

Overall Score:

85 - Strong

Legal Framework Score:

90 - Strong

Actual Implementation Score:

79 - Moderate

Category 1. Non-Governmental Organizations, Public
Information and Media

1.1. ⁸⁷Anti-Corruption Non-Governmental Organizations

1. Are anti-corruption/good governance NGOs legally protected?

67

01a. In law, citizens have a right to form NGOs focused on anti-corruption or good governance.

Yes | No

Comments:

The First Amendment of the U.S. Constitution protects freedom of religion, speech, press, assembly and petition of the government for redress of grievances. Further, there are innumerable NGOs that actively exercise their right to form organizations that conduct work in support of anti-corruption or good governance.

For instance, the Government Accountability Project, Citizens for Responsibility and Ethics, Sunlight Foundation and OMB Watch represent active organizations focused on anti-corruption and good governance in the United States.

References:

Law: U.S. Constitution, Bill of Rights, First Amendment (1791). <http://topics.law.cornell.edu/constitution/billofrights>

Yes: A YES score is earned when freedom to assemble into groups promoting good governance or anti-corruption is protected by law, regardless of political ideology, religion or objectives. Groups with a history of violence or terrorism (within last ten years) may be banned. Groups sympathetic to or related to banned groups must be allowed if they have no history of violence. Non-governmental organizations (NGOs) are defined here as any organized group that is separate from the state working on issues of governance, transparency, and/or anti-corruption.

No: A NO score is earned when any single non-violent group is legally prohibited from organizing to promote good governance or anti-corruption. These groups may include non-violent separatist groups, political parties or religious groups.

01b. In law, anti-corruption/good governance NGOs are free to accept funding from any foreign or domestic sources.

Yes | No

Comments:

No law restricts NGOs from accepting funding from any foreign or domestic sources.

Although no law restricts foreign agents from funding U.S. NGOs, the Foreign Agents Registration Act (FARA) places some obligations on foreign principals. It requires people acting as agents of foreign principals in a political or quasi-political capacity to make periodic public disclosure of their relationship with the foreign principal, including activities, receipts and disbursements.

However, in practice, the enforcement of FARA is perhaps less than effective. As Jahad Atieh suggests, "Loopholes in FARA have allowed foreign lobbyists to unduly influence U.S. foreign and domestic policy."

References:

Law: No law restricts NGOs from accepting funding from any foreign or domestic sources.

Source: Internal Revenue Service information, NGO/charitable organization tax exemption eligibility, Section 501(c)(3). <http://www.irs.gov/charities/charitable/article/0,,id=96099,00.html>

Source: Foreign Agents Registration Act (FARA). <http://www.fara.gov/>

Source: Jahad Atieh, University of Pennsylvania Journal of International Law, Volume 31, Issue 4, p. 1051. "Foreign Agents: Updating FARA to Protect American Democracy," November 17, 2010. <http://www.law.upenn.edu/journals/jil/articles/volume31/issue4/Atieh31U.Pa.J.Int%27IL.1051%282010%29.pdf>

Yes: A YES score is earned if anti-corruption/good governance NGOs face no legal or regulatory restrictions to raise or accept funds from any foreign or domestic sources. A YES score may still be earned if funds from groups with a history of violence or terrorism (within last ten years) are banned.

No: A NO score is earned if there any formal legal or regulatory bans on foreign or domestic funding sources for NGOs focused on anti-corruption or good governance.

01c. In law, anti-corruption/good governance NGOs are required to disclose their sources of funding.

Yes | No

Comments:

No law requires NGOs (organizations with 501(c)(3) or 501(c)(4) status) to disclose their funding sources.

Although no law mandates NGO disclosure of funding sources, some disclosure requirements exist. For example, most federally tax-exempt organizations, with the exception of churches and state institutions, and all 501(c)(3) private foundations must file IRS Form 990. Form 990 is an annual reporting return that provides information publicly on the filing organization's finances. Further, NGOs that do not have nonprofit tax exemption status may be required to follow other disclosure requirements.

Finally, some NGOs seem to be making funding sources more transparent through internal disclosure requirements. For example, the executive director of Transparency International-USA (TI-USA), Nancy Boswell, resigned from her position in March 2011. She left after criticism of the anti-corruption NGO's fundraising and grant management. TI-USA also had been criticized for being slow to comply with a request from the Berlin secretariat at TI headquarters to make public how much money it received from corporate donors, some of which had been the subject of international bribery investigations. The organization's secretariat had put pressure on TI-USA to be more transparent about its funding, and it began publishing specific details of corporate donations on its website in December 2010.

References:

NGOs with 501(c)(3) or 501(c)(4) status are not required to disclose their funding sources. <http://www.irs.gov/charities/charitable/article/0,,id=96099,00.html>

Website Guide Star, Help on Form 990. <http://www2.guidestar.org/rxg/help/faqs/form-990/index.aspx>.

Transparency International-USA Chief Announces Departure After Tensions Boil (March 16, 2011). <http://www.mainjustice.com/justanticorruption/2011/03/16/transparency-international-usa-chief-announces-departure-after-tensions-boil/>.

Head of Transparency International USA Resigns (March 22, 2011). <http://www.trust.org/trustlaw/news/head-of-transparency-international-usa-resigns/>

Yes: A YES score is earned if anti-corruption/good governance NGOs are required to publicly disclose their sources of funding.

No: A NO score is earned if no such public disclosure requirement exists.

2. Are anti-corruption/good governance NGOs able to operate freely?

92

02a. In practice, the government does not create barriers to the organization of new anti-corruption/good governance NGOs.

100 | 75 | 50 | 25 | 0

Comments:

In practice, innumerable anti-corruption/good governance NGOs freely operate and have formed without government barriers. The environment is favorable to diverse and adverse ideas.

Newly formed NGOs (and initiatives) within the 2010-2011 time frame include Government In The Lab and Symposium on Government Oversight.

References:

Source 1: ABA Global Anti-Corruption Initiatives Task Force. http://www.americanbar.org/groups/criminal_justice/pages/anti_corruptionlinks.html

Source 2: Project on Government Oversight. <http://www.pogo.org/>

Source 3: Government Accountability Project. <http://www.whistleblower.org/>

Source 4: The 9/11 Truth Movement. <http://www.911truth.org/>

Source 5: The Birthers. <http://www.birthers.org/>

Source 6: Partnership for Public Service. <http://www.ourpublicservice.org/OPS/>

Source 7: National Whistleblowers Center. <http://www.whistleblowers.org/>

Source 8: OpenTheGovernment.org. <http://www.openthegovernment.org>

Source 9: Sunlight Foundation. <http://sunlightfoundation.com/>

Source 10: Government In The Lab. <http://govinthelab.org>

Source 11: Symposium on Government Oversight. <http://gwujeeel.wordpress.com/2011/04/03/symposium-panel-new-approaches-to-government-oversight/>

Source 12: Citizens for Responsibility and Ethics in Washington. <http://www.citizensforethics.org/>

Source 13: Center for Responsive Politics. <http://www.opensecrets.org/>

Source 14: Phone Interview on August 16, 2011, with Jim McGann, senior fellow at the Foreign Policy Research Institute and director of Think Tanks and Civil Societies Program, assistant director of the International Relations Program at the University of Pennsylvania

100: NGOs focused on promoting good governance or anti-corruption can freely organize with little to no interaction with the government, other than voluntary registration.

75:

50: NGOs focused on promoting good governance or anti-corruption must go through formal steps to form, requiring interaction with the state such as licenses or registration. Formation is possible, though there is some burden on the NGO. Some unofficial barriers, such as harassment of minority groups, may occur.

25:

0: Other than pro-government groups, NGOs focused on promoting good governance or anti-corruption are effectively prohibited, either by official requirements or by unofficial means, such as intimidation or fear.

02b. In practice, anti-corruption/good governance NGOs actively engage in the political and policymaking process.

100 | **75** | 50 | 25 | 0

Comments:

In practice, anti-corruption/good governance NGOs actively engage in the political and policy-making process.

James G. McGann, Ph.D., senior fellow at the Foreign Policy Research Institute and director of Think Tanks and Civil Societies Program, as well as professor at the University of Pennsylvania, indicated that NGOs have had a "huge, significant role" in politics for the last 25 years. In his view, a dramatic increase of NGOs on both the right and the left is related to the decentralized nature of the political system. Non-state actors have more points of access and influence over the political process, creating an interdependence among the various institutions that influence policy.

NGOs themselves affirm this role. For example, Global Governance Watch/NGO Watch is entirely devoted to encouraging transparency and accountability of such NGOs. Their website states, "NGOs have positioned themselves as advocates of global governance and shapers of corporate and government policy."

References:

Source 1: Global Governance Watch/NGO Watch. http://www.globalgovernancewatch.org/ngo_watch/

Source 2: Agata Stachowicz-Stanusch, ed. Organizational Immunity to Corruption: Building Theoretical and Research Foundations. P. 197. (May 2010).

Source 3: Phone Interview on August 16, 2011, with James G. McGann, Ph.D., senior fellow at the Foreign Policy Research Institute and director of Think Tanks and Civil Societies Program; professor at the University of Pennsylvania.

Source 3: James G. McGann, Ph.D., senior fellow at the Foreign Policy Research Institute and director of Think Tanks and Civil Societies Program; professor at the University of Pennsylvania. Article: "NGO Pushback: The Use of Legal and Extralegal Means to Constrain Think Tanks and Civil Society Organizations." http://repository.upenn.edu/cgi/viewcontent.cgi?article=1002&context=think_tanks&sei-redir=1#search=%22U.S.%20NGO%20Civil%20society%20organization%20ph.d%22

Source 4: Gala Dinner Celebrating the U.S.-Islamic World Forum. Remarks: Secretary of State Hillary Rodham Clinton, Hosted by the Brookings Institution and the State of Qatar, "Gala Dinner Celebrating the U.S.-Islamic World Forum," April 12, 2011. <http://www.state.gov/secretary/rm/2011/04/160642.htm>.

100: Non-governmental organizations focused on anti-corruption or good governance are an essential component of the political process. NGOs provide widely valued insights and have political power. Those NGOs play a leading role in shaping public opinion on political matters.

75:

50: Anti-corruption/good governance NGOs are active, but may not be relevant to political decisions or the policymaking process. Those NGOs are willing to articulate opinions on political matters, but have little access to decision makers. They have some influence over public opinion, but considerably less than political figures.

25:

0: Anti-corruption/good governance NGOs are effectively prohibited from engaging in the political process. Those NGOs are unwilling to take positions on political issues. They are not relevant to changes in public opinion.

02c. In practice, no anti-corruption/good governance NGOs have been shut down by the government for their work on corruption-related issues during the study period.

Yes | No

Comments:

There are no reports of anti-corruption/good governance NGOs that have been shut down by the U.S. government for their work on corruption-related issues during the study period.

References:

Source 1: Internet search revealed no indication that anti-corruption/good governance NGOs have been shut down for their work on corruption-related issues.

Source 2: Phone Interview, August 16, 2011. James G. McGann, Ph.D., senior fellow at the Foreign Policy Research Institute and director at Think Tanks and Civil Societies Program; professor at the University of Pennsylvania.

Yes: A YES score is earned if there were no NGOs shut down by the government or forced to cease operations because of their work on corruption-related issues during the study period. YES is a positive score.

No: A NO score is earned if any NGO has been effectively shut down by the government or forced to cease operations because of its work on corruption-related issues during the study period. The causal relationship between the cessation of operations and the NGO's work may not be explicit, however the burden of proof here is low. If it seems likely that the NGO was forced to cease operations due to its work, then the indicator is scored as a NO. Corruption is defined broadly to include any abuses of power, not just the passing of bribes.

3. Are anti-corruption/good governance NGO activists safe when working on corruption issues?

100

03a. In practice, in the past year, no anti-corruption/good governance NGO activists working on corruption issues have been imprisoned.

Yes | No

Comments:

As of September 2011, no reports indicate that anti-corruption/good governance NGO activists working on corruption issues have been imprisoned.

Of note, the RSF Washington director distinguishes inappropriate action of local law enforcement officials from federal government policy and practices, of which the former do occur in the United States.

References:

Source 1: Search of major news sources and corruption and human rights indices, including Freedom House, RSF, Transparency International, Human Rights Watch.

Source 2: Person Interview on August 18, 2011, with Clothilde le Coz, journalist and Washington director of Reporters Without Borders.

Source 3: Phone Interview, August 16, 2011, with James G. McGann, Ph.D., senior fellow at the Foreign Policy Research Institute and director at Think Tanks and Civil Societies Program; professor at the University of Pennsylvania.

Yes: A YES score is earned if there were no NGO activists imprisoned because of their work covering corruption. YES is a positive score.

No: A NO score is earned if any activist was jailed in relation to work covering corruption. The causal relationship between the official charges and the person's work may not be explicit, however the burden of proof here is low. If it seems likely that the person was imprisoned due to his or her work, then the indicator is scored as a NO. Corruption is defined broadly to include any abuses of power, not just the passing of bribes. "Imprisoned" is defined here as detention by the government lasting more than 24 hours.

03b. In practice, in the past year, no anti-corruption/good governance NGO activists working on corruption issues have been physically harmed.

Yes | No

Comments:

As of September 2011, no reports indicate that anti-corruption/good governance NGO activists working on corruption issues have been physically harmed in the United States.

References:

Source 1: Search of major news sources and corruption and human rights Indices, including Freedom House, RSF, Transparency International, Human Rights Watch.

Source 2: Person Interview on August 18, 2011, with Clothilde le Coz, journalist and Washington director of Reporters Without Borders.

Source 3: Phone Interview, August 16, 2011, with James G. McGann, Ph.D., senior fellow at the Foreign Policy Research Institute and director at Think Tanks and Civil Societies Program; professor at the University of Pennsylvania.

Yes: A YES score is earned if there were no documented cases of NGO activists covering corruption being assaulted in the specific study period. A YES score can be earned if there was an attack but it was clearly unrelated to the activist's work. YES is a positive score.

No: A NO score is earned if there were any documented cases during the study period of assault to an activist who covers corruption. Corruption is defined broadly to include any abuses of power, not just the passing of bribes.

03c. In practice, in the past year, no anti-corruption/good governance NGO activists working on corruption issues have been killed.

Yes | No

Comments:

As of September 2011, no reports indicate that anti-corruption/good governance NGO activists working on corruption issues have been killed in the U.S.

References:

Source 1: Search of major news sources and corruption and human rights Indices, including Freedom House, RSF, Transparency International, Human Rights Watch.

Source 2: Person Interview on August 18, 2011, with Clothilde le Coz, journalist and Washington director of Reporters Without Borders.

Source 3: Phone Interview, August 16, 2011, with James G. McGann, Ph.D., senior fellow at the Foreign Policy Research Institute and director at Think Tanks and Civil Societies Program; professor at the University of Pennsylvania.

Yes: A YES score is earned if there were no documented cases of NGO activists being killed because of their work covering corruption in the specific study period. YES is a positive score.

No: A NO score is earned if there were any documented cases during the study period where a person was killed related to a corruption trial, scandal or investigation. The relationship between a mysterious death and an individual's history may not be clear, however the burden of proof here is low. If it is reasonable that a person was killed in relation to his or her work on corruption issues, then the indicator is scored as a NO. Corruption is defined broadly to include any abuses of power, not just the passing of bribes.

4. Can citizens organize into trade unions?

100

04a. In law, citizens have a right to organize into trade unions.

Yes | No

Comments:

The Wagner Act (1935) ensures that citizens have a right to organize into trade unions by “encouraging the practice and procedure of collective bargaining and by protecting the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection.”

The Taft-Hartley Act amended the Wagner Act by narrowing the rights of labor organizations and employers/employees in the interest of promoting commerce and the general welfare, health and safety (such as national emergencies). Despite these limitations, citizens still enjoy rights to form trade labor unions.

References:

Law 1: National Labor Relations Act, “Wagner Act,” 29 U.S.C. §§151-169 (1935). http://www.law.cornell.edu/uscode/129/usc_sup_01_29_10_7_20_II.html

Law 2: Law 1 was amended by the Labor Management Relations Act, “Taft-Hartley Act,” 29 U.S.C. §§141-197 (1947). <http://www.law.cornell.edu/uscode/29/141.html>

Yes: A YES score is earned when trade unions are allowed by law, regardless of political ideology, religion or objectives. Groups with a history of violence or terrorism (within last ten years) may be banned. Groups sympathetic to or related to banned groups must be allowed if they have no history of violence.

No: A NO score is earned when any single non-violent trade union is legally prohibited by the government from organizing.

04b. In practice, citizens are able to organize into trade unions.

100 | 75 | 50 | 25 | 0

Comments:

In practice, citizens are able to organize into trade unions, despite recent declines in union membership.

In 2010, the Bureau of Labor Statistics reported that 11.9 percent of wage and salary workers in the U.S. – 14.7 million people – were members of a union. This is a decline in membership, down 612,000 members from the 12.3 percent membership in 2009.

References:

Source 1: Bureau of Labor Statistics, U.S. Department of Labor, “News Release: Union Members – 2010,” January 21, 2011. <http://www.bls.gov/news.release/pdf/union2.pdf>

Source 2: Bloomberg News, "Twitter Bombing the Boss Looms as Worker Right Business Dreads," August 5, 2011. <http://www.bloomberg.com/news/2011-08-05/twitter-bombing-the-boss-looms-as-worker-right-business-dreads.html>

Source 3: Peter Whoriskey and Amy Gardner, The Washington Post, "Wisconsin Shine Spotlight on New Union Battle: Government Workers vs. Taxpayers," February 27, 2011. http://www.washingtonpost.com/business/economy/ohio-wisconsin-shine-spotlight-on-new-union-battle-government-workers-vs-taxpayers/2011/02/25/ABxPOkJ_story_1.html

100: Trade unions are common and are an important part of the political process and political discourse. Trade union organizers have widely understood rights. Trade unions are free from intimidation or violence.

75:

50: Trade unions exist, but are not always relevant to politics or policy debates. Barriers to organizing trade unions exist, such as intimidation at work, or retribution firings. Trade union organizers have some rights, but these may not be commonly known, or are difficult to defend.

25:

0: Trade unions are rare. Significant barriers to organization exist, including direct violence. Rights of union organizers are not widely known, or are ineffective in protecting organizers.

1.2. Media's Ability to Report on Corruption

5. Are media and free speech protected?

100

05a. In law, freedom of the media is guaranteed.

Yes

No

Comments:

The First Amendment of the U.S. Constitution and numerous Supreme Court decisions guarantee freedom of the media, requiring that Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof, or abridging freedom of speech or the press.

References:

Law: U.S. Constitution. Amendment I (1789). <http://www.usconstitution.net/const.html#Am1>

Case Law: Near v. Minnesota (1931). http://www.law.cornell.edu/supct/html/historics/USSC_CR_0283_0697_ZS.html

Case Law: New York Times Co. v. U.S. (1971). http://www.law.cornell.edu/supct/html/historics/USSC_CR_0403_0713_ZS.html

Yes: A YES score is earned if freedom of the press is guaranteed in law, including to all political parties, religions, and ideologies.

No: A NO score is earned if any specific publication relating to government affairs is legally banned, or any general topic is prohibited from publication. Specific restrictions on media regarding privacy or slander are allowed, but not if these amount to legal censorship of a general topic, such as corruption or defense. A NO score is earned if non-government media is prohibited or restricted.

05b. In law, freedom of speech is guaranteed.

Yes | No

Comments:

The First Amendment of the U.S. Constitution and numerous Supreme Court decisions guarantee freedom of the speech, requiring that Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press.

References:

Law: U.S. Constitution. Amendment I (1789). <http://www.usconstitution.net/const.html#Am1>

Case Law: Near v. Minnesota (1931) http://www.law.cornell.edu/supct/html/historics/USSC_CR_0283_0697_ZS.html

Case Law: New York Times Co. v. U.S. (1971) http://www.law.cornell.edu/supct/html/historics/USSC_CR_0403_0713_ZS.html

Yes: A YES score is earned if freedom of individual speech is guaranteed in law, including to all political parties, religions, and ideologies.

No: A NO score is earned if any individual speech is legally prohibited, regardless of topic. Specific exceptions for speech linked with a criminal act, such as a prohibition on death threats, are allowed. However, any non-specific prohibition earns a NO score.

6. Are citizens able to form print media entities?

100

06a. In practice, the government does not create barriers to form a print media entity.

100 | 75 | 50 | 25 | 0

Comments:

The government does not create barriers to form a print media entity. For instance, no license is needed to form a print media entity. In further support, Freedom House labeled the United States as “free” and ranked it 17 out of 196 countries.

References:

Source 1: Freedom House’s “Freedom of the Press 2011” Report, May 02, 2011. <http://freedomhouse.org/images/File/fop/2011/FOTP2011MOPF.pdf>.

Source 2: In-person interview on August 18, 2011, with journalist and Reporters Without Borders Washington Director Clothilde Le Coz.

Source 3: Phone Interview on August 22, 2011, with Professor Albert L. May, associate professor of media and public affairs, George Washington University.

100: Print media entities can freely organize with little to no interaction with the government. This score may still be earned if groups or individuals with a history of political violence or terrorism (within last ten years) are banned from forming media entities.

75:

50: Formation of print media groups is possible, though there is some burden on the media group including overly complicated registration or licensing requirements. Some unofficial barriers, such as harassment of minority groups, may occur.

25:

0: Print media groups are effectively prohibited, either by official requirements or by unofficial means, such as intimidation or fear.

06b. In law, where a print media license is necessary, there is an appeals mechanism if a license is denied or revoked.

Yes | No

Comments:

As no print media license is necessary, there is no appeals mechanism.

References:

As no print media license is necessary, there is no appeals mechanism.

Yes: A YES score is earned if there is, in law or in accompanying regulations, a formal process to appeal a denied print media license, including through the courts. A YES score is also earned if no print license is necessary.

No: A NO score is earned if there is no appeal process for print media licenses.

06c. In practice, where necessary, citizens can obtain a print media license within a reasonable time period.

100 | 75 | 50 | 25 | 0

Comments:

No print media license is necessary.

References:

Source 1: In-person interview on August 18, 2011, with journalist and Reporters Without Borders Washington Director Clothilde Le Coz.

100: Licenses are not required or licenses can be obtained within two months.

75:

50: Licensing is required and takes more than two months. Some groups may be delayed up to six months.

25:

0: Licensing takes close to or more than one year for most groups.

06d. In practice, where necessary, citizens can obtain a print media license at a reasonable cost.

100 | 75 | 50 | 25 | 0

Comments:

No print media license is necessary.

References:

Source 1: In-person interview on August 18, 2011, with journalist and Reporters Without Borders Washington Director Clothilde Le Coz.

100: Licenses are not required or can be obtained at minimal cost to the organization. Licenses can be obtained on-line or through the mail.

75:

50: Licenses are required, and impose a financial burden on the organization. Licenses may require a visit to a specific office, such as a regional or national capital.

25:

0: Licenses are required, and impose a major financial burden on the organization. Licensing costs are prohibitive to the organization.

7. Are citizens able to form broadcast (radio and TV) media entities?

63

07a. In practice, the government does not create barriers to form a broadcast (radio and TV) media entity.

100 | 75 | **50** | 25 | 0

Comments:

It seems that the government does create some barriers to forming a broadcast (radio and TV) media entity. The organization of broadcast media entities is heavily dependent on the decisions and actions of the Federal Communications Commission (FCC), an administrative agency in the executive branch of the government. Although the FCC has a reasonably fair distribution system, in practice, it is difficult for new, diverse media entities to form.

As stated by Freedom House in the Map of Press Freedom 2010, "Media ownership concentration is an ongoing concern in the United States. The problem has intensified in recent years following the purchase of media entities, especially television networks, by large corporations with no previous experience in journalism. The FCC regularly considers policies that would lift restrictions on the monopolization of national or local media markets by a limited number of entities, with a particular focus on policies that limit a single corporation's ownership of both television stations and newspapers in a single local market." The distribution system clearly supports market-driven preferences, allocating licenses and license renewals to existing media entities with a stable consumer-base and financial capital.

Angela Campbell, Georgetown University law professor and co-director at the Institute for Public Representation, echoes similar concerns regarding the FCC and media entities. Campbell discussed considerable bureaucracy (time, cost) that creates barriers to forming print/broadcast media. Moreover, Campbell explained that the licenses, which give user rights to a part of the radio frequency spectrum, are limited in number. Thus, because most license-holders simply renew their licenses, new radio/broadcast media entities are rare. Even when the FCC has an open bid process for renewal licenses, it is difficult to compete with existing, proven license holders. Campbell says it is "virtually impossible" to license new entities. Of note, Campbell says this disproportionately affects particular populations, namely women and minorities. The impact has been more pronounced with recent industry practices to consolidate media entities.

Additionally, the FCC is riddled with bureaucratic inefficiencies including confusing processes, outdated regulations and indefinite delay. These issues are only intensifying as technology and media platforms become both more sophisticated and accessible to users.

Finally, financial and technological limits function as a barrier to forming media entities. In Professor Campbell's experience, cost of entry is "substantial."

References:

Source 1: Phone Interview on August 22, 2011, with Professor Albert L. May, associate professor of media and public affairs, George Washington University.

Source 2: Freedom House Map of Press Freedom 2010.

Source 3: In-person interview on August 24, 2011, with Professor Angela Campbell, Georgetown University, professor of law; co-director, Institute for Public Representation.

Source 4: Phone interview on September 22, 2011, with Andy Schwartzman, Media Access Project, senior vice president and policy director.

Source 5: Steven Waldman and the Working Group on Information Needs of Communities, "Information Needs of Communities," June 2011. <http://www.fcc.gov/info-needs-communities>

100: Broadcast media entities can freely organize with little to no interaction with the government. Media groups have equal access to broadcast bandwidth through a reasonably fair distribution system. This score may still be earned if groups or individuals with a history of political violence or terrorism (within last ten years) are banned from forming media entities.

75:

50: Formation of broadcast media groups is possible, though there is some burden on the media group including overly complicated registration or licensing requirements. Some unofficial barriers, such as harassment of minority groups, may occur. Division of broadcast bandwidth is widely viewed to be somewhat unfair.

25:

0: Broadcast media groups are effectively prohibited, either by official requirements or by unofficial means, such as intimidation or fear. This score is appropriate if the division of broadcast bandwidth is widely viewed to be used as a political tool.

07b. In law, where a broadcast (radio and TV) media license is necessary, there is an appeals mechanism if a license is denied or revoked.

Yes | No

Comments:

The U.S. Code Title 47 Section 402(b) grants the Court of Appeals for the D.C. Circuit exclusive jurisdiction to review appeals concerning Federal Communications Commission (FCC) licensing decisions, including granting, denying, modifying or revoking television broadcast licenses. Decisions rendered by the Court of Appeals may be appealed to the U. S. Supreme Court.

The FCC also has its own administrative appeals process.

References:

Law: 47 U.S.C. §402(b). http://www.law.cornell.edu/uscode/47/usc_sec_47_00000402--000-.html

Federal Regulations: 47 C.F.R. Part 1.13. Filing of Petitions for Review and Notices of Appeals of Commission Orders. http://www.access.gpo.gov/nara/cfr/waisidx_04/47cfr1_04.html

Source 1: Federal Communications Commission, Agency Regulations. <http://www.fcc.gov/business-licensing>

Source 2: U.S. Court of Appeals for the Third Circuit. Prometheus Radio Project v. FCC, U.S.A., February 24, 2011. www.ca3.uscourts.gov/opinarch/083078p.pdf

Yes: A YES score is earned if there is, in law or in accompanying regulations, a formal process to appeal a denied broadcast media license, including through the courts. A YES score is also earned if no broadcast license is necessary.

No: A NO score is earned if there is no appeal process for broadcast media licenses.

07c. In practice, where necessary, citizens can obtain a broadcast (radio and TV) media license within a reasonable time period.

100 | 75 | 50 | 25 | 0

Comments:

Citizens cannot always obtain a broadcast (radio and TV) media license within a reasonable time period.

Albert L. May, associate professor of media and public affairs at George Washington, said there is a license for broadcast, but that now it is easy to create media organizations because there are lower distribution costs and more forms of media.

However, Angela Campbell, Georgetown University professor of law and co-director of the Institute for Public Representation, said the licensing process is always backed up. She recently waited two years for an FCC adjudication on an appeal. License renewals always take longer than they should. For example, Campbell knows two citizen groups that filed license renewals in 2004, and the renewals were still pending in mid-2011.

References:

Source 1: Professor Albert L. May, associate professor of Media and Public Affairs, George Washington University. Phone Interview on August 22, 2011.

Source 2: Professor Angela Campbell, Georgetown University, professor of law; co-director, Institute for Public Representation. In-person interview on August 24, 2011.

Source 4: Phone interview on September 22, 2011, with Andy Schwartzman, Media Access Project, senior vice president and policy director.

Source 5: Steven Waldman and the Working Group on Information Needs of Communities, "Information Needs of Communities," June 2011. <http://www.fcc.gov/info-needs-communities>

100: Licenses are not required or licenses can be obtained within two months.

75:

50: Licensing is required and takes more than two months. Some groups may be delayed up to six months.

25:

0: Licensing takes close to or more than one year for most groups.

07d. In practice, where necessary, citizens can obtain a broadcast (radio and TV) media license at a reasonable cost.

100 | 75 | 50 | 25 | 0

Comments:

Professor Angela Campbell, Georgetown University professor of law and co-director of the Institute for Public Representation, said the cost of entry for a license in telecommunications is "substantial." She suggested that individuals or companies applying for a license or renewal are wealthy and savvy. Thus, the cost seems more reasonable because it is mostly only a self-selected group of financially capable people applying for the licenses/renewals.

References:

Source 1: Professor Albert L. May, associate professor of media and public affairs, George Washington University. Phone Interview on August 22, 2011.

Source 2: Professor Angela Campbell, Georgetown University professor of law and co-director of the Institute for Public Representation. In-person interview on August 24, 2011.

Source 4: Phone interview on September 22, 2011, with Andy Schwartzman, Media Access Project, senior vice president and policy director.

Source 5: Steven Waldman and the Working Group on Information Needs of Communities, "Information Needs of Communities," June 2011. <http://www.fcc.gov/info-needs-communities>

100: Licenses are not required or can be obtained at minimal cost to the organization. Licenses can be obtained on-line or through the mail.

75:

50: Licenses are required, and impose a financial burden on the organization. Licenses may require a visit to a specific office, such as a regional or national capital.

25:

0: Licenses are required, and impose a major financial burden on the organization. Licensing costs are prohibitive to the organization.

8. Can citizens freely use the Internet?

100

08a. In practice, the government does not prevent citizens from accessing content published on-line.

100 | 75 | 50 | 25 | 0

Comments:

The government does not stop citizens from accessing content online. Quite the opposite, access to content on the Internet in the United States is open and free.

For example, Freedom House's Freedom On the Net 2011 ranked the Internet Freedom Status in the United States as "free." Further, with respect to "limits on content," the United States is ranked No. 2, as supported by finding no blocked substantial political censorship or Web 2.0 applications.

References:

Source 1: Journalist and Reporters Without Borders Washington Director Clothilde Le Coz. In-person interview on August 18, 2011.

Source 2: Professor Albert L. May, associate professor of media and public affairs, George Washington University. Phone Interview on August 22, 2011.

Source 3: Freedom House, Freedom On the Net 2011, U.S.A. Report available at <http://www.freedomhouse.org/images/File/FotN/USA2011.pdf>

Source 4: Tova Wang, The Century Foundation and Demos Senior Democracy Fellow. Skype Interview on September 12, 2011.

100: The government does not prevent Internet users from accessing online content. While some forms of content may be illegal to download or own (such as child pornography), the government does not manipulate networks to prevent access to this information. This indicator addresses direct government intervention in the transfer of information, not indirect deterrents such as intimidation, surveillance or technical difficulties in countries with poor infrastructure.

75:

50: Internet users are prevented by the government from reaching online content in some cases. Government tactics may include firewalls preventing access to networks in other countries, or manipulating search engine results to exclude politically sensitive topics.

25:

0: Internet users are routinely prevented from accessing online content. Government restrictions are in place at all times for certain topics. Government tactics may include firewalls preventing access to networks in other countries, or manipulating search engine results to exclude politically sensitive topics.

08b. In practice, the government does not censor citizens creating content on-line.

100 | 75 | 50 | 25 | 0

Comments:

Research and interviews indicate that the U.S. government does not censor citizens creating content online.

References:

Source 1: Journalist and Reporters Without Borders Washington Director Clothilde Le Coz. In-person interview on August 18, 2011.

Source 2: Professor Albert L. May, associate professor of media and public affairs, George Washington University. Phone Interview on August 22, 2011.

Source 4: Tova Wang, The Century Foundation and Demos Senior Democracy Fellow. Skype Interview on September 12, 2011.

100: The government never removes online information or disables servers due to their political content. All political speech is protected with limited exceptions, such as legitimate intellectual property restrictions; direct calls to violence; or pornography.

75:

50: In some cases, the government restricts political speech by its citizens on the Internet. This is accomplished either directly by controlling servers hosting restricted content, or indirectly through threats or intimidation against the persons posting political content.

25:

0: The government regularly restricts political speech by its citizens on the Internet. This is accomplished either directly by controlling servers hosting the restricted content, or indirectly through threats or intimidation against the persons posting political content.

9. Are the media able to report on corruption?

100

09a. In law, it is legal to report accurate news even if it damages the reputation of a public figure.

Yes | No

Comments:

U.S. Supreme Court rulings set binding precedent for accurate news, even if it damages the reputation of public figures.

As explained in the InfoUSA Portal, the decision in *New York Times Co. v. Sullivan* created a national rule that prohibited public officials from suing for libel unless they could prove “actual malice” when publishing false statements about them. The Supreme Court later ruling in *Curtis Publishing Co. v. Butts* extended the rule to cover “public figures,” meaning individuals who are not in public office but who are still newsworthy because of their prominence in the public eye.

References:

Law 1: *New York Times Co. v. Sullivan*, 376 U.S. 254 (1967). <http://www.law.cornell.edu/supct/cases/376us254.htm>

Law 2: *Curtis Publishing Co. v. Butts* 388 U.S. 130 (1967). http://www.law.cornell.edu/supct/html/historics/USSC_CR_0388_0130_ZS.html

Source 1: History of Libel Laws in the United States. InfoUSA portal run by the U.S. Department of State. <http://usinfo.org/enus/government/overview/libellaw.html>.

Yes: A YES score is earned if it is legal to report accurate information on public figures regardless of damage to their reputations. Public figures are defined broadly, including anyone in a position of responsibility in the government or civil service; any political leader; leaders of civil society groups including religious groups, trade unions, or NGOs; leaders or officers of large businesses. A YES score can still be earned if a reckless disregard for the truth (i.e. slander) is prohibited.

No: A NO score is earned if privacy laws protect any public figures (as defined in the YES coding) from accurate information.

09b. In practice, the government or media owners/distribution groups do not encourage self-censorship of corruption-related stories.

100 | 75 | 50 | 25 | 0

Comments:

The government or media owners/distribution groups do not encourage self-censorship of corruption-related stories.

Of note, journalists, academics and NGO-sector experts all emphasize that the national media owners/distribution groups are quite biased. Although experts differ in opinion as to whether the bias is due to consumer or market demand, all agree that selection and reporting of stories clearly reflect media entities' political ideologies.

References:

Source 1: Journalist and Reporters Without Borders Washington Director Clothilde Le Coz. In-person interview on August 18, 2011.

Source 2: Professor Albert L. May, associate professor of media and public affairs, George Washington University. Phone Interview on August 22, 2011.

Source 3: Tova Wang, The Century Foundation and Demos Senior Democracy Fellow (Skype Interview on September 12, 2011).

100: The government, its proxies, or media ownership/distribution groups make no attempt to restrict media coverage of corruption-related issues through unofficial means.

75:

50: The government, its proxies, or media ownership/distribution groups make some attempts to restrict media coverage of corruption-related issues through unofficial means, such as restricting access by disfavored media outlets, or other short-term consequences. Violent reprisals against media outlets are rare.

25:

0: The government, its proxies, or media ownership/distribution groups actively use illegal methods to restrict reporting of corruption-related issues. This may include harassment, arrests, and threats. Journalists and publishers take a personal risk to report on corruption, and media outlets who commonly report on corruption face long-term consequences or violent reprisals.

09c. In practice, there is no prior government restraint (pre-publication censoring) on publishing corruption-related stories.

100 | 75 | 50 | 25 | 0

Comments:

Research and interviews indicate that there is no prior government restraint (pre-publication censoring) on publishing corruption-related stories.

Of note, the Obama administration does engage in "news management" in the context of censoring corruption-related stories. The Obama Administration uses media as a tool for its political agenda. For example, Clothilde Le Coz, Washington director of Reporters Without Borders, recounted an instance of subtle media framing when photographers weren't allowed to take photos of President Barack Obama with the Dalai Lama in an effort to preserve relations with China. Similarly, George Washington

University Professor Albert May discussed the White House's defensive use of media to depict Fox News as "an arm of the Republican Party."

References:

Source 1: Journalist and Reporters Without Borders Washington Director Clothilde Le Coz. In-person interview on August 18, 2011.

Source 2: Professor Albert L. May, associate professor of media and public affairs, George Washington University. Phone interview on August 22, 2011.

Source 3: Professor Angela Campbell, Georgetown University professor of law; co-director, Institute for Public Representation. In Person Interview on August 24, 2011.

Source 4: Tova Wang, The Century Foundation and Demos Senior Democracy Fellow. Skype Interview on September 12, 2011.

100: The government never prevents publication of controversial corruption-related materials.

75:

50: The government prevents publication of controversial corruption-related material in cases where there is a strong political incentive to suppress the information. This score is appropriate if in countries where illiteracy is high, the government may allow a free print press but censor broadcast media.

25:

0: The government regularly censors material prior to publication, especially politically sensitive or damaging corruption-related material. This score is appropriate even if the government restricts only politically damaging news while allowing favorable coverage.

10. Are the media credible sources of information?

75

10a. In law, print media companies are required to publicly disclose their ownership.

Yes | **No**

Comments:

Print media companies are not required by law to publicly disclose their ownership. However, publicly owned companies are required to report their ownership to the U.S. Securities and Exchange Commission, which makes information publicly available. Therefore, as many U.S. newspapers are at least partially owned by the public (such as through publicly traded stock), some ownership information may be disclosed through the SEC.

An exception is that some disclosures of privately owned companies are made in the course of bankruptcy proceedings, but these are not as accessible as the SEC-reported disclosures.

References:

Source 1: Email exchange with Martin Langeveld on August 11, 2011.

Source 2: Martin Langeveld, NiemanLab blog post, March 2011. <http://www.niemanlab.org/2011/03/who-owns-newspaper-companies-the-banks-funds-and-investors-and-their-big-slices-of-the-industry/>

Yes: A YES score is earned if print media companies are required by law to publicly disclose all owners of the company.

No: A NO score is earned if there is no such requirement or if the requirement is optional, only partially applicable, or exempts certain types of entities or agents from being publicly disclosed.

10b. In law, broadcast (radio and TV) media companies are required to publicly disclose their ownership.

Yes | No

Comments:

Title 47, Section 303, of the U.S. Code requires all broadcast stations and applications for new stations to maintain a file available for public inspection, including ownership information.

As explained in the FCC's Media Bureau report "The Public Broadcasting," the public file must contain a copy of the most recent, complete ownership report, which discloses the names of the owners of the station licensee and their ownership interests, lists any contracts related to the station that are required to be filed with the FCC, and identifies any interests in other broadcast stations held by the station licensee or owners.

