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JUDGING GIFT RULES BY THEIR WRAPPINGS—
TOWARDS A CLEARER ARTICULATION
OF FEDERAL EMPLOYEE GIFT-
ACCEPTANCE RULES

Seth D. Zinman*

I. Introduction

Edward Gibbon, the renowned historian of ancient Rome, would not have been surprised to learn of modern-day America's political scandals. "Corruption," he observed, is "the most infallible symptom of constitutional liberty."¹

Despite Gibbon's observations, there is little danger that Americans today will embrace corruption as a sign of democratic virtue or permit their officials wear it as a badge of honor. Particularly in recent years, the nation has focused its attention continually on the ethical climate of government. Its concerns are well placed. Official misconduct corrodes democratic structures. In a democracy, public servants frustrate the nation's policies and goals when they fail to serve the public interest.² Even the appearance of misconduct can be as damaging as the reality. As the Supreme Court has pointed out, "a democracy is effective only if the people have faith in those who govern, and that faith is bound to be shattered when high officials and their appointees engage in activities which arouse suspicions of malfeasance and corruption."³

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¹ 1 Edward Gibbon, The Decline and Fall of the Roman Empire 706 (1950) (footnote omitted).
Good ethics rules do not ensure good government, but they are a crucial prerequisite. Writing such rules is not an easy task. It is not enough that ethics rules reflect sound, wise, and practical value judgments. The success of the entire enterprise depends upon the skill with which authors draft these rules. Complexity and ambiguity are the twin hobgoblins of comprehension, and the public cannot expect officials to obey a code they do not understand.

A confusing ethics code can undermine the functions of democratic government in a less obvious way. It can create reasonable fear that an entirely proper official action will place the employee in legal jeopardy. The most ethically sensitive and informed employees often are those most likely to succumb to this fear.

It was just this concern over the *in terrorem* effects of personal liability that led to the doctrine of qualified immunity of government officials for tortious acts related to their government duties. The rationale for the immunity doctrine is that government officials will be immobilized if they fear liability for every action which is later found to exceed their statutory authority. The immunity doctrine absolves government officials from personal responsibility in private suits for some illegal actions arising out


5. Justice Marshall, writing for a unanimous court, explained the rationale of the immunity doctrine:

The purpose of such official immunity is not to protect an erring official, but to insulate the decisionmaking process from the harassment of prospective litigation. The provision of immunity rests on the view that the threat of liability will make federal officials unduly timid in carrying out their official duties, and that effective Government will be promoted if officials are freed of the costs of vexatious and often frivolous damages suits.

of their official duties. Moreover, the Justice Department may represent the government official in court.

A government official who faces the alleged violation of an ethics regulation confronts a very different predicament. No doctrine of immunity shields the official from the consequences of ethical infractions which are close to the line. Every breach is deemed to be a violation of the official's public trust. When an official is charged with an ethics violation, the government acts as the prosecutor, rather than the defense. The stakes

6. Westfall, 484 U.S. at 295. The United States Supreme Court has held that: “absolute immunity does not shield official functions from state-law tort liability unless the challenged conduct is within the outer perimeter of an official's duties and is discretionary in nature.” Id. at 300.

In Butz v. Economou, 438 U.S. 478, 507 (1978), the Court held that only a qualified immunity, rather than an absolute immunity, extends to most suits alleging constitutional violations. Id.


8. In deciding whether to seek punitive action, and in gauging what punishment is appropriate, the government may take into account the severity of the violation, the clarity of the rule, and the good faith of the employee. See Douglas v. Veterans Admin., 5 M.S.P.R. 280, 305-06 (1981).

New Justice Department regulations governing the contact of its lawyers with unrepresented persons have the effect of granting limited immunity under state disciplinary rules for non-willful violations of the new rules. 59 Fed. Reg. 39,910 (1994) (to be codified at 28 C.F.R. § 77.12).

State ethics rules generally bar certain contact between lawyers and non-lawyers. The new Justice Department regulations establish specified department-wide standards governing these attorney contacts and preempt the application of state laws and the local rules of the federal courts. Id. at 39,929-31. The new regulations only allow state authorities to discipline Justice Department lawyers when the Attorney General finds that the attorney willfully violated the new Justice Department rules. Id. at 39,931. While the Justice Department still may punish non-willful violations, the attorney, in effect, is immunized from prosecution under local disciplinary procedures, even though the conduct violates both Federal and state rules. Id.

for the accused are very high: criminal prosecution, loss of employment, or serious damage to reputation and career.

Thus, when ethically sensitive employees face confusing ethics rules bearing on imminent future actions, they must make important decisions. There are several possibilities.

First, they can seek legal advice before taking action. The adequacy of this option depends on the resources available to provide definitive and timely guidance. A complex or ambiguous ethics code can overload employee guidance systems and render them incapable of producing a response that meets agency and employee needs.

Second, employees can reject all choices that raise ethics questions. This option may require employees to dismiss beneficial alternatives that are entirely proper. It is acceptable only if the employees' ultimate decisions serve the public interest as well as the lawful choices which they rejected. Otherwise, the ambiguities in the ethics rules, in effect, will cause employees to defy the principle underlying most ethics codes—that the public interest must govern employees' official behavior. The employees' actions are not unlike those of physicians who prescribe unnecessary tests to protect against malpractice suits.

Third, employees can do nothing. This option is a more severe and dramatic version of option two.

Finally, employees can ignore the pervasive ethical uncertainties, thereby avoiding interference with the speed and efficiency of decision making. This option obliges ethical employees to desensitize themselves. It requires, in effect, a reenactment of the "see no evil, hear no evil" tableau in which the most ethically sensitive employee plays the role of the Monkey-in-Chief.

The public would like to believe that ethics codes have consequences, and they do. A carefully balanced and artfully crafted code helps preserve and protect the fundamental democratic values on which our system of government is based. An ill-conceived or poorly drafted code often can do "more harm than good." With these considerations in mind, one may wonder about the efflorescence of ethical codes and standards marking the closing years of the 1980s and the dawn of the 1990s. Since 1988, Congress has enacted an

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array of amendments to the Ethics in Government Act.\textsuperscript{12} It has passed procurement integrity legislation and has gone forward with a confusing flurry of amendments, suspensions, and reinstatements of the Act.\textsuperscript{13} Agencies have issued detailed regulations to interpret its provisions.\textsuperscript{14} Presidents have signed four Executive Orders dealing with ethics matters.\textsuperscript{15} The Office of Government Ethics (OGE) has promulgated detailed rules governing financial disclosure, qualified trusts, and certificates of divestiture for Executive Branch employees.\textsuperscript{16} It also has published regulations describing limitations on outside employment and honoraria,\textsuperscript{17} and requiring agencies to establish extensive employee train-


\textsuperscript{14} 48 C.F.R. §§ 3.101 to .204 (1994).


\textsuperscript{16} Executive Branch Financial Disclosure, Qualified Trusts, and Certificates of Divestiture, 5 C.F.R. §§ 2634.101 to .104 and appendices (1994).

\textsuperscript{17} Limitations on Outside Employment and Prohibition of Honoraria; Confidential Reporting of Payments to Charities in Lieu of Honoraria, 5 C.F.R. §§ 2636.101 to .307.
The General Services Administration (GSA) also has been involved, setting forth detailed guidelines concerning the authority of agencies to accept payment from outside sources for the travel-related expenses of agency employees. Without doubt, the "800 pound gorilla" of all ethics rule changes is the OGE's new government-wide ethics code which became effective on February 3, 1993. This code is especially important because it covers virtually every aspect of employee conduct and replaces existing agency standards which have been in effect since the mid-1960s.

For those who believe that the form and substance of ethics rules can profoundly affect the ability of democratic government to carry out its mission, these recent changes should be matters of intense interest. This article closely inspects the strengths and failings of the new government-wide code, particularly its provisions limiting gifts to government employees from sources outside the government. It begins with a brief review of earlier ethics regulation efforts to place the new code in historical perspective. This article then analyzes the new code's specific provisions and compares them to the older regulations restricting gifts to government employees. Finally, this article offers recommendations and conclusions as to how the drafters of ethics codes can achieve competing goals in ethics regulation.

II. BACKGROUND OF THE NEW CODE

A series of influence-peddling scandals during the mid-nineteenth century prompted the first serious federal effort to regulate conflicts of interest. Except for the broadest of the new laws, the predecessor to 18 U.S.C. § 208, Congress narrowly focused the resulting criminal statutes to remedy specific forms of misbehavior.
Prior to the 1960s, neither Congress nor the Executive Branch gave much sustained attention to ethics regulation. The Civil Service Commission had not published general guidelines to implement the conflict-of-interest laws, and agency regulation was desultory at best. Only the Department of Justice demonstrated an aggressive interest in government-wide ethics matters, arising principally from its role in the presidential appointment process and its enforcement of the criminal laws. This activity, however, was insufficient to compensate for a general lack of central direction within the Executive branch. Congress issued a broad statement of ethics principles in 1958, but it included no enforcement provisions.

In 1962, Congress extensively revised the conflict-of-interest laws. Although the amendments were significant, they represented evolutionary change, rather than a shift to a more pervasive regulatory environment. It is not surprising that these reforms were so modest. In the early 1960s, the government faced new ethical challenges, which were seen to arise from forces outside of the bureaucracy and not from any fundamental pathology of the institution itself. The new law responded, in part, to some well-publicized instances of misconduct, but in the view of President Kennedy, “the few instances of official impropriety” did not betoken a “widespread departure from high standards of ethics and moral conduct.”

One of the primary concerns of the new conflict-of-interest law was the increasing governmental presence of experts whose principal economic...
locus was the private sector. In the view of Roswell Perkins, a scholar of the new law, the government's growing dependence on the scientific and technological expertise of transient experts multiplied the number and subtlety of conflicting economic interests.

While President Kennedy emphasized the need to deal in a balanced manner with the presence of outside experts, he also wanted to assure the public that government employees at all levels maintained the highest ethical standards. His transmittal message to Congress included a statement of the ethical principles by which all federal employees must be bound. Future executive orders and ethics regulations reflected many of these formulations.

President Kennedy's highest priority for ethics regulations in the permanent bureaucracy was the layer of political appointees at the top of the pyramid. To encourage this group to set an example for their subordinates, he announced his intention to cover them separately under an executive order prescribing specific ethics standards. White House memoranda or agency regulations provided rules for other categories of employees.

In 1965, a major change occurred in the role of the executive branch agencies. On May 8, 1965, President Johnson issued Executive Order 11,222 which required agencies to administer ethics programs under the active leadership of the Civil Service Commission for the first time.

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29. President Kennedy stressed the need to attract temporary experts and consultants while maintaining the government's high ethical standards. Id. at 327. The new law established a category of special government employees who were subject to lesser restrictions than regular employees. See 18 U.S.C. §§ 202, 203, 205, 209 (1988 & Supp. IV 1992).


31. See Kennedy Special Message, supra note 28, at 326.

32. Id.


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Agency guidance to the agencies and to implement the new financial reporting requirements.  

Agencies were to promulgate regulations covering their own employees. Although the Commission permitted some variation, it required these regulations to conform generally to its model ethics standards. The Commission also obliged agencies to establish employee ethics counseling programs. The government-wide ethics and conduct program, which Executive Order 11,222 established, remained largely unchanged until 1978.

By 1978, a sea change had occurred in the public attitude toward its government. There were many possible authors of this change: Watergate and its profoundly disturbing impact on the public viscera; a newly energized press with a less than cheerful view of the nation’s governing officials; a divisive war in southeast Asia which alienated many citizens from their government; the accumulated frustrations of the cold war and the inability of democratic government to shield its citizens from the uncertainties of an unsettled world.

On October 26, 1978, President Carter signed the Ethics in Government Act into law. It is not mere coincidence that within the two-week period immediately preceding President Carter’s signature, two other important statutes also became law, the Inspector General Act and the Civil Service Reform Act. Taken together, these three laws suggested a strong public perception that something in government had gone desperately awry and that the existing mechanisms could not repair the problem.

35. While the Order applied ethics standards to all employees, it retained a strong emphasis on officials who were only loosely attached to the federal workforce. Id. at 307. Part III dealt exclusively with those temporary employees who were an important focus of the 1962 statute, and mandated financial disclosure for these officials. Id. Part IV included financial disclosure requirements for certain presidential appointees. Id. at 308. The order directed the Civil Service Commission to issue general financial disclosure regulations. Id. at 309.


Congress intended the Civil Service Reform Act as a total overhaul of the system.\textsuperscript{41} Among its many changes were mechanisms to ensure that officials objectively measured the performance of employees so that they could weed out or otherwise appropriately deal with incompetents.\textsuperscript{42} The Act established an Office of Special Counsel to investigate and enforce the newly created ban on specified prohibited personnel practices.\textsuperscript{43} Whistleblowers who identified the abuses in the system also were offered protections under the Act.\textsuperscript{44}

The Inspector General Act established independent investigators charged with discovering and reporting on waste, fraud, abuse, and employee misconduct.\textsuperscript{45} Their independence prevented agency interference with their activities.\textsuperscript{46} Each Inspector General headed an office appropriately staffed with investigators and auditors.\textsuperscript{47}

The Ethics in Government Act had four principal provisions. It revised the conflict-of-interest laws applicable to former government employees, and particularly to those who had served at senior levels.\textsuperscript{48} It initiated a new program of public financial disclosure for a large number of employees.\textsuperscript{49} It also established an independent counsel\textsuperscript{50} mechanism to deal with misconduct at the highest levels of government.\textsuperscript{51} Lastly, it created an Office of Government Ethics (OGE) as an administrative entity within the Office of Personnel Management.\textsuperscript{52}

Though intended as a response to the dramatically altered public perception of government, the Act did not fundamentally alter the substance of ethics rules for current government employees. In his signing message,
President Carter expressed the belief that this new law would help restore public confidence in the integrity of government.\footnote{53. Ethics in Government Act of 1978, Remarks on Signing S. 555 into Law, II PUB. PAPERS 1855 (Oct. 26, 1978).}

The Ethics in Government Act did produce a more formal structure, both at the agency level and government-wide.\footnote{54. See Ethics in Gov't Act of 1978, 5 U.S.C. app. §§ 101-505 (Supp. V 1993).} The law and its implementing regulations resulted in the designation of agency ethics officials responsible for reviewing financial disclosure forms.\footnote{55. Id. app. § 106 (listing procedures for agency ethics officials to follow in reviewing financial disclosure forms).} New agency responsibilities implied an increase in resources available to the ethics program and a more ordered administrative process to handle ethics issues.

The law fostered a centralization of ethics functions. The creation of the Office of Government Ethics was one of the most significant achievements of the Ethics in Government Act.\footnote{56. The OGE was organized as a part of the new Office of Personnel Management which the Civil Service Reform Act had created. Pub. L. No. 95-454, § 201, 92 Stat. 1111, 1118-21 (codified as amended at scattered sections of 5 U.S.C.). The Congress later reconstituted the Office of Government Ethics as a separate and independent agency. Act of Nov. 3, 1988, Pub. L. 100-598, § 3(a), 102 Stat. 3031, 3031 (codified as amended at 5 U.S.C. app. § 401(a) (Supp. V 1993)).} The OGE assumed responsibility for stewardship over the ethics program. Its creation, however, did not diminish the role of the agencies.\footnote{57. For a description of OGE’s original functions, see § 402 of the Ethics in Government Act of 1978, Pub. L. No. 95-521, 92 Stat. 1824, 1862 (codified as amended at 5 U.S.C. app. § 402 (Supp. V 1993)).} Each agency retained its separate ethics code and the primary responsibility for interpreting and administering its provisions.\footnote{58. See Ethics in Government Act § 402.} The Ethics in Government Act directed OGE to review the financial disclosure forms of certain higher level agency officials.\footnote{59. Id. § 203(a).} It also assigned the OGE new oversight responsibilities.\footnote{60. See id. § 402 (listing the OGE’s responsibilities).} As the OGE became fully operational, it was inevitable that it would play a larger role in the management of the government’s ethics program. The OGE established an auditing capacity and required agencies to provide specific information about their activities.\footnote{61. Id. § 402 b(8).}

The Ethics in Government Act also required the OGE to establish an advisory service and to publish its opinions.\footnote{62. Id.} The OGE had perhaps its greatest impact in its performance of this function. For the first time, authoritative advice on a full range of ethics questions was available to current and former government employees, agency ethics officials, and
the public. To carry out this responsibility, the OGE signed an agreement with the Department of Justice that gave it limited authority to interpret the conflict-of-interest laws.

