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Record Group/Collection:	George H.W. Bush Presidential Records
Collection/Office of Origin:	Counsels Office, White House
Series:	Swanson, Rob, Files
Subseries:	Alpha Subject Files

OA/ID Number:	CF01281
Folder ID Number:	CF01281-012

Folder Title:
Ethics/OSTP Fellowship Program

Stack:	Row:	Section:	Shelf:	Position:
G	13	6	2	3

Withdrawal/Redaction Sheet
(George Bush Library)

Document No. and Type	Subject/Title of Document	Date	Restriction	Class.
01. Memo	From Michelle Van Cleave to Rob Swanson Re: Fellowship Program at OSTP (1 pp.)	04/17/91	~~P-5~~	

Collection:

Open on FOIA Appeal
(Document Follows)
By NGD (NLGB) on 4/24/2006

Record Group: Bush Presidential Records
Office: Counsel to the President, Office of
Series: Swanson, Robert
Subseries:
WHORM Cat.:
File Location: Ethics/OSTP Fellowship Program

Date Closed: 2/1/1998	**OA/ID Number:** CF01281-012
FOIA/SYS Case #: 1998-0252-F **Re-review Case #:** **P-2/P-5 Review Case #:**	**Appeal Case #:** **Appeal Disposition:** **Disposition Date:**
AR Case #: **AR Disposition:** **AR Disposition Date:**	**MR Case #:** **MR Disposition:** **MR Disposition Date:**

RESTRICTION CODES

Presidential Records Act - [44 U.S.C. 2204(a)]

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C. Closed in accordance with restrictions contained in donor's deed of gift.

PRM. Removed as a personal record misfile.

Freedom of Information Act - [5 U.S.C. 552(b)]

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→ Ethics/~~[illegible]~~.

OSTP

Fellowship

Program

EXECUTIVE OFFICE OF THE PRESIDENT
OFFICE OF SCIENCE AND TECHNOLOGY POLICY
WASHINGTON, D.C. 20506

April 17, 1991

MEMORANDUM FOR ROB SWANSON
OFFICE OF THE WHITE HOUSE COUNSEL

FROM: MICHELLE K. VAN CLEAVE MKVC

SUBJECT: FELLOWSHIP PROGRAM AT OSTP

Amy Schwartz provided assistance to this office in setting up our fellowship program. Because this issue continues to raise some questions within the scientific community, we may need further guidance from your office. Accordingly, I enclose for your reference key documents from my files, including a copy of an overview memorandum I recently wrote for Dr. Bromley. I also enclose an analysis we received from the Carnegie Commission.

Attachments

Withdrawal/Redaction Sheet
(George Bush Library)

Document No. and Type	Subject/Title of Document	Date	Restriction	Class.
02. Memo	From C. Boyden Gray to D. Allen Bromley Re: Your Inquiry about an ASME Follow (2 pp.)	04/23/90	~~P-5~~	

Collection:

Open on FOIA Appeal
(Document Follows)
By NGD (NLGB) on 4/24/2006

Record Group: Bush Presidential Records
Office: Counsel to the President, Office of
Series: Swanson, Robert
Subseries:
WHORM Cat.:
File Location: Ethics/OSTP Fellowship Program

Date Closed:	2/1/1998	**OA/ID Number:**	CF01281-012
FOIA/SYS Case #:	1998-0252-F	**Appeal Case #:**	
Re-review Case #:		**Appeal Disposition:**	
P-2/P-5 Review Case #:		**Disposition Date:**	
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AR Disposition:		**MR Disposition:**	
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THE WHITE HOUSE

WASHINGTON

April 23, 1990

MEMORANDUM FOR D. ALLEN BROMLEY
DIRECTOR, OFFICE OF SCIENCE AND TECHNOLOGY POLICY

FROM: C. BOYDEN GRAY CBG
COUNSEL TO THE PRESIDENT

SUBJECT: Your Inquiry about an ASME Fellow

This responds to your memorandum asking my advice on the propriety of the Office of Science and Technology Policy accepting the services of a fellow arranged through the American Society of Mechanical Engineers (ASME), a non-profit organization recognized by the Internal Revenue Service under section 501(c)(3) of the Internal Revenue Code. Although I will leave it to your own counsel to assess any issues that arise specifically under OSTP's own legal framework, the following is general guidance on the considerations affecting fellowship programs.