References:

Law: 47 U.S.C. §303. Wire or Radio Communication. http://www.law.cornell.edu/uscode/usc_sup_01_47.html

Federal Regulation: 47 C.F.R. §§73.3526-27. Requirement to Maintain a Public Inspection File.

Source 1: Media Bureau (FCC) USA. "The Public Broadcasting, July 2008. http://transition.fcc.gov/mb/audio/decdoc/public_and_broadcasting.html#_Toc202587529

Source 2: Professor Angela Campbell, Georgetown University professor of law; co-director, Institute for Public Representation. In-person interview on August 24, 2011.

Yes: A YES score is earned if broadcast media companies are required by law to publicly disclose all owners of the company.

No: A NO score is earned if there is no such requirement or if the requirement is optional, only partially applicable, or exempts certain types of entities or agents from being publicly disclosed.

10c. In practice, journalists and editors adhere to strict, professional practices in their reporting.

100 | 75 | 50 | 25 | 0

Comments:

Most journalists are strongly committed to journalism ethics and uphold their professional practices.

References:

Source 1: Journalist and Reporters Without Borders Washington Director Clothilde Le Coz. In-person interview on August 18, 2011.

Source 2: National Public Radio, "New York Times Reporter Subpoenaed," May 24, 2011. <http://www.npr.org/2011/05/24/136620215/new-york-times-reporter-subpoenaed>

Source 3: First Amendment Center, "Federal Judge Orders NY Times Reporter to Testify, Limits Scope. <http://www.firstamendmentcenter.org/federal-judge-orders-n-y-times-reporter-to-testify-limits-scope>

Source 4: Professor Albert L. May, associate professor of media and public affairs, George Washington University. Phone interview on August 22, 2011.

Source 4: National Public Radio, Ombudsman Blog, "NPR Terminates Contract With Juan Williams," October 21, 2010. <http://www.npr.org/blogs/ombudsman/2010/10/21/130713285/npr-terminates-contract-with-juan-williams>

100: Editors and journalists at the major media outlets abide by a strict journalistic code of conduct and are unwilling to alter their coverage of a particular issue, event or person in exchange for money, gifts, or other favors or remuneration.

75:

50: Editors and journalists at the major media outlets generally avoid altering coverage in exchange for favors but some exceptions have been noted. Not all newsrooms abide by a formal journalistic code of conduct.

25:

0: Editors and journalists are widely known to “sell” favorable or unfavorable coverage in exchange for money, gifts, or other remuneration. The major media outlets do not abide by any formal journalistic code of conduct.

10d. In practice, during the most recent election, political parties or independent candidates received fair media coverage.

100 | 75 | 50 | 25 | 0

Comments:

During the most recent election, political parties or independent candidates received fair media coverage. Professor Albert May gives the impression that in U.S. politics, it is not that the media controls candidates and candidate information, but that candidates control the media. He says, “Both sides are quick to use media as part of the toolkit as part of the political debate.”

May indicates that the system self-regulates. For example, in the primary campaign launch by the Republican Party for the Iowa straw poll, we saw that Ron Paul initially did not receive due media after doing well. His supporters turned around and critiqued the media, mainly Fox News. The media ran those critiques and drew the due attention to Paul. Thus, there are more watchdog groups, NGOs and citizen media (blogs, Twitter, etc.) that critique media and keep it honest.

There is federal media funding for presidential candidates, but only the extremists candidates use it. Professor May says, “Public financing is a dead issue.” This is particularly true given the Supreme Court’s decision in *Citizens*, which allows corporate contributions. May says the Internet has helped the lesser-known candidates raise money online through small contributions, citing Paul as an example. Access is not barred by the candidate’s lack of money or the media entity’s political agenda; a candidate is barred by the fact that the media doesn’t think the news will sell.

May says a sponsor pays for a televised primary political debate (such as a political party, news organization or private organization) and sets up its own guidelines. However, for presidential elections, debates are systematized. The Commission on Presidential Debates (CPD) is an NGO established and recognized by both political parties, sponsored by private parties and contributions. Debates are now broadcast on cable, and “amazingly” there were at least 40 in the last election cycle. Notably, the CPD has a rule that for a party to be included in the national debates it must garner at least 15 percent support across five national polls. This rule is considered controversial as most Americans tune in to the televised national debates and hear only the opinions of two parties instead of the 10 or so parties that are actually running for president of the United States. May says Ross Perot was the last third party/independent candidate to participate. Similarly, at the recent Iowa straw poll hosted by the Iowa Republicans, not all of the Republican candidates were invited.

Freedom House Map of Press Freedom 2010 states: “Media coverage of political affairs is aggressive and in some cases partisan. The press itself is frequently a source of controversy, with conservatives and liberals alike accusing the media of bias. The appearance of enhanced polarization is driven to some degree by the growing influence of blogs, many of which are aggressively partisan. Nonetheless, most U.S. newspapers make a serious effort to keep a wall of separation between news reporting, commentary and editorials. Ironically, the trend toward fewer family-owned newspapers and more newspapers under corporate control has contributed to a less partisan, if blander, editorial tone. In recent years, cable television stations that focus on news and public affairs have gained substantial viewership. These outlets are more openly partisan than the three major private television networks.”

Interestingly, Tova Wang, Senior Democracy Fellow with the Century Foundation and Demos, notices a huge difference between ethnic and mainstream English-language press in America. She says Latino/Spanish-speaking media is much more focused on serious politics and policies. The media is active in getting participation and community involvement. It informs viewers about the participatory process and actual candidate policies.

References:

Source 1: Professor Albert L. May, associate professor of media and public affairs, George Washington University. Phone interview on August 22, 2011.

Source 2: Steve Gorman, Reuters, “Media Bias Largely Unseen in U.S. Presidential Race,” November 6, 2008. <http://www.reuters.com/article/2008/11/06/us-usa-election-media-idUSTRE4A57FO20081106>

Source 3: Freedom House Map of Press Freedom 2010. <http://www.freedomhouse.org/template.cfm?page=251&year=2010>

Source 4: Tova Wang, The Century Foundation and Demos, Senior Democracy Fellow. Skype Interview on September 12, 2011.

100: All political parties and independent candidates have some access to media outlets. Individual media outlets may have biases, but on balance, the national media coverage reflects the interests of the electorate. Media groups generally act as disinterested parties in an election. In places where a government is popular with the public, opposition viewpoints can access the public via media outlets.

75:

50: Major popular media outlets have a persistent bias regarding some parties or independent candidates. Some major parties may be partially excluded from media coverage, or draw more negative coverage. Media sectors may have distinct biases, such as newspapers favoring one party, while radio favors another.

25:

0: The mass media, on balance, have clear preferences in election outcomes and coverage is driven to achieve these goals. Some major parties or independent candidates are excluded or consistently negatively portrayed by mass media. Dissenting political opinions are only found on fringe or elite media outlets, such as Web sites.

10e. In practice, political parties and candidates have equitable access to state-owned media outlets.

100 | 75 | 50 | 25 | 0

Comments:

The U.S. does not have state-owned media outlets.

The U.S. government provides minimal funding for National Public Radio. For example, less than 6 percent of NPR funding in 2009 came from federal, state and local governments. NPR has been criticized for having a liberal reporting bias, as discussed in The New York Times: "NPR's serving of news comes with a heaping side dish of squishy liberal ideology. And that's true to a point. In terms of assignments and sensibility, NPR has always been more blue than red, but it's not as if it has an overt political agenda."

Moreover, Professor Albert May of George Washington University discussed the role NPR has as part of a larger, partisan political dynamic. For example, in spring 2011, the House passed a bill to defund the national public radio system. This came directly after NPR reporter Juan Williams was fired for giving personal views on Fox News, violating the NPR ethics code. May stated that this was an unprecedented example of Congress's ability to retaliate politically by cutting funding and symbolically holding national media news organizations in contempt. The bill was never expected to pass into law.

Thus, NPR's liberal reporting bias is perhaps best understood as but one part of the increasingly partisan media and political environment in the United States. The Freedom House Map of Press Freedom 2010 Report also discusses partisan media in the United States, stating, "Media coverage of political affairs is aggressive and in some cases partisan. The press itself is frequently a source of controversy, with conservatives and liberals alike accusing the media of bias."

The Freedom House Map of Press Freedom 2010 Report also stated, "Nonetheless, most U.S. newspapers make a serious effort to keep a wall of separation between news reporting, commentary and editorials. Ironically, the trend toward fewer family-owned newspapers and more newspapers under corporate control has contributed to a less partisan, if blander, editorial tone. In recent years, cable television stations that focus on news and public affairs have gained substantial viewership. These outlets are more openly partisan than the three major private television networks."

References:

The U.S. does not have state-owned media outlets.

Source 1: National Public Radio, "About NPR: Public Radio Finances." <http://www.npr.org/about/aboutnpr/publicradiofinances.html>

Source 2: David Carr, New York Times, "At NPR, Strong Journalism and Weak Management," March 14, 2011. http://www.nytimes.com/2011/03/14/business/media/14carr.html?pagewanted=1&_r=1

Source 3: Professor Albert L. May, associate professor of media and public affairs, George Washington University. Phone Interview on August 22, 2011.

Source 4: Freedom House Map of Press Freedom 2010. <http://www.freedomhouse.org/template.cfm?page=251&year=2010>.

100: The government ensures that equal access and fair treatment of election contestants is provided by all state-owned media outlets, including all electronic and print media. This obligation extends to news reports, editorial comment, and all other content. All parties and candidates are offered consistent and equivalent rates for campaign advertising on state-owned media outlets.

75:

50: The government generally ensures equal access and fair treatment of all candidates and parties by state-owned media outlets but some exceptions exist. State-owned media may occasionally discriminate against particular parties or candidates and advertising rates may be confusing or non-transparent.

25:

0: The government uses state-owned media to routinely discriminate against opposition candidates and parties. Advertising space may be denied to opposition candidates and parties or higher rates may be charged.

11. Are journalists safe when investigating corruption?

100

11a. In practice, in the past year, no journalists investigating corruption have been imprisoned.

Yes | No

Comments:

Neither the RSF press report nor the Freedom House Map of Freedom report any imprisonments.

Of note, Le Coz made a distinction between law enforcement and U.S. mandate. Generally, arrests of journalists in the United States are mistakes or ignorance on the part of the local police, not federal government abuse of power.

References:

Source 1: Reporters Without Borders Washington Director Clothilde Le Coz. In-person interview on August 18, 2011.

Source 2: Freedom House Map of Press Freedom 2010. <http://www.freedomhouse.org/template.cfm?page=251&year=2010>

Yes: A YES score is earned if there were no journalists imprisoned related to work covering corruption during the study period. A YES score is positive.

No: A NO score is earned if any journalist was jailed because of his/her work covering corruption during the study period. The causal relationship between the official charges and the journalist's work may not be explicit, however the burden of proof here is low. If it seems likely that the journalist was imprisoned due to his or her work, then the indicator is scored as a NO. Corruption is defined broadly to include any abuses of power, not just the passing of bribes. "Imprisoned" is defined here as detention by the government lasting more than 24 hours.

11b. In practice, in the past year, no journalists investigating corruption have been physically harmed.

Yes | No

Comments:

Neither the RSF press report nor the Freedom House Map of Freedom report any physically harmed journalists.

References:

Source 1: Reporters Without Borders Washington Director Clothilde Le Coz. In-person interview on August 18, 2011.

Source 2: Freedom House Map of Press Freedom 2010. <http://www.freedomhouse.org/template.cfm?page=251&year=2010>

Source 3: RSF Press Freedom Barometer. <http://en.rsf.org/>

Yes: A YES score is earned if there were no documented cases of journalists being assaulted during the specific study period for their work covering corruption issues. A YES score is positive.

No: A NO score is earned if there were any documented cases of assault to a journalist covering corruption during the study period. Corruption is defined broadly to include any abuses of power, not just the passing of bribes.

11c. In practice, in the past year, no journalists investigating corruption have been killed.

Yes | No

Comments:

Neither the RSF press report nor the Freedom House Map of Freedom report any murders of journalists.

References:

Source 1: Reporters Without Borders Washington Director Clothilde Le Coz. In-person interview on August 18, 2011.

Source 2: Freedom House Map of Press Freedom 2010. <http://www.freedomhouse.org/template.cfm?page=251&year=2010>

Yes: A YES score is earned if there were no documented cases of journalists being killed because of their work covering corruption-related issues during the study period. A YES score is positive.

No: A NO score is earned if there were any documented cases where a journalist was killed in relation to his or her work covering corruption-related issues in the study period. The relationship between a mysterious death and an individual's work may not be clear, however the burden of proof here is low. If it is a reasonable guess that a person was killed in relation to his or her work on corruption issues, then the indicator is scored as a NO. Corruption is defined broadly to include any abuses of power, not just the passing of bribes.

91

1.3. Public Requests for Government Information

12. Do citizens have a legal right to request information?

100

12a. In law, citizens have a right to request government information and basic government records.

Yes | No

Comments:

The Freedom of Information Act (FOIA) allows full or partial disclosure of information and documents controlled by the U.S. government. It applies only to the executive branch, although the following executive entities are exempt from complying with FOIA: White House Office, office of the Vice President, Council of Economic Advisers, National Security Council, Office of Policy Development, Domestic Policy Council, Office of National AIDS Policy, National Economic Council and the President's Foreign Intelligence Advisory Board. Further, there are nine exemptions to the statute (such as classified information and information vital to national security), which give rise to dispute. FOIA has been amended numerous times, most recently by the Openness Promotes Effectiveness in our National Government Act (OPEN Government Act of 2007).

References:

Law: 5 U.S.C. §552. Freedom of Information Act. <http://www.law.cornell.edu/uscode/05/552.html>

Yes: A YES score is earned if there is a formal right to request government documents, including constitutional guarantees. Exceptions can be made for national security reasons or individual privacy, but they should be limited in scope. All other government documents should be available upon a public request.

No: A NO score is earned if there is no such right.

12b. In law, citizens have a right of appeal if a request for a basic government record is denied.

Yes

No

Comments:

An administrative appeal may be undertaken upon either the denial of an initial FOIA request or an agency's failure to issue a determination within the statutory 20-day time deadline. A final ruling on an appeal is required by statute within 20 working days.

Appeal letters can be used to challenge: the agency's failure to timely respond; the agency's decision not to release records; the adequacy of the search methodology used by the agency to locate responsive records; and the agency's decision not to grant a fee waiver.

Although an administrative appeal is available, administrative remedies need not be exhausted before seeking remedies at law.

References:

Law: 5 U.S.C. §§ 552(a)(6)(A)(i), 552(a)(6)(C). <http://www.law.cornell.edu/uscode/05/552.html>

Source 1: Phone Interview with Lucy Dalglish, executive director of Reporters Committee for Freedom of the Press, August 16, 2011.

Yes: A YES score is earned if there is a formal process of appeal for rejected information requests. A YES score can still be earned if the appeals process involves redress through the courts rather than administrative appeal.

No: A NO score is earned if there is no such formal process.

12c. In law, there is an established institutional mechanism through which citizens can request government records.

Yes

No

Comments:

Although there is no one established institutional mechanism through which citizens can request government records, institutional mechanisms exist, as determined by each executive entity that is required to disclose government records under the Freedom of Information Act (FOIA).

Each executive branch entity specifies its own FOIA request process, although the general path is similar: submit a written request, agency acknowledgment, clarification of request, agency response, agency appeal, court appeal. Notably, the process, time, cost and quality of response vary widely across the federal agencies.

In March 2011, the Obama administration launched a FOIA website as part of an effort to give better access to government data and spending information. The website aims to inform the general public on how to request government information.

References:

Law: 5 U.S.C. §552. http://www.law.cornell.edu/uscode/usc_sec_05_00000552--000-.html

Source 1: National Security Archives, "Follow A Request Through the FOIA Process." Last accessed September 19, 2011. http://www.gwu.edu/~nsarchiv/nsa/foia/foia_flowchart.pdf

Source 2: Ed O'Keefe, The Washington Post, "Barely Half of Agencies Meeting Obama's FOIA Request Goals Study Says," March 3, 2011. http://www.washingtonpost.com/politics/barely-half-of-agencies-meeting-obamas-foia-request-goals-study-says/2011/03/11/ABImgsT_story.html?wpisrc=nl_politics

Source 3: U.S. Department of Justice, FOIA.gov. <http://www.foia.gov/>

Source 4: Christina Marcos, The Hill, "Agencies' FOIA Responses Seem to Have No Guide," June 3, 2011. <http://thehill.com/business-a-lobbying/164621-agencies-foia-responses-seem-to-have-no-guide>

Yes: A YES score is earned if there is a formal government mechanism/institution through which citizens can access government records available under freedom of information laws. This mechanism could be a government office (or offices within agencies or ministries) or an electronic request system.

No: A NO score is earned if there is no such formal mechanism or institution.

13. Is the right to information requests effective?

58

13a. In practice, citizens receive responses to information requests within a reasonable time period.

100 | 75 | 50 | 25 | 0

Comments:

There is widespread agreement that federal agency responses to FOIA requests are not given within a reasonable time period, if at all. Federal agencies are required to respond to FOIA requests within 20 business days. However, by one estimate, agency response times range from three months to 15 years. This is echoed by the 2011 Knight Open Government Survey, which reported that 41 out of 90 agencies (approximately 46 percent) did not respond to FOIA requests within 20 business days, as required by law. The Knight Survey also found that some pending FOIA requests were a decade old, with the oldest pending request made to the National Archives 20 years ago. A FOIA representative at the National Security Archives (NSA) states that requests are "almost never fulfilled within 20 days." But, the representative is optimistic that a recent court case will change that. Now, if the agency has not responded to the FOIA request within 20 days, the agency cannot charge any fee.

It also is commonly believed that response times vary across agencies. In the words of one expert, "It's hit or miss. Reports depend on the agency, and it seems random how quickly you might get answers back."

Not only do responses vary among agencies but also within agencies. For example, in the experience of one interviewee, agency responses are given haphazardly. Agencies "deliberately pick and choose" which requests they will fulfill based on whether the government wants to release the information.

References:

Source 1: Josh Israel, The Associated Press, "State Department FOIA Requests Unanswered Four Long Years Later: Obama Promised More Responsiveness, but Delays are Still Common," July 6, 2011. <http://www.iwatchnews.org/2011/07/06/5123/state-department-foia-requests-unanswered-four-long-years-later>

Source 2: Ed O'Keefe, The Washington Post, "Barely Half of Agencies Meeting Obama's FOIA Request Goals, Study Says," March 3, 2011. http://www.washingtonpost.com/politics/barely-half-of-agencies-meeting-obamas-foia-request-goals-study-says/2011/03/11/ABImgsT_story.html?wpisrc=nl_politics

Source 3: Lucy Dalglish, Executive Director, Reporters Committee for Freedom of the Press. Phone Interview on August 2011. <http://www.rcfp.org/about.html>.

Source 4: United States Reporters Without Borders Director, Clothilde Le Coz. In Person Interview on August 18, 2011.

Source 5: Professor Angela Campbell, Georgetown University, Professor Law; Co-Director, Institute for Public Representation. In Person Interview on August 24, 2011.

Source 6: Tova Wang, Century Foundation and Demos Senior Democracy Fellow. Skype Interview on September 12, 2011.

Source 7: National Security Archive & George Washington University, "2011 Knight Open Government Survey," March 14, 2011. <http://www.gwu.edu/~nsarchiv/NSAEBB/NSAEBB338/KnightOpenGovtSurvey2011.pdf>

Source 8: FOIA Representative at the National Security Archives. Phone interview on September 22, 2011.

100: Records are available on-line, or records can be obtained within two weeks. Records are uniformly available; there are no delays for politically sensitive information. Legitimate exceptions are allowed for sensitive national security-related information.

75:

50: Records take around one to two months to obtain. Some additional delays may be experienced. Politically-sensitive information may be withheld without sufficient justification.

25:

0: Records take more than four months to acquire. In some cases, most records may be available sooner, but there may be persistent delays in obtaining politically sensitive records. National security exemptions may be abused to avoid disclosure of government information.

13b. In practice, citizens can use the information request mechanism at a reasonable cost.

100 | 75 | 50 | 25 | 0

Comments:

Records are available for the cost of copying (paper or electronic) the requested documents.

Note that for some citizens, the cost may be prohibitive, particularly depending on the size of the requested records. Further, the average citizen must know the agency and its specific process well to be able to successfully request information. Thus, if a citizen is financially unable to seek professional help in filing a FOIA request, the individual is likely to receive poor quality response or be denied.

However, an NSA FOIA representative says that a recent court ruling prohibits an agency from charging fees if the documents are produced after the legal maximum response time of 20 days.

And, notably, often journalists, NGOs, and universities can get records through a fee waiver exemption.

References:

Source 1: Lucy Dalglish, executive director, Reporters Committee for Freedom of the Press. Phone Interview on August 16, 2011.

Source 2: Professor Angela Campbell, Georgetown University professor of law; co-director, Institute for Public Representation. In-person interview on August 24, 2011.

Source 3: FOIA representative at the National Security Archives. Phone interview on September 22, 2011.

Source 4: National Security Archive and George Washington University, "2011 Knight Open Government Survey," March 14, 2011. <http://www.gwu.edu/~nsarchiv/NSAEBB/NSAEBB338/KnightOpenGovtSurvey2011.pdf>

100: Records are free to all citizens, or available for the cost of photocopying. Records can be obtained at little cost, such as by mail, or on-line.

75:

50: Records impose a financial burden on citizens, journalists or NGOs. Retrieving records may require a visit to a specific office, such as a regional or national capital.

25:

0: Retrieving records imposes a major financial burden on citizens. Records costs are prohibitive to most citizens, journalists, or NGOs trying to access this information.

13c. In practice, responses to information requests are of high quality.

100 | 75 | 50 | 25 | 0

Comments:

The quality of documents released through FOIA varies widely by agency. Often, responses are redacted and names blocked out. For instance, on one hand, defense, intelligence and health agencies tend to disclose the least amount of information. On the other hand, the Agriculture Department, Environmental Protection Agency and Consumer Product Safety Commission are preemptively publishing online government data sets previously withheld from public view.

FOIA expert Lucy Dalglish said that the quality of responses vary by agency. She said that sometimes agencies “astonish” you and give you just what you want, while other times a request will not receive a good answer. One might have a harder time getting information that could be used against the government. An NSA FOIA representative corroborates this statement that the quality is mixed. Many of the reports are redacted. The FOIA representative also said that many agencies heads do not implement FOIA laws because they consider FOIA requests a low-priority resource drain.

References:

Source 1: The Hill, “Hill Analysis: Agencies’ FOIA Responses Seem to Have No Guide,” June 3, 2011. <http://thehill.com/business-a-lobbying/164621-agencies-foia-responses-seem-to-have-no-guide>

Source 2: The Washington Post, “Barely Half of Agencies Meeting Obama’s FOIA request Goals, Study says,” March 13, 2011. http://www.washingtonpost.com/politics/barely-half-of-agencies-meeting-obamas-foia-request-goals-study-says/2011/03/11/ABImgsT_story.html?wpisrc=nl_politics

Source 3: Lucy Dalglish, executive director, Reporters Committee for Freedom of the Press. Phone interview on August 16, 2011.

Source 4: National Security Archives FOIA representative. Phone interview on September 22, 2011.

Source 5: National Security Archive and George Washington University, “2011 Knight Open Government Survey,” March 14, 2011. <http://www.gwu.edu/~nsarchiv/NSAEBB/NSAEBB338/KnightOpenGovtSurvey2011.pdf>

100: Responses to information requests typically address the requestor’s questions in full and are not redacted or edited to remove sensitive information.

75:

50: Information requests are sometimes met with sufficient responses, but responses to information requests may be vague or overly general when sensitive information is sought.

25:

0: The government rarely or never replies to information requests with meaningful responses. If and when responses are issued, they are so overly general or heavily redacted as to render them useless.

13d. In practice, citizens can resolve appeals to information requests within a reasonable time period.

100 | 75 | 50 | 25 | 0

Comments:

Appeal success depends on the agency and the venue.

Often, FOIA expert Lucy Dalglish recommends skipping the agency appeal and suing, going straight to court.

By contrast, an NSA FOIA representative states that agency appeals yield more information 50 percent of the time. The representative also says that agency appeals may be more accessible as they are free. Court appeals are expensive and rarely used.

References:

Source 1: Lucy Dalglish, executive director, Reporters Committee for Freedom of the Press. Phone interview on August 16, 2011.

Source 2: National Security Archives FOIA Representative. Phone interview on September 22, 2011.

100: The agency/entity acts on appeals quickly. While some backlog is expected and inevitable, appeals are acknowledged promptly and cases move steadily towards resolution.

75:

50: The agency/entity acts on appeals quickly but with some exceptions. Some appeals may not be acknowledged, and simple issues may take more than two months to resolve.

25:

0: The agency/entity does not resolve appeals in a timely fashion quickly. Appeals may be unacknowledged for many months and simple issues may take more than three months to resolve.

13e. In practice, citizens can resolve appeals to information requests at a reasonable cost.

100 | 75 | 50 | 25 | 0

Comments:

The cost of agency appeals is free. Court appeals are costly. Thus, the cost of court appeals can be prohibitive for citizens.

References:

Source 1: Lucy Dalglish, executive director, Reporters Committee for Freedom of the Press. <http://www.rcfp.org/about.html>. Phone interview on August 16, 2011.

Source 2: National Security Archive, FOIA representative. Phone interview on September 22, 2011.

100: In most cases, the appeals mechanism is an affordable option to middle class citizens seeking to challenge an access to information determination.

75:

50: In some cases, the appeals mechanism is not an affordable option to middle class citizens seeking to challenge an access to information determination.

25:

0: The prohibitive cost of utilizing the access to information appeals mechanism prevents middle class citizens from challenging access to information determinations.

13f. In practice, the government gives reasons for denying an information request.

100 | 75 | 50 | 25 | 0

Comments:

The government usually discloses reasons for denying an information request, even if the reasons may be vague or difficult to understand. Several reports and personal accounts show that some agencies deny records under FOIA exemption (b)(6) with ambiguous or no explanation.

FOIA Expert Lucy Dalglish confirms this, stating that the government will give a form letter with exemption number or legal citation but no explanation of what that means or application of the facts of your request to the legal exemption. If you call an agency on the phone, you may get some advice about how to resubmit your FOIA request. Reporters Without Borders Washington Director Clothilde le Coz has received similar FOIA responses. In her experience, responses are given very haphazardly. The government deliberately picks and chooses which requests it will fulfill based on whether the government wants to release the information. She says the government gives no detailed explanation for requested documents that relate to national security.

However, Professor Albert L. May and an NSA FOIA representative both discussed a recent FOIA policy shift. An Obama administration 2009 executive order and the 2007 Open Government Law have shifted the presumption toward openness and transparency. Now, government agencies have to show reason not to release FOIA information. Thus, there is a presumption of releasing information, even if only nominally.

References:

Source 1: Lucy Dalglish, executive director, Reporters Committee for Freedom of the Press. Phone interview on August 16, 2011.

Source 2: The Washington Post, "Barely Half of Agencies Meeting Obama's FOIA Request Goals, Study Says," March 11, 2011. http://www.washingtonpost.com/politics/barely-half-of-agencies-meeting-obamas-foia-request-goals-study-says/2011/03/11/ABImgsT_story.html?wpisrc=nl_politics

Source 3: Reporters Without Borders Washington Director Clothilde Le Coz, In-person interview on August 18, 2011.

Source 4: Professor Albert L. May, associate professor of media and public affairs, George Washington University. Phone Interview on August 22, 2011.

Source 5: National Security Archive, FOIA Representative. Phone interview on September 22, 2011.

Source 6: Cristina Marcos, The Hill, "Hill Analysis: Agencies' FOIA Responses Seem to Have No Guide," June 3, 2011. <http://thehill.com/business-a-lobbying/164621-agencies-foia-responses-seem-to-have-no-guide>

Source 7: Knight Foundation and George Washington University National Security Archives, "2011 Open Government Survey," March 14, 2011. <http://www.gwu.edu/~nsarchiv/NSAEBB/NSAEBB338/KnightOpenGovtSurvey2011.pdf>

100: The government always discloses to the requestor the specific, formal reasons for denying information requests.

75:

50: The government usually discloses reasons for denying an information request to the requestor, with some exceptions. The reasons may be vague or difficult to obtain.

25:

0: The government does not regularly give reasons for denying an information request to the requestor.

Category 2. Elections

2.1. ⁸⁸Voting and Party Formation

14. Is there a legal framework guaranteeing the right to vote?

100

14a. In law, universal and equal adult suffrage is guaranteed to all citizens.

Yes | No

Comments:

The U.S. Constitution and subsequent amendments implicitly guarantee universal and equal adult suffrage by prohibiting discrimination in establishing the qualifications for suffrage. Some qualifications, specified by both federal and state law, are controversial. For instance, state laws that prohibit convicted felons prompt considerable debate because they disqualify some 5.3 million people and disproportionately affect minority populations.

References:

Law: U.S. Constitution, Amendment 14, Amendment 15, Amendment 19. <http://www.law.cornell.edu/constitution/>

Source: The Sentencing Project. "Voting Rights." <http://www.sentencingproject.org/template/page.cfm?id=133>

Source: The White House. "Elections and Voting." <http://www.whitehouse.gov/our-government/elections-and-voting>.

Yes: A YES score is earned if the right to vote is guaranteed to all citizens of the country (basic age limitations are allowed). A YES score can still be earned if voting procedures are, in practice, inconvenient or unfair.

No: A NO score is earned if suffrage is denied by law to any group of adult citizens for any reason. Citizen is defined broadly, to include all ethnicities, or anyone born in the country. A NO score is earned if homeless or impoverished people are legally prohibited from voting.

14b. In law, there is a legal framework requiring that elections be held at regular intervals.

Yes | No

Comments:

Federal elections are held on the Tuesday after the first Monday in November (3 U.S.C. 1) for the appointment of presidential electors every fourth year. Congressional representative elections are in every even numbered year in (2 U.S.C. 7) and congressional Senate elections are held on January 3 prior to the expiration of the sitting senator's term (2 U.S.C. 1).

References:

Law 1: 3 U.S.C. 1 (1845). <http://www.law.cornell.edu/uscode/3/1.shtml>

Law 2: 2 U.S.C. 7 (1875). http://www.law.cornell.edu/uscode/2/usc_sec_02_00000007--000-.html

Law 3: 2 U.S.C. 1 (1914). <http://www.law.cornell.edu/uscode/2/1.html>

Yes: A YES score is earned if there is a statutory or other framework enshrined in law that mandates elections at reasonable intervals.

No: A NO score is earned if no such framework exists.

15. Can all citizens exercise their right to vote?

100

15a. In practice, all adult citizens can vote.

Comments:

Voting is open to all citizens, regardless of race, gender, prior political affiliations, physical disability or other traditional barriers. The National Coalition for the Homeless and the Brennan Center for Justice reported that state legislation requiring an ID or proof of citizenship to vote prevents eligible citizens from voting, including college-age, minority, elderly and homeless people, but this is a procedural safeguard, not a purposeful, systemic attempt at discrimination.

However, in the United States, there is concern about voter disenfranchisement of convicted felons. The Sentencing Project estimates that felony disenfranchisement impacts 5.3 million people. Voting is governed mostly by state law and, in some parts of the country, convicted felons cannot vote while in prison or on parole. Some convicted felons lose the right to vote for life. Of great concern, this disproportionately affects African Americans, who make up 38 percent of felon disenfranchisement.

Director of Advocacy Kara Gotsch at The Sentencing Project also believes “de facto disenfranchisement” is a problem. She described this as when felons – and convicted criminals – have the legal right to vote, but in practice are not given the education or resources to vote. University of California Davis School of Law Professor Jack Chin also believes an important question is if there is an available mechanism for those who are disenfranchised to get their rights restored.

Gotsch says the federal climate for changing felony disenfranchisement legislation is highly partisan with politically charged rhetoric. Although there is some federal legislation pending to change federal election disenfranchisement, she is not optimistic that it will pass anytime soon. She praises recent progress in felony empowerment as seen in states that have passed laws mandating notification to convicted felons if and when they regain the right to vote (such as Louisiana).

References:

Source 1: Kara Gotsch, The Sentencing Project, Director of Advocacy. Phone interview on August 30, 2011.

Source 2: Marc Mauer, Howard Law Journal Vol. 4: 549, “Voting Behind Bars: An Argument for Voting by Prisoners,” 2011. <http://sentencingproject.org/doc/Howard%20Law%20-%20Voting%20Behind%20Bars.pdf>

Source 3: The National Coalition for the Homeless and the Brennan Center for Justice, State ID Legislation Threatens to Disenfranchise Homeless Voters, June 2011. <http://nationalhomeless.org/WordPress/2011/06/state-id-legislation-threatens-to-disenfranchise-homeless-voters/> and http://www.brennancenter.org/page/-/d/download_file_39242.pdf

Source 4: Phone interview on September 2 with Professor Gabriel Jack Chin, University of California Davis School of Law.

100: Voting is open to all citizens regardless of race, gender, prior political affiliations, physical disability, or other traditional barriers.

75:

50: Voting is often open to all citizens regardless of race, gender, prior political affiliations, physical disability, or other traditional barriers, with some exceptions.

25:

0: Voting is not available to some demographics through some form of official or unofficial pressure. Voting may be too dangerous, expensive, or difficult for many people.

15b. In practice, ballots are secret or equivalently protected.

Comments:

Generally, elections in the United States are held by secret ballot. There is no constitutional guarantee that ballots will be secret or equivalently protected. Regardless, federal election ballots are administered by states that, despite variation, virtually all implement secret ballots.

However, some state use of mail or open ballots raises concerns over secrecy. For example, Article 4, Section 2 of the West Virginia Constitution mandates that, in West Virginia, “In all elections by the people, the mode of voting shall be by ballot; but the voter shall be left free to vote by either open, sealed or secret ballot, as he may elect.”

Others raise concerns over secrecy when lawmakers use detailed election data in campaigns and redistricting.

References:

The Constitution Center, @ConstitutionCtr, via Twitter on August 16, 2011.

Source 1: Barry Massey, The Associated Press, "Ballot Secrecy Compromised By Detailed Election Data," July 16, 2010. http://www.huffingtonpost.com/2010/07/16/ballot-secrecy-compromise_n_648675.html

Source 2: Alan S. Gerber, Gregory A. Huber, David Doherty and Conor M. Dowling, Yale University, Institution for Social and Policy Studies, "Is There a Secret Ballot? Ballot Secrecy Perceptions and Their Implications for Voting Behavior," 2011. " http://huber.research.yale.edu/materials/30_paper.pdf

Source 3: Tova Wang, Century Foundation and Demos, Senior Democracy Fellow. Skype interview on September 12, 2011.

100: Ballots are secret, or there is a functional equivalent protection, in all cases.

75:

50: Ballots are secret, or there is a functional equivalent protection, in most cases. Some exceptions to this practice have occurred. Ballots may be subject to tampering during transport or counting.

25:

0: Ballot preferences are not secret. Ballots are routinely tampered with during transport and counting.

15c. In practice, elections are held according to a regular schedule.

100 | 75 | 50 | 25 | 0

Comments:

Elections are all held according to a regular schedule. No incidences of delayed elections in the country could be found from searching the online news archives of major U.S. newspapers.

References:

Internet search of media reports, academic articles and organization reports.

100: Elections are always held according to a regular schedule, or there is a formal democratic process for calling a new election, with deadlines for mandatory elections.

75:

50: Elections are normally held according to a regular schedule, but there have been recent exceptions. The formal process for calling a new election may be flawed or abused.

25:

0: Elections are called arbitrarily by the government. There is no functioning schedule or deadline for new elections.

16. Are citizens able to participate equally in the political process?

95

16a. In law, all citizens have a right to form political parties.

Yes | No

Comments:

No federal law grants or denies an affirmative right to citizens to form political parties.

The Federal Election Commission, an independent regulation agency, “determines whether committees meet the criteria for ... national party committee status through the advisory opinion process.” The commission’s criteria, which may be prohibitive financially or otherwise, includes the following:

- Nominating qualified candidates for president and various congressional offices in numerous states;
- Engaging in certain activities, such as voter registration and get-out-the-vote drives, on an ongoing basis;
- Publicizing the party’s supporters and primary issues throughout the nation;
- Holding a national convention;
- Setting up a national office;
- Establishing state affiliates.

References:

No law affirmatively grants citizens a right to form political parties.

Source 1: Federal Election Commission. “Quick Answers – Party.” Last accessed August 15, 2011. http://www.fec.gov/ans/answers_party.shtml#qualify/

Yes: A YES score is earned if citizens have the right to form political parties without interference from government. A YES score may still be earned if groups or individuals with a history of violence or terrorism (within last ten years) are banned from forming political parties. Non-discriminatory minimal criteria (e.g. minimum age) are also allowed.

No: A NO score is earned if there are any legal or regulatory restrictions or prohibitions barring any types of political parties from being formed.

16b. In law, all citizens have a right to run for political office.

Yes | No

Comments:

All citizens have a right to run for political office provided that they meet qualifications specified by law. Candidates for president must be natural born or a citizen of the United States, over 30 years old and a resident of the United States for at least 14 years (2 U.S.C. 1). U.S. Senate candidates must be a U.S. citizen for at least nine years, at least 30 years old and a resident of their state when elected (2 U.S.C. 1). U.S. House candidates must be a U.S. citizen for at least seven years, at least 25 years old and a resident of their state when elected (2 U.S.C. 2).

References:

Law: U.S. Constitution, Article II, §§1-3. <http://topics.law.cornell.edu/constitution/articleii>

Yes: A YES score is earned if all citizens (citizen is defined broadly, to include all ethnicities, or anyone born in the country) have the right under law to run for political office. A YES score may still be earned if individuals with a history of violence, terrorism, or criminality are banned from running for office.

No: A NO score is earned if there are any legal restrictions barring certain individuals or groups from running for political office.

16c. In practice, all citizens are able to form political parties.

100 | 75 | 50 | 25 | 0

Comments:

Although it is difficult to obtain status as a political party in an obviously tightly run two-party system, political parties can form freely without opposition or government interference.

Notably, nearly all practical matters related to American federal elections occur on the state level, including the formation of parties.

References:

Source 1: Iowa Secretary of State, Forming a Political Party in Iowa. Last accessed September 20, 2011. <http://www.sos.state.ia.us/elections/electioninfo/FormPoliticalParty.html>

Source 2: Federal Election Commission, Quick Answers to Party Questions. Last accessed September 20, 2011. http://www.fec.gov/ans/answers_party.shtml

Source 3: Tova Wang, Century Foundation and Demos, Senior Democracy Fellow. Skype interview on September 12, 2011.

100: While there is no guarantee of electoral success, political parties can form freely without opposition.

75:

50: Some barriers to formation are present, such as burdensome registration requirements that may not be fairly applied. Some parties' political viewpoints may draw pressure from the government, such as surveillance or intimidation. Some political parties or organizations may have extra barriers to getting on a ballot.

25:

0: Some political parties are effectively barred from forming through some manner of official or unofficial pressure. This may include threats, arrest, or violence from competing parties or other groups.

16d. In practice, all citizens can run for political office.

100 | 75 | 50 | 25 | 0

Comments:

All citizens can run for political office. Professor Gabriel "Jack" Chin affirms that the career is open to a wide variety of people. There is "limited fluidity" in that successful citizens must have some capital, whether political or financial, and they must be willing to make substantial financial and professional investments to lay the groundwork to be involved at the national level.

