Public Service by Public Servants

Lisa G. Lerman

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PUBLIC SERVICE BY PUBLIC SERVANTS

Lisa G. Lerman*

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America today needs more from the legal profession. At a time when most of our nation enjoys an historic level of prosperity and comfort, we must devote special attention to those living on the edge, those lacking adequate food or shelter, those addicted or mentally ill, those whose neighborhoods have been decimated by crime and decay.

George Bush

When compliance with the law becomes mainly a matter of form, the law is made to appear ludicrous, legal administration is undermined, the underlying policy of the law may be subverted, and the most conscientious bear the heaviest burden. And it is usually a sign that the law is out of touch with reality.

I. INTRODUCTION

Lawyers have a professional duty to provide service to the poor, or to engage in other public service activities. The ethical rules always have encouraged such service activities; some jurisdictions are beginning to impose mandatory duties. The federal government, however, heavily restricts the outside activities of its attorneys; existing law governing these lawyers operates to discourage voluntary service to those in need.

One barrier is 18 U.S.C. section 205, which prohibits federal government lawyers from acting as agent or attorney in any matter in which the United States is a party or has a direct and substantial interest. The statutory barrier is a historical accident resulting from

contemporary application of language drafted in the mid-nineteenth century to address other problems. Other barriers are imposed by regulations promulgated by the Office of Personnel Management and other agencies, and by court and agency decisions that restrict the use of government time and resources for pro bono work. Some of these are the result of an effort during the Reagan administration to scale back services to poor people. The various barriers prohibit some pro bono work and set bureaucratic obstacles to the performance of permitted pro bono work. Despite these problems, a small number of federal government attorneys contribute time and effort to public service beyond the time devoted to their government jobs.

The significant question is not the technical one of whether government service satisfies the duty to do pro bono work, but whether, as a matter of public policy, the federal government should prohibit, permit or encourage its attorneys to donate some services to indigent individuals or groups who need lawyers, or to participate in other public service activities.

To ensure that the various missions of the federal government are accomplished, the government must prohibit its attorneys from engaging in outside activities that conflict, temporally or substantively, with their official responsibilities. However, the government also should seek to avoid overbroad restrictions on the activities of its employees, and should encourage public service activities by all Americans, including government employees. Therefore, the government should permit and even encourage government lawyers to engage in non-conflicting public service activities.

The need for services is an important reason to allow pro bono

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4. See infra notes 195-274 and accompanying text.
5. It might be urged that the federal government should require all of its attorneys to undertake some pro bono representation, and that, absent a requirement, too few lawyers will do pro bono work to provide any significant amount of service.

While requiring pro bono assistance undoubtedly would produce much more public service than a permissive rule, at the present time it would be an unrealistic objective. The Bush administration appears to be more sympathetic to the needs of the poor than the Reagan administration, but any mandatory pro bono proposal nevertheless would generate immense controversy.

A more constructive approach to the question at the present time is to examine whether the current barriers to pro bono assistance are justified and, if not, to urge that lawyers should not be constrained from doing public service simply because they are employed by the federal government. If the administration wishes to encourage volunteer service (as is suggested by statements like the one by the President quoted at the beginning of this article), articulated government policy should encourage federal government lawyers to undertake permissible pro bono work.
service. Most poor people who need lawyers are not represented. Esther Lardent, an expert on lawyer pro bono work, reports that studies of unmet legal needs "consistently find that only between 15-20% of the critical needs of low income persons presently are being met."6 A 1988 survey in Maryland indicated that a low-income household typically experiences over three legal problems each year.7 Legal services programs are able to assist less than one fifth of those in need.8 The A.B.A. Journal reported that Legal Services lawyers represent only 6.1 percent of indigents who need assistance; the private bar involvement program provides representation for .7 percent of those in need; 93.2 percent of needed legal services are not performed by anyone.9

While most poor people who need lawyers are unrepresented, public funding for legal services has been cut in recent years, making the problem of unmet needs even more acute. From 1981 to 1989, the funding for the Legal Services Corporation was reduced by forty percent per capita (adjusted for inflation).10 And despite frequent encouragement to do pro bono work, most of those in private practice provide little or no service without pay.11

6. Lardent, Mandatory Pro Bono in Civil Cases: The Wrong Answer to the Right Question, 49 Md. L. Rev. 78, 85 n.22 (1990) (citing CIVIL LEGAL SERVICES COMMISSION, NORTH DAKOTA SUPREME COURT, NORTH DAKOTA TRIAL LAWYERS’ ASSOCIATION, A WORKABLE PLAN FOR CIVIL LEGAL SERVICES FOR THE POOR: A PRACTICAL, EQUITABLE AND POLITICAL PROPOSAL FOR BAR LEADERSHIP (1988); COMMITTEE TO IMPROVE THE AVAILABILITY OF LEGAL SERVICES, PRELIMINARY REPORT TO THE CHIEF JUDGE OF THE STATE OF NEW YORK (1989)).

7. Deborah Rhode reports that “the Legal Services Corporation projected that persons below the official poverty line would encounter between 6 and 132 million legal problems in 1980, while Corporation-funded offices could handle at most 2 million matters.” Rhode, Why the ABA Bothers: A Functional Perspective on Professional Codes, 59 Tex. L. Rev. 689, 700 (1981).

8. Id. at 6.

9. Born, Serving the Poor, A.B.A.J., Mar. 1988, at 144 (estimating that there were 18,452,665 unserved legal problems, that 1,197,668 cases were handled annually by legal services lawyers, and that 141,667 cases were handled through the private bar involvement program). These figures appear to include only civil cases.


11. In one 1975 survey, three fifths of the lawyers surveyed spent less than five percent of their billable hours on pro bono work. Half of this group did no pro bono work. Most of the pro bono work that was done was for relatives and friends. Most of the rest was done for organizations that serve middle class people. Handler, Hollingsworth, Erlanger & Ladinsky, The Public Interest Activities of Private Practice Lawyers, 61 A.B.A.J. 1388-89 (Nov. 1975).
These statistics compel the observation that legal services for the poor cannot be provided effectively by pro bono services. The government must assume responsibility for providing free lawyers to the poor, and the funding for such lawyers must be greatly increased. At present, legal services lawyers cannot even staff all of the emergency cases in which the safety or the health of a client is threatened. The statistics place pro bono activity in a different perspective; the thousand points of light may help many individuals, but in this arena they cannot begin to solve a major social problem.

The need for services is so enormous that any effort to encourage government lawyers to do pro bono work may not even make a dent in the existing need for legal services.\(^\text{12}\) In 1985, there were about 20,300 lawyers employed by the federal government; this group constitutes only 3.1 percent of the lawyers in the United States.\(^\text{13}\) At present, it appears that only a small number of federally employed lawyers wish to do pro bono work.\(^\text{14}\) Even if the number increased, each lawyer is likely to contribute only a small number of hours of service. The overall impact on the problem of unmet needs is likely to be statistically invisible.

If the government lawyers cannot help very many poor people, why bother encouraging pro bono work? In an environment of such tremendous need, any unnecessary barrier to efforts to serve the disadvantaged should be removed. Suppose that ten percent of the federal bar represented one client per year. If (for purposes of analysis) each handled one child support enforcement matter, the possibility of adequate financial support would increase for thousands of American children. Perhaps the numbers would be insignificant, but the benefit to those assisted would be immeasurable.

A second reason to encourage public interest work by government lawyers is to assist the professional development of the individual lawyers. Most federal agencies have specialized functions. Their

\(^{12}\) See Rhode, supra note 6, at 698 (criticizing the 40 hour a year proposal in the original Model Rules).

\(^{13}\) B. CURRAN, SUPPLEMENT TO THE LAWYER STATISTICAL REPORT: THE U.S. LEGAL PROFESSION IN 1985 (1986).

\(^{14}\) Most of the lawyers I interviewed reported that they knew at most one or two other federal government lawyers who had ever done any pro bono work. I called several organizations that distribute pro bono work to volunteer attorneys; when asked whether they had volunteer attorneys who worked for the federal government, they reported at most a few participants. Perhaps if the barriers to participation were reduced, more lawyers would undertake pro bono assistance, but it is unlikely that the numbers would change dramatically absent a mandatory pro bono requirement.
attorneys work in narrow areas of law. Encouraging them to take on limited outside activities consistent with their official responsibilities would allow them to learn about other areas of law or types of practice. Pro bono work may offer better opportunities for litigation experience than exist within their own agencies. The attorneys would grow as professionals from contact with other institutions and with other legal problems than those presented in their daily work.

The exposure that government lawyers would gain through pro bono activities would encourage a greater commitment to public service, by asking each attorney to think about how he or she might contribute to solving a problem in the community. This might make continued public service activity more likely even among those lawyers who move into the private sector.

A third reason that the federal government should permit pro bono work by government attorneys is that a more permissive policy would offer a significant improvement in work conditions at a negligible cost.\textsuperscript{15} Many lawyers regard opportunities to do public service work as an important fringe benefit of a job.\textsuperscript{16} It is a modicum of professional freedom, an opportunity to pursue a public issue of personal concern. The permission to engage in such activities is likely to increase the job satisfaction of government lawyers, and may increase the length of their government service. Lawyers are more useful to their institutions if they have substantial experience in the performance of their duties. Rapid turnover has high economic costs because of time lost in training and expertise lost by departure of expe-

\begin{footnotesize}
15. I have not attempted to estimate the actual cost of the recommendations that conclude the report. The assertion that the cost is low assumes that government lawyers would not take on work that would interfere with or increase the cost of their performance of their official responsibilities. It assumes that they would be able to make limited use of government resources (desks, phones, computers, paper, pens, etc.) but that no significant expenses would be paid out of taxpayer dollars.


\begin{quote}
I think every major law firm today has come to recognize that the graduating lawyers are interested in having the opportunity of providing pro bono service to the public. We, in turn, have found that by encouraging our attorneys to engage in pro bono activities, and giving them the opportunity to do so, helps our recruitment and retention of young lawyers. I know the same would be true of Government service attorneys.
\end{quote}
\end{footnotesize}
rienced employees. In the legal profession, private sector wages have far outstripped government salaries; the government faces obstacles in attracting and keeping qualified lawyers. A more permissive pro bono policy is one step that the government can take to make public law careers attractive.

A fourth reason to encourage pro bono work by federal government lawyers is that the federal government should seek to create within itself a model for the private bar of public-spirited law practice. Attorneys in private practice have difficulty fitting pro bono work in with their other responsibilities, especially if their law firms are not supportive toward attorneys who make the effort. Many firms do not encourage pro bono efforts, because usually pro bono hours displace billable hours. The possibility of institutional support is much greater in non-profit organizations.

A final reason to permit pro bono work by government attorneys is that to do otherwise might infringe on the attorneys’ rights of free expression or free association, and the rights of their hypothetical clients.

17. Cf. S. Kelman, Making Public Policy: A Hopeful View of American Government 263 (1987) (observing widespread public-mindedness within the government, and urging that “government is seen as an appropriate forum for the display of the concern for others that so many people wish to show”).

18. Interviewed one lawyer in private practice who had been ordered by a partner in his law firm to spend the entire day before a trial in a pro bono case working on a matter for a paying client. This deprived him of the opportunity to do essential preparation for trial in the pro bono case. He was distressed about the low priority accorded to non-paying clients by his firm. Interview with anonymous lawyer (summer 1988)

Some private law firms offer institutional support for pro bono work by counting pro bono hours as part of a lawyer’s total number of billable hours, by hiring staff to assist and coordinate pro bono efforts, and by establishing a policy that clients are entitled to the same quality of service whether they are paying for representation or not. See Lindon & Hoffman, Pro Bono: Can it Survive the Bottom Line?, WASH. LAW., Sept.-Oct. 1990, at 26.


20. See Lardent, supra note 6, at 90-91 (discussing the economics of law practice for private law firms).


In In re Primus, 436 U.S. 412, 432 (1978), the Supreme Court found, in a different context, that a lawyer’s offer to represent a client for the purpose of furthering political and ideological goals was a constitutionally protected associational activity. There the Court stated that “broad rules framed to protect the public and to preserve respect for the administration
Another question raised by current statutory restrictions is whether federal government lawyers should be permitted to represent indigent clients in matters in which the United States has an interest, but that do not pose a conflict of interest with the attorneys' official duties. One reason to allow such work is that such representation usually assists in the efficient operation of some other organ of the federal government. Federal administrative and judicial officers usually prefer that claimants and litigants be represented by counsel so that proceedings move more quickly and smoothly. When the litigant has counsel, the judge need not spend time explaining the process to the claimant. The determination of facts is easier when a professional presents a case. If some federal government attorneys wish to do pro bono work, it is arguably a waste of valuable resources for the government to disallow them from representation that would assist another government agency.

There are potential problems with allowing government lawyers to engage in pro bono work. One is that pro bono work may present conflicts of interest with government lawyers' official duties. While present law may sweep too broadly in its prohibitions, some conduct would pose real conflicts of interest and must be prohibited. Some federal managers believe that the current rule prohibiting nearly all pro bono representation against the United States should be maintained because of the difficulty of anticipating conflicts in some cases and the time required to screen for conflicts. In certain sections of the Justice Department and in some other agencies, lawyers work on matters that affect many other agencies. These lawyers should be precluded from a wider range of pro bono activity than many other lawyers. Some representation against the government might result in the making of law that would have a broad impact on the government and might involve an unanticipated conflict.

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22. As discussed infra notes 71-99 and accompanying text, what is a conflict of interest depends on how the client entity is defined, so this question is somewhat circular.


24. This concern was raised in discussions of pro bono policy by members of ACUS during meetings in 1990.

of justice' must not work a significant impairment of 'the value of associational freedoms.' The court found that a letter offering representation to a prospective client by an ACLU lawyer was protected speech. Id. at 425. This decision suggests that some lawyering activity is protected by the first amendment. The question is whether this continues to be the case if the lawyer in question works for the federal government and the activity is outside of her normal responsibilities.
The question underlying the concern about conflicts of interest is whether pro bono service will harm government interests. A traditional approach is to regard the government as a monolithic entity with one coherent set of interests, and to regard any adversity to the government as against the government's interest. A more realistic model of the federal government must recognize the diverse and often conflicting interests among parts of the government. Conflicts between agencies and within agencies occur frequently, and are an inevitable product of the process of policy making. Those who single out pro bono work as a source of serious conflicts may be forgetting that our government exists in part to help people in need, and that poor people are not the adversaries of the federal government.

If government lawyers engage in some outside activities, care must be taken that those activities do not interfere with their official duties. A final problem presented by a permissive pro bono policy is the need to protect federal resources, both personnel and other resources, from unauthorized use. The government lawyers whom the author interviewed about their pro bono activities consistently reported no problems with impairment of their primary professional activities, and that they used only de minimis amounts of government resources.

A more flexible policy on pro bono work will yield significant benefits to society, the bar, government attorneys and their agencies. Possible harms can be avoided by developing guidelines and by continuing to require government lawyers to consult with their supervisors about anticipated projects.

This article reviews current federal policy on pro bono work. Part II examines the duty imposed on lawyers to serve the poor, and the application of that duty to federal government lawyers. Part III discusses the question of who is the government lawyer's client in order to identify pro bono activities that present conflicts of interest and, therefore, should be prohibited. Part IV looks at the current statutory restrictions on pro bono work by federal government lawyers, and reveals the essentially accidental genesis of the current

25. Cf. G. ALLISON, THE ESSENCE OF DECISION (1971) (describing three models of government decisionmaking, the first of which is to regard the government as a single unified entity).

26. See infra notes 299-314 and accompanying text (setting forth recommendations on screening procedures, leave policy, resources and support staff).

27. See infra notes 33-70 and accompanying text.

28. See infra notes 63-99 and accompanying text.
II. THE DUTY TO DO PRO BONO WORK

A. Lawyers' Duty to Do Pro Bono Work

For at least the last 150 years, some lawyers have urged that each member of the profession has an obligation to provide services to those who cannot afford to pay. In 1908 the ABA adopted a recommended oath of admission to practice for lawyers, including a promise that each lawyer "will never reject, from any consideration personal to [himself], the cause of the defenseless or oppressed." The Model Code of Professional Conduct, adopted by the ABA in 1970, stated that the "basic responsibility for providing legal services for those unable to pay ultimately rests upon the individual lawyer . . . . Every lawyer, regardless of professional prominence or professional work load, should find time to participate in serving the disadvantaged."

In 1975 the ABA House of Delegates passed a resolution that "it is a basic professional responsibility of each lawyer engaged in the practice of law to provide public interest legal services". This poli-
cy was then expressed in the ABA Model Rules of Professional Conduct, which adopted by the ABA in 1983, which provide that “[a] lawyer should render public interest legal service,” and then define public interest legal service as “professional services at no fee or a reduced fee to persons of limited means or to public service or charitable groups or organizations, by service in activities for improving the law, the legal system or the legal profession, and by financial support for organizations that provide legal services to persons of limited means.” While this rule presents a vigorous endorsement of the notion that all lawyers should do pro bono work, it falls short of requiring pro bono service.

Another Model Rule addressing pro bono responsibilities is Rule 6.2, which imposes a duty “not [to] seek to avoid appointment by a tribunal to represent a person except for good cause . . . .” This

37. The Model Rules were written under the sponsorship of the American Bar Association and were presented to the states for possible adoption in 1983. To date, they have been adopted by approximately thirty states. Fewer than twenty states continue to use some version of the Model Code of Professional Responsibility, which is the predecessor of the Model Rules. The Model Code was approved by the ABA in 1970, and had been adopted in all but a few states by 1973. S. GILLERS & R. SIMON, REGULATION OF LAWYERS, STATUTES AND STANDARDS vii, 201 (1989).


39. The initial exhortation of this rule says “should” rather than “shall”, the latter being the word used in the Model Rules to denote a mandatory duty. See Id. at 7 (noting the distinction between imperative and permissive language). The rule appears to encourage but not require the performance of pro bono work by members of the bar. The absence of the word “shall” signifies that violation of this rule would not be a basis for disciplinary action. The comments following the rule explain that “[t]his Rule . . . is not intended to be enforced through disciplinary process.” Id. at Rule 6.1 comment.

The original draft of the Model Rules proposed a mandatory annual minimum commitment of forty hours of work for no pay or reduced pay. Even this modest requirement was met by vehement opposition by the bar, so it was deleted and an annual reporting requirement was substituted. Rhode, supra note 12 at 698.

The MODEL CODE likewise imposed no mandatory duty to do pro bono work, but urged that each lawyer had a responsibility to and should “participate in serving the disadvantaged.” MODEL CODE supra note 35 at EC 2-25 (1986); see id. at EC 8-9 (noting that a lawyer’s role in the advancement of the legal system entails making needed changes and improvements where necessary); id. at EC 8-3 (stressing the importance of the availability of lawyers to effect the fair administration of justice).

40. MODEL RULES supra note 38, at Rule 6.2 (1989). In Mallard v. District Court, 490 U.S. 296 (1989), the Supreme Court interpreted a federal statute allowing courts to appoint attorneys to represent indigents, in response to a lawyer who rejected such an appointment. The Supreme Court found that the statute allowed the court to request, but not to compel,
rule states that it is not a violation to refuse to accept an appointment as counsel if accepting the appointment would violate the Model Rules or other law.41

The Model Rules, like the earlier ABA resolution, define pro bono work to include a wide range of service activities, including representation of indigents and bar association work.42 The new District of Columbia Rules of Professional Conduct, in contrast, define pro bono publico service as the representation of those who are unable to obtain counsel, or the support of organizations that provide such representation.43 The D.C. definition reflects a judgment that the need for services to unrepresented indigents is so great that each attorney should undertake representational work on a pro bono basis every year.44

Much is said and written about the supposed duty to do pro bono work,45 but relatively little service to the poor is provided by members of the bar other than those few who work for legal services organizations.46

41. For example, the appointment of a federal government attorney to represent an indigent criminal defendant would contravene 18 U.S.C. section 205 (1988). MODEL RULES OF PROFESSIONAL CONDUCT Rule 6.2 (1989) also provides that a lawyer may decline an appointment when acceptance would result in an unreasonable financial burden, or when the client or cause "is so repugnant to the lawyer as to be likely to impair the client-lawyer relationship or the lawyer's ability to represent the client."

42. President Bush appears to advocate an even broader definition, including non-legal with legal service. See Bush, supra note 1, at 9 (exhorting lawyers to implement a comprehensive regime of public service).


44. Id. The comments to Rule 6.1 provide that lawyers should accept one court appointment each year or provide 40 hours of pro bono publico legal service, or "when personal representation is not feasible, contribute the lesser of $200 or 1% of earned income to a legal assistance organization which services the community's economically disadvantaged." Id. at comment 5.

