Office of Government Ethics
88 x 13 -- 09/12/88

**September 12, 1988 Memorandum
from the Director
of the Office of Government Ethics
to Designated Agency Ethics Officials,
General Counsels, Inspectors General
and Other Interested Persons
Concerning Guidance on Ethics Program Issues
Raised in the Report of the Independent Counsel
dated July 5, 1988**

On July 5, 1988, Independent Counsel McKay submitted his report on his investigation of Edwin Meese III to the Special Division of the United States Court of Appeals for the District of Columbia Circuit responsible for appointing Independent Counsels. That same day, Mr. Meese stated to the press that he had been vindicated by the report. Thereafter, on July 18, the report with comments submitted by or on behalf of parties or organizations named in the report, was made public by the Court. This process, the contents of the report and its aftermath are a very public example of the importance of understanding fully the process of an evaluation by a prosecutor for possible prosecution under the criminal conflict of interest statutes; the significance of a declination of prosecution in a conflict of interest referral; the importance of "ethics agreements" both to the individual and to the public; the role of public financial disclosure reports and those reviewing them; the acquisition and use of a waiver under 18 U.S.C. § 208(b)(1); and, the requirements of certain basic standards contained within Executive Order 11222 and the regulations promulgated pursuant to that Order.

Because this matter has been the subject of much public comment, some highly incorrect, and a lengthy Independent Counsel's report, I believe this memorandum can best serve as an important and valuable vehicle for providing guidance on a number of issues to ethics officials, counselors and investigators. It should also be of particular interest to those about to form a new administration of Federal executive affairs.

I. Significance of a Referral for Prosecutorial Determination and the Aftermath of a Declination of Prosecution

As you are well aware, the minimum standards expected of executive branch officials -- the minimum "ethics" requirements regarding the conduct of such officials -- are found in two basic sources. The first and oldest of the two sources of standards is the restrictive criminal conflict of interest statutes found in 18 U.S.C. §§ 201-209.**1** The second and much broader set of standards is found in Executive Order 11222 and regulations promulgated pursuant thereto.**2** There is a significant difference in the range of conduct covered by these two sets of standards. Conduct covered by the criminal statutes is that which Congress has determined is punitively inappropriate in public service. The regulatory standards of conduct for executive branch officials, which cover a larger range of conduct, reflect a Presidential determination for executive branch officials. Such conduct does not rise to a level requiring use of criminal process. While the standards of conduct also prohibit conduct covered by the criminal conflict of interest statutes, in the absence of prosecution, the only sanction which can be imposed directly by the agency is, by its nature, administrative. These sanctions can range from reprimand to dismissal and can include restitution. Therefore, a referral of a matter for prosecutorial decision based on a possible violation of one or more of the criminal conflict of interest statutes is only the first step in any review for a violation of the minimum "ethics" standards applicable to officers and employees of the executive branch. The second step requires that an agency review and decide if evidence of the same conduct reveals that the non-criminal standards of conduct have been violated. A declination of prosecution does not obviate the agency's responsibility for conducting this additional review and decision. It does not exonerate the employee under these standards of conduct until such a review and finding are properly made by the agency. Even with an acquittal or dismissal of charges, this administrative process is ordinarily required.

The standard procedure which should be followed by all agencies when confronted with evidence of conduct which appears to constitute a probable violation of one or more of the criminal conflict of interest statutes, is, pursuant to 28 U.S.C. § 535, to refer that matter to the Department of Justice. The agency should follow the guidance issued by Attorney General Levi in his memorandum of May 4, 1976, on administrative investigations of employee misconduct and referrals and the supplemental guidance issued by Attorney General Civiletti in his memorandum of June 4, 1980. In most instances, the Department of Justice prefers that the agency cease its administrative investigation until the Department has completed its criminal investigation; simultaneous investigations must be coordinated with that Department.