References:

Source 1: Professor Gabriel Jack Chin, University of California Davis School of Law. Phone interview on September 2, 2011.

Source 2: Source 2: Tova Wang, Century Foundation and Demos, Senior Democracy Fellow. Skype Interview on September 12, 2011.

100: While there is no guarantee of electoral success, anyone can run for office under transparent and equitable guidelines. There is a formal process for access to the ballot which is fairly applied. The costs of running a campaign are reasonable and do not deter candidates from entering a race.

75:

50: Some barriers exist to getting on the ballot and bureaucratic or regulatory requirements for doing so may be unfairly applied. The costs of running a political campaign are significant and result in dissuading some candidates from running for office. A system of party lists may discourage or prevent independent candidates from running for office.

25:

0: Citizens can effectively be barred from the ballot through government abuse of official rules and/or unofficial pressure. The costs of running a campaign are extremely high and result in most average citizens being unable to run an effective campaign for office.

16e. In practice, an opposition party is represented in the legislature.

100 | 75 | 50 | 25 | 0

Comments:

The main opposition party is represented in the legislature, reflecting the deeply entrenched two-party system in the United States. The 112th Congress represents both major parties in the United States. Of the 435 members of the House of Representatives, 192 are Democrats and 240 are Republicans (three seats are vacant). Of the 100 members of the Senate, 51 are Democrats, 47 are Republicans and two are Independents.

Innumerable examples show how opposition engages in meaningful debate on a variety of issues, including taxes, gays in the military and immigrant access to education.

References:

Source 1: Office of the Clerk of the U.S. House of Representatives, "Congressional Profile." Last accessed September 21, 2011. http://clerk.house.gov/member_info/cong.aspx

Source 2: The Washington Post, "Senate Blocks Extension of Bush-era Tax Cuts," December 4, 2010. <http://www.washingtonpost.com/wp-dyn/content/article/2010/12/04/AR2010120403716.html>

Source 3: Washington Times, "Senate Blocks Bill to Lift Military Gay Ban," September 21, 2010. <http://www.washingtontimes.com/news/2010/sep/21/gop-blocks-bill-lift-military-gay-ban2/>

Source 4: Texas Tribune, "Senate Blocks DREAM Act Amendment," September 21, 2010. <http://www.texastribune.org/immigration-in-texas/immigration/senate-blocks-dream-act-amendment/>

100: The opposition party always has some influence on the proceedings of the legislature. The opposition party can introduce legislation or bring pending matters to a vote without the consent of the ruling party.

75:

50: The opposition party has influence on the proceeding of the legislature, but it is limited in scope. The opposition's ability to force votes or publicly debate certain topics may be limited.

25:

0: The opposition party has only token participation in the legislature's proceedings and cannot advance legislation or force a debate.

2.2. Election Integrity

17. In law, is there an election monitoring agency or set of election monitoring agencies/entities?

100

17a. In law, is there an election monitoring agency or set of election monitoring agencies/entities?

Yes | No

Comments:

No one agency or entity conducts election monitoring in the United States. But, several agencies regulate and enforce various aspects of elections.

The Federal Election Commission is an independent agency formed in 1975 to regulate financial aspects of elections, including disclosing campaign finance information, enforcing limits and prohibitions on contributions and overseeing the public funding of presidential elections.

The U.S. Electoral College, administered by the National Archives and Records Administration, implements an indirect, hybrid election process, whereby both elected members of Congress and popular vote determine who wins the presidential office.

The Office of the Federal Registrar coordinates the Electoral College, both serving as an intermediary between the states and Congress and reviewing the legal sufficiency of state and electors' actions in the presidential election.

The Electoral Assistance Commission administers payments from the federal government to states, develops guidelines, adopts voluntary voting system guidelines, accredits voting system test laboratories and equipment and maintains a national mail voter registration form. Notably, state and local institutions are responsible for administering national elections.

The Department of Justice, Civil Rights Division, Voting Section can certify and assign federal observers and election monitors. Observers and monitors may be assigned to complete the following tasks, among others:

- Conduct investigations to determine whether it is likely that minority voters will not be allowed to cast a ballot without interference in particular polling places on election day;
- Write reports of the activities they witness in polling places and provide those reports to the Voting Section;
- Address concerns about racial discrimination in the voting process;
- Ensure compliance with bilingual election procedures.

Extensive fragmentation of federal election administration is cause for much criticism.

References:

Law 1: Federal Election Campaign Act. 2 U.S.C. § 431 et seq. http://www.law.cornell.edu/uscode/2/uscode_sec_02_00000431-000-.html

Law 2: Electoral College, 3 U.S.C. §4. http://www.law.cornell.edu/uscode/3/uscode_sup_01_3_10_1.html

Law 3: Help America Vote Act Title II (A)(1) §§202, 206, 207, 209 (2002). <http://www.fec.gov/hava/eac.htm> and <http://www.eac.gov/>

Source 1: Guy-Uriel E. Charles, Heather K. Gerken and Michael S. Kang, eds., "Race, Reform and Regulation of the Electoral Process: Recurring Puzzles in American Democracy," p. 193 (2011).

Source 2: Federal Election Commission, "About." Last accessed September 21, 2011. <http://www.fec.gov/about.shtml>

Source 3: The Department of Justice, Civil Rights Division, Voting Section. Last accessed September 21, 2011. http://www.justice.gov/crt/about/vot/examine/activ_exam.php

Yes: A YES score is earned if there is a domestic agency or set of domestic agencies/entities formally assigned to ensure the integrity of the election process.

No: A NO score is earned if no domestic agency or set of domestic agencies/entities exists that monitors elections. A NO score is earned if elections are only monitored by an agency informally, such as poll booth monitoring by the police, only by international observers, or only by NGOs. A NO score is earned if the domestic election agency or set of domestic agencies simply facilitates the process of voting but is not empowered to report violations or abuses.

18. Is the election monitoring agency effective?

80

18a. In law, the agency or set of agencies/entities is protected from political interference.

Yes | No

Comments:

By law, the primary agency overseeing elections, the Federal Election Commission, is protected from political interference. Legal safeguards include that the Commission must have representation from different political parties. Further, the chairman and the vice chairman must not be affiliated with the same political party. Moreover, to be eligible as a commission member, one must be independent of any branch of federal government and relinquish any other business, vocation or employment. A member may serve as chairman only once during any term of office. Finally, terms of office (six years) do not align with presidential terms (four years).

Federal election monitoring is regulated by both federal and state and local laws. Thus, election monitoring also is done by agencies at the state and local level. Each state has its own laws for creating formal organizational independence from the bodies contesting in the election. Notably, state election monitoring entities do not maintain as high a standard of formal organizational independence as federal election monitoring entities. For instance, the majority of state election officials are political appointees. However, it is a non-issue because bodies contesting federal elections likely would contest through federal mechanisms, not state mechanisms.

References:

Law: 2 U.S.C. §437(c). Federal Election Committee. http://www.law.cornell.edu/uscode/2/usc_sec_02_00000437--c000-.html

Yes: A YES score is earned only if the agency or set of agencies/entities has some formal organizational independence from the bodies contesting in the election. A YES score is still earned even if the entity is legally separate but in practice staffed by partisans.

No: A NO score is earned if the election monitoring agency or set of agencies/entities is legally tied to bodies contesting the election (i.e. an executive branch agency such as the Interior Ministry, or a committee of the legislature). A NO score is automatically earned if there is no domestic election monitoring agency.

18b. In practice, agency (or set of agencies/entities) appointments are made that support the independence of the agency.

100 | 75 | 50 | 25 | 0

Comments:

The Federal Election Commission (FEC), whose principle function is to regulate campaign finance, is the federal agency with the most influence on elections. Although by law the FEC can have no more than three members from one party, in practice the confirmation process appoints members that align with the ruling party. Thus, appointments are procedurally fair and based on professional qualifications but usually have clear political party affiliations.

Notably, the politicized nature of FEC member appointments has severely hampered the agency. In the words of Century Foundation and Demos Democracy Fellow Tova Wang, "The FEC is generally considered the most dysfunctional agency in the country."

The FEC increasingly has been paralyzed by a sometimes bitter standoff between Republicans and Democrats on the evenly divided panel. According to the watchdog group Public Citizen, the FEC has deadlocked on one in seven cases during the past 2 1/2 years, compared with one in 50 cases in the five prior years.

References:

Source 1: Tova Wang, Century Foundation and Demos, Senior Democracy Fellow. Skype interview on 9/12/2011.

Source 2: T.W. Farnam, The Washington Post, "FEC Still Hasn't Issued New Campaign Spending Rules," March 23, 2011. http://www.washingtonpost.com/politics/fec-still-hasnt-issued-new-campaign-spending-rules/2011/03/23/AF4FX3VB_story.html

Source 3: T.W. Farnam, The Washington Post, "FEC Is Stalled on Election Rules," March 29, 2011. http://www.washingtonpost.com/todays_paper/A%20Section/2011-03-29/A/3/18.0.1946337649_epaper.html

Source 4: Democracy 21, Letter to President Obama from NGOs regarding Federal Election Commission Appointment. March 13, 2011. <http://www.democracy21.org/vertical/Sites/%7B3D66FAFE-2697-446F-BB39-85FBBBA57812%7D/uploads/%7BCC360C8B-46D2-41AB-9EB4-96650403DF68%7D.PDF>

100: Appointments to the agency or set of agencies/entities are made based on professional qualifications. Individuals appointed are free of conflicts of interest due to personal loyalties, family connections or other biases. Individuals appointed usually do not have clear political party affiliations.

75:

50: Appointments are usually based on professional qualifications. However, individuals appointed may have clear party loyalties.

25:

0: Appointments are often based on political considerations. Individuals appointed often have conflicts of interest due to personal loyalties, family connections or other biases. Individuals appointed often have clear party loyalties.

18c. In practice, the agency or set of agencies/entities has a professional, full-time staff.

100 | 75 | 50 | 25 | 0

Comments:

At any given time, the FEC has 350 to 400 professionally trained, full-time staff members.

Despite the adequately staffed federal agency in Washington, it must be noted that much of the federal election process is implemented at the state level. Particularly during the election season, staffing at the poll stations has been criticized as inadequate, temporary and nonprofessional.

References:

Source: Phone call to Information Desk, Federal Election Commission, Washington headquarters.

100: The agency or set of agencies/entities has staff sufficient to fulfill its basic mandate.

75:

50: The agency or set of agencies/entities has limited staff, or staff without necessary qualifications to fulfill its basic mandate.

25:

0: The agency or set of agencies/entities has no staff, or such a limited staff that is clearly unqualified to fulfill its mandate.

18d. In practice, the agency or set of agencies/entities makes timely, publicly available reports following an election cycle.

100 | 75 | 50 | 25 | 0

Comments:

The Federal Election Commission (FEC) makes timely, publicly available reports. The Press Office of the FEC provides a weekly FEC Digest, newsletter, news releases, fundraising information, campaign statistics and all statements of political candidates and committees. Financial disclosures and reports are posted within 48 hours. All information is publicly available online at no cost.

References:

Source: Phone call to Information Desk, Federal Election Commission, Washington headquarters.

100: Reports are released to the public on a predictable schedule, without exceptions.

75:

50: Reports are released, but may be delayed, difficult to access, or otherwise limited.

25:

0: The agency or set of agencies/entities makes no public reports, issues reports which are effectively secret, or issues reports of no value.

18e. In practice, when necessary, the agency or set of agencies/entities imposes penalties on offenders.

100 | 75 | 50 | 25 | 0

Comments:

The FEC imposes penalties on offenders, usually in the form of a fine.

But, lengthy investigations and determinations before imposing penalties on more serious violations usually are so time-delayed as to be irrelevant. Lengthy investigations are believed to be the product of the agency's highly partisan commission members who, some argue, make it the most dysfunctional agency. As described by The New York Times, the FEC's "dysfunction has now reached the point where commission members are routinely ignoring the recommendations of their staff investigators rather than enforce the nation's election laws."

References:

Source 1: Phone call to Information Desk, Federal Election Commission, Washington headquarters.

Source 2: Tova Wang, Century Foundation and Demos, Senior Democracy Fellow. Skype interview on 9/12/2011.

Source 3: Editorial, The New York Times, "When Election Police Go Easy," December 31, 2010. <http://www.nytimes.com/2010/12/31/opinion/31fri4.html?scp=7&sq=Federal+Election+Commission+investigation&st=nyt>

100: When rules violations are discovered, the agency or set of agencies/entities is aggressive in penalizing offenders and/or in cooperating with other agencies in penalizing offenders.

75:

50: The agency or set of agencies/entities enforces rules, but is limited in its effectiveness. The agency may be slow to act, unwilling to take on politically powerful offenders, reluctant to cooperate with other agencies, or occasionally unable to enforce its judgments.

25:

0: The agency or set of agencies/entities does not effectively penalize offenders and/or cooperate with other agencies in penalizing offenders. The agency may make judgments but not enforce them, or may fail to make reasonable judgments against offenders. The agency may be partisan in its application of power.

19. Are elections systems transparent and effective?

92

19a. In practice, there is a clear and transparent system of voter registration.

100 | 75 | 50 | 25 | 0

Comments:

There is a clear and transparent system of voter registration in that, for the majority of voters, is easy. Registration may be done online, by mail or in person, and generally voters have sufficient time to understand their rights, check the accuracy of their registration and ensure that errors are corrected before they vote. Apart from government-run voter registration (such as the District of Columbia Board of Elections & Ethics), there are innumerable non-governmental organizations that educate and assist voters in (see <http://www.canivote.org>; <https://registertovote.org>; <http://www.nonprofitvote.org>; and <http://www.rockthevote.org>).

However, there are some problems. Both Common Cause and the Brennan Center for Justice reported that voter registration was the No. 1 barrier to the 2010 midterm election. Specific difficulties included burdensome registration deadlines, confusing residency requirements and improper voting list purges.

Moreover, a serious problem with unclear voter registration is that it disproportionately affects minority populations. The Brennan Center for Justice, for example, reports disproportionate affect on African-American voters with respect to voter intimidation and deceptive practices. The Sentencing Project's director of advocacy, Kara Gotsch, and University of California-Davis Law Professor Jack Chin each pointed to voting registration issues as key reasons for convicted felons' disenfranchisement. In particular, as convicted felons' rights to vote differ by state, misunderstanding one's rights and inaccurate registration lists lead to "de facto disenfranchisement," where eligible, willing voters do not vote.

References:

Source 1: Common Cause, Executive Summary, "2010 Swing States Report" (2010). <http://www.commoncause.org/site/pp.asp?c=dkLNK1MQIwG&b=6237739>

Source 2: Non-governmental

Organizations: <http://www.canivote.org>; <https://registertovote.org>; <http://www.nonprofitvote.org>; <http://www.rockthevote.org>

Source 3: United States Elections Project, "Turnout 2010" (2010). http://elections.gmu.edu/Turnout_2010G.html

Source 4: Brennan Center for Justice, "Why Aren't Voters Registering?" and "Voting Challenges 2010" (2010). http://www.brennancenter.org/blog/archives/why_arent_voters_registering/ and http://brennan.3cdn.net/7a4356fa4b248a76f7_uam6bqv

Source 5: Common Cause, "Voter Registration." Last accessed September 27, 2011. <http://www.commoncause.org/site/pp.asp?c=dkLNK1MQIwG&b=4923169>

Source 6: District of Columbia Board of Elections & Ethics, "Online Voter Registration." Last accessed September 27, 2011. https://www.dcboee.org/voter_info/register_to_vote/ovr_step1.asp

Source 7: Phone interview on August 30, 2011, with Kara Gotsch, The Sentencing Project, Director of Advocacy.

Source 8: Phone interview on September 2, 2011, with Jack Chin, professor of law at the University of California, Davis.

100: There is a transparent system of voter registration that provides voters with sufficient time to understand their rights, check the accuracy of their registration, and ensure that errors are corrected before they vote.

75:

50: There is a transparent voter registration system that provides voters with sufficient time to understand their rights, check the accuracy of their registration, and ensure that errors are corrected before they vote but there are some problems. Voters may have not access to registration lists with sufficient time to correct errors before voting or registration lists may at times be inaccessible.

25:

0: The system of voter registration is incomplete or does not exist. Government may routinely falsify registration lists to affect voting patterns and limit access to the polls. Double voting and "ghost" voting by non-existent voters is common.

19b. In law, election results can be contested through the judicial system.

Yes

No

Comments:

Colloquially known as the "Safe Harbor Provision," U.S. Code Title 3 Section 5 governs the determination of controversy as to appointment of electors in presidential elections. It specifies that "judicial or other methods or procedures" may be used to determine controversy or contest concerning the appointment of electors.

Further, U.S. Code Title 28 Section 1257 grants the right of judicial review of the highest state court to the Supreme Court by writ of certiorari.

References:

Law 1: 3 U.S.C. § 5. http://www.law.cornell.edu/uscode/3/usc_sec_03_00000005--000-.html

Law 2: 28 U.S.C. § 1257. <http://www.law.cornell.edu/uscode/28/1257.html>

Yes: A YES score is earned if citizens or political parties can challenge allegedly fraudulent election results through the courts or other judicial mechanisms.

No: A NO score is earned if there is no legal right for citizens or political parties to challenge allegedly fraudulent election results in the courts or other judicial mechanisms.

19c. In practice, election results can be effectively appealed through the judicial system.

100 | 75 | 50 | 25 | 0

Comments:

Although used infrequently, federal election results can be effectively appealed through the judicial system. For example, in 2000, presidential candidates George Bush and Al Gore appealed election results through the judicial system. The Supreme Court settled the election dispute, eliciting a highly polarized political reaction.

References:

Common Law: Bush v. Gore, 531 U.S. 98 (2000). http://oyez.org/cases/2000-2009/2000/2000_00_949

100: The electoral appeals mechanism takes cases from both candidates complaining of flaws in the electoral process as well as citizens bringing complaints related to denial of suffrage or registration errors. There is an expedited process for resolving such complaints to avoid delaying a timely announcement of electoral results.

75:

50: The electoral appeals mechanism takes complaints from both candidates and voters but may not always act on complaints promptly. The appeals mechanism may be abused at times by parties or candidates seeking to delay the announcement of electoral results.

25:

0: The electoral appeals mechanism rarely or never acts on complaints brought by candidates or citizens. Citizens may not be able to bring complaints related to denial of suffrage or voter registration errors.

19d. In practice, the military and security forces remain neutral during elections.

100 | 75 | 50 | 25 | 0

Comments:

There is no indication of military or security participation in elections. As a matter of long-standing policy, military service members and federal employees acting in their official capacity may not engage in activities that associate the Department of Defense with any partisan political campaign or elections, candidate, cause or issue. The limitations of participation can be found in Department of Defense directive 1344.10, "Political Activities by Members of the Armed Forces," and the Hatch Act:

Members of the armed forces who are on active duty are permitted to express their personal opinions on political candidates, make a monetary contribution to a campaign, sign a petition to place a candidate's name on the ballot and attend a political event as a spectator. Members on active duty may not participate in partisan activities such as soliciting or engaging in partisan

fundraiser activities, serving as the sponsor of a partisan club or speaking before a partisan gathering. In addition, all military members, including National Guard and Reserve forces, are prohibited from wearing military uniforms at political campaign events.

References:

Source: Department of Defense. "Participation in Political Activities," August 3, 2009. https://kb.defense.gov/app/answers/detail/a_id/668/kw/elections/session/L3RpbWUvMTMxMzQzNjA4MS9zaWQvX2ZoSk9DQms%3D

100: The military, military officers, and other security forces refrain from overtly supporting or opposing political candidates or commenting on elections. The military or security forces refrain from physically interfering with political campaigns, rallies, or voting.

75:

50: The military, military officers, and security forces may be known to unofficially support or oppose particular candidates or parties. The military or security forces generally refrain from the use of force to support or oppose particular candidates or parties but there are exceptions.

25:

0: The military or other security forces are an active and explicit player in politics and overly support or oppose particular candidates or parties. The military or security forces routinely exercise the use of force to support or oppose parties or candidates.

19e. In law, domestic and international election observers are allowed to monitor elections.

Yes | No

Comments:

No laws prohibit election monitors, although their presence is rare.

References:

No laws prohibit election monitors.

Yes: A YES score is earned if domestic and international election observers are allowed to monitor the electoral process.

No: A NO score is earned if there are any legal or regulatory prohibitions on the monitoring of the electoral process by domestic or international election observers.

19f. In practice, election observers are able to effectively monitor elections.

100 | 75 | 50 | 25 | 0

Comments:

Election observers are able to effectively monitor elections. The most recent U.S. general elections in 2008 were monitored by international observers. All members of the Organization for Security and Co-operation in Europe have agreed to invite international observers, and the United States, as a member, invited observers.

More recently, in the 2010 mid-term federal elections, the Department of Justice's Criminal Division dispatched a vote fraud team of more than 400 observers and monitors to 30 potential trouble spots in 18 states due to concerns about voter intimidation or fraud, though they had not yet received any significant reports of problems. Further, members from conservative and liberal groups monitored polls and organized "election protection" hot lines to prevent voter fraud and help voters who felt threatened.

References:

Source 1: Office for Democratic Institutions and Human Rights. "Election Activities in 2008." <http://www.osce.org/odihr/elections/76830> and http://www.osce.org/odihr/elections/usa/general_2008.

Source 2: Richard Wolf, USA Today, "Hours Before Midterm Vote, Both Sides Vie For Last Word," November 1, 2010. http://www.usatoday.com/news/politics/2010-11-02-election02_ST_N.htm

Source 3: CNN Wire Staff, CNN, "Scattered Snags Reported In Midterm Balloting," November 2, 2010. <http://www.cnn.com/2010/POLITICS/11/02/voting.irregularities/index.html>

100: Election observers have unfettered access to polling sites, counting stations, and voters themselves. The government does not interfere with the observers' activities.

75:

50: Election observers generally have access to polling sites, counting stations, and voters but encounter restrictions in certain areas. The government may impose burdensome regulatory or bureaucratic requirements on observers to discourage their involvement.

25:

0: Election observers' movements are significantly limited by the government and many polling and counting sites are restricted or barred from observers. The government imposes so many bureaucratic or regulatory burdens on the observers that their mission is rendered ineffective.

91 2.3. Political Financing Transparency

20. Are there regulations governing the financing of political parties?

100

20a. In law, there are limits on individual donations to political parties.

Yes

No

Comments:

The Federal Election Commission, an independent agency, regulates campaign financing to candidates and political parties. Individual contributions are limited to \$30,800 per calendar year to a national party committee. This limit applies separately to a party's national committee, House campaign committee and Senate campaign committee. There is also a \$117,000 total biennial limit that places a ceiling on total contributions over a two-year period.

References:

Law: 2 U.S.C. 431 et seq., Federal Election Campaign Act of 1971 (as amended). <http://www.law.cornell.edu/uscode/2/431.html>

Federal Regulation: Code of Federal Regulation, Title 11: Federal Elections. http://ecfr.gpoaccess.gov/cgi/t/text/text-idx?&c=ecfr&tpl=/ecfrbrowse/Title11/11tab_02.tpl

Source 1: <http://www.fec.gov/pages/brochures/citizens.shtml>

Yes: A YES score is earned if there are any limits in size on individual contributions to political parties. A YES score is also earned if individual contributions are prohibited.

No: A NO score is earned if there are no limits on contributions from individuals. A NO score is also earned if limits are applied by the government on opposition parties in a discriminatory manner.

20b. In law, there are limits on corporate donations to political parties.

Yes

No

Comments:

There is a ban on corporate contributions to political parties, as established in the Tillman Act of 1907. Further, the Taft-Hartley Act of 1947 banned corporate expenditures related to general and primary federal elections.

However, the 2010 Supreme Court decision in Citizens v. FEC overturned precedent limiting corporate activity in campaigns. The court ruling allows unlimited corporate funding of political broadcasts (advertisements for candidates) in national elections. The case did not affect the federal ban of direct contributions from corporations or unions to political parties or candidate campaigns. Nonetheless, this highly controversial ruling was followed by unprecedented levels of corporate involvement in midterm elections. The upcoming 2012 presidential election will show the full affect of the Citizens ruling on corporate contributions to political parties or candidate campaigns.

References:

Law 1: U.S.C., Title 2, Chapter 14, Subchapter I, §441b: Contributions or Expenditures by National Banks, Corporations or Labor Organizations. http://www.law.cornell.edu/uscode/2/uscode_sec_02_00000441-b000-.html

Law 2: Citizens United v. Federal Election Commission, 558 U.S. 08-205 (2010). <http://topics.law.cornell.edu/supct/cert/08-205>

Source 1: Monica Youn, Testimony in Citizens v. FEC. <http://judiciary.senate.gov/pdf/11-04-12%20Youn%20Testimony.pdf>

Yes: A YES score is earned if there are any limits in size on corporate contributions to political parties. A YES score is earned if corporate contributions are prohibited.

No: A NO score is earned if there are no limits on corporate contributions to political parties. A NO score is also earned if limits are applied by the government on opposition parties in a discriminatory manner.

20c. In law, there are limits on total political party expenditures.

Yes

No

Comments:

There are no limits on total political party expenditures, unless political parties receive public funding. If parties accept public funding, there are national spending limits. To avoid such limits, virtually no parties accept public funding. Thus, although the law places some limitations on political party expenditures, in practice, the limits are meaningless.

References:

Law: U.S.C. Title 2, Sub-chapter 1: Disclosure of Federal Campaign Funds. http://www.law.cornell.edu/uscode/2/uscode_sup_01_2_10_14_20_1.html

Source 1: Federal Election Commission, "Brochures: Expenditure Limits." Last accessed September 22, 2011. http://www.fec.gov/pages/brochures/pubfund.shtml#Expenditure_Limits

Yes: A YES score is earned if there are any limits in size on political party expenditures during the course of an election.

No: A NO score is earned if there are no limits on political party expenditures during an election. A NO score is also earned if limits are applied by the government on opposition parties in a discriminatory manner.

20d. In law, there are requirements for the disclosure of donations to political parties.

Yes | No

Comments:

Pre- and post-election and quarterly reports are required for political committees.

References:

Law: 2 U.S.C. §434: Disclosure of Federal Campaign Funds, Reporting Requirements. http://www.law.cornell.edu/uscode/2/uscode_sec_02_00000434--000-.html

Yes: A YES score is earned if there are any requirements mandating the disclosure of financial contributions to political parties.

No: A NO score is earned if there are no requirements mandating the disclosure of contributions to political parties, existing regulations do not require a donor's name or amount given, or the regulations allow for anonymous donations. Systems where only certain donation amounts are required to be made public (above a non-trivial amount) also earn a NO score.

20e. In law, there are requirements for the independent auditing of the finances and expenditures of political parties when financial irregularities are uncovered.

Yes | No

Comments:

Section 438(b) permits the Federal Election Commission to conduct an audit of any political committee when a committee appears not to have met the threshold requirements for substantial compliance. The commission also audits presidential campaigns and convention committees that accept public funds.

References:

Law: 2 U.S.C. §438(b). <http://ecfr.gpoaccess.gov/cgi/t/text/text-idx?c=ecfr&sid=917122af8017fa1b9df451e6dce4aa83&rgn=div8&view=text&node=11:1.0.1.1.12.0.1.16&idno=11>

Federal Regulation: CFR, Title 11, §104.16.

Yes: A YES score is earned if there is a legal or regulatory requirement for the independent auditing of party finances and expenditures when irregularities are uncovered. The auditing is performed by an impartial third-party.

No: A NO score is earned if there are no legal or regulatory requirements for the independent auditing of political parties' finances and expenditures when financial irregularities are uncovered. A NO score is also earned if such requirements exist but allow for parties to self-audit.

20f. In law, there is an agency or entity that monitors the financing of political parties.

Yes | No

Comments:

An independent regulatory agency, the Federal Election Commission (FEC) was created by Congress in 1975 to administer and enforce federal election financing laws. Its duties are to disclose campaign finance information, enforce the contribution provisions of the law and oversee the public funding of presidential elections.

The Federal Election Commission is made up of six members, who are appointed by the president and confirmed by the Senate. Each member serves a six-year term, and two seats are subject to appointment every two years. By law, no more than three commissioners can be members of the same political party, and at least four votes are required for any official commission action. This structure was created to encourage nonpartisan decisions. The chairmanship of the commission rotates among the members each year, with no member serving as chairman more than once during his or her term.

References:

Law: Federal Election Campaign Act, 2 U.S.C. §431 et seq. <http://www.law.cornell.edu/uscode/2/431.html>

Source 1: Federal Election Commission, "About." Last accessed September 22, 2011. <http://www.fec.gov/about.shtml>

Yes: A YES score is earned if there is a domestic agency or set of domestic agencies/entities formally assigned to monitor and enforce laws and regulations around the financing of political parties. A YES score is earned even if the agency/entity is ineffective in practice.

No: A NO score is earned if there is no such agency or entity. A NO score is also earned if this monitoring is solely carried out by the media and non-governmental organizations.

21. Are there regulations governing the financing of individual political candidates?

100

21a. In law, there are limits on individual donations to political candidates.

Yes

No

Comments:

There are limits on individual donations to political candidates. Individuals may give no more than \$2,500 to each candidate or candidate committee per election. There is also a biennial limit on individual contributions capped at \$46,200 to all candidates.

However, one loophole that allows individual donations is to give "soft money" in the form of donations to independent, nonprofit political organizations that are not regulated by the FEC or state election commissions. Such organizations can spend on political activities that do not promote the election or defeat of a specific candidate, including voter registration and issue advertising. Many of these organizations are called "527 Groups," reflecting their "527" Internal Revenue Service tax classification. Other organizations that may receive unlimited individual donations are political action committees (PACs) or nonprofit entities with 501(c) status.

References:

Law: 2 U.S.C. 441: Disclosure of Federal Campaign Funds. http://www.law.cornell.edu/uscode/2/usc_sup_01_2_10_14_20_1.html

Federal Regulation: 11 CFR, section 110: Contributions and Expenditure Limits and Prohibitions. http://ecfr.gpoaccess.gov/cgi/t/text/text-idx?c=ecfr&tpl=/ecfrbrowse/Title11/11cfr110_main_02.tpl

Source 1: Federal Election Commission, "Contribution Limits Chart 2011-12." Last visited September 22, 2011. <http://www.fec.gov/pages/brochures/contriblimits.shtml>

Source 2: Federal Election Commission, "Answers: General." Last accessed September 22, 2011. http://www.fec.gov/ans/answers_general.shtml

Source 3: Federal Election Commission, "Brochures." Last accessed September 22, 2011. <http://www.fec.gov/pages/brochures/indexp.shtml>

Yes: A YES score is earned if there are any limits in size on individual contributions to political candidates. A YES score is also earned if individual contributions are prohibited.

No: A NO score is earned if there are no limits on contributions from individuals. A NO score is also earned if limits are applied by the government on opposition candidates in a discriminatory manner.

21b. In law, there are limits on corporate donations to individual political candidates.

Yes | No

Comments:

Corporations, national banks and federally chartered corporations may not make contributions in connection with any election, including state and local elections. However, political action committees (PACs) established by corporations, labor organizations, national banks and incorporated membership organizations may make contributions to a specific candidate. PACs must use segregated funds and file contribution disclosures, and they face limitations on how much they can raise and from whom. They are allowed to contribute to a candidate at twice the amount of an individual – \$5,000 per election instead of \$2,500.

Recent U.S. jurisprudence has expanded the avenues through which corporations may contribute to political activity. In January 2010, the Supreme Court ruled in *Citizens v. FEC* that corporations may give unlimited funds to political broadcasts (advertisements for candidates) in national elections. Subsequently, in *SpeechNow.Org v. Federal Election Commission* (2010), the U.S. Court of Appeals for the D.C. Circuit held that corporations may make unlimited contributions to PACs, independent organizations that directly advocate for or against candidates. These decisions are highly controversial, although the full weight of their impact is yet to come in the 2012 presidential elections.

References:

Law: 2 U.S.C. § 441(b), Contributions or Expenditures by National Banks, Corporations or Labor Organizations. http://www.law.cornell.edu/uscode/2/uscode_sec_02_00000441-b000-.html

Federal Regulation: 11 C.F.R. 114.2. http://edocket.access.gpo.gov/cfr_2011/janqtr/pdf/11cfr114.2.pdf

Federal Regulation: 11 C.F.R. 114.5. http://edocket.access.gpo.gov/cfr_2011/janqtr/pdf/11cfr114.5.pdf

Common Law 1: *Citizens United v. FEC*, 130 S. Ct. 876 (2010). www.supremecourt.gov/opinions/09pdf/08-205.pdf

Common Law 2: *SpeechNow.Org v. FEC*, 389 U.S.App.D.C. 424 (2010). www.fec.gov/law/litigation/speechnow_ac_opinion.pdf

Source 1: Adam Liptak, The New York Times, “Federal Courts Rule In Campaign Finance Cases,” March 27, 2010. <http://www.nytimes.com/2010/03/27/us/politics/27campaign.html>

Yes: A YES score is earned if there are any limits in size on corporate contributions to individual political candidates. A YES score is earned if corporate contributions are prohibited.

No: A NO score is earned if there are no limits on corporate contributions to individual political candidates. A NO score is also earned if limits are applied by the government on opposition candidates in a discriminatory manner.

21c. In law, there are requirements for the disclosure of donations to individual political candidates.

Yes | No

Comments:

Disclosed information is required by law to be made public. Campaign finance reports and data are made available by the Federal Election Commission.

References:

Law 1: 2 U.S.C. §441b(a), Corporate Contributions. http://www.law.cornell.edu/uscode/2/uscode_sec_02_00000441-b000-.html

Law 2: 2 U.S.C. §434, Reporting Requirements. http://www.law.cornell.edu/uscode/2/uscode_sec_02_00000434--000-.html

Source 1: Federal Election Commission, “Disclosure.” Last accessed September 24, 2011. <http://www.fec.gov/disclosure.shtml>

Yes: A YES score is earned if there are any requirements mandating the disclosure of financial contributions to individual political candidates.

No: A NO score is earned if there are no requirements mandating the disclosure of contributions to individual political candidates, existing regulations do not require a donor's name or amount given, or the regulations allow for anonymous donations. Systems where only certain donation amounts are required to be made public (above a non-trivial amount) also earn a NO score.

21d. In law, there are requirements for the independent auditing of the campaign finances of individual political candidates when irregularities are uncovered.

Yes | No

Comments:

Campaign finance law permits the Federal Election Commission to conduct an audit of any political committee "when a committee appears not to have met the threshold requirements for substantial compliance." The audit aims to determine whether the committee complied with the limitations, prohibitions and disclosure requirements of the Federal Election Campaign Act. In addition, the commission is required by law to audit presidential campaigns and convention committees that accept public funds.

References:

Law: 2 U.S.C. §438(b), Administrative Provisions: Audits and Field Investigations. <http://www.law.cornell.edu/uscode/2/438.html>

Yes: A YES score is earned if there is a legal or regulatory requirement for the independent auditing of an individual candidate's campaign finances and expenditures when financial irregularities are uncovered. The auditing is performed by an impartial third-party.

No: A NO score is earned if there are no legal or regulatory requirements for the independent auditing of an individual candidate's campaign finances and expenditures when financial irregularities are uncovered. A NO score is also earned if such requirements exist but allow for candidates to self-audit.

21e. In law, there is an agency or entity that monitors the financing of individual political candidates' campaigns.

Yes | No

Comments:

The Federal Elections Commission Act passed in 1971 created the Federal Elections Commission, an independent agency charged with mentoring campaign finance.

References:

Law: 2 U.S.C. §§431-442. Disclosure of Federal Campaign Funds. <http://www.law.cornell.edu/uscode/2/431.html>

Yes: A YES score is earned if there is a domestic agency or set of domestic agencies/entities formally assigned to monitor and enforce laws and regulations around the financing of individual political candidates' campaigns. A YES score is earned even if the agency/entity is ineffective in practice.

No: A NO score is earned if there is no such agency or entity. A NO score is also earned if this monitoring is solely carried out by the media and non-governmental organizations.

22. Are the regulations governing the political financing of parties effective?

22a. In practice, the limits on individual donations to political parties are effective in regulating an individual's ability to financially support a political party.

100 | 75 | 50 | 25 | 0

Comments:

The limits on individual donations to political parties are effective in regulating an individual's ability to offer direct financial support to a political party. Capped at \$30,800 a year, individuals generally adhere to this "hard" money limit.

However, limits do not prevent individuals from indirectly financing a political party by donating "soft" money. Rather than donating directly to a political party or candidate, individuals can donate to nominally independent, third-party organizations that advocate on behalf of or against a particular party. Many of these organizations are "527" or 501(c) nonprofits or "Super PACs."

527s, named for a section of the tax code, can accept unlimited donations. They cannot solicit a vote for or against a candidate. 501(c) organizations are nonprofit groups, which include the U.S. Chamber of Commerce and the Tea Party-affiliated Americans for Prosperity, that can accept unlimited donations and do not have to disclose donors. Super PACs can accept unlimited donations and endorse candidates. They cannot contribute to candidates but can advertise independently for or against federal candidates. Super PACs are new, formed in the wake of the U.S. Supreme Court's 2010 Citizens United v. Federal Election Commission ruling. They contrast traditional PACs, which have a \$5,000 per year contribution limit and cannot accept money from corporate or union treasuries. 527s report to the IRS, super PACs to the FEC. 501(c)s must report to the FEC how much they spend on ads that mention a federal candidate.

In an interview conducted by the Center for Responsive Politics, Trevor Potter, former chair of the Federal Election Commission, said that the new Citizens United ruling allows individuals who have reached their legal limit to support their candidate through independent expenditure campaigns tied to most of the major candidates. People with "deep pockets" are willing to spend that money, and they can under this new system. Many of these individual donations go undisclosed — depending on whether they are made through a super PAC, 501(c) or shadow corporation — because such groups are allowed to collect them anonymously when political activity is not the groups' key focus.

References:

Source 1: Kathleen Ronayne, Center for Responsive Politics, "Money Talks: OpenSecrets.org's Interview with Top Campaign Finance Attorney Trevor Potter," August 3, 2011. <http://www.opensecrets.org/news/2011/08/money-talks-trevor-potter.html>

Source 2: Evan Mackinder, Center for Responsive Politics, "OpenSecrets.org's Sheila Krumholz Schools Stephen Colbert on Dangers of Dark Money in Politics," July 19, 2011. <http://www.opensecrets.org/news/2011/07/sheila-krumholz-schools-stephen-colbert.html>

Source 3: Business Week, "How Money Flows to Candidates," September 30, 2010. http://www.businessweek.com/magazine/content/10_41/b4198032741459.htm

Source 4: By Melanie Mason, Los Angeles Times, "New GOP 'Super PAC' Tests Limits of Campaign Finance Laws," May 17, 2011. <http://articles.latimes.com/2011/may/17/news/la-pn-gop-super-pac-20110517>

Source 5: Jill Abramson, The New York Times, "Return of the Secret Donors," October 16, 2010. <http://www.nytimes.com/2010/10/17/weekinreview/17abramson.html?pagewanted=1>

100: Existing limits represent the full extent to which an individual can directly or indirectly financially support a political party. Limits are reasonably low enough in the context of the total costs of running a campaign.

75:

50: Existing limits generally represent the full extent to which an individual can directly or indirectly financially support a political party. However, exceptions and loopholes exist through which individuals can indirectly support political parties above and beyond those formal limitations. Such loopholes could include making donations to third-party groups that advocate on behalf of (or against) a particular party; unregulated loans to parties (rather than direct donations); or in-kind support that is not explicitly regulated by laws or regulations. The limits may be too high in the context of the overall costs of running a campaign.