45. Compare Christensen, supra note 39 (advocating a mandatory system of pro bono service) with Shapiro, The Enigma of the Lawyer's Duty to Serve, 55 N.Y.U. L. REV. 735 (1980) (arguing that the pro bono responsibility should derive solely from the ethical aspirations of the attorney).

46. See supra text accompanying notes 7-10. In Washington, D.C., for example, over forty percent of 800 large firm lawyers surveyed by the Washington Council of Lawyers performed twenty or fewer hours of pro bono service (which was broadly defined) each year. Torry, D.C. LAWYERS LAG in Work for Poor, Wash. Post, October 1, 1990, at D1, col. 3. The results of this survey are reported in more detail in Lindon & Hoffman, supra note 18. See Handler, Hollingsworth, Erlanger & Ladinsky, supra note 11 at 1388. (arguing that the bulk of the private bar's pro bono work comes not from large firms, but from solo practitioners, and that this contribution is rarely aimed at challenging the status quo).
B. Federal Government Lawyers’ Duty

The ethical rules encouraging lawyers to do pro bono work state no exception for government lawyers. At several points the comments specifically note that all lawyers are subject to these duties. The Federal Bar Association’s Model Rules of Professional Conduct for Federal Lawyers\(^\text{47}\) offer guidance to lawyers working for the federal government. These rules, however, have only advisory status,\(^\text{48}\) unlike the ethics codes adopted by each state, which have the force of law. The Model Rules of Professional Conduct for Federal Lawyers track the language of the ABA Model Rules on pro bono assistance,\(^\text{49}\) except that the relevant rule also includes a provision urging government lawyers to provide pro bono assistance in a manner that comports with applicable law.\(^\text{50}\)

The D.C. Rules of Professional Conduct are of particular importance to federal government attorneys, because over half of the lawyers employed by the federal government practice in the District of Columbia. The D.C. Rules explain that the obligation imposed by Rule 6.1 is not “intended to place any obligation on a government lawyer that is inconsistent with the laws such as 18 U.S.C. sections 203 and 205 limiting the scope of permissible employment or representational activities.”\(^\text{51}\) To the extent not precluded by other law, the rule is intended to apply to lawyers in government as well as those in private practice.

Despite the relative clarity of the rules, there has been some disagreement in the legal community about whether federal government lawyers are subject to the rules, and, if so, whether federal government lawyers’ duty to do pro bono work is satisfied by their performance of their regular responsibilities.

The first of these questions asks who has the authority to regulate lawyers who are employed by the federal government. The courts traditionally have asserted the exclusive authority to regulate the prac-


\(^{48}\) Id. at 1 (stating that “[t]he FBA is not empowered to discipline members or enforce these Rules”).


\(^{50}\) FBA Model Rules, supra note 47, at Rule 6.1(b) (1990).

tice of law under the inherent powers doctrine,\textsuperscript{52} and have sometimes struck down legislation regulating the conduct of lawyers as an interference with their exclusive authority.\textsuperscript{53} Under this doctrine, lawyers are subject to the rules of the court that issued their license to practice law, regardless of who employs them.\textsuperscript{54} The highest court of each state ordinarily adopts ethical rules that govern members of the state bar, and determines standards for admission to the bar.\textsuperscript{55} The federal courts formally have separate ethical rules and rules on admission to practice, but on both matters they tend to adapt the standards set by the highest court of the state in which each federal court is located.\textsuperscript{56}

A federal government lawyer cannot practice law unless he or she is licensed by a state bar.\textsuperscript{57} In most states, admission to practice is predicated on obtaining a law degree, passing a bar exam, and satisfying the bar as to one's moral character. A lawyer admitted to the bar commits herself to comply with the ethical rules promulgated by the state in which she is admitted. The regulatory structure contemplates no exemption for those employed by the federal government.

The proposition that government lawyers are governed by the state codes of ethics was challenged by Deputy Attorney General Harold Christensen in 1988.\textsuperscript{58} In comments on the proposed new ethics code for the District of Columbia, Christensen took the position that the federal government has the exclusive authority to regulate its lawyers, and that the ethics rules were merely advisory.\textsuperscript{59} Other federal officials took the same position. Robert Jordan, past president of the D.C. Bar, however, characterized Christensen's position as "hogwash."\textsuperscript{60} Christensen's effort to place federal government lawyers

\textsuperscript{52} See generally WOLFRAM, MODERN LEGAL ETHICS 22 (1986).
\textsuperscript{53} Id.
\textsuperscript{54} See id. at 31 (discussing regulation by trial courts); see also The Judiciary Act of 1789, 28 U.S.C. § 1654 (1988) (authorizing federal courts to regulate lawyers who appear before them).
\textsuperscript{55} See WOLFRAM, supra note 52, at 24.
\textsuperscript{56} Id. at 24, 58.
\textsuperscript{57} See E. FARNSWORTH, AN INTRODUCTION TO THE LEGAL SYSTEM OF THE UNITED STATES 21 (1983) (discussing the regulation of the legal profession); D. MELLINKOFF, LAWYERS AND THE SYSTEM OF JUSTICE 132 (1976) (discussing federal practice requirements).
\textsuperscript{58} Pendlebury, Bar Agencies Haggle over Defining 'Client': For Whom Does the Government Lawyer Toll?, Legal Times, Nov. 14, 1988 at 17.
\textsuperscript{59} Id.
\textsuperscript{60} Id.
outside of the structure that governs all lawyers is inconsistent with all of the ethical rules discussed earlier in this section.\textsuperscript{61}

Another question raised by the officials in the Reagan administration is whether the duty to perform pro bono work is satisfied by the federal attorneys' performance of their regular responsibilities. In 1985 the Office of Personnel Management advanced the argument that working for the federal government might satisfy the lawyers' duty to do pro bono work.\textsuperscript{62} Since government lawyers' work is by definition intended to benefit the people of the United States, this work benefits "persons of limited means".\textsuperscript{63} It is for a public service organization (the government), and it is intended to "improve the law, and the legal profession . . . ."\textsuperscript{64}

On the other hand, some federal officials have taken the position that federal government lawyers have as much responsibility as the private bar to provide legal services to those in need, and to participate in bar and other activities designed to improve the legal system.\textsuperscript{65} The former president of the District of Columbia Bar urged

\begin{footnotesize}
\begin{enumerate}
\item The Federal Bar Association takes the position that:
Federal lawyers shall be thoroughly acquainted with and shall adhere at all times to the rules of professional responsibility adopted by the Federal Agency that employs them or before which they practice. In the absence of Federal Agency rules, they should comply with the rules of the state bars in which they are licensed to practice. \textit{FBA Model Rules, supra} note 47, at Preface. This rather ambiguous statement should be interpreted to mean that a federal agency rule on a particular topic preempts a state rule addressing the same topic.
\item \textit{Federal Personnel Manual, supra} note 23, at Ch. 990, Subch. 2-2(a) (Pro Bono Publico Services By Federal Government Attorneys).
\item See \textit{supra} notes 37-38 and accompanying text (discussing the \textit{Model Rules'} definition of public interest legal service).
\item \textit{Model Code} \textit{supra} note 35, at 6.
\item Judge Royce C. Lamberth of the United States District Court for the District of Columbia spoke to the Federal Bar Association on March 8, 1990, and urged that, since there are so many cases in which litigants cannot afford counsel, all attorneys should accept pro bono representation of indigents. He pointed out that 40 percent of the cases in his court do not involve the government as a party and would pose no conflict for federal government attorneys.
\end{enumerate}
\end{footnotesize}
that federal government lawyers should be encouraged to do pro bono work outside of their regular duties:

If membership in the legal profession includes an obligation to improve the administration of justice, to assist in providing legal services to the poor, and more broadly to serve the community, that is an obligation that attaches, without distinction, to those employed in the private and in the public sectors. Moreover, if only out of self-interest, government agencies should understand that they will benefit from their lawyers’ professional development and their increased stature in the Bar, and from the community’s perception that they are committed to public service beyond their public employment.66

Each state bar has its own rules regarding the pro bono obligation, and none exempts federal government lawyers. District of Columbia Bar officials have given more attention to the question of pro bono work by federal government attorneys than have other state bars, because of the large population of federal employees.67 Their analysis of the issue offers guidance for other jurisdictions where this issue has been less fully explored.

Rules on pro bono work by state government lawyers provide another model for policy on federal attorney pro bono work. Two states have statutes that specifically permit lawyers employed by the State Attorney Generals to engage in pro bono assistance.68 The highest courts of both New York and Maryland have taken the position that all lawyers licensed to practice in the state, including gov-

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ernment lawyers, have the obligation to do pro bono work. In both states the courts have undertaken initiatives to increase pro bono participation through encouragement of voluntary efforts. If these do not succeed, mandatory requirements may be imposed. The Attorney General of California established a policy encouraging participation of lawyers employed by the Attorney General’s office in “bona fide legal service programs.” These initiatives demonstrate growing recognition that every member of the bar should make a contribution to the representation of those who cannot afford lawyers.

III. DEFINING CONFLICTS OF INTEREST FOR GOVERNMENT LAWYERS

A. In General

To determine what pro bono activity should be prohibited to government lawyers, one must identify which pro bono activities are in conflict with the interests of the government attorney’s client. In order to identify the conflicts, it is first necessary to identify the client. Traditionally the client was regarded as the entire government. Recent developments reflect that this definition is too broad and that a more appropriate standard is to regard the government attorney’s client as his or her agency.

Section 205 of Title 18 defines the federal government attorney’s “client” as the United States government. Representation of a client against the U.S. by a federal government attorney is punishable as a crime under the statute. For example, the law requires a lawyer for

69. Cardin & Rhudy, supra note 7, at 13-17 (describing the Maryland initiative to encourage pro bono service, and the possibility of a mandatory rule if the voluntary initiative is ineffective); Milleman, Mandatory Pro Bono in Civil Cases: A Partial Answer to the Right Question, 49 MD. L. REV. 18, 56 n.194 (1990) (describing the New York proposal that every lawyer licensed in the state, including government lawyers, be required to perform at least 40 hours of pro bono service every two years); COMMITTEE TO IMPROVE THE AVAILABILITY OF LEGAL SERVICES, FINAL REPORT TO THE CHIEF JUDGE OF THE STATE OF NEW YORK (April 1990), reprinted in 19 HOFSTRA L. REV. 755 (1991) (endorsing the mandatory pro bono proposal) [hereinafter THE MARRERO REPORT].


71. Professor Robert Lawry points out that the significant question is not who is the client: Whoever is not the client must be put at arms length, so the better question is who should be put at arms length. Lawry, Who is the Client of the Federal Government Lawyer? An Analysis of the Wrong Question, 37 FED. B.J 61 (1978).

72. Id.

73. See D.C. RULES, supra note 43, at Rule 1.6 (f).
the Federal Energy Regulatory Commission (FERC) to be as loyal to the Immigration and Naturalization Service (INS) as to her own agency and therefore not to take a position contrary to the interests of the INS. So, an FERC employee is prohibited from representing an individual seeking to avoid deportation by INS.

When section 205 was enacted in 1853, the notion of the federal government as one discrete client entity was more plausible because the federal government was quite small, employing approximately 36,500 people. By contrast, in 1991 the federal government's civilian workforce included 3 million people, 80 times the size of the 1859 government. In 1859 the government seems to have been primarily occupied with delivering mail and collecting taxes. In 1990, the functions of the federal government are almost as broad as those of the private sector.

The question is whether there is any continuing reason to define the government attorney's client so broadly. The argument for doing so is centered in some notion of abstract loyalty to the government as a whole, or to the United States in general, and on some abstract harm that might result if a government employee takes a position adverse to the government. This traditional view is premised on an adversarial model of conflict resolution in which each case is presumed to have two diametrically opposed interests. This model does not fully describe the relationships of parties and tribunals in cases in which lawyers represent indigent clients. Even, and perhaps especially, if the lawyer is a zealous advocate for her client, the lawyer is providing a significant administrative service to the court or agency in

74. For example, in 1859 there were five civil officers employed by the Attorney General's office. Letter from the Attorney General, S. Exec. Doc. No. 82, 44th Cong. 1st Sess. (1876). This number, and those listed for other agencies, did not include "laborers or mechanics employed by the day, or contractors." Id. 30,817 people were employed by the Post-Office Department (including over 28,500 postmasters). Letter from the Postmaster General, S. Exec. Doc. No. 83, 44th Cong., 1st Sess. (1876). 339 people were employed by the War Department. Letter from the Secretary of War, S. Exec. Doc No. 86, 44th Cong., 1st Sess. (1876). 1,081 were employed by the Interior Department. Letter from the Acting Secretary of the Interior, S. Exec. Doc No. 87, 44th Cong. 1st Sess. (1876). 90 people were employed by the Navy Department. Letter from the Secretary of the Navy, S. Exec. Doc. No. 89, 44th Cong. 1st Sess. (1876). 3,778 were employed by the Secretary of the Treasury. Letter from the Secretary of the Treasury, S. Exec. Doc. No. 91, 44th Cong., 1st Sess. (1876). 367 people were employed by the Department of State. Message from the President of the United States, S. Exec. Doc. No. 92, 44th Cong., 1st Sess. (1876). If (as appears to be the case from the records) this covers all the federal agencies, the total number of employees was approximately 36,477.

which the case is pending, because it is so difficult to process pro se cases.

If the case is a request for public benefits, such as social security disability benefits, it is not adversarial in any traditional sense; if the person is legally entitled to receive benefits, it is not against the interest of the government for those benefits to be paid. Indeed, Congress has made a decision that it is in the government's interest to pay benefits to certain people. If the case is appealed to federal court and another federal government lawyer is representing the Social Security Administration, the case becomes formally adversarial. But even in this setting, the purpose of the proceeding is to determine whether an individual is entitled to benefits, and a decision for the claimant is not really against the government.

Other cases also challenge the traditional model. If a lawyer undertakes representation of a prisoner in a habeas corpus action that would otherwise be handled by the claimant pro se, the lawyer becomes an intermediary between the petitioner and the government, helping each to understand the other. In addition to the practical assistance offered to judges, prosecutors, court clerks and other federal officials by lawyers handling pro bono claims, this representation is in the interest of the United States on a more abstract level because the lawyer is helping an indigent person to obtain proper consideration of a request. If a lawyer files comments on a proposed agency rule on behalf of a client, the matter is not an adversarial case at all; the lawyer is helping a client to participate in democratic government decision-making, and helping the government to make a well-informed decision.

A contemporary definition of the "client" of a government lawyer is provided by the D.C. Rules of Professional Conduct Rule 1.6(i), which has no counterpart in the Model Rules. It states that "[t]he client of the government lawyer is the agency that employs the lawyer unless expressly provided to the contrary by appropriate law, regulation or order."76

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76. At the administrative level the claimant, with or without counsel, appears before an administrative law judge, who hears evidence and asks questions. No one presents the government's case.

77. D.C. RULES, supra note 43, at Rule 1.6(i). Another pertinent provision is Rule 1.13, which states that "[a] lawyer employed or retained by an organization represents the organization acting through its duly authorized constituents." The comment says "[b]ecause the government agency which employs the government lawyer is the lawyer's client, the lawyer represents the agency through its duly authorized constituents." Id. at Rule 1.13.
This rule reflects the careful consideration given to this question by a committee appointed by the Board of Governors of the D.C. Bar. As with the rules on pro bono work, the D.C. Bar paid close attention to the impact of the rules defining the client on government lawyers. The committee considered defining the government attorney’s client as the public interest, the official supervising each lawyer, the American people, or the United States government as a whole, and concluded that “the employing agency should in normal circumstances be considered the client of the government lawyer.”

The D.C. Bar committee emphasized that the government lawyer should serve the public, and define her obligations in accordance with law, rather than in accordance with “the whims of persons momentarily in the executive branch.” From a functional perspective, however, the committee was concerned that this abstract definition of duty would not provide adequate constraint upon or guidance to government lawyers. The committee rejected the possibility of defining the client as the entire United States government. It is useful to define the agency as the client because it is “a discrete entity, clearly definable and the source of identifiable lines of authority . . . . The lawyer’s explicit responsibilities will be limited to those assigned by the agency; and agency regulations provide a clear benchmark for assessing attorney conduct.” This definition offers concrete boundaries and is specific enough to help determine duties of confidentiality and conflicts of interest.

The report notes that others who have considered the question, including the Federal Bar Association, federal lawmakers, disciplinary bodies, and commentators, have also concluded that the

79. Id. at 7.
80. Id. at 9 (quoting Schnapper, Legal Ethics and the Government Lawyer, 32 REC. ASS’N BAR CTRY N.Y. 649, 654 (1977)).
81. Id at 13-14.
82. See FBA MODEL RULES, supra note 47, at Rule 1.13 (stating that “[e]xcept when representing another client . . . a Government lawyer represents the Federal Agency that employs the Government lawyer . . . . Unless otherwise specifically provided, the Federal Agency, not the organizational element, is ordinarily considered the client”).
84. Committe on Professional Ethics, New York State Bar Association, Opinion 501 (1979). “When a governmental body is organized into a number of separate departments or
government attorney’s client should be defined as her employing agency.

Defining the government lawyer’s client as her employing agency for the purpose of determining conflicts of interest would provide a clear boundary that would help lawyers to avoid any actual or apparent conflicts of interest, but it would not prohibit a wide range of other conduct that might be desirable for other reasons and which would pose no such conflict. FBA Model Rule 1.7 encourages determination of the presence or absence of conflicts by examination of each situation:

(a) A Federal lawyer shall not represent a client if the representation of that client will be directly adverse to another client, unless:
   (1) The Federal lawyer reasonably believes the representation will not adversely affect the relationship with the other client; and
   (2) each client consents after consultation.
(b) A Federal lawyer shall not represent a client if the representation of that client may be materially limited by the lawyer’s responsibilities to another client or to a third person, or by the Federal lawyer’s own interests, unless:
   (1) The Federal lawyer reasonably believes the representation will not be adversely affected; and
   (2) The client consents after consultation . . . .

The rule imposes a duty on each lawyer to make a case by case determination of whether the interests of one client are adverse to another, or whether the representation of one client would be materially limited by the representation of another. If one treats the entire United States government as the client, it might be impossible in many cases to determine the client’s “interest.” The interest in question, and the relevant consent, if appropriate, is that of officials of the agency being represented.

While the definition of client as agency is preferable to a broad-

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86. FBA MODEL RULES, supra note 47, at Rule 1.7.
87. There are frequent conflicts between agencies adversarial negotiations and even lawsuits by one agency against another. In such a situation how might a lawyer determine the interest of the United States?
er definition, in some instances it is overbroad. If a lawyer works for a massive department, such as the Departments of Defense or Health and Human Services, the office in which she works might be as institutionally separate from another office in the department as a FERC lawyer would be from the Veteran’s Administration. If the government attorney’s client is redefined as her agency, the question of whether a whole department or a sub-unit of a department is an agency will require further examination.

While the D.C. Rules of Professional Conduct define the client of each government attorney as her agency, the rules defer to definitions supplied by other law. While state ethics codes generally apply to lawyers in private practice and to government lawyers equally, the D.C. rule does not purport to displace 18 U.S.C. section 205. The prohibitions of section 205 will remain intact until Congress notices that this statute embodies a nineteenth century notion of conflicts of interest, and amends it to make it consistent with other contemporary analysis.

B. Conflicts of Interest of State and Local Government Lawyers

The case law addressing who is the client of the government attorney for the purpose of determining conflicts of interest involves mainly part-time state or local government lawyers, and most of the cases involve conflicts with compensated private practice. Nevertheless, a review of these cases offers some useful insights. The courts tend to examine each situation to determine whether the government lawyer in question has an actual or an apparent conflict of interest. In doing so, they almost always define the “client” of the government lawyer more narrowly than does 18 U.S.C section 205.

The Supreme Court of West Virginia held that lawyers in the same firm as a part-time county prosecutor should accept court appointments to represent indigent criminal defendants, and that they should not be paid for such representation. The court decided that the right to representation was so fundamental as to override the possible appearance of impropriety. The court, however, ordered that such appointments should be accepted only from other counties than the ones in which the prosecutor-partner serves, and then only with the knowing written consent of the defendant.

88. See supra notes 38-39 and accompanying text.
90. Id. at 87.
The Supreme Court of New Jersey held that one attorney or one law firm could not properly represent both a municipality and the county within which the municipality was located, because of likely conflicts arising from the numerous business transactions between the two entities. The same court in another case confronted the question of whether a municipal prosecutor may represent the municipality against its employees in disciplinary or other proceedings. The court held that if the lawyer and the employee had regular and frequent contact (such as that between prosecutors and police officers) there might be at least the appearance of a conflict of interest and the lawyer should not prosecute the employee. The court noted that an appearance of impropriety must be “more than a fanciful possibility” to disqualify the lawyer.