In the case of Mr. Meese, when a referral was made to the Independent Counsel regarding a possible violation of 18 U.S.C. § 208 by Mr. Meese, the Department of Justice and the Office of Government Ethics were asked by the Independent Counsel not to pursue possible violations of the Department's administrative standards of conduct or financial disclosure requirements until the Independent Counsel's investigation and resulting action were complete. The Department and this Office complied with that request, despite urgings of those who wished both to pursue this matter simultaneously with the Independent Counsel. Usually sound reasons grounded in premature disclosure of evidence and interests in fair trial militate against contemporaneous proceedings. However, when the Independent Counsel issued his report declining prosecution, it became the responsibility of the Department of Justice as the employing agency to determine whether Mr. Meese had violated the Department's standards of conduct.**3** That review was begun by the Office of Professional Responsibility in conjunction with the Department's ethics official. Mr. Meese has now left the Department. When an employee leaves Government service prior to the completion of an agency's review for administrative action, if the agency has no reason to believe that the matter must be pursued for other purposes, its review for administrative sanctions would ordinarily cease because no sanctions could be imposed. I understand that the Office of Professional Responsibility is continuing its review.

A review for administrative action is the primary responsibility of the employing agency and is not the responsibility of this Office. As many of you know, however, it is not unusual for this Office to request an agency which has received a declination of prosecution on a conflict of interest referral to notify the Office of any administrative action taken against the individual involved. This is done as part of the Office's oversight responsibility concerning agency ethics programs. In the past some agencies were treating declinations as closing such cases and were not following the second step of review for possible administrative action.

The Office offered its assistance to the Department in its review of the Independent Counsel's declination report and asked to be provided with a copy of its report. With regard to the public financial disclosure reports filed by Mr. Meese, however, this Office does have continuing statutory responsibility to review the reports and continues to work with the Department on these matters.

II. Importance of an "Ethics Agreement"4

Pursuant to 5 U.S.C. App. 4 § 211, an officer or employee who enters into an agreement with his designated agency ethics official ("DAEO"), the Office of Government Ethics ("OGE"), or his Senate confirming committee to take any action under the Ethics in Government Act of 1978 ("Act") or other applicable conflict of interest statute or standards of conduct regulation, shall take the action agreed to, generally no later than three months from the time of the agreement. And, he shall notify the DAEO, OGE or the Senate confirming committee, whichever was a party to the agreement, that such action has been taken. These agreements typically arise in the context of OGE's review with an agency of a public financial disclosure report (SF 278) filed by a Presidential nominee prior to his confirmation hearing. The agreements are established so that the steps the individual must take in order to insulate himself and protect the agency processes from conflict of interest are clear, not only to the individual, the agency and the public, but to the Senate committee responsible for holding the confirmation hearing. These agreements, therefore, serve an important purpose and should not be taken lightly by the individuals making them. The significance of these agreements should be stressed with all future nominees.

In early 1984, as a result of his nomination for the position of Attorney General and after advice from the Department of Justice, Mr. Meese entered into an ethics agreement with this Office through a letter from Mr. Meese to the Director. In it, he stated he would divest, among other things, his and Mrs. Meese's telecommunications industry holdings within a reasonable time following his confirmation. Because of the appointment of Independent Counsel Stein to investigate unrelated activities of Mr. Meese, this confirmation process was halted and Mr. Meese's obligation to divest these assets was tolled. He was, however, aware at that time that service as Attorney General would undoubtedly entail such a divestiture.

After Mr. Stein's investigation was completed and his report filed, Mr. Meese's confirmation proceedings resumed in early

1985. At that time, based upon an updated SF-278, the Department again recommended, in part, divestiture of his telecommunications industry holdings. Therefore, Mr. Meese executed a second ethics agreement with OGE which set forth that promise. His agreement also included a promise that he would institute a written recusal policy in a memorandum to be circulated to his staff that would outline his disqualifying financial interests. He also stated he would recuse himself on any matters involving the law firms that represented him during Independent Counsel Stein's investigation until his liability to those firms was discharged. One of those firms was that of E. Robert Wallach.

Within the 90 day period following his confirmation, Mr. Meese was properly briefed by Department of Justice officials on his obligations pursuant to this last agreement. These officials also drafted a recusal memorandum with a specific cover notation to Mr. Meese indicating the statements contained in the recusal memorandum were based on the assumption that he would accomplish all that he had promised to do in his agreement. Also drafted was a notification to the Department's DAEO for transmittal to OGE of Mr. Meese's compliance with his ethics agreement. Mr. Meese executed the recusal memorandum and the notification to the DAEO and copies were transmitted to OGE by the Department's DAEO as evidence of Mr. Meese's compliance with his agreement.