25:

0: Existing limits are routinely bypassed or willfully ignored. The vast majority of individual contributions to a political party are made outside of the formal limitation system. There is no enforcement of violations. Limits are so high that they are meaningless in the context of the overall costs of running a campaign.

22b. In practice, the limits on corporate donations to political parties are effective in regulating a company's ability to financially support a political party.

100 | 75 | 50 | 25 | 0

Comments:

The limits on corporate donations to political parties are in effect limitless. "Hard" money limits regulating a corporation's ability to offer direct financial support to a political party are generally effective. There is enforcement of violations, but loopholes allowing indirect spending render limits on direct spending meaningless in the context of the overall costs of running a campaign.

Limits do not prevent corporations from indirectly financing a political party by donating "soft" money. The biggest game-changer was the U.S. Supreme Court's 2010 Citizens United v. Federal Election Commission ruling. Rather than donating directly to a political party or candidate, corporations can make unlimited independent expenditures to nominally independent, third-party organizations (527s, super PACs, 501(c) organizations) that in reality endorse a particular campaign. The ruling also allows corporations to pay out of their general treasury to support congressional campaigns and party committees.

For example, the Center for Responsive Politics reported that in the 2010 midterm election cycle, corporations generally did not directly get involved in political spending but donated more than \$15 million just to "super PACs."

Another change from the Citizens United ruling is that many corporate donations now go undisclosed because corporations are allowed to donate to 501(c) nonprofit organizations. Such organizations, by definition of their tax status, are not required to disclose their political spending to the FEC.

References:

Source 1: Kathleen Ronayne, Center for Responsive Politics, "Money Talks: OpenSecrets.org's Interview with Top Campaign Finance Attorney Trevor Potter," August 3, 2011. <http://www.opensecrets.org/news/2011/08/money-talks-trevor-potter.html>

Source 2: Business Week, "How Money Flows to Candidates," September 30, 2010. http://www.businessweek.com/magazine/content/10_41/b4198032741459.htm

Source 3: Spencer MacColl, Center for Responsive Politics, "OpenSecrets.org: Citizens United Decision Profoundly Affects Political Landscape," May 5, 2011. <http://www.opensecrets.org/news/2011/05/citizens-united-decision-profoundly-affects-political-landscape.html>

Source 4: Jill Abramson, The New York Times, "Return of the Secret Donors," October 16, 2010. <http://www.nytimes.com/2010/10/17/weekinreview/17abramson.html?pagewanted=1>

100: Existing limits represent the full extent to which a company can directly or indirectly financially support a political party. Limits are reasonably low enough in the context of the total costs of running a campaign to be meaningful.

75:

50: Existing limits generally represent the full extent to which a company can directly or indirectly financially support a political party. However, exceptions and loopholes exist through which companies can indirectly support political parties above and beyond those formal limitations. Such loopholes could include making donations to third-party groups that advocate on behalf of (or against) a particular party; unregulated loans to parties (rather than direct donations); or in-kind support that is not explicitly regulated by laws or regulations. The limits may be too high in the context of the overall costs of running a campaign.

25:

0: Existing limits are routinely bypassed or willfully ignored. The majority of corporate contributions to political parties are made outside of the formal limitation system. There is no enforcement of violations. Limits are so high that they are meaningless in the context of the overall costs of running a campaign.

22c. In practice, the limits on total party expenditures are effective in regulating a political party's ability to fund campaigns or politically-related activities.

100 | 75 | 50 | 25 | 0

Comments:

There are expenditure limits only if candidates accept public financing. But in the United States, no candidates accept public financing, so in practice there are no limits on party expenditures. Thus, total party expenditures rise to unprecedented amounts of money. Moreover, as mentioned previously, limits on direct individual donations are virtually meaningless given unlimited indirect individual donations. In general, Federal Election Commission (FEC) regulation of political party and candidate self-funding is ineffective in limiting overall money spent in elections.

It is important to note how the 2010 Supreme Court ruling in *Citizens United v. Federal Election Commission* drastically diminished the role of candidate and political party self-financing. Candidate and parties no longer need to rely on their ability to fund campaigns or politically related activities because third-party groups provide support and funding for them — and with virtually no spending limit. For example, The Washington Post quoted political scientist Lawrence R. Jacobs: “The candidate and party money will no longer have to do the heavy lifting on the negative ads. It’s being outsourced to these shadowy groups.”

References:

Source 1: Dan Eggen and T.W. Farnam, The Washington Post, “Election 2010: Spending On Midterm Campaigns Could Affect 2012 Race,” November 2, 2010. http://www.washingtonpost.com/wp-dyn/content/article/2010/11/02/AR2010110201573_2.html?sid=ST2010110203144

Source 2: Federal Election Commission. Disclosure. Last accessed October 9, 2011. <http://www.fec.gov/disclosurehs/hsnational.do>

100: Existing limits represent the full extent to which political parties are able to finance their activities. Limits are reasonably low enough in the context of the total costs of running a party to be meaningful.

75:

50: Existing limits generally represent the full extent to which a political party can finance its activities. However, exceptions and loopholes exist through which parties can generate revenue or finance their activities beyond the scope of existing regulations. Such loopholes could include taking loans that are outside of the scope of regulations covering direct donations; links to revenue-generating business activities that are beyond the scope of electoral or campaign-related regulations; or accepting in-kind support that is not explicitly regulated by laws or regulations. The limits may be too high in the context of the overall costs of running a party.

25:

0: Existing limits are routinely bypassed or willfully ignored. The majority of expenditures are made outside of the formal limitation system. Limits are so high that they are meaningless in the context of the overall costs of running a party.

22d. In practice, when necessary, an agency or entity monitoring the financing of political parties independently initiates investigations.

100 | 75 | 50 | 25 | 0

Comments:

The Federal Election Commission (FEC) does not initiate investigations but instead responds to complaints. The agency often relies on external pressure from the media attention, watchdog NGOs and adversely affected parties to set priorities.

The FEC is generally considered the most dysfunctional agency in the country. Senior Democracy Fellow Tova Wang says there is some action against campaign finance violations, but it is usually time-delayed and irrelevant. For example, the FEC announced in April 2011 that it completed a two-year investigation of President Barack Obama’s 2008 campaign. The dispute is still unresolved as now the FEC is conducting a full audit.

The FEC itself recognizes its inability to investigate or enforce campaign finance laws. Commissioner Ellen Weintraub said statistics show that the Federal Election Commission has become “less aggressive” at enforcing the nation’s campaign finance laws, as it is not a “fierce investigative agency.” From fiscal 2006 to 2010, the average fine levied against campaigns, parties and political action committees for violating campaign finance law dropped to \$42,000 from \$180,000, Weintraub said. Similarly, the number of conciliation agreements, deals on penalties hammered out between the FEC and those under investigation, fell to 29 in fiscal 2010 from 91 in fiscal 2007, which Weintraub called a “pretty sharp drop.” Weintraub attributed the weak enforcement to “a strong ideological divide on the commission.” Others believe it is because the law has changed considerably.

References:

Source 1: Tova Wang, Century Foundation and Demos, Senior Democracy Fellow. Skype Interview on 9/12/2011.

Source 2: Gary Wong, Center for Responsive Politics, "FEC Audits Obama's 2008 Campaign," April 19, 2011. <http://www.opensecrets.org/news/2011/04/ceo-4192011.html>

Source 3: Alex Knott, Roll Call, "FEC Falls Short on Enforcement, Commissioner Says," May 27, 2011. http://www.rollcall.com/news/FEC_falls_short_enforcement_commissioner_Weintraub-206027-1.html?zkMobileView=true

Source 4: Citizens for Responsibility and Ethics in Washington, Legal Filings. Last accessed October 10, 2011. <http://www.citizensforethics.org/legal-filings>

100: The agency or entity aggressively starts investigations into allegations of wrong doing with respect to the financing of political parties, or cooperates well with other agencies that do. The agency is fair in its application of this power.

75:

50: The agency or entity will start investigations, but often relies on external pressure to set priorities, has limited effectiveness when investigating, or is reluctant to cooperate with other agencies in politically sensitive cases. The agency, though limited in effectiveness, is still fair in its application of power.

25:

0: The agency or entity rarely investigates on its own, is uncooperative with other agencies, or the agency or entity is partisan in its application of this power.

22e. In practice, when necessary, an agency or entity monitoring the financing of political parties imposes penalties on offenders.

100 | 75 | 50 | **25** | 0

Comments:

The Federal Election Commission (FEC) does not effectively penalize offenders. The FEC rarely pursues the penalty process, although the FEC does enforce its judgments, when it makes them.

The FEC is generally considered the most dysfunctional agency in the country. Senior Democracy Fellow Tova Wang says there is some action against campaign finance violations, but it is usually time-delayed and irrelevant. For example, the FEC announced in April 2011 that it completed a two-year investigation of President Barack Obama's 2008 campaign. The dispute is still unresolved as now the FEC is conducting a full audit.

Even some FEC members recognize the agency's inability to investigate or enforce campaign finance laws. Commissioner Ellen Weintraub said statistics show that the Federal Election Commission has become "less aggressive" at enforcing the nation's campaign finance laws, as it is not a "fierce investigative agency." From fiscal 2006 to 2010, the average fine levied against campaigns, parties and political action committees for violating campaign finance law dropped to \$42,000 from \$180,000, Weintraub said. Similarly, the number of conciliation agreements, deals on penalties hammered out between the FEC and those under investigation, fell to 29 in fiscal 2010 from 91 in fiscal 2007, which Weintraub called a "pretty sharp drop." Weintraub attributed the weak enforcement to "a strong ideological divide on the commission." Others believe it is because the law has changed considerably.

References:

Source 1: Federal Election Commission, Press. Last accessed October 8, 2011. <http://www.fec.gov/press/press.shtml>

Source 2: Tova Wang, Century Foundation and Demos, Senior Democracy Fellow. Skype Interview on 9/12/2011.

Source 3: Gary Wong, Center for Responsive Politics, "FEC Audits Obama's 2008 Campaign," April 19, 2011. <http://www.opensecrets.org/news/2011/04/ceo-4192011.html>

Source 4: Alex Knott, Roll Call, "FEC Falls Short on Enforcement, Commissioner Says," May 27, 2011. http://www.rollcall.com/news/FEC_falls_short_enforcement_commissioner_Weintraub-206027-1.html?zkMobileView=true

100: When rules violations are discovered, the agency or entity is aggressive in penalizing offenders or cooperates well with other agencies that impose penalties.

75:

50: The agency or entity enforces rules, but is limited in its effectiveness. The agency or entity may be slow to act, unwilling to take on politically powerful offenders, reluctant to cooperate with other agencies, or occasionally unable to enforce its judgments.

25:

0: The agency or entity does not effectively penalize offenders. The agency or entity may make judgments but not enforce them, or may fail to make reasonable judgments against offenders. The agency or entity may be partisan in its application of power and may refuse cooperation with other agencies.

22f. In practice, contributions to political parties are audited.

100 | 75 | 50 | 25 | 0

Comments:

In practice, the Federal Election Commission conducts audits, as required by law. While the Commission can audit any political committee candidate, the commission generally conducts audits when a committee appears not to have met the threshold requirements for substantial compliance. FEC audits determine whether the committee complied with the limitations, prohibitions and disclosure requirements of the Federal Election Campaign Act.

The FEC audits authorized committees (committees authorized by candidates), unauthorized committees and Title 26 audit reports (presidential campaigns and convention committees that accept public funds). Some 937 audits, findings and actions issued by the FEC are available in a searchable database on the FEC website.

Notably, the audits are general reviews for completeness and general compliance with FEC standards, not checks for rigorous financial or criminal behavior.

References:

Source 1: Federal Election Commission, Audit Report Search System. <http://www.fec.gov/auditsearch/auditsearch.do>

100: Political party finances are regularly audited using generally accepted auditing practices. The auditing may be regular and comprehensive or only initiated after an initial review reveals irregularities. Auditing includes the auditing of nominally independent financial organizations that act as financial extensions of the party.

75:

50: Political party finances (as defined) are audited, but audits are limited in some way, such as using inadequate auditing standards, or the presence of exceptions to disclosed contributions. Contributions to the political party may be sufficiently audited, but the auditing of nominally independent extensions of the party may not be.

25:

0: Party finances are not audited, or the audits performed have no value in tracking contributions. Audits may be performed by entities known to be partisan or biased in their practices.

23. Are the regulations governing the political financing of individual candidates effective?

25

23a. In practice, the limits on individual donations to political candidates are effective in regulating an individual's ability to financially support a particular candidate.

100 | 75 | 50 | 25 | 0

Comments:

The limits on individual donations to political candidates are only moderately effective in regulating an individual's ability to financially support a particular candidate. Generally, existing limits represent the full extent to which an individual can directly financially support a particular candidate. Further, the Federal Election Commission enforces them through fairly regular party and candidate audits.

However, exceptions and loopholes exist through which individuals can indirectly support particular political candidates above and beyond those formal limitations. Rather than donating directly to a political party or candidate, individuals can donate to nominally independent, third-party organizations that advocate on behalf of or against a particular party. Many of these organizations are "527" or 501(c) nonprofits or "Super PACs."

527s, named for a section of the tax code, can accept unlimited donations. They cannot solicit a vote for or against a candidate. 501(c) organizations are nonprofit groups, which include the U.S. Chamber of Commerce and the Tea Party-affiliated Americans for Prosperity, that can accept unlimited donations and do not have to disclose donors. Super PACs can accept unlimited donations and endorse candidates. They cannot contribute to candidates but can advertise independently for or against federal candidates. Super PACs are new, formed in the wake of the U.S. Supreme Court's 2010 Citizens United v. Federal Election Commission ruling. They contrast traditional PACs, which have a \$5,000 per year contribution limit and cannot accept money from corporate or union treasuries. 527s report to the IRS, super PACs to the FEC. 501(c)s must report to the FEC how much they spend on ads that mention a federal candidate.

In an interview conducted by the Center for Responsive Politics, Trevor Potter, former chairman of the Federal Election Commission, said that the new Citizens United ruling allows individuals who have reached their legal limit to support their candidate through independent expenditure campaigns tied to most of the major candidates. People with "deep pockets" are willing to spend that money, and they can under this new system. Many of these individual donations go undisclosed — depending on whether they are made through a super PAC, 501(c)(4) or shadow corporation — because such groups are allowed to collect the donations anonymously when political activity is not their key focus.

References:

Source 1: Kathleen Ronayne, Center for Responsive Politics, "Money Talks: OpenSecrets.org's Interview with Top Campaign Finance Attorney Trevor Potter," August 3, 2011. <http://www.opensecrets.org/news/2011/08/money-talks-trevor-potter.html>

Source 2: Evan Mackinder, Center for Responsive Politics, "OpenSecrets.org's Sheila Krumholz Schools Stephen Colbert on Dangers of Dark Money in Politics," July 19, 2011. <http://www.opensecrets.org/news/2011/07/sheila-krumholz-schools-stephen-colbert.html>

Source 3: Business Week, "How Money Flows to Candidates," September 30, 2010. http://www.businessweek.com/magazine/content/10_41/b4198032741459.htm

Source 4: By Melanie Mason, Los Angeles Times, "New GOP 'Super PAC' Tests Limits of Campaign Finance Laws," May 17, 2011. <http://articles.latimes.com/2011/may/17/news/la-pn-gop-super-pac-20110517>

Source 5: Jill Abramson, The New York Times, "Return of the Secret Donors," October 16, 2010. <http://www.nytimes.com/2010/10/17/weekinreview/17abramson.html?pagewanted=1>

Source 6: Federal Election Commission, Audit Report Search System. <http://www.fec.gov/auditsearch/auditsearch.do>

100: Existing limits represent the full extent to which an individual can directly or indirectly financially support a political candidate. Limits are reasonably low enough in the context of the total costs of running a campaign.

75:

50: Existing limits generally represent the full extent to which an individual can directly or indirectly financially support a particular candidate. However, exceptions and loopholes exist through which individuals can indirectly support particular political candidates above and beyond those formal limitations. Such loopholes could include making donations to third-party groups that advocate on behalf of (or against) a particular candidate; unregulated loans to candidates (rather than direct donations); or in-kind support that is not explicitly regulated by laws or regulations. The limits may be too high in the context of the overall costs of running a campaign.

25:

0: Existing limits are routinely bypassed or willfully ignored. The vast majority of individual contributions to a particular political candidate are made outside of the formal limitation system. There is no enforcement of violations. Limits are so high that they are meaningless in the context of the overall costs of running a campaign.

23b. In practice, the limits on corporate donations to individual candidates are effective in regulating a company's ability to financially support a candidate.

Comments:

The limits on corporate donations to political candidates are only minimally effective. “Hard” money limits regulating a corporation’s ability to offer direct financial support to a particular political candidate are generally effective. Further, there is usually Federal Election Commission (FEC) enforcement of such violations.

However, limits do not prevent corporations from indirectly financing a political party by donating “soft” money. Limits are somewhat effective in limiting corporate support of a particular candidate. But in both the primaries and presidential election, nominal support of a political party is de facto support of a particular candidate. For example, corporate support for the Democratic party is actually support for the sitting president and only Democratic candidate, President Barack Obama.

The biggest game-changer was the U.S. Supreme Court’s 2010 Citizens United v. Federal Election Commission ruling. Rather than donating directly to a political party or candidate, corporations can make unlimited independent expenditures to nominally independent, third-party organizations (527s, super PACs, 501(c) organizations) that in reality endorse a particular campaign. The ruling also allows corporations to pay out of their general treasury to support congressional campaigns and party committees.

For example, the Center for Responsive Politics reported that in the 2010 midterm election cycle, corporations generally did not directly get involved in political spending but donated more than \$15 million just to super PACs.

Another change from the Citizens United ruling in January 2010 is that many corporate donations now remain undisclosed because corporations are allowed to donate to 501(c) nonprofit organizations. Such organizations, by definition of their tax status, are not required to disclose their political spending to the FEC.

References:

Source 1: Kathleen Ronayne, Center for Responsive Politics, “Money Talks: OpenSecrets.org’s Interview with Top Campaign Finance Attorney Trevor Potter,” August 3, 2011. <http://www.opensecrets.org/news/2011/08/money-talks-trevor-potter.html>

Source 2: Business Week, “How Money Flows to Candidates,” September 30, 2010. http://www.businessweek.com/magazine/content/10_41/b4198032741459.htm

Source 3: Spencer MacColl, Center for Responsive Politics, “OpenSecrets.org: Citizens United Decision Profoundly Affects Political Landscape,” May 5, 2011. <http://www.opensecrets.org/news/2011/05/citizens-united-decision-profoundly-affects-political-landscape.html>

Source 4: Jill Abramson, The New York Times, “Return of the Secret Donors,” October 16, 2010. <http://www.nytimes.com/2010/10/17/weekinreview/17abramson.html?pagewanted=1>

100: Existing limits represent the full extent to which a company can directly or indirectly financially support an individual candidate. Limits are reasonably low enough in the context of the total costs of running a campaign to be meaningful.

75:

50: Existing limits generally represent the full extent to which a company can directly or indirectly financially support an individual candidate. However, exceptions and loopholes exist through which companies can indirectly support individual candidates above and beyond those formal limitations. Such loopholes could include making donations to third-party groups that advocate on behalf of (or against) a particular candidate; unregulated loans to candidates (rather than direct donations); or in-kind support that is not explicitly regulated by laws or regulations. The limits may be too high in the context of the overall costs of running a campaign.

25:

0: Existing limits are routinely bypassed or willfully ignored. The majority of corporate contributions to individual candidates are made outside of the formal limitation system. There is no enforcement of violations. Limits are so high that they are meaningless in the context of the overall costs of running a campaign.

23c. In practice, when necessary, an agency or entity monitoring the financing of individual candidates’ campaigns independently initiates investigations.

Comments:

The FEC board rarely audits candidates unless disputes are brought to its attention by media attention, NGO watchdogs or adversely affected parties. The audit database and new reports indicate few audits of candidates. The most recent high-profile candidate audit was that of John Edwards. The former North Carolina senator and Democratic presidential candidate must pay back about \$2.3 million in public funds he received for his 2008 campaign. Although regarding a 2008 campaign, the audit and final action memorandum was not issued until July 2011.

Even disputes regarding candidate campaign financing that gain public attention are not always audited. Delaware Senate candidate Christine O'Donnell garnered considerable media attention and speculation in September 2010 for her campaign financing. The Delaware Republican Party and the NGO watchdog Citizens for Responsibility and Ethics in Washington both filed a complaint with the FEC alleging that O'Donnell accepted illegal contributions from the Tea Party Express and used campaign contributions for personal use. The FEC issued warnings of an audit but has not announced a formal audit.

References:

Source 1: Federal Election Commission, Audit Review Search System. <http://www.fec.gov/auditsearch/auditsearch.do>

Source 2: Mark Benjamin, Salon, "So, Did Christine O'Donnell Break the Law?" September 23, 2010. http://politics.salon.com/2010/09/23/christine_o_donnell_law/

Source 3: Nicholas Confessore, The New York Times, "Edwards Ordered to Repay \$2.3 Million in Public Funds," July 21, 2011. <http://thecaucus.blogs.nytimes.com/2011/07/21/edwards-ordered-to-repay-2-3-million-in-public-funds/>

100: The agency or entity aggressively starts investigations into allegations of wrong doing with respect to the financing of individual candidates' campaigns, or cooperates well with other agencies that do. The agency is fair in its application of this power.

75:

50: The agency or entity will start investigations, but often relies on external pressure to set priorities, or has limited effectiveness when investigating. The agency, though limited in effectiveness, is still fair in its application of power. It may be reluctant to cooperate with other investigatory agencies.

25:

0: The agency or entity rarely investigates on its own, or the agency or entity is partisan in its application of this power. It does not cooperate well with other investigatory agencies.

23d. In practice, when necessary, an agency or entity monitoring the financing of individual candidates' campaigns imposes penalties on offenders.

100 | 75 | 50 | 25 | 0

Comments:

The Federal Election Commission (FEC) does not effectively penalize offenders. The FEC does not often issue penalties, although the FEC does enforce its judgments when it makes them.

The FEC is generally considered the most dysfunctional agency in the country. The FEC board initiates investigations and audits when disputes are brought to its attention by media attention, NGO watchdogs or adversely affected parties. The audit database and new reports indicate few audits of candidates, with most finding no action was necessary. Senior Democracy Fellow Tova Wang said that FEC punitive action is so time-delayed as to be irrelevant. The most recent high-profile candidate audit was that of John Edwards. The former North Carolina senator and Democratic presidential candidate must pay back about \$2.3 million in public funds he received for his 2008 campaign. Although regarding a 2008 campaign, the audit and final action memorandum was not issued until July 2011. Similarly, the FEC announced in April 2011 that it completed a two-year investigation of President Barack Obama's 2008 campaign. The dispute is still unresolved as now the FEC is conducting a full audit.

Even disputes regarding candidate campaign financing that gain public attention are not always audited. Delaware Senate candidate Christine O'Donnell garnered considerable media attention and speculation in September 2010 for her campaign financing. The Delaware Republican Party and NGO watchdog Citizens for Responsibility and Ethics in Washington both filed a complaint with the FEC alleging that O'Donnell accepted illegal contributions from the Tea Party Express and used campaign contributions for personal use. The FEC issued warnings of an audit but has not announced any intention of conducting a formal audit.

Finally, even some FEC members recognize the agency's inability to investigate or enforce campaign finance laws. In a news report by Roll Call, Commissioner Ellen Weintraub said statistics show that the Federal Election Commission has become "less aggressive" at enforcing the nation's campaign finance laws, as they are not a "fierce investigative agency." From fiscal 2006 to 2010, the average fine levied against campaigns, parties and political action committees for violating campaign finance law dropped from \$180,000 to \$42,000, Weintraub said. Similarly, the number of conciliation agreements fell from 91 in fiscal 2007 to

29 in fiscal year 2010, which Weintraub called a “pretty sharp drop.” Weintraub attributed the weak enforcement to “a strong ideological divide on the commission.” Others believe it is because the law has changed considerably.

References:

Source 1: Federal Election Commission, Audit Review Search System. <http://www.fec.gov/auditsearch/auditsearch.do>

Source 2: Mark Benjamin, Salon, “So, Did Christine O'Donnell Break the Law?” September 23, 2010. http://politics.salon.com/2010/09/23/christine_o_donnell_law/

Source 3: Nicholas Confessore, The New York Times, “Edwards Ordered to Repay \$2.3 Million in Public Funds,” July 21, 2011. <http://thecaucus.blogs.nytimes.com/2011/07/21/edwards-ordered-to-repay-2-3-million-in-public-funds/>

Source 4: Tova Wang, Senior Democracy Fellow at the Century Foundation and Demos. Skype interview on September 12, 2011.

Source 5: Alex Knott, Roll Call, “FEC Falls Short on Enforcement, Commissioner Says,” May 27, 2011. http://www.rollcall.com/news/FEC_falls_short_enforcement_commissioner_Weintraub-206027-1.html?zkMobileView=true

100: When rules violations are discovered, the agency or entity is aggressive in penalizing offenders or in cooperating with other agencies that do.

75:

50: The agency or entity enforces rules, but is limited in its effectiveness. The agency or entity may be slow to act, unwilling to take on politically powerful offenders, reluctant to cooperate with other agencies, or occasionally unable to enforce its judgments.

25:

0: The agency or entity does not effectively penalize offenders. The agency or entity may make judgments but not enforce them, or may fail to make reasonable judgments against offenders. The agency or entity may be partisan in its application of power or may refuse to cooperate with other agencies.

23e. In practice, the finances of individual candidates' campaigns are audited.

100 | 75 | 50 | 25 | 0

Comments:

In practice the Federal Election Commission conducts audits, as required by law. While the Commission can audit any political committee candidate, the commission generally conducts audits when a committee appears not to have met the threshold requirements for substantial compliance. FEC audits determine whether the committee complied with the limitations, prohibitions and disclosure requirements of the Federal Election Campaign Act.

The FEC audits authorized committees (committees authorized by candidates), unauthorized committees and Title 26 audit reports (presidential campaigns and convention committees that accept public funds). Some 937 audits, findings and actions issued by the FEC has conducted are available in a searchable database on the FEC website.

Notably, the audits are general reviews for completeness and general compliance with FEC standards, not checks for rigorous financial information or criminal behavior.

References:

Source 1: Federal Election Commission, Audit Review Search System. <http://www.fec.gov/auditsearch/auditsearch.do>

100: The finances of individual candidates' campaigns are regularly audited using generally accepted auditing practices. The auditing may be regular and comprehensive or only initiated after an initial review reveals irregularities.

75:

50: The finances of individual candidates' campaigns are audited, but audits are limited in some way, such as using inadequate auditing standards, or the presence of exceptions to disclosed contributions.

25:

0: The finances of individual candidates' campaigns are not audited, or the audits performed have no value in tracking contributions. Audits may be performed by entities known to be partisan or biased in their practices.

24. Can citizens access records related to the financing of political parties?

94

24a. In practice, political parties disclose data relating to financial support and expenditures within a reasonable time period.

100 | 75 | 50 | 25 | 0

Comments:

The Federal Election Commission provides updated data and reports on its website.

References:

Source 1: Federal Election Commission, "Disclosure Data." Last accessed September 24, 2011. http://www.fec.gov/finance/disclosure/disclosure_data_search.shtml

100: Political parties disclose their sources of funding and expenditures at least every quarter.

75:

50: Political parties disclose their sources of funding and expenditures only one or two times per year. Delays may occur when sensitive political information is involved.

25:

0: Political parties never publish their sources of funding or expenditures or publish that information only rarely with more than a year in between publication. Politically sensitive information is regular withheld from public disclosure.

24b. In practice, citizens can access the financial records of political parties within a reasonable time period.

100 | 75 | 50 | 25 | 0

Comments:

The Federal Election Commission provides publicly accessible, updated reports and data through a searchable database on its website.

References:

Source 1: Federal Election Commission, "Disclosure Data." Last accessed September 24, 2011. http://www.fec.gov/finance/disclosure/disclosure_data_search.shtml

100: Records are available on-line, or records can be obtained within two days. Records are uniformly available; there are no delays for politically sensitive information.

75:

50: Records take two to four weeks to obtain. Some delays may be experienced.

25:

0: Records take more than a month to acquire. There may be persistent delays in obtaining politically sensitive records.

24c. In practice, citizens can access the financial records of political parties at a reasonable cost.

100 | 75 | 50 | 25 | 0

Comments:

The Federal Election Commission provides free, public information through a searchable database on its website.

References:

Source 1: Federal Election Commission, "Disclosure Data." Last accessed September, 2011. http://www.fec.gov/finance/disclosure/disclosure_data_search.shtml

100: Records are free to all citizens, or available for the cost of photocopying. Records can be obtained at little cost, such as by mail, or on-line.

75:

50: Records impose a financial burden on citizens, journalists or NGOs. Retrieving records may require a visit to a specific office, such as a regional or national capital.

25:

0: Retrieving records imposes a major financial burden on citizens. Records costs are prohibitive to most citizens, journalists, or NGOs trying to access this information.

24d. In practice, the publicly available records of political parties' finances are of high quality.

100 | 75 | 50 | 25 | 0

Comments:

The Federal Election Commission provides public, free information through a searchable database on its website. The quality of information is sufficiently detailed and includes significant sources of income and expenditures.

References:

Source 1: Federal Election Commission, "Disclosure Data." Last accessed September 24, 2011. http://www.fec.gov/finance/disclosure/disclosure_data_search.shtml

100: Publicly available records of political parties' finances are complete and detailed, itemizing all significant sources of income and expenditures.

75:

50: Publicly available records of political parties' finances are available but are often lacking in important details, are overly general, or are otherwise incomplete.

25:

0: Publicly available records of political parties' finances, when available, are so incomplete or overly general as to render them useless in understanding a party's sources of income and its expenditures.

25. Can citizens access records related to the financing of individual candidates' campaigns?

94

25a. In practice, individual political candidates disclose data relating to financial support and expenditures within a reasonable time period.

100 | 75 | 50 | 25 | 0

Comments:

Most individual political candidates disclose data relating to financial support and expenditures within a reasonable time period. The FEC requires candidates to file quarterly, if not monthly, reports. Quarterly reports are due on April 15, July 15, October 15 and January 31. Monthly reports usually are due on the 20th day of the following month.

The FEC does not have statutory authority to extend any filing deadlines. Further, the FEC has an Administrative Fine Program that issues civil money penalties for candidates who fail to file reports on time. Penalties range from \$30 to \$16,000, or over \$16,000 if the filer is repeatedly late or did not file at all. The fines imposed by the FEC often are based on a percentage of a candidate's receipts and may be mitigated by circumstances.

Despite strict deadlines and increasingly costly penalties, many candidates file their financial disclosures late. For example, one candidate missed filing nine campaign finance reports from 2004 to 2008. Democratic candidates have missed 447 filings since 2000, while Republican candidates failed to file 449 reports. Third-party candidates missed a combined total of 37 filings.

References:

Source 1: Federal Election Commission, "Quick Answers to Filing Questions." Last accessed September 28, 2011. http://www.fec.gov/ans/answers_filing.shtml

Source 2: Alex Knott, Roll Call Politics, "Members Miss FEC Filings, Face Fines," March 3, 2011. http://www.rollcall.com/issues/56_90/-203805-1.html

Source 3: Shira Toeplitz, Politico, "Miller Overdue on Disclosure Forms," September 29, 2010. <http://www.politico.com/news/stories/0910/42921.html>

100: Individual candidates disclose their sources of funding and expenditures at least every quarter.

75:

50: Individual candidates disclose their sources of funding and expenditures only one or two times per year. Delays may occur when sensitive political information is involved.

25:

0: Individual candidates never publish their sources of funding or expenditures or publish that information only rarely with more than a year in between publication. Politically sensitive information is regular withheld from public disclosure.

25b. In practice, citizens can access the financial records of individual candidates (their campaign revenues and expenditures) within a reasonable time period.

100 | 75 | 50 | 25 | 0

Comments:

Citizens can access financial records of individual candidates within a reasonable time period. The Federal Election Commission (FEC) makes information available for viewing online or downloading in multiple formats. All records are posted within 24 or 48 hours, as required by law. Reports filed electronically are available on the Web almost instantaneously.

The FEC's online databases, Financial disclosure Data Search and Electronically Filed Independent Expenditure Report, are searchable by a candidate or office holder or an individual donor, as well as by the names of campaign committees and political action committees. Citizens can search by name, state, party, office, city, ZIP code, principal place of business, date, amount, committee treasurer's name, party designation, committee type and party affiliation. Citizens have access to detailed information about each candidate, party and PAC's receipts (contributions), disbursements (expenses), debt, cash on hand and number of itemized receipts.

Admittedly, FEC reports can be difficult to navigate. But outside sources such as blogs and NGO databases offer explanations and alternative search options. For examples, look at "How to Read an FEC Report" (<http://ihartpolitics.com/?p=157>), the Center for Responsive Politics (<http://opensecrets.org>) and the Center for Political Accountability (<http://www.politicalaccountability.net>).

References:

Source 1: Federal Election Commission, "Campaign Finance Reports and Data." Last accessed September 28, 2011. <http://www.fec.gov/disclosure.shtml>

Source 2: Paul Grabowicz, Knight Digital Media Center, "Federal Campaign Statements," June 26, 2011. <http://multimedia.journalism.berkeley.edu/tutorials/campaign-statements/federal-campaign-statements/>

Source 3: Center for Political Accountability, "Reports and Surveys." Last accessed September 28, 2011. <http://www.politicalaccountability.net>

Source 4: Justin Hart, iHartPolitics Blog, "Politics." Last accessed September 28, 2011. <http://ihartpolitics.com/?p=157>

Source 5: Center for Responsive Politics, "Politicians & Elections." Last accessed September 28, 2011. <http://www.opensecrets.org>

100: Records are available on-line, or records can be obtained within two days. Records are uniformly available; there are no delays for politically sensitive information.

75:

50: Records take two to four weeks to obtain. Some delays may be experienced.

25:

0: Records take more than a month to acquire. There may be persistent delays in obtaining politically sensitive records.

25c. In practice, citizens can access the financial records of individual candidates (their campaign revenues and expenditures) at a reasonable cost.

100 | 75 | 50 | 25 | 0

Comments:

Citizens can access financial records of individual candidates at a reasonable cost.. The Federal Election Commission ("FEC") makes information publicly available for viewing online or downloading at no cost. Information is posted within 24 or 48 hours, as required by law.

Outside sources such as blogs, NGOs and private databases offer explanations on FEC formatting and alternative formats of financial records of individual candidates. For examples, look at "How to Read an FEC Report" (<http://ihartpolitics.com/?p=157>), the Center for Responsive Politics (<http://opensecrets.org>) and the Center for Political Accountability (<http://www.politicalaccountability.net>).

References:

Source 1: Federal Election Commission, "Campaign Finance Reports and Data." Last accessed September 28, 2011. <http://www.fec.gov/disclosure.shtml>

Source 2: Paul Grabowicz, Knight Digital Media Center, "Federal Campaign Statements," June 26, 2011. <http://multimedia.journalism.berkeley.edu/tutorials/campaign-statements/federal-campaign-statements/>

Source 3: Center for Political Accountability, "Reports and Surveys." Last accessed September 28, 2011. <http://www.politicalaccountability.net>

Source 4: Justin Hart, iHartPolitics Blog, "Politics." Last accessed September 28, 2011. <http://ihartpolitics.com/?p=157>

Source 5: Center for Responsive Politics, "Politicians and Elections." Last accessed September 28, 2011. <http://www.opensecrets.org>

100: Records are free to all citizens, or available for the cost of photocopying. Records can be obtained at little cost, such as by mail, or on-line.

75:

50: Records impose a financial burden on citizens, journalists or NGOs. Retrieving records may require a visit to a specific office, such as a regional or national capital.

25:

0: Retrieving records imposes a major financial burden on citizens. Records costs are prohibitive to most citizens, journalists, or NGOs trying to access this information.

25d. In practice, the publicly available records of political candidates' campaign finances are of high quality.

100 | 75 | 50 | 25 | 0

Comments:

Publicly available records of political candidates' campaign finances are of high quality. The FEC's online databases give citizens access to detailed information about each candidate, party and PAC's receipts (contributions), disbursements (expenses), debt, cash on hand and number of itemized receipts.

The quality and availability of political candidates' financial and campaign disclosures was greatly improved by the recent ability to access electronic copies of paper filings. Moreover, a Ruby gem application, "Fech," enables citizens to match current data fields with outdated, different versions of FEC electronic campaign finance reports.

References:

Source 1: Federal Election Commission, "Campaign Finance Reports and Data." Last accessed September 28, 2011. <http://www.fec.gov/disclosure.shtml>

Source 2: Paul Grabowicz, Knight Digital Media Center, "Federal Campaign Statements," June 26, 2011. <http://multimedia.journalism.berkeley.edu/tutorials/campaign-statements/federal-campaign-statements/>

Source 3: Justin Hart, iHartPolitics Blog, "Politics." Last accessed September 28, 2011. <http://ihartpolitics.com/?p=157>

Source 4: Derek Willis, The New York Times, "New in the Campaign Finance API: Paper Filings," June 2, 2011. <http://open.blogs.nytimes.com/2011/06/02/paper-filings/>

Source 5: Michael Strickland, The New York Times, "Introducing Fech," August 29, 2011. <http://open.blogs.nytimes.com/2011/08/29/introducing-fech/>

100: Publicly available records of political candidates' campaign finances are complete and detailed, itemizing all significant sources of income and expenditures.

75:

50: Publicly available records of political candidates' campaign finances are available but are often lacking in important details, are overly general, or are otherwise incomplete.

25:

0: Publicly available records of political candidates' campaign finances, when available, are so incomplete or overly general as to render them useless in understanding a candidate's sources of income and expenditures.

3.1. Conflicts of Interest Safeguards & Checks and Balances: Executive Branch

26. In law, can citizens sue the government for infringement of their civil rights?

100

26a. In law, can citizens sue the government for infringement of their civil rights?

Yes | No

Comments:

The First Amendment of the U.S. Constitution grants citizens the right to petition the government for a redress of grievances. In *Bivens v. Six Unknown Named Agents*, the Supreme Court affirmatively established that individual citizens have an implied right of action to claim damages from federal government actors for actions similar to the civil right violated in *Bivens*. In *Bivens*, the civil right violated was unreasonable search and seizure.

References:

Law: U.S. Constitution, Amendment 1. http://topics.law.cornell.edu/wex/First_amendment

Common Law: *Bivens v. Six Unknown Named Agents*, 403 U.S. 388 (1971). <http://supreme.justia.com/us/403/388/case.html>

Yes: A YES score is earned if all citizens (citizen is defined broadly, to include all ethnicities, or anyone born in the country) can receive compensation or redress through the courts for civil rights violations committed by the government, such as failure to follow due process of law when detaining suspected criminals.

No: A NO score is earned if any group of citizens is excluded from the right to sue the government, or no such mechanism exists.

27. Can the chief executive be held accountable for his/her actions?

100

27a. In practice, the chief executive gives reasons for his/her policy decisions.

100 | 75 | 50 | 25 | 0

Comments:

President Barack Obama gives reasons for his policy decisions through a variety of formal interactions with the public. The president regularly takes critical questions from journalists and the general public. The president's speaking engagement schedule is made public. The press is often invited and given time for questions. In September 2010, for example, the president gave an 80-minute press conference answering questions on sensitive topics such as the economy, the upcoming battle over Bush tax cuts, a newly proposed \$50 billion infrastructure development plan, health care reform, national security, Middle East peace talks and Muslim relations in the nation.

