict of Interest and Public Service," in Ethics, Free Enterprise, and Public Policy, ed. by Richard T. DeGeorge and Joseph A. Pichler, pp. 233-234.
4. U.S. General Accounting Office, DOD Revolving Door: Post DOD Employment May Raise Concerns, p. 10.
5. U.S. Congress, House, Subcommittee for Special Investigations, Employment of Retired Commissioned Officers by Defense Department Contractors, p. 3.
6. Fred D. Baldwin, "Conflict of Interest: A Necessary Good," American Spectator, June 1979, p. 26.
7. William J. Lanoutte, "The Revolving Door: It's Tricky to Try to Stop It," National Journal, 1977, p. 1798.
8. Michael A. Cravens, The Revolving Door: Are Our Ethics Showing?, p. 1.
9. Ann Marie Donahue, ed. Ethics in Politics and Government, p. 80.
10. Ibid., p. 81.
11. U. S. Congress, House, Committee on the Judiciary, Subcommittee on Administrative Law and Governmental Relations, Post-Employment Restrictions for Federal Officers and Employees, p. 159.
12. Ibid., p. 376.
13. Donahue, p. 82.
14. Beard, p. 245.

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