

GAO

Testimony

Before the Subcommittee on Treasury, Postal Service and
General Government
Committee on Appropriations
House of Representatives

For Release on Delivery
Expected at
9:30 a.m. EDT
Friday
October 22, 1993

PERSONNEL PRACTICES

**Retroactive Appointments and Pay
Adjustments in the Executive Office
of the President**

Statement of
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058363/150138

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in the Executive office of the President

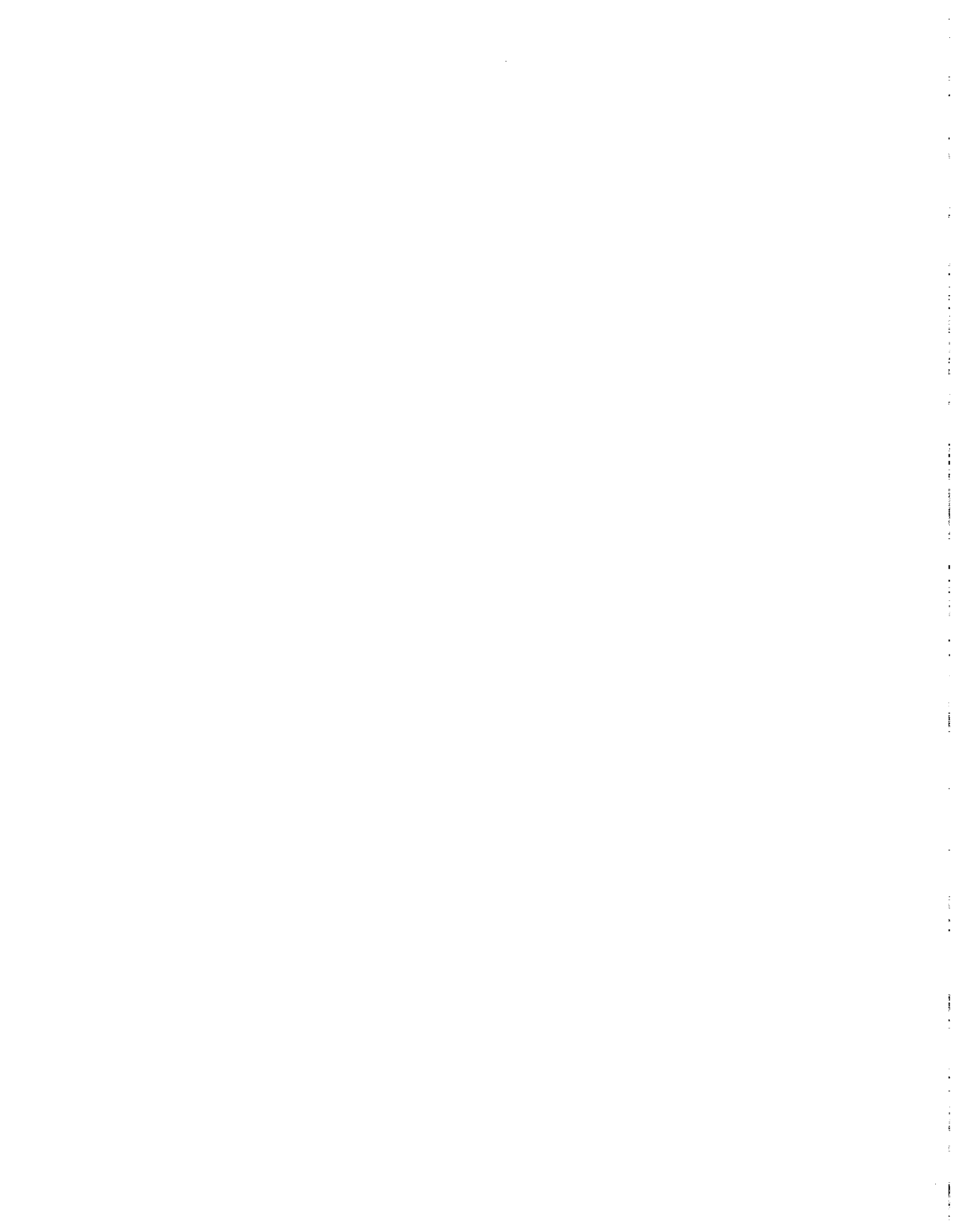
Summary of Statement by
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Earlier this year, allegations surfaced concerning the backdating of White House appointments and salary adjustments. In response to a request from Representatives Lightfoot, Istook, and Wolf of the House Appropriations Subcommittee on Treasury, Postal Service and General Government, GAO investigated these and other personnel issues.

