Compliance of the United States of America
with the
The Inter-American Convention Against
Corruption

Report of Civil Society to the Committee of Experts

January 31, 2005

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COMMITTEE OF EXPERTS OF THE FOLLOW-UP MECHANISM FOR THE IMPLEMENTATION OF THE INTER-AMERICAN CONVENTION AGAINST CORRUPTION

Commentary by Civil Society on the Government of the United States of America's Response to the Questionnaire on Provisions Selected by the Committee of Experts for Analysis Within the Framework of the First Round

INTRODUCTION

January 31, 2005

Pursuant to Rule 33(b) of the Rules for the Follow-up Mechanism for the Inter-American Convention against Corruption, Transparency International USA (TI-USA) submits the following response to the evaluative questionnaire for consideration by the Committee of Experts. This submission, co-authored with Foley Hoag, LLP, incorporates material provided in consultation with numerous civil society organizations and experts, including:

Campaign Legal Center (www.campaignlegalcenter.org)
Citizens for Responsibility and Ethics in Washington (CREW) (www.citizensforethics.org)
George Washington University Law School - Government Procurement Law Program (www.law.gwu.edu)
Government Accountability Project (www.whistleblower.org)
International Business Ethics Institute (www.business-ethics.org)
Judicial Watch (www.judicialwatch.org)

The U.S. Government is to be commended for the complete and informative response to the questionnaire. Its breadth and depth reflect a system that establishes the highest standards of integrity and transparency and calls for the broadest scope of application. As noted by the former Comptroller of the United States and TI-USA Advisory Council member Charles A. Bowsher, "it is not a static system, but rather one that must and does constantly evolve, reacting to attempts to circumvent it or to changes in practice." It is in this spirit that this submission takes the Government's response as its starting point and only makes note of those positive aspects in the U.S. system that may not be included in the Government's response or of those issues of concern from a civil society perspective.

We look forward to presenting these and other findings to the Committee of Experts Meeting with Civil Society on Monday, September 26, 2005. Until then, please contact the undersigned for further information on this report.

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CHAPTER ONE

MEASURES AND MECHANISMS REGARDING STANDARDS OF CONDUCT FOR THE CORRECT, HONORABLE, AND PROPER FULFILLMENT OF PUBLIC FUNCTIONS

1. General Standards of Conduct and Mechanisms

a. Are there standards of conduct in your country for the correct, honorable and adequate fulfillment of public functions?

Executive Branch –

While the U.S. Government response notes the applicable regulatory regime, improvements are needed for the ethics system to operate at its most efficient and effective level. The Office of Government Ethics has been without a director since December 2003 and the position should be filled promptly. The position requires a person familiar with ethics and compliance systems, as well as with investigative and prosecutorial standards. The director must also manage an office with a broad mandate, including counseling, training and financial disclosure and be able to work effectively with the Designated Agency Ethics Officials (DAEO) in more than 100 departments and agencies, as well as 60 Inspectorates General, the Office of Personnel Management, the Department of Justice and others. Given the broad range of the director's responsibilities, expertise, not politics should inform this selection.

The independence of the Director of OGE must be assured. The Director currently has a five year appointment, which contributes to insulating the position from political influence. However, the director serves at the pleasure of the President. The director would have greater assurance of independence if the term of appointment were lengthened and, particularly, if removal were permitted only for cause.

The independence of the Inspectors General (IGs) could also be strengthened by a selection process emphasizing expertise in investigation or auditing and by assuring they too are removed only for cause. This would give each agency's IG greater independence from outside political pressures or from the politically-appointed agency heads permitting them to ferret out waste, fraud and abuse.

Over time, the standards of conduct have been supplemented by over 1400 informal advisory opinions, resulting in a system that is complex and that makes compliance difficult. Furthermore, there has been no OGE review of the system's effectiveness since 1992 and no congressional review for almost 20 years. Over this period, technology advances and changes in the way the federal government does business have created vulnerabilities that have been identified but which have not, as yet, been remedied. (This is discussed in greater detail in Chapter Two, question a.)

In addition to the statutes enumerated in the U.S. Government response, the Hatch Act, 5 U.S.C. §§ 7321-7326, seeks to protect the impartiality of federal employees by limiting their ability to participate in political activity.

Legislative Branch – As noted in the U.S. Government response, both the Senate and House of Representatives have codes of conduct and publish manuals providing guidance on their interpretation. The Senate Select Committee on Ethics and the House Committee on Standards of Official Conduct notify members and staff about changes in the law that might affect them.

However, as opposed to the executive branch system, in which codes of conduct are set by law and augmented and applied by an independent body, the legislature is self-regulating. It develops and applies its codes to itself. As a result, there is widespread concern that the system in both houses is ineffective, with rules rarely enforced, punishments insufficient to discourage future violations and a process subject to political influence.

For a period in the late 1980s and 1990s, a number of House members filed ethics complaints against members of the opposite party in what some characterized as an attempt to use the ethics process to damage political opponents. As a result, in 1997, members of the congressional leadership of both parties reportedly entered into an informal "truce" under which members agreed they would avoid filing ethics complaints against colleagues.[1] At the same time, the House Committee on Standards of Official Conduct adopted a rules change that prohibited outside "watchdog" groups from filing complaints unless accompanied by a certification signed by a House member.

Since then, according to a 2004 House Committee report,[2] there has been a sharp decline in complaints brought either by members or by outside groups. In 2004, a rule change went into effect that will make it even harder to launch an investigation, by requiring a majority vote of the Committee rather than a tie vote as was required in the past to trigger an automatic investigation within 45 days of the filing of a complaint. Given the structure of the Committee, which is permanently comprised of five Democrats and five Republicans, this may result in political considerations playing an even larger role in decisions. Moreover, the Committee has recently declared that it will not accept complaints containing "innuendo, speculative assertions or conclusory statements."[3]

A coalition of civil society organizations has been drawing attention to the system's weaknesses. Under the resulting public pressure, this year, the majority party retreated from tentative plans to place further restrictions on the ethics process, including a rule that would have provided for the Committee to sanction a member only for violating a specific law or regulation. Historically, the Committee has most often imposed sanctions under a broader standard requiring members to conduct themselves in a manner that "reflects creditably upon the institution."