Mr. Meese executed these documents even though they did not contain accurate information regarding his assets. He had not, as stated in the documents, complied with his promise to divest himself and Mrs. Meese of certain of the interests listed, most notably his interests in the Regional Bell Operating Companies (RBOC's), nor had he divested himself of other assets not required to be sold but which he stated he had sold. And, the list in his memorandum of recusal to his senior staff listing all assets requiring his recusal was not accurate, as it did not include all assets still held. Further, his memorandum of recusal stated that he would recuse himself from any matter involving E. Robert Wallach until the matter of his legal fees incurred by him during the prior investigation by Independent Counsel Stein was discharged.[5] According to facts in the Independent Counsel's report, that recusal was not honored.

This lack of genuine concern for honoring the terms of the agreement he made with this Office, was an important factor that led to the expanded investigation by Mr. McKay. The agreement was as much for his benefit as it was for the departmental processes and the public, and the simple fact that he chose not to live up to its terms, for whatever reason, has led to this unfortunate and expensive result.

First, with regard to Mr. Meese's financial assets, during his confirmation proceedings assets that created a potential conflict of interest were earmarked for divestiture. There was no suggestion by him that he wished to consider a blind trust for the rest. Quite the contrary, he marked his public financial disclosure report to indicate he did not intend to create a blind trust. Further, given his limited assets, he would not have been advised to do so. (In instances where similar limited assets have been held by a nominee, the Office of Government Ethics has dissuaded the nominee from creating such a trust because very adequate and alternate arrangements less costly to the nominee are available without creating any question of a conflict of interest.)

Instead, Mr. Meese was asked to and agreed to dispose of some, but not all, of his modest stock holdings. Subsequently, Mr. Meese, apparently on the advice of Mr. Wallach rather than any ethics official in the Department of Justice or certainly at OGE, established a limited partnership with the intent to create the same effect as a blind trust, even though there are specific statutory requirements for such trusts, some of which require the approval of the Attorney General.**6** Further, while he transferred most of his stock holdings to his general partner, Mr. Chinn, for sale and funding of the partnership, he did not effectively transfer the legal or beneficial ownership of the RBOC stocks whose certificates he was unable to locate. These were in part the same stocks he had specifically promised to sell and confirmed to OGE that he had divested. While Mr. Wallach's use of Mr. Meese's name in connection with Wedtech matters had raised some question of his conduct, it was his financial relationship with Mr. Chinn and Mr. Chinn's involvement with Wedtech that ultimately triggered serious questions about Mr. Meese's involvement with the Wedtech Corporation difficulties. Further, it was Mr. Meese's failure to sell the RBOC stocks, as he had promised, and his subsequent official actions affecting those companies that required a referral of a potential 18 U.S.C. § 208 violation to the Independent Counsel. And, it was his failure to refrain from taking any official action involving E. Robert Wallach during a portion of 1985 as promised in his recusal agreement (i.e., his personal call to Mr. McFarlane on Mr. Wallach's behalf for Mr. Wallach's pursuit of his representation of Mr. Rappaport on the Aqaba pipeline project) which required an Independent Counsel's review of his involvement in the Aqaba project. It would have been far better if Mr. Meese had taken his ethics agreement seriously and pursued advice from the knowledgeable ethics officials of his own Department regarding an establishment of a blind investment vehicle. If so, the extended investigation by the Independent Counsel might have been avoided. Further, the public would have been spared the tremendous cost this investigation has incurred and undoubtedly will incur as a result of any payment of Mr. Meese's legal fees for his defense.

This Office did not accept Mr. Meese's ethics agreement lightly, does not accept his failure to comply with it lightly and will not accept other nominees' agreements lightly in the future. These agreements serve an important purpose not only for the individual involved but for the public. This investigation of Mr. Meese is a stark example of the results of inattention to such an agreement by an official.

III. Financial Disclosure Requirements

The Act established public financial disclosure requirements for persons in high level positions so that the public along with an agency can review the reports and be assured that conflicts of interest do not exist, have not occurred, or will not occur. The issue of Mr. Meese's failure to disclose properly the assets of Meese Partners (initially reported by him as Financial Management, Inc.) has already been the subject of one Senate hearing, a lengthy statement by his counsel and lengthy correspondence from this Office regarding the requirements of disclosure. Mr. Meese's lack of attention to the requirements of properly reporting his assets outside of Meese Partners and the assets of Meese Partners was a contributing factor in the ultimate referral of the possible 18 U.S.C. § 208 violation by Mr. Meese. Had he reported his retention of some interest in the RBOC stocks or properly reported his limited partnership or properly reported his other assets and gifts on the annual report he filed for calendar year 1985, corrective steps could have been taken prior to his acting in his official capacity in matters affecting the RBOC's, and his recusal statement could have been amended to reflect his actual disqualifying interests.