The Appellate Division of the New York Supreme Court held that a trial judge acted improperly by barring a part-time county attorney who was assigned exclusively to the Department of Social Services from representing a criminal defendant. The court found that there was neither a conflict of interest nor an appearance of impropriety because the lawyer’s institutional affiliation, while formally with the County Attorney, which was prosecuting the case, was actually with the Department of Social Services.

The functionalist analysis used in these decisions offers a striking contrast to the formalistic approach of federal law. Rather than a categorical preclusion of a broad range of activity, such as is imposed by 18 U.S.C. section 205, the courts look at each case to determine whether the lawyer’s representation of a client involves advocacy of interests that are contrary to the lawyer’s official duties. If not, the representation is permitted, even if the lawyer is engaging in advocacy “against the government”.

One might ask why the state policies are so much more permissive, and whether there is some justification for the federal government to have more restrictive policies on conflicts of interest or on pro bono work than those articulated by the courts with respect to

93. Id. at 376, 416 A.2d at 807.
94. Id.
96. Id. at 304-05, 455 N.Y.S.2d at 428.
state or local attorneys. One reason for the difference is historical; federal policy was set by statute at a time when the government and the practice of law were very different from the contemporary picture.

State rules were written more recently than the nineteenth century federal statutes. But this is not a complete answer since federal policy was reviewed and reaffirmed during the Reagan administration. Perhaps the recent policy was based on an explicit wish to prevent poor people from getting legal assistance, and indeed to reduce payment of public benefits. Many states have more positive policies on services to poor people. If there is any justification for a difference between state and federal policy, it would be in support of a more restrictive policy for state and local government lawyers. The state and local governments are smaller and more interconnected, and more likely to present conflicts or appearance problems than is the vast federal government.

The cases on government lawyers' conflicts of interest demonstrate the relatively few circumstances in which conflicts arise, and offer models for weighing possible conflicts or appearance problems against public policy objectives that favor allowing government lawyers to engage in more diverse activities.

C. Conflicts Between Government Work and Pro Bono Projects

The question of who is a government lawyer's client in this context asks what types of pro bono activity would pose a conflict with a government lawyer's other responsibilities such that they should be prohibited? What is needed is a definition of client that avoids any actual or apparent conflicts but does not prohibit pro bono work that is not problematic.

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97. The Reagan Administration sought to eliminate the Legal Services Corporation, which provides most available free civil legal services to indigent clients. Although this effort failed, the corporation's budget was cut by 25 percent from $321 million in 1981. As of January 1989, the Legal Services Corporation budget was $308.5 million. Lawrence, Md. Lawyers Debate Proposal to Require Legal Work for Poor, Wash. Post, January 9, 1989, at 1., col. 2 (Business). This effort reflected a policy position that such services are undesirable.

The Office of Personnel Management imposed severe restrictions on pro bono work during the Reagan Administration. These regulations emphasized the duty of loyalty to the government and were accompanied by a statement by the Federal Legal Council that asserted, among other things, that "the private bar is fully capable of providing pro bono representation in the one area in which government lawyers are barred from providing such services—against their own client, the federal government." FEDERAL PERSONNEL MANUAL, supra note 23, at Ch. 990, Appendix A-2. These were amended in April of 1991. See infra text accompanying notes 220-23.
By looking at some specific examples of possible pro bono projects, one can evaluate the conflicts that might arise from pro bono undertakings by government lawyers, and test the proposal that, for this purpose at least, the client should be regarded as the lawyer’s agency.98

1. Attorney for the Social Security Administration represents claimants for social security disability benefits.

If the Social Security Administration (SSA) made the representation of claimants an official part of a staff attorney’s duties (similar to representation provided to military personnel in court-martial and other proceedings by the Judge Advocate General’s lawyers), there would be no conflict of interest. If, on the other hand, an SSA lawyer undertook representation of a claimant as an individual pro bono project, this activity would pose a conflict of interest. One would worry that the SSA lawyer would have access to information that might be used on behalf of the client that should not be used. One might worry about the possibility of improper influence. Even if neither of these problems existed, there would be a problem with the appearance of improper influence, which might inflate the client’s expectations or harm the reputation of the agency for making fair and objective determinations. While this type of situation presents an obvious conflict, this example is similar to the work allowed by an exception to section 205, under which lawyers may represent fellow employees in EEO matters before their own agencies.

2. FERC lawyer represents a claimant for veteran’s benefits.

In contrast to the situation above, a lawyer who works for the Federal Energy Regulatory Commission has no greater access to information from the Department of Veterans’ Affairs than an attorney in private practice. There is a possibility of improper influence based on the adjudicator learning that the lawyer is a fellow public servant. However, this is extremely remote, and no more problematic than the type of positive relationship that might result if the adjudicator and the claimant’s representative learned that they had gone to the same law school.

98. Assume for the purpose of discussion that the lawyers in each example work on these matters outside of work hours, that they use no government resources, and that the work does not interfere with the performance of their official duties. These issues are dealt with separately.
One would want the lawyer to make clear to the client that she worked for a different agency, and that her service was voluntary rather than official. To avoid any appearance of official sponsorship of the activity, one might want the lawyer not to identify her agency affiliation on papers filed in connection with the proceeding. These details accomplished, it is difficult to imagine even an appearance of impropriety in such activity. To the contrary, an employee of one agency would be undertaking voluntary duties that would assist another part of the government in accomplishing its mission.

3. Labor Department lawyer represents a social security claimant in an appeal to federal court.

Is there any greater problem with federal government lawyers appearing in court on behalf of pro bono clients than with their appearing in administrative hearings? Court proceedings might be more time-consuming, or they might receive more public attention. The time problem might be avoided by the exercise of supervisory discretion over the size of pro bono projects taken on by government attorneys.99

The publicity problem is more worrisome. If two federal government lawyers argue against one another in court, it is possible that negative publicity would result, which might include allegations of wasted tax dollars or lack of coordination within the federal government. If the pro bono attorney were in a prominent position, publicity would be more likely.

This problem can be avoided by the pre-screening process presently in place in most agencies. If each lawyer wishing to undertake a pro bono case that might go to court must seek advance approval from an agency official, the cases can be examined for their potential to cause embarrassment or to create an appearance problem. The few cases in which publicity was likely, either because of the nature of the case or the identity of the parties or the lawyers involved, permission to undertake representation might be declined. And in those in which permission was granted, the lawyer might be required to explain in writing that she was acting not on behalf of her agency but


If a court hearing is scheduled at a time that poses a conflict for one of the attorneys, a motion for a continuance would normally be granted.
as a pro bono attorney.

4. Health and Human Services attorney meets with Congressional staffers on behalf of the Women's Legal Defense Fund in support of a bill (unrelated to the lawyer's official duties) that would create a new program within HHS.

This example allows examination of the propriety of pro bono work involving legislative advocacy by a government attorney. Here, the lawyer might have no access to agency information if the bill dealt with a topic different from the topics involved in the lawyer's work. Nevertheless, one would worry, even if the lawyer were not officially identified with HHS, that the affiliation would become known to the staffers and would affect their evaluation of the lawyer's comments. While there is no particular conflict problem relating to the legislative nature of the work, the impact of the bill on the lawyer's own agency creates an appearance of impropriety, because the lawyer is not acting under the authority of the agency.

5. Agriculture Department attorney attends meetings with Congressional staffers on behalf of the National Rifle Association (of which the attorney is a member) opposing a gun control bill. The gun control bill is supported by the administration.

This example presents none of the problems of the preceding one. As in other examples, one would want to disallow the lawyer from creating the appearance that his action was on behalf of the department. This example presents a situation in which the lawyer's pro bono work is a form of political expression. One could argue that the "government interest" is the administration position; alternatively one might urge that the more important government interest is to allow citizens to participate in a democratic process.

6. Attorney for the Federal Communications Commission drafts comments on a proposed Housing and Urban Development rule on behalf of the Community for Creative Non-Violence, and appears at a hearing to explain the comments.

Here is an example of what might be a typical type of administrative advocacy undertaken on a pro bono basis by a federal government lawyer. One would be uncomfortable with the lawyer participating in such a proceeding at her own agency on behalf of a private organization, but in an appearance before another agency, there is no connection between the lawyer's work and the decision-maker that
would create even the appearance of impropriety.

These examples show the types of conflict questions that might be raised by government lawyers doing pro bono work in which the government had an interest. They suggest that current law sweeps too broadly in its prohibitions. While there is some possibility that a narrower conflict rule would result in an occasional appearance problem, most such problems could be avoided through screening of pro bono cases.

IV. RESTRICTIONS ON PRO BONO WORK IMPOSED BY 18 U.S.C. SECTION 205

A. The Statute

Some of the significant barriers to performance of pro bono work are imposed by 18 U.S.C. section 205, which is based on an 1853 statute. Others are imposed by agency regulations. This section will explore those barriers.

18 U.S.C. section 205 imposes limits on “officers and employees” of the United States in all three branches of the government or in any agency of the United States. The statute prohibits these persons from acting (other than in performance of their official duties) as an “agent or attorney for prosecuting any claim against the United States, or receiv[ing] any gratuity, or any share of or interest in any such claim” in payment for prosecuting it. It prohibits act-

100. This language indicates the broad applicability of the statute and the irrelevance of distinctions drawn in some case law between officers and employees. B. MANNING, FEDERAL CONFLICT OF INTEREST LAW 23-24 (1964). Neither of these terms is defined in the statute.

101. In addressing whether a federal employee could act as agent or attorney for the employees of the Senate Restaurant in their efforts to organize a bargaining unit, a 1981 opinion of the Office of Legal Counsel explains that the “legislative history of the conflict of interest laws indicates that the representational bar of section 205 was not intended to prohibit services before ‘congress or its committees’ (citing H.R. Rep. No. 748, 87th Cong., 1st Sess. 20 (1961)), but it does apply to other parts of the legislative branch.” The opinion explains that the term “agency” is defined at 18 U.S.C. § 6 to include “any department, independent establishment, commission, administration, authority, board or bureau of the United States or any corporation in which the United States has a proprietary interest, unless the context shows that such term was intended to be used in a more limited sense.” This creates “a presumption that a governmental entity is an agency for purposes of a given offense, including the conflict of interest statutes.” Op. Off. Legal Counsel 194-97 (1988).

102. 18 U.S.C. § 205. The courts have interpreted the phrase "claims against the United States" to include only claims for money. See, e.g., Hobbs v. McLean, 117 U.S. 567 (1886) (stating that a claim against the United States is a "right to demand money" in a related statute); United States v. Bergson, 119 F. Supp. 459 (D.D.C. 1954) (interpreting the term
ing as "agent or attorney" for anyone before any department, agency, court, court-martial, officer, or any civil, military or naval commission, in connection with any covered matter in which the United States is a party or has a direct and substantial interest.).

A parallel provision prohibits an "officer or employee of the District of Columbia or an officer or employee of the Office of the United States Attorney for the District of Columbia" from acting (other than in the performance of official duties) as an agent or attorney against the District of Columbia.

103. The prohibition on acting as agent or attorney has been interpreted to prohibit representational activities such as appearing at a proceeding or signing documents filed with an adjudicator, but not to prohibit other behind-the-scenes assistance. In Refine Construction Co. v. United States, 12 Cl. Ct. 56 (1987), a Veterans Administration employee was found to have violated section 205 by preparing material and cost estimates for a company submitting a bid for a contract, and by defending those estimates "before a government auditor within the context of the negotiation of a contract between the government and his principal." Id. at 61. At an earlier negotiating session, the court noted that "Mr. Scott did not speak for his client . . . but rather, limited his role to that of a consultant to plaintiff," and concluded that "[t]his action did not constitute a violation of section 205." Id. See Bachman v. Pertschuk, 437 F. Supp. 973 (D.D.C. 1977) (distinguishing appearance in court from preparation of the case of a criminal defendant, urging that the former but not the latter was prohibited by section 205); 5 Op. Off. Legal Counsel 194, 196 (1981) (noting that a federal government attorney was prohibited from acting as "agent or attorney" for a group of employees seeking to organize a union, but stating "[w]e stress that section 205 does not bar Mr. A from aiding and assisting the Senate employees in their efforts to organize, as long as he does not act as their 'agent or attorney.'") See infra notes 144-77 and accompanying text (discussing the 1962 amendments of section 205, which added language prohibiting acting as agent or attorney but did not include in that section language prohibiting assistance short of representation).

104. A covered matter is a judicial or other "proceeding, application, request for a ruling or other determination, contract, claim, controversy, charge, accusation, arrest or other particular matter". 18 U.S.C. § 205 (h) (Supp. 1990).

105. Pursuant to Exec. Order No. 12146, 1-301, 3 C.F.R. 409, 410 (1980), 15 WEEKLY COMP. PRES. DOC. 1264, 1265 (July 18, 1979), the Attorney General was mandated to establish a "litigation notice system that provides timely information about all civil litigation pending in the courts in which the Federal Government is a party or has a significant interest.

106. 18 U.S.C. § 205(b) (Supp. 1991). The activities prohibited are the same with respect to D.C. employees in relation to the D.C. government as are the activities prohibited to federal employees in relation to the federal government. Employees of the United States
Subsection (c) of section 205 provides that subsections (a) and (b) have only limited impact on "special Government employees." This class of part-time employees are subject to these prohibitions only for matters in which they have participated personally and substantially and had some decisional responsibility, and for matters pending before the department or agency of government in which the employee works.

The statute creates two significant exceptions to the prohibited activities. One is that government employees are permitted to represent persons subject to "disciplinary, loyalty or other personnel administration proceedings" brought by the government. This exception is essentially a pre-approved category of permitted pro bono work. The statute provides governmental consent to pro bono representation of employees in matters that present an actual conflict of interest. The policy expressed is that employees with grievances

107. According to 18 U.S.C. section 202(a) (Supp. 1991), a special Government employee is "an officer or employee of the executive or legislative branch of the United States Government, of any independent agency of the United States or of the District of Columbia," who is employed with or without pay for not more than 130 days during any 365-day period. The employment contemplated includes "temporary duties either on a full-time or intermittent basis" and includes part-time United States commissioners and part-time United States magistrates. Independent counsels are classified as special employees regardless of the number of days of employment, as are part-time local representatives of Members of Congress who work in local districts, and some Reserve officers.

108. The second of these prohibitions applies only to those whose service has exceeded sixty out of the last 365 days. 18 U.S.C. § 203 (Supp. 1991).


110. In such cases, one lawyer within an agency is representing an individual against the employer agency. Even if the government attorney's client were defined as the agency rather than the United States, this would present a conflict of interest. Since this provision has been in effect since 1963, it would be interesting to do a case study on its operation, to determine what if any problems have arisen as a result of allowing pro bono work against the agency.
against their agencies should have representation in those claims without having to hire a private attorney. Some agencies allow use of administrative leave for this purpose. In addition, employees are permitted to represent certain relatives against the United States (or D.C., in the case of D.C. employees) in matters in which the employee has not had personal or substantial involvement or official responsibility.

Violation of section 205 is a misdemeanor punishable by a fine of up to $100,000 or up to a year in prison, or both, or, if willful, violation is a felony punishable by a fine of up to $250,000, or up to five years in prison, or both. The law also authorizes a civil action against a violator by the Department of Justice, which could result in a fine of not more than $50,000, or the amount of compensation received or offered for the prohibited conduct, whichever is greater. In addition, the Justice Department may request an injunction prohibiting a person from engaging in conduct that would violate the statute.

B. Legislative History

The legislative history of 18 U.S.C. section 205 is interesting for a couple of reasons. Most importantly, it shows that, until the Reagan administration, no deliberate decision was ever made in Congress or in the executive branch to prohibit pro bono work. Second, the early history vividly depicts the same types of use of government position for private gain that has plagued our federal government in recent years. The original version of 18 U.S.C. section 205 was part of a statute entitled “An Act to Prevent Frauds upon the Treasury of the United States,” enacted in 1853. The statute was enacted during a

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111. Interview with Joyce Allen (federal government attorney interviewed by the author; identified by fictitious name); see infra text accompanying notes 279-81.
113. There are two other exceptions: One allows performance of work under grants by, or contracts with, or for the benefit of, the United States, with the permission of the head of the relevant department or agency. 18 U.S.C. § 205(f) (Supp. 1991). The other allows government employees to give testimony that they are required by law to give. Id. at § 205(g).
115. 10 Stat. 170 (1853). Section 2 of the statute provided the following:
   And be it further enacted, That any officer of the United States, or person holding any place of trust or profit, or discharging any official function under, or in connection with, any executive department of the Government of the United States, or
period in which government officials were routinely paid by others to pursue claims against the government or to advocate for their interests. Such activities were not, until the 1853 law was passed, prohibited or regarded as improper. One striking example appears in a letter from Senator Daniel Webster to Nicholas Biddle, President of the National Bank, suggesting that Webster should raise the issue in Congress that President Jackson had proposed to withdraw U.S. funds from the bank:

Since I have arrived here, I have had an application to be concerned, professionally, against the Bank, which I have declined, of course, although I believe my retainer has not been renewed, or refreshed as usual. If it be wished that my relation to the Bank should be continued, it may be well to send me the usual retainers.

Apparently this type of activity was common. Congressmen, senators and executive branch officials filed claims for individuals, appeared in the Supreme Court and other courts, and engaged in other advocacy under the Senate or House of Representatives of the United States, who, after the passage of this act, shall act as an agent or attorney for prosecuting any claim against the United States, or shall in any manner, or by any means, otherwise than in the discharge of his proper official duties, aid or assist in the prosecution or support of any such claim or claims, or shall receive any gratuity, or any share of or interest in any claim from any claimant against the United States, with intent to aid or assist, or in consideration of having aided or assisted, in the prosecution of such claim, shall be liable to indictment, as for a misdemeanor, in any court of the United States having jurisdiction thereof, and, on conviction, shall pay a fine not exceeding five thousand dollars, or suffer imprisonment in the penitentiary not exceeding one year, or both, as the court in its discretion shall adjudge.

Note that this language makes representation or receipt of compensation a crime. This language prohibited even uncompensated representation. Section 3 of the statute imposed similar prohibitions on members of Congress, but only prohibited such activity if it was compensated.

Section 8 of the statute provided: "And be it further enacted, That nothing in the second and third sections of this act contained shall be construed to apply to the prosecution or defence of any action or suit in any judicial court of the United States."

116. With respect to this and the other nineteenth century conflict of interest provisions, one commentator has stated that the statutes "were born alike out of a primitive personnel system, a poorly controlled disbursement procedure, and the wastes of war." ASS'N OF THE BAR OF THE CITY OF NEW YORK SPECIAL COMM. ON THE FED. CONFLICT OF INTEREST LAWS, CONFLICT OF INTEREST AND FEDERAL SERVICE 44 (1960) (on file at Hofstra Law Review) [hereinafter NEW YORK CITY BAR REPORT].

117. Id. at 30 (quoting from Letters From Daniel Webster to Nicholas Biddle, October 29, 1833, December 21, 1833, in McGrane, The Correspondence of Nicholas Biddle 216-17, 218 (1919)).
activities for compensation.\footnote{118} During the Civil War some members of Congress published advertisements offering their services in the Washington newspapers.\footnote{119} Some government employees reviewed government files to identify claimants to whom they might offer their services or whose claims they might purchase.\footnote{120}

The most notorious claim scandal of the period, the Gardiner incident, involved Senator Corwin of Ohio, who became Secretary of the Treasury during the incident. Corwin represented a dentist who was attempting to collect $500,000 from the Mexican Claims Commission for a silver mine that the dentist claimed he had owned, and which had been destroyed during the Mexican War. Corwin was to be paid five percent of the proceeds for his services. In addition, Corwin purchased a one-fourth interest in the claim. When Senator Corwin became Secretary of the Treasury, he sold his interest in the claim. The claim turned out to be entirely fraudulent, but Corwin may not have known of the fraud.\footnote{121} One Congressman, in a speech defending Corwin’s reputation, urged that representation of others before the government by members of Congress was commonplace:

Every gentleman who hears me knows that it is usual, and has been from the beginning of this Government, for Senators and members of this House to appear as counsel for fee and reward or compensation before the Supreme Court of the United States, to appear before any of the courts of the Union, and before commissioners appointed to adjudicate claims similar to these.\footnote{122}

In the discussion that followed this comment, several members of Congress acknowledged having represented others in claims against the United States but denied having been paid for doing so.\footnote{123} The original version of 18 U.S.C. section 205 was introduced by the committee appointed to investigate the Corwin matter, and was presented as a response that would prevent such conduct in the future.\footnote{124} The bill sought to prohibit government officials from getting

\footnotesize{\begin{itemize}
\item \textit{\textsuperscript{118}} Id.
\item \textit{\textsuperscript{119}} Id. at 32 (citing CONG. GLOBE, 38th Cong., 1st Sess. 559 (1864) (statement of Rep. Hale)).
\item \textit{\textsuperscript{120}} Id.
\item \textit{\textsuperscript{121}} Id. at 32-33.
\item \textit{\textsuperscript{122}} CONG. GLOBE, 32d Cong. 2d Sess. 289 (1853) (statement of Rep. Stephens). The Congressman then went on to list several other members of Congress who, he urged, had engaged in similar activities.
\item \textit{\textsuperscript{123}} Id.
\item \textit{\textsuperscript{124}} CONG. GLOBE, 32d Cong., 2d Sess. 242 (1853).
\end{itemize}}
paid for handling claims against the United States. Senator Badger of North Carolina, chief proponent of the bill, explained the purpose of the new law:

It was intended for the benefit of a class of men who are entitled to the aid and assistance of the Government—for the benefit of the poor and ignorant, who have claims against the United States, and who are put under the necessity, as the law now exists, of submitting to the most grinding oppression . . . for the purpose of getting their claims brought forward and sanctioned here in Congress, or before the Executive Departments.