The White House website also provides the administration's rationale for executive policy through a "Briefing Room" that provides public statements, proclamations, executive orders and press releases through email updates, photos, video and blogs. The president also seeks critical and demanding inquiries through live, interactive "town halls" over social media platforms such as LinkedIn and Twitter.

References:

Source 1: The White House. Last accessed September 28, 2011. <http://www.whitehouse.gov/>

Source 2: In person interview with Reporters Without Borders Washington Director Clothilde le Coz on August 18, 2011.

Source 3: The Huffington Post, "Obama News Conference: President Takes Press Questions On Economy, Health Care, Islamophobia, National Security," 09-10-10 September 10, 2010. http://www.huffingtonpost.com/2010/09/10/obama-news-conference-pre_1_n_712058.html

100: The chief executive and/or cabinet ministers give formal explanations of all policy matters. The chief executive regularly takes critical questions from journalists or an opposition party, usually at least once a month. There is no censoring of such sessions.

75:

50: The chief executive and/or cabinet ministers give explanations of policy, but not always in a timely or complete way. The chief executive occasionally takes critical questions from journalists or an opposition party, but not in a regular or formalized process. Particular issues of political sensitivity may be censored by government broadcasters.

25:

0: The chief executive and/or cabinet ministers do not give substantial justifications for policy. Public appearances by the chief executive offer no exposure to critical questions. The government and government-run media routinely censor such sessions.

27b. In law, the judiciary can review the actions of the executive.

Yes

No

Comments:

Article 3 of the U.S. Constitution establishes the three branches of government, granting the judiciary jurisdiction over all cases and controversies arising out of the Constitution or other laws of the United States. The right to judicial review of another branch of government, including the executive, was affirmatively established in *Marbury v. Madison*.

References:

Law: U.S. Constitution, Article III. <http://www.law.cornell.edu/constitution/articleiii>

Common Law: *Marbury v. Madison*, 5 U.S. 137 (1803). www.law.cornell.edu/supct/html/.../USSC_CR_0005_0137_ZS.html

Yes: A YES score is earned if there is a formal process by which the judiciary can pass judgments on the legality or constitutionality of actions taken by the executive.

No: A NO score is earned if no such mechanism exists. A NO score is earned if judicial review is vaguely established in law or regulation without formal procedures. A NO score is earned if general exemptions exist with respect to executive actions that are reviewable (a national security exemption, for example).

27c. In practice, when necessary, the judiciary reviews the actions of the executive.

100 | 75 | 50 | 25 | 0

Comments:

News reports show that the Obama administration and executive branch are constantly under judicial review. For example, a federal district court in Washington recently reviewed White House disclosure practices of visitor logs. Further, in the 2011-2012 term, the Supreme Court is expected to review President Barack Obama's health care law.

References:

Source 1: The Reporters Committee for Freedom of the Press, "Court Rules White House Visitor Logs Subject to FOIA," August 18, 2011. <http://www.rcfp.org/newsitems/index.php?i=11993>

Source 2: Nina Totenberg, National Public Radio, "Supreme Court Ethics and Reviewing the Health Law," August 17, 2011. <http://www.npr.org/2011/08/17/139721843/in-top-court-anticipated-health-law-review-raises-ethics-questions>

100: When constitutional or legal questions or possible violations are raised, the judiciary is aggressive in reviewing executive actions and can void illegal or unconstitutional actions. The judiciary is fair and nonpartisan in its application of this power. It does not need to rely upon the executive to initiate a constitutional or legal review.

75:

50: The judiciary will review executive actions, but is limited in its effectiveness. The judiciary may be slow to act, unwilling to take on politically sensitive issues, or occasionally unable to enforce its judgments.

25:

0: The judiciary does not effectively review executive policy. The judiciary may make judgments but not enforce them, or may fail to pass judgments on executive abuses. The judiciary may be partisan in its application of power. It must rely on instructions from the executive in order to initiate a legal or constitutional review.

27d. In practice, the chief executive limits the use of executive orders for establishing new regulations, policies, or government practices.

100 | 75 | 50 | 25 | 0

Comments:

President Barack Obama issued 33 executive orders from June 30, 2010, to June 30, 2011. This is comparable to previous administrations, showing Obama's appropriate use of executive orders.

U.S. executive orders generally are not considered to have the force of law. However, one expert suggests Obama is increasing the weight of executive orders through less deferential language (such as "shall" vs. "may").

References:

Source 1: Peter Baker, The New York Times, "Obama Making Plans to Use Executive Power," February 13, 2010. <http://www.nytimes.com/2010/02/13/us/politics/13obama.html>

Source 2: Federal Register, "Executive Orders." Last accessed September 24, 2011. <http://www.archives.gov/federal-register/executive-orders/obama.html>

Source 3: Regulation Blog, University of Pennsylvania Law Penn Program on Regulation, "Obama Directs Independent Regulatory Agencies," July, 2011. <http://www.law.upenn.edu/blogs/regblog/2011/07/obama-directs-independent-regulatory-agencies.html>

100: The chief executive utilizes executive orders only when there is no constitutional or legal requirement for official legislative action or approval. Executive orders are limited in number and narrow in scope.

75:

50: The chief executive sometimes relies on executive orders to implement policies and regulations opposed by the legislature. Some executive orders are overly broad in scope and are designed to circumvent constitutional or legal requirements for legislative action or approval.

25:

0: The chief executive routinely abuses executive orders to render the legislature practically useless. Executive orders are the norm, not the exception, and directly contravene constitutional or legal requirements for legislative action or approval.

28. Is the executive leadership subject to criminal proceedings?

100

28a. In law, the heads of state and government can be prosecuted for crimes they commit.

Yes

No

Comments:

The Constitution grants Congress the authority to impeach the president, vice-president and all civil officers of the United States for treason, bribery or other high crimes and misdemeanors.

However, judicial interpretation of the U.S. Constitution in three relevant cases suggests that the president has immunity from indictment and criminal prosecution while sitting in office. Notably, ambiguities remain regarding to whom the immunity applies (it arguably does not cover mid- or low-level employees of the executive branch) and how impunity and impeachment proceedings function concurrently.

References:

Law: U.S. Constitution, Article 2, § 4 (Impeachment). <http://www.law.cornell.edu/background/impeach/impeach.htm>

Common Law 1: U.S. v. Nixon, 418 U.S. 683 (1974). http://www.law.cornell.edu/supct/html/.../USSC_CR_0418_0683_ZS.html

Common Law 2: Nixon v. Fitzgerald, 457 U.S. 731 (1982). http://www.law.cornell.edu/supct/html/.../USSC_CR_0457_0731_ZO.html

Common Law 3: Clinton v. Jones, 520 U.S. 681 (1997). http://www.justice.gov/olc/sitting_president.htm

Source 1: John H. Kim, "Criminal Prosecution of an Incumbent President," 2005. <http://s3.amazonaws.com/codepink4peace.org/downloads/CriminalProsecutionofPresident.pdf>

Yes: A YES score is earned if the heads of state and government can be investigated, charged or prosecuted for criminal allegations. Figurehead officials (symbolic figures without day-to-day authority) may be exempt.

No: A NO score is earned if either the head of state or government cannot be investigated, charged or prosecuted for criminal allegations or the executive branch controls whether investigative or prosecutorial immunity can be lifted on the heads of state or government.

28b. In law, ministerial-level officials can be prosecuted for crimes they commit.

Yes

No

Comments:

The Constitution grants Congress the authority to impeach the president, vice-president and all civil officers of the United States for treason, bribery or other high crimes and misdemeanors. The law is ambiguous as to whether such people may be criminally prosecuted while sitting in office. However, the immunity likely extended to the president from indictment and criminal prosecution while sitting in office arguably does not cover mid- or low-level employees of the executive branch.

References:

Law: U.S. Constitution, Article 2, § 4 (Impeachment). <http://www.law.cornell.edu/background/impeach/impeach.htm>

Common Law 1: U.S. v. Nixon, 418 U.S. 683 (1974). http://www.law.cornell.edu/supct/html/.../USSC_CR_0418_0683_ZS.html

Common Law 2: Nixon v. Fitzgerald, 457 U.S. 731 (1982). http://www.law.cornell.edu/supct/html/.../USSC_CR_0457_0731_ZO.html

Common Law 3: Clinton v. Jones, 520 U.S. 681 (1997). http://www.justice.gov/olc/sitting__president.htm

Source 1: John H. Kim, "Criminal Prosecution of an Incumbent President,"

2005. <http://s3.amazonaws.com/codepink4peace.org/downloads/CriminalProsecutionofPresident.pdf>

Yes: A YES score is earned if ministerial-level officials, or their equivalents, can all be investigated, charged or prosecuted for criminal allegations.

No: A NO score is earned if any ministerial-level official, or equivalent official, cannot be investigated, charged or prosecuted for criminal allegations or the executive branch controls whether investigative or prosecutorial immunity can be lifted on ministerial-level officials.

29. Are there regulations governing conflicts of interest by the executive branch?

84

29a. In law, the heads of state and government are required to file a regular asset disclosure form.

Yes

No

Comments:

Title I of the Ethics in Government Act of 1978 requires men and women in the public service sector to fill out financial disclosure forms that include sources and amounts of income, gifts, reimbursements, the identity and approximate value of property held and liabilities owed, transactions in property, commodities and securities, and certain financial interests of a spouse or dependent. The president, vice president, employees and officers of the executive branch, postmaster general, deputy postmaster general and U.S. Postal Service officials and employees each must file a report called Form 278.

References:

Law: 5 U.S.C. §§ 101-105. Ethics in Government Act of 1978: Financial

Disclosure. http://www.law.cornell.edu/uscode/html/uscode05a/usc_sup_05_5_10_sq3.html

Federal Regulations: 5 C.F.R. §2635. http://www.usoge.gov/laws_regs/regulations/5cfr2635.aspx

Source 1: U.S. Office of Government Ethics, "Common Ethics Issues: Financial Disclosure." Last accessed September 24, 2011. http://www.usoge.gov/common_ethics_issues/financial_disclosure.aspx

Source 2: The White House, "OGE Form 278." Last accessed September 24, 2011. http://www.whitehouse.gov/sites/default/files/rss_viewer/POTUS_OGE278_CY2010.pdf

Yes: A YES score is earned if the heads of state and government are required by law to file an asset disclosure form while in office, illustrating sources of income, stock holdings, and other assets. This form need not be publicly available to score a YES. Figurehead officials (symbolic figures without day-to-day authority) may be exempt.

No: A NO score is earned if either the head of state or government is not required to disclose assets.

29b. In law, ministerial-level officials are required to file a regular asset disclosure form.

Yes | No

Comments:

Title 1 of the Ethics in Government Act of 1978 requires men and women in the public service sector to fill out financial disclosure forms that include sources and amounts of income, gifts, reimbursements, the identity and approximate value of property held and liabilities owed, transactions in property, commodities and securities, and certain financial interests of a spouse or dependent.

The president, vice president, employees and officers of the executive branch, postmaster general, deputy postmaster general and U.S. Postal Service officials and employees each must file a report.

Certain other executive branch employees whose duties involve the exercise of discretion in sensitive areas are required to file a financial disclosure report, but it will be kept confidential. For example, asset values, income amounts, interests in or income from bank accounts, money market mutual funds, U.S. obligations and government securities are not required.

References:

Law: 5 U.S.C, Part I, §§ 101-105. Ethics in Government Act of 1978, Financial Disclosure. http://www.law.cornell.edu/uscode/html/uscode05a/usc_sup_05_5_10_sq3.html

Federal Regulations: 5 C.F.R. 2645. http://www.usoge.gov/laws_regs/regulations/5cfr2635.aspx

Source 1: U.S. Office of Government Ethics, "Common Ethics Issues: Financial Disclosure." Last accessed September 24, 2011. http://www.usoge.gov/common_ethics_issues/financial_disclosure.aspx

Yes: A YES score is earned if ministerial-level officials, or their equivalents, are all required by law to file an asset disclosure form while in office, illustrating sources of income, stock holdings, and other assets.

No: A NO score is earned if ministers are not required to disclose assets. A NO score is earned if some ministers must disclose assets, but other ministers are not required.

29c. In law, there are regulations governing gifts and hospitality offered to members of the executive branch.

Yes | No

Comments:

Title 1 of the Ethics in Government Act of 1978 requires men and women in the public service sector to fill out financial disclosure forms that include the sources and amounts of income, gifts, reimbursements, the identity and approximate value of property held and liabilities owed, transactions in property, commodities and securities, and certain financial interests of a spouse or dependent, including retirement benefits, honoraria and any other noninvestment income gifts and reimbursements that meet reporting thresholds. The president, vice president, employees and officers of the executive branch, postmaster general, deputy postmaster general and U.S. Postal Service officials and employees each must file a report.

References:

Law: 5 U.S.C, Part I, §§ 101-105. Ethics in Government Act of 1978, Financial Disclosure. http://www.law.cornell.edu/uscode/html/uscode05a/usc_sup_05_5_10_sq3.html

Federal Regulations: 5 C.F.R. 2645. http://www.usoge.gov/laws_regs/regulations/5cfr2635.aspx

Source 1: U.S. Office of Government Ethics, "Common Ethics Issues: Financial Disclosure." Last accessed September 24, 2011. http://www.usoge.gov/common_ethics_issues/financial_disclosure.aspx

Yes: A YES score is earned if there are formal guidelines regulating gifts and hospitality offered to members of the executive branch of government.

No: A NO score is earned if there are no guidelines or regulations with respect to gifts and hospitality offered to members of the executive branch. A NO score is earned if the guidelines are overly general and do not specify what is and is not appropriate.

29d. In law, there are requirements for the independent auditing of the executive branch asset disclosure forms (defined here as ministers and heads of state and government).

Yes

No

Comments:

The Office of Government Ethics must conduct reviews of financial disclosure reports filed by employees of the executive branch to determine whether the reports reveal possible violations of the conflict of interest laws and regulations.

References:

Law: 5 U.S.C. app. 4 §§ 401-408. Office of Government Ethics. <http://www.gpo.gov/fdsys/pkg/USCODE-2010-title5/html/USCODE-2010-title5-app-ethicsing-titleIV.htm>

Source 1: Office of Government Ethics. <http://www.usoge.gov/Financial-Disclosure/Financial-Disclosure/>

Source 2: In-person interview on September 23, 2011, with Angela Canterbury, director of public policy at the Project on Government Oversight.

Source 3: In-person interview on October 6, 2011 with interviewee who requested anonymity at the Office of Government Ethics.

Yes: A YES score is earned if there is a legal or regulatory requirement for independent auditing of executive branch asset disclosures. The auditing is performed by an impartial third-party. Figurehead officials (symbolic figures without day-to-day authority) may be exempt.

No: A NO score is earned if there are no legal or regulatory requirements for the independent auditing of executive branch asset disclosures or if such requirements exist but allow for self-auditing.

29e. In law, there are restrictions on heads of state and government and ministers entering the private sector after leaving the government.

Yes

No

Comments:

President Barack Obama's Executive Order of 2009 mandated every appointee in every executive agency to commit to an ethics pledge. The pledge places a ban on several conflicts of interest, including lobbyist gifts, revolving doors and hiring for any reason other than employment qualifications.

The Office of Government Ethics, in accordance with 18 U.S.C. 207 puts similar regulations on any federal employee, including prohibitions on any post-employment "revolving door" between government and lobbyist positions.

Finally, under 41 U.S.C. 423(d), employees may be subject to other post-employment prohibitions on acceptance of compensation from contractors.

References:

Law 1: President Barack Obama, Executive Order No. 12490 (January 21, 2009). http://www.whitehouse.gov/the_press_office/ExecutiveOrder-EthicsCommitments

Law 2: 5a U.S.C. §§401-408, Ethics in Government Act of 1978. http://www.law.cornell.edu/uscode/html/uscode05a/usc_sup_05_5_10_sq3.html

Law 3: 18 U.S.C. §207, Criminal and Criminal Procedure; Bribery, Graft and Conflicts of Interest: Restrictions on Former Officers, Employees and Elected Officials of the Executive and Legislative Branches. http://www.law.cornell.edu/uscode/18/usc_sec_18_00000207--000-.html

Law 4: 41 U.S.C. §423(d), Public Contracts; Office of Federal Procurement Policy: Restrictions on Disclosing and Obtaining Contractor Bid or Proposal Information or Source Selection Information. http://www.law.cornell.edu/uscode/usc_sec_41_00000423--000-.html

Yes: A YES score is earned if there are regulations restricting the ability of heads of state/government and ministers to take positions in the private sector after leaving government that would present a conflict of interest, including positions that directly seek to influence their former government colleagues. Figurehead officials (symbolic figures without day-to-day authority) may be exempt.

No: A NO score is earned if no such restrictions exist.

29f. In practice, the regulations restricting post-government private sector employment for heads of state and government and ministers are effective.

100 | 75 | 50 | 25 | 0

Comments:

The Office of Government Ethics (OGE) sets forth the rules on post-government employment. The rules prohibit former government employees from working as a lobbyist to federal offices or employees with whom an ex-government official has just worked closely. They do not set forth a general ban on former government employees being lobbyists.

But the OGE is not required to initiate investigations because it has neither the authority nor the resources to keep abreast of all former government employees. An OGE deputy director said, "We don't follow someone around." In her experience, post-government employment violations are self-policed. The public and press bring issues to the attention of OGE, agency ethics officers and inspector generals. "Washington has a lot of public and press oversight," and OGE will investigate ethics issues that are brought to its attention, either by the press or an employee. Indeed, many investigative journalists and nonprofit organizations "keep watch." Among others, the Project on Government Oversight and The Center for Responsive Politics each maintain a database of former government employees' current employment.

Cooling-off periods are substantial and generally adhered to, although there are cases where these restrictions are ignored. Project on Government Oversight's Director of Public Policy Angela Canterbury discussed several recent high-profile cases. For example, there was concern over President Barack Obama's appointment of Daniel Gallagher to be commissioner of the Security Exchange Commission. In May 2011, Federal Communications Commission commissioner Meredith Atwell Baker announced that she was leaving the commission to become the chief lobbyist for the newly merged Comcast/NBCUniversal.

Some believe that Obama's revised ethics rules define lobbyist too narrowly, such that the corporate executives and advocates do not meet the definition and are allowed to influence former government employers through the "revolving door."

References:

Source 1: In-person interview on October 6, 2011, with interviewee who requested anonymity, Office of Government Ethics.

Source 2: In-person interview on September 23, 2011, with Director of Public Policy Angela Canterbury of the Project on Government Oversight.

Source 3: Center for Responsive Politics. Revolving Door. Last accessed October 7, 2011. <http://www.opensecrets.org/revolving/>

Source 4: Project on Government Oversight, "Database Tracks Revolving Door Between SEC and Wall Street," May 13, 2011. <http://www.pogo.org/pogo-files/alerts/financial-oversight/fo-fra-20110513.html>

Source 5: James Downie, National Public Radio, "New Republic: The FCC's Revolving Door Is Shameless," May 20, 2011. <http://www.npr.org/2011/05/20/136492206/new-republic-the-fccs-revolving-door-is-shameless>

Source 6: Eliza Newlin Carney, National Journal, "Obama Ethics Regime Draws Mixed Reviews: The White House Made Significant Reforms in 2009 But Failed to Address Underlying Issues," January 4, 2010. <http://www.nationaljournal.com/columns/rules-of-the-game/obama-ethics-regime-draws-mixed-reviews-20100104>

100: The regulations restricting post-government private sector employment for heads of state/government and ministers are uniformly enforced. There are no cases or few cases of those officials taking jobs in the private sector after leaving government where they directly lobby or seek to influence their former government colleagues without an adequate "cooling off" period.

75:

50: The regulations are generally enforced though some exceptions exist. In certain sectors, heads of state/government or ministers are known to regularly take jobs in the private sector that entail directly lobbying or seeking to influence their former government colleagues. Cooling off periods are short and sometimes ignored.

25:

0: The regulations are rarely or never enforced. Heads of state/government or ministers routinely take jobs in the private sector following government employment that involve direct lobbying or influencing of former government colleagues. Cooling off periods are non-existent or never enforced. A zero score is also earned if heads of state and government or minister are allowed to hold private sector jobs while in office.

29g. In practice, the regulations governing gifts and hospitality offered to members of the executive branch are effective.

100 | 75 | 50 | 25 | 0

Comments:

The regulations governing gifts and hospitality offered to members of the executive branch are effective only to the extent that issues catch the attention of government officials. Although the Office of Government Ethics (OGE) sets forth the rules on gifts and hospitality, it does not enforce the ethics code and is not tasked with initiating investigations. Agency ethics officers or inspectors general investigate compliance with the Standard Code of Ethics and the agency is responsible for disciplinary action. OGE and agencies become aware of potential problems through a number of sources, including public and press oversight.

Thus, enforcement is mostly effective when applied, but there is often confusion as to which agency is charged with aggressively investigating employees, particularly if employees appear innocent to the public and press. One is forced to question how many incidents go unnoticed.

References:

Source 1: In-person interview on October 6, 2011, with interviewee who requested anonymity at the Office of Government Ethics.

Source 2: In-person interview on September 23, 2011, with Director of Public Policy Angela Canterbury of the Project on Government Oversight.

100: The regulations governing gifts and hospitality to members of the executive branch are regularly enforced. Members of the executive branch never or rarely accept gifts or hospitality above what is allowed.

75:

50: The regulations governing gifts and hospitality to members of the executive branch are generally applied though exceptions exist. Some ministers in certain sectors are known to accept greater amounts of gifts and hospitality from outside interest groups or private sector actors than is allowed.

25:

0: The regulations governing gifts and hospitality to members of the executive branch are routinely ignored and unenforced. Ministers and other members of the executive branch routinely accept significant amounts of gifts and hospitality from outside interest groups and actors seeking to influence their decisions.

29h. In practice, executive branch asset disclosures (defined here as ministers and above) are audited.

100 | 75 | 50 | 25 | 0

Comments:

Administrative agency ethics officers review the financial disclosures of their employees for potential or actual conflicts of interest. Then, the Office of Government Ethics (OGE) will do a "sampling review." The sampling review serves as a double oversight, reviewing both the records and the agency ethics officer's job competency.

A senior official at the Office of Government Ethics stated that the ethics officer reviews are to uncover potential or actual conflicts of interest. The reviews are not full audits of the financial information. No agency initiates independent audits (such as to determine that the employee does not misrepresent assets on financial disclosure forms, a crime).

References:

Source 1: In-person interview on October 6, 2011, with interviewee who requested anonymity at the Office of Government Ethics.

100: Executive branch asset disclosures are regularly audited using generally accepted auditing practices.

75:

50: Executive branch asset disclosures are audited, but audits are limited in some way, such as using inadequate auditing standards, or the presence of exceptions to disclosed assets.

25:

0: Executive branch asset disclosures are not audited, or the audits performed have no value. Audits may be performed by entities known to be partisan or biased in their practices.

30. Can citizens access the asset disclosure records of the heads of state and government?

88

30a. In law, citizens can access the asset disclosure records of the heads of state and government.

Yes

No

Comments:

The law mandates executive or judicial branch ethics offices, the clerk of the House of Representatives and the secretary of the Senate to make public the disclosure reports of its employees, including senior officials. However, independent agencies and entities related to national security are exempt from the mandate.

References:

Law: 1 U.S.C. §105. Ethics in Government Act of 1978, "Custody of and Public Access to Reports." http://www.law.cornell.edu/uscode/html/uscode05a/usc_sec_05a_00000105--000-.html

Yes: A YES score is earned if the heads of state and government file an asset disclosure form that is, in law, accessible to the public (individuals, civil society groups or journalists).

No: A NO score is earned if there is no asset disclosure for either the head of state or government. A NO score is earned if the form is filed, but not available to the public.

30b. In practice, citizens can access the asset disclosure records of the heads of state and government within a reasonable time period.

100

75

50

25

0

Comments:

Citizens have free, quick access to financial disclosure reports for executive branch officials. For the first time, Executive Branch Personnel Public Financial Disclosure reports for White House officials are available online in PDF form. Citizens file an electronic request and reports are "emailed as quickly as possible" by email. Any delay is addressed immediately by the press office.

References:

Source 1: The White House, Press Office, "Financial Disclosure Reports Now Available." Last accessed October 1, 2011. http://www.whitehouse.gov/the_press_office/Financial-Disclosure-Reports-Now-Available

Source 2: In-person interview with Director of Public Policy Angela Canterbury of the Project on Government Oversight on September 23, 2011.

Source 3: In-person interview with interviewee who requested anonymity at the Office of Government Ethics on October 6, 2011.

100: Records are available on-line, or records can be obtained within two days. Records are uniformly available; there are no delays for politically sensitive information.

75:

50: Records take around two weeks to obtain. Some additional delays may be experienced.

25:

0: Records take more than a month to acquire. In some cases, most records may be available sooner, but there may be persistent delays in obtaining politically sensitive records.

30c. In practice, citizens can access the asset disclosure records of the heads of state and government at a reasonable cost.

100 | 75 | 50 | 25 | 0

Comments:

Citizens have free, quick access to financial disclosure reports for executive branch officials. For the first time, Executive Branch Personnel Public Financial Disclosure reports for White House officials are available online in PDF form. Citizens file an electronic request and reports are “emailed as quickly as possible” by email. Any delay is addressed immediately by the press office.

References:

Source 1: The White House, Press Office, “Financial Disclosure Reports Now Available.” Last accessed October 1, 2011. http://www.whitehouse.gov/the_press_office/Financial-Disclosure-Reports-Now-Available

Source 2: In-person interview with Director of Public Policy Angela Canterbury at the Project on Government Accountability on September 23, 2011.

Source 3: In-person interview with interviewee who requested anonymity at the Office of Government Ethics on October 6, 2011.

100: Records are free to all citizens, or available for the cost of photocopying. Records can be obtained at little cost, such as by mail, or on-line.

75:

50: Records impose a financial burden on citizens, journalists or NGOs. Retrieving records may require a visit to a specific office, such as a regional or national capital.

25:

0: Retrieving records imposes a major financial burden on citizens. Records costs are prohibitive to most citizens, journalists, or NGOs trying to access this information.

30d. In practice, the asset disclosure records of the heads of state and government are of high quality.

100 | 75 | 50 | 25 | 0

Comments:

There are two forms, one confidential and one public. Director of Public Policy Angela Canterbury of the Project on Government

Oversight says often the government does not release to the public the full report. Confidential-only reports make it difficult for the public to determine if there are conflicts of interest.

For the goal of identifying conflicts of interest (not necessarily indicative of criminal behavior), the financial disclosures provide sufficient information regarding individuals' sources of income, investments and other financial interests.

References:

Source 1: The White House, Press Office, "Financial Disclosure Reports Now Available." Last accessed October 1, 2011. http://www.whitehouse.gov/the_press_office/Financial-Disclosure-Reports-Now-Available

Source 2: In-person interview with Director of Public Policy Angela Canterbury at the Project on Government Accountability on September 23, 2011.

Source 3: In person interview with interviewee who requested anonymity at the Office of Government Ethics on October 6, 2011.

100: The asset disclosure records of the heads of state and government are complete and detailed, providing the public with an accurate and updated accounting of the individuals' sources of income, investments, and other financial interests.

75:

50: The asset disclosure records of the heads of state and government contain some useful information but may be lacking important details, including politically sensitive investment or other financial arrangements in which the individual has an interest.

25:

0: The asset disclosure records of the heads of state and government are overly general, lack any meaningful detail, and do not provide a clear accounting of the individuals' sources of income, investments, and other financial assets.

31. In practice, official government functions are kept separate and distinct from the functions of the ruling political party.

100

31a. In practice, official government functions are kept separate and distinct from the functions of the ruling political party.

100 | 75 | 50 | 25 | 0

Comments:

Search of major news sources revealed nothing (The New York Times, The Washington Post, Los Angeles Times, Google News for June 30, 2010, to June 30, 2011).

References:

Search of major news sources revealed nothing (The New York Times, The Washington Post, Los Angeles Times, Google News for June 30, 2010, to June 30, 2011).

100: Clear rules are followed distinguishing state functions from party activities. Government funds are never used for party activities. The civil service is completely distinct from party bureaucracy.

75:

50: The ruling party is, in principal, separate from the state, but exceptions to this standard sometimes occur. Examples may be the use of civil servants to organize political rallies, use of government vehicles on campaign trips, or use of government funds for party purposes.

25:

0: The government bureaucracy is an extension of the ruling party. There are few boundaries between government and party activities. Government funds, equipment and personnel are regularly used to support party activities.

3.2. Conflicts of Interest Safeguards & Checks and Balances: Legislative Branch

32. Can members of the legislature be held accountable for their actions?

67

32a. In law, the judiciary can review laws passed by the legislature.

Yes | No

Comments:

Article 3 of the U.S. Constitution establishes the three branches of government, granting the judiciary jurisdiction over all cases and controversies arising out of the Constitution or other laws of the United States. The right to judicial review of another branch of government, including the executive, was affirmatively established in *Marbury v. Madison*.

References:

Law 1: U.S. Constitution, Article III. <http://www.law.cornell.edu/constitution/articleiii>

Common Law 1: *Marbury v. Madison*, 5 U.S. 137 (1803). http://www.law.cornell.edu/supct/html/.../USSC_CR_0005_0137_ZS.html

Yes: A YES score is earned if there is a formal process by which the judiciary or constitutional courts can pass judgments on the legality or constitutionality of laws passed by the legislature.

No: A NO score is earned if no such mechanism exists. A NO score is earned if judicial review is vaguely established in law or regulation without formal procedures. A NO score is earned if general exceptions exist exempting certain legislative actions from being reviewed (a national security exemption, for example).

32b. In practice, when necessary, the judiciary reviews laws passed by the legislature.

100 | 75 | 50 | 25 | 0

Comments:

The judiciary reviews laws passed by the legislature when constitutional questions are raised. In the United States, virtually all cases that reach the federal appellate level are constitutional issues because lower courts resolve factual disputes.

The judiciary is seen as fair and nonpartisan in its application of this power. As there are far more constitutional issues raised than the judiciary has time to hear, courts must choose the cases they review. But, judges adhere to a well-established criteria for determining whether an issue is fit for review, or has "standing." For instance, the Supreme Court selected well over 50 cases for its 2010-2011 docket, and the cases reviewed relevant, politically sensitive constitutional issues.

Notably, as expressed by Judicial Watch's President Tom Fitton, some believe that judicial review of national controversies is too aggressive. In his view, judges can be too "activist" when they use judicial review as a political tool, overturning actions of the legislature.

References:

Source 1: In-person interview with President Tom Fitton of Judicial Watch on September 21, 2011.

Source 2: Phone interview with University of Pittsburgh Law Professor Arthur Hellman on September 22, 2011.

Source 3: Steven R. Shapiro, American Civil Liberties Union, "ACLU Summary of the 2010 Supreme Court Term," June 27, 2011. <http://www.aclu.org/organization-news-and-highlights/aclu-summary-2010-supreme-court-term>

Source 4: Bill Mears, CNN, "Big Cases Await U.S. Supreme Court's 2010-2011 Term," September 29, 2010. http://articles.cnn.com/2010-09-27/us/new.scotus.term_1_military-funerals-westboro-baptist-church-fred-phelps?_s=PM:US

Source 5: The Brookings Institution. "Constitution Day 2010." September 17, 2010. http://www.brookings.edu/opinions/2010/0917_constitution_day_wheeler.aspx

100: When constitutional or legal questions or possible violations are raised, the judiciary is aggressive in reviewing laws passed and can void illegal or unconstitutional actions. The judiciary is fair and nonpartisan in its application of this power.

75:

50: The judiciary will review laws passed, but is limited in its effectiveness. The judiciary may be slow to act, unwilling to take on politically sensitive issues, or occasionally unable to enforce its judgments.

25:

0: The judiciary does not effectively review laws passed. The judiciary may make judgments but not enforce them, or may fail to pass judgments on executive abuses. The judiciary may be partisan in its application of power.

32c. In law, are members of the national legislature subject to criminal proceedings?

Yes

No

Comments:

In *Kilbourn v. Thompson*, the Supreme Court interpreted the U.S. Constitution's Speech and Debate clause to provide immunity to members of Congress. Thus, national legislators are protected from criminal liability for their legislative activities. There is ambiguity and discretion over what constitutes legislative activities.

References:

Law: U.S. Constitution, Art. I, §6. <http://www.law.cornell.edu/constitution/articlevi>

Common Law: *Kilbourn v. Thompson*, 103 U.S. 168, 202-204 (1881). http://www.law.cornell.edu/supct/html/historics/USSC_CR_0103_0168_ZO.html

Yes: A YES score is earned if all members of the legislature can, in law, be investigated and prosecuted for criminal allegations.

No: A NO score is earned if any member of the legislature cannot, in law, be investigated and prosecuted for criminal proceedings. A NO score is also earned if the legislative branch itself controls whether investigative or prosecutorial immunity can be lifted on members of the legislature.

33. Are there regulations governing conflicts of interest by members of the national legislature?

79

33a. In law, members of the national legislature are required to file an asset disclosure form.

Yes | No

Comments:

Yes, members of the national legislature are required to file an asset disclosure form.

References:

Law: 5a U.S.C. § 101(f). Ethics in Government Act of 1978, Persons Required to
File. http://www.law.cornell.edu/uscode/html/uscode05a/usc_sec_05a_00000101---000-.html

Yes: A YES score is earned if all members of the legislature are required by law to file an asset disclosure form while in office, illustrating sources of income, stock holdings, and other assets. This form does not need to be publicly available to score a YES.

No: A NO score is earned if any member of the legislature is not required to disclose assets.

33b. In law, there are restrictions for national legislators entering the private sector after leaving the government.

Yes | No

Comments:

The Ethics Reform Act of 1989 enacted post-employment restrictions on members, elected officers and certain employees of the House and Senate and certain officers and employees of other legislative branch offices.

The restrictions were amended slightly by the Honest Leadership and Open Government Act of 2007. Sections 1601 to 1614 of the Honest Leadership and Open Government Act require the clerk of the House to provide all departing members and covered employees (such as those employees who are subject to the post-employment restrictions) with a letter notifying the individual "of the beginning and ending date of the prohibitions that apply." The act also mandates that the same information be available on a public Internet site.

References:

Law 1: 18 U.S.C. §207, Ethics Reform Act of 1989. http://www.law.cornell.edu/uscode/18/usc_sec_18_00000207---000-.html

Law: 2 U.S.C. §§1601-1614. Honest Leadership and Open Government Act
(2007). http://www.law.cornell.edu/uscode/2/usc_sup_01_2_10_26.html

Source 1: Jack Maskell, Congressional Research Service, "Post-Employment, Revolving Door, Laws for Federal Personnel," May 12, 2010. <http://www.fas.org/sqp/crs/misc/97-875.pdf>

Yes: A YES score is earned if there are regulations restricting national legislators' ability to take positions in the private sector after leaving government that would present a conflict of interest, including positions that directly seek to influence their former government colleagues.

No: A NO score is earned if no such restrictions exist.

33c. In law, there are regulations governing gifts and hospitality offered to members of the national legislature.

Yes | No

Comments:

There are regulations governing gifts and hospitality offered to members of the national legislature. The Ethics Reform Act of 1989 enacted restrictions on members, elected officers and certain employees of the House and Senate and certain officers and employees of other legislative branch offices. The restrictions were amended slightly by the Honest Leadership and Open Government Act of 2007. Chapter 11 of Title 18, "Bribery, Graft and Conflicts of Interests," regulates acceptance of gifts and hospitality offered to members of the national legislature.

References:

Law 1: 18 U.S.C. §§201-227, Ethics Reform Act of 1989. http://www.law.cornell.edu/uscode/18/usc_sup_01_18_10_I_20_11.html

Law 2: 2 U.S.C. §§1601-1614, Honest Leadership and Open Government Act (2007). http://www.law.cornell.edu/uscode/2/usc_sup_01_2_10_26.html

Source 1: Jack Maskell, Congressional Research Service, "Lobbying Congress: An Overview of Legal Provisions and Congressional Ethics Rules," Page 16, October 24, 2007. <http://moneyline.cq.com/flatfiles/editorialFiles/moneyLine/reference/crs/campfin/cpeif.pdf>

Source 2: U.S. House of Representatives, "Committee on Ethics, Gifts." <http://ethics.house.gov/Subjects/List.aspx?subid=1>

Yes: A YES score is earned if there are formal guidelines regulating gifts and hospitality for members of the legislature.

No: A NO score is earned if there are no guidelines or regulations with respect to gifts or hospitality offered to members of the legislature. A NO score is earned if the guidelines are general and do not specify what is and is not appropriate.

33d. In law, there are requirements for the independent auditing of the asset disclosure forms of members of the national legislature.

Yes | No

Comments:

The Ethics in Government Act requires members of the Senate and House of Representatives to file financial disclosure reports. The Senate Select Committee on Ethics and the House of Representatives Committee on Standards of Official Conduct have authority to administer their respective members' financial disclosures.

Section 106(2) expressly states that each congressional ethics committee (Senate Ethics Committee and House Committee on Rules) must ensure that each report filed by congressional members is reviewed within 60 days after the date of such filing. If the report is believed to be in compliance, the ethics committee (Senate/House) will state that opinion on the report and sign it. If the report is believed to be noncompliant, the ethics committee will notify the individual and give reasonable opportunity for the individual to remedy the report.

Note that a review is not the same as a formal fiscal audit. A review reveals conflicts of interest, whereas an audit pertains to monetary accounting.

References:

Law: 5 U.S.C. App. §§101-111, Ethics in Government Act of 1978, Ethics, Financial Disclosure Requirements of Federal Personnel. http://www.law.cornell.edu/uscode/html/uscode05a/usc_sup_05_5_10_sq3_20_I.html

Senate Rule: Senate Rule 34. <http://ethics.senate.gov/public/index.cfm/financialdisclosure?p=overview>

House Rule: House Rule 26, Financial Disclosure. <http://www.rules.house.gov/singlepages.aspx?NewsID=146&rsbd=165>

Yes: A YES score is earned if there is a legal or regulatory requirement for independent auditing of legislative branch asset disclosures. The auditing is performed by an impartial third-party.

No: A NO score is earned if there are no legal or regulatory requirements for the independent auditing of legislative branch asset disclosures or if such requirements exist but allow for self-auditing.

33e. In practice, the regulations restricting post-government private sector employment for national legislators are effective.

100 | 75 | 50 | 25 | 0

Comments:

The Center for Responsive Politics hosts a database of current and former congressional members who have “passed through the revolving door.” By their count, 340 former senators and representatives are now lobbyists in violation of ethics rules. Hundreds of additional former members of congressional committees now work as lobbyists. Those in particular industries are more likely to violate post-government employment rules, including people who work in business, finance, insurance, real estate, health, communications and technology.

In particular, there were several high-profile cases in the last year, including Sens. John Thune and Dan Coats and former congressman Bart Stupak.

References:

Source 1: In-person interview on September 23, 2011, with Director of Public Policy Angela Canterbury of the Project on Government Oversight.