[1] Charles Babington and Dan Morgan, "Ethics Truce Frays in House," *Washington Post*, March 17, 2004, p. A01.
[2] Historical Summary of Conduct Cases in the House of Representatives, (November 6, 2004) http://www.house,gov/ethics/Historical_Chart_Final_Version.html.
[3] http://www.house.gov/ethics/Press _Statement_DeLay_Bell.htm

In the Senate, where the rules and culture strongly encourage collegiality, senators have filed few complaints against their colleagues. Although the Senate rules do permit outside groups to file complaints with the Select Committee on Ethics, in refusing to investigate several complaints the Committee has explained that it does not pursue allegations based solely on press reports.

In both the House and the Senate, the self-regulating system, which places responsibility for evaluating members on a committee comprised of only members, creates pressure on the committee and particularly on its chairman. The discharge of their duty to investigate a colleague, alleged to have committed a violation, could jeopardize the committee members' capacity to pursue their legislative objectives, particularly when the subject of the allegation is a party leader or someone who plays a powerful role in the Congress.

Given the inherent vulnerabilities of a self-regulating system and the weak track record in Congress, many believe that the process should be administered by an independent body of non-Members with the requisite expertise and authority to investigate complaints and recommend sanctions. In the House of Representatives, the ethics rules should permit non-Members, including non-governmental organizations, congressional staff and other employees to file complaints without the support of a House member.

Some recommend that when a complaint is filed, an independent outside counsel with experience in public corruption cases should conduct an initial investigation and recommend to the ethics committees whether further action should be taken or whether it should be dismissed. If outside counsel were to recommend further investigation, it could be given wide latitude to carry this out, reporting its findings and recommendations to the committee. A finding of violations should be shared with all Members of the chamber and be made public

With regard to the committees' practice of providing advisory opinions in response to members' requests for advice with regard to a particular ethics situation, consideration should be given to making such opinions public.

It is important to note that Congress members have only limited immunity[4] and there is a transparent process for lifting it. Members can be expelled when there are allegations of or convictions for criminal misconduct. This is critical to preventing an elected official from using his or her office as a shield from legitimate judicial process.

Judicial Branch – As stated in the U.S. Government response, the judicial branch sets high standards of conduct and federal judges are expected to act in a way that does not give rise to even an appearance of misconduct. The federal court system governs itself on the national level through the Judicial Conference of the United States (a body of 27 federal judges, led by the Chief Justice of the United States). At the state and local level, there is considerable variation. Judicial Councils, comprised of judges, consider ethics complaints against judges. As with any self-regulating peer review system, there are inherent weaknesses. Judges may be hesitant to

[4] *U.S. Constitution*, Article 1, Section 6: "They shall in all Cases, except Treason, Felony and Breach of the Peace, be privileged from Arrest during their Attendance at the Session of their respective Houses, and in going to and returning from the same; and for any Speech or Debate in either House, they shall not be questioned in any other Place."

investigate or punish ethical and legal transgressions by other judges.[5] Moreover, it is difficult to evaluate the sufficiency of judicial discipline by the Judicial Conference, as the Committee on Codes of Conduct publishes no statistics.

The Judicial Conference should consider allowing for independent screening of complaints prior to their referral. An independent body could keep confidential the names of complainants unless or until the process reached the hearing stage.[6] Such a body could also monitor complaints to determine if there are patterns of allegations that might indicate unethical activities. Permitting non-judges to participate in the adjudication of judicial ethics complaints could also diminish any perception of favoritism that could arise when judges adjudicate complaints against their colleagues.

2. Conflicts of Interest

a. Are there standards of conduct in your country regarding the prevention of conflicts of interest in the performance of public functions? b. Are there mechanisms to enforce compliance with the above standards of conduct?

Executive Branch – As indicated in the U.S. Government response to Chapter One, Question 1a, the executive branch Standards of Conduct cover conflicts of interest. The system for disclosure of assets, described in Chapter Two below, acts to identify potential conflicts of interest and provides for corrective action. In addition to recommendations provided in these sections, it should be mandatory, not voluntary, for U.S. Attorneys' offices to respond to the Office of Government Ethics' survey of prosecutions for conflict of interest so that it can be included in OGE reports to the public.

Legislative Branch – While it may not be strictly construed as a conflict of interest, there is deep concern that elected officials are subject to influence by significant contributors to electoral campaigns. Given the costs of a campaign, the pressure to raise substantial amounts of funding is very real. As a result, seeking contributions, whether from individuals or political action committees, is a necessity for congressional candidates and large contributors are or appear in some cases to be rewarded with increased access to policy makers and influence over decision-making. There also appears to be a widespread public belief that special interests are writing legislation to protect or benefit their interests.

It is imperative that the system remain highly transparent, with information more easily accessible to the public. While transparency is a critical threshold issue, it is clear that other measures are essential to reduce candidates' dependency on financial support from special interests to get elected. In addition, foreign agent registrations should and registration information submitted by lobbyists should be more accessible.

[5] *See e.g.* Anthony D'Amato, *Self Regulation of Judicial Conduct could be Mis-Regulation*, 89 Michigan Law Review 609 (1990).

[6] Due process requirements prohibit completely anonymous complaints, as accused judges ultimately have the right to confront their accusers

Judicial Branch – In cases where there is concern that a judge may have a conflict of interest, either party may requests that a judge recuse, or disqualify, himself from the proceedings. (Judges may, and often do, make this determination.) If rejected, this decision can be appealed, with the notable exception of Supreme Court justices. As a general matter, the system appears to work well. An analysis by Judicial Watch of public court records shows 1,609 instances of voluntary recusal by Supreme Court justices from January 1990 through January 2004. However, there have been instances that provoked controversy and some commentators and public officials have suggested that either other justices or the Judicial Council for the United States retain appellate jurisdiction over recusal controversies concerning Supreme Court justices.

Despite strict rules, the acceptance of free trips to conferences or travel with individuals associated with cases before the court have recently sparked concerns about their potential impact on a judge or a justice's impartiality. Although attorneys can requests recusal based on the impact of such outside influence, such recusal motions and appeals are difficult to win and do not address the issue of whether such trips create conflicts of interest outside the context of a particular case.