It was intended, in the second place, to protect the United States, because, as the law stands at present, the largest inducements are held out to crafty or dishonest men to get up, by whatever means, maintain, and carry through before the Departments, or before Congress, claims that are really unfounded, or claims that are greatly exaggerated.

The next object was to protect the Government, by preventing the Executive officers of the Government from employing themselves, while they hold office under the Government of the United States, and are paid by the Government of the United States, from availing themselves of their opportunities to hunt up and to prosecute claims against the Government. It is needless for me to say to what crying abuses such a privilege has already led, and must continue to lead, unless it is put an end to.\footnote{125. CONG. GLOBE, 32d Cong., 1st Sess. 1339 (1852).}

Representative Andrew Johnson of Tennessee spoke in support of the 1853 bill:

I cannot conclude without making an earnest appeal to the House to come forward and sustain this bill, as one step towards arresting and condemning this system of high-handed plundering and swindling, which has been and is being carried on, about Congress and the various departments of Government. Sound morality, common honesty, justice, an eviscerated Treasury, all demand that something should be done to separate these vampires from the body politic. There must be something done to restore public confidence, for it is going very fast, if not already gone. The Government and the functionaries of Government are beginning to stink in the very nostrils of the nation; it is now dead and rotten in many of its parts, while the disease is rapidly making its way into the others less accessible. Its putrid stench is sent forth upon every wind and is arresting the attention of the voracious vultures throughout the land, and they
have gathered, and are still gathering, around the carcass, ready to begin their foul work.\footnote{126. CONG. GLOBE, 32d Cong., 2d Sess. 67 (Appendix 1853).}

The discussion of the bill reveals that its primary purpose was to prevent government officials from economically exploiting their public positions. The discussion shows that some members of Congress wished to continue to permit uncompensated assistance. In 1851 an early version of the bill was introduced by Congressman Smart prohibiting the prosecution of claims against the United States by heads of Departments, Senators and Representatives in Congress. In commenting on the bill, Congressman Jones objected to the indiscriminate prohibition of this type of service whether compensated or not:

We are all in the habit here, or at least I am, of attending to every claim which our constituents may send us against the Government in any of the Departments or before Congress. I have never received, directly or indirectly, the first cent of compensation for such services . . . . [A] bill should be so guarded as not to prevent others from attending to the legitimate demands of their constituents against the Government.\footnote{127. CONG. GLOBE, 31st Cong., 2d Sess. 1338 (1851).}

Senator Underwood made a similar objection to the prohibition of uncompensated representation of others against the government, urging that in the absence of compensation there was no evil in the service:

There is another provision of this bill, which I think should not be sanctioned. It is this: it punishes officers of the Government connected with Departments, who may aid or assist in the prosecution of claims, although they receive no reward for so doing. In the other provisions of the bill, the punishments are connected with the reception of rewards on the part of the individual who prosecutes improperly. But in regard to officers of the Government . . . if he assists an old father or mother, or brother, or sister, or friend, in the prosecution of a claim against the Government, though he does not receive a cent, or any benefit whatever, he is liable to be indicted, and punished by imprisonment for six months, and a fine of $1,000, under the operation of this bill, as I understand it. Now that seems to me to be a degree of rigor, for the exercise of mere benevolence towards a friend or relation, which is excessively severe. There is no evil, it seems to me, likely to grow out of gratuitous service rendered for a relative or a friend. There is no motive to induce an officer to suborn witnesses when he has no interest at stake, or to
act corruptly in any manner whatever.\(^\text{128}\)

In the 1853 debate it was clear that the section of the original bill that applied to members of Congress prohibited compensated prosecution of claims, but not uncompensated representation, the latter being regarded, at least by some, as appropriate constituent service. But section 2, which applies to executive branch employees, prohibited both compensated and uncompensated representation.\(^\text{129}\) It is not possible to determine whether Senator Underwood's colleagues heard and rejected his comments, or whether his analysis was lost in the legislative shuffle.

The statute was not originally intended to prohibit pro bono publico representation; at the time that the 1853 law was passed, there was no clear conception of "pro bono work."\(^\text{130}\) Those who debated the bill appeared to contemplate that one might do some uncompensated service for a constituent, a friend or a relative, but not for a needy stranger.

The legislation was focused only on "claims against the United States," which referred to claims for payment from the United States Treasury.\(^\text{131}\) It did not cover other adversarial proceedings against the government, and section 8 specifically excluded from its prohibitions "the prosecution or defence of any action or suit in any judicial court of the United States."\(^\text{132}\) This section of the statute was repealed as part of some technical amendments adopted in 1873, even though the revision committee had no authority to make substantive changes in the law.\(^\text{133}\) But for this deletion, a large proportion of needed pro bono assistance would not now be prohibited by section 205.

In 1864 another similar statute was enacted to prohibit representation of others against the United States.\(^\text{134}\) It prohibited representa-
tion of others in any matter in which the United States was a party or had an interest. It covered members of Congress as well as members of the executive branch. It prohibited only compensated activity, and was limited to matters before an executive department. The law did not apply to court actions.\textsuperscript{135} Since there is a great deal of overlap in the objectives, the coverage, and, indeed, in the language of these two statutes, it is not clear why, in 1864, Congress enacted a new law instead of amending the old one. The New York City Bar report suggests that “abuses had continued and grown worse with the war, scandal was in the air, public opinion was aroused, and action was the order of the day.”\textsuperscript{136} But the debate on the 1864 bill, while it includes a couple of mentions of the 1853 bill,\textsuperscript{137} largely ignores

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Heads of Departments, and other Officers of the Government“, required:

That no member of the Senate or House of Representatives shall, . . . nor shall any head of a department, head of a bureau, clerk, or any other officer of the government receive or agree to receive any compensation whatsoever, directly or indirectly, for any services rendered, or to be rendered, after the passage of this act, to any person, either by himself or another, in relation to any proceeding, contract, claim, controversy, charge, accusation, arrest, or other matter or thing in which the United States is a party, or directly or indirectly interested, before any department, court-martial, bureau, officer, or any civil, military, or naval commission whatever. And any person offending against any provision of this act shall, on conviction thereof, be deemed guilty of a misdemeanor, and be punished by a fine not exceeding ten thousand dollars, and by imprisonment for a term not exceeding two years, at the discretion of the court trying the same, and shall be forever thereafter incapable of holding any office of honor, trust, or profit under the government of the United States.


136. \textit{Id.} at 40. In 1873, Congress repealed the section of the 1953 act that applied to members of Congress, apparently thinking that the 1864 act had intended to repeal this section. \textit{Id.}

137. Senator Johnson said in reference to the bill, “[t]he most of its provisions, so far as I understand them from the reading, appear to be reenacting the laws as they are. An act passed several years ago prohibits any member of Congress from prosecuting any claim against the Government except in the courts. This bill, I think, repeats that provision.” \textit{Cong. Globe, 38th Cong., 1st Sess.} 555 (1864).

Later, in the rather lengthy debate, Senator Cowan pointed out the existence of the 1853 law again. He assumed that the purpose of the new law was to increase the penalties imposed for conduct already prohibited (the 1853 law allowed a one-year jail sentence, and the 1864 law allowed a two-year jail sentence), and he objected to that increase. He said:

I believe it is proper in making a new law to inquire first what the old law is; second, the mischiefs; and then to look at the remedy. Now, as I understand the mischief which is to be corrected here, it is that members of the Senate and of the House of Representatives are in the habit of appearing in cases where the United States are concerned. I suppose there can be no mischief in their appearing on behalf of the United States. I suppose there is nobody who complains of that here. If there be any mischief at all it must exist in their appearing before certain
the existence of the previous law. It seems that many Senators enacted the 1864 law without having read the 1853 law, and that they simply did not understand their relationship to one another.

The debate on the 1864 bill focused on the restrictions that the bill would impose on members of Congress, specifically on the limitation on their ability to practice law. The Senate discussion makes it abundantly clear that the bill was not intended to prohibit uncompensated activity.\textsuperscript{3} There was lengthy debate about whether to prohibit members of Congress from representing defendants before courts-martial. Senator Johnson indicated that most such defendants had no money, and that he represented them without fee.\textsuperscript{39} But Senator Fessenden pointed out that very few of the other lawyers in Congress represented clients without fee:

There are not many of our profession who are situated precisely as is my honorable friend from Maryland. We are generally men who work for pay in our profession. We like fees. We are not disposed to give our time and our labor and our study, as the gentleman from Maryland is, for weeks to the defense of people whom we do not know, merely from love of the profession or a sense of professional duty; and therefore the bill as it stands will apply to everybody but him.\textsuperscript{40}

The 1864 law, like the one enacted in 1853, prohibited representation by certain government officials before executive departments, but it did not prohibit any court representation except of defendants before courts-martial.\textsuperscript{41}

\begin{footnotes}
\item[3] tribunals, not the judicial tribunals of the country, against the United States. If that is the mischief, then I propose to read the law as it stands already. I read from the act of the 26th of February, 1853: \textit{Id} at 561. He then went on to object to the increased penalties. His speech was followed by a comment from Senator Trumbull that "the debate which has ensued on this bill is an illustration of the truth that we know not what is before us." \textit{Id}.

\item[138] In fact, the original draft included language that would have prohibited uncompensated representation; this was deleted by amendment. CONG. GLOBE, 38th Cong., 1st Sess. 555 (1864).

\item[39] \textit{Id} at 556.

\item[40] \textit{Id} at 558.

\item[41] Senator Trumbull, who presented the Judiciary Committee bill to the Senate, said that "[t]he bill as reported by the committee does not prohibit members of Congress from practicing in the courts of the county; but it does prohibit them from appearing before courts-martial, commissions, Departments, bureaus, or anywhere else for a fee or consideration from anyone." \textit{Id} at 555.

The prohibition on appearing in a court-martial was based, at least in part, on the possibility of improper influence, since the Senate acted on promotion of officers, including
\end{footnotes}
These two statutes, both predecessors of 18 USC section 205, changed little during the century following their enactment.\textsuperscript{142} In the late 1950s attention turned again to this statute, primarily because its prohibitions prevented the government from engaging the services of many desirable attorney consultants and such services had become necessary.\textsuperscript{143} The New York City Bar did a major study of the problem of conflicts of interest of federal employees and made proposals that became the basis of a set of amendments. In 1962, Congress made some significant changes in the 1853 statute. The product, Public Law No. 87-849,\textsuperscript{144} reads as follows:

\textsuperscript{142} The 1958 edition of Section 283 read:

\textquote{Whoever, being an officer or employee of the United States or any department or agency thereof, or of the Senate or House of Representatives, acts as an agent or attorney for prosecuting any claim against the United States, or aids or assists in the prosecution or support of any such claim otherwise than in the proper discharge of his official duties, or receives any gratuity, or share of or interest in any such claim in consideration of assistance in the prosecution of such claim, shall be fined not more than $10,000 or imprisoned not more than one year, or both.}

\textsuperscript{143} In evaluating the operation of the federal conflict of interest statutes, the New York City Bar Report concludes:

\textquote{The most damaging result of the present system is its deterrent effect on the recruitment and retention of executive and some kinds of consultative talent. The restrictions tend to block the interflow of men and information at the very time in the nation's history when such an interflow is most necessary . . . . [T]he undesirable effects of the present system of restraints are traceable to three basic causes: faulty drafting, inadequate administration, and the obsolescence of the statutes.}

\textsuperscript{144} The italicized language was added by the 1962 amendments and the bracketed language was deleted from the statute.
Whoever, being an officer or employee of the United States [or any department or agency thereof, or of the Senate or House of Representatives,] in the executive, legislative or judicial branch of the Government or in any agency of the United States, including the District of Columbia, otherwise than in the proper discharge of his official duties—

(1) acts as [an] agent or attorney for prosecuting any claim against the United States, [or aids or assists in the prosecution or support of any such claim otherwise than in the proper discharge of his official duties,] or receives any gratuity, or any share of or interest in any such claim in consideration of assistance in the prosecution of such claim, or

(2) acts as agent or attorney for anyone before any department, agency, court, court-martial, officer, or any civil, military or naval commission in connection with any proceeding, application, request for a ruling or other determination, contract, claim, controversy, charge, accusation, arrest, or other particular matter in which the United States is a party or has a direct and substantial interest—

Shall be fined not more than $10,000 or imprisoned not more than [one year] two years, or both.

The 1962 statute then goes on to provide that this section has only limited application to special (temporary or intermittent) government employees, to exempt (1) representation of others in "disciplinary, loyalty, or other personnel administration proceedings", (2) representation of family members and others for whom the employee acts as a personal fiduciary, (3) certain grant or contract work, and (4) the giving of testimony under oath.

Part of the impact of these changes is to expand enormously the scope of activity prohibited by section 205, and to expand the categories of federal employees who are covered. These changes incorporate language from section 203 (the contemporary version of the 1864 statute) into section 205, but change its effect. The 1962 statute is no longer restricted to claims against the United States, but covers

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145. The language describing the branches of government is a revision and expansion of language previously in section 283 (which was the successor of the 1864 law). The language exempting activities "in the proper discharge of his official duties" appears to have been moved up to make it apply to the new subsection 2.
147. See infra note 157 and accompanying text.
148. The language describing the covered proceedings and characterizing the conflict as with proceedings in which "the United States is a party or has a direct and substantial interest" was adapted from the previous language of section 281, which was the 1864 law.
all sorts of adjudicative proceedings before executive agencies and before courts.

Section 203 prohibited representation of others by federal employees in proceedings before executive agencies, but not before courts. In the language added to section 205 in the 1962 amendments, the word “courts” was added to the list of prohibited proceedings, thereby barring representation of parties against the United States before the judicial as well as the executive branch.

Under section 203, representation of parties in proceedings in which the United States had an interest had been prohibited only if compensated. Until 1962, there was no prohibition on pro bono publico representation by federal attorneys against the United States unless the matter was a “claim against the United States.” But the incorporation into section 205 of the language from section 203 (subsection (2) above) removes the exemption of uncompensated activity. One question, then, is whether this was a purposeful change.

In 1960, there appears to have been only the dimmest awareness of the possibility that federal government lawyers might wish to do pro bono work. Indeed, the passing reference to this issue that was made while the bill was being amended suggests that pro bono work as we know it did not exist in 1960, or at least was unknown to those who rewrote section 205. The authors of the New York City Bar Report thought that their proposed amendments to section 205 should not and would not preclude public service activity:

An employee who is a member of an organization to protect wildlife, for example, will not run afoul of section 4, [the proposed language, similar in effect to the final language of section 205, that would have restricted uncompensated activity] even if he actively helps the organization in its efforts to influence federal policy in the direction of better wildlife protection. The efforts of such an organization would seldom produce “transactions involving the government,” as defined. In those cases in which it did, the employee would not encounter a bar under the section unless his government job involves the same transactions, or he is paid by the organization to assist it in the transactions, or he acts in the capacity of agent or attorney in the transactions.\footnote{149. NEW YORK CITY BAR REPORT, supra note 116, at 209.}

The authors of the report, then, did not intend to prohibit pro bono activity, but they did not conceive that such activity would be repre-
sentational in nature.

During the hearings on the 1962 bill held by the House of Representatives, George Abbott, the Secretary of the Interior, pointed out that the expansion of section 205 to cover matters other than claims would result in the prohibition of much public service activity, and urged that this was undesirable:

The prohibition in proposed section 205 respecting matters other than claims appears to us to have too broad a reach and would make activities in which there was no real conflict of interest a criminal offense. If, and this is certainly a homely example, if an employee of the Post Office Department is an ardent conservationist and a member of the Izaak Walton League, we would see no impropriety in his assisting gratis in the presentation of the league's views on a matter under the jurisdiction of the Fish and Wildlife Service. 150

These comments, the absence of others in the 1962 discussion, and the absence of any comments to the contrary, indicate that the expansion of section 205 in 1962 beyond coverage of claims against the United States may have been not a purposeful prohibition of pro bono activity in which the government was a party, but suggest that it was an accident of statutory drafting. If pro bono service was a very marginal activity in the early sixties, these comments might not have led to amendment of the language even if they were noncontroversial. Perhaps the issue was simply not important enough.

The statute makes some peculiar distinctions between prohibition of representation of parties against the United States, and prohibition of assistance to such parties. The law fails to prohibit some activity that might involve an actual conflict of interest, as long as the attorney involved avoids actual representation in proceedings.

The prohibition of prosecution of claims against the United States applies to compensated and uncompensated representation (acting as agent or attorney) and compensated assistance other than representation. Uncompensated assistance with a claim against the United States would not violate the statute. If a social security disability matter is a "claim," 151 a federal government attorney could offer

150. C. Elefant, When Helping Others is A Crime: Section 205's Restriction on Pro Bono Representation By Federal Attorneys at 28 (unpublished manuscript) (on file at Hofstra Law Review). The author of the cited paper is a federal government attorney who would like to be able to do more pro bono work.

151. See supra notes 148-50 and accompanying text. Since social security claimants de-
any other type of pro bono assistance than actual appearance on behalf of a claimant at a hearing or in court. The attorney could assist the claimant in filling out forms, marshalling evidence and witnesses, analyzing the application of the regulations to the matter, and preparing an explanation of the case.

The second clause of section 205 prohibits federal attorneys from acting as agent or attorney in any matter in which the United States is a party or has a direct and substantial interest, regardless of whether this activity is compensated. However, this provision does not prohibit any assistance falling short of actual representation,\textsuperscript{5} even if the assistance provided is compensated.\textsuperscript{5} This suggests that it would not violate section 205, for example, for a federal government attorney to be paid $100,000 for assistance other than representation to a drug kingpin being prosecuted by the United States Attorney, or for assistance short of representation to the government of Lithuania in obtaining diplomatic recognition by the U.S. government.\textsuperscript{5}

While the 1962 amendments might have some anomalous results in unintended areas, the law was sensibly narrowed in its application to temporary government employees.\textsuperscript{5}\textsuperscript{5} Section 205 provides that special government employees are subject to the prohibitions of the section only in relation to a particular matter involving a specific party or parties (1) in which he has at any time participated personally and substantially as a Government employee or as a special Government employee through decision, approval, disapproval, recommendation, the rendering of advice, investigation or otherwise, or (2) which is

\textsuperscript{152} See supra note 103 and accompanying text (defining agent or attorney and explaining that this language has been narrowly interpreted to prohibit only representational advocacy and not other assistance).

\textsuperscript{153} This peculiarity of the statute was noted in B. MANNING, supra note 100, at 91. The distinction was also pointed out in a Memorandum Opinion for the Acting General Counsel, Office of Justice Assistance, Research and Statistics, on the Applicability of 18 U.S.C. 205 to Union Organizing Activities of Department of Justice Employee 5 Op. Off. Legal Counsel 194, 196 (1981), which found that "Mr. A" was barred from acting as agent or attorney for employees of the Senate restaurant, but "205 does not bar Mr. A from aiding and assisting the Senate employees in their efforts to organize, as long as he does not act as their 'agent or attorney.'"

\textsuperscript{154} These types of assistance, however, might be prohibited by ethical rules or other law.

\textsuperscript{155} See supra note 107 and accompanying text (stating that a "special government employee" is defined by 18 U.S.C. section 202 to include one who is employed for not more than 130 out of any 365 day period).
pending in the department or agency of the Government in which he is serving.\textsuperscript{156}

This amendment represented an attempt to cull from the mass of activity prohibited by the statute that which might pose an actual (clause 1) or apparent (clause 2) conflict of interest with the work of the particular federal employee. This exception was created because the government needed to hire consultants whose primary employment (e.g., law practice) involved some work that was adverse to the federal government. Absent actual conflicts between the consulting work and the primary work, there was no reason not to allow the use of such consultants.\textsuperscript{157}

There is a clear analogy to the present concern; now it is full-time government employees who have an interest in pursuing some activity that is adverse to the federal government that does not conflict with their official responsibilities.