Source 2: Center for Responsive Politics. Revolving Door. Last accessed October 7, 2011. <http://www.opensecrets.org/revolving/>

Source 3: Eliza Newlin Carney, National Journal, “Obama Ethics Regime Draws Mixed Reviews: The White House Made Significant Reforms In 2009 But Failed to Address Underlying Issues,” January 4, 2010. <http://www.nationaljournal.com/columns/rules-of-the-game/obama-ethics-regime-draws-mixed-reviews-20100104>

Source 4: The New York Times, “Lobbyist Turns Senator but Twists Same Arms,” February 28, 2006. <http://www.nytimes.com/2006/02/28/politics/28lobby.html>

Source 5: The New York Times, “Dan Coats,” January 5, 2011. http://topics.nytimes.com/top/reference/timestopics/people/c/dan_coats/index.html

Source 6: Eric Lichtblau, The New York Times, “Stupak Signs On as a Lobbyist,” April 11, 2011. <http://thecaucus.blogs.nytimes.com/2011/04/11/stupak-signs-on-as-a-lobbyist/?partner=rss&emc=rss>

100: The regulations restricting post-government private sector employment for national legislators are uniformly enforced. There are no cases or few cases of legislators taking jobs in the private sector after leaving government where they directly lobby or seek to influence their former government colleagues without an adequate “cooling off” period.

75:

50: The regulations are generally enforced though some exceptions exist. In certain sectors, legislators are known to regularly take jobs in the private sector that entail directly lobbying or seeking to influence their former government colleagues. Cooling off periods are short and sometimes ignored.

25:

0: The regulations are rarely or never enforced. Legislators routinely take jobs in the private sector following government employment that involve direct lobbying or influencing of former government colleagues. Cooling off periods are non-existent or never enforced. A zero score is also earned if legislators are allowed to hold private sector positions while in office.

33f. In practice, the regulations governing gifts and hospitality offered to national legislators are effective.

100 | 75 | 50 | 25 | 0

Comments:

Regulations on gifts and hospitality to national legislators are only moderately effective, despite regular attempts to enforce them. Legislators frequently accept gifts or hospitality above what is allowed.

The numerous media reports of congressional employees accepting improper gifts shows that the Senate and House ethics committees investigate ethics rules on gifts and hospitality. Unfortunately, the media reports also indicate that members of the legislature routinely violate ethics rules by accepting improper gifts and hospitality.

For example, in November 2010, the House Ethics Committee conducted an investigation and formal hearing against Rep. Charles Rangel, a New York Democrat. Rangel was found guilty of 11 ethics violations, including violating the solicitation and gift ban when he solicited donations and other things of value on behalf of the Rangel Center from people or entities with business before him or his Ways and Means Committee.

Notably, many investigations by the ethics committees are only initiated after NGO investigatory work and press attention. And, investigations do not always result in civil or criminal penalties.

References:

Source 1: Politico, “House Ethics: Jean Schmidt Took Improper \$500K Gift But Not Guilty of Violation,” August 5, 2011. http://www.politico.com/blogs/glennthrush/0811/Ethics_Committee_Jean_Schmidt_took_improper_gift_but_not_guilty_of_violation.html

Source 2: Andy Newman, The New York Times, “Rangel Found to Have Violated Multiple Ethics Rules,” November 16, 2010. <http://cityroom.blogs.nytimes.com/2010/11/16/rangel-found-to-have-violated-multiple-ethics-rules/>

Source 3: Eliza Newlin Carney, National Journal, “Obama Ethics Regime Draws Mixed Reviews: The White House Made Significant Reforms In 2009 But Failed to Address Underlying Issues,” January 4, 2010. <http://www.nationaljournal.com/columns/rules-of-the-game/obama-ethics-regime-draws-mixed-reviews-20100104>

Source 4: Citizens for Responsibility and Ethics in Washington, “Rep. Jean Schmidt (R-OH) Named One of the Most Corrupt Members of Congress,” September 19, 2011. <http://www.citizensforethics.org/press/entry/jean-schmidt-named-most-corrupt-member-of-congress>

Source 5: Eric Lichtblau, The New York Times, “Nevada Senator’s Parents Cleared in Election Inquiry,” November 19, 2010. <http://www.nytimes.com/2010/11/20/us/politics/20ensign.html>

Source 6: In-person interview on September 23, 2011, with Director of Public Policy Angela Canterbury of the Project on Government Oversight. Washington.

100: The regulations governing gifts and hospitality to national legislators are regularly enforced. Legislators never or rarely accept gifts or hospitality above what is allowed.

75:

50: The regulations governing gifts and hospitality to national legislators are generally applied though exceptions exist. Some legislators in certain sectors are known to accept greater amounts of gifts and hospitality from outside interest groups or private sector actors than is allowed.

25:

0: The regulations are rarely or never enforced. Legislators routinely take jobs in the private sector following government employment that involve direct lobbying or influencing of former government colleagues. Cooling off periods are non-existent or never enforced.

33g. In practice, national legislative branch asset disclosures are audited.

100 | 75 | 50 | 25 | 0

Comments:

Audits of the legislative branch asset disclosures are ineffective as the entities charged with auditing lack either the will to investigate or the authority to enforce. The House and Senate ethics committees are charged with collecting and reviewing congressional financial disclosure statements. Melanie Sloan of Citizens for Responsibility and Ethics in Washington (CREW) stated, “The House and Senate have done a dismal job policing the misconduct of their members. Over and over, the ethics committees in both Houses reveal they are not up to the job of enforcing ethics rules.” As she told CBS News, “The fact is the House Ethics Committee is renowned for not doing its job. It is the most toothless committee in Congress. It never goes after anybody. It really exists just to give members a pass. Congress can say it cares about ethics by having an ethics committee, but the ethics committee never finds anybody did anything wrong.” Congress created an independent Office of Congressional Ethics (OCE) that investigates cases to fix the problem, but the OCE simply refers cases back to the House Ethics Committee, which decides whether to bring charges. For example, in 11 out of 12 cases referred by the OCE, the House Ethics Committee decided not to charge any members.

Angela Canterbury, director of public policy at the Project on Government Oversight, echoed this sentiment, stating that the House and Senate ethics committees were “lame.”

Official investigations seem to be initiated only when the press or NGO watchdog community brings attention to the issue. In addition to the Project on Government Oversight and Citizens for Responsibility and Ethics in Washington, NGO Legistorm also

compiles information on congressional financial disclosures, initiates investigations and brings issues to the attention of the public.

Finally, as with executive branch entities, the congressional entities charged with financial disclosure “audits” actually conduct reviews. They look for ethics rule violations such as potential or actual conflicts of interest, not criminal conduct, such as misrepresenting assets.

References:

Source 1: Sharyl Attkisson, CBS News, “A Double Standard for House Ethics?,” October 25, 2010. http://www.cbsnews.com/8301-503544_162-20020521-503544.html

Source 2: Center for Responsibility and Ethics in Washington, “Crew: House and Senate Ethics Committees Protecting the Most Corrupt Members of Congress,” October 13, 2010. <http://www.citizensforethics.org/press/entry/crew-26-lawmakers-corrupting-halls-congress>

Source 3: Legistorm. Last accessed October 7, 2011. <http://www.legistorm.com/>

100: Legislative branch asset disclosures are regularly audited using generally accepted auditing practices.

75:

50: Legislative branch asset disclosures are audited, but audits are limited in some way, such as using inadequate auditing standards, or the presence of exceptions to disclosed assets.

25:

0: The regulations are rarely or never enforced. Legislators routinely take jobs in the private sector following government employment that involve direct lobbying or influencing of former government colleagues. Cooling off periods are non-existent or never enforced.

34. Can citizens access the asset disclosure records of members of the national legislature?

100

34a. In law, citizens can access the asset disclosure records of members of the national legislature.

Yes

No

Comments:

The House clerk and Senate Office of Public Records retain the disclosure reports for six years and the reports of unsuccessful candidates for one year. In addition, pursuant to the Honest Leadership and Open Government Act, the reports are to be made available on a public, searchable website within 45 days of their filing.

References:

Law 1: 5 U.S.C. app. 4 §105(d). Ethics in Government Act of 1978, Financial Disclosure Information: Custody of and Public Access to Reports. http://www.law.cornell.edu/uscode/html/uscode05a/usc_sec_05a_00000105---000-.html

Yes: A YES score is earned if members of the national legislature file an asset disclosure form that is, in law, accessible to the public (individuals, non-governmental groups or journalists).

No: A NO score is earned if there is no asset disclosure for members of the national legislature. A NO score is earned if the form is filed, but not available to the public.

34b. In practice, citizens can access legislative asset disclosure records within a reasonable time period.

100 | 75 | 50 | 25 | 0

Comments:

The Office of the Clerk of the U.S. House of Representatives maintains an online, free database for immediate access.

The Office of Public Records for the Senate does not post financial disclosure reports online. They are available publicly upon in-person request at the agency's office in Washington. Citizens may view the reports in the agency's private database. Citizens may also print and keep reports at the cost of 20 cents a page. The reports are in the database immediately following their scheduled deadline.

Unofficial sources such as Legistorm and the Center for Responsible Politics also maintain databases that provide free, fast access to financial disclosure records.

References:

Source 1: The Office of the Clerk of the U.S. House of Representatives, "Public Disclosure Financial Search." Last accessed September 26, 2011. http://clerk.house.gov/public_disc/financial-search.aspx

Source 2: Secretary of the Senate, Office of Public Records. Phone Conversation with administrative staff on September 26, 2011. Office of Public Records, 232 Hart Senate Office Building, Washington, D.C. 20510-7116. Telephone +1 (202) 224-0758.

Source 3: Legistorm. Last accessed September 26, 2011. <http://www.legistorm.com/>

Source 4: Center for Responsible Politics. Last accessed September 26, 2011. <http://www.opensecrets.org/pfds/>

100: Records are available on-line, or records can be obtained within two days. Records are uniformly available; there are no delays for politically sensitive information.

75:

50: Records take around two weeks to obtain. Some delays may be experienced.

25:

0: Records take more than a month to acquire. In some cases, most records may be available sooner, but there may be persistent delays in obtaining politically sensitive records.

34c. In practice, citizens can access legislative asset disclosure records at a reasonable cost.

100 | 75 | 50 | 25 | 0

Comments:

The Office of the Clerk of the U.S. House of Representatives maintains an online, free database for immediate access.

The Office of Public Records for the Senate does not post financial disclosure reports online. They are available publicly upon in-person request at the agency's office in Washington. Citizens may view the reports in the agency's private database. Citizens may also print and keep reports at the cost of 20 cents a page. The reports are in the database immediately following their scheduled deadline.

Unofficial sources, such as the Center for Responsible Politics and Legistorm, also maintain databases that facilitate fast, free access to legislative asset disclosure records.

References:

Source 1: The Office of the Clerk of the U.S. House of Representatives, "Public Disclosure Financial Search." Last accessed September 26, 2011. http://clerk.house.gov/public_disc/financial-search.aspx

Source 2: Phone Conversation with administrative staff on September 26, 2011 at the Secretary of the Senate, Office of Public Records, "Legislation and Records." http://www.senate.gov/pagelayout/legislative/g_three_sections_with_teasers/legislative_home.htm

Source 3: Legistorm. Last accessed September 26, 2011. <http://www.legistorm.com/>

Source 4: Center for Responsible Politics. Last accessed September 26, 2011. <http://www.opensecrets.org/pfds/>

100: Records are free to all citizens, or available for the cost of photocopying. Records can be obtained at little cost, such as by mail, or on-line.

75:

50: Records impose a financial burden on citizens, journalists or NGOs. Retrieving records may require a visit to a specific office, such as a regional or national capital.

25:

0: Retrieving records imposes a major financial burden on citizens. Records costs are prohibitive to most citizens, journalists, or NGOs trying to access this information.

34d. In practice, the asset disclosure records of members of the national legislature are of high quality.

100 | 75 | 50 | 25 | 0

Comments:

There are public disclosure reports and, for security reasons, confidential security reports. For the most part, even the public disclosure reports are sufficiently detailed to reveal conflicts of interest. The personal financial disclosure forms crafted by the House and Senate ask members and staffers to identify a range of financial information that might identify possible conflicts of interest with their official duties. It includes assets, debts, earned income, prior employment, agreements, gifts and positions held. Other assets disclosed on the report include spouse employment, earned income outside congressional work (campaign-related and non-campaign-related), prior employment, positions held, agreements with private parties, compensation greater than \$5,000 and gifts provided.

The financial disclosure reports are not comprehensive. Legislature members are not required to list their principal residences and only need to list assets in very broad ranges. Financial disclosures also can list assets that a filer manages for a dependent child but are not owned by the filer. The value of assets in certain trusts also do not need to be disclosed. Those filing personal financial disclosures are not required to list a principal residence on their assets list, such as valuable items owned, like antiques and artwork. Listing primary residences is entirely optional on both the assets and debts pages.

References:

Source 1: Legistorm, "Personal Financial Disclosures." http://www.legistorm.com/financial_disclosure.html

100: The asset disclosure records of members of the national legislature are complete and detailed, providing the public with an accurate and updated accounting of the individuals' sources of income, investments, and other financial interests.

75:

50: The asset disclosure records of the members of the national legislature contain some useful information but may be lacking important details, including politically sensitive investment or other financial arrangements in which the individual has an interest.

25:

0: The asset disclosure records of the members of the national legislature are overly general, lack any meaningful detail, and do not provide clear accounting of the individuals' sources of income, investments, and other financial assets.

35. Can citizens access legislative processes and documents?

100

35a. In law, citizens can access records of legislative processes and documents.

Yes | No

Comments:

Title 44 was passed to keep citizens informed by providing government documents to libraries for access by the public. Amended in 1993, it requires the Government Printing Office to provide electronic access to government documents for the public.

Although most legislative documents by law are available to citizens, there is some controversy over the work produced by the Congressional Research Service (CRS). CRS is an independent research service that provides reports to members of Congress. By law, CRS does not need to make its reports public. The reports are not introduced into the public domain until a member of Congress releases the report. Several sources provide access to CRS reports that have been released to the public, including Open CRS, Source Watch, University of North Texas Libraries, Federation of American Scientists, Franklin Pierce Law Center, U.S. Dept. of Foreign Press Center and University of Maryland School of Law.

References:

Law 1: 44 U.S.C., Public Printing and Documents. http://www.law.cornell.edu/uscode/usc_sup_01_44.html

Law 2: Government Printing Office Electronic Information Enhancement Act of 1993. http://www.access.gpo.gov/su_docs/law.html

Source 1: Government Printing Office, Legislative Branch, U.S. Congressional Serial Set: Congressional Reports. <http://www.gpoaccess.gov/serialset/creports/index.html>

Source 2: About the Center for Legislative Archives. <http://www.archives.gov/legislative/cla/index.html>

Yes: A YES score is earned if there is a general legal right to access records of legislative proceedings including voting records. A YES score can still be given if there are formal rules for specific exemptions to the right to disclosure (special secret sessions related to national security).

No: A NO score is earned if there is no general right to access documents recording legislative proceedings. A NO score is earned if there are exemptions to the general right that are not clearly defined by formal rules.

35b. In practice, citizens can access records of legislative processes and documents within a reasonable time period.

100 | 75 | 50 | 25 | 0

Comments:

The Government Printing Office provides a free and expedient searchable database of Congressional documents, including the Congressional Record and the House Journal.

The Congressional Record is published daily when Congress is in session. At the back of each daily issue is the "Daily Digest," which summarizes the day's floor and committee activities. The database is updated daily by 11 a.m.

The Journal is a record of the proceedings of each legislative day in the House of Representatives.

References:

Source 1: Government Printing Office, Legislative Branch, Congressional Record. <http://www.gpoaccess.gov/crecord/index.html>

100: Records are available on-line, or records can be obtained within two days. Records are uniformly available; there are no delays for politically sensitive information.

75:

50: Records take around two weeks to obtain. Some delays may be experienced.

25:

0: Records take more than a month to acquire. In some cases, most records may be available sooner, but there may be persistent delays in obtaining politically sensitive records.

35c. In practice, citizens can access records of legislative processes and documents at a reasonable cost.

100 | 75 | 50 | 25 | 0

Comments:

The Government Printing Office provides a free and expedient searchable database of Congressional documents, including the Congressional Record and the House Journal.

References:

Source 1: Government Printing Office, Legislative Branch, Congressional Record. <http://www.gpoaccess.gov/crecord/index.html>

100: Records are free to all citizens, or available for the cost of photocopying. Records can be obtained at little cost, such as by mail, or on-line.

75:

50: Records impose a financial burden on citizens, journalists or NGOs. Retrieving records may require a visit to a specific office, such as a regional or national capital.

25:

0: Retrieving records imposes a major financial burden on citizens. Records costs are prohibitive to most citizens, journalists, or NGOs trying to access this information.

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3.3. Conflicts of Interest Safeguards & Checks and Balances: Judicial Branch

36. Are judges appointed fairly?

100

36a. In law, there is a transparent procedure for selecting national-level judges.

Yes | No

Comments:

A transparent procedure for selecting national-level judges is set forth in Article 2 of the Constitution. Supreme Court justices, court of appeals judges and district court judges are nominated by the president and confirmed by the U.S. Senate. The federal judiciary, the Judicial Conference of the United States and the Administrative Office of the U.S. Courts play no role in the nomination and confirmation process.

Generally, the process is as follows: The names of potential nominees are often recommended by senators or sometimes by members of the House who are of the president's political party. The Senate Judiciary Committee (SJC) typically conducts confirmation hearings for each nominee in which senators are permitted to question the nominee. The SJC votes on the nomination and then makes a recommendation to the full Senate that the nominee be confirmed or rejected. Alternately, it may not have a recommendation (sometimes this process results in nominees failing to reach the Senate at all). The full Senate

debates the nomination. A vote of three-fifths of the Senate (60 senators) is required to end debate. When debate ends, the Senate votes on the nomination. Confirmation requires a simple majority of the senators present and voting. Article 3 of the Constitution states that these judicial officers are appointed for a life term.

References:

Law: Article 2, §2 and Article 3 of the U.S. Constitution. <http://www.law.cornell.edu/constitution/>

Law: Title 28 of the U.S. Code. Judiciary and Judicial Procedure. <http://www.law.cornell.edu/uscode/28/>

Source 1: Administrative Office of the U.S. Courts, "Common FAQs." Last accessed September 26, 2011. <http://www.uscourts.gov/Common/FAQS.aspx>

Source 2: Project on the Judiciary, "Judicial Nomination Process." Last accessed September 26, 2011. <http://www.judiciaryproject.org/judicial-nominations-process/>

Yes: A YES score is earned if there is a formal process for selecting national level justices. This process should be public in the debating and confirmation stages. National-level judges are defined as judges who have powers that derive from a national law or constitution; are nominated/appointed by a national governmental body (head of state/government or national legislature); and/or are elected nationally.

No: A NO score is given if there is no formal process of selection or the process is conducted without public oversight. National-level judges are defined as judges who have powers that derive from a national law or constitution; are nominated/appointed by a national governmental body (head of state/government or national legislature); and/or are elected nationally.

36b. In practice, professional criteria are followed in selecting national-level judges.

100 | 75 | 50 | 25 | 0

Comments:

The Constitution sets forth no specific requirements. However, members of Congress, who typically recommend potential nominees, and the Department of Justice, which reviews nominees' qualifications, have developed their own informal criteria.

For instance, the American Bar Association Standing Committee on the Federal Judiciary conducts independent peer-review evaluations of the professional qualifications of prospective nominees. The evaluations are based on predetermined and objective evaluation criteria, including integrity, professional competence and judicial temperament.

References:

Source 1: ABA Standing Committee on the Federal Judiciary, "What It Is and How It Works." http://www.americanbar.org/content/dam/aba/migrated/2011_build/federal_judiciary/federal_judiciary09.authcheckdam.pdf

Source 2: Phone interview with University of Pittsburgh Law School Professor Arthur Hellman on September 22, 2011.

100: National-level judges selected have relevant professional qualifications such as formal legal training, experience as a lower court judge or a career as a litigator.

75:

50: Most national-level judges selected meet these qualifications, with some exceptions.

25:

0: National-level judges are often unqualified due to lack of training or experience.

36c. In law, there is a confirmation process for national-level judges (i.e. conducted by the legislature or an independent body).

Yes | No

Comments:

There is a confirmation process for national-level judges conducted by the president and the U.S. Senate Committee on the Judiciary.

Nominations for the Supreme Court, Courts of Appeals and District Courts are made by the president and confirmed by the Senate. Potential nominees are sometimes identified and recommended by members of Congress. Nominees confirmed by the Senate are appointed for lifetime terms. After a nomination is received by the Senate and referred to the Judiciary Committee, the committee typically conducts a confirmation hearing for each nominee. Before a hearing can be scheduled in the committee, however, nominees are expected to complete a comprehensive questionnaire. In light of their interest in nominees from their home state, and to encourage consultation, senators from a nominee's home state are also invited to participate in the process. They are provided a "blue slip" by the committee, by which they can approve moving the nominee through the committee process. It is important to note, however, that the return of a positive "blue slip" is not a commitment by either home state senator to support or oppose a pending nomination. During a hearing, judicial nominees engage in a question and answer session with members of the Judiciary Committee. After the hearing, committee members may send written follow-up questions to the nominee. After the completion of any follow-up questions, a nomination can then be listed for committee consideration during an executive business meeting. Should the committee order a nomination reported, the nomination would await consideration by the full Senate. If a majority of the Senate votes in favor of a nomination, the president is notified of the Senate's action, and the nomination is confirmed.

References:

Law 1: Article 2, §2 and Article 3 of the U.S. Constitution. <http://www.law.cornell.edu/constitution/>

Law 2: Title 28 of the U.S. Code. Judiciary and Judicial Procedure. <http://www.law.cornell.edu/uscode/28/>

Source 1: U.S. Senate Committee on the Judiciary, "Judicial Nominations and Confirmations." Last accessed September 26, 2011. <http://judiciary.senate.gov/nominations/judicial.cfm>

Yes: A YES score is earned if there is a formal process establishing a review of national-level judicial nominees by an agency or entity independent from the body appointing the judges.

No: A NO score is earned if there is no formal review. A NO score is earned if the review is conducted by the same body that appoints the judges (such as the Prime Minister approving judicial nominees put forward by the Minister of Justice, both of whom are part of the executive).

37. Can members of the judiciary be held accountable for their actions?

92

37a. In law, members of the national-level judiciary are obliged to give reasons for their decisions.

Yes | No

Comments:

Common law required judges to give reasons for their decisions. The precedent to explain and write judicial opinions was established in Marbury v. Madison in 1803: "It is emphatically the duty of the Judicial Department to say what the law is. Those who apply the rule to particular cases must, of necessity, expound and interpret that rule."

References:

Common Law: Marbury v. Madison, 5 U.S. 137 (1803). http://www.law.cornell.edu/supct/html/historics/USSC_CR_0005_0137_ZS.html

Source 1: Gerald Lebovitz, "Ethical Judicial Opinion Writing," The Berkeley Electronic Press (2006). <http://law.bepress.com/cgi/viewcontent.cgi?article=8178&context=expresso&sei-redir=1#search=%22judicial%20opinion%20must%20written%22>

Yes: A YES score is earned if there is a formal and mandatory process for judges to explain their decisions.

No: A NO score is earned if justices are not required to explain decisions. A NO score is earned if there is a general exemption from explaining some decisions (such as national security).

37b. In practice, members of the national-level judiciary give reasons for their decisions.

100 | 75 | 50 | 25 | 0

Comments:

National-level judges virtually always give reasons for their decisions in a written opinion.

Most opinions are written and available publicly through a legal database (WestLaw or LexisNexis) or a public search engine.

References:

Source 1: Phone Interview on September 22, 2011, with University of Pittsburgh School of Law Professor Arthur Hellman.

Source 2: Cornell University Law School's Legal Information Institute, "Federal Opinions." Last accessed September 26, 2011. <http://www.law.cornell.edu/federal/opinions.html>

100: Judges are formally required to explain their judgments in detail, establishing a body of precedent. All judges comply with these requirements.

75:

50: Judges are compelled to give substantial reasons for their decisions, but some exceptions exist. These may include special courts, such as military courts or tribunals.

25:

0: Judges commonly issue decisions without formal explanations.

37c. In law, there is a disciplinary agency (or equivalent mechanism) for the national-level judicial system.

Yes | No

Comments:

The clerk of the U.S. Appeals Court for the Circuit processes claims against federal judiciary members, acting as a disciplinary agency. Notably, the chief judge and Judicial Council of the U.S. Appeals court for the Circuit retain considerable discretion in whether and how to address the complaint.

References:

Law: 28 U.S.C. §§ 351-364 (1980). Judicial Conduct and Disability Act. http://www.law.cornell.edu/uscode/uscode_sup_01_28_10_120_16.html

Source 1: Phone interview on September 22, 2011, with University of Pittsburgh School of Law Professor Arthur Hellman.

Yes: A YES score is earned if there is a disciplinary agency (or equivalent mechanism) for the judicial system. A disciplinary agency is defined here as an agency or mechanism specifically mandated to investigate breaches of procedure, abuses of power or other failures of the judiciary. A YES score can still be earned if the judicial disciplinary agency (or mechanism) is internal to the judiciary.

No: A NO score is earned if no agency or mechanism is specifically mandated to act as a disciplinary mechanism for the national-level judiciary.

37d. In law, the judicial disciplinary agency (or equivalent mechanism) is protected from political interference.

Yes | No

Comments:

The law provides procedural guarantees of independence in reviewing judicial ethics and professional conduct. The Judicial Conference of the United States addresses matters of judicial ethics according to the federal rules of practice and the Code of Conduct for judges. Membership of the Judicial Conference is limited to the judicial branch, which limits political interference. The chief justice of the United States is the presiding officer of the Judicial Conference. Membership comprises the chief judge of each judicial circuit, the chief judge of the Court of International Trade and a district judge from each regional judicial circuit.

References:

Law: 28 U.S.C. §§ 331—335. Conferences and Councils of Judges. http://www.law.cornell.edu/uscode/usc_sup_01_28_10_1_20_15.html

Source 1: Administrative Office of the U.S. Courts, "Judicial Conference Membership." Last accessed October 1, 2011. <http://www.uscourts.gov/FederalCourts/JudicialConference/Membership.aspx>

Yes: A YES score is earned if there are formal rules establishing that the judicial disciplinary agency (or equivalent mechanism) is protected from political interference by the executive and legislative branches.

No: A NO score is earned if there are no formal rules establishing the independence of the judicial disciplinary agency (or equivalent mechanism). A NO score is given if the judicial disciplinary agency or equivalent mechanism function is carried out by an executive ministry or legislative committee.

37e. In practice, when necessary, the judicial disciplinary agency (or equivalent mechanism) initiates investigations.

100 | 75 | 50 | 25 | 0

Comments:

The judiciary initiates some investigations of judicial ethics.

Professor Arthur Hellman stated that the judicial disciplinary agency, The Judicial Conference, has worked pretty well. Citizens file a complaint, and the Judicial Conference undertakes an initial inquiry. Should it believe that further investigation is necessary, the Judicial Conference refers the complaint to an appointed special committee. "It carries out investigations and in general has done a good job," Hellman says, adding that it hasn't "swept misconduct under the rug." He cited the example of two impeachments of federal judges within the last few years.

The Judicial Conference does not initiate investigations of its own volition. Further, Hellman also stated that sometimes the judicial disciplinary agency was "not as zealous or aggressive as it could have been." Judicial Watch President Tom Fitton echoed this sentiment, stressing an inherent conflict of interest in that judges are asked to review and "police" their peers.

Finally, the Supreme Court is not subject to any ethics guidelines or governing ethics body.

References:

Source 1: Phone interview with University of Pittsburgh School of Law Professor Arthur Hellman on September 22, 2011.

Source 2: In-person interview with Tom Fitton, president of Judicial Watch, on September 23, 2011.

100: The judicial disciplinary agency (or equivalent mechanism) aggressively starts investigations — or participates fully with cooperating agencies' investigations — into judicial misconduct. The judicial disciplinary agency (or equivalent mechanism)

is fair in its application of this power.

75:

50: The judicial disciplinary agency (or equivalent mechanism) will start or cooperate in investigations, but often relies on external pressure to set priorities, or has limited effectiveness when investigating. The judicial disciplinary agency (or equivalent mechanism), though limited in effectiveness, is still fair in its application of power.

25:

0: The judicial disciplinary agency (or equivalent mechanism) rarely investigates on its own or cooperates in other agencies' investigations, or the judicial disciplinary agency (or equivalent mechanism) is partisan in its application of this power.

37f. In practice, when necessary, the judicial disciplinary agency (or equivalent mechanism) imposes penalties on offenders.

100 | 75 | 50 | 25 | 0

Comments:

The judicial disciplinary agency (or an equivalent mechanism) imposes some penalties on offenders.

The disciplinary action that the Judicial Conference has authority to order is limited. Only the legislature can impeach judges. The primary disciplinary action against a judge is a fine. Most judicial ethics violations receive a public reprimand. If the infraction is really serious, the judicial council of the circuit can suspend the judge from hearing cases. Professor Hellman says "even that is really extreme and only happens very occasionally." In fact, by his estimate, it has only happened approximately six times in the 30-year history of the governing act.

References:

Source 1: Phone interview with University of Pittsburgh School of Law Professor Arthur Hellman on September 22, 2011.

Source 2: In-person interview with Tom Fitton, president of Judicial Watch, on September 23, 2011.

100: When rules violations are discovered, the judicial disciplinary agency (or equivalent mechanism) is aggressive in penalizing offenders or in cooperating with other agencies who penalize offenders.

75:

50: The judicial disciplinary agency (or equivalent mechanism) enforces rules, but is limited in its effectiveness. The judicial disciplinary agency (or equivalent mechanism) may be slow to act, unwilling to take on politically powerful offenders, resistant to cooperating with other agencies, or occasionally unable to enforce its judgments.

25:

0: The judicial disciplinary agency (or equivalent mechanism) does not effectively penalize offenders. The judicial disciplinary agency (or equivalent mechanism) may make judgments but not enforce them, does not cooperate with other agencies in enforcing penalties, or may fail to make reasonable judgments against offenders. The judicial disciplinary agency (or equivalent mechanism) may be partisan in its application of power.

38. Are there regulations governing conflicts of interest for the national-level judiciary?

64

38a. In law, members of the national-level judiciary are required to file an asset disclosure form.

Yes | No

Comments:

Federal judges are required to disclose their finances.

References:

Law: 5a U.S.C. § 105, Ethics in Government Act of 1978, Financial Disclosure Requirements of Federal Personnel. http://www.law.cornell.edu/uscode/html/uscode05a/usc_sup_05_5_10_sq3_20_1.html

Law: 5 U.S.C. App. §§ 101 to 111. Ethics Reform Act, Financial Disclosure Provisions. http://www.law.cornell.edu/uscode/html/uscode05a/usc_sup_05_5_10_sq3_20_1.html

Yes: A YES score is earned if all members of the national-level judiciary are required by law to file an asset disclosure form while in office, illustrating sources of income, stock holdings, and other assets. This form does not need to be publicly available to score a YES.

No: A NO score is earned if any member of the national-level judiciary is not required to publicly disclose assets.

38b. In law, there are regulations governing gifts and hospitality offered to members of the national-level judiciary.

Yes

No

Comments:

Federal judges also are subject to restrictions on accepting gifts and hospitality.

References:

Law: 5 U.S.C. § 7353. Ethics Reform Act, Gifts to Federal Employees. http://www.law.cornell.edu/uscode/5/usc_sec_05_00007353---000-.html

Law: 5 U.S.C. § 7342. Ethics Reform Act, Foreign Gifts. http://www.law.cornell.edu/uscode/5/usc_sec_05_00007342---000-.html

Law: 5 U.S.C. § 7351. Ethics Reform Act, Gifts to Superiors. <http://www.law.cornell.edu/uscode/5/7351.html>

Source 1: Judicial Conference, Code of Conduct. Last Accessed October 1, 2011. <http://www.uscourts.gov/rulesandpolicies/codesofconduct/codeconductjudicialemembers.aspx>

Yes: A YES score is earned if there are formal guidelines regulating gifts and hospitality for members of the national-level judiciary.

No: A NO score is earned if there are no guidelines or regulations with respect to gifts or hospitality offered to members of the national-level judiciary. A NO score is earned if the guidelines are general and do not specify what is and is not appropriate.

38c. In law, there are requirements for the independent auditing of the asset disclosure forms of members of the national-level judiciary.

Yes

No

Comments:

There is no independent audit of the judiciary branch's financial disclosures.

Professor Hellman stated that Congress, in theory, does investigate and audit the judiciary branch's financial disclosures, but "nothing like that has ever happened." He believes it does not happen because judges recuse themselves.

References:

Source 1: Phone interview with University of Pittsburgh School of Law Professor Arthur Hellman on September 22, 2011.

Source 2: In-person interview with Tom Fitton, president of Judicial Watch, on September 23, 2011.

Yes: A YES score is earned if there is a legal or regulatory requirement for independent auditing of national-level judiciary asset disclosures. The auditing is performed by an impartial third-party.

No: A NO score is earned if there are no legal or regulatory requirements for the independent auditing of national-level judiciary asset disclosures or if such requirements exist but allow for self-auditing.

38d. In law, there are restrictions for national-level judges entering the private sector after leaving the government.

Yes | No

Comments:

There are no post-government employment restrictions on federal judges.

References:

Source 1: Phone interview with University of Pittsburgh School of Law Professor Arthur Hellman on September 22, 2011.

Source 2: In-person interview with Tom Fitton, president of Judicial Watch, on September 23, 2011.

Yes: A YES score is earned if there are regulations restricting national-level judges’ ability to take positions in the private sector after leaving government that would present a conflict of interest, including positions that directly seek to influence their former government colleagues.

No: A NO score is earned if no such restrictions exist.

38e. In practice, the regulations restricting post-government private sector employment for national-level judges are effective.

100 | 75 | 50 | 25 | 0

Comments:

There are no laws restricting judges from taking post-government employment in the private sector. However, in practice, it is less of an issue than it seems. Judges are appointed for life. Upon leaving government employment, many judges retire, taking up no employment.

References:

Source 1: Phone interview with University of Pittsburgh School of Law Professor Arthur Hellman on September 22, 2011.

Source 2: In-person interview with Tom Fitton, president of Judicial Watch, on September 23, 2011.

100: The regulations restricting post-government private sector employment for national-level judges are uniformly enforced. There are no cases or few cases of judges taking jobs in the private sector after leaving government where they directly lobby or seek to influence their former government colleagues without an adequate “cooling off” period.

75:

50: The regulations are generally enforced though some exceptions exist. In certain cases, judges are known to regularly take jobs in the private sector that entail directly lobbying or seeking to influence their former government colleagues. Cooling off periods are short and sometimes ignored.

25:

0: The regulations are rarely or never enforced. Judges routinely take jobs in the private sector following government employment that involve direct lobbying or influencing of former government colleagues. Cooling off periods are non-existent or never enforced. A zero score is also earned if judges are allowed to hold private sector jobs while serving on the bench.

38f. In practice, the regulations governing gifts and hospitality offered to members of the national-level judiciary are effective.

100 | 75 | 50 | 25 | 0

Comments:

Regulations governing gifts and hospitality offered to members of the national-level judiciary are effective. Federal judges are closely watched by the public and, for the most part, adhere to strict regulations.

References:

Source 1: Phone interview with University of Pittsburgh School of Law Professor Arthur Hellman on September 22, 2011.

Source 2: In-person interview with Tom Fitton, president of Judicial Watch, on September 23, 2011.

100: The regulations governing gifts and hospitality to members of the national-level judiciary are regularly enforced. Judges never or rarely accept gifts or hospitality above what is allowed.

75:

50: The regulations governing gifts and hospitality to members of the national-level judiciary are generally applied though exceptions exist. Some judges are known to accept greater amounts of gifts and hospitality from outside interest groups or private sector actors than is allowed.

25:

0: The regulations are rarely or never enforced. Judges routinely take jobs in the private sector following government employment that involve direct lobbying or influencing of former government colleagues. Cooling off periods are non-existent or never enforced.

38g. In practice, national-level judiciary asset disclosures are audited.

100 | 75 | 50 | 25 | 0

Comments:

Judges are audited and investigated if there is cause for concern. Law professor Arthur Hellman noted that, in practice, audits are rare. However, the scarcity of audits is not from lack of rigorous anti-corruption efforts; rather, audits generally are not conducted because judges rarely give cause for concern.

References:

Source 1: Phone interview with University of Pittsburgh School of Law Professor Arthur Hellman on September 22, 2011.

Source 2: In-person interview with Tom Fitton, president of Judicial Watch, on September 23, 2011.

100: National-level judiciary asset disclosures are regularly audited using generally accepted auditing practices.

75:

50: National-level judiciary asset disclosures are audited, but audits are limited in some way, such as using inadequate auditing standards, or the presence of exceptions to disclosed assets.

25:

0: The regulations are rarely or never enforced. Judges routinely take jobs in the private sector following government employment that involve direct lobbying or influencing of former government colleagues. Cooling off periods are non-existent or never enforced.

39. Can citizens access the asset disclosure records of members of the national-level judiciary?

19

39a. In law, citizens can access the asset disclosure records of members of the national-level judiciary.

Yes | **No**

Comments:

One section of the Ethics in Government Act sets broad parameters that exempt judges from giving public access to their financial disclosure records.

References:

Law: 5a U.S.C. § 105(b)(3)(C) Ethics. Custody of and Public Access to Reports. http://www.law.cornell.edu/uscode/html/uscode05a/usc_sec_05a_00000105--000-.html

Yes: A YES score is earned if members of the national-level judiciary file an asset disclosure form that is, in law, accessible to the public (individuals, civil society groups or journalists).

No: A NO score is earned if there is no asset disclosure for members of the national-level judiciary. A NO score is earned if the form is filed, but not available to the public.

39b. In practice, citizens can access judicial asset disclosure records within a reasonable time period.

100 | 75 | 50 | 25 | **0**

Comments:

There does not appear to be a quick, cost-accessible way for citizens to request information from the Judicial Committee on financial disclosures.

The Judicial Committee does not make reports publicly available of its own volition. It does not provide electronic online reports or give information on its website about the request process. Further, the Judicial Committee has discretion to redact the financial statements and/or deny public access. But for citizen (or organization) requests, the Judicial Conference would not make these documents available. Judicial Watch, for example, pays thousands of dollars a year to the federal government to access copies, which Judicial Watch posts online for free, public access.

Finally, it is important to note that citizens requesting access to the reports are required to provide information about themselves. In a system that requires citizens to initiate public access, this could be a serious deterrent.

References:

Source 1: Judicial Watch, Financial Disclosure. Last accessed October 1, 2011. <http://www.judicialwatch.org/judicial-financial-disclosure>

Source 2: Phone interview with University of Pittsburgh School of Law Professor Arthur Hellman on September 22, 2011.

Source 3: In-person interview with Tom Fitton, president of Judicial Watch, on September 23, 2011.

Source 4: Sunlight Foundation, Blog, "Put Judicial Financial Disclosures Online," July 20, 2011. <http://sunlightfoundation.com/blog/2011/07/20/put-judicial-financial-disclosures-online/>

100: Records are available on-line, or records can be obtained within two days. Records are uniformly available; there are no delays for politically sensitive information.

75:

50: Records take around two weeks to obtain. Some delays may be experienced.

25:

0: Records take more than a month to acquire. In some cases, most records may be available sooner, but there may be persistent delays in obtaining politically sensitive records.

39c. In practice, citizens can access judicial asset disclosure records at a reasonable cost.

100 | 75 | 50 | 25 | 0

Comments:

There does not appear to be a quick, cost-accessible way for citizens to request information from the Judicial Committee on financial disclosures.