Failure to pay close attention to filing a public financial disclosure report has not only caused Mr. Meese much public criticism, but many others as well. Mr. Meese's situation, however, because of his high visibility, should be a very constructive, albeit unfortunate, example for others in the future. This Office and agency ethics officials owe employees of or nominees to positions within their agencies a careful and thorough review of their reports in order not only to ensure that no conflicts or potential conflicts exist but, in addition, to assist filers in completing the form properly when a reviewer sees some indication that there may have not been a complete understanding by the filer of the reporting requirements. Filers may believe the filing requirements onerous and imposing but the price for being careless about or actually ignoring the requirements, as demonstrated by this case, is very high indeed. One can see what damage to reputation alone can result.

IV. Waivers Under 18 U.S.C. § 208(b)(1)

Mr. Meese's 1982 and 1987 waivers under section 208(b)(1) are instructive in a number of instances. First, a waiver is good only for prospective actions; it is not valid for past actions taken which may have violated the provisions of section 208(a). Second, in seeking a waiver, it is of utmost importance that full and proper disclosure of the facts be made to the granting authority. These facts include a full description of the extent of the disqualifying interest and of the actions the requesting official will be disqualified from taking without such a waiver. Should full disclosure not be made, the waiver may not serve to protect the individual because the granting authority did not have sufficient information on which to make the necessary determination. That is, that the interests were not so substantial as to be deemed likely to affect the integrity of services the employee will render in the matter or matters otherwise requiring recusal. A valid waiver may become void, as well, if the financial interests or the official responsibilities of the recipient change and such a potential change was not considered by the grantor of the waiver. In Mr. Meese's case, his 1986 request to the Counsel to the President[7] was presented through Department of Justice officials who either did not provide or did not have from Mr. Meese complete information about the status of the disqualifying interests, i.e., the document purporting to transfer ownership of the RBOC's stock to Mr. Chinn, the information regarding the receipt of dividends and the fact that the transferee was Mr. Meese's general partner.[8] Nor does it appear that the Counsel to the President was told that the waiver was being sought for interests that Mr. Meese had not only promised to sell but had confirmed to this Office many months earlier he had divested. These kinds of factors are crucial to the issuance of a valid waiver. It is instructive that others rather than the individual seeking the waiver were the source of the information provided to the granting official and that such information was incomplete. This Office would strongly suggest that individuals assisting others seeking waivers should not attempt to answer requests for additional information from the granting authority without first directing the questions to the individual seeking the waiver. Waivers issued under such circumstances may very well not serve to protect the recipient from prosecution.

V. Standards of Conduct Issues

As mentioned earlier, it is the responsibility of the employing agency to review an employee's conduct for purposes of taking possible administrative action pursuant to that agency's regulations. Even though the action an agency may take when dealing with the head of an agency may be limited to reporting its findings to the President for his action, the investigation and any findings remain primarily the agency's responsibility. (The President may, of course, request that an appointee resign or reprimand an appointee without resorting to any formal investigation or fact finding.)

Therefore, with regard to the information provided in the Independent Counsel's report, I cannot properly state that Mr. Meese or any other employee has violated one of the provisions of an employing agency's regulations. I can, however, point out where real issues of possible standards of conduct violations exist and why. Because Mr. Meese's statements regarding his vindication have been made in such a public manner so as to cause real confusion on the role of the standards of conduct, I believe it would be inappropriate for this Office to stay silent on these issues. These observations are not intended by this Office to be in lieu of actual findings of the Department of Justice and will be general in nature.

As noted earlier, the Civil Service Commission was required to promulgate regulations implementing Executive Order 11222 which now appear in Part 735 of Title 5, C.F.R. Pursuant to those regulations each agency was required to issue its own regulations not inconsistent with Part 735 but tailored to the agency's mission. These regulations are instructive but it is interesting to note that the issues raised in the Independent Counsel's report revolve around the basic standards in the Executive Order unembellished by the implementing regulations at 5 C.F.R. Part 735 or the regulations of the various employing agencies involved. Therefore, it is these standards that will be addressed using limited examples from the report. For purposes of discussing the standards, it is not important that each possible fact situation in which that standard may be at issue be discussed; rather, I believe, it is sufficiently instructive to note only those which seemed generally to have received the most public attention and thus were subject to the most misinterpretation.