Since its creation, the OGE has fostered an open process encouraging all interested parties to seek its advice and assistance. Through its publication of formal opinions, it has developed a “common law” of ethics, adding healthy mounds of flesh to the sparse skeletal structure of the old model rules.

The most recent cycle of ethics rule changes appears to be linked closely to a wide range of misconduct allegations during the 1980s. Some of the new rules seem to address particular episodes of misconduct. A more generic public concern over the ethical climate of the government may have inspired other rules, including the new government-wide ethics rules.

The new government-wide ethics code, established February 3, 1993, developed out of the recommendations of the President’s Commission on Federal Ethics Law Reform. President Bush established the Commission on January 25, 1989, shortly after his inauguration. The Commission was to “review Federal ethics laws, Executive orders, and policies and [to] make recommendations to the President for legislative, administrative, and other reforms needed to ensure full public confidence in the integrity of all Federal public officials and employees.”

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63. Id.
64. See Hearings, supra note 2, at 284.
The Commission issued its broad report in March, 1989. By looking at the patchwork of ethics regulation that had developed over the previous decades, the Commission concluded that, "the Office of Government Ethics should have primary responsibility for the development and interpretation of standardized ethics rules within the executive branch."

On April 12, 1989, President Bush issued Executive Order 12,674, "Principles of Ethical Conduct for Government Officers and Employees." This Order set forth the general ethics principles that apply to all federal employees. The order required the OGE to issue a single set of executive branch standards in consultation with the Attorney General and the Office of Personnel Management. Separate agency ethics codes were to be abolished.


III. STRATEGIC OBJECTIVES OF THE NEW ETHICS CODE

These regulations and the Executive orders from which they arose respond to the public's palpable anxiety about the ethics of its governing officials. The regulations attempt to achieve uniformity and coherence, as the Commission recommended, and to realize the Executive order's goal of creating regulations that are comprehensive, clear, objective, reasonable, and enforceable.

The new rules have altered the shape of the government's ethics program dramatically. They shift the balance toward a more centralized pro-

70. See Ethics Comm'n Report, supra note 67, at 1.
71. Id. at 93.
72. Id.
75. See 5 C.F.R. § 2635.105 (1994). The new code permits agencies to supplement these government-wide rules through the issuance regulations deemed necessary in light of the agency's programs and operations. Id. Agencies must submit their regulations to the OGE for concurrence and joint issuance. Id.
78. See 5 C.F.R. § 735.101 (1991) (stating that one purpose of the regulation is to maintain the confidence of citizens in their government); see also 5 C.F.R. § 2635.101 (1994) (listing numerous principals and responsibilities to guide federal employees in their daily work).
They mandate an increasingly formal decision-making process within each agency. Most conspicuously, when compared to the old model ethics rules, they represent a striking increase in size and complexity.\(^8^1\)

While these new rules look very different, they do not alter fundamentally the ethical principles of Executive Order 11222 and its implementing rules.\(^8^2\) One must therefore ask what underlying purpose the new rules are intended to serve, why they are so long and detailed, and whether these changes will contribute to a more ethical environment or whether they will prove to be ineffective and counterproductive.

A. Attempting to Eliminate the Arbitrariness and Generalities of the Old Ethics Code

In part, the complexity of the new code reflects the growing size and impact of the federal establishment and the proliferation of special interests that have created a more complicated economic and legal world.\(^8^3\) In

\(^8^0\) See 5 C.F.R. § 2635.101 (1994).


\(^8^2\) The general ethics standards in the new code, set forth in 5 C.F.R. § 2635.101, have their counterparts in the old model rules. Included here is a comparative reference between the new provisions and their predecessors:

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<td>101(b)(10)</td>
<td>203(a)</td>
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<td>101(b)(12)</td>
<td>207</td>
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<td>101(b)(13)</td>
<td>201a(b), (d), (f)</td>
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<td>101(b)(14)</td>
<td>201a(a)</td>
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In using this comparison, this article does not intend to suggest that the ethical mandates of the old and new rules are identical. Clearly, the new rules make a number of specific changes. See infra notes 101-219 (comparing the old and new gift rules). Arguably, each variation reflects a different ethical balance. Nevertheless, these shifts appear principally to reflect semantic differences or prudential and pragmatic choices. For simplicity's sake, this article compares provisions of the new code to the model rules rather than the individual agency ethics rules. See, e.g., supra note 36.

\(^8^3\) Morgan, supra note 11, at 490-91. Similar reasons were ascribed to the enactment of the 1962 conflict-of-interest statute. Perkins, supra note 27, at 1114.
part, the rules reflect a quantum increase in fiscal and intellectual resources dedicated to the ethics program over the past several decades and a growing sophistication in dealing with ethics issues.

Articulation of the many subtle judgments reflected in this new code would not have been possible without the institutionalization of the ethics function beginning in the 1960s. Much has changed since the late 1950s when agency ethics regulation was a tentative and uncertain business, with virtually no government-wide coordination.\textsuperscript{84} In the 1970s, the Ethics in Government Act brought about the creation of an ethics "community," consisting of the OGE and a cadre of agency ethics officials throughout the executive branch.\textsuperscript{85} These changes ensured that the march toward increasingly complex and sophisticated ethics rules would be inexorable.

In large part, the new approach represents a basic change in drafting strategy. The drafters strived to abandon a code which had been based on sweeping statements of ethical principle. They attempted to craft a code that articulates its subtle judgments clearly, comprehensively, and objectively.\textsuperscript{86}

In its day, the broad generalities of the old model rules significantly advanced the goal of comprehensive and effective ethics regulation. The old rules provided government-wide guidance on daily conduct to fill the gaps in a highly focused and porous criminal code. The old code's ethical principles had the virtue of appearing to be self-evident, and for that very reason, a wide range of readers could understand their purposes.

Today, however, the uncertainties of the old rules are easily uncovered.\textsuperscript{87} The generality of the language was both the old code's major strength and its principal weakness.

\textsuperscript{84} See \textit{New York Bar Study}, supra note 2 at 72-94.

\textsuperscript{85} In its Third Biennial Report to Congress in March, 1994, the OGE reported that it had five major subdivisions: an Office of the Director, Office of General Counsel and Legal Policy, Office of Education, Office of Program Assistance and Review, and an Office of Administration. \textit{United States Off. of Gov't Ethics, Third Biennial Report to Congress}, (1994). The agency reports eighty-five full time equivalent positions in fiscal year 1993, of which 20 are located in the Office of General Counsel and Legal Policy. \textit{Id.} at 31. Executive agency staff working in the ethics program had expanded from just over 6,000 in 1989 to more than 8,500 in 1991. \textit{United States Off. of Gov't Ethics, Second Biennial Report to Congress} 44 (1992). The vast majority of these employees worked in the program only on a part-time basis. \textit{Id.}

\textsuperscript{86} See Exec. Order 12,674, 3 C.F.R. 216 (1990) (establishing as OGE goals the promulgation of "regulations that establish a single, comprehensive, and clear set of executive-branch standards of conduct that shall be objective, reasonable, and enforceable.")

\textsuperscript{87} One notable example illustrates the breadth of the old code's provisions:

An employee shall avoid any action, whether or not specifically prohibited by this subpart, which might result in, or create the appearance of:
A critic properly might argue that the problem with self-evident principles is that they can self-evidently mean different things to different people. One consequence of multiple interpretations is a perception that the rules are unevenly and unfairly applied. There is no other charge that the guardians of ethics regulation must take more seriously.

The OGE's answer to the serious difficulties of the old regulations is a new code which is more than ten times longer and considerably more complex. The new rules seek to liberate federal employees from the tyranny of self-evident principles by explicitly defining the boundaries of impermissible behavior. Employees no longer will be subjected to whimsically diverging interpretations of the same inscrutable generalities. Those seeking objective guidance will not be required to locate and parse the enigmatic, and at times paradoxical, musings of past ethics officials. The new rules give unclear terms specific meanings and establish procedures to find answers to unsettled questions. In one bold stroke, the authors transformed ethics law from a "common law" jurisdiction to a "code" jurisdiction.

The drafters, at least, intended these effects as blessings of the new ethics code, but the choice of a long and complex code to achieve clarity and objectivity is a high risk enterprise. It threatens to place the code potentially out of reach for millions of federal employees, thereby undermining the code's fundamental purpose.88

B. Potential Problems With the New, Detailed Ethics Code

The new code, which is a forty-five page legal document, will prove to be a forbidding presence for the many millions of Federal employees whom it regulates. While the OGE requires that agencies give each em-

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88. Legal scholars have noted the importance of ensuring that the drafters of legal language are, "attentive to the probable effect[s] of [their] choice of words upon the rule's intended audience." Colin S. Diver, The Optimal Precision of Administrative Rules, 93 Yale L.J. 65, 67 (1983); see also, Reed Dickerson, The Fundamentals of Legal Drafting 18-35 (1965).
ployee time to read the new rules, no legal mechanism has been devised to ensure that readers understand or remember what they read.

Apart from length, specific rules often require the use of drafting techniques that present further barriers to understanding. Precise (and occasionally exotic) legal definitions, cross references, and incorporations by reference are all important devices commonly used to manage large bodies of complex materials. While these tools often are helpful in drafting codes, they do not produce a "user friendly" product and they sometimes befuddle even the experts.

Moreover, the notion that detailed specifics will greatly reduce the need for administrative interpretation merits a healthy dose of skepticism. Massive litigation under laws such as the Internal Revenue Code suggests that the goal of "one-stop shopping" for legal answers is likely to remain elusive.

While it is difficult to write a detailed code that also is understandable, careful drafting can improve its clarity. A complex code must achieve a high measure of internal coherence. Specific provisions should be consistent with each other and with the code's general principles. When a code is conceptually coherent, even those unfamiliar with its exact language may be able to make reasonable guesses. If they cannot remember the words, it would be nice if they at least could hum the tune.

To achieve coherence and consistency in a complex code, the drafters must successfully impose order on a vast army of unruly details. Their

89. 5 C.F.R. § 2638.703(a)(4) (1994).
90. Id. § 2638.704(a). The OGE requires that agencies give certain employees at least one hour of ethics training per year. Id. The OGE also has issued a 35-page handbook describing the new rules which agencies may make available to their employees. See UNITED STATES OFFICE OF GOV'T ETHICS, DO IT RIGHT: AN ETHICS HANDBOOK FOR EXECUTIVE BRANCH EMPLOYEES (August 1993). The handbook provides almost four pages describing the restrictions on gifts from sources outside the government. See id. at 10-13. This brief summary serves as a useful overview of the regulations, but the OGE clearly does not intend for it to provide guidance on the subtle interpretive questions that are likely to arise as a result of the code's complex language.
91. See Dickerson, supra note 88, at 98-111 (discussing the perils and allure of Humpty Dumptyisms: the use of arbitrary definitions in legal drafting). Dickerson refers to Humpty Dumpty, the semanticist and former egg, celebrated in Lewis Carroll's Through the Looking Glass. Dumpty is famous for his remark, "When I use a word, it means just what I choose it to mean—neither more nor less." LEWIS CARROLL, THE ANNOTATED ALICE, ALICE'S ADVENTURES IN WONDERLAND & THROUGH THE LOOKING GLASS 269 (1960).

Dickerson believes that while arbitrary and exotic legal definitions often are convenient, users err in assuming that because language principally is conventional, they can give words whatever meanings they wish. See Dickerson, supra note 88, at 98-111. Users often fail to account for the strong psychological habits and connections which words evoke. Id. Consequently, even those who use unconventional definitions may find it impossible to use them consistently. Id.
task becomes more difficult when the drafters must modify their con-ceptual framework to adapt to specific incongruous laws and orders. The result may be a code that embodies conflicting purposes and becomes even more complicated because of efforts to deal with the conflicts.

The most serious threat to the internal coherence of a detailed code arises out of the special character of ethics codes. Detailed codes draw fine lines that can yield arbitrary results. When it comes to ethics regulation, it is difficult to accept an arbitrary provision which appears to allow an unethical official escape on a technicality. The public demands that the drafters produce an ethics code with specific rules that are always congruent with the commonly prevailing standards of what seems ethical.

The difficulty is that even the most skilled drafters are unable to draft an objective code that meets these requirements. Drafters can never foresee all possible contingencies. The need to address these contingencies is largely responsible for the ubiquity in ethics codes of the "gotcha catchall." The gotcha catchall comes in many forms, but whatever its guise, it thoroughly undermines any certainty that the code's specific rules create. It allows those charged with interpreting the rules to import into their seemingly objective language whatever value judgements they deem necessary to see that justice is done.

Gotcha catchalls are found in all ethics codes. When they appear in detailed codes, such as the new rules, however, they are particularly misleading. Complex codes entice their lay readers into ignoring the effects of catchalls. To these readers it may seem incredible that the drafters would have spelled out the specifics so fastidiously if they had intended this apparent precision to be nullified by a few brief and formless generalities. This confidence is misplaced. Drafters often include catchalls precisely because they are unwilling to accept the consequences of the more technically precise provisions. In reality, a complex code containing these catchalls often lacks the internal coherence and comprehensibility of simpler efforts, while failing to achieve the objectivity and certainty that are the principal reasons for its existence.

Consequently, the drafters of ethics codes are likely to be plagued by formidable drafting demons whether they choose an approach that focuses on broad and theoretical principles or one that emphasizes detailed and objective standards. Inherently, each approach is flawed. This stra-

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92. See infra notes 219-86 and accompanying text (discussing the catchalls).
93. An extreme version of a gotcha catchall withdraws permission for an activity which the code previously authorized when it is otherwise inappropriate. Gotcha catchalls are quite common in daily life and are especially familiar to persons who have had the need or occasion to explore the warranties on used automobiles.
Judging Gift Rules by Their Wrappings

tactic dilemma is neither new nor unique to the field of ethics regulation. Drafters can arrive at an optimum balance of methodologies only by shrewdly assessing both the subject matter of the regulations and the technical sophistication of the intended audience.

The new code is an especially revealing case study of the perils and blessings of specific drafting. It reflects years of work by skilled drafters with decades of institutional expertise. If the new code fails to achieve its objectives, it is not for want of a fair attempt. Because the underlying principles of both codes are roughly similar, it is easy to measure the defects of the new code against the proven limitations of its predecessor. This article contends that the new code strays much too far in the direction of detailed regulation. To demonstrate this thesis, the following section provides a comparison between the new code and the old regulations which governed the receipt of gifts from outside the government.

IV. REGULATIONS GOVERNING THE RECEIPT OF GIFTS

This article focuses on the rules governing Federal employees' receipt of gifts for two principle reasons. First, the impact of the two drafting philosophies is highlighted dramatically by an especially sharp contrast between the terseness of the old gift regulations and the specificity of the new code. Second, the regulations governing gifts are among the ethics code's most important provisions. They address a fundamental and abiding symbol of government gone astray. The use of public office for private gain undermines public confidence that official action fairly reflects the outcome of democratic processes.

The framers of the Constitution understood the hazards of benevolence. They prohibited government officials from accepting "any present, Emolument, Office, or Title, of any kind whatever, from any King, Prince, or foreign State" without the consent of Congress.94 Our more recent ethics codes recognize that home-grown gifts can also seriously undermine governmental processes and that gifts less grand than the conferring of a dukedom can place one in another's debt.