The Judicial Committee does not make reports publicly available of its own volition. It does not provide electronic online reports or give information on its website about the request process. Further, the Judicial Committee has discretion to redact the financial statements and/or deny public access. But for citizen (or organization) requests, the Judicial Conference would not make these documents available. Judicial Watch, for example, pays thousands of dollars a year to the federal government to access copies, which Judicial Watch posts online for free, public access.

Finally, it is important to note that citizens requesting access to the reports are required to provide information about themselves. In a system that requires citizens to initiate public access, this could be a serious deterrent.

References:

Source 1: Judicial Watch, Financial Disclosure. Last accessed October 1, 2011. <http://www.judicialwatch.org/judicial-financial-disclosure>

Source 2: Phone interview with University of Pittsburgh School of Law Professor Arthur Hellman on September 22, 2011.

Source 3: In-person interview with Tom Fitton, president of Judicial Watch, on September 23, 2011.

Source 4: Sunlight Foundation, Blog, "Put Judicial Financial Disclosures Online," July 20, 2011. <http://sunlightfoundation.com/blog/2011/07/20/put-judicial-financial-disclosures-online/>

100: Records are free to all citizens, or available for the cost of photocopying. Records can be obtained at little cost, such as by mail, or on-line.

75:

50: Records impose a financial burden on citizens, journalists or NGOs. Retrieving records may require a visit to a specific office, such as a regional or national capital.

25:

0: Retrieving records imposes a major financial burden on citizens. Records costs are prohibitive to most citizens, journalists, or NGOs trying to access this information.

39d. In practice, the asset disclosure records of the national-level judiciary are of high quality.

100 | 75 | 50 | 25 | 0

Comments:

The reports that are disclosed often are not of high quality. The Judicial Committee often evokes the provision in the Ethics in Government Act that allows “personal and sensitive” information to be redacted “to the extent necessary to protect the individual who filed the report or a family member of that individual.”

Moreover, judges sometimes do not complete their reports or report finances accurately. Recently, for instance, Supreme Court Justice Clarence Thomas failed to report over \$680,000, his wife’s income from 2003 to 2007.

Finally, it is important to note that citizens requesting access to the reports are required to provide information about themselves. This could be a serious deterrent in citizen access to records.

References:

Source 1: Judicial Watch, Financial Disclosure. Last accessed October 1, 2011. <http://www.judicialwatch.org/judicial-financial-disclosure>

Source 2: Phone interview with University of Pittsburgh School of Law Professor Arthur Hellman on September 22, 2011.

Source 3: In-person interview with Tom Fitton, president of Judicial Watch, on September 23, 2011.

Source 4: Sunlight Foundation, Blog, “Put Judicial Financial Disclosures Online,” July 20, 2011. <http://sunlightfoundation.com/blog/2011/07/20/put-judicial-financial-disclosures-online/>

Source 5: Kim Geiger, Los Angeles Times, “Clarence Thomas Failed to Report Wife’s Income, Watchdog Says,” January 22, 2011. <http://articles.latimes.com/2011/jan/22/nation/la-na-thomas-disclosure-20110122>

100: The asset disclosure records of the national-level judiciary are complete and detailed, providing the public with an accurate and updated accounting of the individuals’ sources of income, investments, and other financial interests.

75:

50: The asset disclosure records of the national-level judiciary contain some useful information but may be lacking important details, including politically sensitive investment or other financial arrangements in which the individual has an interest.

25:

0: The asset disclosure records of the national-level judiciary are overly general, lack any meaningful detail, and do not provide a clear accounting of the individuals’ sources of income, investments, and other financial assets.

3.4. Budget Process Oversight & Transparency

40. Can the legislature provide input to the national budget?

100

40a. In law, the legislature can amend the budget.

Yes | No

Comments:

The legislature can amend the budget. Subtitle 2 of Title 31 sets forth the budget process in which Congress has authority to add or remove items to the national government budget. The president and executive Office of Management and Budget work in consultation with the committees on appropriations, the Congressional Budget Office and both houses of Congress to determine a national budget.

References:

Law: 31 U.S.C. §1104. Budget and Accounting Act of 1921, Budget and Appropriations Authority of the President. http://www.law.cornell.edu/uscode/usc_sec_31_00001104---000-.html

Law: 31 U.S.C. §1105. Budget and Accounting Act of 1921, Budget Contents and Submission to Congress. http://www.law.cornell.edu/uscode/usc_sec_31_00001105---000-.html

Source 1: International Budget Partnership, Open Budget Index, "United States Report 2010," April 2011. <http://internationalbudget.org/wp-content/uploads/2011/04/OBI2010-UnitedStates.pdf>

Yes: A YES score is earned if the legislature has the power to add or remove items to the national government budget.

No: A NO score is earned if the legislature can only approve but not change details of the budget. A NO score is earned if the legislature has no input into the budget process.

40b. In practice, significant public expenditures require legislative approval.

100 | 75 | 50 | 25 | 0

Comments:

Significant, and indeed all, public expenditures require legislative input. The executive branch's Office of Management and Budget must come to consensus with the congressional appropriations and budget committees before the budget can be passed. According to the Open Budget Survey 2010, the budget oversight roles of both parts the legislature in the United States are strong.

References:

Source 1: International Budget Partnership, Open Budget Index, "United States Report 2010," April 2011. <http://internationalbudget.org/wp-content/uploads/2011/04/OBI2010-UnitedStates.pdf>

Source 2: Shailagh Murray and Lori Montgomery, The Washington Post, "Obama Invites Congressional Leaders to Meet With Biden on Budget," March 2, 2011. <http://www.washingtonpost.com/wp-dyn/content/article/2011/03/02/AR2011030206932.html?sid=ST2011030302285>

Source 3: David Welna, National Public Radio, "Debt Projection Leaves Congress With Tough Choices," January 27, 2011. <http://www.npr.org/2011/01/27/133280638/cbo-paints-dire-picture-of-nations-debt>

Source 4: James R. Horney, International Budget Partnership, "Open Budget Questionnaire, United States of America 2009," <http://internationalbudget.org/wp-content/uploads/2011/04/US-OBI2010QuestionnaireFinal.pdf>

100: All significant government expenditures (defined as any project costing more than 1% of the total national budget), must be approved by the legislature. This includes defense and secret programs, which may be debated in closed hearings.

75:

50: Most significant government expenditures (as defined) are approved by the legislature, but some exceptions to this rule exist. This may include defense programs, an executive's personal budget, or other expenses.

25:

0: The legislature does not have the power to approve or disapprove large portions of the government budget, or the legislature does not exercise this power in a meaningful way.

40c. In practice, the legislature has sufficient capacity to monitor the budget process and provide input or changes.

100 | 75 | 50 | 25 | 0

Comments:

Congress has sufficient capacity to monitor the budget process and provide input or changes. The Congressional Budget Office is adequately staffed with approximately 250 employees who are highly educated and report job satisfaction.

The budget can only be passed with Congressional and executive consent. In reaching consensus, Congress exercises control over budgetary issues through an array of congressional committees, as well as the House and Senate leadership. The House and Senate budget committees exercise principal legislative jurisdiction over the broad outlines of budgetary and economic policy, but several other committees also hold hearings on overarching issues, including the Joint Economic Committee, the tax committees and sometimes the appropriations committees. Most other House and Senate committees hold narrowly focused hearings that concern only the particular budgetary issues under their jurisdiction.

References:

Source 1: Congressional Budget Office, "Who We Are." Last accessed October 2, 2011. <http://www.cbo.gov/employment/employeeprofiles.cfm>

Source 2: International Budget Partnership, Open Budget Index, "2010 United States Report," April 2011. <http://internationalbudget.org/wp-content/uploads/2011/04/OBI2010-UnitedStates.pdf>

Source 3: James Horney, International Budget Partnership, "Open Budget Index Questionnaire, United States of America September 2009," <http://internationalbudget.org/wp-content/uploads/2011/04/US-OBI2010QuestionnaireFinal.pdf>

100: Legislators benefit from a sufficient and qualified staff as well as adequate financial and physical resources. Lack of capacity is never a reason why legislators cannot carry out their duties effectively.

75:

50: Legislators have some staff and financial resources but are limited by a shortfall of resources to adequately perform all of their budgetary oversight functions. Legislators are occasionally overwhelmed by the volume of work to be performed.

25:

0: Legislators have little to no staff and virtually no financial resources with which to perform their budgetary oversight role. Lack of resources is a regular and systemic problem that cripples the performance of the legislature.

41. Can citizens access the national budgetary process?

75

41a. In practice, the national budgetary process is conducted in a transparent manner in the debating stage (i.e. before final approval).

100 | 75 | 50 | 25 | 0

Comments:

The national budgetary process is conducted in a quasi-transparent manner before final approval.

According to the International Budget Partnership's 2010 Open Budget Index, the United States does not produce a pre-budget statement or a citizens budget. A pre-budget statement sets the broad parameters that will define the government's forthcoming

budget. A citizens budget is a nontechnical presentation of a government's budget that enables the public to understand a government's plans. The public is allowed at Congressional hearings.

While there is a formal, transparent process, many negotiations take place in closed sessions. Any citizen participation in budget negotiations is most likely done on behalf of an NGO, larger organization or lobbyist that represents a particular viewpoint on an issue.

References:

Source 1: International Budget Partnership, Open Budget Index, "2010 United States Report," April 2011. <http://internationalbudget.org/wp-content/uploads/2011/04/OBI2010-UnitedStates.pdf>

Source 2: Jennifer Steinhauer, The New York Times, "Abortion Dispute Complicates Budget Negotiations," April 7, 2011. <http://www.nytimes.com/2011/04/08/us/politics/08riders.html>

Source 3: Reuters, WeekAhead, "U.S. Budget Negotiations to Continue," March 18, 2011. <http://in.reuters.com/article/2011/03/18/weekahead-americas-idlNN1827760620110318>

Source 4: James R. Horney, International Budget Partnership, "Open Budget Questionnaire, United States of America 2009," <http://internationalbudget.org/wp-content/uploads/2011/04/US-OBI2010QuestionnaireFinal.pdf>

100: Budget debates are public and records of these proceedings are easily accessible. Authors of individual budget items can easily be identified. Nearly all budget negotiations are conducted in these official proceedings.

75:

50: There is a formal, transparent process for budget debate, but major budget modifications may be negotiated in separate, closed sessions. Some items, such as non-secret defense projects, may be negotiated in closed sessions. Authors of individual line items may be difficult to identify.

25:

0: Budget negotiations are effectively closed to the public. There may be a formal, transparent process, but most real discussion and debate happens in other, closed settings.

41b. In practice, citizens provide input at budget hearings.

100 | 75 | 50 | 25 | 0

Comments:

According to the International Budget Partnership's 2010 Open Budget Index, the United States does not produce a pre-budget statement or a citizens budget. A pre-budget statement sets the broad parameters that will define the government's forthcoming budget. A citizens budget is a nontechnical presentation of a government's budget that enables the public to understand a government's plans.

While there is a formal, transparent process, many negotiations take place in closed sessions. Any citizen participation in budget negotiations is most likely done on behalf of an NGO, larger organization or lobbyist that represents a particular viewpoint on an issue. As evident in the electronic hearing schedules, both the Senate and House Budget Committees hold public hearings at which civil society experts and academics represent interests on behalf of citizens.

References:

Source 1: House of Representatives Committee on the Budget, Hearing Schedule. Last accessed October 2, 2011. <http://budget.house.gov/HearingSchedule/>

Source 2: Senate Budget Committee, Hearings. Last accessed October 2, 2011. <http://budget.senate.gov/democratic/index.cfm/committeehearings>

Source 3: International Budget Partnership, Open Budget Index, "2010 United States Report," April 2011. <http://internationalbudget.org/wp-content/uploads/2011/04/OBI2010-UnitedStates.pdf>

Source 4: John Horney, International Budget Partnership, "Open Budget Questionnaire: United States of America, September 2009." <http://internationalbudget.org/wp-content/uploads/2011/04/US-OBI2010QuestionnaireFinal.pdf>

100: Citizens, usually acting through NGOs, can provide information or commentary to the budget debate through a formal process. This information is essential to the process of evaluating budget priorities.

75:

50: Citizens or NGOs can provide input, but this information is often not relevant to budget decisions.

25:

0: Citizens or NGOs have no formal access to provide input to the budget debate.

41c. In practice, citizens can access itemized budget allocations.

100 | 75 | 50 | 25 | 0

Comments:

Citizens can access an itemized budget. The International Budget Partnership's 2010 Open Budget Index reports that the U.S. national budget is produced and distributed to the public. The enacted report is available on the White House Office of Management and Budget website, as are in-year reports, the mid-year, the year-end report and the audit report. The White House also gives advance notice to media, disseminates (limited) free copies and hosts press conferences. The report is not available in more than one language.

The Open Budget Index Questionnaire for the United States of America states that some of funds are allocated in "lump sum" amounts on an account basis to cover numerous programs. Program-level funding usually is not designated in the legislation, but instead is indicated in committee reports and other documents that support the legislation. Most of the funds are allocated to mandatory spending acts. Such programs include budget detail such as eligibility criteria, benefit schedules and indexation formulas.

References:

Source 1: The White House, Office of Management and Budget. Last accessed October 6, 2011. <http://www.whitehouse.gov/omb/>

Source 2: James R. Horney, International Budget Partnership, "Open Budget Questionnaire, United States of America 2009," <http://internationalbudget.org/wp-content/uploads/2011/04/US-OB2010QuestionnaireFinal.pdf>

Source 3: Government Printing Office. Budget of the United States. Last accessed October 6, 2011. <http://www.gpoaccess.gov/usbudget/index.html>

100: Citizens, journalists and NGOs can access itemized lists of budget allocations. This information is easily available and up to date.

75:

50: Citizens, journalists and NGOs can access itemized lists of budget allocations but this information may be difficult to access, incomplete or out of date.

25:

0: Citizens cannot access an itemized list of budget allocations, due to secrecy, prohibitive barriers or government inefficiency.

42. In law, is there a separate legislative committee which provides oversight of public funds?

100

42a. In law, is there a separate legislative committee which provides oversight of public funds?

Yes | No

Comments:

Many legislative committees oversee various portions of public funds both before and after the budget is signed.

The primary legislative oversight entity after legislation is signed is the Government Accountability Office (GAO). The GAO was formed by the Budget and Accounting Act in 1921 and has a broad mandate to investigate how federal dollars are spent. The GAO operates under the direction of the comptroller general. The comptroller general is appointed to a 15-year term by the president from a slate of candidates Congress proposes and provides macro-level reports with budget recommendations to the president and Congress. At the request of Congress, the GAO conducts performance and financial audits of executive agency programs. Sometimes the GAO will initiate its own investigations. The executive agencies have no fixed schedule by which they must submit reports to the GAO.

The primary legislative oversight entity before legislation is signed is the Congressional Budget Office (CBO). The CBO is mandated to provide the Congress with objective, nonpartisan and timely analyses to aid in economic and budgetary decisions on the wide array of programs covered by the federal budget. Other House of Representatives and Senate special committees and subcommittees provide oversight of issue-specific public funding, including committees on ways and means, budget and appropriations.

References:

Law: 31 U.S.C. § 3523. (Budget and Accounting Act). General Audit Authority of the Comptroller General. http://www.law.cornell.edu/uscode/uscode_sec_31_00003523--000-.html

Law: Congressional Budget and Impoundment Control Act. (P.L. 93-344)

Source 1: U.S. House of Representatives Committee on Ways and Means, "Oversight Letter," February 15, 2011. http://waysandmeans.house.gov/UploadedFiles/Oversight_Letter_Final.pdf

Source 2: U.S. House of Representatives Committee on Ways and Means, About. Last accessed October 2, 2011. <http://waysandmeans.house.gov/About/History.htm>

Source 3: Congressional Budget Office. Last accessed October 6, 2011. <http://www.cbo.gov>

Source 4: U.S. Senate Committee on Appropriations. Last accessed October 6, 2011. <http://appropriations.senate.gov/>

Source 5: House of Representatives Committee on the Budget. Last accessed October 6, 2011. <http://budget.house.gov/>

Source 6: U.S. House of Representatives Committee on Appropriations. Last accessed October 6, 2011. <http://appropriations.house.gov/>

Source 7: U.S. Senate Committee on the Budget. Last accessed October 6, 2011. <http://budget.senate.gov/>

Yes: A YES score is earned if there is a dedicated legislative committee (or equivalent group located in the legislature) that oversees the expenditure of public funds.

No: A NO score is earned if no such body exists within the legislature. A NO score is earned if there is a body executing this function but it is not part of the legislature (such as a separate supreme audit institution).

43. Is the legislative committee overseeing the expenditure of public funds effective?

83

43a. In practice, department heads regularly submit reports to this committee.

100 | 75 | 50 | 25 | 0

Comments:

The executive agencies have no fixed schedule by which they must submit reports to the Government Accountability Office (GAO). The GAO is the primary legislative oversight entity and is responsible for requesting and analyzing agency expenditures.

The GAO operates under the direction of the comptroller general and conducts performance and financial audits of executive agency programs at the request of Congress. Specifically, the GAO audits agency programs to determine whether federal funds are being spent efficiently and effectively; investigates allegations of illegal and improper activities; reports on how well government programs and policies are meeting their objectives; performs policy analyses and outlines options for congressional consideration; and issues legal decisions and opinions, such as bid protest rulings and reports on agency rules. Executive agencies rarely refuse an audit by the GAO. Sometimes the GAO will initiate research under the authority of the comptroller general. The comptroller general is appointed to a 15-year term by the president from a slate of candidates Congress proposes and provides macro-level reports with budget recommendations to the president and Congress.

Regarding the various legislative committees and subcommittees, agencies do not file regular reports. Rather than file written reports, U.S. agencies are requested to give testimony at hearings before the various Congressional budget committees and subcommittees. The hearings and testimonies are all listed on publicly available schedules, and the public is invited to attend.

As agencies are under the power of the president in the executive branch, agencies also submit regular reports on budget expenditure and accountability to the president's White House budget office, the Office of Management and Budget (OMB). Those reports are available publicly on agency websites, the OMB website and at the Government Printing Office (GPO) "Budget of the United States Government" page.

References:

Source 1: Government Printing Office. Budget. Last accessed October 6, 2011. <http://www.gpoaccess.gov/usbudget/>

Source 2: U.S. Senate Committee on Appropriations. Hearings and Testimony. Last accessed October 6, 2011. <http://appropriations.senate.gov/hearings-landing.cfm>

Source 3: Title 31, Section 3523. General Audit Authority of the Comptroller General. http://www.law.cornell.edu/uscode/usc_sec_31_00003523--000-.html

Source 4: Government Accountability Office. About. Last accessed October 7, 2011. <http://www.gao.gov/about/index.html>

100: Heads of ministry- or cabinet-level agencies submit regular, formal reports of expenses to a budget oversight committee.

75:

50: Agency heads submit reports to a budget oversight committee, but these reports are flawed in some way. The reports may be inconsistently delivered, or lacking important details.

25:

0: There is no budget oversight committee or equivalent, or heads of agencies do not submit meaningful reports to the agency.

43b. In practice, the committee acts in a non-partisan manner with members of opposition parties serving on the committee in an equitable fashion.



Comments:

The Government Accountability Office is nonpartisan and impartial in its work. Its reports are highly regarded for being accurate and unbiased.

By contrast, the legislative committees overseeing the expenditure of public funds are partisan committees controlled by the majority party. The committees comprise legislators who are Republicans and Democrats proportionate to the party representation by members of the House and Senate. All members of the committee — including opposition party members — are able to fully participate in the activities of the committee, but the majority party has more influence over the committee's work. This is because committee chairs are chosen by the majority party. Chairmen have significant power to set the committee's schedule, focus and hearings. Minority members have limited influence in setting the committee's broad agenda. Of the legislative entities, the Congressional Budget Office is known to be the most bipartisan. The chairman is elected by both parties and the chairman's role is apolitical ("crunching numbers").

References:

Source 1: Robert Pear, The New York Times, "New Jockeying in Congress for Next Phase in Budget Fight," August 4, 2011. <http://www.nytimes.com/2011/08/04/us/politics/04panel.html>

Source 2: Congressional Budget Office. Organization. Last accessed October 6, 2011. <http://www.cbo.gov/aboutcbo/organization/>

Source 3: Press Releases, U.S. House of Representatives Committee on the Budget. "Paul Ryan Responds to President's Disappointing, Partisan Speech," April 13, 2011. <http://budget.house.gov/News/DocumentSingle.aspx?DocumentID=236403>

Source 4: U.S. Government Accountability Office. <http://www.gao.gov>

100: The committee is comprised of legislators from both the ruling party (or parties) and opposition parties in a roughly equitable distribution. All members of the committee — including opposition party members — are able to fully participate in the activities of the committee and influence the committee's work to roughly the same extent as any other member of the committee.

75:

50: The committee is comprised of legislators from both the ruling party (or parties) and opposition parties although the ruling party has a disproportionate share of committee seats. The chairperson of the committee may be overly influential and curb other members' ability to shape the committee's activities.

25:

0: The committee is dominated by legislators of the ruling party and/or the committee chairperson. Opposition legislators serving on the committee have in practice no way to influence the work of the committee.

43c. In practice, when necessary, this committee initiates independent investigations into financial irregularities.

100 | 75 | 50 | 25 | 0

Comments:

Yes, sometimes the Government Accountability Office will initiate research under the authority of the comptroller general. The GAO, the primary legislative oversight entity, is responsible for requesting and analyzing agency expenditures. The GAO operates under the direction of the comptroller general and conducts performance and financial audits of executive agency programs at the request of Congress. Specifically, the GAO audits agency programs to determine whether federal funds are being spent efficiently and effectively; investigates allegations of illegal and improper activities; reports on how well government programs and policies are meeting their objectives; performs policy analyses and outlines options for congressional consideration; and issues legal decisions and opinions, such as bid protest rulings and reports on agency rules. From June 30, 2010, to June 30, 2011, the GAO conducted 796 audits for which reports are publicly available.

Other agencies share this responsibility, such as the Department of Justice, Offices of Inspector General, etc.

References:

Source 1: Government Accountability Office. About. <http://www.gao.gov/about/index.html>

100: When irregularities are discovered, the committee is aggressive in investigating the government.

75:

50: The committee starts investigations, but is limited in its effectiveness. The committee may be slow to act, unwilling to take on politically powerful offenders, or occasionally unable to enforce its judgments.

25:

0: The committee does not effectively investigate financial irregularities. The committee may start investigations but not complete them, or may fail to detect offenders. The committee may be partisan in its application of power.

4.1. Civil Service: Conflicts of Interest Safeguards and Political Independence

44. Are there national regulations for the civil service encompassing, at least, the managerial and professional staff?

75

44a. In law, there are regulations requiring an impartial, independent and fairly managed civil service.

Yes

No

Comments:

The Pendleton Act of 1883 (as amended in the Reform Act of 1978) regulates federal government civil service employment. Codified in Title 5, the act established an impartial, independent and fair civil service managed under the Office of Personnel Management and based on merit system principles.

References:

Law: 5 U.S.C. §§ 2101—10210. Government Organization and Employees.
Employees. http://www.law.cornell.edu/uscode/usc_sup_01_5.html

Law: 5 U.S.C. § 2301. Merit system principles. http://www.law.cornell.edu/uscode/usc_sup_01_5.html

Source 1: U.S. Office of Personnel Management. <http://www.opm.gov/>

Yes: A YES score is earned if there are specific formal rules establishing that the civil service carry out its duties independent of political interference.

No: A NO score is earned if there are no formal rules establishing an independent civil service.

44b. In law, there are regulations to prevent nepotism, cronyism, and patronage within the civil service.

Yes

No

Comments:

The law states that employees should be protected against arbitrary action, personal favoritism or coercion for partisan political purposes. The law prohibits employees from using their official authority or influence for the purpose of interfering with or affecting the result of an election or a nomination for election.

References:

Law: 5 U.S.C. § 2301(b)(8). Merit system principles. http://www.law.cornell.edu/uscode/usc_sup_01_5.html

Yes: A YES score is earned if there are specific formal rules prohibiting nepotism, cronyism, and patronage in the civil service. These should include competitive recruitment and promotion procedures as well as safeguards against arbitrary disciplinary actions and dismissal.

No: A NO score is earned if no such regulations exist.

44c. In law, there is an independent redress mechanism for the civil service.

Yes | No

Comments:

Yes, there are several redress mechanisms. In addition to alternative dispute resolution with their immediate supervisors, civil servants may seek redress through the Office of Personnel Management's administrative agency appeals process or the federal court appeals process. The law details both procedures for actions involving discrimination or decisions of the Merit Systems Protection Board.

Civil servants may also seek redress through several other avenues. The inspector general and Office of Special Counsel offer whistleblowing expertise and protections. The Office of Government Ethics and agency ethics officers provide advice regarding conflicts of interest. Finally, the Equal Employment Opportunities Commission (EEOC), a separate agency, is mandated to ensure that federal employees are not discriminated against in any hiring, firing, salary or promotion decisions.

References:

Law: 5 U.S.C. §§7201—7211. Antidiscrimination; Right to Petition

Congress: http://www.law.cornell.edu/uscode/usc_sup_01_5_10_III_20_F_30_72.html

Law: 5 U.S.C. §§ 7701—7703. Labor Management and Employee Relations.

Appeals: http://www.law.cornell.edu/uscode/usc_sup_01_5_10_III_20_F_30_77.html

Source 1: U.S. Equal Employment Opportunity Commission. <http://www.eeoc.gov>

Source 2: U.S. Office of Personnel Management. <http://www.opm.gov/>

Source 3: U.S. Office of Special Counsel. <http://www.osc.gov/>

Source 4: U.S. Office of Personnel Management Office of Inspector General. <http://www.opm.gov/oig/>

Yes: A YES score is earned if there is a mechanism to which civil servants and applicants for the civil service can take grievances regarding civil service management actions. The mechanism should be independent of their supervisors but can still be located within the government agency or entity (such as a special commission or board). Civil servants are able to appeal the mechanism's decisions to the judiciary.

No: A NO score is earned if no such mechanism exists, or if the only recourse civil servants have is directly through the courts.

44d. In law, civil servants convicted of corruption are prohibited from future government employment.

Yes | No

Comments:

Civil servants convicted of corruption-related crimes are not necessarily prohibited for life from future government employment. The vast majority of citizens with criminal records are eligible to be employed by the federal government. According to the Merit System Principles, the federal government must consider applicants who have criminal records if they have the requisite knowledge, skills and abilities that would make them the best candidates. Individuals must undergo an investigation to establish suitability or fitness for employment. Thus, there is considerable discretion to determine if previous criminal conduct could potentially render an individual incompatible with the core duties of the job.

Civil servants convicted of select crimes (such as treason) may be prohibited from federal employment for life. Previous criminal conduct may also affect an individual's eligibility for a security clearance.

References:

Source 1: National Reentry Resource Center. "Reentry Mythbuster." Last accessed October 9,

2011. http://www.nationalreentryresourcecenter.org/documents/0000/1083/Reentry_Council_Mythbuster_Fed_Employment.pdf

Yes: A YES score is earned if there are specific rules prohibiting continued government employment following a corruption conviction.

No: A NO score is earned if no such rules exist or if the ban is not a lifetime ban.

45. Is the law governing the administration and civil service effective?

81

45a. In practice, civil servants are protected from political interference.

100 | 75 | 50 | 25 | 0

Comments:

Employees of the civil service ("career positions") hired through a general application process are generally free from political interference in their day-to-day activities. However, high-level civil servants are exempt from the typical Office of Personnel Management hiring procedure. Civil servant employment at this level is through executive (presidential) appointment.

There are four kinds of presidential appointments. Three kinds do not require Senate approval and serve at the pleasure of the president, which is to say they may be removed from their position at any time. The three are: presidential appointments (PA), with appointees often sitting on boards and commissions; non-career senior executive service (NC-SES) positions, which include most of the top managerial, supervisory and policy positions in the executive branch; only 10 percent of SES positions may be filled by non-career appointees; and Schedule C positions, the most common type, with employees generally serving as key officials in the Office of the Secretary, Office of Public Affairs or Office of Congressional Affairs.

The fourth kind of presidential appointment is a presidential appointment requiring Senate confirmation (PAS) position — a presidential appointment made with the advice and consent of the Senate. These jobs are some of the most senior positions in the federal government. They include cabinet officers; heads of executive branch agencies and departments; ambassadors; federal judges; U.S. attorneys; and chairmen and members of boards, commissions and committees.

Generally, the PAS process is subject to checks and balances because the president nominates a candidate who must then be confirmed by the Senate. But, there are obvious political party allegiances to the administration in power. Political affiliations were at play, for example, in partisan stalling over court nominees because the Republican-controlled Senate did not want to confirm President Barack Obama's democratic-leaning nominations, Sonia Sotomayor and Elena Kagan.

References:

Source 1: David Savage, Los Angeles Times, "Chief Justice Urges End to Partisan Stalling," January 1, 2011. <http://articles.latimes.com/2011/jan/01/nation/la-na-roberts-report-20110101>

Source 2: U.S. Office of Personnel Management. USAJobs. <http://usajobs.gov/>

Source 3: U.S. Office of Personnel Management. "Excepted Service Appointing Authorities." Last accessed October 6, 2011. http://www.opm.gov/strategic_management_of_human_capital/fhfr/FLX05020.asp

Source 4: The Council for Excellence in Government. "The Presidential Appointee Roadmap." Last accessed October 6, 2011. <http://www.excellenceintransition.org/files/transition/roadmap/introduction.html>

100: Civil servants operate independently of the political process, without incentive or pressure to render favorable treatment or policy decisions on politically sensitive issues. Civil servants rarely comment on political debates. Individual judgments are rarely praised or criticized by political figures. Civil servants can bring a case to the courts challenging politically-motivated firings.

75:

50: Civil servants are typically independent, yet are sometimes influenced in their judgments by negative or positive political or personal incentives. This may include favorable or unfavorable treatment by superiors, public criticism or praise by the government, or other forms of influence. Civil servants may bring a case to the judicial system challenging politically-motivated firings but the case may encounter delays or bureaucratic hurdles.

25:

0: Civil servants are commonly influenced by political or personal matters. This may include conflicting family relationships, professional partnerships, or other personal loyalties. Negative incentives may include threats, harassment or other abuses of power. Civil servants are unable to find a remedy in the courts for unjustified or politically-motivated firings.

45b. In practice, civil servants are appointed and evaluated according to professional criteria.

100 | 75 | 50 | 25 | 0

Comments:

Appointments to civil service and professional evaluations are made based on professional qualifications. Individuals appointed generally are free of improper conflicts of interest arising from personal loyalties or family connections, although higher-level appointed civil servants often have clear political party affiliations.

The Office of Personnel Management specifies clear professional qualifications for each career position job posted on USAJobs.gov, the government jobs application website. Applicants must go through a regimented hiring process according to Equal Employment Opportunity Commission regulations. For instance, each position must be posted publicly for a minimum period of time, and hiring management must interview a certain minimum of candidates, scoring each blindly based on established criteria. Political appointments do not follow the OPM hiring process but are subject to rigorous professional standards.

It is important to note that while all civil servants meet professional qualifications, both career positions and political appointment employees usually had some personal connection. With so many qualified candidates, in practice the choice is made based on personal recommendation or prior established professional relationship.

References:

Source 1: U.S. Office of Personnel Management. USAJobs.gov. <http://www.usajobs.gov/>

Source 2: U.S. Equal Employment Opportunity Commission. "Types of Discrimination." Last accessed October 6, 2011. <http://www.eeoc.gov/laws/types/index.cfm>

Source 3: U.S. Office of Personnel Management. Hiring Process Toolkit: OPM Hiring Process Model. Last accessed October 6, 2011. http://www.opm.gov/hiringtoolkit/docs_508/hiring_timeline_tool.htm

100: Appointments to the civil service and their professional evaluations are made based on professional qualifications. Individuals appointed are free of conflicts of interest arising from personal loyalties, family connections or other biases. Individuals appointed usually do not have clear political party affiliations.

75:

50: Appointments and professional assessments are usually based on professional qualifications. Individuals appointed may have clear party loyalties, however.

25:

0: Appointments and professional assessments are often based on political considerations. Individuals appointed often have conflicts of interest due to personal loyalties, family connections or other biases. Individuals appointed often have clear party loyalties.

45c. In practice, civil service management actions (e.g. hiring, firing, promotions) are not based on nepotism, cronyism, or patronage.

100 | 75 | 50 | 25 | 0

Comments:

Nepotism, cronyism and patronage are actively discouraged at all levels of the civil service. Hirings, firings, and promotions usually are based on merit and performance.

The Office of Personnel Management (OPM) specifies a clear process for civil service promotions. Applicants must go through a systematic performance review process according to the OPM's merit-based system. Civil servants can complain about unfair evaluations through the Office of Special Counsel (OSC) and the Equal Employment Opportunity Commission (EEOC). The OSC is tasked with receiving civil servant complaints based on whistle-blower protections, prohibited personnel practices and the Hatch Act, all of which aim to ensure the civil service is a merit-based promotion system. The EEOC fills a similar role ensuring a workplace free from discrimination based on race, ethnicity, gender, sexual-preference, disability, etc. Both the OSC and EEOC publish statistics on probes and criminal cases that came out of civil servant complaints on their websites, and these suggest some unfair promotion practices.

Grace E. Speights, a partner at Morgan, Lewis & Bockius LLP who specializes in federal employment, submitted testimony to the EEOC in June 2011. She stated: "We are still seeing a consistent number of hiring claims in the failure to promote context." Government employees often allege that internal promotions exclude employees or a biased manager unduly influenced the process.

References:

Source 1: Office of Personnel Management. "Promotions." Last accessed October 7, 2011. <http://www.opm.gov/oca/pay/HTML/promotion.asp>

Source 2: Office of Special Counsel. Fiscal Year 2011 Disclosure Public File." Last accessed October 7, 2011. <http://www.osc.gov/FY%202011%20A.html>

Source 3: Equal Employment Opportunity Commission.

Source 4: Written Testimony before the EEOC Disparate Treatment in Hiring by Grace E. Speights, Partner at Morgan, Lewis & Bockius LLP. June 22, 2011. <http://www.eeoc.gov/eeoc/meetings/6-22-11/speights.cfm>

100: Nepotism (favorable treatment of family members), cronyism (favorable treatment of friends and colleagues), and patronage (favorable treatment of those who reward their superiors) are actively discouraged at all levels of the civil service. H hirings, firings, and promotions are based on merit and performance.

75:

50: Nepotism, cronyism, and patronage are discouraged, but exceptions exist. Political leaders or senior officials sometimes appoint family member or friends to favorable positions in the civil service, or lend other favorable treatment.

25:

0: Nepotism, cronyism, and patronage are commonly accepted principles in hiring, firing and promotions of civil servants.

45d. In practice, civil servants have clear job descriptions.

100 | 75 | 50 | 25 | 0

Comments:

The federal government publishes job openings and job descriptions online on the USA Jobs website.

References:

Source 1: Office of Personnel Management. USAJobs.gov. <http://www.usajobs.gov>

100: Civil servants almost always have formal job descriptions establishing levels of seniority, assigned functions, and compensation. Job descriptions are a reliable representation of positions in terms of a person's authority, responsibility and base pay.

75:

50: Civil servants often have formal job descriptions, but exceptions exist. Some civil servants may not be part of the formal assignment of duties and compensations. Some job descriptions may not map clearly to pay or responsibilities in some cases.

25:

0: Civil servants do not have formal roles or job descriptions. If they do, such job descriptions have little or nothing to do with the position's responsibilities, authority, or pay.

45e. In practice, civil servant bonuses constitute only a small fraction of total pay.

100 | 75 | 50 | 25 | 0

Comments:

Beginning in fiscal year 2011, agencies must limit total spending on performance awards for senior executive service members and other senior-level employees to no more than 5 percent of their aggregate salaries. Limits on bonuses for lower-ranking employees are even tighter: 1 percent of their combined salaries. The Office of Personnel Management and Office of Management and Budget said the trimming should begin this year.

Agencies report awards to the Central Personnel Data File/Enterprise Human Resources Initiative. They also report SES/SL/ST rating, pay and awards data to OPM through the annual data call.

Annual performance raises range from 2.6 percent to 3.3 percent.

References:

Source 1: John Berry, Director of OPM, and Jeffrey Zients, Deputy Director for Management and Chief Performance Officer, OMB, "Memorandum for Heads of Executive Departments and Agencies on Guidance on Awards for Fiscal Years 2011 and 2012." June 10, 2011. <http://www.chcoc.gov/transmittals/TransmittalDetails.aspx?TransmittalID=3997>

Source 2: Charles S. Clark, Federal Times, "Plan to Cap Bonuses Detailed in Obama Administration Memo," June 19, 2011. <http://www.federaltimes.com/article/20110619/BENEFITS01/106190301/1001>

100: Civil servant bonuses constitute no more than 10% of total pay and do not represent a major element of take-home pay.

75:

50: Civil servant bonuses are generally a small percentage of total take-home pay for most civil servants though exceptions exist where some civil servants' bonuses represent a significant part of total pay.

25:

0: Most civil servants receive bonuses that represent a significant amount of total take-home pay. In some cases bonuses represent the majority of total pay to civil servants.

45f. In practice, the government publishes the number of authorized civil service positions along with the number of positions actually filled.

100 | 75 | 50 | 25 | 0

Comments:

The Office of Personnel Management publishes a list of top government agencies hiring with current civil servant vacancies. There is no compiled list of allocated civil servant positions, showing both vacant and filled positions. Each agency advertises positions as they become vacant.

Perhaps the closest publication is the Bureau of Labor Statistics, which provides total federal government civilian employment by industry sector.

References:

Source 1: Office of Personnel Management. <http://www.usajobs.gov>

100: The government publishes such a list on a regular basis.

75:

50: The government publishes such a list but it is often delayed or incomplete. There may be multiple years in between each successive publication.

25:

0: The government rarely or never publishes such a list, or when it does it is wholly incomplete.

45g. In practice, the independent redress mechanism for the civil service is effective.

100 | 75 | 50 | 25 | 0

Comments:

In the federal dispute resolution process, several agencies adjudicate appeals arising from workplace disputes. The main administrative appeals agencies are the Equal Employment Opportunity Commission (EEOC), the Merit Systems Protection Board (MSPB) and the Office of Special Counsel (OSC). The agencies operate independently and control the timing and pace of their investigations without input from the bodies that manage civil servants on a day-to-day basis.

The EEOC is an independent agency charged with nationwide leadership in anti-discrimination efforts and enforcement of related laws. The EEOC website offers detailed statistics over which it has control, including number of processed appeals and processing time.

The U.S. Office of Special Counsel is an independent federal investigative and prosecutorial agency. Under the Civil Service Reform Act and the Whistleblower Protection Act, the OSC's primary mission is to safeguard the merit system by protecting federal employees and applicants from prohibited personnel practices, especially reprisal for whistle-blowing.

The U.S. Merit Systems Protection Board is an independent agency in the executive branch of the federal government that serves as the guardian of federal merit systems. The board's mission is to ensure that federal employees are protected against abuses by agency management, that executive branch agencies make employment decisions in accordance with the merit system principles, and that federal merit systems are kept free of prohibited personnel practices. A key function is hearing and deciding employee appeals from agency actions. In fiscal year 2010, the board received 8,260 cases and processed 7,708 cases. Seventy-two percent of initial appeals were processed in 110 days or less (84 percent of initial appeals were processed in 120 days or less) and 58 percent of PFRs (Petitions for Review) were processed in 110 days or less. The remaining 28 percent of initial appeals took more than 110 days to process (16 percent took more than 120 days to process), and 42 percent of PFRs took more than 110 days to process.