o Before outlining the standards, I believe it is important to remember that the policy of Executive Order 11222 as stated in section 101 of that Order is as follows:

> Where government is based on the consent of the governed, every citizen is entitled to have complete confidence in the integrity of his government. Each individual officer, employee, or adviser of government must help to earn and must honor that trust by his own integrity and conduct in all official actions.

o In accordance with that announced policy, section 201(c) states that employees should "avoid any action . . . which might result in or create the appearance of --

(1) using public office for private gain;

(2) giving preferential treatment to any organization or person;

(3) impeding government efficiency or economy;

(4) losing complete independence or impartiality of action;

(5) making a government decision outside official channels; or

(6) affecting adversely the confidence of the public in the integrity of the Government."

The most troublesome aspect of the information in the Independent Counsel's report is the extent to which Mr. Meese or

Mr. Meese's official position was used for the benefit of Mr. Wallach. The standard against using public office for private gain includes the private gain of others, not simply the personal gain of the employee. Assisting a friend is not in and of itself prohibited by the Executive Order. But, assisting a friend in a manner which misuses official position for the friend's private benefit, which gives that friend preferential treatment not properly afforded, which causes a Government decision to be made outside official channels, which affects the public's confidence in the integrity of its Government, or which leads an informed and reasonable person to believe that any of these things have occurred, is what this section was in part intended to prohibit. This section, as well, requires that an executive branch employee take some positive steps to stop any other individual from using the official position of the employee, assuming the employee knows his position is being used or that it might be used. This is true for no other reason than to avoid the appearance that the employee is in fact misusing his position or that he is making Government decisions outside official channels. This Office has consistently stated that employees should actively take care to ensure that private individuals or organizations not use the appearance of official participation of a Government employee in matters in which the employee is not acting officially, be that in giving a speech, making a presentation at a seminar, participating in a fundraising event, or facilitating the procurement of a Government contract or benefit.**9**

The information in the Independent Counsel's report indicates that in two significant instances Mr. Meese's activities on behalf of Mr. Wallach's private endeavors bring his personal use of official position into question. While in both instances Mr. Meese appears not to have personally participated in any extended manner, his acts were crucial to the subsequent acts of others simply by virtue of the offices he held. First, Mr. Meese asked his staff at the White House to check into what was actually a procurement matter (i.e., the attempt by Welbilt, later Wedtech, to secure a contract from the Army through the SBA's 8(a) program for minority-owned companies). This was done at the behest of and on behalf of his friend Mr. Wallach when it was the White House policy for staff not to become involved in procurement matters involving personal interests or those of friends without seeking guidance from the White House Counsel's Office.**10** The second was Mr. Meese's late May or early June 1985 telephone call as Attorney General to the National Security Advisor, Mr. McFarlane, asking him to meet with Mr. Wallach about the Aqaba pipeline project. This was at a time when Mr. Meese knew Mr. Wallach had been retained by Mr. Rappaport to assist him in securing a political risk insurance package for this project and at a time when Mr. Meese's recusal agreement, if followed, would require that he not take any official action involving a matter in which Mr. Wallach was representing a client. Had Mr. Wallach simply sought information from his friend Mr. Meese regarding which was the proper office in the Government to contact, this same issue would not have arisen.**11** It is simply a fact that care must be taken, especially when acting outside one's usual official responsibilities to see that the acts are not misinterpreted, and that these considerations should be a part of any counseling provided an official who seeks assistance with a standards of conduct question.

It also becomes the responsibility of a Government official who becomes aware that a private individual is improperly or wrongly invoking the position of or representing the acts of the official to make an effort to see that such misuse by another of his official position ceases. Continuance of that use by others will only support an appearance that the official has taken the acts attributed to him and that official decisions are being made outside official channels. This report is replete with instances of Mr. Wallach's trading on and use of Mr. Meese's name and position. The Independent Counsel's evidence of that comes in large part from Mr. Wallach's own documents. The specter that Mr. Meese actually engaged in the conduct attributed to him by Mr. Wallach is evident in the fact that the possibility was sufficient enough to require a lengthy investigation. If Mr. Meese encouraged this conduct on Mr. Wallach's part or at a minimum knew and did nothing to stop it, then Mr. Meese's conduct clearly becomes an issue under these standards.