Two hundred and thirty White House appointments and 22 salary increases were made retroactively during the period from January 20 through April 24, 1993. Although retroactive, these appointments and salary adjustments were legal. With respect to the retroactive appointments, GAO has long held that a valid appointment is effective from the date the authorized appointing official approves the appointment and the employee performs work under supervision. With respect to the retroactive salary increases, GAO decisions and case law generally hold that such personnel actions may be made retroactively only under certain limited exceptions, such as clerical or administrative errors. These exceptions covered 2 of the 22 cases in question.

The remaining 20 retroactive salary increases involved employees appointed under title 3 of the U.S. Code, the personnel law which governs many appointments in the White House. Title 3 gives the President authority to set pay for title 3 employees "without regard to any other provision of law regulating the employment or compensation of persons in the Government service." GAO found no basis to conclude that the salary increases covered by this authority were illegal. However, since this interpretation of the law appears to leave room for abuse, GAO believes that the Congress may wish to consider amending title 3 to provide greater specificity as to the intended scope of the President's authority with respect to retroactive pay adjustments.

GAO also identified several irregular personnel and pay actions, including the double payment of 25 employees by the White House and the Presidential transition team, the improper advancement of annual leave, the retention of an employee on the payroll after the expiration of a temporary appointment, and several salary overpayments.



Mr. Chairman, Representative Lightfoot, and Members of the Subcommittee:

We are pleased to be here this morning to provide information about our review of certain personnel and pay actions in the Executive Office of the President (EOP). You asked us to summarize our findings, with particular emphasis on the basis for our conclusions about the propriety of the actions.

BACKGROUND

As you know, in April of this year, Representatives Lightfoot, Istook, and Wolf of this Subcommittee asked us to investigate certain allegations reported to them concerning the backdating of White House appointments and salary adjustments. We provided some preliminary information in May, prior to this Subcommittee's markup of the White House's fiscal year 1993 supplemental appropriation request. We continued to inquire into these and other related matters, including whether White House officials required to file financial disclosure reports had done so in a timely manner, and whether certain White House employees had received compensation from the Presidential transition during the same period they were employed in the White House.

We issued a report on the results of our work on September 9, 1993.¹ On September 14, 1993, Representative Lightfoot provided 17 additional questions related to our work. We responded to those questions by correspondence dated October 8, 1993.²

The personnel actions in question were taken under one of two statutory employment authorizations. Some involved appointments or pay adjustments under title 5, U.S. Code, the personnel law which governs most appointments in the executive branch and contains specific requirements relating to the pay and position classification of employees. Most of the appointments and pay adjustments we examined involved positions authorized under title 3, U.S. Code. While title 3 contains certain limits on the numbers of appointments that are authorized at upper salary levels, it also provides in pertinent part as follows:

"(T)he President is authorized to appoint and fix the pay of employees in the White House Office without regard to any other provision of law regulating the employment or compensation of persons in the Government service."

¹Personnel Practices: Retroactive Appointments and Pay Adjustments in the Executive Office of the President, (GAO/GGD-93-148, Sept. 9, 1993).

²EOP Personnel Practices, (GAO/GGD-94-16R, Oct. 8, 1993).

We emphasize the underscored language because it is central to our analysis of the personnel actions in question.

As agreed with the requesters' staffs, we reviewed all of the appointments and salary adjustments that were effective between the start of the Administration on January 20, 1993, and the end of the ninth 2-week pay period in the current EOP payroll year, which was April 24, 1993.³ We also reviewed certain personnel actions outside that time frame which came to our attention during the course of our work.

RETROACTIVE PERSONNEL ACTIONS

We found that a number of personnel actions, including appointments and salary adjustments, were made retroactive to dates from one to several pay periods earlier than the dates on which the actions were processed. The 230 retroactive appointments we identified involved individuals in a variety of EOP offices and at varying salary levels.

The 30 retroactive salary adjustments--22 increases and 8 decreases--also affected individuals from a variety of White House offices. We discussed all of the retroactive salary adjustments with White House officials and obtained pertinent documentation which supported their explanations for these adjustments. It should be noted that the retroactive payments we examined involved relatively modest amounts of money. The largest involved an additional payment of \$3,720, while most were less than \$400.