Under federal law, government agencies ordinarily are prohibited from making use of volunteer services. In the case of the White House, a number of Department of Justice opinions have concluded that in positions for which there is no minimum salary level set by statute or otherwise, it is permissible for the White House to accept "gratuitous" services -- essentially to "hire" an individual at a salary of zero. Copies of the opinions are attached for your reference. Whether or not the DOJ analysis can be extended to OSTP will depend on the legal authority under which OSTP staff is hired.

Per DOJ's advice, White House procedures call for volunteers to enter into an up-front agreement that they will serve without compensation, and there is a form that the White House Personnel Office uses for this. (This can avoid having private volunteers later sue the government for compensation.)

The same Department of Justice opinions addressing the hiring of volunteers also state that there is no blanket prohibition against private organizations paying the salary of White House volunteers, e.g., by providing a fellowship to support an internship. Because the fellow would be considered a Federal employee, any such arrangement would be subject to conflict-of-interest limitations, as discussed below. Assuming such limitations are met, I would not object on policy grounds to taking on an ASME fellow. I would object, however, to accepting volunteer services from an individual employed by or on leave from an outside company or other organization.

Standard conflict of interest statutes and regulations would apply to any fellow. As a result, for example, --

- o the fellow should not participate personally and substantially in any matter in which the fellow has (or has attributed to him/her) a financial interest under 18 U.S.C. 208, and the fellow should not work on matters in which ASME has a financial interest;

- o the fellow should not deal with ASME on behalf of the government or deal with the government on behalf of ASME;

- o to the extent that the fellow participates personally and substantially in government matters involving the rights of specific parties, the fellow will be subject to post-employment restrictions;

- o the fellow may not provide non-public government information to ASME or otherwise use government resources for private purposes, including ASME purposes.

There are also general standards of conduct, requiring among other things that employees (including unpaid employees such as volunteers and interns) avoid actions that may result in or create the appearance of impropriety or using public office for private gain. 3 C.F.R. 100.735-4.

In view of these restrictions, it would be useful for ASME to commit to you in writing that there are no problematic conditions attached to the receipt of the fellowship (e.g., that ASME does not expect any non-public information or special treatment from the fellow or OSTP on account of the fellow's placement). Application materials and selection criteria for the fellow should also reflect the applicability of basic conflict-of-interest requirements.

Feel free to contact me or Amy Schwartz of my staff if you have any questions.

Attachments

Withdrawal/Redaction Sheet
(George Bush Library)

Document No. and Type	Subject/Title of Document	Date	Restriction	Class.
03. Memo	From Michelle Van Cleave to D. Allan Bromley Re: Review of followship program at OSTP (2 pp.)	04/09/91	~~P-5~~	

Collection:

Record Group: Bush Presidential Records
Office: Counsel to the President, Office of
Series: Swanson, Robert
Subseries:
WHORM Cat.:
File Location: Ethics/OSTP Fellowship Program

Open on FOIA Appeal
(Document Follows)
By NGD (NLGB) on 4/24/2006

Date Closed: 2/1/1998	**OA/ID Number:** CF01281-012
FOIA/SYS Case #: 1998-0252-F	**Appeal Case #:**
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EXECUTIVE OFFICE OF THE PRESIDENT
OFFICE OF SCIENCE AND TECHNOLOGY POLICY
WASHINGTON, D.C. 20506

9 April 1991

MEMORANDUM FOR D. ALLAN BROMLEY

FROM MICHELLE VAN CLEAVE mvc

SUBJECT: Review of fellowship program at OSTP -- legal and policy issues

In light of current interest and apparently growing confusion, I thought you might want a quick overview of the fellowship programs at OSTP:

- Prior to the Bush Administration, there are no records of any legal review of any fellowship program at OSTP to ensure conformity with applicable laws, regulations or EOP policy.

- Procedural guidelines for industry fellows were dim or nonexistent when you took office. Our first action was to require the fellows who were already here to complete confidential data statements, document the business activities of their parent company (copies to supervisors), and seek strict guidance from their supervisors on the appropriate scope of their work at OSTP to avoid any potential conflicts.

- In March of 1990, ASME proposed to create a new fellowship at OSTP, which you submitted to Boyden Gray's office for review. In late April Mr. Gray provided written guidance (enclosed) which reads in part:

> "Because the fellow would be considered a Federal employee, any such arrangement would be subject to conflict of interest limitations...Assuming such limitations are met, I would not object on policy grounds to taking on an ASME fellow. <u>I would object, however, to accepting volunteer services from an individual employed by or on leave from an outside company or other organization."</u> [Emphasis added.]