Elsewhere in the report, the issue of the possibility that official decisions were being made outside of official channels is raised by Mr. Meese's apparent acquiescence in Mr. Wallach's plan to secure a legal opinion directly from Allan Gerson, a Deputy Assistant Attorney General in the Office of Legal Counsel, rather than allowing the OPIC request for an opinion to be processed through OLC in normal channels. While Mr. Meese may have believed that it was appropriate since Mr. Gerson was a part of OLC, I am unaware of any normal practice of the Department which allows agencies or private citizens to pick a Department attorney of their choosing for opinions or representation and thereafter have that attorney report only to the Attorney General and keep no official records.

In addition, Mr. Meese seems to have used Mr. Wallach significantly in his personnel selections within the Department of Justice, having him interview prospective candidates for positions. While individuals in the Government can occasionally seek advice from private parties, when the use of that advice becomes "institutionalized," the appearance that normal Government decisions are being made by nongovernment individuals is clearly at issue. Indeed, ordinary rules respecting limited or absolute official immunity may well be rendered inapplicable. It is also important to note that such use of private parties may subject those individuals to the conflict of interest statutes while providing this service because they are in fact carrying out Federal functions. Further, questions regarding the use of volunteers arise for the agency.

There is no more clarion standard at issue in this matter than that which exhorts an employee to avoid any action that adversely affects the confidence of the public in the integrity of the Government. While Mr. Meese's personal reputation could not but have suffered as a result of this investigation, the public's confidence in the Department of Justice has also suffered. One need only look at the well-publicized personnel resignations in the Department to see why this standard is at issue.

o Section 201(a) states that employees may not "solicit or accept, directly or indirectly, any gift, gratuity, favor, entertainment, loan or any other thing of monetary value from any person, corporation, or group which --

> (1) has, or is seeking to obtain, contractual or other business or financial relationships with his agency;
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> (2) conducts operation or activities which are regulated by his agency; or
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> (3) has interests which may be substantially affected by the performance or nonperformance of his official duty."

The section goes on to state that it may be appropriate for agency regulations to provide for an exception "governing obvious family or personal relationships where the circumstances make it clear that it is those relationships rather than the business of the persons concerned which are the motivating factors. . . ."

Gifts to Government officials has always been a subject of high interest because a gift brings into play the appearance of a number of improprieties. The standard simply states that if the offeror of a gift to an executive branch official falls within one of the categories of organizations or individuals outlined in the standard, then the public official is not to accept anything directly or indirectly from that individual. Therefore, there will be no question of the integrity of the individual involved. This philosophy is much the same as that behind the criminal conflict of interest statute, 18 U.S.C. § 208, which prohibits an employee from taking an action involving a personal financial interest regardless of the size of that interest. The standards of conduct do recognize that there are limited instances where a gift from an individual who is covered by the language of this standard may still be acceptable where it is clear that the reason for the gift has no relationship to the official's position and is offered for reasons of family affection or real friendship. One must then look to the circumstances surrounding the gift when family or friendship is at issue. Even though a gift may be from a friend or even a family member, if the circumstances would not be clear it is the personal relationship that is the basis for the gift, then the Government employee should not accept the gift.

Mr. Wallach, who sought Mr. Meese's personal actions on matters in which he was involved is reported by the Independent Counsel to have given Mr. Meese a number of items and benefits while he served in the White House and as Attorney General.**12** These gifts raised the specter of a possible bribe as that was the conflict of interest statute which the Independent Counsel felt required his public analysis. There were at least two other conflict statutes not formally addressed in the report which could also have been at issue. While the Independent Counsel concluded that the gifts and benefits were more in the nature of gifts from a friend than that of a quid pro quo for official acts taken by Mr. Meese, the analysis of that for purposes of prosecution and the analysis of the same gifts for purposes of the application of the standards of conduct is quite different. Because of that, some of these gifts may still raise an issue under these standards.**13**

o Section 203 states, in part, that employees may not "have direct or indirect financial interests that conflict substantially, or appear to conflict substantially, with their responsibilities and duties as Federal employees. . . ."