Our ethics laws and rules devote much attention to the receipt of gifts. We have statutes that prohibit bribery,95 illegal gratuities,96 receipt of gifts by procurement officials,97 and the supplementation of government

95. 18 U.S.C. § 201(b) (1988). Unlike the gratuities statute, the bribery statute requires as elements of the crime corrupt gifts or offers, and an intent to influence the official. Id.
96. Id. § 201(c).
salary by sources outside the government.\textsuperscript{98} Even laws which do not deal expressly with gifts reflect a similar concern over the receipt of valuable items from sources outside the government. Laws forbid federal employees from receiving compensation for most private representational services before government agencies and courts.\textsuperscript{99} Moreover, statutes and Executive orders place limits on the receipt of outside income.\textsuperscript{100}

While these and other statutory restrictions address specific abuses, it is the task of the ethics regulations to deal with gift issues more broadly. It is hoped that a comparison of the gift provisions in the old and new codes will illuminate some of the strengths and deficiencies of specificity as a drafting strategy, and particularly in the formulation of ethics codes.

\textbf{A. The Old Gift Code}

Although the old gift code lacked detail, its meaning was largely clear. The ban on gift acceptance was broad, and there were very few exceptions. The old code prohibited gifts from improper sources, which included persons having or seeking business with the employee's agency, those whom the agency regulated, and those who had interests which might be substantially affected by the performance or non-performance of the employee's official duties.\textsuperscript{101}

The old code permitted gifts from these prohibited sources only if they qualified under one of the code's few exceptions. For example, the old code allowed employees to accept gifts which were clearly motivated by family or personal relationships.\textsuperscript{102} In addition, employees might receive food and refreshments of nominal value on infrequent occasions in the ordinary course of an official meeting or inspection tour.\textsuperscript{103} They could accept awards for meritorious public contribution or achievement from various charitable or civic organizations.\textsuperscript{104} They were free to obtain loans from financial institutions under customary terms.\textsuperscript{105} The code did not require them to return unsolicited advertising or promotional materials, such as pens, calendars, note pads, and other items of nominal intrin-

\textsuperscript{100} See 5 C.F.R. §§ 2636.301 to .307 (1994) (describing the outside earned income limitation and affiliation restrictions applicable to certain noncareer employees).
\textsuperscript{101} 5 C.F.R. § 735.202(a) (1991).
\textsuperscript{102} Id. § 735.202(b)(1).
\textsuperscript{103} Id. § 735.202(b)(2).
\textsuperscript{104} Id. § 735.203(e)(3). Oddly enough, the old code includes this provision among the rules dealing with outside employment and other activities.
\textsuperscript{105} Id. § 735.202(b)(3).
If a gift from an improper source did not satisfy one of these exceptions, however, the old code prohibited its receipt.

While the old gift code covered gifts to employees, it did not apply to a broad range of gifts commonly proffered to the employee's agency. Other rules generally barred these agency gifts. Appropriation law, rather than ethics regulations, largely served as the basis for the prohibition on agency gifts, including the payment of official travel expenses. Because the law ordinarily requires an agency to pay travel expenses, donations from private sources augment the agency's appropriation without the consent of the Congress.

Congress gave some agencies express permission to augment their appropriations. These gift-acceptance statutes allowed private parties to

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106. Id. § 735.202(b)(4).

107. Until recently, it usually was illegal for private persons to defray the costs of a government employee's travel. See infra notes 110-22 and accompanying text. The rules required government employees to turn down offers of transportation, hotel accommodations, or subsistence expenses in connection with official speeches or other meetings which they attended in an official capacity.

108. See, e.g., 5 U.S.C. § 5702 (1988 & Supp. V 1993). Section 5702 requires that agencies pay most federal employees expenses in connection with official travel. Section 5703 authorizes, but does not require, agencies to pay these expenses for employees serving intermittently in government service as experts or consultants and paid on a daily when-actually-employed basis, or those serving without pay or at one dollar per year. 5 U.S.C. § 5703 (1988). Many, though not all, of these experts and consultants will qualify as "special government employees" under 18 U.S.C. § 202 because of their limited attachment to the federal workforce. 18 U.S.C. § 202(a) (1988). Section 209 does not apply to special government employees or employees serving without compensation. 18 U.S.C. § 209(c) (1988).


First, 31 U.S.C. § 3302 provides that the gross amount of any moneys that an agency receives must be deposited promptly in the Treasury without any abatement, deduction, or charges. 31 U.S.C. § 3302 (1988). The GAO interprets this requirement to mean the General Fund of the Treasury rather than the agency's appropriation. 2 Office of the General Counsel, supra, at 6-106.

The second provision requires that appropriated funds be used only for their intended purposes. 31 U.S.C. § 1301 (1988). "Early decisions often based the augmentation prohibition" on §§ 1301 and 1302. 2 Office of the General Counsel, supra, at 6-103.

In the GAO's view, the third statutory basis for the anti-augmentation rule is the conflict-of-interest statute. See 18 U.S.C. § 209 (1988). Off. of Gen. Counsel, supra, at 6-103. Section 209 forbids any outside source from paying any salary or supplementation of salary to a federal official. See supra note 98 and accompanying text. The GAO believes that this provision prohibits an outside source from paying the travel expenses of government employees on agency business. See infra notes 230-33 and accompanying text (discussing the use of section 209 to support the rule against augmentation of appropriations).

subsidize official trips, as long as the agency and the private concerns followed proper procedures. The regulations required the donor to contribute any funds directly to the agency. They also directed the agency to reimburse the employee for the expenses of the trip in accordance with normal government travel procedures. The employee received no additional payment because of the gift.

The Government Employees Training Act also allowed employees to accept approved expenses incident to participation in training or attendance at meetings. The Act only permitted contributions from donors which were tax-exempt organizations under section 501(c)(3) of the Internal Revenue Code (charitable, educational, and religious organizations) and state, county, or municipal treasuries. Donors were to make gifts directly to the employee and not to the agency. Implementing regulations imposed additional conditions on the acceptance of Training Act gifts, including requirements that agencies review the conflict-of-interest considerations.

The anti-augmentation principles and the old gift rules established a system of gift regulation which was complicated, but the bottom line results of its operation were not fundamentally confusing. The rules were very restrictive. There were few exceptions. Use of the broadest of these exceptions, the Government Employees Training Act, clearly required agency approval. Only employees who had agency permission or sufficient authority to act on behalf of the agency could use the agency gift-acceptance statutes. Thus, there was little possibility that employees

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111. See 46 Comp. Gen. 689 (1967). A gift-acceptance statute is, in effect, congressional authority to augment an agency's appropriations. Id.
113. Id.
119. See 5 C.F.R. § 410.702 (1994) (discussing the OPM requirements concerning federal employees' acceptance of gifts from non-governmental organizations).
120. See supra notes 114-19 (discussing the Government Employees Training Act).
121. 5 C.F.R. § 410.702 (1994).
122. See supra note 110 and accompanying text.
who were unfamiliar with these rules would try to grapple with their complexities without the agency’s assistance.

While the old gift rules were not devoid of interpretive issues, the uncertainties were considerably more modest than those which the new gift code creates. The old rules did contain some ambiguities, and there was some variation among agencies. For example, the old rules generally outlawed gifts from individuals or entities which the employee’s agency regulated.123 If one subunit of a diverse cabinet agency regulated the prospective donor, it was not clear whether the law prohibited all agency employees from receiving gifts from that donor or only the employees of the regulating subunit. Generally, the interpretations or regulations of each agency were left to resolve this important question.124

The old gift rules allowed employees to consume meals of nominal value on infrequent occasions in the ordinary course of an official meeting or inspection tour.125 The rules did not define the terms “nominal” and “infrequent.” Moreover, the terms lacked any obvious numerical meaning. There was no reason to assume that the agencies would interpret or define these terms consistently.126

In addition, the OGE interpretations of the terms were not always obvious from the face of the regulations. In October, 1987, OGE held that the exception for nominal value lunches did not apply to “one-on-one business lunches” at restaurants nor to receptions given by interest groups, even if the parties discussed business.127 The OGE also has had to clarify by its interpretations when commercial discounts to employees constitute prohibited gifts.128 Nevertheless, ambiguities of this magnitude were not likely to undermine an employee’s understanding of the old rules.

Even uncertainties of far greater potential importance created few practical problems. One of these uncertainties involved the relationship between the gift rules and 18 U.S.C. § 209, a criminal provision which

124. The new gift code addresses this matter directly by allowing cabinet departments, with OGE approval, to divide themselves into discrete units for the purposes of defining “prohibited source[s].” 5 C.F.R. § 2635.203(a) (1994).
126. The successor provisions in the new regulations only partially eliminate these ambiguities. See infra notes 153-219 (discussing confusing issues in the new gift code).
127. Acceptance of Food and Refreshments by Executive Branch Employees, Off. Gov’t Ethics Op. 87 x 13 (Oct. 23, 1987). The new regulations attempt to address these issues definitively. See 5 C.F.R. §§ 2635.204(a),(g) (1994).
prohibits most government employees from receiving any salary or supplemen-
tation of their government salaries from outside sources.\textsuperscript{129} Com-
plying with the ethics regulations, of course, did not relieve employees of
their responsibilities under the criminal code. Because the old ethics
code and the ban on agency gifts were so strict, there was little danger
that an employee who followed the rules would violate section 209.

In some cases, however, it was possible to interpret the language of the
gift rules as conflicting with section 209. The old gift rules explicitly al-
lowed employees to accept certain awards for outstanding public ser-
vice.\textsuperscript{130} Although these awards plausibly could be construed as
supplementations of salary in violation of section 209, the Justice Depart-
ment and the OGE consistently have viewed such awards as
permissible.\textsuperscript{131}

The model rule allowing employees to accept food and refreshment of
nominal value in connection with official meetings also arguably clashed
with section 209.\textsuperscript{132} However, there has been no evident prosecutorial
enthusiasm to indict those employees who had accepted nominal gifts in
compliance with agency ethics regulations under section 209.

Another potentially troubling interpretive issue under the old model
rules involved its most notable gotcha catchall. In effect, the old rules
warned employees that they were in violation of the rules by appearing to
be unethical, even if there were no specific provisions prohibiting their
behavior.\textsuperscript{133} Again, the highly proscriptive nature of the gift rules made
it unlikely that employees who obeyed the code's more particular man-
dates would violate this catchall provision.

In summary, the uncertainties of the old model gift rules were not suffi-
cient to undermine their clarity. The old code succeeded despite an ab-
sence of detail, not because of it. Had the old model gift rules been more
permissive, as are the new regulations, their lack of specificity could have
been considerably more confusing. Moreover, their gotcha catchalls
would have been more significant. The old code was comprehensible
largely because it proclaimed loudly, albeit without much detail, the sim-
plest word in the lexicon of an ethics official: "No!"

\textsuperscript{131} Letter to a DAEO dated July 26, 1983, Off. Gov't Ethics Op. 83 x 11 (July 26,
1983).
\textsuperscript{132} Summary of Acceptance and Disclosure of Travel Expenses and Related Gifts,
Off. Gov't Ethics Op. 84 x 5 (May 1, 1984) (discussing the ability of employees to be reim-
bursed directly or to accept payment offers of travel expenses); Letter to a DAEO dated
\textsuperscript{133} See \textit{supra} note 87 for the text of this provision.
B. The New Gift Code

The new rules issued by the OGE, on the other hand, attempt to achieve a more subtle and difficult task. The OGE endeavors to introduce flexibility by permitting reasonable gifts which conform to the broader principles of the old code. In introducing this new flexibility, the OGE avoids the broadly stated exceptions to the gift-acceptance ban under the old rules. Instead, it describes the permissible gifts in rich detail. The specificity of the new rules reflects an effort to craft the new exceptions cautiously and to avoid the subjectivity that can produce many different interpretations of the same language. These rational efforts to fine tune the gift-acceptance ban draw upon extensive experience with the rigidities of the old system.

As this article explains, however, the new code's detail causes complexity which overloads all systems. It strains the capacity of the regulated public to understand the code's language and the ability of the drafters to manage an increasingly ungovernable body of minutia consistently and coherently. The "last straw" lands on the back of the beleaguered camel when newly resurgent gotcha catchalls seriously undermine the code's efforts to achieve objectivity.

1. Distinguishing Between Personal and Agency Gifts

The new code's failures to achieve a consistent definition of "gift" and to distinguish coherently between personal and agency gifts foreshadow its critical problem in producing clarity. In the old, simpler, and highly proscriptive gift code, definitions were not very important. Indeed the model rules lacked a definition of the term gift. In the new, highly complex code, definitions become crucial.

Insistence on definitional purity is not the product of an ill-tempered fussiness. Clarity and consistency of regulatory definitions, apart from their other virtues, also are mnemonic devices. By emphasizing clear and consistent definitions, the drafters can transform the process of learning a forty-page code into rational analysis, rather than an exercise in sheer memorization. Rule memorization is an exercise that few of the millions of employees subject to the ethics codes are likely to undertake successfully.

While subpart B of the new government-wide ethics code covers gifts to the employee, it does not cover gifts to the employee's agency. The GSA has set forth rules which cover gifts to the employee's agency.134

134. See 5 C.F.R. § 2635.201 (1994). Gift is defined to include anything of monetary value, with certain specified exclusions. For example, the definition excludes loans on publicly available terms; discounts and other favorable rates available to the public or all gov-
The Ethics Reform Act authorized the GSA to issue rules greatly expanding the authority of agencies to accept gifts. As previously noted, some agencies already had their own special statutory gift-acceptance authority. The existence of a new, complex GSA agency gift code adds considerably to the difficulty in understanding the OGE ethics rules, because the GSA and OGE regulations need to be read in conjunction with one another.

The new ethics rules generally bar personal “gifts” to an employee from “prohibited sources” or because of an employee’s official position. This general proscriptive standard is similar to that of the old model rules. Unlike the model rules, the new OGE regulations provide many detailed exceptions. However, these excepted gifts also must meet additional limitations set forth in the regulations.

In the new gift code, it is essential that employees understand the distinction between personal and agency gifts. In light of the special opprobrium that attaches to ethical infractions, employees need to understand whether a potential gift raises an ethics question or reflects a matter of proper agency procedures. Clear distinctions can help employees determine where to look for answers. Moreover, in a complex body of rules, such as the new gift code, a grasp of basic definitions is critical to understanding all of the code’s detailed mandates. The confusion between personal and agency gifts is one of subpart B’s major flaws.

136. Where the GSA rules cover a gift to an agency, they are, with limited exceptions, the only authority under which the agency may accept the gift. Id. § 1353(a).
137. A prohibited source refers to any person who:
   (1) Is seeking official action by the employee’s agency;
   (2) Does business or seeks to do business with the employee’s agency;
   (3) Conducts activities regulated by the employee’s agency;
   (4) Has interests that may be substantially affected by performance or nonperformance of the employee’s official duties; or
   (5) Is an organization a majority of whose members are described in paragraphs (1) through (4) of this section.
140. 5 C.F.R. § 2635.202(c) (1994).
Judging Gift Rules by Their Wrappings

a. Previous Failures to Distinguish Between Personal and Agency Gifts

The absence of a clear distinction between personal and agency gifts long predates the creation of the OGE gift rules. The lack of conceptual clarity also was inherent in the old model rules that drew heavily on old opinions by the General Accounting Office (GAO). The current complex regulatory structure, thus, exists on a very uncertain foundation.

The confusion arose out of early efforts to base the rule against agency gifts, in part, on an ethics-based criminal statute, 18 U.S.C. § 209141 and its predecessor, 18 U.S.C. § 1914.142 These provisions prohibit federal employees from accepting any salary or salary supplementation from an outside source for performing government work.143 The GAO144 histor-

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Title 31 U.S.C. § 3529 directs the Comptroller General to issue decisions in response to requests for advice on the propriety of various payments by responsible officials. Id. § 3529. The expenditure of government funds is the focus of these decisions. Id. § 3529(a). Nevertheless, in determining whether the expenditure is valid, the GAO has found it necessary to interpret a wide variety of substantive statutes.

The GAO General Counsel has taken the position that its decisions are binding on the executive branch and the United States General Accounting Office. 2 OFFICE OF THE GENERAL COUNSEL, supra note 109, at 1-27.