In other words, while there is no blanket prohibition against the White House accepting volunteer services, as a matter of <u>policy</u> Mr. Gray would not approve accepting volunteer services from a private company. The implicit reason for this policy is to avoid giving rise to any appearance of impropriety in violation of the Standards of Conduct governing the Executive Office of the President. This ruling would seem to apply not only to OSTP but to all offices within the EOP.

- On May 11, 1990, we met with Mr. Gray to discuss his opinion and its impact on the (then) existing fellowship programs with IRI and SAE. Mr. Gray stated that the corrective action we had taken would be helpful but not sufficient to bring those programs into conformity with the requirements. You stressed the disruption that would result should the fellowships be terminated midstream. It was agreed that the incumbent IRI and SAE fellows would be permitted to finish their terms, but that subsequent fellows would be subject to the guidelines laid out for the ASME program.

- In order to ensure that future fellows were not "employed by or on leave from an outside company or other organization", OSTP's guidance to sponsoring organizations has been that the fellows must have severed all ties with their parent company in order to qualify for the fellowship. Further, the sponsoring organization would have to be not-for-profit. Copies of your letters to SAE and IRI explaining these requirements are enclosed. The relevant text of those letters was reviewed and approved by Boyden Gray's office.

I have read the legal memorandum prepared by Mr. Richard Berg, which Tom Ratchford circulated within OSTP in anticipation of oversight hearings on the OSTP organic act. I agree with Mr. Berg's conclusion that a concern for appearances cannot be resolved through new legislation, which he writes "has been suggested" (although I do not know who made this suggestion). I am less persuaded, however, by his recommendation that we raise the fellowship-related conflict of interest concerns in the course of the oversight hearings for the purpose of eliciting discussion or Congressional endorsement.

Measures that may be necessary to avoid an appearance of a conflict of interest are inherently subjective and judgmental. Not surprisingly, the Department of Justice Office of Legal Counsel has ruled that the responsible officials at the White House are in the best place to judge where unacceptable apparent conflicts might arise with respect to persons employed here. It is difficult to see what might be gained by raising this as an issue in the course of our oversight hearings or by inviting Congress to second-guess Boyden Gray's advice. If upon review you believe his policy determination should be revisited, I would recommend we raise the issue with White House Counsel.

cc Ken Yale

EXECUTIVE OFFICE OF THE PRESIDENT
OFFICE OF SCIENCE AND TECHNOLOGY POLICY
WASHINGTON, D.C. 20506

May 15, 1990

Dear Mr. Mabley:

We understand that you are in the process of selecting candidates to serve as SAE fellows at the Office of Science and Technology Policy for the coming year. This office has benefited richly from the fellow program in years past and we are most grateful for the generous support we have received from SAE, for the talented fellows who have served here with such distinction, and for the excellent relationship we have been privileged to enjoy with your organization. Based on this positive experience, it is my desire that we will be able to continue the fellowship program in the future.

However, under the new Administration we have conducted a careful legal review of the procedures under which the followship program has been organized. I have delayed responding to your letter of nomination until now because the review has only just been completed. Legal counsel has advised me that we will need to make some key changes in the fellowship program before we can move forward.

The principal concern at issue is a determination that all fellows must received their compensation from qualified 501(c)(3) organizations; individuals employed by or on leave from an outside company or other organization would not be eligible, under current ethics laws and regulations.

I would also note that I have been advised that fellows will be required to file public financial disclosure statements, as is required of all senior Federal Government employees.

It may be an impossible or at least an undesirable burden for SAE to assume the cost of the fellows' support, and I would certainly understand should that be your determination. I sincerely hope, however, that you will find it both possible and desirable to restructure the program in a fashion that would meet this legal requirement, so that we might continue what has been a most mutually rewarding program.

Regrettably, unless the program is restructured to meet these ethics requirements, I must decline your generous offer to provide a fellow to OSTP for next year.

Sincerely,

D. Allan Bromley
Director

Mr. Edward T. Mabley
President
Society of Automotive Engineers, Inc.
400 Commonwealth Drive
Warrendale, PA 15096-0001

EXECUTIVE OFFICE OF THE PRESIDENT
OFFICE OF SCIENCE AND TECHNOLOGY POLICY
WASHINGTON, D.C. 20506

May 15, 1990

Dear Mr. Larson:

This is in response to your February letter nominating Dr. Jerry Krassner of Grumman Corporation to serve as an IRI fellow at the Office of Science and Technology Policy for the coming year. This office has benefited richly from the fellow program in years past and we are most grateful for the generous support we have received from IRI, for the talented fellows who have served here with such distinction, and for the excellent relationship we have been privileged to enjoy with your organization. Based on this positive experience, it is my desire that we will be able to continue the fellowship program in the future.