In 2004, an independent report by Community Rights Counsel (CRC), entitled "Nothing for Free: How Private Judicial Seminars are Undermining Environmental Protections and Breaking the Public Trust," led to investigative reporting by the media and generated significant outcry among ethics experts, judges, public interest groups, and the media at large. Legislative efforts to address this issue have not been successful. [7] The reaction to the report by CRC demonstrates that there is a need for an avenue to report issues of judicial integrity outside the system in order to preserve the judiciary's goal of not only avoiding impropriety, but avoiding even the appearance of it.

There is also concern about the potential impact of judicial appointment or election on judicial impartiality and independence. Judges run for office in 38 of 50 states. At the state and local level, almost ninety percent of all 30,000 judges are elected, and the cost of judicial elections runs into the millions of dollars.[8]

The Group of States Against Corruption (GRECO), in its 2004 evaluation of the United States, commented that judicial appointments also have a political dimension that can create a conflict of interest for a judge. It recommended that the U.S. "promote a public policy discussion with the participation of all interested parties, addressing the process of selection of federal judges with a view to enhancing the efficient functioning of the judicial process."[9]

[7] This information is taken from Douglas T. Kendall and Jason C. Rylander, "Tainted Justice: How Private Judicial Trips Undermine Public Confidence in the Judiciary," Georgetown Journal of Legal Ethics, Fall/Winter 2004.
[8] See also Bok and Hills, "Justice for Sale," Committee for Economic Development, Washington.
[9] Group of States Against Corruption, First Evaluation Round, Evaluation Report on the United States of America, adopted at the 17th Plenary Meeting, March 22-25, 2004, page 36. Available at www.greco.coe.int.

3. Conservation and Proper Use of Resources Entrusted to Public Officials in the Performance of Their Functions

a. Are there standards of conduct in your country that govern the conservation and proper use of resources entrusted to public officials in the performance of their functions? b. Are there mechanisms to enforce compliance with the above standards of conduct?

Executive Branch – Any discussion of the proper use of resources and oversight to prevent fraud, waste and abuse must include the critical role of the Inspectorates General and the Government Accountability Office ("GAO" formerly, General Accounting Office.) The GAO oversees on behalf of Congress budgets, bidding and contract administration, and other use of resources by the Executive Branch. Not only are its reports and rulings available on-line, but individual members of the public can ask to be put on mailing lists to receive notifications of every report and ruling. Misuse of public resources can be reported directly to the GAO via their website. This extensive and public effort to keep the executive branch accountable is commendable

In the area of procurement, an area not covered by the U.S. response, the following addresses specific issues which deserve attention. There is great concern that recent structural changes, known as "streamlining," have had the effect of reducing transparency and competition for public contracts. While the bid processes for Iraq reconstruction garnered the most public attention, the potential for problems is more widespread. With less competition and less transparency about the cost-effectiveness of the bid, there is more scope for relationships to influence the outcome. See the General Services Administration recent report on massive failures in task-order contracting (or "framework agreements" with reduced competition.)[10] Some members of Congress have raised significant concerns about the possibility of favoritism, collusion, and overcharging in the awards.[11] A report by the Center for Public Integrity concludes that Pentagon management of outside vendors needs greater oversight and notes that the Pentagon has significantly reduced the number of officials responsible for procurement oversight by almost half since the beginning of the 1990s, despite increasing budgets. [12]

In terms of enforcing regulations governing resource management by executive branch officials, the U.S. response, while quite comprehensive, is essentially from the executive branch perspective and does not fully address the enforcement mechanisms outlined below, many of them implemented by private parties, which help to ensure the conservation and proper use of resources entrusted to public officials in the United States.

1. Bid Protests

The U.S. response notes that another "anticorruption mechanism that provides for public participation is the procedure for disappointed bidders to challenge Federal contract awards,"

[10] *See* Office of Inspector General, General Services Administration, *Compendium of Audits of the Federal Technology Service Regional Client Support Centers (Dem. 2004), available at http://www.pubklaw.com/hi/gsaig12-14-04.pdf.*

[11] *See e.g.* Gail Russell Chaddock, "Targeting No-Bid Deals," *The Christian Science Monitor*, October 10, 2003.
[12] "Outsourcing the Pentagon", Center for Public Integrity, September 29, 2004.

under 48 C.F.R. Part 33. The bid protest (or "challenge" procedure, as it is known in many countries) is in practice a robust means of ensuring careful stewardship of public resources expended by United States through the procurement process. Under current law, an "interested party" (generally a disappointed bidder) may bring a bid protest in one of three different forums: the U.S. Court of Federal Claims, the Government Accountability Office, or the contracting agency (under an "agency-level" bid protest). The second course – protests to the Government Accountability Office – is, in practice, by far the most popular; the GAO hears and disposes of approximately 1200 to 1300 bid protests per year. *See, e.g.*, Report of GAO to Congress (Jan. 30, 2004), *available at* http://www.gao.gov/special.pubs/bidpro03.pdf. The GAO also provides an on-line registry service that will automatically email a synopsis of every GAO report and bid protest decision to any individual requesting it on a daily basis. This mechanism is not perfect, as it affords only limited transparency, only affected contractors have standing, and bid protest decisions tend to turn on procedural errors rather than substantive mistakes in officials' handling of public resources. Nonetheless, despite its sporadic and unpredictable nature, the bid protest process provides an important guarantor of integrity in the U.S. procurement system.

2. False Claims Act

The U.S. response also only touches on civil fraud actions, including the 'qui tam' (or "fraud whistleblower") action (31 U.S.C. § 3730), which permits a private citizen to file a complaint under the False Claims Act, alleging corruption to obtain a public contract. Although the U.S. response notes that, "[i]f successful, the citizen may recover a percentage of the proceeds of the settlement or judgment," it understates the impact that qui tam actions have had in protecting the integrity of U.S. procurement. These civil fraud actions are typically first brought by a private relator (the "whistleblower") and then, if appropriate, joined by the Justice Department. Because the relator may recover a substantial bounty, and any unsuccessful defendant can also be required to pay the relator's attorney fees, a sizeable community of private attorneys has emerged to handle these cases. The damage awards can also be severe: defendant contractors can be forced to pay treble damages *plus* penalties of up to $11,000 per false "claim" (i.e., invoice). Through these types of actions, private relators and the Civil Division in the U.S. Justice Department have recovered billions of dollars for fraud against the government. The threat of these lawsuits serves as a worthwhile deterrent against fraud by U.S. contractors.