Under title 5, retroactive appointments and salary adjustments occasionally occur in executive branch agencies, and we have issued a number of decisions which set forth the limited circumstances in which we believe retroactive actions are appropriate. With respect to retroactive appointments, we have long held that a valid appointment is effective from the date the authorized appointing official approves the appointment and the employee performs work under supervision. When an employee begins work, based on a decision by an appointing official, and performs his or her duties in good faith without fraud for a period prior to the implementation of his or her appointment in an agency's personnel system, the employee is considered to be a de facto employee and may be paid for the services performed. We found that both the title 5 and title 3 appointments we reviewed met this basic test.

³In total we examined 611 appointments effective during this period, of which 230 were retroactive, that is, made effective on a date at least one pay period earlier than the date of the action. We also examined 69 instances of salary increases or decreases, of which 30 were retroactive.

With respect to salary increases, our decisions and numerous court cases, mostly involving title 5 employees, have generally held that a personnel action such as a salary increase may not be made retroactive. Certain limited exceptions have been identified that would warrant payment of back wages under the Back Pay Act (5 U.S.C. 5596 (1988)). These exceptions involve clerical or administrative errors that (1) prevented an approved personnel action from taking effect as originally intended, (2) deprived an employee of a right granted by statute or regulation, or (3) would result in the failure to carry out a nondiscretionary administrative regulation or policy. Both of the retroactive salary increases granted to title 5 employees that we examined were found to be permissible payments of back pay under these general exceptions.

The remaining 20 retroactive salary increases affected employees appointed under title 3.⁴ No previous GAO decisions or court cases have been issued concerning salary adjustments for title 3 employees. White House Legal Counsel officials and the Justice Department's Office of Legal Counsel argue that the President's employment authority under title 3 is very broad, and that the specific cases we reviewed were within the scope of that authority. Although these actions may not have been considered proper under title 5, their legality must be judged under the broad authority of title 3 which, as noted above, authorizes the President to appoint and fix the pay of certain employees in the White House without regard to any other provision of law regulating the employment or compensation of persons in the Government service. We concluded, based on the broad language of the statute and its legislative history, that such retroactive pay increases were legal.

However, we continue to be concerned that the White House and Justice counsels' argument that the President has "absolute authority" within the broad authority of title 3, and need not justify his actions provided that the employees worked and the total numbers of appointments and the pay caps of title 3 are not violated, may not be consistent with congressional wishes and could lead to the statutory authority conceivably being used in unreasonable and abusive ways. For those reasons, despite the findings in the immediate cases that the actions taken were within the President's authority and hence legally proper, we believe that the Congress may wish to consider amending title 3 to provide greater specificity as to the intended scope of the President's authority with respect to retroactive pay adjustments.

⁴The remaining 8 retroactive salary adjustments were salary decreases. Our examination of the individual cases revealed no basis to question those actions.

TIMELINESS OF FINANCIAL DISCLOSURE

For the 147 employees identified by EOP who had a public financial disclosure report filing requirement under the conflict of interest laws⁵, we found that 133 of the employees filed their financial disclosure forms within the required time frame. Of the 14 who did not, 11 were granted a waiver from the requirement and 2 paid the late filing penalty. The Office of Government Ethics is currently considering a waiver request for the remaining individual.

DUAL PAYMENTS AND OTHER PERSONNEL MATTERS

We also determined whether certain White House employees whose appointments were effective on or after January 20, 1993, the first day of the new Administration, had also received a salary payment from the Presidential transition accounts for the period between January 20 (a Wednesday) and February 20, which was the end of the final transition payroll period. We confirmed that 25 employees appeared to have overlapping salary periods and provided that information and estimates of the dual payment amounts to General Services Administration (GSA) and White House officials for their action.

At the time we completed our review, 10 of these employees had refunded amounts to the GSA, which administered the transition payroll. Since then, the White House has determined that the other 15 employees were also overpaid. On September 27, 1993, the fund manager for the Clinton/Gore transition staff asked GSA to take the necessary action to collect the overpayments from these 15 employees and the remaining amounts due from 9 of the 10 employees who had made previous repayments. GSA is currently in the process of determining the exact amounts to bill each of the 24 employees.

Finally, in the course of our work, we noted several other personnel related matters affecting 11 employees that we believed warranted further clarification or action. These matters included improper advancement of annual leave, retention of an employee on the payroll after the expiration of the temporary appointment, and several cases of salary overpayments resulting from confusion about effective dates of appointments. EOP officials either took or are in the process of taking corrective actions in those cases.

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Mr. Chairman, the details of our findings can be found in our report. This concludes my statement, and I would be happy to respond to any questions that you or your colleagues may have.

⁵Title I of the Ethics in Government Act of 1978, as amended.

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