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Regrettably, unless the program is restructured to meet these ethics requirements, I must decline your generous offer to provide a fellow to OSTP for next year.

Sincerely,

D. Allan Bromley
Director

Mr. Charles F. Larson
Executive Director
Industrial Research Institute, Inc.
1550 M Street, N.W.
Washington, D.C. 20036

Withdrawal/Redaction Sheet
(George Bush Library)

Document No. and Type	Subject/Title of Document	Date	Restriction	Class.
04. Memo	From Tom Ratchford to D. Allan Bromley Re: Conflict of Interest Issues and OSTP Fellows (Sentence redacted) (1 pp.)	04/04/91	~~P-5~~	

Collection:

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By NGD (NLGB) on 4/24/2006

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EXECUTIVE OFFICE OF THE PRESIDENT
OFFICE OF SCIENCE AND TECHNOLOGY POLICY
WASHINGTON, D.C. 20506

April 4, 1991

MEMORANDUM FOR D. ALLAN BROMLEY

FROM: TOM RATCHFORD

SUBJECT: CONFLICT OF INTEREST ISSUES AND OSTP FELLOWS

Attached is a note by Richard K. Berg, forwarded by Dave Beckler. Berg is one of the foremost legal scholars in the area of conflict of interest, and is doing a study for the Carnegie Commission. I call your attention to the last paragraph, in particular.

Ken Yale has the lead on solving this particular staffing problem, as I understand it, with support from Michelle Van Cleave and others. I suggest this issue be kept in mind as we prepare for oversight hearings on the OSTP organic act.

cc: Henderson
Phillips
Wong
Yale
Van Cleave
Bach
Olson
Blake

Withdrawal/Redaction Sheet
(George Bush Library)

Document No. and Type	Subject/Title of Document	Date	Restriction	Class.
05. Letter with Attachment	From Richard Berg to David Beckler Re: OSTP conflict of interest (6 pp.)	03/05/91	~~P-5~~	

Collection:

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By NGD (NLGB) on 4/24/2006

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YZL

LAW OFFICES
MULTINATIONAL LEGAL SERVICES, P. C.
11 DUPONT CIRCLE
WASHINGTON, D. C. 20036
(202) 797-7124

TELECOPIER (202) 939-6969
TELEX 499 3870 MBS UI

March 5, 1991

Mr. David Beckler
Carnegie Commission on Science,
Technology and Government
10 Waverly Place
New York, New York 10003

Dear Dave:

I attach a memorandum I have prepared on the OSTP conflict if interest problem. I found, in the course of writing, that I did not have as firm an understanding of the factual situation as I would have liked, but I think it suffices for the purpose. The crux of the argument can be stated in two sentences:

1. Section 209 does not apply because the employees are not paid by the Federal Government.

2. Section 208 may apply in given situations, but the problems can be dealt with as they arise.

As to Point 2, of course, it follows that OSTP must be able to obtain timely advice on these issues. It must be recognized that the fact that these employees expect to go back to particular firms in the private sector magnifies their exposure to conflict of interest problems, because their assumed "interest" in their future employer is significantly greater than an interest which another employee might have through a small financial holding in a publicly held company. But I see no reason why an effective program to foresee and prevent conflicts can not be set up if it is not already in place.

Sincerely,

Dick Berg

Richard K. Berg

M E M O R A N D U M

Re: Application of Conflict of Interest Laws to Employment

Arrangements at the Office of Science and Technology

A question has been raised as to the employment by the Office of Science and Technology Policy of persons on leave of absence from firms in the private sector. These employees serve in the Office for approximately a year. They receive no pay from the Federal Government but are paid by private sources, either non-profit foundations or their previous employer. They typically retain pension rights and other fringe benefits from their previous employer and expect to return to their previous employment. It has been suggested that there may be a legal impediment to continuing these arrangements. I have not been informed in detail of the duties these employees perform, but in general they are to assist the Director of the Office in implementing the tasks set out in the National Science and Technology Policy, Organization and Priorities Act of 1976 (the "Act"), P.L. 94-282, Section 205, 42 U.S.C. 6614, and in developing the information for the Director's report to Congress, required by Section 206 of the Act, 42 U.S.C. 6615. It has been suggested that for these employees to receive compensation from the private sector under these circumstances may constitute or give rise to a forbidden conflict of interest.