3. Procurement Integrity Act

The U.S. response also does not cite the Procurement Integrity Act, 41 U.S.C. § 423, which is implemented at 48 C.F.R. § 3.104-1 *et seq*. (Federal Acquisition Regulation (FAR) 3.104-1 *et seq.*). The Procurement Integrity Act sets careful controls on the release of sensitive procurement information from both government and contractors, and the Act sets important limits on the "revolving door," *i.e.*, the regular flow, in the United States, of skilled personnel between government and industry. Among other things, the Procurement Integrity Act complements (and, some would argue, overlaps) with the criminal conflict-of-interest statute cited by the U.S. response, 18 U.S.C. § 208. The Procurement Integrity Act and the criminal statutes are, of course, not enough in themselves to stem all corruption as the recent Air Force scandals demonstrate. The Procurement Integrity Act is, however, an important part of the tapestry of U.S. anticorruption rules, and it deserves some mention.

4. Organizational Conflicts of Interest

The U.S. response does not address organizational conflicts of interest, which are an increasingly an area at high risk for corruption as the U.S. procurement system matures and more public work is "outsourced" to private contractors. The concern is that private contractors will not provide impartial advice to the government. Under the U.S. procurement laws, per 48 C.F.R. Subpart 9.5 (FAR Subpart 9.5, available at www.arnet.gov/far), if, due to other work or obligations, (1) a contractor gains an unfair advantage in a procurement, or (2) the contractor's advice to the government may be distorted, this gives rise to what is termed an "organizational conflict of interest," which must be addressed by the contracting officer. The U.S. law in this area is complex and advancing rapidly, and the evolving protections under U.S. rules and case law may be worthy of further attention and review.

5. Corporate Outreach and Compliance

The current mandate of the U.S. Office of Government Ethics does not include training or counseling in the private sector as is the case in many countries. With the increase in volume and value of government contracts, with greater emphasis on buying services rather than goods, consideration should be given to expanding OGE's responsibilities to provide a significant liaison with the private sector, particularly government contractors that are not publicly traded.

In practice, corporate compliance programs, which emphasize lawful conduct and cooperation with government investigations, often serve as the "first line of defense" against fraud and corruption in the federal procurement process. The U.S. response does not refer to the incentives for compliance programs created by the sentencing guidelines promulgated by the U.S. Sentencing Commission, www.ussc.gov, outlined in greater detail at http://www.ussc.gov/orgguide.HTM. Under these guidelines, as revised in November 2004, corporations are required to establish extensive internal compliance programs, to ensure that employees understand the corporations' legal obligations and to bring to the fore corporate violations of law. In practice many corporations, particularly those publicly traded, institute these compliance programs as a matter of course. Thus, the private sector shares a substantial portion of the burden of assuring compliance with the law and its efforts are complementary to programs in federal agencies.

4. Measures and Systems Requiring Public Officials to Report to Appropriate Authorities Acts of Corruption in the Performance of Public Functions of Which They are Aware

a. Are there standards of conduct in your country that establish measures and systems governing the requirement that public officials report to appropriate authorities acts of corruption in public office of which they are aware? b. Are there mechanisms to enforce compliance with the above standards of conduct? c. Briefly state the results that have been obtained in implementing the above standards and mechanisms

Executive Branch – The U.S. Government response accurately states that the policies for mandatory reporting of corruption across all three branches of government. It also correctly

reports the resources that have been saved or recovered due to employee reports of fraud and other acts of corruption.

However, while executive branch employees are covered by the Whistleblower Protection Act of 1989,[13], bipartisan legislation introduced in the last Congress indicated that some lawmakers do not view that statutory protection as adequate and reflected concern that federal employees might be discouraged from bringing issues forward. Data collected by the Government Accountability Project on cases of retribution against whistleblowers shows that protections are not sufficient to protect those acting on their duty to report. Statistical evidence from analyses of cases where whistleblowers have fought retaliation for their reporting of wrongdoing confirms the consequences of these weaknesses in the law. In looking at records of the Federal Circuit Court of Appeals from October 1994 through October 2004, in 95 out of 96 decisions the court ruled against the whistleblower in decisions on the merits. The internal administrative mechanism – the Merit Systems Protection Board (MSPB) – has a similar record with regard to whistleblowers

When Congress last strengthened the Whistleblower Protection Act in 1994, some considered it the strongest free speech law in history. In practice, however, it has weakened over the past 10 years. Both the House and Senate bills sought to strengthen the protections necessary to encourage employees to step forward.

In practice, federal employees also face problems deciding when and how to report and who is finally accountable for acting on that report. Laws regarding protection of classified or otherwise restricted information can leave executive branch employees caught between their obligation to protect classified information and the need to act in the public interest by disclosing information either to the Congress or to the public at large. Inspectorates General often lack the resources to deal with emergent situations or to respond quickly to issues where there is an immediate threat to the public interest. The increase in political appointees as Inspectors General has also raised concerns that employees may refrain from reporting information due to apprehension about partisanship.

There is support for the federal government to provide a process, outside the agency system, that is independent and capable of rapid response. A process for communication with Congress in a manner that protects both the employee and the information could be helpful and agencies should not be allowed to prohibit employees from talking to Congress when appropriate mechanisms to safeguard sensitive information are in place.

Legislative Branch – Although the U.S. Government response correctly notes the obligation of members, officer and employees to report acts of corruption, it does not address the practical difficulties raised by the systemic limitations noted in Chapter One, Question 1a. The changes since 1997, as described above, actually discourage reporting. Moreover, legislative branch employees do not have statutory whistleblower protection.

Judicial Branch – The U.S. Government response describes the rules requiring judicial branch employees to report acts of acts of corruption. However, in the judicial branch there is less

[13] 5 U.S.C. § 2302(b)(8).

guidance to staff and no independent authority to call into question a judge's actions, as discussed above and no whistleblower protection.