The 1853 statute was intended to prohibit federal employees from improperly using their positions to influence other parts of the federal government or to enrich themselves by doing so. If anything, this purpose would be less offended by allowing uncompensated activity by full-time employees than by allowing compensated activity by part-time employees. It is difficult to justify the imposition of a broader standard for prohibited pro bono work than the one stated for special employees.

The bar on a substantial portion of pro bono work by federal government attorneys was imposed in part in 1853 and in part in 1962, but in neither case was there a deliberate policy decision on this matter. Much of the present law on this subject might be characterized as an accident of history. Some inappropriate restrictions on pro bono work could be removed by amending the law to apply the rules created in 1962 for special employees to pro bono work by full-time employees.

In the District of Columbia, because of its large population of federal government lawyers, there have been periodic discussions and initiatives aimed to permit or encourage more pro bono work by

\textsuperscript{156} 18 U.S.C. § 205 (1988). The statute further provides that clause 2 of the quoted section does not apply to those who have served no more than sixty days out of the preceding 365 days.

\textsuperscript{157} See generally Perkins, The New Federal Conflict-of-Interest Law, 76 HARV. L. REV. 1113, 1123-27 (1963) (noting the failure of the pre-1963 statutes to recognize the distinction between the regular full time government employees and intermittent government employees).
government lawyers since the early 1980s. In 1984, David Isbell, then President of the D.C. Bar, wrote to the heads of all federal agencies suggesting that they adopt more flexible guidelines on pro bono work. Very few agencies changed their rules as a result of this initiative. In 1984 and 1986, Congressman Robert Kastenmeier introduced legislation that would have amended section 205 to reduce its restrictions on pro bono work by federal government attorneys. These were the first times that Congress gave any serious attention to the question of what pro bono work federal government attorneys should be permitted to do. Hearings were held in 1986 on the subject. The ABA gave careful consideration to the restrictions on pro bono work imposed by the statute, and recommended that federal government lawyers should be allowed to represent pro bono clients against the federal government absent some real or apparent conflict of interest with the lawyer’s agency work. The D.C. Circuit Judicial

158. This proposal was based on guidelines issued by the Department of Transportation. See Pickering, Pro Bono Representation by Government Attorneys, Proposed Resolution to Amend 18 U.S.C. § 205, 8 DIST. LAW. 25 (May/June 1984).
159. Interview with John Pickering, Wilmer, Cutler and Pickering (October 1989) and review of Mr. Pickering’s copies of agency responses to David Isbell.
162. In August 1984, the ABA House of Delegates adopted a resolution urging the following:

that government employed attorneys should not be prohibited or discouraged from representing pro bono clients in general or in actions against the government so long as such representation does not present a conflict of interest, is consistent with all other applicable rules of professional responsibility and is not undertaken on government time or at government expense.

The resolution, which went on specifically to encourage amendment of section 205 to implement this policy, was accompanied by a report from the Federal Bar Association and two sections of the ABA, which had proposed the resolution. The report offered examples of prohibited pro bono work which, the report asserted, posed no real or apparent conflict of interest:

an attorney employed by the Interior Department cannot represent a claimant in a social security disability proceeding . . . . Similarly, an attorney employed by the State Department could not represent a low-income public housing tenant in an eviction proceeding if title to the property was vested in the Department of Housing and Urban Development.

The ABA favored a more significant amendment of section 205 than was accomplished in 1989, one which would have allowed these types of activity. Dougherty, Watkins and
Conference adopted a similar recommendation in 1985, urging that section 205 was "unduly broad and restrictive in a number of respects," and that "there are countless matters where either a federally employed or District of Columbia attorney could represent an indigent defendant where there is no conceivable conflict of interest with the interests of the department or agency for which the attorney works." 163

The 1984 bill would have allowed federal government lawyers to represent claimants in federal public benefits hearings, to represent federal employees in personnel matters in federal courts, 164 and to represent pro bono clients against the District of Columbia. 165 This bill, according to Congressman Kastenmeier, was intended "to increase pro bono opportunities for federally employed and D.C. Government attorneys," and "would have allowed representation by a federally employed attorney or other employee when a different agency of the Federal Government was on the opposing side, 'if not inconsistent with the faithful performance of his duties.'" 166 This proposal was opposed by the administration, through the Federal Legal Council and the Office of Government Ethics. 167

In 1986, Congressman Kastenmeier introduced a narrower bill that would have allowed federal government lawyers to represent pro bono clients against the District of Columbia (which was at that time treated as part of the federal government for the purpose of defining conflicts of interest) and to allow District of Columbia lawyers to represent pro bono clients against the federal government. 168 Despite

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Hultman, Recommendation from the ABA Special Committee on Lawyers' Public Service Responsibility, Young Lawyers' Division and the Federal Bar Association (August 1984).
164. This would have limited the effect of Bachman v. Pertschuk, 437 F. Supp. 973 (D.D.C. 1977), in which the U.S. District Court for D.C. prohibited such representation.
165. H.R. 6267, 98th Cong., 2d Sess. (1984). This bill was supported by the Federal Bar Association, the ABA, and the Judicial Conference of the D.C. Circuit, but was opposed by the administration. See Pro Bono Representation, supra note 161 (opening remarks of Congressman Robert W. Kastenmeier). See Pickering, supra note 158 (describing the proposed amendments).
167. Ibid.
168. H.R. 4898, 99th Cong., 2d Sess. (1986). The purpose of this bill was articulated as "[t]o extend the permissible pro bono representation by employees of the Federal Government
substantial support for the 1986 bill, it was not enacted at that time.

In 1989 the substance of the 1986 bill\textsuperscript{169} appeared in a set of amendments to the federal ethics laws.\textsuperscript{170} This proposal was then enacted without controversy. These most recent changes are reflected as follows:\textsuperscript{171}

(a) Whoever, being an officer or employee of the United States in the executive, legislative, or judicial branch of the Government or in any agency of the United States, [including the District of Columbia,] other\textsuperscript{wise} than in the proper discharge of his official duties—

(1) acts as agent or attorney for prosecuting any claim against the United States, or receives any gratuity, or any share of or interest in any such claim, in consideration of assistance in the prosecution of such claim; or

(2) acts as agent or attorney for anyone before any department, agency, court, court-martial, officer, or any civil, military, or naval commission in connection with any [proceeding, application, request for a ruling or other determination, contract, claim, controversy, charge, accusation, arrest, or other particular matter] covered matter in which the United States is a party or has a direct and substantial interest;

shall be [fined not more than $10,000 or imprisoned for not more than two years, or both.] subject to the penalties set forth in section 216 of this title.

(b) Whoever, being an officer or employee of the District of Columbia or an officer or employee of the Office of the United States Attorney for the District of Columbia, otherwise than in the proper discharge of official duties—

(1) acts as agent or attorney for prosecuting any claim against the District of Columbia, or receives any gratuity, or any share of or interest in any such claim in consideration of assistance in the prosecution of such claim; or

(2) acts as agent or attorney for anyone before any department,

\textsuperscript{169} Although the language of the 1986 bill and the 1989 amendments is different, their intent appears to be the same.


\textsuperscript{171} The language in italics was added by the amendment and the bracketed language was deleted.
agency, court, officer, or any commission in connection with any covered matter in which the District of Columbia is a party or has a direct and substantial interest; shall be subject to the penalties set forth in section 216 of this title.\textsuperscript{172}

The 1989 version of section 205 also creates a separate section to define what proceedings are "covered matters" for the purpose of the prohibitions of the statute; these are "any judicial or other proceeding, application, request for a ruling or other determination, contract, claim, controversy, investigation, charge, accusation, arrest, or other particular matter."\textsuperscript{173} This definition replicates language in the 1962 version except for the marked changes. It was moved to a separate section so that it would apply to subsections (a) and (b).

The penalties language was moved to the end of the section and amended. It was expanded to allow misdemeanor or felony prosecution, civil penalties, and injunctions against violators.\textsuperscript{174}

The most important change in the law is that the District of Columbia and the United States are now to be treated as separate entities for the purpose of defining precluded activities.\textsuperscript{175} This pro-
posal was part of the Bush administration's proposals for the Ethics Reform Act.176

In 1984 and in 1986, the amendment of 18 U.S.C. section 205 was controversial. In 1989, this change was treated as a technical amendment. No hearings were held; the bill was introduced and enacted in the same week. Organizations and individuals which have a longstanding interest in the ability of government lawyers to do pro bono work did not know about the amendment until after it had been signed into law.177

C. Interpretation of Section 205

Section 205 has been interpreted by numerous court decisions and advisory opinions.178 Only a few have dealt directly with attempts by federal government attorneys to do pro bono work. In 1974


176. Conversation with Jane Lay, Deputy General Counsel, Office of Government Ethics (Feb. 1990). OGE’s 1989 report to the President’s Commission on Federal Ethics Law Reform urged that section 205 “be amended to treat the District of Columbia and the federal governments as separate entities for purposes of applying this provision.” Letter from OGE to Honorable Malcolm Wilkey, Chairman, President’s Commission on Federal Ethics Law Reform, (Feb. 10, 1989) at 5. In a section of the letter describing the effect of the change for sections 203 and 205 (in language not precisely correct for 205), OGE explained that “federal employees would be prohibited from receiving compensation for a representation or representing another only before the federal government and not the D.C. government and D.C. employees prohibited from the same conduct only with regard to representations to the District Government. The one possible exception to this separation would be the Office of the United States Attorney for the District of Columbia which has a unique role.” Id. at 4.

The language in the statute was not that proposed by the President, but was drafted by staff of the Senate Governmental Affairs Committee. Telephone interviews with Jane Lay, Office of Government Ethics, and Linda Gustitis, Senate Governmental Affairs Committee (Feb. 1989).

177. This was true of the Washington Council of Lawyers and the D.C. Circuit Judicial Conference.

178. Most of the early opinions interpreting section 205 are not directly relevant to this analysis of the impact of 205 on the ability of government attorneys to do pro bono work. Most of them examine whether a particular employee is governed by the restrictions of section 205. See, e.g., Case v. Helwig, 65 F.2d 186-88 (D.C. Cir. 1933) (lawyer who became employed by the government during the prosecution of a claim against the United States is not permitted to retain an interest in the claim); Flower v. United States, 31 Ct. Cl. 35 (1895) (distinguishing officers of the Army who are retired from active service from those who are wholly retired, who are not officers of the United States, and who are not subject to section 5498 [the predecessor of 205]); Prosecution of Claims; Temporary Employee, Member of Law Partnership, 40 Op. Att’y Gen. 289 (1943) (prosecution of a claim by the law partner of a consultant to the government would subject the consultant to criminal penalties).
two evening division students at Georgetown University Law Center were denied permission to appear in court on a criminal appeal that they were handling through a law school clinic, because both were federal employees, and the “clear wording” of 18 U.S.C. section 205 was found “unmistakably” to bar their appearance in court. The court rejected the students’ arguments that the statute had been designed “to deal with corruption and abuses of inside information”, and that there was no actual conflict of interest. The court noted that the students had “already participated in investigation and drafting of legal memoranda in [the] case,” since the judge did not indicate that these actions violate the statute, it appears that he read the statute to prohibit only signing papers and appearing in court. This outcome, that even uncompensated representation of indigents who are being prosecuted by an agency remote from the representatives’ employer is prohibited, is compelled by the clear language of section 205.

In a 1977 case, federal district Judge Richey offered the opinion that Section 205 “forbids a federal employee from representing anyone before an agency or court.” This sweeping statement appears to overlook the language in section 205 that precludes the representation of others in any “matter in which the United States is a party or has a direct and substantial interest,” and to suggest that a federal government lawyer would have a conflict based on the forum in which the matter is presented, regardless of who was the adversary.

In Bachman v. Pertschuk, the case in which this statement was made, Judge Richey interpreted the exception in the statute which allows federal government employees to represent others in “disciplinary, loyalty or other personnel administrative proceedings,” not to allow federal employees to handle such matters in court.

180. Id. at 679-80.
181. Id.
182. The same interpretation is offered by an opinion of the Office of Legal Counsel that representation of indigent criminal defendants by attorneys for the federal government was prohibited by the statute because of the interest of the United States in those cases. Government Lawyer’s Pro Bono Activities in the District of Columbia, 4 Op. O.L.C. (Vol. B) 800 (1980).
184. Id.
185. This was based on the equation of “administration proceedings” with administrative proceedings, and a further interpretation that the exception allows only defense of actions brought by the agency for “disciplinary, loyalty or other personnel reasons.” Id. at 976.
In particular, the judge found that because of a conflict of interest, a Federal Trade Commission attorney was disqualified from representing a class of which he was a member in an employment discrimination case against the FTC. The court noted that there might be a conflict between his personal interests and those of others in the class.\textsuperscript{186}

If federal employees have been prosecuted under 18 U.S.C. section 205, virtually none of those prosecutions has resulted in a published court opinion. In 1970 one case was reported\textsuperscript{187} in which one person was charged with the type of conduct that was sought to be prohibited by the original version of section 205.\textsuperscript{188} In \textit{U.S. v. Sweig},\textsuperscript{189} Martin Sweig, who was an assistant to Speaker John W. McCormack of the United States House of Representatives, was charged with having appeared before the Securities and Exchange Commission as an agent for a company regarding the Commission’s suspension of trading in that company’s stock. This was part of a scheme under which Sweig and his collaborator, who was not a government employee, were alleged to have agreed “to have the latter take fees from people with matters before government agencies in exchange for undertaking ‘to exert the influence of the office of the Speaker of the House to said agencies’.”\textsuperscript{190} The conduct other than the SEC appearances was charged under another statute.\textsuperscript{191}

One puzzling question about the scope of section 205 is whether a federal government lawyer may engage in pro bono work involving lobbying on legislation or filing comments in an agency rulemaking proceeding if the lawyer’s position on the bill is contrary to that of

\textsuperscript{186} \textit{Id.} at 977.
\textsuperscript{188} I found no other reported cases involving criminal charges for violation of section 205.
\textsuperscript{190} \textit{Id.} at 1155.
\textsuperscript{191} Sweig tried unsuccessfully to have the charge under section 205 dismissed, urging that it was inapplicable because he was not an attorney nor was he a legal agent for the company on whose behalf he appeared before the SEC. \textit{Id.} at 1156. In declining to dismiss this count of the indictment, the court found that “the strict common-law notion of ‘agency’ does not necessarily exhaust the meaning of the prohibition.” \textit{Id.} at 1157.

One other case in which the application of section 205 might have been consistent with the original intention of the statute is \textit{Refine Constr. Co. v. United States}, 12 Cl. Ct. 56 (1987). There the court found that the Veterans Administration has not acted improperly in declining to award a contract to a company which had been represented in negotiations with the agency by an engineer who was a full-time employee of the Veterans Administration. The engineer was not prosecuted under the statute, but the court, upon examining his conduct, found that he had violated it. It was not clear whether the engineer had been compensated for his services. \textit{Id.}
the executive branch. The current law defines a "covered matter" to include any judicial or other "proceeding, application, request for a ruling or other determination, contract, claim, controversy, charge, accusation, arrest or other particular matter." This language includes any sort of adjudicative proceeding, but not legislative proceedings. Perhaps, then, 18 U.S.C. section 205 does not prohibit legislative advocacy on behalf of anyone before Congress or any other legislative body, even if the federal government is opposing the position advocated by the client of the government attorney. The statute may not prohibit filing comments on a proposed rule on behalf of any person, regardless of the position taken by any government agency in that matter, because rulemaking is legislative rather than adjudicative behavior. This result, like other effects of the statute, is anomalous. The barrier imposed by the statute fails to prohibit some activity that would pose an actual or apparent conflict of interest.

V. ADMINISTRATIVE REGULATION OF PRO BONO WORK

In addition to the restrictions imposed by section 205, pro bono work by federal attorneys is restricted by various federal regulations. These regulations in some cases create administrative barriers to the performance of pro bono work that are more onerous than those imposed by section 205. To avoid section 205, a federal government lawyer need only select pro bono projects in which the government has no interest, such as domestic relations cases or employment discrimination complaints against private employers. The administrative restrictions may have a greater negative impact than section 205 on pro bono work because they apply to nearly all pro bono projects, regardless of who is the client.


193. In explaining the types of proceedings encompassed by the term "particular matter", Robert Jordan explains that "the conflict of interest laws cover 'adjudicative' situations, whether formal or informal and whether or not subject to the Administrative Procedure Act or similar procedures; the laws do not cover 'rulemaking.'" Jordan, Ethical Issues Arising from Present or Past Government Service, in PROFESSIONAL RESPONSIBILITY: A GUIDE FOR ATTORNEYS 171, 177 (1978). Since the current definition of "covered matter" includes the term "particular matter" and numerous examples of such matters, it appears that the 1989 amendments did not change the scope of section 205.

194. I recommend, infra notes 299-300 and accompanying text, that the statute should be amended to make the government attorney's client her agency. In identifying conflicts with the lawyer's agency, the potentially conflicting activity should be expanded to include any advocacy adverse to the agency, whether before a court, a legislative body or an agency.
A. The Executive Order and the OPM Regulations

Pursuant to Executive Order No. 11222, which dealt with ethical conduct of federal employees, the Office of Personnel Management promulgated regulations addressing restrictions on outside activities by federal government employees. In addition, OPM offers guidance to agencies on this issue in the Federal Personnel Manual. The Comptroller General has issued some opinions on leave that may be granted to federal employees for pro bono work; these are binding on the agencies. As directed by the executive order and the OPM regulations, most agencies have issued their own rules on outside activities by government lawyers. Some appear in the Code of Federal Regulations, others are embodied in agency memoranda and others in letters by agency general counsels re-


The executive order was revoked in 1989 by Principles of Ethical Conduct for Government Officers and Employees, Exec. Order No. 12674, 54 Fed. Reg. 15159 (April 12, 1989), which addresses the same issues addressed by the previous order. The OGE regulations issued under the revoked order will remain in effect until amended. Exec. Order No. 12674 § 502(a).

196. 5 C.F.R. § 735 (1988).

197. FEDERAL PERSONNEL MANUAL, supra note 23, at Chapter 990, subchapters 1, 2, and 11.

198. The FEDERAL PERSONNEL MANUAL is the “official medium of the Office of Personnel Management for issuing personnel instructions, operational guidance, policy statements, related material on government-wide personnel programs, and advice on good practice in personnel management to other agencies.” FEDERAL PERSONNEL MANUAL, supra note 23, at ch. 171, subch. 2-1 (June 10, 1986) Some of the materials in the FEDERAL PERSONNEL MANUAL (FPM) are binding regulations; others are interpretive rules or policy statements, which are precatory in nature. Memorandum from Chris J. Melcher, Wilmer, Cutler and Pickering to the Board of Directors, Washington Council of Lawyers 6-7 (July 12, 1988) (on file at Hofstra Law Review), citing Homer v. Jeffrey, 832 F.2d 1521, 1530 (Fed. Cir. 1987) (expressing doubt that the FPM provisions are “law”); American Fed’n. of Gov’t Employees, Local 2782 v. Federal Labor Relations Auth., 803 F. 2d 737, 741, 742 n. 2 (D.C. Cir. 1986) (stating that some of the provisions of the FPM are rules). In general, the contents of the FPM are binding to the extent that they are issued in conformance with procedural requirements imposed by Congress for rulemaking. Chrysler Corp. v. Brown, 441 U.S. 281, 301-04 (1979). See National Treasury Employees Union v. Reagan, 685 F. Supp. 1346 (E.D. La. 1988) (addressing whether the FPM can provide independent mandatory requirements).

199. See, e.g., infra notes 244-86 and accompanying text (citing to examples of these regulations).

200. See, e.g., Department of Justice Standards of Conduct, 28 C.F.R. §§ 45.735-9, 45.735-12 (1990).

201. See, e.g., Memorandum from John M. Fowler, General Counsel, Department of
sponding to inquiries.202

The Office of Personnel Management's "Agency Regulations Governing Ethical and Other Conduct and Responsibilities of Employees"203 require each agency to issue regulations addressing the matters addressed in the OPM regulations. The regulations do not address directly whether federal government attorneys may perform pro bono work. They prohibit the receipt of gifts, entertainment, and favors in exchange for any service relating to official duties.204 They prohibit "outside employment or other outside activity not compatible with the full and proper discharge of the duties and responsibilities of . . . Government employment."205 These include acceptance of anything of value that might create a conflict of interest.206 They prohibit the acquisition of financial interests which conflict with duties to the government.207 They prohibit the use of government property, including equipment and supplies, "for other than officially approved activities."208

The Federal Personnel Manual addresses the question of attorney pro bono work directly. In January 1981, before the current FPM policy was written, the Attorney General of the United States recommended that federal agencies adopt policies encouraging pro bono activities by agency attorneys.209 The impact of this resolution is evident in some of the policies.210 In 1985, however, the Office of Transportation, to all DOT attorneys (Apr. 9, 1981) (on file at Hofstra Law Review) [hereinafter DOT memorandum]; Department of Commerce Secretary's Circular No. 32, Pro Bono Activities by Attorneys in Commerce Department Legal Office (Jan. 19, 1981) (on file at Hofstra Law Review) [hereinafter Department of Commerce Circular].