The standard in the Executive Order is different and much broader than that in 18 U.S.C. § 208. While section 208 prohibits an employee from taking an official action affecting a personal financial interest, it does not require that the employee divest himself of the interest. The thrust of the criminal statute is to protect the governmental processes by prohibiting an employee from taking actions in a matter involving his personal financial interests; it thereby avoids the question of the integrity of the individual in allowing those interests possibly to sway his acts. The Executive Order standard on the other hand prohibits an employee from having a financial interest either directly or indirectly that conflicts or appears to conflict substantially with his official responsibilities. Mr. Meese was aware from the processes leading up to his 1984 confirmation hearings and the resumption of those hearings in 1985 that the Department of Justice felt because of the AT&T antitrust case pending in the Department, he should divest and would be requested to divest himself of his interests in the telecommunications industry. Yet, when it came time to divest of those interests (having known for over a year that he would be asked to do so), he had not located the certificates for some of the issues and had not requested replacement certificates. Instead, he and Mrs. Meese executed a transfer document purporting to transfer their interest in those stocks to Mr. Chinn and promised to supply replacement certificates upon their receipt. (Mr. Chinn did not sign the document as acceptance of the transfer nor did he immediately know of the document's existence.) Mr. Meese did not begin to seek the replacement certificates for ten months after confirmation and the certificates were not actually obtained until June 1987, over two years after he was to divest of his interest. Further, as dividends paid by the corporations were sent to him, he did not forward them to the transferee, rather he maintained physical control over them and ultimately declared his legal ownership of them for income tax purposes. Whether Mr. Meese felt the transfer was effective, he did state he retained any risk of loss on the stocks until the replacement certificates and the dividends were transferred to Mr. Chinn.**14** Consequently, he retained a financial interest in the stocks, as a risk of loss is as much a financial interest as a gain. Further, he did take official acts that affected the companies in which he had an interest. These facts undeniably raise an issue under this provision as it also formed the basis for the Independent Counsel's belief that a trier of fact would probably find beyond a reasonable doubt that Mr. Meese's acts with regard to these interests had violated 18 U.S.C. § 208.

o Section 204 states that "[a]n employee shall not use Federal property of any kind for other than officially approved activities."

While one normally thinks of Federal property as being things, it also includes the time of Federal employees while on Government duty. Therefore, one employee cannot ask another employee to provide services in furtherance of purely personal projects while on official duty. And, if a supervisor asks someone he supervises to provide free personal services to the supervisor on nonofficial duty, the supervisor is requesting a gift from that employee which is prohibited by statute. (5 U.S.C. § 7351). There were two instances in the Independent Counsel's report which suggested Mr. Meese's staff handled purely personal matters for him, apparently during normal working hours. The first was the provision of private legal services through the drafting of the transfer document for the stock certificates which he could not find, an obligation that was personal, and the second was the assignment of a staff member to obtain the information he needed for his amended tax return from the attorney handling his mother-in-law's estate. Compiling that information was clearly a personal obligation of Mr. Meese. Whether Mr. Meese paid these individuals from his own money for their efforts and whether they provided these services to him on Government time was not clearly addressed by the Independent Counsel, but the fact that they provided or were requested to provide these services raises the type of issue that should be reviewed by the Department of Justice.

o Section 205 states "[a]n employee shall not directly or indirectly make use of, or permit others to make use of, for the purpose of furthering a private interest, official information not made available to the general public."

This provision of the standards of conduct is directed not only to information which is by statute confidential or classified, but also to the large amount of information which is neither, yet clearly not information generally available to the public. Such information was made available to Mr. Wallach by a number of sources in the executive branch in the course of his representational activities, and the provision of such information assisted in at least the appearance that he was being afforded preferential treatment by these Government officials and that official decisions were being made outside official channels. As with gifts, an issue arising under one standard may very often raise a separate issue under others.

o Section 206 states "[a]n employee is expected to meet all just financial obligations, especially those -- such as Federal, State, or local taxes -- which are imposed by law."

The standard requires that an employee is expected to meet all just financial obligations including his Federal taxes. The report indicates that Mr. Meese initially did not meet his obligations and that his efforts at doing so were at best tardy. His failure to meet these obligations was not because of a disagreement with the Government on the extent of the obligation. It was a failure to report income. He has, however, now apparently met the obligations, but an issue arising under this standard remains as to whether the manner in which he handled his tax obligations has affected adversely the confidence of the public in the integrity of the Government. It is reasonably easy to assume that the public's confidence in the integrity of the fairness of the tax collection process will be affected when it becomes publicly known that the chief law enforcement official fails to declare income for tax purposes until after his records for the appropriate period are requested by a prosecutor.