CHAPTER TWO

SYSTEMS FOR REGISTERING INCOME, ASSETS AND LIABILITIES

a. Are there regulations in your country establishing methods for registering the income, assets and liabilities of those who perform public functions in certain posts as specified by law and, where appropriate, for making such disclosures public? b. Briefly state the results that have been obtained in implementing the above standards and mechanisms, attaching the pertinent statistical information, if available.

Executive Branch – Although the U.S. Government response provides a full answer to this question, former government experts find the system out of date and in need of revision. The current financial disclosure system does not address the fluidity of today's financial markets. For example, with day trading, it is possible for an individual to conduct several hundred transactions in one day and it would be impossible to effectively track these on a once-a-year financial disclosure.

It is notable that some agencies, such as the Securities and Exchange Commission (SEC), where employees might have greater access to information that could influence markets, require employees to register all transactions. Similarly, the Department of Defense, where employees regularly work closely with government contractors, has heightened requirements.

Overall, the focus of the U.S. system for registering income, assets and liabilities is focused on identifying conflicts of interest, rather than determining the net worth of individuals. By focusing only on identifying conflicts of interest, the U.S. is balancing the need to ensure the independence of executive branch employees from private interests with the individual employee's right to privacy. However, the system would benefit from a simplification of reporting forms and reducing the number of filers.

Most of the elements of the public disclosure system are mandated by Congress and can only be changed by Congress. The forms are viewed by many as overly complicated, often requiring appointed officials to hire accountants in order to fill them out properly. They are difficult to review, not readily yielding the information needed to identify conflicts of interest. For those nominated to political positions requiring Senate consent, each committee can require additional income registrations. This can result in two or three forms with conflicting or different information required (for example, statements for "this calendar year" can be completely different than those covering "the last twelve months").

While simplification is clearly called for, concerns have been raised that pending legislation might reduce the quality of financial disclosure by high-level presidential appointees. It is important that any effort to revise the forms not be used to impede their usefulness.

The U.S. Office of Government Ethics (OGE) recently published reports and strategic plans, providing some data (www.usoge.gov). The overall executive branch system collects approximately 20,000 public disclosure reports and over a quarter of a million confidential disclosure reports. Most of these are reviewed in the agencies, although OGE does review several thousand of the most senior official's disclosures. Past statistics (OGE 1994 report to Congress) suggests that approximately one third of all political appointees must divest, or make other arrangements, for their assets or positions before they enter government. However, civil servants, who file most of the reports, add only nominally to the number of those required to make changes.

Legislative Branch – Senators and Members of the House of Representatives are required to file financial disclosure reports and they are available to the public upon request from the House Clerk's Office and the Secretary of the Senate. However, there is no enforcement mechanism other than the committees to ensure full or accurate disclosure. As discussed above, because the ethics committees have been reluctant to take action against colleagues, it is unlikely they will address tardy or incomplete filers. Moreover, since non-members are effectively barred from filing complaints in the House, issues raised in filings are not likely to result in any formal action taken by the Committees.

However, it is important to note that, due to a strong tradition of aggressive investigative reporting in the U.S. press, the contents are very likely to be reported. Their impact on elections helps ensure that Congress members will take this reporting requirement seriously and will recognize it is in their own self-interest to ensure that the reports are accurate.

Judicial Branch – Judicial financial disclosure reports are used by litigants, the news media, and judicial watchdog groups to monitor possible conflicts of interest judges may have when presiding over cases. However, while the financial disclosure reports are supposed to be available to the public – upon request and for a fee – 30 days after they are filed, a recent United States Government Accountability Office (GAO-04-696NI) study found that during 2002 it took an average of 90 days for the staff of the Judicial Conference's Committee on Financial Disclosure (the repository of judicial financial disclosure reports) to respond to requests made that year.

Federal law allows information to be redacted from the financial disclosure forms of federal judges for security reasons. Critics have maintained that some judges, in consultation with United States Marshals Service, have requested and had approved by the Judicial Conference unnecessary redactions from their disclosure forms of information that is not reasonably security-related. According to the General Accounting Office study, financial and other information was withheld 592 times for security reasons from 1999-2002.

In 2004, working with the Judicial Conference, Judicial Watch, a non-governmental organization, instituted a program to make judicial financial disclosure reports available to the public free of charge on the Internet as they become available from the Judicial Conference. This should eliminate delays in access to this information. The Judicial Conference, the United States Marshals Service and individual judges need to reevaluate whether important financial and other information is being properly withheld from the public.

CHAPTER THREE
OVERSIGHT BODIES

a. Are there oversight bodies charged with the responsibility of ensuring compliance with the provisions stated in article III (1), (2) and (4)? b. Briefly state the results that said oversight bodies have obtained in complying with the previous functions.

Executive Branch **–** The Office of Government Ethics (OGE) is charged with overseeing the ethics offices review of disclosures and has an audit group responsible for doing this. However, due to the reduction in the number of auditors over the past five years, the review of every agency at least every four years might now take six years or more.

OGE issues reports on their agency audits and notes deficiencies. It has the authority to issue corrective action as well as other measures to force agencies to comply and has done so regularly.

Legislative Branch – As noted in response to Question 1 a, congressional oversight is left to Congress itself. The only other oversight, as a practical matter, is the influence of an independent press and sound investigative reporting on elections.

Judicial Branch -- As noted in the U.S. response, the Federal court system is self-governing, through the Judicial Conference of the United States. At the federal level, any citizen can file a complaint about a judge. Some complaints focus erroneously on a judge's rulings rather than on misconduct.

A federal judge can be removed only through impeachment by the Senate. The judiciary has admonished, reprimanded and even publicly censured some judges and, in the case of a gross breach of judicial ethics or a crime, has referred some to the Senate for impeachment. However, few judges have been impeached in the nation's history,[14] although some have resigned under pressure.

As noted in the discussion of the legislative branch, there are inherent weaknesses in a self-regulating system. Critics believe the system would be improved by giving representation on the committees to private citizens, as is the case in some states. Some argue for greater congressional oversight. However, given the potential for such oversight to impinge on judicial independence, it is up to the Judicial Conference to ensure that its practices retain public confidence. Greater transparency would be helpful in this regard.