205. 5 C.F.R. § 735.203(a).
207. 5 C.F.R. § 735.204 (a)(1) (1990).
209. Referred to in Department of Commerce Circular, supra note 206 (implementing United States Attorney General's recommendation, dated Jan. 5, 1981). The Department of Transportation explains that "[p]ursuant to Executive Order 12146, the Federal Legal Council recently resolved to encourage pro bono activities by federal attorneys and asked federal agencies to adopt the Council's proposed policy statement." DOT memorandum, supra note 201 (regarding "DOT Policy Governing pro bono Activities by Attorneys").
210. The Department of Transportation guidelines may have provided the model for the more permissive of the existing guidelines. In 1984, David Isbell, then President of the District of Columbia Bar, circulated proposed guidelines on pro bono work by federal government attorneys. This draft resembled regulations already in place at the Department of Trans-
Personnel Management issued a version of Chapter 990 that imposed many restrictions on pro bono work. The 1985 document noted that federal government attorneys may have an ethical obligation to do pro bono work, but urged that "it can be argued that service as counsel to the Federal Government is pro bono publico by definition."211

The manual then stated that government lawyers (a) may not perform pro bono services on Government time or at Government expense,212 (b) may not use the services of other government employees to spend government time "to carry out otherwise impermissible pro bono services"213; (c) may not ask clerical employees to help with pro bono work "even on off-duty hours on a voluntary basis."214 The subchapter then asserted that "the United States Government as a client is entitled to the same degree of loyalty as any other client."215

Appended to this subchapter was a policy statement by the Federal Legal Council opposing amendment of 18 U.S.C. section 205, and asserting that the boundary drawn by the law is necessary. The statement assumes that the client of a federal attorney is the entire federal government, and asserts that "[i]t does not seem useful to forego the existing clear-cut rule to create an amorphous situation demanding constant (and somewhat speculative) case-by-case analysis of whether a given government attorney's pro bono representation would raise such conflicts."216 The impact of this policy statement is evident in other of the regulations.

Constance Berry Newman, Director of OPM, adopted a more

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211. Id.
212. Id. § 2-2(c). In support of this the FPM cites 61 Comp. Gen. 652 (1982), dicussed infra notes 226-31 and accompanying text.
213. Id.
214. Id. Here the FPM cites General Accounting Office Letter B-215476 from Harry R. Van Cleve, Acting General Counsel, General Accounting Office, to David B. Isbell, President, District of Columbia Bar (July 2, 1984).
215. FEDERAL PERSONNEL MANUAL, supra note 23, at Chapter 990, subchapter 2-2(d).
216. Id., Appendix A at A-1. The Federal Legal Council was composed of the Attorney General and the General Counsels of the federal government. The statement urges that if the scope of section 205 were limited, problems in limiting the scope of section 205 would occur because of the overlap of agency functions and the need for information-sharing between agencies. It urges that "[i]t is, to say the least, a questionable management practice, with dubious effects on morale, to have one employee litigating against another." Id. The statement does not explain what proposed amendment of section 205 is being opposed. Since the statement is dated March 14, 1985 the Council may have been responding to the 1984 Kastenmeler bill.
positive tone in guidance offered to the agencies regarding pro bono work by attorneys in a memo issued to heads of all departments and agencies in 1990.

I ask you to encourage employees to participate in volunteer activities associated with helping those who need legal counsel and other services. In addition, I ask you to be as sensitive and flexible as possible in scheduling work for these employees and in granting annual leave or leave without pay [consistent with existing regulations] . . . .

I believe the end result of our effort to help those in need will serve to improve our country and the Federal Government.\(^\text{217}\)

Newman wrote this memo in response to a letter from the Washington Council of Lawyers,\(^\text{218}\) a D.C. public interest bar group, requesting changes in regulations relating to pro bono work.\(^\text{219}\)

Newman’s memo was followed a year later by a new set of policies, included in the Federal Personnel Manual, on pro bono legal service by federal employees.\(^\text{220}\) This is part of a general policy encouraging volunteer work and public service, consistent with President Bush’s Points of Light Initiative. The new OPM policy asserts:

Employees of the Federal Government can play a significant


\(^{218}\) In the fall of 1989, I became a member of the Board of Directors of the Washington Council of Lawyers. This provided some opportunities to discuss the issues addressed here with others concerned about them. I had already become a consultant to ACUS at the time I joined the Council Board. To avoid role confusion, I did not become actively involved in the Council’s advocacy of more pro bono opportunities for government lawyers.

\(^{219}\) See Letter from Constance Berry Newman, Director, Office of Personnel Management, to Timothy Lindon, Esq., President, Washington Council of Lawyers (Feb. 26, 1990) (stating that it is not appropriate for OPM to require agency support of pro bono work since each must give primary attention to its own mission, but noting that she issued a memo to agency heads reminding them of opportunities for pro bono work under existing law) (on file at Hofstra Law Review). Also in 1989 Charles Ruff, the president of the District of Columbia Bar, made the issue of pro bono work by government lawyers a priority, and created a committee to promote pro bono work by federal and District government employees. Ruff, Government Lawyers Under Restraint, THE WASHINGTON LAWYER (1989). The committee’s goals include the study of barriers experienced by government lawyers to participating in bar activities and to doing pro bono work. The committee intends to examine steps that might be taken to remove those barriers. Bar to Reach Out to Government Lawyers, D.C. BAR REP., Dec.–Jan. 1990, at 1.

\(^{220}\) FPM Letter 992-1 (April 19, 1991) (the relevant part of which is identified as superseding FPM Chapter 990, Subchapter 2).
role in providing legal assistance to those in need.

OPM encourages agencies to be supportive of employees who wish to provide volunteer services to help those in need of legal assistance. Attorneys in the Federal Government, in keeping with their ethical obligation to the system of justice, may provide legal services *pro bono publico* to those in need, when such activities do not present a conflict of interest with their job responsibilities.\(^{21}\)

The general statement of policy takes a tone virtually diametrically opposite from that of the previous OPM policy. The letter makes concrete suggestions of ways that federal agencies can encourage their employees to do volunteer work, including:

- flexible or compressed work schedules . . . for employees who wish to engage in volunteer activities during normal working hours . . .
- granting of annual leave, leave without pay, or, in very limited circumstances, excused absence . . . [to facilitate volunteer activities].\(^{22}\)

The letter explains that excused absence (also called “administrative leave”)

should be limited to those situations in which the employee’s volunteer service, in the agency’s determination, . . . is directly related to the department’s or agency’s mission; is officially sponsored or sanctioned by the head of the department or agency; or will clearly enhance the professional development or skills of the employee in his or her current position.\(^{23}\)

While OPM accepts the idea that the entire United States government is the client of every federal government lawyer, this policy makes major strides in encouraging pro bono work. If these policies are incorporated into the regulations of the agencies, lawyers will be subject to many fewer barriers to participation in pro bono activities.

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\(^{21}\) *Id.* at 3.

\(^{22}\) *Id.* at 2.

\(^{23}\) *Id.* The letter also makes clear that, contrary to previous policy, “federal employees may use the services of other Federal employees on Government time to carry out *pro bono* services that satisfy one or more of the criteria for conducting such activities on an excused absence basis, provided appropriate supervisory approval has been granted.” *Id.* at 4.
B. Comptroller General Opinions

The Comptroller General of the United States has authority over the use of appropriated funds and, therefore, issues opinions on topics such as the use of administrative leave or government resources for outside activities. Though, in general, federal employees may not be excused from work without loss of pay or vacation time, brief periods of administrative leave are proper for certain types of activities. These include participation in civil defense programs, voting, donating blood, tardiness, taking examinations pertinent to federal employment, attending conferences, and representing employee organizations. However, there are many other activities in which the Comptroller General has found that administrative leave was not justified.

The most directly relevant of these decisions is In re Elmer DeRitter, Jr., which concerns employees of the Veteran’s Administration (now the Department of Veterans’ Affairs) who had been assigned to represent an indigent criminal defendant and who requested “court leave” (generally granted for service as a juror or witness) to do so. The Comptroller General held that “an employee in this situation may not be excused on court leave or administrative leave and may be compensated by the Government only to the extent he has to his credit and requests a grant of annual leave.” This activity was not regarded as furthering a federal function, and since it might have required substantial time, administrative leave was regarded as inappropriate. The Comptroller General acknowledged that “it may be unfair to force a Government attorney, who is required to be a member of a bar to qualify for his position, to use annual leave

224. Administrative leave is not authorized by statute, but agencies are permitted to allow employees brief periods of leave without charging the time to annual leave or reducing the employee’s pay. See FEDERAL PERSONNEL MANUAL, supra note 23, at Supp. 990-2, Book 630, Subchapter S11.

225. The extent to which opinions of the Comptroller General are binding is a matter of some controversy. Conversation with Stuart Rick, Office of General Counsel, Office of Personnel Management (Feb. 23, 1990).


228. Id. at 652-53.

229. Id. at 652.

230. Id. at 653-54.
to meet this obligation of bar membership." However, this consideration was not determinative.

The *DeRitter* decision relied on a 1965 decision in which the Comptroller General held that a federal agency could not establish a policy allowing administrative leave to attorneys appointed by a court to represent indigent criminal defendants. In that case, the Civil Service Commission questioned whether the answer would be different if the amount of time involved was a maximum of three to five days; by its silence on this distinction, the Comptroller General appears to indicate that the amount of time involved is not relevant. Instead, the key issue was held to be "whether the service performed by federally employed attorneys in such cases is in furtherance of a Federal function for which the employing agency’s appropriations are available." Otherwise, the decision indicates that an act of Congress would be needed to make administrative leave available for court-appointed representation of indigents.

It should be noted that the *DeRitter* decision was written before the ABA Model Code of Professional Responsibility had been written. The Civil Service Commission letter cited Canon 4 of the rules of the Supreme Court of Missouri, discouraging requests by members of the bar to be excused from court-appointed representation of indigents, but the Comptroller General seems to have regarded Canon 4 as something less than binding law. During the intervening twenty-five years, most states have developed more sophisticated codes of ethics and have set up or expanded lawyer regulatory agencies. Ethical rules imposed on lawyers are given greater legal effect in 1992 than they were in 1965, among them the obligation to do pro bono work.

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231. *Id.* at 654.
232. *Id.*
234. *Id.* at 644.
235. *Id.* The decision points out that such a statute mandated the allowance of leave only for federal employees serving on juries. *See id.* at 653 (citing 5 U.S.C. § 6322(a) and (b) (1988)).
237. The ethical obligation to represent indigents was raised and rejected by the Comptroller General in *DeRitter* as well, on the basis that government attorneys were not granted administrative leave to study for the bar exam. The decision reflects a position that the government may require attorneys to fulfill obligations to the bar on their own time. 61 Comp. Gen. at 654 (1982).
gal context, the request for administrative leave would be granted.

Another Comptroller General decision involved a request for three days per month of administrative leave by a HUD employee who had male breast cancer, to participate in an NIH study of his cancer. In that case three days per month was found to constitute "brief periods of time" for which administrative leave could be allowed. In addressing whether the activity is in furtherance of an agency function, the Comptroller General noted with apparent approval that this project was "part of a cooperative effort between HUD and NIH" and that "the employee's performance could benefit from his participation in the protocol."

In another decision, an employee of the Department of Labor was found not entitled to administrative leave for six weeks of almost uncompensated drought relief service for Africare, a private non-profit organization. Although the work she did in Africa during this period was similar to that performed in her official capacity, she was not entitled to administrative leave. Her supervisors urged that the experience contributed to her ability to perform her official duties more effectively, but the Comptroller General was unpersuaded. The decision notes the "substantial period of time" of the employee's absence.

While these decisions articulate some guidelines for decisions on administrative leave, the Federal Personnel Manual makes clear that each agency has broad discretion regarding these determinations.

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239. Id. See supra pp. 1145-46 (discussing benefits to federal attorneys' lawyering skills and professional development from doing public service work, resulting in increased work satisfaction and possibly leading to increased duration of federal service).

240. The employee was paid $75 per week for the service provided. In re Secretary of Labor, B-155287 (June 26, 1974) (unpublished opinion).

241. Id.

242. FEDERAL PERSONNEL MANUAL, supra note 23, at Supp. 990-2, Book 630, Subchapter S11 explains that "[w]ith a few exceptions, agencies determine administratively situations in which they will excuse employees from duty without charge to leave and may by adminis-
The Comptroller General stated in one decision that “each agency is responsible for determining those situations in which excusing employees from work without charge to leave is appropriate under the general guidance of the decisions of this Office.”

C. Agency Regulations

Most federal agencies have rules imposing restrictions on outside activities by government employees. These prohibit activity that would give rise to an actual or apparent conflict of interest based on personal financial interest, the interest of another, or possible revelation of confidential information. These regulations are similar to the corresponding set of OPM regulations, but each agency has its own variations on the rules. Some of these rules directly address pro bono work by government attorneys; others impose more general restrictions.

1. Permission To Do Pro Bono Work

Some agency regulations set the policy on pro bono work by government attorneys. The regulations of the Department of Justice, the largest employer of attorneys in the federal government, provide that:

employees are encouraged to provide public interest professional services so long as such services do not interfere with their official responsibilities. Such public interest services must be conducted without compensation, and during off-duty hours or while on leave. Leave will be granted for court appearances or other necessary incidents of representation in accordance with established policy on leave administration . . .

The Department of Justice regulations prohibit professional or practice or outside employment if:

(1) The activity will in any manner interfere with the proper and effective performance of the employee’s official duties;
(2) The activity will create or appear to create a conflict of interest;

244. See infra notes 246-79 and accompanying text.
246. 28 C.F.R. § 45.735-9 (c)(1) (1990). The regulation also permits attorneys to represent federal employees in Equal Employment Opportunity complaint procedures, and prohibits employees from seeking an award of attorney’s fees for public interest work.
(4) The employee's position in the Department of Justice will influence or appear to influence the outcome of the matter;

(5) The activity will involve assertions that are contrary to the interests or positions of the United States; or

(6) The activity involves any criminal matter or proceeding whether Federal, State or local, or any other matter or proceeding in which the United States (including the District of Columbia) government is a party or has a direct and substantial interest.\footnote{247}

Some of the other agencies, including the Department of Commerce and the Department of Transportation, also encourage pro bono work by agency attorneys. They mandate the creation of systems within the agencies to notify agency attorneys of opportunities and to coordinate with organizations that refer clients who need pro bono assistance.\footnote{248} Some agencies just have a general policy encouraging pro bono work. The Department of the Navy, for example, has no official policy but issued a statement explaining that "the Office of the General Counsel actively supports and encourages individual initiative in furtherance of the ideals and goals of the legal profession."\footnote{249}

2. Definition of Pro Bono Work

"Public interest service" is defined in the Department of Justice and some other regulations as service to a client who cannot afford to pay a lawyer; efforts to protect public rights, to further the purpose of a charitable, religious, civic or educational organization, or "services to improve the administration of justice."\footnote{250}

3. Permission/Notice Procedures

Most of the agency regulations set up procedures by which a lawyer may seek approval of some outside activity.\footnote{251} Generally,
they require that the employee who wants to undertake an outside activity submit a written request to the appropriate ethics official describing in detail the activity and the amount of time involved. The Department of Justice regulations require that notice be given of intent to provide such services to the head of the employee’s division. The Department of Education regulations require prior approval of outside activity, unless “the outside activity will not - (i) be performed during the employee’s regular work hours; (ii) aggregate 10 or more hours a week; (iii) involve public writing or speaking; . . . and (iv) reasonably raise questions under the standards in this part.”

4. Prohibition of Private Practice

Some agency regulations emphasize the prohibition of outside activity rather than the desirability of pro bono service. Such regulations do not include an exhortation to attorneys to do pro bono work, and tend to emphasize what is prohibited rather than what is permitted. The National Labor Relations Board states that “[t]he private practice of law either individually or with another person” is “incompatible with the full and proper discharge of the duties and responsibilities of . . . Government employment.” The regulations mention the possible exception of occasional involvement in “family or civic matters.”

the supervisors. The NLRB regulations require an annual report from each division chief detailing any outside employment requested and whether the request was granted. The Department of the Army imposed similar requirements of advance written permission and agency reporting on outside activity. AR 690-300, Interim Change No. 109, Department of the Army (Dec. 18, 1985) (expired Dec. 18, 1987).

In contrast to these requirements of advance written approval, the Department of Transportation Guidelines require that “[n]otice of intention to provide pro bono services shall be given in writing to the head of the employee’s division,” and then provides for resolution of any disagreements about the work to be done. Memorandum from John M Fowler, General Counsel of the Department of Transportation, to all DOT Attorneys (Apr. 9, 1981) (discussing DOT Policy Governing Pro Bono Activities by Attorneys).

252. E.g., Environmental Protection Agency regulations, Procedures for Permission to Engage in Outside Employment or Other Outside Activity, 40 C.F.R. Part 3, Subpart E, Appendix A (1990).


254. 34 C.F.R. § 73.22 (b)(2) (1990).

255. 29 C.F.R. § 100.113 (a) (1990).

256. Id.

257. Id. § 100.113 (a)(1). Similarly, the Army regulations state that “[b]ecause of the greater potential for actual or apparent conflicts of interests, the outside practice of law particularly is discouraged.” AR 690-300, Interim Change No. 109, Department of the Army
The Solicitor’s Office of the Department of Labor issued a memo to its attorneys in 1982 to impose stricter “limitations on the outside practice of law than apply to other outside activities of attorneys.” The memo defines activity requiring specific advance clearance “to include advisory or consultatory services on behalf of a litigant, a possible litigant, or a client in addition to actual representation of a client.” The memo prohibits any “affiliation or association with a law firm or another attorney.”

The GAO personnel regulations are quite restrictive also. They state:

Representation Before the Government. Except as specifically permitted by 18 U.S.C. §§ 203 and 205, permission to engage in outside employment will not be granted for the purpose of representing any employer, client, or other person before the Federal Government or, where compensation is received, for the purpose of assisting in such representation. This prohibition is statutory and applies even to representation occurring as part of the normal membership activities of any of the organizations specified in paragraph 2b, above.

The prohibition of section 205 is of representation of any person against rather than before the government. This rule appears to read the statute to prohibit any appearance in any federal court or other tribunal (other than in performance of official duties) against any adversary. In fact the statute prohibits acting as agent or attorney

(Dec. 18, 1985) (expired Dec. 18, 1987). These Army regulations do qualify the prohibition, stating that pro bono services are permitted, as long as they are performed within the restrictions imposed by 18 U.S.C. § 205, the Federal Personnel Manual Chapter 990, and these regulations. Id.

The Department of Energy regulations assert that engaging in private practice is incompatible with a lawyer’s performance of his or her official duties, but they exempt from the section in which this prohibition appears any participation in the affairs of a non-profit or public service organization. 10 C.F.R. § 1010.204 (a)(3)(i) and (g)(2) (1990).


259. Id.

260. Id. This is in contrast to the Department of Labor regulations, which state that “[t]here is . . . no general prohibition against Department employees holding jobs, financial interest, or engaging in outside business or professional activities.” 29 C.F.R. § 0.735.11 (1990).


against the federal government. The statute would not prohibit litigation of a pro bono employment discrimination case against a private employer in federal court. The GAO rules disapprove of court appearances for other than official purposes.

5. Reiteration of Language of Section 205

Many agency regulations on outside activities reiterate or paraphrase the language of section 205, but some of these, like the GAO regulations, prohibit more than is prohibited by section 205. For example, the statute prohibits acting as "agent or attorney" for anyone in a matter in which the United States is a party or has a direct and substantial interest. The statute prohibits actual representation, whereas the Department of Justice regulations prohibit "activity", which may include non-representational assistance as well.