There are two provisions of the Federal conflict of interest laws which seem relevant to this situation. Section 209 of title 18, U.S. Code, prohibits employees of the executive branch of the U.S. Government or of any independent Federal agency to receive any contribution to or supplementation of salary from a private non-governmental source. Both the acts of making and of accepting the contribution are prohibited. However, there are two exceptions which appear to cover fully the situation we are considering. First, Section 209(b) excludes from the prohibition continued participation in a bonafide pension, retirement, insurance, or other welfare or benefit plan maintained by a former employer. Second, Section 209(c) excludes from the application of the entire section special Government employees and employees serving without compensation, whether or not special Government employees. I understand that the employees in question serve substantially full time for a year, and thus they are not special Government employees, see 18 U.S.C. 202(a), but since they serve entirely without compensation from the Government, they are entitled to the exclusion from Section 209 nonetheless.

The second statutory provision which must be considered is 18 U.S.C. Section 208. Section 208 forbids any officer or employee of the Federal Government to participate "personally and substantially as a Government officer or employee" in any "particular matter" in which to his knowledge he has a financial interest. The "particular matters" to which this applies include substantially any kind of agency action and the statue reaches any kind of substantial participation by the employee, even by way of recommendation or rendering of advice. The concept of "financial interest" is likewise broad and would include any interest of the company to which the employee would be returning after his Government service. Consequently, although I understand that the duties of the Office of Science and Technology and of the employees in question involve questions of general science policy and, ordinarily, not matters specifically affecting individual companies, it cannot be said that no situation is likely to arise in which Section 208 would come into play.[1/]

However, it must be emphasized that Section 208 is matter-oriented. It does not forbid the employment of anyone; it merely forbids employees to act with respect to those particular matters where there is a disqualifying financial interest. Consequently, there are usually ways to avoid the Section 208 short of avoiding or terminating employment.

Obviously, one way is to avoid assigning the employee to a task where there is a perceived conflict of interest or to permit him to recuse himself from any participation in the matter in question. Second, an employee may divest himself of the interest which creates the conflict. However, this is probably not practicable where the interest stems from an arrangement for future employment. Finally, there is the

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[1/] The Department of Justice has taken the position that Section 208 applies to matters of general applicability, such as rules, which may have a direct and predictable effect on a firm in which an employee has an interest "even though all other firms similarly situated will be affected in a like manner." 2 Ops. OLC 151, 155 (1978).

possibility of a waiver. Waivers from Section 208 may be granted in individual cases where the employee advises the agency of the circumstances creating the conflict and receives from the official responsible for his appointment a written determination that "the interest is not so substantial as to be deemed likely to affect the integrity of the services which the Government may expect from such officer or employee," 28 U.S.C. Section 208(b)(1). (Waivers from Section 208 may also be granted more generally by rule, but given the difficulty of determining in advance the nature and gravity of the conflicts which might arise from arrangements for future employment, it is doubtful that waivers by rule would be practicable in such situations.)[2/] Where a waiver is granted in an individual case, a copy of the agency determination must be made available to the public, 18 U.S.C. Section 208(d)(1).

I know of no other legal impediment to the employment arrangements described. The personnel of the Office of Science and Technology informed me in the course of our discussion that no specific statutory prohibition had been cited to them but that there was concern over an "appearance of conflict of interest."

[2/] Prior to the 1989 ethics legislation, each agency could adopt its own waiver rules under Section 208. The Ethics Reform Act of 1984, P.L. 101-194, moves this rulemaking authority to the Office of Government Ethics. Waiver rules in the past have generally been used to exempt types of financial holdings on grounds of size or diffuseness, e.g., investments in diversified mutual funds, see 40 C.F.R. §3.301(b) (EPA).

Since any actual conflict of interest can be resolved through recusal or waiver, under existing law, I do not believe that this concern for appearances can be resolved through new legislation, as has been suggested. It would be hard to make a case for some sort of legislative across-the-board waiver of Section 208, when the administrative waiver now available has not been proved inadequate.

I suggested to the Office personnel that the best way to deal with the problem of appearances would be for them to discuss openly the employment arrangements in question in the course of the next Congressional oversight hearing, describing the institutional safeguards taken to avoid conflicts. Perhaps discussion or endorsement of the program could even be included in the Congressional committee report. This should, in my view, be much easier to obtain than changes in legislation, and it should be just as efficacious. There may, of course, be a risk in calling attention to the problem, but if the alternative is to abandon the present program, it is hard to see what is lost by bringing the issue to the attention of Congress, and if the case on the merits is made, the result should be a satisfactory resolution.

Richard K. Berg

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