[14] "Judicial Ethics and Rule of Law, By U.S. Supreme Court Justice Anthony Kennedy, Issues of Democracy, September 1999. See also www.senate.gov

CHAPTER FOUR

PARTICIPATION BY CIVIL SOCIETY

1. General Questions on the Mechanisms for Participation

a. Are there in your country a legal framework and mechanisms to encourage participation by civil society and non-governmental organizations in efforts to prevent corruption?

The U.S. Government response describes accurately the very broad opportunities for citizen participation in the policymaking process. They are rooted in the First Amendment to the Constitution guaranteeing free speech and the right to petition government.

The increased use of the Internet by all branches of government, providing reports, statistics, proposed regulations, judicial decisions and other vital information, has also enabled the public to provide more meaningful input and to participate more actively. Nonetheless, there is a widely held perception that major campaign contributors have a disproportionate impact on policy outcomes.

2. Mechanisms for Access to Information

a. Are there mechanisms in your country that regulate and facilitate the access of civil society and non-governmental organizations to information in the control of public institutions?
b. Briefly state the results that have been obtained in implementing the above standards and mechanisms.

The Freedom of Information Act (FOIA) and the Privacy Act together form a comprehensive legislative scheme providing a private right, enforceable in court, to obtain government information. Supporting this legislative regime is a long history of judicial enforcement and doctrine that reinforces and protects the U.S. information culture described above.

The U.S. response notes that the Department of Justice annually reports on FOIA activity. In addition, the FOIA obligates every agency of the federal government to report on FOIA activity. *See* 5 U.S.C. § 552(e) (2004). This requirement, which allows citizens to review the responsiveness and adequacy of FOIA implementation year to year, would be more helpful if the information were compiled in a single report covering all reporting federal components.

While finding the balance between transparency and competing values of privacy and security is a challenge, there has been a disturbing shift in the environment recently to a tightening of access to information. FOIA establishes a general presumption that all records in the possession of the agencies and departments of the Executive Branch of the United States government should be accessible to the public. The law grants an individual the right to request these records and to receive a response to that request, although it does not grant an absolute right to examine all federal government documents. If an agency denies a request, the burden of proof is on the government to demonstrate that the information falls under one of the nine clearly delineated statutory exceptions to the rule requiring it to provide the records requested.

In the Clinton Administrations, the government's capacity to invoke discretionary exceptions was limited. The government had the burden of demonstrating that foreseeable harm would occur from disclosure. In a 2001 Memorandum from Attorney General Ashcroft to government agencies, this burden was reversed. Under the new standard, the government is to determine whether there is a "sound legal basis" for relying on an exception to withhold information and the Justice Department has indicated it will defend all such findings.

There are other illustrations of what some find a pattern of limiting public access to information. For example, the 1978 Presidential Records Act permits a FOIA request for presidential records 12 years after a president leaves office. However, the 2001 Presidential Executive Order 13233 restricts public access by giving an incumbent or former president discretion to deny access based on constitutional privileges.

Past practice of the U.S. Government under the FOIA and its supporting regulations presents two additional serious problem areas: (a) classification and (b) inefficient implementation.

1. Classification

Many of the exemptions from disclosure provided for in the FOIA are designed to protect citizens from disclosure of private or otherwise sensitive information, such as internal personnel files, trade secrets, and the like. Internal deliberations of agencies are likewise protected, to ensure an environment where officials can freely express their views and subject policy to full scrutiny, as are law enforcement activities when disclosure might jeopardize the fairness of judicial process or put law enforcement officers at risk.

Exemptions from release under FOIA become more problematic when information is withheld under the "national security" exemption - a broad exception to disclosure that protects any document that is properly classified. While certainly a broad range of information that is classified should in fact be kept secret for reasons of national security and/or protection of personnel, included in this broad category are documents relating to some of the most critical aspects of government where transparency is needed the most.

Recognizing this problem, in 1995, President Clinton revised the criteria of classification pursuant to the FOIA, 5 U.S.C. § 552(b)(1)(A), under Executive Order 12958 (E.O. 12958). E.O. 12958 took dramatic steps toward improving public access to information previously withheld, often indefinitely, from public scrutiny. Unfortunately, most, if not all, of the key provisions of E.O. 12958 were eroded or destroyed by Executive Order 13292 (E.O. 13292), issued by President Bush in March 2003. A review of the reports produced by the Information Security Oversight Office illuminates the severity of the problem. From fiscal years 1995 to 2002, the years E.O. 12958 was in place, the average number of pages declassified annually was 126 billion. In comparison, a mere 43 billion were declassified in fiscal year 2003 (and for the first six months of that year, E.O. 12958 was still in effect). In addition, a much larger number of documents are being classified under E.O. 13292, they are being classified at higher levels,

and they retain their classified status for longer periods of time. These changes are significantly eroding the efficacy of the FOIA in areas of classified documents.[15]

2. Inefficient Implementation

The federal government of the United States is quite possibly the largest bureaucracy in the world. FOIA adds a complex legal and regulatory scheme that is not, and cannot be, within the expertise of every official that may encounter it. A certain degree of inefficiency, therefore, is unavoidable. However, the inefficiency of the FOIA system is significantly greater than it should be.

The first problem is with the systems of document maintenance and archiving. Federal agencies have policies relating to how records are to be filed, maintained, and archived (or "retired") to ensure that document searches under FOIA or for judicial action can be performed efficiently, retrieving all information responsive to an inquiry. However, too many federal employees are either not implementing those policies or they are unaware of them. As a result, searches for responsive information become long, arduous processes without any guarantee of actually identifying all, or even the majority, of the relevant documents.

The second problem is that the FOIA establishes statutory deadlines for providing responses that mislead citizens into believing that they can actually get the information requested in a reasonable period of time when, in fact, they may have to wait more than a year. To the average reader, it appears that 20 days should be sufficient time to request information under FOIA. In reality it is not, as the FOIA enumerates "unusual circumstances" under which an agency can extend that period on written notice. Many of the circumstances described - such as collecting information from facilities outside that processing the request - are hardly unusual and apply to virtually every FOIA request. FOIA goes on to eviscerate the time guidelines by providing that an agency can lift time limits altogether if the requestor declines to limit the scope of the request or arrange an alternative time frame. As a result, no requestor can know in advance what the time frame of the response might actually be. For example, the Department of State report on FOIA for 2003 lists median numbers of days to process requests ranging from eight days to 671. There are provisions for expedited processing, but they limit it to specific circumstances that are overly restrictive. Even for expedited processing, the Department of State median reached 196 days.