The scope of the GAO's authority to issue binding opinions is far from clear. Even the GAO General Counsel reports that there are some areas in which the GAO will decline to issue a decision because it is not in a position to render authoritative determinations. Id. at 1-30 to 1-31. These areas include matters of criminal law. Id.; see also 48 Comp. Gen. 24, 27 (1968) (stating that criminal statutes are under exclusive jurisdiction of the Department of Justice). Moreover, there likely will be continuing dialogue over the role of the Comptroller General in interpreting substantive statutes vis-a-vis the role of the agencies and that of the Attorney General, as chief executive branch lawyer. Congress has given the Attorney General statutory authority to render opinions. 28 U.S.C. § 512 (1988).


The Supreme Court's decision in Bowsher v. Synar, 478 U.S. 714 (1986), raises many serious questions about the authority of the Comptroller General to control or direct the operations of the Executive Branch. The Bowsher Court held that in light of congressional influence over the GAO, the GAO's exercise of authority under the Balanced Budget and
cally has viewed the payment of government travel expenses by outside sources as a supplementation of the employee's salary in violation of section 209.145

It is clear why payment of employee travel expenses is seen appropriately as an augmentation of an agency's appropriations. Because the agency legally is bound to pay these expenses, payments by private sources increase the funds otherwise available to the agency. It is not clear, however, why such payments must be seen as a supplementation of the employee's salary in violation of section 209. The gift does not place the employee in a more advantageous position.

The GAO has found it difficult to apply its broad interpretation of the criminal statute in a consistent manner. On the one hand, it has ruled that an employee may not accept cash reimbursements for travel expenses. On the other hand, an employee may directly accept these expenses in-kind where the agency has statutory gift-acceptance authority.146

In a 1956 decision, the Comptroller General offered a less than persuasive explanation for its distinction between cash and in-kind expenses.147 He suggested that in the case of in-kind gifts, the close working relationship between the donor and the agency substantially eliminated the evils that Congress intended to address.148 He therefore allowed in-kind gifts of employee expenses to be treated as gifts to the agency.149


Regardless of the limits on the GAO's authority, executive branch agencies continue to seek its opinions in part because of its acknowledged expertise, particularly in fiscal areas.

145. In 1923, the Comptroller General held that a payment to cover the salary and expenses of a government employee was an illegal payment of salary or supplementation of salary (under the predecessor to section 209) even if it is made directly to the agency rather than to the employee. 2 Comp. Gen. 775 (1923).

A long line of GAO decisions supports the proposition that payment of government travel expenses to an employee violates section 209 and its predecessor provisions. See, e.g., 55 Comp. Gen 1293 (1976); 64 Comp. Gen. 185 (1985); see also Letter from Joseph Campbell, Comptroller General, to Tom Murray, Chairman, Committee on Post Office and Civil Service, United States House of Representatives (May 2, 1957), in 85 U.S.C.C.A.N. 2918 (1958) (examining a proposed statute regarding the training of federal employees).

146. See 36 Comp. Gen. 268 (1956).

147. Id. at 270.

148. Id.

149. Id.
It is curious that the GAO saw the close ties between the agency and the donor as authorizing in-kind gifts to agency employees. Both the old and new ethics codes treat donors with close agency ties as prohibited sources. Moreover, reliance on donor-agency ties conflicts with the history of the statute. In 1917, Congress enacted the predecessor to section 209 in an attempt to respond to donors who paid the salaries of dollar-a-year agency employees because of their close links to a given agency.

Even though the old ethics rules and their specific gift provisions did not pay significant attention to definitional matters, they clearly are premised on these GAO opinions. Both the old rules and the GAO opinions failed to distinguish convincingly between personal and agency gifts, and they share the GAO's questionable interpretation of section 209. The old code's failure to grapple successfully with its underlying conceptual tensions had few practical consequences. The old rules were strict, but easy to remember. Employees who followed them were unlikely to violate section 209, regardless of how broadly or narrowly the law might be interpreted.

b. The Failure of the New Gift Code to Distinguish Between Personal and Agency Gifts

The new OGE regulations create a changed legal environment. The rules must provide crisp distinctions between personal and agency gifts if employees are to understand them intuitively. Moreover, it now becomes crucial for the regulators to resolve the interpretive issues surrounding section 209. The OGE and the GSA codes considerably broaden the authority of the employee and the agency to accept gifts. Employees must know whether this criminal statute limits in any way the broader gift-acceptance permission which the language of the rules purports to confer.

Rather than resolving past confusions however, the OGE perpetuates them in its new rules. The new code considers as personal or non-gifts many items which are similar in character to those that GSA treats as agency gifts. Deeming these items to be personal gifts (or even non-gifts) has a mixed effect. While employees who improperly accept these items may be vulnerable to an ethics charge, the code's artificial expansion of the personal gift definition paradoxically broadens an employee's


152. NEW YORK BAR STUDY, supra note 2, at 54.

authority to accept such items. Because the code now deems these items to be personal gifts, the OGE can authorize their acceptance under its regulations without violating the GSA’s exclusive jurisdiction over the acceptance of covered agency gifts.\textsuperscript{154}

The OGE permits employees to accept many items as personal gifts although the agency is the exclusive economic beneficiary. One new rule allows gifts of food, refreshments, or entertainment in connection with certain foreign meetings or events.\textsuperscript{155} Although the rule characterizes these expenses as employee gifts, the OGE appears to recognize that the purpose of this exception is not to validate personal benefits for the employee, but to help the agency more effectively perform its mission.\textsuperscript{156} The OGE perceives the “foreign meeting” provision as a tool for agencies to supplement their agency gift authority.\textsuperscript{157}

The new ethics code also includes a broad new \textit{de minimis} exception which permits unsolicited gifts with a market value of twenty dollars or less per occasion, as long as the aggregate market value of gifts from any one person does not exceed fifty dollars in a calendar year.\textsuperscript{158} While this exception does not focus specifically on agency-related gifts, it does allow employees on official travel to accept food and subsistence expenses as personal gifts.\textsuperscript{159} The agency ordinarily would be responsible for paying these expenses under government travel regulations.

Another exception in the new gift code permits those who present agency views at official meetings to receive as \textit{non-gifts} “free attendance”...
from the sponsor of the event. Free attendance includes a waiver of conference fees and the furnishing of materials, food, refreshments, and entertainment. The food and refreshment items are comparable to those that agency employees may receive under the foreign meeting exception.

It is evident that the OGE does not rigorously distinguish between personal and agency gifts. It treats items as personal gifts or non-gifts even though the donations facilitate the conduct of official duties. Despite the GSA's exclusive authority to regulate certain agency gifts, the OGE, with the GSA's apparent approval, does not shrink from effectively asserting concurrent jurisdiction.

Such an approach blurs the lines between personal and agency gifts. Moreover, even the words of the OGE appear to reflect very serious legal misgivings about the approach it has taken. The OGE has expressed strong doubts about its own power to authorize gifts which are directly related to an employee's performance of official duties.

The new code's definitions are confusing in other ways. It treats subsistence expenses which agency officials receive under the "speaker" provision as non-gifts, but regards similar items they receive under the foreign

160. Id. § 2635.204(g)(1).
161. Id. § 2635.204(g)(4).
162. Compare id. § 2635.204(g)(1) (allowing free attendance at events when employees are speakers or are on the panel) with id. § 2635.204(i) (permitting employees to accept food and entertainment when they are on duty in a foreign area).
163. The OGE expressed its view in response to comments it received on the proposed ethics regulations. Proposed section 2635.204(g)(2) permitted employees to receive as personal gifts food, refreshments, and entertainment incident to "widely-attended" gatherings during off-duty hours. Several agencies had recommended that the rules be expanded to cover on-duty receptions. 57 Fed. Reg. 35,019 (1992). The OGE declined to cover these events because its coverage of on-duty events could result in illegal agency gifts.

In rejecting the proposal, OGE stated:

While this revision may not fully address the concerns noted, it is imposed of necessity to ensure that the gift is made to the employee rather than to the agency and, thus, that it does not improperly augment agency appropriations available for payment of expenses of attendance at training, meetings or similar events.

It is in part the purpose of renumbered § 2635.204(g)(2) to fill a gap in statutory authorities under which agencies or employees may accept gifts of free attendance. Some agency gift acceptance statutes and 31 U.S.C. 1353 provide authority for agencies, that otherwise would use their own funds for those purposes, to accept gifts from non-Federal sources to enable their employees to attend certain events on official time.
meeting and *de minimis* exceptions as personal gifts. The OGE's rationale for its inconsistent definitions of these comparable items is not persuasive. It argues that the subsistence expenses that an official speaker accepts are not gifts because they are a necessary and customary part of performing the assignment. The OGE fails to explain why the same reasoning does not apply to similar subsistence items which agency employees receive under the foreign meeting and *de minimis* provisions. It treats similar items received under these provisions as personal gifts.

Besides treating subsistence expenses under the speaker provision as non-gifts, the OGE ethics regulations exclude other items from the definition of gifts. For example, these non-gifts include greeting cards and modest items of food and refreshment that are not offered as part of a meal. The regulations, however, do not appear to treat these non-gift items consistently.

Employees will be unable to find a coherent and intuitive set of principles to decide whether an item is a potential gift, and if so, whether the beneficiary is the employee, the agency, both, or neither. Moreover, it is not possible for an employee to know how the regulations will treat an

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164. It is unclear where the OGE gets the authority to rule that these gifts are not agency gifts. Under the Ethics Reform Act, the OGE's jurisdiction is limited to employee gifts. 5 U.S.C. § 7353 (Supp. V 1993).
165. 5 C.F.R. § 2635.204(g)(1) (1994).
166. Id. § 2635.204(a)(1). Arguably, free admission of a government speaker to a private event on the day of the speech is not a gift to either the employee or the agency. The purpose of the official's admission is to furnish a service to the sponsor of the event and not to receive a gift. It is impossible for the employee to perform the assignment without being admitted to the meeting. A similar rationale applies to the use of conference material in connection with the official's preparation and participation.

On the other hand, it is possible for employees to perform the assignments without the donors providing free meals or allowing them to retain the conference materials. Donation of these items clearly represents the transfer of a benefit to either the employee or the agency. While agency employees often incur subsistence expenses in connection with the performance of assignments, the expenses generally are the responsibility of the agency when the employee is in travel status. These expenses may be the responsibility of the employee in other situations.

167. Id. § 2635.203(b)(2).
168. Id. § 2635.203(b)(1).

169. The regulations classified these items as non-gifts so that employees could accept them freely without regard to the additional catchall restrictions of section 2635.202(c). Standards of Ethical Conduct for Employees of the Executive Branch, 57 Fed. Reg. 35,006, 35,013 (1992). Items which agency employees receive under the speaker provisions are also non-gifts, but they may be subject to the catchalls.

Unlike the other non-gifts, speaker items are listed in section 2635.204, among the "exceptions" to the gift acceptance ban. 5 C.F.R. § 2635.204 (1994). The introductory text of section 2635.202(c) states that most items included in section 2635.204 are subject to the catchalls. On the other hand, the language of most of the catchall provisions purports to apply only to the acceptance of gifts.
item merely by remembering whether the rules characterize it as a gift or a non-gift. If employees have questions, they will have to find the answers in the regulations themselves, a task they cannot easily accomplish.

These regulations are very difficult for a non-expert to understand. The problem is not only the lavish use of legal techniques such as specialized definitions, cross references, and incorporations by reference. It is not merely the extravagant detail that can lure an employee who has found an apparently relevant provision into falsely believing that it is safe to look no further. The OGE and related gift codes present the regulated public with an array of overlapping, duplicative, and slightly varying provisions that are very difficult to comprehend.

c. A Hypothetical Application of the Old and New Gift Rules

To illustrate these difficulties, consider how the rules apply to the following hypothetical example. An employee will participate in an official foreign tour to gather background information useful in the development of United States trade policy. The employee will participate in seminars and meet individually with entrepreneurs. A university in the foreign country offers to pay the employee's travel expenses and to provide a very generous subsistence allowance during the one-week trip. The agency has statutory gift-acceptance authority. For the purposes of this hypothetical, the potential donors are prohibited sources under the ethics rules.

Under the old ethics structure, it would have been necessary to consider four separate authorities: the foreign gift statutes, the Government Employees Training Act, the agency gift-acceptance laws, and the ethics provisions allowing employees to accept food and refreshments of nominal value in the course of official meetings. The first three continue to be relevant under the new gift rules. A new and even broader *de minimis* provision has replaced the "nominal value" exception in the old model rules.

The Foreign Gifts and Decorations Act[^70] would apply in this case only if the university were an arm of a foreign state or a conduit for foreign government funds. This Act, which authorizes gifts from foreign governments, permits an employee to accept subsistence and travel expenses taking place entirely outside of the United States.[^71] It does not permit the employee to accept payment for travel to the foreign country.[^72]

[^71]: Id. § 7342(c)(1)(B)(ii).
[^72]: Id.

[^71]: Id. § 7342(c)(1)(B)(ii).
It is unlikely that the Government Employees Training Act\textsuperscript{173} would apply to these hypothetical facts. The Training Act authorizes acceptance of gifts incident to participation in training and official meetings.\textsuperscript{174} The Act limits donors to charitable, educational, and religious organizations exempt from taxation under section 501(c)(3) of the Internal Revenue Code and state or local treasuries.\textsuperscript{175} A foreign university is unlikely to have obtained section 501(c)(3) tax-exempt status.

As previously noted, the agency in the hypothetical has statutory gift-acceptance authority which might cover some of the trip's expenses. Before the promulgation of the new rules, agencies with broad agency gift-acceptance statutes could accept cash contributions directly and reimburse the employee for travel expenses under normal government procedures. The employee also could accept in-kind expenses directly.\textsuperscript{176} If the agency lacked its own gift acceptance authority, special circumstances might justify other arrangements allowing an outside source to finance the trip.\textsuperscript{177}

The old provision permitting employees to accept food and refreshments of nominal value might be of some help for minor expenses which other authorities do not cover. The two new provisions allowing employees to accept modest items of food and refreshment and items of little intrinsic value also may cover these expenses.

The new gift rules add an array of fresh authorities with complex consequences. Some expenses in the hypothetical example appear to be acceptable under the OGE's new foreign meetings exception. This exception applies where attendance at a meeting or event is part of the employee's official duties to obtain or disseminate information, promote the export of United States goods and services, represent the United States, or otherwise further programs or operations of the agency or the United States mission in the foreign area.\textsuperscript{178} It covers meetings which non-United States citizens or representatives of foreign governments or entities attend.\textsuperscript{179} This provision, like each of the other gift acceptance

\textsuperscript{174} Id. § 4111(a).
\textsuperscript{175} Id.
\textsuperscript{176} See supra notes 146-49 (discussing in-kind gifts).
\textsuperscript{177} These arrangements might include the employee's assignment to an agency that has gift-acceptance authority, see, e.g., 42 U.S.C. § 215 (1988) (providing authority for the Public Health Service to detail employees to other government departments), to a foreign government, 22 U.S.C. § 2387 (1988), to an international organization, id. § 2388, or to a requesting country, id. § 1451. In some cases, the Economy Act may warrant arrangements with agencies having gift-acceptance authority. 31 U.S.C. §§ 1535-36 (1988).
\textsuperscript{178} 5 C.F.R. § 2635.204(i)(3) (1994).
\textsuperscript{179} Id. § 2635.204(i)(2).
Judging Gift Rules by Their Wrappings

rules, contains a unique description of the gifts that agency employees may accept. It permits the employee to accept food, refreshments, and entertainment in the course of meetings or events in foreign areas, but it does not cover transportation or lodging expenses. These subsistence expenses may not exceed the authorized government per diem rate for the area.

The new OGE speaker exception also may apply. It covers an employee who the agency assigns to participate as a speaker or panel participant, or to present information on behalf of the agency at a conference or other event. The employee may accept free attendance at the event on the day of presentation. For other days of the event, a separate, but closely related provision may apply. While the speaker provision permits the acceptance of gifts similar to those that employees may accept under the OGE foreign meetings rule, there are some minor variations.