6. Prohibition on Federal Court Appearances

Some federal agency policies specifically address the language in section 205 that allows representation of federal employees in personnel administration proceedings. Some agencies have incorporated a broad reading of the decision in Bachman v. Pertschuk into their regulations, and assert (as the court arguably did in that decision) that section 205 permits federal employees to represent other employees against the government in personnel proceedings, but does not permit federal court appearances by federal attorneys in such cas-


264. Rule 9(d) of chapter 5 of the GAO Code of Ethics states that "[p]ermission to engage in outside employment will not be granted for the purpose of representing clients in court except in cases not prohibited by law where approved by the General Counsel for the purpose of a specific appearance." The lesser restrictions on non-litigation activity also are reflected in a rule allowing preparation of the tax returns of others. Id. at rule 9(e).


266. Id. GAO Code of Ethics at Rule 9(c). This interpretation also appears in the sources cited supra note 201 which provide that pursuant to 18 U.S.C. section 205, "no employee shall engage in pro bono activity in which the United States is a party or has a direct and substantial interest."

Some of the regulations refer to 18 U.S.C. section 205 without elaboration. See, e.g., 29 C.F.R. § 100.122(d) (1990) (NLRB regulations mandating that employees acquaint themselves with the statute).

267. See, e.g., supra note 201.

The Department of Commerce circular, on the other hand, interprets Bachman v. Pertschuk narrowly and finds it not to preclude court representation in such cases.

7. Rules on Teaching, Lecturing and Writing

Some pro bono work involves writing articles, teaching, or giving lectures. Most agencies offer qualified encouragement to federal government employees to do teaching, lecturing and writing, but they often prohibit receipt of honoraria or limit the amount that employees may be paid for such activities. Some agencies prohibit employees from using expertise acquired in federal employment in their teaching; others prohibit revealing information acquired in federal employment that is not generally available to the public.

8. Rules on Membership in Professional Societies

Some regulations are explicit in their permission to federal employees to be members of or officers in professional societies or other civic, religious or charitable organizations. The GAO, for example, requires advance approval of most outside activities, but provides that “approval is not required to . . . engage in the normal membership activities of a charitable, religious, professional, social, fraternal, nonprofit educational and recreational, public service, homeowners, or civic organization. Normal membership activities include those ordinarily performed on a noncompensated basis by members.” This

269. See, e.g., 45 C.F.R. § 73.735-702 (1990) (Department of Health and Human Services prohibitions on outside employment activities).

270. Department of Commerce Circular, supra note 201.

271. The DOT memorandum, supra note 201, reports that the Federal Legal Council resolved that this case “should be interpreted narrowly so as to limit the decision to its facts”. The attorney in Bachman v. Pertschuk wished to represent a class in a personnel administration proceeding in court. He was not permitted to do so because of a specific conflict between his duties to his employer and to the class. 437 F. Supp. 973 (D.D.C. 1977).

272. 7 C.F.R. § 0.735-13(i) (1990) (U.S. Department of Agriculture).


rule appears to permit participation in bar activities, or membership and participation in the activities of a law reform organization without prior approval.

In July of 1991 the Office of Government Ethics issued a proposed rule revising the conduct code for executive branch employees, which would have restricted sharply the participation of lawyers in bar association activities by prohibiting the use of administrative leave for such activity unless it was directly related to the employee’s official duty.\textsuperscript{277} This proposal was withdrawn by OGE after 980 negative comments were filed during the comment period.\textsuperscript{278}

9. Prohibition on Use of Government Time

Most agencies require that pro bono work be conducted “during off-duty hours or while on leave.”\textsuperscript{279} This requires that attorneys use only evening and weekend hours for pro bono projects; any daytime hours are deducted from vacation time. The Departments of Transportation and Commerce make compensatory time arrangements available to accommodate pro bono work.\textsuperscript{280} In addition, the Department of Commerce policy provides that some administrative leave “(use of official time)” may be granted.\textsuperscript{281}

10. Prohibition on Use of Government Resources

Most agency regulations prohibit the use of government property, including equipment and supplies, for any activity not officially approved.\textsuperscript{282} The Department of Commerce permits “the reasonable use of government libraries, offices, [and] equipment.”\textsuperscript{283} The Department of Transportation permits such use of resources also, but points out that “[a]utomated research systems, for which direct user charges are made to the agency, shall not be available for pro bono work.”\textsuperscript{284}

\begin{thebibliography}{99}
\bibitem{278} Causey, \textit{supra} note 75.
\bibitem{279} \textit{See id.} at Rule 9(a).
\bibitem{280} \textit{See sources cited supra} note 201.
\bibitem{281} Department of Commerce Circular, \textit{supra} note 201.
\bibitem{282} 29 C.F.R. § 1600.735-205(e)(i) (1990); \textit{see} 7 C.F.R. § 0.735-13 (a)(9) (1990) (U.S. Department of Agriculture).
\bibitem{283} Department of Commerce Circular, \textit{supra} note 201.
\bibitem{284} DOT memorandum, \textit{supra} note 201.
\end{thebibliography}
11. Prohibition on Use of Secretaries

In most agencies lawyers may not request assistance from their secretaries with pro bono projects, on or off government time.\textsuperscript{285} The Department of Transportation policy, however, permits attorneys to obtain the assistance of clerical employees in the performance of pro bono work as long as such assistance does not interfere with performance of official responsibilities.\textsuperscript{286}

This analysis of the agency regulations reveals considerable variation in agency policies. Some of the variance may be explained by the differences in agency operations and the need for specific restrictions. Many of the differences, however, may be attributable to differences in the political ideology of the drafters. Many of the regulations bear the unmistakable imprint of Reagan administration efforts to curtail services to the poor. This is a problem not only because it reflects mistaken policy judgments, but also because federal civil servants should not be prohibited from volunteer service activity on their own time as a means of furthering the political agenda of any administration.

In the revision of these regulations, restrictions should be removed which are not necessary to avoid conflicts of interest or abuse of resources. Government employees should be given as much flexibility as possible in the rules on voluntary service, and should not be barred from fulfilling their duty as professionals to serve those in need.

\textsuperscript{285} E.g., \textit{FEDERAL PERSONNEL MANUAL}, Chapter 990, Subchapter 2, states that "OPM has concluded that Federal attorneys engaged in pro bono activities may not solicit Federal clerical employees to assist with pro bono work even on off-duty hours on a voluntary basis."

\textsuperscript{286} The DOT memorandum, \textit{supra} note 201, states that:

Clerical employees should be encouraged to assist an attorney in the provision of pro bono services, and, with the consent of the clerical employee, such services may be provided so long as official responsibilities are not impeded. Any clerical employee, however, has the right to decline to provide such service, and the decision of any employee who declines should be fully respected. Attorneys should not request clerical employees to perform such work after hours, except where the employee specifically agrees that the work is being volunteered and that the government will not be providing compensation to them.

\textit{Id.} at 2.
D. Regulation of Pro Bono Work and Other Outside Activities by Other Governments

Information is not easily available about foreign government policies on pro bono assistance by government attorneys. However, it is useful to look briefly at the rules imposed in England and Germany regulating outside activities by government employees. These suggest that some western countries are far more flexible than the United States in the regulation of outside activities, and more specific in the types of activities prohibited.

The British civil service rules prohibit a much narrower spectrum of activity than does section 205. A civil servant in Britain may be barred from acting on behalf of others who have business with his department. This restriction is imposed only by certain departments, including the Bureau of Inland Revenue and the Department of the Environment. In comparing these regulations to those of the United States federal government, Professor Robert Vaughn points out that the British rules "focus upon a few demonstrated risks . . . . [including] the appearance of improper influence on the decisionmaking process, conflict of roles, the likelihood of coercion of third parties, and the improper use of official information." In Germany, outside activities of government employees are regulated by the Federal Public Officials Law. As in England, the rules are more flexible than those of section 205. Generally, public officials do not need to ask permission to engage in uncompensated outside activity. Permission must be requested, however, if the outside activity involves "engaging in a profession," which presumably includes practicing law. The reasons for possible disallowance of the activity include probable impairment of an official interest, such as by hindrance of fulfillment of official responsibilities, or the appearance of conflict of interest. German law prohibits the use of official time and property for an outside activity unless the

288. Id. at 721.
290. Id. at 357.
291. Id. at 358.
292. Id. at 357-58.
activity is approved by a supervisor as "fulfilling an official interest." If resources are used, costs must be reimbursed in most cases. This small window into the choices made by other governments underlines the assertion that our current system is extremely rigid, and that other choices are possible.

VI. THE LAW IN OPERATION: REPORTS FROM THE FIELD

I spoke with some federal government attorneys who have done pro bono work about the nature of their work, and about the approval/oversight process. Most of the examples that I discuss below involve some possible technical violation of agency regulations, though none of those interviewed had abused government time or resources. Because of the possible violations, I will not use the real names of these lawyers or their agencies. Absent assurances of confidentiality, my sources would not have shared these stories.

Sheila Jackson was a volunteer mediator while a full-time lawyer at a federal agency. She did mediation for various programs—each time she became involved with a mediation program, she wrote a memo requesting permission to accept cases from that program. Each request was approved. She did not request permission on a case-by-case basis, but she declined to handle any cases in which either the federal government or the D.C. government was a party. Jackson was not familiar with the particular restrictions imposed by her agency on the use of agency resources, but assumed that they prohibited any use

293. Id. at 361.

294. Id. at 362.

295. I sought names of government lawyers who do pro bono work from various sources. First I asked organizations that distribute pro bono work for names of federal government lawyers with whom they work. The staff of these organizations were generally reluctant to provide names, because they had the impression that the federal government lawyers with whom they worked were often volunteering in violation of some rule or other and were skittish about their activities. My research assistants asked agency personnel whom they called to find out agency policy for names of individuals; these contacts were similarly reluctant to offer names.

Finally, I simply began asking every government lawyer I spoke with whether he or she did pro bono work or knew anyone who did. This was more successful. However, I have talked with only a small number of lawyers, and my technique for identifying them bears no resemblance to proper sampling procedure. These examples come from different agencies, but there is no reason to believe that they are "typical" of the experiences of government lawyers who are interested in pro bono work. I did, however, report all of the examples that were reported to me.
for non-official purposes. She avoided using office duplicating equipment (by asking parties to send her copies of any documents she needed), but she did make phone calls from her office to set up meetings with people. She needed to call the lawyers representing the parties to mediation at their offices during regular working hours; it would have been awkward to try to reach them at home. She did most of her mediation outside of regular work hours, but sometimes she took annual leave or used informal flextime (just making up the hours missed) to compensate for daytime hours devoted to mediation-related work. Jackson said she never had problems with time conflicts between her mediation and her official responsibilities. Normally, mediation sessions were scheduled after office hours; even so, sometimes Jackson had to reschedule them to permit her to work overtime at her agency.

When asked why she did pro bono work, Jackson explained that she enjoyed mediation more than litigation, that she enjoyed the contact with people, and found it satisfying to make this contribution of services.

Andrea Barlow, in addition to her government job, is active on a D.C. bar committee and serves on the board of directors of an organization that provides services to indigents. When she began this work, she got informal oral approval of her activities from her superiors, but later got official written approval after her agency became more actively concerned with ethical issues than it had been in past years. She attends board meetings during regular working hours, but then makes up the hours at other times. She explained that the lawyers in her office work many more hours than they are obligated to by law, so she does not worry about spending a few daytime hours on an outside project.

Barlow said she has not made any real use of government resources for her pro bono work. She does occasionally call someone from work, and if others involved in her pro bono project call her at work she does talk to them during regular business hours. She did once need to do a substantial amount of photocopying for a pro bono project; for this she used the office copying machine, but brought in her own paper.

Barlow does feel constrained from some pro bono activities as a result of being a federal employee. She declined an invitation to testify before the D.C. City Council because the testimony she would have given involved taking a position opposing that of the federal government. But she values her freedom to do some pro bono work,
and regards it as an essential component of any professional position. She pointed out that to prohibit lawyers from engaging in pro bono work would be to treat them "as four-year-olds, not as professionals." She urged that lawyers can make judgments about the amount of pro bono work they can do without interfering with their official responsibilities.

Charlie Glass, a federal government lawyer who does EEO work, is engaged in two pro bono projects. One is to act as police liaison for a pro-choice organization during attempts by Operation Rescue to close abortion clinics. The pro-choice group goes to the clinics being picketed by Operation Rescue and attempts to keep the clinics open. Glass’ role is to talk with the police at the event on behalf of the pro-choice group, and to communicate information to the group about what types of conduct will result in arrest, or communicate to the police the wishes of members of the pro-choice group to file assault or other charges against Operation Rescue members.

Glass talked with his agency supervisor before taking on this work about whether there was a conflict of interest. The regulations of his agency require written approval of such activity. (He did not know this, but knew of a possible conflict from his law school course in Professional Responsibility.) His supervisor gave him oral permission to take on this project, but told him that he should not appear at the police station or the courthouse on behalf of his client.

Glass’ role requires different interventions at each event. He is not certain whether all of the work he does would meet with the approval of his supervisor. For example, he talked with the police on behalf of one pro-choice person who had slashed the tires of an Operation Rescue person, and persuaded the police to issue a citation rather than make an arrest. Glass commented, “I don’t know if [the supervisor] would have anticipated me doing that stuff . . . . [I felt I had a conflict because] this was me representing a citizen against the government.”

Glass’ other project is working at an entitlements clinic, helping people to fill out forms to apply for welfare and social security disability benefits. He does not represent any of the applicants at hearings. Glass’ government work involves some policy issues that are of interest to the staff of the entitlements clinic, and they sometimes ask him for information about developing policy. This makes him uncomfortable; he declines to answer these questions.

Glass’ pro bono work is all done outside of working hours. He is aware of rules prohibiting use of office equipment. He noted that
he did call the entitlements clinic from work to make arrangements about when he would be there.

Ruth Ferguson did one pro bono landlord-tenant case. In the office in which she works, no other lawyers have done any pro bono work, as far as she knows. She first attended a day-long bar-sponsored training session on landlord-tenant work. When she told her supervisor that she would be taking annual leave to attend the training, the supervisor said she would give Ferguson administrative leave for the day. In talking with another lawyer in a different office of the same agency, she found out that the other lawyer had been required to take annual leave for the same event.

Ferguson’s case required one two-hour court appearance to get a continuance. Ferguson recorded this as “non-case time.” She did not charge herself annual leave, she said, because “her boss does not enforce the annual leave requirements” and she “works more than forty hours a week anyway.” Subsequently, the case was settled through telephone conversations between Ferguson and her opposing counsel. These took place during work time. Ferguson indicated that she is officially allowed only one personal call per day. She said there is no monitoring of the lawyers’ use of the phone in her agency, and she was not concerned about having broken this rule, because she does not abuse the phone. She said “Nobody pays attention to the restrictions, because local calls don’t cost anything.” Ferguson indicated that she would not hesitate to use her office computer for pro bono work. She said that, in general, people in her office do not take all the rigid rules on use of resources very seriously, and that the rules are enforced only when there is abuse of resources.

Ferguson said she did not request permission before taking this case, because she saw no possible conflict. “If I had a question I would have cleared it but I didn’t do anything questionable.” She avoided matters involving the U.S. government because of possible conflicts. She did mention that she saw no actual conflict in representing indigent criminal defendants, and said she thought that federal government attorneys could be in a good position to assist the pro bono program with representation of defendants, because of the proximity of some government offices to the U.S. Attorney’s office.

I asked Ruth Ferguson whether pro bono work was encouraged or discouraged by her agency. She said the only serious barriers were the rule requiring use of annual leave for daytime work, and the fact that she travels a great deal in her government work. The travel effectively prevents her from taking pro bono cases. She mentioned that
there was some institutional discouragement of pro bono work during the Reagan administration. She recalled that when Edwin Meese was Attorney General a memo was sent around saying that working for the federal government was pro bono work. She does not agree; she urges that her government work is not pro bono because she is compensated for it.

Ferguson’s interest in doing pro bono work is that she perceives a need for lawyers to represent indigents, and that it makes her feel good to make a contribution. She noted that she did not intend to undertake landlord/tenant work when she left the government, so she was not training herself for a future position. She mentioned that, having been a tenant, she “had no love lost for landlords,” so she enjoyed representing a tenant. Ferguson indicated that, as far as she knew, she was the only lawyer in her office who had done any pro bono work during the four years that she had been there.

Another government lawyer, Amy Pinsky, represents her agency in equal employment opportunity matters. In her spare time she does volunteer work for plaintiffs in employment discrimination cases, but never takes cases against the government. She counsels potential plaintiffs, negotiates settlements, and once represented a plaintiff in a hearing before the D.C. Human Rights Commission. She was counsel of record in the case. The papers did not identify her government affiliation, but instead her affiliation with the organization that referred the case to her. Pinsky also does telephone counseling of women who need advice about family law matters. She accepts these calls one day a week, sometimes at her office.

Pinsky filed a request for permission to undertake the employment discrimination work in 1983. Since then she has continued to do this work on an occasional basis. She does not file a new request for permission for each matter. She knows of two others in her agency who do this work, and reports that her agency is fairly relaxed about such things. She uses her computer and her office phone for pro bono work, and does a small amount of photocopying. Her pro bono work has never interfered with her other responsibilities.

When asked why she does pro bono work, Pinsky said, “I can’t get paid to do the work I find meaningful; I didn’t go to law school to do [her bureaucratic government job] . . . . It’s good to meet other lawyers who have similar goals.”

Joyce Koerner has been in the government for six years, and has regularly represented plaintiffs in employment discrimination cases
filed with administrative agencies. When asked why she does pro bono work, Koerner just says she feels it is something she should do. She handles about one case per year. For each, she requests permission from her division director, a personnel official, and notifies the agency ethics officer. She has always been given permission, and reports that her superiors have been quite supportive. She has not had occasion to go to hearings, but has negotiated settlements with opposing counsel. She has never represented anyone who was suing the government, but points out that, within her agency, she would be permitted to represent agency employees in administrative hearings on personnel matters.

Koerner reports that the forms she fills out require that she verify that she will not use government time or resources for her pro bono work. She finds it impossible to comply fully with the regulations, pointing out that one “can’t call someone from a small firm at nine at night at home.” Also, she has used her computer for pro bono documents and has done a small amount of copying.

Another lawyer, Henry Ackerman, worked at the Office of Immigration Litigation of the Department of Justice from 1984 to 1986. He said he did not do any pro bono work while he was there, but he once tried to. He wanted to represent someone who had been arrested during a demonstration at the South African Embassy. He asked permission from his supervisor, who said he could not do it, because those cases were being prosecuted by the Justice Department. He was disappointed, but understood the reason for the decision. Ackerman did not perceive any actual conflict between his work and his proposed project, but acknowledged the concern with the appearance of a conflict.

A few observations emerge from examination of these stories. One is that the lawyers interviewed seem to be doing pro bono work as an expression of deeply held values, aspirations, and political beliefs. Each works on issues that are personally important. Another is that these lawyers comply with the regulations in different degrees,

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296. As explained above, under 18 U.S.C. section 205, the U.S. waives the conflict of interest inherent in a government lawyer’s representing an employee against the agency that employs the lawyer.

297. The work described appears to be the sort of political expression that is generally regarded as protected by the first amendment of the United States Constitution. See In re Primus, 436 U.S. 412 (1978) (prohibiting a state from punishing a lawyer who, “seeking to further political and ideological goals through associational activity, including litigation, advises a lay person of her legal rights” and offers free legal assistance in writing).
depending on the attitude of the agency and the type of project. But each seemed committed to not allow the pro bono work to interfere with regular duties. All of them found it too difficult to comply with the rigid prohibition on use of office resources for some part of the work. Only one used more than a trivial amount of government time, and none used more than a trivial amount of government resources such as paper, electricity, telephone, and copying.

These stories place in sharp relief the two policy questions that are central to this inquiry. The first is whether it is reasonable to continue to regard pro bono representation of indigents in matters that involve the government as presenting a conflict of interest for a federal government lawyer, even if the agency and the subject matter are remote from the lawyer’s normal duties. The second is whether there is any reason to maintain regulations on use of time, space and resources that are so restrictive that the norm is to violate them. On both questions the law needs to be changed to correspond better with reality.

VII. RECOMMENDATIONS

Federal government policy should be revised to narrow the restrictions placed on uncompensated public service activity by employees of the government. The restrictions currently in place prohibit more than is necessary to protect the legitimate interests of the government, including avoidance of conflicts of interest and interference with employees’ performance of their official duties, and conservation of federal resources. By narrowing the restrictions, the federal government can allow those employees who wish to do so to make a contribution to those in need in their communities, and can discard some unnecessary bureaucratic restrictions on individual activity.