The United States should return to the declassification parameters of E.O. 12958 and rescind the Attorney General's guidance on expansive interpretations of exceptions to the FOIA. The presumption of disclosure should be reinstated.

The United States should ensure that all government employees are adequately trained in document maintenance, retention and archiving policies and that files are appropriately archived. Legislation should be enacted to: (1) provide explicitly for expedited processing of FOIA requests when there is a court case pending; (2) prescribe a reasonable, reliable period of time in

[15] Information Security Oversight Office, "Report to the President 2003" and "2001 Report to the President," March 31, 2004 and September 20, 2002.

which a FOIA response must be completed, regardless of "unusual circumstances;" (3) restrict the definition of "unusual circumstances."

3. Mechanisms for Consultation

a. Are there mechanisms in your country for those who perform public functions to consult civil society and non-governmental organizations on matters within their sphere of competence, which can be used for the purpose of preventing, detecting, punishing, and eradicating public corruption?

There is an extensive system for obtaining civil society input into the decision-making process. With regard to trade-related issues, for example, there are opportunities for comment in response to Federal Register notices and informal briefings. In terms of the advisory committee process noted in the Government's response, there have been numerous recommendations from the GAO and from civil society for improving the system and broadening participation. A 2003 Report[16] of the Trade and Environment Policy Advisory Committee took notice of a number of ways in which civil society can provide its input into the trade policy dialogue. However, it noted that these opportunities are not well known and recommended USTR make greater efforts to "increase the public availability of information about how to communicate with it effectively." Its recommendations included making greater use of the internet, identifying key personnel and congressional trade-related and oversight committees and providing greater feedback to civil society to demonstrate whether its views have been taken into account.

A 2002 GAO Report[17] comments on the important role that the advisory committee system plays in the formulation of trade policy. However, it notes three areas where the system needs improvement: 1) holding consultations in a timely manner; 2) providing more meaningful opportunities for input with access to key documents and time to assess them; and 3) increasing the flow of information to Congress to ensure that advice is being taken into account. It also noted that "the structure and composition of the committee system have not been fully updated to reflect changes in the U.S. economy and U.S. trade policy." In particular, it cited the fact that "nonbusiness stakeholders" feel "marginalized in the system as a whole because they are permitted membership on relatively few committees and perceive difficulty ensuring that their views get serious consideration." These issues need to be addressed.

Beyond the area of trade policy, not every agency has created advisory committees. Consideration should be given to the creation of such committees in all agencies to provide adequate channels for civil society input to policy and decision-making.

4. Mechanisms to Encourage Active Participation in Public Administration

a. Are there mechanisms in your country to facilitate, promote, and obtain the active participation of civil society and non-governmental organizations in the process of public

[16] Report to the USTR from the Trade and Environment Policy Advisory Committee on Civil Society Input Into Trade Decisions, 2003.
[17] GAO-02-876 International Trade

policy making and decision making, in order to meet the purposes of preventing, detecting, punishing and eradicating acts of public corruption?

As stated in the U.S. Government response, all branches of the U.S. government have procedural requirements in place for open meetings and hearings, and for providing the public the opportunity to comment on proposed laws and regulations. In the legislative context however, civil society organizations have raised concerns that Congressional conference committees[18] are holding fewer open meetings, sometimes shutting out public participation at critical points and tilting policy-making in favor of those who have access to congressional staff without public debate[19]. The conference committee should meet in open session before compromise language has been agreed, thus allowing public access to the proceedings and the opportunity to comment.

CHAPTER FIVE
ASSISTANCE AND COOPERATION

1. Mutual Assistance

a. Briefly describe your country's legal framework, if any, that establishes mechanisms for mutual assistance in processing requests from foreign States that seek assistance in the investigation and prosecution of acts of corruption.

The U.S. government response is complete, although it is worth noting that the Federal Rules of Criminal Procedure, unlike the Federal Rules of Civil Procedure, do not provide for the issuance of requests for judicial assistance. As a result, under Federal Rule of Criminal Procedure 57, judges may regulate judicial assistance in any manner not incompatible with the rules, which can result in great inconsistency of practice.

The United States is to be commended not only for its ratification of the Inter-American Convention on Mutual Assistance in Criminal Matters and numerous bilateral treaties to facilitate mutual assistance, but also for its efforts to promote improved mutual legal assistance mechanisms in the Summit of the Americas, Organization of American States, and other international fora. Such treaties and mechanisms are the only way to speed what is, without special arrangements, an incredibly slow and burdensome process.

b. Has your government presented or received requests for mutual assistance under the Convention?

Even where mutual assistance is provided for by treaty, such as the Inter-American Convention Against Corruption (IACAC), when no specific mutual legal assistance treaty ("MLAT") is in force between the requesting and requested state, U.S. law obliges mutual assistance to be performed either under the Hague Convention or through the diplomatic process of letters

[18] When the House and the Senate have approved differing versions of the same piece of legislation, a "conference committee," made up of members from both chambers, is convened to negotiate a common piece of legislation that both the House and the Senate can approve. The resulting negotiated bill is issued in a "conference report."
[19] See "Common Cause supports procedural reforms to assure all voices are heard in Congress", July 14, 2004 at http://www.commoncause.org/site/apps/nl/content2.asp?c=dkLNK1MQIwG&b=194883&ct=225160.

rogatory. Both of those processes, particularly letters rogatory, are difficult and slow. The Department of State advises on its website that, "Letters rogatory are a time consuming, cumbersome process and should not be utilized unless there are no other options available." Letters rogatory are complex to submit and there is no guarantee that a judge will respond favorably, as process based on letters rogatory is a matter of comity, not of international obligation.