The speaker exception may not cover any of the meetings which the employee attends in the hypothetical example. The employee may not qualify as a “speaker,” “panel participant,” or one who will “present information on behalf of the agency.” Although she will interact extensively with others “on behalf of her agency,” she may make no formal presentations. Her primary mission is to gather information, although this may be difficult to accomplish without revealing an agency point of view.

The meaning of the term “event” is also unclear. If read broadly, it includes any meeting at which the official makes a presentation or sets

180. Id. § 2635.204(i).
181. Id. § 2635.204(i)(1).
182. Id. § 2635.204(g).
183. Id. § 2635.204(g)(1).
184. This option, like the foreign meeting exemption, covers food, refreshments, and entertainment and does not permit the employee to accept travel expenses or hotel accommodations. Id. § 2635.204(g). It differs from the foreign meeting exception in several ways. Unlike the foreign meeting exception, it does not specifically limit the value of the food provided, and it permits the employee to accept conference and other fees and various materials provided to the other participants. Compare id. § 2635.204(g) (speaker provision) with id. § 2635.204(i) (foreign meeting exception). As a practical matter, the speaker provision includes strict limitations on the value of food and refreshment that agency employees may accept. See id. § 2635.204(g). The sponsor must furnish these items to all attendees in a group setting which is an integral part of the event. See id. § 2635.204(g)(4).
185. See id. § 2635.204(g)(1).
186. See id. § 2635.204(g).
forth an agency position. The context suggests, however, that the exception may refer only to events of a more formal nature.\textsuperscript{187}

Under the widely attended gathering rule,\textsuperscript{188} an employee may receive from the event's sponsor the same types of expenses as the speaker provision covers, but under very different conditions. Unlike the speaker provision, the widely attended gathering rule only applies if the employee is in leave status.\textsuperscript{189} The event must be widely attended, as defined in the rule,\textsuperscript{190} and must be of mutual interest to a number of parties. The agency must determine that attendance is in its interests because it will further agency programs or operations.

An agency sometimes may give oral approval, but a writing is necessary if the employee's official duties may affect the sponsor's interests substantially.\textsuperscript{191} The agency must carefully balance the value of the employee's attendance against the risks of improper influence of the appearance of impropriety.

If the agency asks the employee in the hypothetical example to speak on one day of a multi-day event, she still possibly may accept expenses for the entire event by combining the authority of the speaker rule with that of the widely attended gathering provision. The employee needs no further agency permission to accept expenses for the day of her assigned presentation. On the other days, her agency may agree to place her on official leave and make the various determinations that the widely attended gathering rule requires.

As previously noted, the new, detailed GSA agency gift rules, for all practical purposes, cover many of the same kinds of gifts as those which the OGE's new gift rules treat as personal gifts. The GSA rules permit agency employees to accept expenses in connection with a "meeting or similar function."\textsuperscript{192} The regulations define these as a "conference, semi-

\textsuperscript{187} The references to the terms "conference," "speaker," "panel participant" and the reference to "free attendance" suggest more formal kinds of events. \textit{Id.} §§ 2635.204(g)(1),(4).

\textsuperscript{188} 5 C.F.R. § 2635.204(g)(2)-(6) (1994).

\textsuperscript{189} \textit{Id.} § 2635.204(g)(2). The rule applies to an employee on "annual" (or vacation) leave, or an employee on leave without pay. \textit{Id.} It also applies when the agency, because of the government interest involved, has granted "official" leave and pays the employee's salary without reducing the employee's annual leave balance. \textit{Id.} The requirement that an employee be in leave status only applies to employees who are under a leave system. \textit{Id.}

\textsuperscript{190} \textit{Id.} The regulation defines "widely attended" through an example, stating that "[a] gathering is widely attended if... it is open to members from throughout a given industry or profession or if those in attendance represent a range of person interested in a given matter." \textit{Id.}

\textsuperscript{191} \textit{Id.} § 2635.204(g)(3). A written decision also is necessary if the donor is an association or organization, the majority of whose members have such interests. \textit{Id.}

\textsuperscript{192} 41 C.F.R. § 304-1.3(a) (1994).
nar, speaking engagement, symposium, training course, or similar event that takes place away from the employee's official station. Thus, unlike the OGE speaker rule, the GSA regulations allow officials to accept expenses even if they do not disseminate any information at the meeting. Similar to speaker rule, however, the GSA regulation does not indicate whether it covers informal meetings designed to gather information, such as those described in the hypothetical.

Further uncertainties exist regarding the scope of the GSA rule as applied to the hypothetical. The rule forbids acceptance of gifts in connection with events "required to carry out an agency's statutory and regulatory functions . . . such as investigations, inspections, audits, site visits, negotiations, or litigation." The line between the activities of an agency that are authorized and those that are required to carry out a statutory mission is not as clear as the GSA apparently assumes. The GSA's explanation does not resolve the ambiguities.

Applying the GSA regulation to the hypothetical example does not yield clear conclusions. The informational purpose of the trip seems consistent with the non-operational focus of the GSA rule. On the other hand, the information sought facilitates the performance of a critical agency function, the development of a national trade policy. It is unclear how helpful this information must be before the GSA regulations become inapplicable to the trip's meetings. The language of the regulations does not resolve whether the meetings include site visits.

In light of the broad dictionary definition of the term site, it is unclear what would constitute a site visit within the context of a travel rule.

193. Id. § 304-1.2(c)(3).
194. Id.
195. The GSA has indicated that:

In some cases, an agency may consider a particular speech or type of speech (e.g., training) to be essential to, and not merely in furtherance of, the agency's mission.
An agency could, for example, have a specific statutory or regulatory mandate to educate a particular audience concerning an agency policy, program, or operation.

Federal Travel Regulations; Acceptance of Payment from a Non-Federal Source for Travel Expenses, 57 Fed. Reg. 53,283, 53,285 (1992). The GSA surely has not established a bright line test. In many cases it is possible to question the importance of an event in relation to the agency's statutory functions.
196. See 41 C.F.R. § 304-1.2(c)(3) (1994).
197. Site is defined as: "1a the spatial location of an actual or planned structure . . . (as a building, town, or monument[ ] ) b: a space of ground occupied or to be occupied by a building. 2: the place, scene, or point of something." WEBSTER'S NINTH NEW COLLEGIATE DICTIONARY 1102 (9th ed. 1986).
Despite these ambiguities, the GSA rules cover a wide variety of meetings. When they do apply, their scope and procedures differ markedly from those of the other authorities described above.\textsuperscript{198}

In the wake of the GSA rules, one cannot know whether an agency gift-acceptance statute allows a gift without first deciding whether the GSA rules provide coverage. The GSA rules purport to be, with certain exceptions, the exclusive authority for an agency to accept the expenses that it covers.\textsuperscript{199}

\textsuperscript{198} Unlike the various OGE provisions, the GSA rules only cover events away from the employee's duty station. Where the GSA rules apply, the employee may accept travel and lodging expenses that he may not accept under any of the OGE rules. Compare 41 C.F.R. § 304-1.3 (permitting the acceptance of travel expenses) with 5 C.F.R. § 2635.204(g) (4) (prohibiting the acceptance of travel and lodging expenses). If approved under the GSA rules, employees may receive expenses and benefits in excess of those which government travel regulations authorize, provided that they meet certain conditions. See 41 C.F.R. § 304-1.3 (1993). Under the Training Act, which also permits employees to receive travel and lodging expenses, 5 U.S.C. § 4111 (1988 Supp. V 1993), the expenses also may exceed government travel regulation limits, but only if the expenses received do not duplicate expenses which the government pays. 5 U.S.C. § 4111 (1988 & Supp. V 1993). The OGE speaker or panel participant exception, which does not permit acceptance of transportation and lodging expenses, imposes no explicit limit based on the government's travel rules. See 5 C.F.R. §§ 2635.204(g)(1), (4) (1994).

Donors under the GSA rule need not be charitable organizations or governmental entities (as they must be under the Training Act). They need not sponsor the event that the employee attends, as they must under the OGE speaker and panel participant rule. Compare 41 C.F.R. § 304-1.3 with 5 C.F.R. § 2635.204(g)(1) (1994) with 5 U.S.C. § 4111(a). The regulation only requires that for most gifts, the meeting be "of mutual interest to the employee's agency and the non-Federal source." 41 C.F.R. § 304-1.4(c) (1994). Where the donor and the agency do not have such a mutual interest, the employee still will be permitted to accept in-kind expenses of the kind that the non-Federal source generally provides. Id.

Before an agency may authorize acceptance of expenses under the GSA rule, there must be a formal review of conflict-of-interest considerations, id. § 304-1.5, and the agency, but not the employee, must submit annual public reports on its gift acceptance activities. Id. § 304-1.9. On the other hand, disclosure regulations may require employees to report payments received under the Government Employees Training Act on their personal financial disclosure report. See 5 C.F.R. §§ 2634.105(g),(h),(n), 204 (1994); 41 C.F.R. § 304-1.9(b) (1994) (GSA gift rules).

Most gift acceptance authorities do not impose specific reporting requirements on employees. The foreign gift statute does have its own separate reporting requirements. See 5 U.S.C. § 7342(f)(2) (1988). Moreover, employees who are subject to financial disclosure requirements may have to include these gifts in their reports. 5 C.F.R. § 2634.304, 907(a)(3) (1994); 41 C.F.R. § 304-1.9(b) (1994).

\textsuperscript{199} The GSA regulations do not preempt authority to accept gifts under the Government Employees Training Act, the Foreign Gifts and Decorations Act, 41 C.F.R. § 304-1.8(a) (1994), and the OGE ethics regulations. Id. § 304-1.8(a). They also allow agency employees to accept gifts under an agency gift-acceptance statute where the GSA regulations do not provide coverage. See id. § 304-1.8.
Even if the agency's decision-making official is confident that the gift is permissible under either the GSA rules or a separate gift-acceptance statute, the agency should not proceed until it decides which authority applies. The procedures for accepting agency gifts under these two authorities differ dramatically. The GSA regulations include detailed standards concerning conflict-of-interest considerations, permissible donors, limitations on the amount of gifts, public disclosure, and agency procedures. These formal requirements do not apply to separate agency gift-acceptance statutes.

In addition to gifts to defray travel expenses, the traveler in our hypothetical example likely will receive gift offers of a more personal or quasi-personal nature. She also may be invited to receptions sponsored by the foreign university or others whom she encounters on the trip. She may be asked to their homes for dinner.

Apart from the *de minimis* exceptions, the new regulations contain three provisions governing these situations. Employees who obtain advance written permission may accept free attendance at certain widely attended gatherings from an events sponsor, including receptions that occur during off duty-hours. The agency must determine that it is in its interests for the employee to attend. The old model rules contained no comparable provision, but the OGE had expressed its willingness to approve agency regulations similar to the one it has adopted in the new rules.

A second regulation allows an employee to accept, without permission, food, refreshments, and entertainment in connection with certain social engagements. This rule applies even though the employees receive the invitation because of their official positions. The rule only applies when the invitation comes from a person who is not a prohibited source, when other people are in attendance, and when no admission fee is charged to anyone.

Third, the new code allows employees to accept entertainment and other gifts from donors with whom they have personal or family relationships, when it is clear that these relationships, and not the employee's

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200. See id. § 304-1.1 to 1.9.
201. 5 C.F.R. § 2635.204(g)(2)-(6) (1994).
202. Id.
203. See Acceptance of Food and Refreshments by Executive Branch Employees, Off. Gov't Ethics Op. 87 x 13 (Oct. 23, 1987).
204. 5 C.F.R. § 2635.204(h) (1994).
205. Id.
206. Id.
official position, are the motivating factors. This new provision is comparable to one found in the old model rules.

Finally, the OGE rules authorize agencies, with OGE concurrence, to issue supplemental rules applicable to their own employees. These rules may include additional provisions governing the acceptance of gifts and may alter the effect of some of the authorities listed above.

As this limited review of the gift provisions suggests, an employee seeking answers from the text of the rules must prepare to tread a rocky and labyrinthine path, one that is perilous without the assistance of a skilled guide. For the solitary travelers, danger lurks around every curve unless they understand that common sense and a highly developed ethical appreciation will not be sufficient to chart the course. Even diligence and sensitivity may not help employees find acceptable answers or determine whether they should seek permission or expert advice.

It is not safe to assume that only the codes governing agency gifts regulate gifts that benefit an agency. While the ethics code purports to deal only with personal gifts, these gifts often are indistinguishable from agency gifts. Nor should one assume that the ethics code exclusively defines ethical transgressions. Indeed, a violation of the detailed GSA agency gift rules also can result in a breach of the ethics rules.

One should not assume that the size of the gift or even the nature of the donor necessarily will determine when the employee needs to obtain advance permission. While the ethics code allows an employee to accept substantial gifts which benefit the agency under the foreign meeting and speaker provisions without advance permission, the Government Employees Training Act and the GSA regulations require an employee to seek permission before accepting gifts of a similar nature. An employee also may need to seek permission under agency gift acceptance laws.

The identity of the donors and their relationship to the agency make a difference only under some of the rules. Under the Government Employees Training Act, donors must be tax-exempt organizations and governmental entities. Under the speaker exception, they must sponsor the event. The foreign meeting exception only excludes foreign gov-

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207. Id. § 2635.204(b).
210. The OGE rules make clear that an employee who accepts an agency gift under specific statutory authority does not violate the ethics rules. Id. § 2635.203(b)(8). If the employee fails to comply precisely with the GSA rules, the gift will violate ethics rules unless it qualifies under another provision.
212. 5 C.F.R. § 2635.204(g)(1) (1994).
The GSA rule does not restrict donors, but the identity of the donor affects the kind of gifts that it may give. Under the agency gift-acceptance statutes, donor identity does not matter. Some rules require formal conflict-of-interest review before the agency or its employees may accept the gift and others do not.

Employees should not assume that reporting the gift is their agency's responsibility, even if the gift principally benefits the government. Employees subject to financial reporting requirements must disclose the larger gifts they receive under the Training Act, the speaker provision, the foreign gift exception, the widely attended gathering authority, and other such personal gifts rules. Agencies must publicly report gifts they receive under the GSA rules, but the employee is required to keep detailed records. Agency gift statutes require no formal reporting, either by the employee or the agency. Both employees and agencies must report some expense reimbursements and other gifts from foreign governments under a separate reporting system.

These occasionally arbitrary distinctions could cause an employee violation for a small and seemingly minor fact variation. Sometimes, the pivotal fact may be who says what at a meeting or the identity of the meeting's participants. Even if another authority could sanction the acceptance of an impermissible gift, employees already would have violated the ethics rules if they failed to obtain the advance approval that the alternative provision requires. Perhaps the best advice for anyone who truly wants to understand the new gift code is, "go to law school."

2. The Catchalls

Employees who successfully have evaded all of the hazards discussed above ultimately must dodge the most dangerously alluring false assumption, a belief that they finally have grasped the code's meaning by mastering its more technical and objective provisions. This misplaced confidence will make employees perilously vulnerable to the effect of the code's "gotcha catchalls."

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213. Id. § 2635.204(i)(4).
214. 41 C.F.R. § 304-1.5(a) (1994) (stating that the identity of a non-federal source is a factor in determining propriety of accepting a gift); id. § 304-1.4(c) (limiting the size of gifts where the meeting or function is not of "mutual interest" to the donor and the agency).
215. See supra note 110-13 and accompanying text.
216. See, e.g., 5 C.F.R. § 2635.204(g)(3) (1994); 41 C.F.R. § 304-1.5 (1994).
217. Id. § 304-1.9.
In the new code, gotcha catchalls appear in two principal flavors, “objective” and “subjective.” In either case, they ultimately can change the apparent meaning of the code’s other provisions. Their vagueness, however, discourages readers from taking them seriously.

An objective catchall asserts that the code's language must be read in light of other laws or regulations whose meaning the reader supposedly can ascertain. A long list of referenced authorities or authorities containing significant ambiguities can undermine certainty about the code's meaning. Legal disputes of which even the conscientious reader may be entirely unaware can hold the rules hostage. When the experts finally decide how to interpret the provisions of the code, their decision becomes an objective truth which the regulated employee presumably should have known all along.