Much of the focus of this report has been on public service activity by attorneys. Lawyers have a professional obligation to do public service work that is not imposed on many other employees, but the restrictions should be narrowed for all government employees, not just the lawyers. Many non-lawyer employees wish to participate in community service; there is no reason that lawyers should be privileged to do so while other employees are not. It may be reasonable, however, to give lawyers and other professionals a greater degree of discretion about the use of time and resources for pro bono work than is given to non-professional staff.
A. Defining Permissible or Priority Pro Bono Work

Federal policy might encourage some types of service work and discourage others by setting the restrictions in a manner that would channel employees toward certain types of service activity. If, for example, the government felt that services to the homeless were needed, employees might be given wide latitude in this area.298

This type of channeling is a bad idea. The policies in question deal with uncompensated activities undertaken by government employees on their own time. If the government wishes to encourage a particular type of public service, it should make that service part of the official duties of some employees. This is done, for example, by allowing administrative leave to those who represent other employees in personnel proceedings.

In defining uncompensated public service activity, the federal government should use an inclusive policy that lists all the public service work in which its employees might wish to participate. The Department of Justice regulations include such a definition:

(3) Public interest services should fall into one of the following categories:
   (i) Service to a client who does not have the financial resources to pay for professional services;
   (ii) Services to assert or defend individual or public rights which society has a special interest in protecting;
   (iii) Services to further the organizational purpose of a charitable, religious, civic or educational organization; or
   (iv) Services designed to improve the administration of justice.299

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298. Many federal agencies during the Bush administration have been actively engaged in selecting and encouraging particular volunteer projects. These are mostly educational outreach activities. The Administration has not encouraged its lawyers to represent indigent individuals or to work on law reform. Pergl, Reaching Out, Gov'T EXECUTIVE, Jan. 1991.
299. 28 C.F.R. § 45.735-9 (c)(3) (1990). The American Bar Association adopted a definition of public interest service in 1975, substantively similar to that listed above, which reads as follows:
   legal service provided without fee or at a substantially reduced fee, which falls into one or more of the following areas:
   1. Poverty Law: Legal services in civil and criminal matters of importance to a client who does not have the financial resources to compensate counsel.
   2. Civil Rights Law: Legal representation involving a right of an individual which society has a special interest in protecting.
   3. Public Rights Law: Legal representation involving an important right belonging to a significant segment of the public.
B. Amendment of Section 205

The legislative history of section 205 reveals that the original purpose of the law was to prohibit federal officials from lining their pockets by abusing their positions to influence government decisions about claims for money. When the law was enacted, lawyers did not do pro bono service, except perhaps for a friend or a family member. The law is being used for purposes that appear not to have been intended by those who enacted the original statute or by those who amended it.

Congress should reevaluate section 205 and should address directly the impact of the statute on public service work. In narrowing the prohibitions of section 205, one proper line is the bright one of compensation. If the outside activity is compensated, then the possibility of impropriety is greater. If the service is voluntary, then the presumption should be that the activity is altruistic rather than self-interested, and the screen for conflicts should be narrower.

An expedient way to remove the inappropriate barriers to pro bono work would be to amend section 205 to provide that employees wishing to undertake uncompensated outside work are subject only to the more limited restrictions presently imposed on special government employees. This would prohibit government employees from acting as agent or attorney for anyone in a matter in which the United States was a party or had an interest, in a matter pending before the department or agency in which the employee worked, or in a matter in which the employee had participated personally and substantially. This would retain a barrier to any activity in which a federal employee was personally involved or might have some influence. Also, it would address the appearance problem by barring a government employee from representing a person in a pro bono matter before his own agen-

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4. Charitable Organization Representation: Legal service to charitable, religious, civil, governmental, and educational institutions in matters in furtherance of their organizational purpose, where the payment of customary legal fees would significantly deplete the organization’s economic resources or would be otherwise inappropriate.

5. Administration of Justice: Activity, whether under bar association auspices, or otherwise, which is designed to increase the availability of legal services, or otherwise improve the administration of justice.

SPECIAL COMMITTEE ON PUBLIC INTEREST PRACTICE OF THE AMERICAN BAR ASSOCIATION, IMPLEMENTING THE LAWYER'S PUBLIC INTEREST PRACTICE OBLIGATION app. at 19 (1977), quoted in Lardent, supra note 6, at 84-85 n.20.
Alternatively, section 205 could be changed to avoid unintended and unnecessary restrictions on pro bono work simply by providing that the law does not apply to uncompensated activity by attorneys. This would mean that pro bono work would be governed by ethical rules on conflicts of interest that apply to all attorneys, and by OPM and agency regulations on outside activities. This option is less attractive than the first, because the first sets a federal statutory standard applicable to all employees, not just lawyers. While the rules of professional conduct are fairly specific on determination of conflicts of interest, they vary from one state to another. Also, many states do not delineate how a government lawyer should define her client.

Section 205 presently imposes an uneven screen for conflicts of interest. While its coverage is overbroad in some respects, it is too narrow in others. The definition of “covered matters” in the statute should be broadened to include not only adversary adjudicative proceedings, but also advocacy directly adverse to the lawyer’s agency in a legislative or administrative forum as well. The possibility of actual conflict of interest does not depend on the forum in which the dispute takes place, but on who the parties are and what their interests are.

The statute also should be amended to eliminate the distinction between representation and assistance with representation. The only logical basis for the exclusion of assistance short of representation from the prohibitions contained in the current statute is that what is being prohibited is activity that creates the appearance of a conflict rather than an actual conflict. The primary concern should be with actual conflicts. The absence of prohibition on assistance with representation is a cavernous loophole that fails to prohibit much activity that would involve an actual conflict of interest. Since the assistance with representation most often would take place behind closed doors, the participants are unlikely to be accountable to anyone other than themselves, and the possibility of improper conduct is greater than in public representational activity.

Section 205 prohibits only activity that is “[other] than in the proper discharge of his official duties.” A federal agency that wished to encourage public service activity could avoid the prohibitions of section 205 by making the pro bono representation of

indigents part of the official duties of the agency lawyers on the basis that this work is part of their professional responsibility.

C. Changes in Regulation of Outside Activity

Section 205 imposes some restrictions on pro bono work by federal government attorneys; OPM and agency regulations impose additional restrictions. Each agency needs to revise its regulations on outside activities to incorporate the changes recently made in section 205. It is an appropriate time to reevaluate other restrictions as well.

1. Flex-time

Even if the barrier of 205 is removed, most government lawyers will not be allowed to do any pro bono work during regular business hours unless they take annual leave. They would not be allowed to make even the most perfunctory phone calls from their offices. Those who endeavor to do some public service beyond their ordinary duties must either suffer inconvenience and loss of vacation time as a result of compliance with the regulations, or live with the anxiety attendant to deliberate, albeit trivial, violations.

The absurdity of the current rules is evident from a quick glance at the workday of a lawyer attempting to comply with those rules. A dutiful government lawyer who wished to call her opposing counsel during the day without violating the regulations might leave the office during the half hour allowed for lunch, with her (privately purchased) pen and pad in hand, and stand in a phone booth on the corner, hoping that her adversary would return her call to the public phone within the appropriate time. If she was fortunate enough to get through, she would have to balance her pad against the wall of the phone booth to make notes of the conversation. If the lawyer’s office was located near the D.C. bar office, she could make the call from an office that the bar makes available for this purpose.

There is good reason not to challenge the limitations on use of government time for non-official business. The use of official time would involve a use of a significant amount of taxpayer dollars for a private project. Current rules allow some uses of administrative

301. Some regulations track the language of the pre-amended section 205 in prohibiting representation of anyone against the District of Columbia. If these are intended to implement the statute, they should be revised to track its current language.

302. One could argue that a pro bono project, once approved, becomes a public project,
leave for pro bono work, but restrict other uses. There is no need to change the rules on administrative leave, because the less significant adjustment in the rules on compensatory time would provide sufficient flexibility to allow the performance of pro bono work.

Agency regulations should be amended to allow the use of informal compensatory time by lawyers doing pro bono projects. The regulations should require lawyers doing pro bono work to maintain records of time spent on such projects during official working hours, and to expend that number of hours on official business outside of regular working hours.303

2. Use of Resources

During the hearings in 1986 on the Kastenmeier bill to reduce restrictions on pro bono work by government lawyers, a Congressman asked a witness whether it would be permissible for a government attorney to think about a pro bono project while sitting in his chair in his government office. The witness responded that that would indeed be a misallocation of government resources.304 On the one hand, it is necessary to prevent the expenditure of government funds for purposes other than those for which the money is authorized to be spent. On the other hand, if the prohibition is absolute, government lawyers are effectively prohibited from any outside public service activity.

but unless a government agency selects projects to offer its attorneys, the project is normally selected by an individual attorney.

303. These regulations could set some reasonable limit on the period within which time shifted would be required to be made up (e.g., a month). These regulations should not set a maximum number of hours per week that may be spent on a pro bono project. Some pro bono work involves litigation, so some cases might require a few consecutive days. The official duties of government lawyers vary; some would not be able to accept a matter that might require a large block of consecutive hours, but others could shift their work to the following week without negative consequences.

304. Congressman Kastenmeier posed the following question to David Martin, the Director of the U.S. Office of Government Ethics:

It is all right you say if the Federal employee is on flextime or whatever and is sitting in his chair, a Government-owned chair at a Government-owned desk, using them on his own time thinking about . . . [his pro bono matter].

Mr. Martin responded:

Well, Maybe that was a misstatement. I don't think any facility or equipment should be used by an employee for pro bono services in any manner that is not pursuant to his duties . . . [A]lcohol and gasoline don’t mix.

There are many uses of federal resources that have little or no cost, such as use of books and office space, making of local phone calls, use of typewriters and computers, and use of pens, paper and copiers. These involve some costs; electricity to light the room and run the equipment, wear on equipment and furniture, and use of paper, ink, and other supplies. The cost involved is very small, however; the regulations might prohibit uses beyond a certain amount.

Allowing the use of minimal amounts of resources for pro bono work might result in a savings in federal resources. If, for example, the employee did not leave the office to go to the phone booth, her official work would be less disrupted. Some of the time spent leaving to do a task on a pro bono project could be devoted to regular responsibilities. Many employees’ job satisfaction and productivity would rise as a result of greater diversity in their work. Increased job satisfaction might result in a longer stay in a federal position, and a correspondingly greater contribution to the institution. Especially in light of the current difficulty faced by the federal government in recruiting good lawyers, the government should undertake to pay more attention to its human resources than to its paper clips.

The regulations should allow the use of offices, desks, computers, telephones (for local calls), and small amounts of supplies, such as paper, pens, and staples. Lawyers who need more significant resources to represent clients effectively should be encouraged to consult with their supervisors, who would determine whether the government could provide any of the needed assistance.

3. Screening Process

Each agency should continue to require (or initiate a process for) advance approval of any representational project in which the government attorney would be counsel of record or would have significant responsibility. This would allow agency officials to screen for conflicts of interest and to assess the amount of time likely to be required by each pro bono project. Non-representational activities currently are subject to fewer restrictions. Careful screening is necessary before a lawyer undertakes representation of a client because of possible conflicts and because of the legal responsibility that follows ac-

305. Report: High Turnover for Federal Lawyers, NAT’L L.J., July 23, 1990, at 7 (reporting on a series of reports from the Merit Systems Protection Board, which indicate that lawyers have one of the highest rates of turnover among professionals in the government, and that the salary disparity between the public and private sectors is greatest for lawyers).
ceptance of a client.

Proposed pro bono projects should be screened only for conflicts of interest and time conflicts. Agencies should not assess the desirability of the objective of the project, as long as it does not present a conflict with the work of the agency. To the extent that the federal government has imposed a particular political ideology on its employees through restrictions on pro bono work, this practice should terminate. Federal government attorneys who wish to undertake advocacy of unpopular causes, or objectives that are not shared by their supervisors, should be permitted to do so. Government employees should not be required to forfeit rights of association or expression unless their activities conflict with their work responsibilities.

In addition to individual screening, an agency might pre-approve a list of categories of projects that had been screened for conflicts and for likely time demands. A general counsel’s office might establish a relationship with a service organization whose work would present no conflicts with the work of the agency. This would allow the lawyers in the office to share pro bono projects, which would reduce time conflicts, and would reduce screening time. Some types of activity might be generally permitted, such as attendance at bar association meetings, or meetings of other law reform organizations. If agencies pre-approve certain projects, they should take care not to direct the employees to particular substantive work or discourage other non-conflicting work. This is a choice for the employees to make.

4. Use of Secretaries

As lawyers have shifted from typewriters to computers, their dependency on secretaries has dropped dramatically. Many lawyers could handle the paperwork for a pro bono case as easily without as with a secretary. There are, however, some lawyers who still make extensive use of secretaries. This discussion of secretarial assistance might apply equally to assistance that lawyers might request from other government employees, such as librarians, paralegals, or others.

It can be argued that secretaries who work for the government

306. The current regulations on outside activities vary from agency to agency. In most respects it would be desirable to have one government-wide policy on attorney pro bono work. Each agency, however, would need to select its own projects for pre-approval, because the different functions of the agencies would create different possible conflicts of interest for each.
should be able to volunteer to assist lawyers in pro bono efforts during non-work hours.\textsuperscript{307} But both of these issues present greater possible problems of line-drawing and abuse than do the proposals to allow use of compensatory time and minimal uses of resources for pro bono work. The issue of the use of secretaries is complicated by the hierarchical nature of the relationship, which would make it difficult for some secretaries to turn down requests for voluntary assistance.\textsuperscript{308} Since secretarial assistance is not essential to the performance of pro bono work,\textsuperscript{309} it is preferable to avoid the adoption of a policy that would risk lawyers’ making inappropriate demands on their secretaries.

The regulations should prohibit lawyers from asking secretaries to work on pro bono projects during official work hours. They should be silent as to arrangements regarding non-work hours. To prohibit a secretary from participation in a pro bono project during off-duty hours would be at least paternalistic and possibly an infringement of the right to free association.

5. Training and Malpractice Insurance

Most lawyers cannot undertake pro bono representation of a client without training. Lawyers are no longer generalists—each area of law must be learned. Since training usually is a prerequisite to performance of pro bono work, informal compensatory time should be equally available for attendance at training and for subsequent representational activities.

In addition, the government should encourage those employees

\textsuperscript{307} Some secretaries are not busy all the time and could assist on pro bono matters on government time without displacing other work. But this raises the specter of the use of significant government resources for other than official purposes. If one were to change the regulations on use of secretaries, it would be far less controversial to limit the proposal to permit such assistance on their own time.

\textsuperscript{308} The supervising attorney might have significant influence on the secretaries’ opportunities for promotions and pay increases. Even if the performance of extra duties were formally excluded from consideration, many secretaries would worry (and some with good reason) that turning down requests for assistance with pro bono projects would make their supervisors value them less.

\textsuperscript{309} This assertion assumes that government lawyers’ principal responsibilities would limit them, as a practical matter, either to representation of clients in "small" cases (consumer, domestic relations, landlord-tenant, etc.), or to handling a limited portion of a larger matter that was being handled primarily by another attorney. The finite amount of time available makes the need for secretarial help less. If a project needs extensive support assistance, it is one that should have the participation of a non-governmental organization, so that those services can be paid for by other than taxpayer dollars.
who undertake representational pro bono work to do so through an organization whose malpractice policy governs its volunteer attorneys.

D. Relative Priority of Regulatory and Statutory Change

One question is the relative priority of changing section 205 and changing the agency regulations. Section 205 imposes a barrier to the representation of individuals in cases involving the United States. The Office of Personnel Management and the agencies impose barriers to pro bono work by limiting leave available to perform pro bono work, by prohibiting use of any government resources, and other regulatory barriers.

If the vast majority of needed legal services or the most urgently needed services are in the federal entitlements area or in other matters in which the U.S. is a party or has an interest, then the amendment of section 205 is essential to help meet this need. If, on the other hand, only a small proportion of the urgently needed work involves the federal government as a party, one might conclude that section 205 is not as significant as the regulatory barriers to the accomplishment of important service.

The resources of the Legal Services Corporation are spread so thin and the unmet client needs are so vast that perhaps volunteer lawyers should be directed to those problems that are most pressing or most critical.310 This paper recommends that the federal government permit pro bono work and that the government not attempt to channel lawyers into particular pro bono projects. However, in apprising its lawyers of pro bono opportunities, the federal government might wish to make special efforts to provide information about needed service that might save a life or a livelihood.311

A majority of federal government lawyers work in the District of Columbia.312 Imani Woody, of the D.C. Bar Public Service Activi-

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311. In general, pro bono assistance has not been organized with the goal of providing for critical unmet needs. At present, there are almost 600 pro bono referral programs in existence in the United States, but they tend to try to refer a maximum number of cases to a maximum number of attorneys, without placing priority on particular types of cases. See generally THE MARRERO REPORT, supra note 69 at 771. Perhaps such an effort would turn out to be futile because of the relatively small proportion of unmet needs that could be satisfied by any pro bono initiative. But if some jurisdictions require pro bono service by all attorneys, it may be possible for the first time to set coherent policy in the allocation of volunteer lawyers, and to have some impact on the unmet service needs of some communities.

312. In 1985, there were 20,310 lawyers employed by the federal government; 11,360
ties Corporation, reported that most of the calls to the D.C. Bar Referral Service requesting pro bono assistance were for help with domestic relations problems. Other commonly requested services include, among others, public benefits, criminal defense, immigration, landlord-tenant, mediation, and employment law. Of these, usually domestic relations and landlord-tenant cases involve no significant federal interest. The criminal, immigration, and some public benefits cases do involve federal interests.

The 1980 Annual Report of the Legal Services Corporation indicates that the primary subjects of representation in legal services offices are family law (30.3%), housing law (17.6%), income maintenance (17.2%), and consumer finance (13.7%). This list does not indicate what services are needed that are not provided. It does not indicate in what percentage of each category the federal government has an interest. But one can guess that the federal government has no interest in the family cases, most of the housing cases, or the consumer cases. Income maintenance may include welfare, social security and other public benefits programs, so some of those cases would involve federal entitlements. This list excludes criminal cases altogether, because the Legal Services Corporation does not fund representation of criminal defendants. As to civil cases, it suggests that the federal government is a party to only a small percentage. If the pool of needed civil representation corresponds to the work being done by legal services offices, then the barriers imposed by section 205 are less significant than the other regulatory barriers to the performance of pro bono work in general. As to criminal cases, except in the

313. The other listed categories, which represented a small percentage of the representation, were "miscellaneous" (11.7%), employment (3.1%), individual rights (2.9%), juvenile (.9%), education (.5%), and health (.2%). Id.

314. Another source of information about demand for services by indigents is a pilot study done in New Jersey by the National Social Science and Law Center. Two hundred and thirty-six low income adults were asked over 300 questions about their civil legal needs. Almost seventy percent of the households studied had at least one legal problem, and 13 percent had ten or more problems. They averaged four legal problems per household during a one year period. The 939 problems reported were of the following types:

<table>
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<tr>
<th>Type</th>
<th>Percent</th>
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<tbody>
<tr>
<td>Municipal services</td>
<td>19.9%</td>
</tr>
<tr>
<td>Public Benefits</td>
<td>19.3%</td>
</tr>
<tr>
<td>Housing</td>
<td>19.0%</td>
</tr>
<tr>
<td>Consumer and Utility</td>
<td>13.8%</td>
</tr>
<tr>
<td>Health, Education, Family</td>
<td>12.5%</td>
</tr>
<tr>
<td>Employment</td>
<td>8.1%</td>
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District of Columbia, section 205 would prohibit federal government attorneys from accepting only federal criminal cases, which are a small proportion of the number of criminal cases prosecuted.

These figures suggest that a significant proportion of the unmet need for legal services involves matters in which the United States is a party or has an interest. The need for service is so enormous that no lawyer seeking a pro bono assignment would be unable to find one on account of the barrier imposed by section 205. On the other hand, many indigent clients might benefit from the amendment of 205 to make the federal government lawyer's client his agency. Especially because so many government lawyers' work involves administrative law, these lawyers might be more adept than private practitioners in handling public benefits and other federal administrative matters. The service that is prohibited might be the most useful service that government lawyers could provide.

The limited data available suggest that the restrictions imposed by the agencies pose more serious barriers than does section 205 to pro bono activity, but that both statutory and regulatory changes are needed to bring the law back in touch with reality. The new OPM policy and the 1989 amendments to 18 U.S.C. section 205 represent important steps in that direction. If other federal officials show similar understanding of lawyers' obligations to assist the disadvantaged, this progress will continue.

<table>
<thead>
<tr>
<th>Environment</th>
<th>6.3%</th>
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</thead>
<tbody>
<tr>
<td>Miscellaneous</td>
<td>1%</td>
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Legal Needs of the Poor: A New Report from the National Social Science and Law Center, 20 CLEARINGHOUSE REV. 1291 (Feb. 1987), (reporting on "A Preliminary Report on a Study of the Legal Needs of the Poor in New Jersey," prepared by the National Social Science & Law Center). On this list, again, the public benefits category is the only one likely to include a significant number of cases in which the federal government is a party or has an interest.