Letters rogatory are handled by the Office of Overseas Citizen Services at the Department of State. Coordination between that office and the Office of International Affairs at the Department of Justice, the Central Authority for most, if not all, of the mutual legal assistance treaties and the Central Authority under the IACAC, could be much improved. The U.S. should take efforts to ensure that coordination among offices involved in mutual legal assistance is effective and that the processing of requests is streamlined to the degree possible.

2. Mutual Technical Cooperation

a. Does your country have mechanisms to permit the widest measure of mutual technical cooperation with other States Parties regarding the most effective ways and means of preventing, detecting, investigating, and punishing acts of public corruption, including the exchange of experiences by way of agreements and meetings between competent bodies and institutions, and the sharing of knowledge on methods and procedures for citizen participation in the fight against corruption?

The United States response focuses largely on anticorruption assistance, rather than anticorruption cooperation more broadly. Addressing, then, assistance first: U.S. efforts to provide training to a wide range of nations through Department of Justice (DOJ) programs such as the International Criminal Investigative Training Assistance Program (ICITAP), the Overseas Prosecutorial Development, Assistance and Training (OPDAT) and other training are commendable. In many areas, the United States has far greater experience than other nations and the willingness to share that expertise is to be applauded. However, ICITAP and OPDAT are not without their flaws. Primary among them is the difficulty many trainers have in recognizing that they are training foreign law enforcement, which operates not only under different laws and procedures but is, more often than not, operating under a completely different legal system altogether. This significantly reduces the value and impact of the training.

On the technical cooperation side, the U.S. has been a world leader in promoting participation in multilateral and bilateral efforts to improve the ability of law enforcement and prosecutors to reach across international borders. The U.S. response mentions in particular the creation of the Network of Government Institutions of Public Ethics in the Americas, which enables a range of consultation and information sharing among public ethics officers. In addition, the United States is an active participant in and promoter of the Egmont Group, an international association of financial intelligence units. The efforts of Egmont to foster networks among financial law enforcement are critical to identifying and repatriating funds stolen by the corrupt. In addition to the mechanisms in the OAS and under the IACAC, the U.S. also participates in numerous other fora to foster cooperation on anticorruption efforts around the world, including the Lyon-Roma Group, the Organization for Economic Cooperation and Development, the Group of States

Against Corruption, the Global Forum on Fighting Corruption and Safeguarding Integrity, and many more. This sustained dedication to international cooperation is among the most positive aspects of U.S. efforts in the anticorruption arena, particularly as corruption becomes ever more a transnational crime.

The U.S. should provide more technical assistance to countries attempting to seek extradition or other legal process, such as asset forfeiture, in the United States. This will become of particular importance once the UN Convention on Corruption enters into force. Meeting U.S. standards in such cases has been difficult for many countries and the dearth of requests for cooperation reported by the U.S. in its response may be a result of foreign prosecutors' difficulty in navigating the U.S. system. The U.S. should evaluate the effectiveness of ICITAP and OPDAT programs to identify areas in which they can be improved, expanded, or better tailored to the particular needs of the individuals receiving training, including familiarizing trainers with the local legal system and laws in advance.

CHAPTER SIX

CENTRAL AUTHORITIES

1. Designation of Central Authorities

a. Has your country designated a central authority for the purposes of channeling requests for mutual assistance as provided under the Convention? b. Has your country designated a central authority for the purposes of channeling requests for mutual technical cooperation as provided under the Convention?

The U.S. response lists the Office of International Affairs of the Department of Justice (OIA) as the Central Authority for mutual assistance matters. However, it should be noted that a large amount of mutual legal assistance is handled by letters rogatory through the Office of Overseas Citizen Services in the Bureau of Consular Affairs at the Department of State (OCS). It is important that, although OIA is designated as the Central Authority, there is adequate and effective cooperation with OCS.

On the other hand, the U.S. response does not designate a Central Authority for technical cooperation. This is inefficient and problematic for other states parties in a number of respects, particularly given the difficulty in navigating the complexity of the federal government. The absence of a central authority creates difficulties for civil society as well as other governments in anticorruption efforts. While the U.S. government has a commendable track record of accomplishments in negotiating numerous anticorruption agreements and initiatives, it is difficult for civil society to determine how the various agencies share and coordinate responsibilities. The United States should identify an office to which requests for technical assistance and information can be directed. Although the questionnaire calls for identification of an individual (for both this and mutual assistance matters), this is impractical in the United States given the frequent movement of personnel. Identification of a position should be sufficient.

2. Operation of Central Authorities

a. Does the central authority have the necessary human, financial and technical resources to enable it to properly make and receive requests for assistance and cooperation under the Convention?

The U.S. government response is accurate, although it omits the significant portion of work covered by the Office of Overseas Citizen Services. OIA is often accused of being slow to respond and having occasionally poor coordination with other offices such as OCS and the Executive Office for United States Attorneys. OIA should work to improve coordination and awareness by U.S. Attorneys' Offices of their efforts and the availability and obligations of the Convention and to streamline cooperation with OCS.

Notably, the U.S. response does not discuss the operation of the Permanent Mission to the Organization of American States as the clearinghouse for technical cooperation requests. While it is perhaps an appropriate starting point for technical assistance, it should not be designated as a contact point for technical cooperation as a whole, to which it is unsuited. The U.S. Permanent Mission to the Organization of American States is essentially an embassy, staffed by career diplomats and political appointees who rotate in and out of their positions every two to four years and have neither the training nor the expertise to appropriately handle technical cooperation requests and long-term institutional development regarding corruption issues.

The United States should designate a Central Authority, or at least a point of contact, for technical cooperation that has appropriate expertise to appropriately handle requests and institutional development. OIA could appropriately fill this role, provided it has the requisite resources. Other possibilities include the Office of Crime Programs in the Bureau of International Narcotics and Law Enforcement Affairs at the Department of State, the Office of Government Relations and Special Projects in the Office of Government Ethics, or the Office of Strategic Planning and External Liaison of the Government Accountability Office.

For technical assistance matters, as opposed to technical cooperation more broadly, the points of contact might better be situated in the Bureau for Western Hemisphere Affairs at the Department of State or the Democracy and Governance Office of the U.S. Agency for International Development than the Permanent Mission to the Organization of American States.