A subjective catchall articulates a broad ethical principle which trumps any of the code's specific provisions. The hapless reader who concentrates single-mindedly on the code's more specific and objective provisions may miss a very important point. Whatever may be the most plausible meaning of these complex provisions, the code's custodians will reverse the meaning if they believe that the result is a “bad” one.

The new ethics code contains major catchalls of both the objective and subjective varieties. In one of the most remarkable catchalls, Subpart A sets forth broad ethics principles similar to those of the old model rules. An agency may discipline employees for violating these principles even if they comply with the code’s more specific provisions. This structure effectively creates a “backup” ethics code similar to the model rules. It assures that despite the level of detail contained in the code’s more objective provisions, the subjectivity of the model rules may not be notably diminished.

Although the broad principles of Subpart A do not apply to gifts which Subpart B authorizes, the gift code comes equipped with its own catchalls, which severely undermine its objectivity. Section 2635.202(c) provides that an employee may not accept a gift in violation of any statute, including 18 U.S.C. § 209, which bars the supplementation of government salaries from outside sources. This provision is one of the gift code’s most notable objective gotcha catchalls.

219. 5 C.F.R. § 2635.101(b) (1994); see supra note 82 (comparing the new provisions with the provisions of the old code).


221. See 5 C.F.R. § 2635.101(b), .204 (1994).

222. See id. § 2635.202(c)(4)(ii).
On its face, this provision seems entirely reasonable. The regulations of an executive agency cannot repeal a criminal statute. On the other hand, for the first time, the new code authorizes many gifts that had previously been prohibited. Many of these gifts have a nexus to an employee's duties, and thus section 209 inevitably hovers over them as a "brooding omnipresence in the sky."\textsuperscript{223}

The meaning of section 209 always has been far from certain, and the General Accounting Office historically has taken a very expansive view.\textsuperscript{224} Previous GAO opinions interpreting section 209 would have prohibited many gifts which the new OGE regulations specifically authorize. While the GAO abjures any authority to issue definitive rulings on criminal statutes, its opinions illustrate how broadly it is possible to read section 209. More to the point, past OGE interpretations of section 209 create an irreconcilable conflict with many of the newly issued gift provisions authorizing acceptance of job-related gifts.\textsuperscript{225}

The uncertainties surrounding section 209 threaten the coherence of the entire new gift code. Ironically, the discussions over its meaning rarely come to the attention of those millions of covered employees who believe that the new code means precisely what it appears to say.

Despite the OGE's lack of authority to revise the criminal code, it is hoped that these matters eventually will be clarified. An Executive order authorizes and directs the OGE to issue interpretative regulations with the Department of Justice's concurrence.\textsuperscript{226} The OGE has announced its intention to issue a notice of proposed rulemaking by December, 1995 with a comment period ending February, 1996.\textsuperscript{227} In the interim, the regulations instruct employees that if section 209 applies, it will bar a gift even if the regulations seem to grant approval.\textsuperscript{228} Thus, the new rules quietly warn employees that they must rely on the regulations at their own peril.\textsuperscript{229}

\begin{thebibliography}{9}
\bibitem{223} Southern Pacific Co. v. Jensen, 244 U.S. 205, 222 (1933) (Holmes, J., dissenting).
\bibitem{224} See supra note 141-45 and accompanying text.
\bibitem{225} See discussion infra notes 231-73 and accompanying text.
\bibitem{228} 5 C.F.R. § 2635.204(j) (1994) (providing broader gift-acceptance authority for the President and Vice-President for reasons relating to the conduct of their offices, including those of protocol and etiquette).
\bibitem{229} In discussing the rules governing "Teaching, Speaking, and Writing" in the preamble to the final regulations, the OGE clearly states that its rules do not interpret section 209. Standards of Ethical Conduct for Employees of the Executive Branch, 57 Fed. Reg. 35,006, 35,035 (1992). The OGE states:
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Leaving these critical matters unresolved for over three years beyond the regulations’ effective date poignantly illustrates that long and detailed codes present difficulties for both the regulated public and the regulators. It is questionable whether the OGE should have promulgated this gift code without first resolving the issues surrounding section 209. The code’s issuance may have been delayed unacceptably if the drafters had taken the opportunity to settle the issues surrounding section 209. If so, the drafters of complex codes could learn a lesson from this situation. At some point along the spectrum of complexity, the size and detail of regulation can frustrate even the regulators.

The clash between the new regulations and past OGE interpretations of section 209 is fundamental. The OGE’s past rulings strongly suggest that an employee personally may not accept official travel expenses without potentially violating section 209. Yet, in accepting these expenses, the employee apparently would still comply with the language of section 2635.204 of the new gift code.

The past OGE interpretations long predate the new ethics code. Although apparently differing from the Justice Department’s approach to section 209, past OGE interpretations are consistent with the tradi-

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The prohibition on receipt of compensation for activities that are part of the employee’s official duties, which flows from the definition at renumbered § 2635.807(a)(2)(i)(A), addresses conduct that may also be prohibited by 18 U.S.C. 209. However, § 2635.807 is not intended to implement or interpret section 209. The Office of Government Ethics intends to issue separate regulations interpreting 18 U.S.C. 209.

Id. at 35,036 (emphasis added).

230. The OGE explains that, absent appropriate statutory authority, an employee personally may not accept travel expenses to carry out official duties without potentially violating section 209. See Letter to a DAEO dated Feb. 4, 1983, Off. Gov’t Ethics Op. 83 x 3, (Feb. 4, 1983); see also Summary of Acceptance and Disclosure of Travel Expenses and Related Gifts, Off. Gov’t Ethics Op. 84 x 5, (May 1, 1984). An employee personally may accept travel expenses only if a statute such as the Training Act allows personal acceptance. Id.; see 5 U.S.C. § 4111(a) (1988). Otherwise these expenses may only be accepted by an agency that has proper gift-acceptance authority. Id.

Conversely, in its new ethics code, the OGE authorizes personal acceptance of expenses related to the performance of official duties. It does so without claiming to revise its interpretation of section 209. See supra note 229.

It follows a fortiorari from these opinions, that an employee’s risk of violating the statute is even stronger when not in a travel status. Under such circumstances, it is the employee that directly benefits from the gift and not the agency.

The Department of Justice has taken positions in the area of travel gifts which appear to conflict with those of the OGE.

231. In deciding whether a payment is an illegal salary supplement, the Justice Department places its emphasis on whether the employee or the agency benefits from the payment. An August 10, 1922 Attorney General opinion held that the agency and not the employee would be the beneficiary of a gift of travel expenses. 33 Op. Att’y Gen. 273, 275.
tional GAO view. Moreover, the old model rules reflect these interpretations. The lack of conformity between the language of the new rules and the OGE’s interpretations of section 209 creates serious doubt about the meaning and viability of both.

The conflict between the old interpretations and the new rules pervades other important areas. An entirely new provision in ethics regulations allows an employee’s spouse to accept certain expenses while accompanying the employee to an official speech. This provision is inconsistent with extant OGE interpretations of section 209.

The “accompanying spouse” provision is an adjunct to both the speaker rule and the widely-attended gathering exception. It applies when the rules authorize a government employee to accept free attendance at the event. Under this provision, the agency also may allow the employee to accept similar benefits for an accompanying spouse if others in attendance generally will be accompanied by spouses.

Past OGE rulings challenge the legality of the spousal gifts which its new provisions appear to allow. The OGE has held that if the spouse of a government employee accepts a free trip in connection with the employee’s official duties merely because of the marital relationship, the gift may be an illegal supplementation of the official’s salary. Acceptance of expenses by official speakers’ spouses is squarely within the section 209 danger zone because the speaker provision applies only when the employee is performing official duties.

A May 13, 1981 opinion by the Department of Justice Office of Legal Counsel appears to take the same view. This opinion involved a gift of legal services by a private foundation to assist a presidential cabinet nominee in preparing for confirmation hearings during a period of presidential transition. Although this case did not involve a government employee, its rationale supports the view that personal benefit to an employee is instrumental in deciding whether a gift violates section 209. The apparently divergent approaches of the OGE and the Justice Department create further uncertainties about the meaning of section 209.

The opinion also found that acceptance would not have violated the predecessor to section 209. Id. at 275-76.

A May 13, 1981 opinion by the Department of Justice Office of Legal Counsel appears to take the same view. 5 Op. Off. Legal Counsel 126 (1981). This opinion involved a gift of legal services by a private foundation to assist a presidential cabinet nominee in preparing for confirmation hearings during a period of presidential transition. Id. at 128. Although this case did not involve a government employee, its rationale supports the view that personal benefit to an employee is instrumental in deciding whether a gift violates section 209. Id. at 128. The apparently divergent approaches of the OGE and the Justice Department create further uncertainties about the meaning of section 209.

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234. 5 C.F.R. § 2635.204(g)(6) (1994).
235. See id. §§ 2635.204(g)(1),(2).
236. Id. § 2635.204(g)(6). Acceptable expenses include food, refreshments, entertainment, instruction, and materials furnished to attendees. Id. § 2635.204(g)(4).
237. Id. § 2635.204(g)(6).
239. Id.
240. The new GSA and OGE rules allow spousal gifts in other circumstances, but not all such gifts come under the cloud of the previous OGE opinions.
The language of the new ethics code produces other conflicts with the OGE's past interpretations of section 209. The *de minimis* provision permits employees to accept small appreciation gifts in connection with the performance of official duties. For example, an official speaker appropriately might receive a modest alarm clock for explaining the delays in carrying out an important agency program. The rule may allow a postal worker to keep the annual box of Christmas cookies offered to venerate her proven agility in evading the jaws of the resident canine.

Prior to the new rules, acceptance of appreciation gifts raised serious questions under the illegal gratuities statute. The statute bars employees from receiving items of value for or because of any official act. Moreover, the old model rules did not contain specific provisions allowing employees to receive appreciation gifts from prohibited sources. Any reward to an employee for performing government services also is suspect under section 209, which prohibits supplementation of the employee's salary.

The new regulations allow these small gifts. They explicitly exempt from the gratuities statute, gifts (such as *de minimis* appreciation gifts)
which are acceptable under section 2635.204. On the other hand, coverage under section 209 remains an open question.

Appreciation gifts raise the specter of a section 209 violation because they reward an employee for official services. In support of the OGE's clear approval of these gifts, one might suggest two arguments. First, the gift is legal because only cash gifts can violate the ban on accepting a salary or supplementation of salary from an outside source. Second, section 209 contains an implicit de minimis test, and small appreciation gifts which agency employees accept under the OGE regulation fall below that threshold.

The OGE's past opinions explicitly reject both arguments. In discussing items given to an employee in appreciation for an official speech, the OGE has determined that section 209 applies to anything of monetary value and that no de minimis exemption exists.

Even where past OGE interpretations of section 209 do not directly clash with the new regulations, they may provide an uncertain guide for both employees and ethics counselors. Some OGE opinions interpreting section 209 reach unexpected results. In others, the OGE appears to shift its position considerably over time.

The treatment of outstanding public service awards is a case in point. The new regulations allow employees to accept both major and minor gifts in connection with bona fide awards for outstanding public service or achievement. More rigorous requirements apply to larger gifts.

246. Id. § 2635.202(b).

247. Students of the conflict-of-interest laws had raised this issue at an early date. In the view of Bayless Manning, it would have been possible to interpret the word salary as a fixed annual or periodic payment for services. However, the term was given a broader meaning whenever the issue was passed upon. See Manning, supra note 26, at 160-61. In its study on the conflict-of-interest laws, the New York Bar committee observed that the word salary had been and probably would be construed to include almost any kind of transfer of value to the employee that appears to be compensation. New York Bar Study, supra note 2, at 64.

In his concurring opinion in Crandon, Justice Scalia differs with the prevailing administrative interpretations. Crandon v. United States, 494 U.S. 152, 168-84 (1989) (Scalia, J., concurring). In his view, the statute only applies to periodic cash payments, the traditional meaning of the term salary. Id. The Court did not adopt this view in its majority opinion. Id. at 152.


249. Id.

250. 5 C.F.R. § 2635.204(d)(1) (1994).

251. Minor awards include gifts of $200 or less, other than cash or investment interests. Id. Agency employees may not accept these gifts from donors who have interests that may be affected substantially by the performance or nonperformance of the employee's official duties. Id. These restrictions also apply to gifts from any association or organization, if a majority of its members have such interests. Id.
Agency employees may accept these awards, like other gifts allowed under section 2635.204 of the gift code, only if they are consistent with section 209. While some have argued that awards in recognition of outstanding government service are the clearest example of salary supplementation, both the OGE and the Department of Justice consistently have permitted them.

It is very difficult to identify the factors which are crucial to the OGE's interpretation. The old model rules permitted employees to accept awards for outstanding public service only from various organizations of a nonprofit charitable or civic nature. In one opinion, the OGE suggested that the donor's charitable status was relevant to its position.

Major awards must meet additional requirements. This category includes gifts of cash or investment interests or gifts in excess of $200. Agency employees may accept major awards only when an ethics official determines, in writing, that the awards are a part of an established program of recognition that meets two conditions: the awards must be made on a regular basis or be funded to assure the continuity of the awards program. They also must be made pursuant to written standards.

252. Justice Scalia vigorously asserted this position in Crandon:

An example is employee receipt of cash awards from nonprofit organizations for meritorious public service. Unless one believes that the statutory term "as compensation" (or its predecessor term "in connection with") imports the common-law requirement of bargained-for consideration—which no one contends—it is difficult to imagine any lump-sum payments more clearly covered by § 209(a) than cash grants conferred specifically to reward the work of Government officials. Crandon, 494 U.S. at 178. Justice Scalia supports a considerably narrower view of the statute than that adopted by the Court, the Justice Department or the OGE. Id. at 171-72. He believes that anomalous administrative interpretations, such as those involving employee awards, are caused by too broad a reading of section 209. Id. at 178.