Conclusion

A major purpose of this memorandum is to remind and inform that simply avoiding criminal conduct is not the mark of public service. The duties imposed by noncriminal standards are far harder to discharge. They may even be strange and seem overly restrictive to some joining Government for the first time. But, they must not be ignored under the real pressures of other official duties. This Office strongly believes, and I hope you will assist in conveying the thought, that problems such as these are not widespread in the executive branch and that the vast majority of officers and employees are hard working and loyal individuals who make every effort to adhere to the high ethical standards the public has a right to expect from them and that they expect from themselves.

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1 Most of these statutes are based on similar statutes enacted in the last century. In 1962, the criminal conflict statutes were recodified into ch. 11 of Title 18, and, execpt for the post employment provisions, have not been amended substantially since that time.

2 Executive Order 11222 was issued by President Johnson in 1965 and the regulations drafted by the Civel Service Commission to be used as a model for each agency's regulations were promulgated in 1966. These model
rules are at 5 C.F.R. Part 735.

3 This Office presumes that the Independent Counse reviewed all information at his diposal and all criminal statutes potentially applicable beform issuing his report. Therefore, without additional information, I asume that there is no question remaining with regard to criminal violations even though the report does not specifically address all atatutes at issue.

4 This specific issue is of special concetn to this Office with regard to Mr. Meese because his agreement was made directly with this Office.

5 On June 7, 1985, the Special Division of the Court of Appeals entered an Order granting Mr. Wallach reimbursement of 54% of his requested fees. The Independent Counsel's report states that Mr. Wallach publicly announced that day that he regarded the award as substantial compensation of hes fees. Pursuant to his written agreement with Mr. Meese, substential compensation form the Court would be considered by him
as ful satisfaction of Mr. Meese's debt. The fees were not actually paid by the Court to Mr. Wallach until October of that year.

6 This Office has maintained that an executive branch official cannot create a selt-blinding investement vehicle that will be recognized for purposes of the public financial disclosure requirements of Title II of the Ethics in Government Act.

7 Mr. Meese was earlier issued a waiver by the Counse to the President so that he might act in his capacity as Counselor to the President on matters that would affect his telecommunications industrt holdings.

8 In fact, the waiver stated an understanding that Mr. Meese had no relationship to the tranferee.

9 See for example, OGE advisory memorandum 85 x 18 (regarding participation by employees in privetely sponsored conferences) and informal advisory letter 87 x 11 (regarding in part, the solicitation of funds by a private organization using an employee's official position).

10 This policy applies not only to calls or contracts in which influence is directly exerted, by also to "status" calls or other communications which might direct the attention of the procurement officer to the fact that the White House staff member has an interest.

11 It is significant that Mr. Wallach, when entering into his retainer agreement with Mr. Rappaport that he would arrange a meeting with Mr. McFarlane. This was prior to the time Mr. Wallach approached Mr. Meese, so it would appear that Mr. Wallach asked Mr. Meese for something other than simply the name of the individual with whom he should speak about the project.

12 The benefits specifically addressed by the report include Mr. Wallach's descharge of the difference between the Court's award to Mr. Wallach for representation of Mr. Meese during the investigation by Independent Counsel Stein, his free legal counsel during Mr. Meese's confirmation hearing, his facilitaion of funding by the Benders of Mrs. Meese's job with the Washington Chapter of the Multiple Sclerosis Society, hes facilitation of a same-day unsecured loan from a local bank for the Meeses, his assistance in securing a trip to Isreal for the Meeses, for the dedication of a grove of trees in memory of their son Scott, and the facilitation of the refinancing of the Meeses' home mortgage.

With regard to gifts of items and of entertainment, Mr. Meese only publicly disclosed the receipt of the painting in memory of his son Scott, so we are unable to determine actually what items were involved other than the Independent Counsel's outline of the assistance given Mr. Meese. The report states "gifts or services were provided by Mr.Wallach to Mr. and Mrs. Meese on five or more instances over six years with a total aggregate value of $3,150." (Report of the Independent Counsel in re Edwin Meese III at page 550).

13 On a related issue, the Independent Counsel's report notes that it is quite common for private parties to provide free legal representation to nominees for purposes of their confirmation proceedings. I cannot speak to whether it is common, but, when asked, this Office has strongly counseled against it, especially if those offering the services do business with or represent clients to the agency in which the nominee will serve if confirmed.

14 The Independent Counsel concluded that the tranfer document did not effectively transfer beneficial interest in the stock.