253. See Letter to a DAEO dated July 21, 1983, Off. Gov't Ethics Op. 83 x 10 (July 21, 1983) (citing Letter from John M. Harmon, Assistant Attorney General, Office of Legal Counsel (OLC) to Robert Lipshutz, Counsel to the President (April 7, 1977); Letter from Leon Ulman, Deputy Assistant Attorney General, OLC, to Stuart R. Reichart, Acting General Counsel, Department of the Air Force (April 7, 1977); and Letter from Paul A. Sweeney, Acting Assistant Attorney General, OLC, to Gerald Morgan, Special Counsel to the President) (June 26, 1956); see also Letter to a DAEO dated July 26, 1983, Off. Gov't Ethics Op. 83 x 11 (July 26, 1983).


obviously is not a critical factor because the new provisions make no distin-
tinction between charitable and profit-making donors.\textsuperscript{256}

The OGE had made clear that charitable status was not dispositive
long before it issued the new regulations. In a 1983 opinion, the OGE
reviewed a proposed charitable trust to help needy federal employees
meet a variety of personal needs, including medical and educational
aid.\textsuperscript{257} The OGE declined to approve the arrangement under section
209.\textsuperscript{258} It ruled that interpretation of section 209 requires a case-by-case
approach, considering a variety of factors, where no single factor is deter-
nominative.\textsuperscript{259} These factors include the intent of both the recipient and
donor and any substantial relationship or pattern of dealings between the
employee's agency and the donor.\textsuperscript{260} The limitation of the trust's benefits
to past, present, and future employees of the office was crucial to the
1983 opinion.\textsuperscript{261}

In the 1983 opinion, the OGE rejected the charitable trust under sec-
tion 209 because it helped only government employees and former em-
ployees.\textsuperscript{262} In 1993, the OGE explicitly rejected the usefulness of its 1983
test.\textsuperscript{263} It eliminated from its proposed regulations a provision that would
have barred awards programs if they were limited to federal employ-
ees.\textsuperscript{264} Several commenters had recommended the elimination of this re-
striction. In accepting their recommendations, the OGE stated: "On
further review, the OGE agrees that the condition is neither necessary
nor desirable, and it has been deleted."\textsuperscript{265}

While the OGE does not further explain the reversal of its position in
the new regulations, a 1993 opinion\textsuperscript{266} concerning employee legal defense
funds suggests that its interpretation of the Supreme Court's decision in
\textit{Crandon v. United States}\textsuperscript{267} may have influenced its new position. The
OGE's 1993 opinion overruled a 1985 advisory opinion which criticized

\begin{footnotesize}
\begin{enumerate}
\item[256.] 5 C.F.R. § 2635.204(d) (1994).
\hspace{1em}19, 1983).
\item[258.] Id.
\item[259.] Id.
\item[260.] Id.
\item[261.] Id.
\item[262.] Id.
\item[263.] 5 C.F.R. § 2635.204(d)(1) (1994).
\item[264.] Standards of Ethical Conduct for Employees of the Executive Branch, 56 Fed.
\hspace{1em}Reg. 33,778, 33,797 (1991) (to be codified at 5 C.F.R. § 2635.204(d)(1)(ii) (1994)).
\item[265.] Standards of Ethical Conduct for Employees of the Executive Branch, 57 Fed.
\item[266.] Letter to an Alternate Designated Agency Ethics Official dated August 30, 1993,
\item[267.] 494 U.S. 152 (1989).
\end{enumerate}
\end{footnotesize}
an employee defense fund limited to one federal employee under section 209268 and approved a fund comparable to the one it had disapproved in 1985.269

The OGE’s change was based on Crandon’s broader rationale rather than on its explicit holding.270 Perhaps for this very reason, it is difficult to determine how the OGE’s interpretation of Crandon will affect other past interpretations of the statute. It is plausible, but by no means certain, that the OGE’s approval of employee award programs and legal defense funds will extend to charitable welfare funds benefitting only current and former federal employees. The ultimate result is uncertain because the OGE has not expressly overruled Opinion 83 x 15, which criticized these funds.271 Moreover, in light of the OGE’s emphasis on a case-by-case and factor-by-factor analysis, its failure to supersede Opinion 83 x 15 may not be mere oversight.

In short, the OGE’s concept of section 209 is not clear from an analysis of its opinions. This lack of clarity assumes critical importance for employees seeking to understand whether the statute, as interpreted by the OGE, overrules the apparently conflicting provisions of its new regulations.

The assertion that the new regulations conflict with the OGE’s past interpretations of section 209 is not intended to be a criticism of the pol-


269. Id. Donors established the 1985 fund to assist a government employee support a grievance against his employing agency. Id. The donors were personal friends of the employee and had no business dealings with the agency. Id. Nothing in the 1985 opinion suggests that the donors were attempting to reward the conduct that gave rise to the grievance. Id. Despite the factors, the OGE, in 1985, did not permit the fund. Id. The fact that the fund benefitted only one government employee and arose out of official duties outweighed the favorable considerations. Id.

270. The OGE’s 1993 opinion allowing a comparable fund imposed specific conditions on the maintenance of the fund and did not excuse the employee from otherwise complying with the rules governing gifts. Letter to an Alternate Designated Agency Ethics Official dated August 30, 1993, Off. Gov’t Ethics Op. 93 x 21 (Aug. 30, 1993). The Crandon case itself did not deal with benefits for current employees. In Crandon, the Supreme Court held that section 209 was inapplicable to severance payments made before the recipients became federal employees. Crandon, 494 U.S. at 163-64.

In 1993, the OGE based its view of legal defense funds on Crandon’s refusal to extend section 209(a) beyond what the text clearly warranted. The OGE concluded that the fund in its 1993 opinion would not violate the statutory purposes, as Crandon articulated them. Letter to an Alternate Designated Agency Ethics Official dated August 30, 1993, Off. Gov’t Ethics Op. 93 x 21 (Aug. 30, 1993). It also stressed that the Crandon majority would resolve any ambiguity under section 209(a) by applying a “rule of lenity.” Id.

271. Letter to an Employee dated Oct. 19, 1993, Off. Gov’t Ethics Op. 83 x 15 (Oct. 19, 1983). In this opinion, the OGE declined to approve a trust under § 209 because its beneficiaries were limited to past, present, and future employees of a particular office.
icy choices that the OGE has made in these rules. Rather, the issuance of comprehensive government-wide ethics rules with which this law is inex-tricably intertwined provides an excellent opportunity to reconsider and clarify the meaning of an old and confusing statute.

Regrettably, these new rules did not reflect any reconsideration of section 209. Instead, the OGE has reserved judgment on the statutory questions, promising to address them at another time. The regulated employee, on the other hand, had to face these issues immediately, unaware that the words might not mean what they appeared to say, and that one provision may withdraw permission which another resonantly heralded.

Section 209 raises issues that, admittedly, are very difficult to address. It is no longer clear what evils this provision seeks to prevent. Revisions of the conflict-of-interest laws during the 1960s subsequently legalized the purported abuses that explicitly had prompted the enactment of section 209. A historical lack of clarity in distinguishing between personal and agency gifts makes a resolution of these issues extremely problematic. These matters await a full and direct debate, and there is some historical difference in perspective between the written opinions of the OGE and those of the Department of Justice.

While these issues may be hard to resolve, the difficulty did not warrant the failure to settle them. Promulgating gift rules such as the new government-wide code without adequately addressing the section 209 issues is like building a bridge halfway across a crocodile-infested river and posting road signs inviting motorists to cross. Road crews will not avoid problems by hoisting more signs seeking pardon for the inconvenience of the ongoing construction.

So far, there is no evidence of a reptilian feast. Indeed, it is hard to imagine prosecutions under section 209 for actions that the new rules appear to invite. A resolution to this conflict eventually will emerge, but until the issuance of new section 209 regulations, many options remain available. The OGE could choose to reaffirm the positions taken in the rules, despite its prior inconsistent interpretations of the statute. Alternatively, in egregious cases, it could interpose the statute to bar actions


which the language of the regulations appears to permit. One casualty of this open-options approach is the purported objectivity of the new code. Where two provisions directly conflict, it is impossible to predict how a decision maker will resolve the conflict.

The gift code also contains a notable example of a subjective gotcha catchall. This provision illustrates the difficulties arising from efforts to fine tune an already complex code. The regulations provide, notwithstanding any of the exceptions to the gift-acceptance ban, that employees may not accept gifts from the same or different sources so frequently as to make a reasonable person believe that the employees are using their public office for private gain.274

In one stroke, this provision imports into the new code all of the broad subjectivity that was the hallmark of many provisions of the old model rules.275 Regardless of how permissible a gift might be under one of the more objective provisions of the code, a recipient must refuse the gift if it is one of a series of gifts made with undue frequency.

The implications of this rule are uncertain. The drafters carefully crafted each of the specific exceptions to the ban on gift-acceptance to ensure that the code denied permission to accept gifts when acceptance would create the appearance of using public office for private gain. The “too often” provision attempts to close a gap in the rules which actually may not exist.

As discussed above, some exceptions, such as the foreign meeting rule and the speaker rule benefit the agency rather than the individual employee. Others, such as the widely attended gathering rule and the accompanying spouse provisions, require specific advance agency approval. It is questionable whether the potential for abuse of these rules is so significant that it justifies the additional subjectivity which the too often provision creates.

The new de minimis exception does permit acceptance of clearly personal gifts without advance approval. The unsupervised acceptance of gifts is a cause for concern. The dollar limits, however, have been calibrated carefully to avoid any appearance that the gifts are excessive. Indeed, the final rules substantially reduced the originally proposed threshold levels to take account of these concerns.276

275. A provision of the old model rules embodied a comparable “too often” concept. It permitted employees to accept from prohibited sources “food and refreshments of nominal value on infrequent occasions in the ordinary course of a luncheon or dinner meeting or other meeting or on an inspection tour where an employee may properly be in attendance.” Id. § 735.202(b)(2) (1991) (emphasis added).
The establishment of very specific limits will lead employees to believe that gifts within the threshold amounts are safe from any improper appearances. Employees are likely to ignore the effects of the too often rule because the specificity of the bright-line numerical thresholds will overwhelm the rule's vagueness. The regulations establish that gifts within the specified dollar limits are only probably safe.

In adopting the too often rule, the drafters have displayed ambivalence toward the thresholds which they incorporated into the regulations. If the new limits are still overly generous, further downward adjustments would have been more consistent with the original purposes of the de minimis provision. The drafters intended the de minimis rule to provide a single exception that would be easier for employees to remember and apply. The reintroduction of a subjective too often test eliminates the advantages of the objective numerical test, yet still requires employees to memorize the numbers. The too often test may make it virtually impossible for an employee to ascertain whether a proposed gift is lawful without a written opinion from an appropriate official.

How often is too often? For the several organizations that opposed any de minimis exception, once obviously is more than enough. The OGE has not accepted this view. It remains to be seen what principles it will apply to test the appropriateness of gifts which otherwise satisfy its more objective standards. The regulations do not succeed in establishing a coherent conceptual framework for resolving this issue.

The OGE attempts to offer some guidance. The regulations provide an example to explain the too often test. In this example, an agency purchasing agent routinely meets with representatives of pharmaceutical manufacturers to gather information about new company products. The official's busy schedule requires him to schedule these meetings regu-

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277. Id. at 35,016.
278. In the formulation of its final regulations, the OGE noted a commenter's argument that the too often test might place employees in the position of having their judgments second-guessed. Id. at 35,012. Employees therefore might choose to seek the "insulation of ethics advice." Id. The OGE nevertheless declined to delete the too often rule. However, it did remove another provision of the proposed rules which would have barred a gift:

from a person who "has interests that may be substantially affected by the performance or nonperformance of the employee's official duties under circumstances where the timing and nature of the gift would cause a reasonable person to question the employee's impartiality in the manner affecting that person."

Id. at 35,011-12.
279. Id. at 35,015.
280. 5 C.F.R. § 2635.202(c)(3) ex. 1 (1994) (discussing the improper acceptance of meals by a purchasing agent from a manufacturer representative).
281. Id.
larly during his lunch hours, and the representative routinely arrives at his office bearing a sandwich and a soft drink for his consumption.\textsuperscript{282} Even though the market value of each lunch is less than six dollars and the aggregate value from any one manufacturer does not exceed the fifty dollar annual limitation on \textit{de minimis} gifts, the regulations find that the practice of accepting even these modest gifts regularly is improper.\textsuperscript{283}

Of course, it would be useful to identify those elements of the cited example which make acceptance of the lunches improper. Regrettably, other provisions of the code hinder efforts to draw any clear lessons from this example.

Assume that the purchasing agent rearranges his schedule to substitute regular late afternoon conferences for his lunchtime sessions. During each of these meetings, tea and crumpets are served. Assume that the value of this hospitality approaches three dollars per session and that during a six-month period, it becomes necessary to have over one hundred meetings with the same manufacturer's representative.

After six months, the value of the food and refreshments approaches three hundred dollars from a single source, but the purchasing agent has not breached an ethics rule. It is irrelevant under the ethics code whether, during the rest of the year, the purchasing agent's rate of harvesting crumpets decreases.

The reason for the agent's good fortune is section 2635.203(b)(1), of the gift code, which excludes from the definition of gift "[m]odest items of food and refreshments, such as soft drinks, coffee and donuts, offered other than as part of a meal."\textsuperscript{284} Excluding these items from the definition of gift means that the purchasing agent can accept the gifts without regard to the dollar limitations contained in the \textit{de minimis} provision. \textit{De minimis} limits apply only to gifts.\textsuperscript{285} Moreover, the too often rule does not apply because it only governs gifts that employees accept under one of Subpart B's exceptions.\textsuperscript{286}

The essential difference between the crumpet and the sandwich is that the sandwich is served as a part of a meal and, therefore, is included in the definition of gift. The crumpet, on the other hand, serves other purposes.

Thus, we return to our original inquiry: How often is too often? The answer appears to be that if the gift is a six dollar sandwich, even the

\begin{itemize}
\item \textsuperscript{282} \textit{Id.}
\item \textsuperscript{283} \textit{Id.}
\item \textsuperscript{284} \textit{Id.} § 2635.203(b)(1).
\item \textsuperscript{285} \textit{Id.} § 2635.204(a).
\item \textsuperscript{286} \textit{Id.} § 2635.202(c).
\end{itemize}
modest thresholds of the *de minimis* provisions provide insufficient protections against abuse. If it is a crumpet, the sky is the limit.

V. **Recommendations and Conclusion**

The new ethics code has some ambiguities and inconsistencies, but these criticisms do not detract from its ground breaking achievements. The new code dramatically abandons many of the brittle rigidities of the old model gift rules. Several provisions reflect the efforts of the drafters to increase flexibility, while avoiding the appearance that officials are using their public office for private gain. Whether or not one agrees with the specifics, the OGE has employed a thoughtful and constructive approach. Unrealistically cramped restrictions foster the unwarranted belief that ethics rules concern insignificant matters. Moreover, as Michael Josephson properly has noted, unduly restrictive rules can make law-breakers out of honest people without deterring the conduct of bad faith violators.287

To appraise this code effectively, one must view it broadly. The success of any ethics code ultimately is judged by how thoroughly employees apply it to their jobs. Poorly articulated regulations may discourage some bad conduct, but they also will deter actions that are useful and constructive. The effects of an ethics code are very difficult to measure objectively.

A. **Recommendations**

Despite the new gift code's improvements, serious flaws remain. The new code provides a useful lesson for those engaged in the drafting of all codes, and particularly ethics codes. There is a point beyond which even the most clever and principled efforts to give full and objective guidance become counterproductive. Even this small portion of a much larger body of new ethics regulation may be too extensive and complex for employees to fathom and for its custodians to manage effectively.

Some problems arise because the new code builds upon the unresolved conceptual issues underlying the old model rules. Elaborating on these uncertainties does not improve the code's clarity. The old theoretical anomalies lead to definitions that agency employees must memorize rather than intuitively understand and lead to the confusion surrounding 18 U.S.C. § 209.

287. *Hearings*, supra note 2, at 171 (statement of Michael Josephson, President of the Josephson Institute for the Advancement of Ethics).
Additional complications arise from the detailed safeguards established to prevent abuse of the code's new flexibility. The unintended consequences of these well-intended efforts include arbitrary distinctions for which there is no clear theoretical justification. Arbitrary distinctions impede understanding and detract from the moral force of the document.

Like many complex mechanisms, this gift code demands an unacceptably high level of effort and attention from its managers and is subject to frequent breakdowns. The inability to resolve in advance the critically important issues surrounding section 209 is a prime example.

1. Reconcile the Conflicts Between the New Gift Code and the OGE's Prior Statutory Interpretations Under Section 209

It is hoped that the OGE and the Department of Justice eventually will reconcile the conflict between the code's specific provisions and the OGE's prior statutory interpretations of section 209.\textsuperscript{288} The experience with section 209 strongly suggests, however, that the new code's complexity will continue to pose serious management challenges. Practical experience inevitably will raise a profusion of previously unanticipated ambiguities. A special source of uncertainty will be the relationship between the code's specific provisions and its gotcha catchalls.

If the OGE or the agencies do not resolve these difficult issues, individual employees will have to handle them without the benefit of legal advice. There is no reason to expect that the OGE will have the resources to handle an explosion of legal disputes or that employees and agencies will resolve these problems consistently.

2. Consolidate Some of the Existing Gift Authorities

The complexity of the new gift rules is only partially the responsibility of its drafters. Additional complications result from a proliferation of legal authorities over which the drafters have no control. The Ethics Reform Act, for example, mandates the GSA rules governing certain agency travel gifts and the OGE rules covering personal gifts.\textsuperscript{289} The Procurement Integrity Act regulates gifts to procurement officials.\textsuperscript{290} The OPM issued special rules which apply to training and meeting expense gifts.

\textsuperscript{288} See supra notes 226-31 and accompanying text (discussing the need for regulations interpreting section 209).

\textsuperscript{289} See supra note 154 (discussing GSA and OGE gift acceptance authorities).

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under the authority of the Government Employees Training Act. Moreover, Congress has passed a number of agency gift-acceptance statutes in what it has considered meritorious cases. Congress enacted the Foreign Gifts and Decorations Act, in response to constitutional procriptions. Because of this fragmentation of statutory authority, it is difficult for the drafters of the principal gift code to give employees a clear, complete, and consistent picture of the applicable rules.

Congress should consolidate some of the existing gift authorities and make it easier for drafters to develop a more coherent and comprehensible code. It should repeal provisions of the Training Act which permit employees to accept training and meeting expenses. Where the Training Act now provides broader authority than that available under the OGE and the GSA rules, the personal or agency gift acceptance rules could be expanded to cover these situations. For many years, the Training Act provided the broadest government-wide permission to accept meeting-related expenses. Today, the GSA or the OGE gift-acceptance rules cover much of the same ground. There is no convincing reason for continuing this separate, narrow-based program.

291. See supra notes 114-19 and accompanying text (citing and discussing the Government Employees Training Act).


293. In light of the origins of the Procurement Integrity Act and its subsequent legislative history, it is unlikely that Congress would consider seriously any proposal to repeal the special provisions restricting gifts to procurement officials. The OGE noted that Congress had overturned prior efforts to conform the procurement integrity gift rules with the old agency standards of conduct. Letter to a designated Agency Ethics Official dated Jan. 30, 1991, Off. of Gov't Ethics Op. 91 x 7 (Jan. 30, 1991). It points out that procurement integrity regulations issued in May, 1989 adopted definitions that would have enabled procurement officials to accept any gifts that the old agency standards of conduct would have allowed. Id. In November, 1989, Congress amended the statute to preclude the accommodation to agency standards of conduct and to require a single, uniform, government-wide procurement integrity limit on gifts to procurement officials. Id. The new ethics regulations make clear that both the procurement integrity requirements and the ethics rules apply to procurement officials. See 5 C.F.R. § 2635.204(a) ex. 5 (1994).

Surely, there are strong policy reasons for imposing tough gift acceptance rules on those actively involved in the procurement process. On the other hand, tight regulation also could be achieved by integrating the rules governing procurement officials with the government-wide gift code. Procurement officials are subject to both codes, and the split location of the regulations makes it difficult for procurement officials to obtain an integrated overview of their obligations. The integration of the codes could assist in avoiding any unnecessary conceptual inconsistencies. The OGE has initiated this integration by specifically referring to the procurement integrity requirements in an example. Id.

294. As interpreted by the OPM, the Training Act does provide broader authority than the GSA rules in certain respects. It permits acceptance of training and meeting expenses even if the employee is not in travel status or is not on duty. See 5 C.F.R. § 410.701(a) (1994). Moreover the Act, unlike the OGE gift-acceptance authorities, permits the acceptance of transportation expenses. See id. § 410.702.
The non-profit or governmental status of Training Act donors no longer seems to be a sufficient basis for maintaining a separate statutory structure. The GSA and the OGE rules treat gifts from charities and public entities like any other donations. These rules properly focus on potential appearances of partiality and improper influence rather than the non-profit status of the donor.

Training Act procedures for accepting gifts differ from those appearing in other codes, resulting in confusion. An employee who mistakenly follows the wrong procedures can face serious consequences. The Training Act creates unnecessary legal distinctions that interfere with the clarity and comprehensibility of the gift-acceptance rules. There is no justification to retain separate Training Act authority for accepting meeting-related gifts.

3. The GSA’s Agency Travel Gift Authority Should Be Transferred to the OGE

Transferring the GSA’s authority over the agency travel gift program to the OGE would improve the clarity and efficiency of the gift rules. A transfer would help achieve the goals of defining personal and agency gifts more precisely and distinguishing between them.

The functional relationships between the agency and personal gift programs suggest that one agency should administer both programs. Accepting agency travel gifts invariably raises ethics issues. Ethics provisions of the GSA rules seek to prevent the appearance of improper influence by donors. The GSA is required to consult with the OGE before issuing its rules. Under the GSA program, agencies now must submit gift reports to the OGE. At the OGE, the government’s principal expert on ethics questions, a cadre of trained counselors is prepared to provide advice on the ethical implications of agency gifts. In addition, real world situations can involve both personal and agency gifts. Comprehensive advice may require consideration of both issues.

The strongest reason for a transfer of authority is to improve the chance that the historically blurred distinction between personal and agency gifts will be reviewed fully and authoritatively. It is much more

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295. See supra notes 198, 210, and 230; see also 5 U.S.C. § 104 app. (Supp. V 1993) (imposing substantial civil penalties on those who willfully fail to file or report any required information on personal financial disclosure reports).
298. 41 C.F.R. § 304-1.9 (1994).
299. For these reasons, the GSA and the OGE rules cross reference each other. See id. § 304-1.8(a)(4) (1993); 5 C.F.R. § 2635.203(b)(8)(i), .204(a), .807(a)(4)(iii) (1994).
difficult to achieve clarity when two agencies each have legal responsibility to plot the single boundary that separates their two programs.\textsuperscript{300}

4. \textit{Policy Should Govern the Gift Acceptance Rules, Not Conflicting and Arbitrary Definitions}

Drafters should abolish the current array of specific, arbitrary, and conflicting definitions. The new definitions of personal and agency gifts should make intuitive sense to employees and should be based on the simple common sense yardstick of who actually benefits from the gift. The current ambiguities threaten the coherence of the gift code and set dangerous traps for unwary employees. Employees cannot develop an intuitive understanding of the personal gift rules without knowing what constitutes a personal gift. The lack of coherent gift definitions also contributes to the perilous obscurity in the interpretation of section 209, which is now awaiting resolution by the OGE and the Department of Justice.

Responsible agencies have never articulated the rationale that distinguishes personal and agency gifts clearly. Concepts of personal ethics traditionally have been mingled with those involving agency gifts in an intellectual \textit{pot au feu} from which no distinct flavors emerge.

The new OGE rules shed no light on these definitional mysteries. No clear theory unites the many specific gift definitions in the code. The OGE categorization of a gift as an agency gift, a personal gift, or a non-gift, does not appear to depend on whether the agency or the employee benefits personally or whether the item relates to the performance of official duties.

The OGE should exclude gifts benefitting the agency from the definition of personal gifts. Under the present system, one must acknowledge that these overly broad and arbitrary definitions sometimes serve a useful purpose. The OGE rules allow employees to accept harmless gifts which the GSA rules do not allow. A clearer and more rigorous approach, however, would permit agency employees to accept such gifts under the agency gift-acceptance authority.

5. \textit{The GSA Travel Gift Rules Should Cover Meetings Required to Carry Out the Agency's Statutory or Regulatory Functions}

If the OGE has adopted a greatly expanded definition of personal gifts, the GSA, to date, has taken an artificially narrow view of its authority.

\textsuperscript{300} Under the current structure, the OGE and the GSA closely cooperate with each other. \textit{Compare} 5 C.F.R. § 2635.201 (OGE overview) \textit{with} 41 C.F.R. § 304-1.2 (general applicability of statute).
The law allows the GSA to authorize travel gifts covering any meeting relating to the employee's official duties. The GSA's current rules appear to cover primarily meetings of an informational or educational nature and not those required to carry out the agency's statutory or regulatory functions. The meaning of these limitations is far from clear.

The GSA's reason for limiting its coverage is not convincing. It wants to avoid the impression that programs and services closely tied to the agency's mission are only available to those who can afford to pay. While this concern is legitimate, the OGE ethics rules already may permit some of the same kinds of gifts that GSA declines to cover, although not to the same extent as under the GSA rules. In addition, agencies with statutory gift-acceptance authority have virtually unlimited permission to accept travel expenses related to the performance of the agency's mission without the GSA safeguards. Extending the GSA rules to cover these gifts would eliminate this untrammeled agency authority and bring these gifts under the extensive protections which the GSA rules provide.

Finally, drafters must recognize that in an era of tight budgets, an offer to pay the expenses of a speech also can distort the priorities of high agency officials. When agency funds are low, the informational meeting or the optional speech at "Paradise Village" may be the first casualty, unless an outside donor is willing to pay these expenses.

The better solution to the GSA's concern over the appearance of outside influence rests in assuring that agencies establish tight administrative safeguards. Agencies must be especially wary of gifts from entities that they regulate, whether these gifts relate to speeches, training sessions, or other activities. Agency officials must review gift offers from these sources carefully. Agencies must not accept any gifts that may in any way compromise the integrity of the agency mission or the appearance of impartiality. Extending the GSA rule to cover additional travel-related gifts facilitates the establishment of such safeguards in many cases.

6. Agency and Personal Gifts Should Be Distinguished Under the OGE's Gift Acceptance Rules

The OGE should make another important change in its ethics regulations to improve the separation between agency and personal gifts. Re-

303. An agency's authority to use its gift acceptance statute for travel related expenses is superseded to the extent that the GSA regulations cover the travel gifts. See supra note 199 and accompanying text.
vised regulations should ensure that an employee does not necessarily commit an ethics violation by failing to comply precisely with the rules governing agency gift acceptance. This current inequity apparently is based on the assumption that a "failed" agency gift necessarily must be viewed as a personal gift. Unless the OGE rules permit the gift, the employee has committed an ethics infraction.

One does not have to condone an employee's noncompliance in order to dispute this flawed assumption. Surely one must discourage mistakes in carrying out official duties. Some mistakes even may be actionable under agency performance requirements or disciplinary procedures. It does not follow, however, that an employee's failure to comply precisely with agency gift procedures results in a gift to the employee. Viewing such gifts as ethics violations seems particularly unfair if the benefit from this irregularly received gift accrues to the agency.304

The drafters of ethics codes must be especially cognizant of the special opprobrium that attaches to ethics violations, and particularly to the charge that employees have accepted improper gifts. Every neglect or breach of agency procedures does not need to be treated as an ethics violation.

B. Conclusion

Consolidating and restructuring gift-acceptance authority would make the code easier for employees to understand. It would encourage the elimination of arbitrary distinctions. It would promote fairness by achieving greater consistency in the treatment of comparable gifts. Current rules limiting the source and amount of gifts, requiring reporting, and mandating agency conflict-of-interest review differ widely. They should be reviewed thoroughly to ensure that the regulations consistently apply adequate safeguards and avoid needless red tape.

The absence of conceptual clarity creates hazardous pitfalls for employees unfamiliar with the regulatory language. Employees who accept gifts intending only to benefit their agencies may commit ethical infractions as well as violations of agency gift acceptance rules. Strict compliance with the details of the OGE or the GSA rules may be the only way to avoid this result.

304. The statute authorizing the GSA rules includes specific penalties for employees or agencies violating the agency gift rules. 31 U.S.C. § 1353 (Supp. V 1993). Treating infractions of the GSA rules as ethics violations could lead to double punishment. It is questionable whether Congress intended this result, particularly in light of the statute's clear division of responsibilities between the OGE and the GSA.
It is ironic that in providing greater flexibility to accept harmless gifts, the new code creates a far more dangerous world for employees. The complexity of the agency and personal gift rules increases the risk that employees will fail to comply precisely with their requirements. These failures can result in violations of the ethics code, or even a violation of section 209. In its attempt to sever the needlessly rigid shackles of the old model rules, the new code appears to have handed employees a sharp, but double-edged blade.

Whether section 209 has any continuing *raison d'être* is a matter beyond the scope of this article. It is hoped, however, that a sharpened and clarified distinction between personal and agency gifts will serve as the basis for the new rules interpreting section 209. Such an approach would bring these rules closer to the past written opinions of the Department of Justice rather than to those of the OGE.

It would have been far better if the drafters had included their interpretation of section 209 within the language of the gift code to which the statute is so closely related. Integration would have reduced the possibility that the interpretations of these two codes eventually will diverge and come into conflict. In any event, it is hoped that the drafters will monitor developments carefully to avoid the emergence of an entirely new set of gotcha catchalls as both codes mature.

This article has proposed specific changes in the gift rules intended to make them clearer and more accessible. While these changes should prove useful, an accessible code is possible only if the drafters directly confront the complexity which is the code's central infirmity. The drafters must address the philosophical and strategic contradictions which are at the new code's core.

In 1989, the President's Commission on Ethics Law Reform recommended that the OGE consolidate all executive branch standards into a single code that the agencies could supplement with OGE approval.\(^305\) The Commission made the following statement in support of its recommendation:

> The Commission believes that the vast majority of federal employees want to comply with ethical rules. However, the sheer bulk of ethics statutes and rules, inconsistent rules, and varying interpretations have contributed greatly to making compliance difficult. To the extent that rules and interpretations can be standardized, the rules can be more easily understood and compliance will be facilitated.\(^306\)

305. See Ethics Comm'n Report, supra note 67, at 92-96.
306. Id. at 93.
The Commission singled out for special criticism the jumble of rules, laws, and orders relating to the acceptance of meals, entertainment, and gifts. In the Commission's words, "it is frequently difficult to ascertain precisely what type of conduct is permissible."

It is unfortunate that this report prompted an ethics code which so conspicuously fails to address one of the report's central criticisms. If anything, the new code is massively more complex and less accessible than the system that it replaced.

The drafters labored courageously to develop rules that were "objective, reasonable, and enforceable." If there is a strategic flaw in their methodology, it is a failure to recognize sufficiently that while these goals sometimes conflict with the goal of accessibility, they cannot pursue each goal independently. It is a failure to appreciate fully the inherent limitations of code drafters and of their audience. It is a failure to seek optimal success by making appropriate trade-offs among competing goals.

Thomas Morgan has pointed out that ethics laws, like all other legislation, are a form of government regulation. "Invoking the talisman 'ethics' does not reduce the need for realistic analysis" of justifications and effects. The assessment must be multidimensional.

A highly sophisticated ethics code will become the victim of its own subtlety, no matter how successfully it otherwise addresses troublesome issues. Verbosity will diminish communication. Complexities will produce inconsistencies that jeopardize the goal of objective regulation. More detailed rules will increase the demand for even more detailed fact-based interpretations. There is no reason to believe that those making these interpretations will be able to treat comparable issues in comparable ways.

A "cookbook" approach to ethics regulation is not realistically possible. Broad ethics principles inevitably will appear in ethics codes. As caveats to very specific rules, they will function as gotcha catchalls with interpretive consequences that may surprise even the drafters. In the end, their presence will overwhelm the code's purported objectivity and fatally undermine the only arguable reason for its complexity.

This article does not urge a return to the open-ended subjectivity of earlier codes. Subjective rules can lead to inconsistent application. Objective rules also can produce this result, but for different reasons. This

307. Id. at 45.
308. Id. at 46.
310. Morgan, supra note 11, at 491.
article does suggest that in their quest for greater objectivity, the drafters of this code have gone much too far. They have tried to impose a degree of precision which the subject matter does not allow.

Even without the legislative changes which this article recommends, much can be done to simplify these rules and make them more intuitive. In 1961, President Kennedy issued wise counsel:

Criminal statutes and Presidential orders, no matter how carefully conceived or meticulously drafted, cannot hope to deal effectively with every problem of ethical behavior or conflict of interest. Problems arise in infinite variation. They often involve subtle and difficult judgments, judgments which are not suited to generalization or government-wide application.\footnote{311. Kennedy Special Message, supra note 28, at 333.}

Code drafters must recognize that every effort to make these distinctions, no matter how reasonable, will affect other drafting goals. It is crucial to avoid what Alexander Bickel calls “an instinct for the capillaries.”\footnote{312. See William Cohen, Is Equal Protection Like Oakland? Equality as a Surrogate for Other Rights, 59 Tul. L. Rev. 884 n.3 (1985).}

Drafters must resist the impulse to tweak the code one last time to produce just one more reasonable distinction.

The central endeavor of any ethics code is motivating employees to assume personal responsibility. The drafters cannot achieve this goal if they entrust the code’s secret meaning to the experts. In the end, it is the underlying principles that matter, and the drafters must not obscure these principles with unnecessary detail. The quest for an optimum balance is a difficult one, but in a democracy, all citizens have a vital stake in its success.