References:

Source 1: Interview on October 6, 2011, with a career position civil servant.

Source 2: Office of Personnel Management. "Alternative Dispute Resolution Guide." Last accessed October 7, 2011. <http://www.opm.gov/er/adrguide/section4.asp>

Source 3: U.S. Merit Systems Protection Board. "Performance and Accountability Report for Fiscal Year 2010." Last accessed October 7, 2011. <http://www.mspb.gov/netsearch/viewdocs.aspx?docnumber=552737&version=554319&application=ACROBAT>

Source 4: Equal Employment Opportunity Commission. "No FEAR Statistics." <http://www.eeoc.gov/eeoc/statistics/nofear/appeals.cfm>

100: The independent redress mechanism for the civil service can control the timing and pace of its investigations without any input from the bodies that manage civil servants on a day-to-day basis.

75:

50: The independent civil service redress mechanism can generally decide what to investigate and when but is sometimes subject to pressure from the executive or the bodies that manage civil servants on a day-to-day basis on politically sensitive issues.

25:

0: The civil service redress mechanism must rely on approval from the executive or the bodies that manage civil servants on a day-to-day basis before initiating investigations. Politically sensitive investigations are almost impossible to move forward on.

45h. In practice, in the past year, the government has paid civil servants on time.

100 | 75 | 50 | 25 | 0

Comments:

In general, civil servants are paid on time.

References:

Source 1: U.S. Office of Personnel Management. Compensation. <http://www.opm.gov/oqa/INDEX.asp>

Source 2: Search of major newspapers.

100: In the past year, no civil servants have been paid late.

75:

50: In the past year, some civil servants have been paid late.

25:

0: In the past year, civil servants have frequently been denied due pay.

45i. In practice, civil servants convicted of corruption are prohibited from future government employment.

100 | 75 | 50 | 25 | 0

Comments:

Civil servants convicted of corruption are not prohibited from future government employment. Under 5 U.S.C 2302(b)(10), a criminal conviction does not automatically warrant lifetime ban from federal employment unless a nexus can be established between the conviction and performance of the employee's duties. The Office of Personnel and Management issued a memorandum with guidance on which criminal convictions are related to certain employee duties.

Moreover, convicted civil servants often lose professional licenses (e.g. debarred from practicing law) as an automatic penalty. Thus, although a civil servant may not be prohibited from employment because of his/her crime, he/she may not be qualified for the employment position if he/she lost his/her professional license.

References:

Source 1: Office of Personnel Management. "Prohibited Personnel Practices." <http://www.opm.gov/ovrsight/proidx.asp>

Source 2: Office of Personnel Management. "Introduction of Credentialing, Suitability and Security Clearance Decision-Making Guide." January 14, 2008. http://www.opm.gov/investigate/resources/decision_making_guide.pdf

100: A system of formal blacklists and cooling off periods is in place for civil servants convicted of corruption. All civil servants are subject to this system.

75:

50: A system of formal blacklists and cooling off periods is in place, but the system has flaws. Some civil servants may not be affected by the system, or the prohibitions are sometimes not effective. Some bans are only temporary.

25:

0: There is no such system, or the system is consistently ineffective in prohibiting future employment of convicted civil servants.

46. Are there regulations addressing conflicts of interest for civil servants?

86

46a. In law, senior members of the civil service are required to file an asset disclosure form.

Yes

No

Comments:

The Ethics in Government Act of 1978, as amended, requires senior officials in the executive, legislative and judicial branches to file public reports of their finances as well as other interests outside the government.

References:

Law: 5 U.S.C. §§ 101-105. Ethics in Government Act of 1978: Financial Disclosure. http://www.law.cornell.edu/uscode/html/uscode05a/usc_sup_05_5_10_sq3.html

Source 1: In person interview on October 6 with interviewee who requested anonymity at the Office of Government Ethics.

Yes: A YES score is earned if senior members of the civil service are required by law to file an asset disclosure form while in office, illustrating sources of income, stock holdings, and other assets. This form does not need to be publicly available to score a YES.

No: A NO score is earned if any senior member of the civil service is not required to disclose assets.

46b. In law, there are requirements for civil servants to recuse themselves from policy decisions where their personal interests may be affected.

Yes

No

Comments:

Civil servants must recuse themselves from any matter that will have a direct and predictable effect on a financial interest of that officer or employee (or spouse or dependent children). Civil servants also must recuse themselves from any matter that might create the appearance of partiality, even if it creates an actual conflict of interest.

References:

Law: 18 U.S.C. § 208. Acts Affecting a Personal Financial Interest. http://www.law.cornell.edu/uscode/usc_sec_18_00000208--000-.html

Federal Regulation: 5 C.F.R. § 2635 Subpart E. Impartiality in Performing Official Duties. http://ecfr.gpoaccess.gov/cgi/t/text/text-idx?c=ecfr&tpl=/ecfrbrowse/Title05/5cfr2635_main_02.tpl

Yes: A YES score is earned if there are requirements for civil servants to recuse themselves from policy decisions where their personal interests, including personal financial interests as well as those of their family and friends, are affected.

No: A NO score exists if no such requirements exist in regulation or law.

46c. In law, there are restrictions for civil servants entering the private sector after leaving the government.

Yes | No

Comments:

There are general post-government employment restrictions for federal government officials at a very high level. They restrict former government officials from accepting any private sector employment that makes representations to or appearances before federal entities or federal officers or employees with whom the former employee used to work. The restriction is for two years.

Senior civil servants have the same restriction but for one year.

References:

Law: 18 U.S.C. §207. Restrictions on Former Officers, Employees and Elected Officials of the Executive and Legislative Branches. http://www.law.cornell.edu/uscode/usc_sec_18_00000207---000-.html

Federal Regulation: 5 C.F.R. Part 2635.601-2635.606. Seeking Other Employment. http://ecfr.gpoaccess.gov/cgi/t/text/text-idx?c=ecfr&tpl=/ecfrbrowse/Title05/5cfr2635_main_02.tpl

Yes: A YES score is earned if there are regulations restricting civil servants' ability to take positions in the private sector after leaving government that would present a conflict of interest, including positions that directly seek to influence their former government colleagues.

No: A NO score is earned if no such restrictions exist.

46d. In law, there are regulations governing gifts and hospitality offered to civil servants.

Yes | No

Comments:

The Honest Leadership and Open Government Act of 2007 and the Ethics in Government Act of 1978, as well as federal regulations, govern gifts and hospitality offered to civil servants. Gifts and hospitality are prohibited, except in limited cases. Gifts valued at \$20 or less, based solely on a family relationship, personal friendship, outside business or employment relationship, and in connection with certain political activities are permitted.

References:

Law: 2 U.S.C. § 1613. Prohibition on Provision of Gifts or Travel by Registered Lobbyists to Members of Congress and to Congressional Employees. <http://www.law.cornell.edu/uscode/2/ch26.html>

Law: 18 U.S.C. §§ 201-227. Bribery, Graft and Conflicts of Interest. http://www.law.cornell.edu/uscode/usc_sup_01_18_10_l.html

Federal Regulation: 5 C.F.R. Subpart B, §§2635.201-2635.205. Gifts From Outside Sources. http://ecfr.gpoaccess.gov/cgi/t/text/text-idx?c=ecfr&tpl=/ecfrbrowse/Title05/5cfr2635_main_02.tpl

Federal Regulation: 5 C.F.R. Subpart C, §§2635.301-2635.304. Gifts Between Employees.

Yes: A YES score is earned if there are formal guidelines regarding gifts and hospitality given to civil servants.

No: A NO score is earned if there are no such guidelines or regulations.

46e. In law, there are requirements for the independent auditing of the asset disclosure forms of senior members of the civil service.

Yes | No

Comments:

The Office of Government Ethics must conduct reviews of financial disclosure reports filed by employees of the executive branch to determine whether the reports reveal possible violations of the conflict of interest laws and regulations.

References:

Law: 5 U.S.C. app. 4 §§ 401-408. Office of Government Ethics. <http://www.gpo.gov/fdsys/pkg/USCODE-2010-title5/html/USCODE-2010-title5-app-ethicsing-titleIV.htm>

Source 1: U.S. Office of Government Ethics. <http://www.usoge.gov/Financial-Disclosure/Financial-Disclosure/>

Source 2: In-person interview on September 23, 2011 with Angela Canterbury, director of Public Policy at the Project on Government Oversight.

Source 3: In person interview on October 6, 2011 with interviewee who requested anonymity at the Office of Government Ethics.

Yes: A YES score is earned if there is a legal or regulatory requirement for independent auditing of civil service asset disclosures. The auditing is performed by an impartial third-party.

No: A NO score is earned if there are no legal or regulatory requirements for the independent auditing of civil service asset disclosures or if such requirements exist but allow for self-auditing.

46f. In practice, the regulations restricting post-government private sector employment for civil servants are effective.

100 | 75 | 50 | 25 | 0

Comments:

The Office of Government Ethics (OGE) sets forth the rules on post-government employment. The rules prohibit former government employees from working as a lobbyist to federal offices or employees with whom an ex-government official has just worked closely. They do not set forth a general ban on former government employees being lobbyists.

But the OGE is not required to initiate investigations because it has neither the authority nor the resources to keep abreast of all former government employees. An official at the Office of Government Ethics stated that post-government employment violations are self-policed. The public and press bring issues to the attention of OGE, agency ethics officers and inspectors general. Washington has significant public and press oversight, and OGE often investigates ethics issues that are brought to its attention, either by the press or an employee. Indeed, many investigative journalists and nonprofit organizations “keep watch.” Among others, the Project on Government Oversight and The Center for Responsive Politics each maintain a database of former government employees’ current employment, showing dozens of former employees in violation.

Cooling-off periods are substantial and generally adhered to, although there are cases where these restrictions are ignored. Project on Government Oversight’s Director of Public Policy Angela Canterbury discussed several recent high-profile cases. For example, there was concern over President Barack Obama’s appointment of Daniel Gallagher to be commissioner of the Security Exchange Commission. In May 2011, Federal Communications Commission commissioner Meredith Atwell Baker announced that she was leaving the commission to become the chief lobbyist for the newly merged Comcast/NBCUniversal.

Some believe that Obama’s revised ethics rules define lobbyist too narrowly, such that the corporate executives and advocates do not meet the definition and are allowed to influence former government employers through the “revolving door.”

References:

Source 1: In-person interview on October 6, 2011, with interviewee who requested anonymity at the Office of Government Ethics.

Source 2: In-person interview on September 23, 2011, with Director of Public Policy Angela Canterbury of the Project on Government Oversight.

Source 3: Center for Responsive Politics. Revolving Door. Last accessed October 7, 2011. <http://www.opensecrets.org/revolving/>

Source 4: Project on Government Oversight, "Database Tracks Revolving Door Between SEC and Wall Street," May 13, 2011. <http://www.pogo.org/pogo-files/alerts/financial-oversight/to-fra-20110513.html>

Source 5: James Downie, National Public Radio, "New Republic: The FCC's Revolving Door Is Shameless," May 20, 2011. <http://www.npr.org/2011/05/20/136492206/new-republic-the-fccs-revolving-door-is-shameless>

Source 6: Eliza Newlin Carney, National Journal, "Obama Ethics Regime Draws Mixed Reviews, The White House Made Significant Reforms In 2009 But Failed to Address Underlying Issues," January 4, 2010. <http://www.nationaljournal.com/columns/rules-of-the-game/obama-ethics-regime-draws-mixed-reviews-20100104>

100: The regulations restricting post-government private sector employment for civil servants are uniformly enforced. There are no cases or few cases of civil servants taking jobs in the private sector after leaving government where they directly lobby or seek to influence their former government colleagues without an adequate "cooling off" period.

75:

50: The regulations are generally enforced though some exceptions exist. In certain sectors, civil servants are known to regularly take jobs in the private sector that entail directly lobbying or seeking to influence their former government colleagues. Cooling off periods are short and sometimes ignored.

25:

0: The regulations are rarely or never enforced. Civil servants routinely take jobs in the private sector following government employment that involve direct lobbying or influencing of former government colleagues. Cooling off periods are non-existent or never enforced.

46g. In practice, the regulations governing gifts and hospitality offered to civil servants are effective.

100 | 75 | 50 | 25 | 0

Comments:

The regulations governing gifts and hospitality offered to members of the executive branch are effective only to the extent that issues catch the attention of government officials. Although the Office of Government Ethics (OGE) sets forth the rules on gifts and hospitality, it does not enforce the ethics code and is not required to initiate investigations. An OGE deputy director states that gifts and hospitality ethics rules "only become an issue when people have proved you wrong." But, the interviewee notes that Washington has a lot of public and press oversight, and the OGE will investigate ethics issues that are brought to its attention either by the press or an employee. In the interviewee's view, gifts and hospitality violations are primarily self-policed, as the OGE has neither the authority nor the resources to keep abreast of all gifts and hospitality offered and accepted to government employees. The public and press bring issues to the attention of OGE, agency ethics officers and inspectors general.

Enforcement is effective when applied, but as no one agency is charged with aggressively investigating all employees regardless of innocent appearance, one is forced to question how many incidents go unnoticed.

References:

Law: 5 U.S.C. app. 4 §§ 401-408. Office of Government Ethics. <http://www.gpo.gov/fdsys/pkg/USCODE-2010-title5/html/USCODE-2010-title5-app-ethicsing-titleIV.htm>

Source 1: U.S. Office of Government Ethics. <http://www.usoge.gov/Financial-Disclosure/Financial-Disclosure/>

Source 2: In-person interview on September 23, 2011, with Angela Canterbury, director of Public Policy at the Project on Government Oversight.

Source 3: In person interview on October 6, 2011 with interviewee who requested anonymity at the Office of Government Ethics.

100: The regulations governing gifts and hospitality to civil servants are regularly enforced. Civil servants never or rarely accept gifts or hospitality above what is allowed.

75:

50: The regulations governing gifts and hospitality to civil servants are generally applied though exceptions exist. Some civil servants in certain sectors are known to accept greater amounts of gifts and hospitality from outside interest groups or

private sector actors than is allowed.

25:

0: The regulations governing gifts and hospitality to the civil service are routinely ignored and unenforced. Civil servants routinely accept significant amounts of gifts and hospitality from outside interest groups and actors seeking to influence their decisions.

46h. In practice, the requirements for civil service recusal from policy decisions affecting personal interests are effective.

100 | 75 | 50 | 25 | 0

Comments:

The Officer of Government Ethics (OGE) helps new civil servants learn conflict of interest rules and file financial disclosure forms. Many conflicts of interest are avoided by recusal and other preventive measures (such as selling an asset or resigning from a position) by employees who have been trained to recognize and anticipate potential ethics breaches. OGE follows up within 90 days after senior civil servant confirmation to ensure that the candidate-turned-employee has followed OGE recommendations and, generally, is in compliance with ethics rules.

An official at the Office of Government Ethics stated that it does not have either the authority or resources to keep abreast of all gifts and hospitality offered to and accepted by government employees. Washington has considerable public and press oversight, and OFE investigates ethics issues that are brought to its attention either by the press or an employee. Gifts and hospitality are primarily self-policed. This is where the public and press bring issues to the attention of OGE, agency ethics officers and inspectors general.

References:

Source 1: In-person interview on October 6, 2011, with interviewee who requested anonymity at the Office of Government Ethics.

100: The requirements that civil servants recuse themselves from policy decisions where their personal interests are affected are routinely followed by most or all civil servants.

75:

50: The requirements that civil servants recuse themselves from policy decisions where their personal interests are affected are followed by most civil servants though exceptions exist. In certain sectors, civil servants are known to routinely participate in policy decisions where their personal interests are affected.

25:

0: Most civil servants routinely ignore recusal requirements and continue to participate in policy decisions where their personal interests are affected.

46i. In practice, civil service asset disclosures are audited.

100 | 75 | 50 | 25 | 0

Comments:

The administrative agency ethics officers review the financial disclosures of agency employees for potential or actual conflicts of interest. Then, the Office of Government Ethics (OGE) will do a "sampling review." The sampling review serves as a double oversight, reviewing both the records and the agency ethics officer's job competency.

The senior official at the Office of Government Ethics made it clear that ethics officer reviews are conducted to uncover potential or actual conflicts of interest. The reviews are not full audits of the financial information. No agency initiates independent audits (such as to determine that the employee does not misrepresent assets on financial disclosure forms, a crime).

References:

Source 1: U.S. Office of Government Ethics. <http://www.usoge.gov/Financial-Disclosure/Financial-Disclosure/>

Source 2: In-person interview on September 23, 2011, with Angela Canterbury, director of Public Policy at the Project on Government Oversight.

Source 3: In-person interview on October 6, 2011, with interviewee who requested anonymity at the Office of Government Ethics.

100: Civil service asset disclosures are regularly audited using generally accepted auditing practices.

75:

50: Civil service asset disclosures are audited, but audits are limited in some way, such as using inadequate auditing standards, or the presence of exceptions to disclosed assets.

25:

0: Civil service asset disclosures are not audited, or the audits performed have no value. Audits may be performed by entities known to be partisan or biased in their practices.

47. Can citizens access the asset disclosure records of senior civil servants?

94

47a. In law, citizens can access the asset disclosure records of senior civil servants.

Yes

No

Comments:

The Office of Government Ethics is responsible for establishing procedures for the filing, review and public availability of financial statements filed by officers and employees in the executive branch. There are exceptions from public availability of financial statements for issues of national security, defense and personal safety.

References:

Law: 5a U.S.C. § 105. Financial Disclosure Requirements of Federal Personnel. Custody of and Public Access to Reports. http://www.law.cornell.edu/uscode/html/uscode05a/usc_sup_05_5_10_sq3_20_1.html

Law: 5a U.S.C. §402. Office of Government Ethics, Authority and Functions. <http://www.gpo.gov/fdsys/pkg/USCODE-2010-title5/html/USCODE-2010-title5-app-ethicsing-titleIV.htm>

Source 1: In-person interview with interviewee who requested anonymity at the Office of Government Ethics on October 6, 2011.

Yes: A YES score is earned if laws or regulations guarantee that citizens can access the asset records of senior civil servants.

No: A NO score is earned if senior civil servants do not file an asset disclosure. A NO score is earned if senior civil servants file an asset disclosure, but it is not available to the public.

47b. In practice, citizens can access the asset disclosure records of senior civil servants within a reasonable time period.

100

75

50

25

0

Comments:

Citizens have free, quick access to financial disclosure reports for executive branch officials. For the first time, Executive Branch Personnel Public Financial Disclosure reports for White House officials are available online in PDF form. Citizens file an electronic request and reports are “emailed as quickly as possible” by email. Any delay is addressed immediately by the press office.

References:

Source 1: The White House, Press Office, “Financial Disclosure Reports Now Available.” Last accessed October 1, 2011. http://www.whitehouse.gov/the_press_office/Financial-Disclosure-Reports-Now-Available

Source 2: In-person interview with Director of Public Policy Angela Canterbury at the Project on Government Accountability on September 23, 2011.

Source 3: In-person interview with interviewee who requested anonymity at the Office of Government Ethics on October 6, 2011.

100: Records are available on-line, or records can be obtained within two days. Records are uniformly available; there are no delays for politically sensitive information.

75:

50: Records take around two weeks to obtain. Some delays may be experienced.

25:

0: Records take more than a month to acquire. In some cases, most records may be available sooner, but there may be persistent delays in obtaining politically sensitive records.

47c. In practice, citizens can access the asset disclosure records of senior civil servants at a reasonable cost.

100 | 75 | 50 | 25 | 0

Comments:

Citizens have free, quick access to financial disclosure reports for executive branch officials. For the first time, Executive Branch Personnel Public Financial Disclosure reports for White House officials are available online in PDF form. Citizens file an electronic request and reports are “emailed as quickly as possible” by email. Any delay is addressed immediately by the press office.

Hard copies from the agencies may cost the cost of copying and mailing, excluding any salary of any employee involved in such reproduction or mailing. Citizens may seek a waiver or reduction in fee if it is in the public interest.

References:

Source 1: The White House, Press Office, “Financial Disclosure Reports Now Available.” Last accessed October 1, 2011. http://www.whitehouse.gov/the_press_office/Financial-Disclosure-Reports-Now-Available

Source 2: In-person interview with Director of Public Policy Angela Canterbury at the Project on Government Accountability on September 23, 2011.

Source 3: In-person interview with interviewee who requested anonymity at the Office of Government Ethics on October 6, 2011.

100: Records are free to all citizens, or available for the cost of photocopying. Records can be obtained at little cost, such as by mail, or on-line.

75:

50: Records impose a financial burden on citizens, journalists or NGOs. Retrieving records may require a visit to a specific office, such as a regional or national capital.

25:

0: Retrieving records imposes a major financial burden on citizens. Records’ costs are prohibitive to most citizens, journalists, or NGOs trying to access this information.

47d. In practice, the asset disclosure records of senior civil servants are of high quality.

100 | 75 | 50 | 25 | 0

Comments:

There are two forms, one confidential and one public. Angela Canterbury of the Project on Government Oversight says often the government does not release to the public the full report. When confidential versions of the report are released, it makes it difficult for the public to determine if there are conflicts of interest.

For the goal of identifying conflicts of interest (not necessarily indicative of criminal behavior), the financial disclosures provide sufficient information regarding individuals' sources of income, investments and other financial interests.

References:

Source 1: The White House, Press Office, "Financial Disclosure Reports Now Available." Last accessed October 1, 2011. http://www.whitehouse.gov/the_press_office/Financial-Disclosure-Reports-Now-Available

Source 2: In person interview with Director of Public Policy Angela Canterbury at the Project on Government Accountability on September 23, 2011.

Source 3: In person interview with interviewee who requested anonymity at the Office of Government Ethics on October 6, 2011.

100: The asset disclosure records of senior civil servants are complete and detailed, providing the public with an accurate and updated accounting of the individuals' sources of income, investments, and other financial interests.

75:

50: The asset disclosure records of senior civil servants contain some useful information but may be lacking important details, including politically sensitive investment or other financial arrangements in which the individual has an interest.

25:

0: The asset disclosure records of senior civil servants are overly general, lack any meaningful detail, and do not provide a clear accounting of the individuals' sources of income, investments, and other financial assets.

4.2. Whistle-blowing Protections

48. Are employees protected from recrimination or other negative consequences when reporting corruption (i.e. whistle-blowing)?

81

48a. In law, civil servants who report cases of corruption, graft, abuse of power, or abuse of resources are protected from recrimination or other negative consequences.

Yes | No

Comments:

Whistle-blower laws in the United States are complex and piecemeal. No one law governs protections. Some of the pertinent laws offering protection to federal employees include the following: the Lloyd-LaFollette Act, which grants employees the right to

petition Congress (5 U.S.C. § 7211); the Ethics in Government Act, which established the Office of Independent Counsel; and the Notification and Federal Employee Antidiscrimination and Retaliation (“NO FEAR”) Act of 2002 (5 U.S.C. § 2301), which mandates training and requires federal agencies to pay awards for discrimination and retaliation violations out of their own budgets.

Angela Canterbury of the Project on Government Oversight said she rarely advises whistle-blowers to go to their agency or Inspector General Office due to “dangers,” noting that generally government employees “have very few protections.” In particular, employees doing work related to national security “really are not protected under the law.”

There is pending legislation that would offer better protection for civil service employees. The Whistleblower Protection Act was originally introduced in 2009 but failed by one vote after controversial amendments were made to protections for national security-related employees. In April 2011, the bill was reintroduced in the Senate with the protections for intelligence agency and FBI employees intact.

A complete list of whistleblowing-related laws is provided free of cost at the National Whistleblower Center’s website (http://www.whistleblowers.org/index.php?option=com_content&task=view&id=816&Itemid=129).

References:

Law: 5 U.S.C. §2301. “No-FEAR Act,” Merit System Principles. http://www.law.cornell.edu/uscode/5/usc_sec_05_00002301---000-.html

Law: 5 U.S.C. §7211. Lloyd-LaFollette Act, Employees’ Right to Petition Congress. <http://www.law.cornell.edu/uscode/5/7211.html>

Law: 18 U.S.C. §§ 201-227 Ethics in Government Act. Bribery, Graft and Conflicts of Interest. http://www.law.cornell.edu/uscode/18/usc_sup_01_18_10_1_20_11.html

Source 1: National Whistleblower Center, Protections. Last accessed October 2, 2011. http://www.whistleblowers.org/index.php?option=com_content&task=view&id=816&Itemid=129

Source 2: U.S. Equal Employment and Opportunity Commission, “Questions and Answers: No FEAR Act.” Last accessed October 2, 2011. <http://www.eeoc.gov/eeoc/statistics/nofear/qanda.cfm>

Yes: A YES score is earned if there are specific laws against recrimination against public sector whistleblowers. This may include prohibitions on termination, transfer, harassment or other consequences.

No: A NO score is earned if there are no legal protections for public-sector whistleblowers.

48b. In practice, civil servants who report cases of corruption, graft, abuse of power, or abuse of resources are protected from recrimination or other negative consequences.

100 | 75 | 50 | 25 | 0

Comments:

Public sector whistle-blowers are sometimes able to come forward without negative consequences, but in other cases, whistle-blowers are punished for disclosing, either through official or unofficial means. The primary agency for whistle-blowing is the Office of Special Counsel. The OSC is an independent federal investigative and prosecutorial agency charged with protecting federal whistle-blowers, investigating their disclosures and reporting its finding to Congress and the president. Employees can file complaints electronically or by mail or fax. Complaints by electronic forms cannot be anonymous, but mail and fax can.

Angela Canterbury of NGO watchdog Project on Government Oversight (POGO) said she rarely advises whistle-blowers to go through government entities such as the OSC or their agency or Inspector General Office due to “dangers.” In her experience, government employees generally “have very few protections.” In particular, employees doing work related to national security “really are not protected under the law.” POGO offers service and support as an institution where whistle-blowers may first disclose information. A similar watchdog NGO, the Government Accountability Project (GAP), also serves to support whistle-blowers as an alternative, nongovernmental place to file a complaint and initiate an investigation.

POGO and the GAP suggest that the success of the agency depends on the appointed administrative head. New head Carolyn Lerner has shifted to a more favorable whistle-blowing climate that, thus far, has provided more protections. POGO and GAP strongly believe that the pending Whistleblower Protection Act is necessary to provide better protection for public employees.

References:

Source 1: National Whistleblower Center, Protections. Last accessed October 2, 2011. http://www.whistleblowers.org/index.php?option=com_content&task=view&id=816&Itemid=129

Source 2: U.S. Equal Employment and Opportunity Commission, "Questions and Answers: No FEAR Act." Last accessed October 2, 2011. <http://www.eeoc.gov/eeoc/statistics/nofear/qanda.cfm>

Source 3: Journalist and Reporters Without Borders Director Clothilde Le Coz. In-person interview on August 18, 2011.

Source 4: In-person interview on September 23, 2011, with Director of Public Policy Angela Canterbury at the Project on Government Oversight.

Source 5: In-person interview on October 6, 2011, with interviewee who requested anonymity at the Office of Government Ethics.

Source 6: Office of Special Counsel. Frequently Asked Questions. Last accessed October 7, 2011. <http://www.osc.gov/>

100: Public sector whistleblowers can report abuses of power without fear of negative consequences. This may be due to robust mechanisms to protect the identity of whistleblowers or may be due to a culture that encourages disclosure and accountability.

75:

50: Public sector whistleblowers are sometimes able to come forward without negative consequences, but in other cases, whistleblowers are punished for disclosing, either through official or unofficial means.

25:

0: Public sector whistleblowers often face substantial negative consequences, such as losing a job, relocating to a less prominent position, or some form of harassment.

48c. In law, private sector employees who report cases of corruption, graft, abuse of power, or abuse of resources are protected from recrimination or other negative consequences.

Yes | No

Comments:

Section 806 of the Sarbanes–Oxley Act of 2002, also known as the Corporate and Criminal Fraud Accountability Act, offer protection for employees of publicly traded companies who provide evidence of fraud. Whistle-blower disclosures involving securities and finance should be made to the Securities and Exchange Commission, the state attorney general or the local district attorney.

More recently, the 2010 Dodd-Frank Wall Street Reform and Consumer Protection Act, passed in the wake of the financial and economic crisis, provides protections and incentives to corporate whistle-blowers.

Other provisions in the Sarbanes Oxley Act and other laws provide legal protection for private employees in corporate, financial and manufacturing industries. A full list of relevant legal provisions is available at no cost on the National Whistleblower Center's website (http://www.whistleblowers.org/index.php?option=com_content&task=view&id=816&Itemid=129).

References:

Law: 18 U.S.C. § 1514A. Corporate and Criminal Fraud Accountability Act, Civil Action to Protect Against Retaliation in Fraud Cases. http://www.law.cornell.edu/uscode/18/usc_sec_18_00001514--A000-.html

Law: 15 U.S.C. § 78u-6(a). The Dodd-Frank Wall Street Reform and Consumer Protection Act, Investigations and Actions. http://www.law.cornell.edu/uscode/usc_sec_15_00000078--u000-.html

Source 1: National Whistleblower Center. http://www.whistleblowers.org/index.php?option=com_content&task=view&id=816&Itemid=129

Source 2: In-person interview with Director of Public Policy Angela Canterbury at the Project on Government Oversight on September 23, 2011.

Source 3: Ben Kerschberg, Forbes, "The Dodd Frank Act's Robust Whistleblowing Incentives," April 4, 2011. <http://www.forbes.com/sites/benkerschberg/2011/04/14/the-dodd-frank-acts-robust-whistleblowing-incentives/>

Yes: A YES score is earned if there are specific laws against recrimination against private sector whistleblowers. This may include prohibitions on termination, transfer, harassment or other consequences.

No: A NO score is earned if there are no legal protections for private-sector whistleblowers.

48d. In practice, private sector employees who report cases of corruption, graft, abuse of power, or abuse of resources are protected from recrimination or other negative consequences.

100 | 75 | 50 | 25 | 0

Comments:

In practice, the private sector certainly receives more protections than public sector employees. The Sarbanes Oxley Act, passed in 2002 after the Enron scandal, is the primary means of private sector protections. Another reason private sector employees have better whistle-blower protections is their access to the federal court system. Public sector employees have limited access to court — there is no access for the victims of retaliation from whistle-blowing — and cost may be prohibitive. For the private sector, cost is not as prohibitive. Finally, most recently, the 2010 Dodd-Frank Wall Street Reform and Consumer Protection Act, passed in the wake of the financial and economic crisis, also offers incentives to corporate whistle-blowers.

Recently, for example, under protection of the Sarbanes-Oxley Act, an executive vice president in charge of fraud risk management at Countrywide won a whistle-blowing case against Bank of America.

However, despite recent legislation, several nationally recognized NGOs still prioritize change in corporate and private sector whistle-blowing as a pressing issue.

References:

Source 1: Government Accountability Project, "Corporate and Financial Accountability." Last accessed October 2, 2011. <http://www.whistleblower.org/program-areas/corporate-a-financial-accountability>.

Source 2: In-person interview on September 23, 2011, with Director of Public Policy Angela Canterbury at the Project on Government Oversight.

Source 3: In-person interview on October 6, 2011, with interviewee who requested anonymity at the Office of Government Ethics.

Source 4: Ben Kerschberg, Forbes, "The Dodd Frank Act's Robust Whistleblowing Incentives," April 4, 2011. <http://www.forbes.com/sites/benkerschberg/2011/04/14/the-dodd-frank-acts-robust-whistleblowing-incentives/>

Source 5: National Whistleblowers Center, "Dodd-Frank and FCPA FAQ." Last accessed October 2, 2011. http://www.whistleblowers.org/index.php?option=com_content&task=view&id=1271&Itemid=194

Source 6: Center for Public Integrity, "Mortgage Industry Whistleblower Wins Case Against Bank of America," September 14, 2011. http://www.iwatchnews.org/2011/09/14/6467/mortgage-industry-whistleblower-wins-case-against-bank-america?utm_source=iwatchnews&utm_medium=site-features&utm_campaign=topics-drawer

100: Private sector whistleblowers can report abuses of power without fear of negative consequences. This may be due to robust mechanisms to protect the identity of whistleblowers or may be due to a culture that encourages disclosure and accountability.

75:

50: Private sector whistleblowers are sometimes able to come forward without negative consequences, but in other cases, whistleblowers are punished for disclosing, either through official or unofficial means.

25:

0: Private sector whistleblowers often face substantial negative consequences, such as losing a job, relocating to a less prominent position, or some form of harassment.

49. In law, is there an internal mechanism (i.e. phone hotline, e-mail address, local office) through which civil servants can report corruption?

49a. In law, is there an internal mechanism (i.e. phone hotline, e-mail address, local office) through which civil servants can report corruption?

Yes | No

Comments:

Several entities comprise an internal mechanism through which civil servants can report corruption. The Office of Special Counsel (OSC) exists to safeguard the merit system by protecting federal employees and applicants from prohibited personnel practices, especially reprisal for whistle-blowing. The OSC was established by Title 5 of the U.S. Code. It derives its investigatory and enforcement powers from four statutes: the Civil Service Reform Act, the Whistleblower Protection Act, the Hatch Act and the Uniformed Services Employment and Reemployment Rights Act (USERRA).

The OSC's Disclosure Unit (DU) receives and reviews disclosures from federal whistle-blowers. DU recommends the appropriate disposition of disclosures, which may include referral to the head of the agency involved for investigation and a report to the special counsel; U.S. Office of Special Counsel informal referral to the inspector general of the agency involved; or closure without further action. Unit attorneys review each agency report of investigation to determine its sufficiency and reasonableness before the special counsel sends the report to the president and responsible congressional oversight committees, along with any comments by the whistle-blower and the special counsel.

In addition, each federal agency has an Office of Inspector General (OIGs). The OIGs generally serve as the clearinghouse for corruption complaints and annually process about 200,000 complaints of waste, fraud and abuse.

References:

Law: 5 U.S.C. §§ 1211 — 1219. Office of Special Counsel. <http://www.law.cornell.edu/uscode/text/5/1212>

Source 1: U.S. Office of Special Counsel. Performance and Accountability Report Fiscal Year 2010. <http://www.osc.gov/documents/gpra/PAF%20FY%202010.pdf>

Yes: A YES score is earned if there is a mechanism, or multiple mechanisms for multiple national government agencies, through which civil servants can report cases of graft, misuse of public funds, or corruption.

No: A NO score is earned if no such mechanism (or equivalent series of mechanisms) exists.

50. In practice, is the internal mechanism (i.e. phone hotline, e-mail address, local office) through which civil servants can report corruption effective?

56

50a. In practice, the internal reporting mechanism for public sector corruption has a professional, full-time staff.

100 | 75 | 50 | 25 | 0

Comments:

The agency employs approximately 110 employees (primarily personnel management specialists, investigators and attorneys) to carry out its government-wide responsibilities. They work in the headquarters office in Washington and in the field offices in Dallas, Detroit, and Oakland.

Angela Canterbury of the Project on Government Oversight states that the Office of Special Counsel needs a bigger budget. Despite a mid-size staff and several locations, it is insufficient given the task as the only official whistle-blowing mechanism for approximately 2 million civilian employees. And, Canterbury says, as with many federal government agencies during the current deficit and economic downturn, the OSC is facing many cuts.

At the same time, Canterbury is optimistic about the role OSC plays as an internal reporting mechanism for public sector corruption because of a recently appointed agency head, Carolyn Lerner, who is "terrific." This is in contrast to the previous head, Scott J. Bloch, who was himself convicted of criminal contempt of Congress when he withheld information about wiping clean investigators' computers.

References:

Source 1: Director of Public Policy at the Project on Government Oversight Angela Canterbury, in person interview on September 23, 2011.

Source 2: In-person interview on October 6, 2011, with interviewee who requested anonymity at the Office of Government Ethics.

Source 3: U.S. Office of Special Counsel. Last accessed October 2, 2011. <http://www.osc.gov>

Source 4: Ed O'Keefe, The Washington Post, "How Many Federal Workers Are There?," September 2010. http://voices.washingtonpost.com/federal-eye/2010/09/how_many_federal_workers_are_t.html

Source 5: Del Quentin Wilber, The Washington Post, "Judge Allows Former Special Counsel to Withdraw Guilty Plea," August 3, 2011. http://www.washingtonpost.com/blogs/crime-scene/post/judge-allows-former-special-counsel-to-withdraw-guilty-plea/2011/08/03/gIQAboRsI_blog.html

Source 6: U.S. Office of Special Counsel. Performance and Accountability Report Fiscal Year 2010. <http://www.osc.gov/documents/gpra/PAR%20FY%202010.pdf>

100: The agency/entity has staff sufficient to fulfill its basic mandate.

75:

50: The agency/entity has limited staff, a fact that hinders its ability to fulfill its basic mandate.

25:

0: The agency/entity has no staff, or a limited staff that is clearly unqualified to fulfill its mandate.

50b. In practice, the internal reporting mechanism for public sector corruption receives regular funding.

100 | **75** | 50 | 25 | 0

Comments:

As with many federal government agencies during the current deficit and economic downturn, the OSC is facing budget cuts. There is no indication that budget cuts are targeted specifically at the OSC or that they are politically motivated. The annual budget is over \$18 million.

Angela Canterbury of the Project on Government Oversight states that the Office of Special Counsel needs a bigger budget. Despite a mid-size staff and several locations, it is insufficient given the task as the only official whistle-blowing mechanism for approximately 2 million civilian employees.

References:

Source 2: In-person interview on October 6, 2011, with interviewee who requested anonymity at the Office of Government Ethics.

Source 3: U.S. Office of Special Counsel. Last accessed October 2, 2011. <http://www.osc.gov>

Source 4: U.S. Office of Special Counsel. Performance Accountability Report Fiscal Year 2010. <http://www.osc.gov/documents/gpra/PAR%20FY%202010.pdf>

100: The agency/entity has a predictable source of funding that is fairly consistent from year to year. Political considerations are not a major factor in determining agency funding.

75:

50: The agency/entity has a regular source of funding but may be pressured by cuts, or threats of cuts to the agency budget. Political considerations have an effect on agency funding.

25:

0: Funding source is unreliable. Funding may be removed arbitrarily or as retaliation for agency actions.

50c. In practice, the internal reporting mechanism for public sector corruption acts on complaints within a reasonable time period.

100 | 75 | 50 | 25 | 0

Comments:

As self-reported, the Office of Special Counsel resolved only 55 percent of whistle-blower reports within the statutory requirement of 15 days. Two percent of disclosures were referred to agency heads or inspectors general.

Angela Canterbury of the Project on Government Oversight affirms that many cases are not resolved within a reasonable time or at all.

References:

Source 1: U.S. Office of Special Counsel, "Performance and Accountability Report Fiscal year 2010," at Pages 34-35. <http://www.osc.gov/documents/gpra/PAF%20FY%202010.pdf>

Source 2: Angela Canterbury, Director of Public Policy at the Project on Government Oversight. In-person interview on September 23, 2011.

100: The agency/entity acts on complaints quickly. While some backlog is expected and inevitable, complaints are acknowledged promptly and investigations into serious abuses move steadily towards resolution. Citizens with simple issues can expect a resolution within a month.

75:

50: The agency/entity acts on complaints quickly, with some exceptions. Some complaints may not be acknowledged, and simple issues may take more than two months to resolve.

25:

0: The agency/entity cannot resolve complaints quickly. Complaints may be unacknowledged for more than a month, and simple issues may take more than three months to resolve. Serious abuses are not investigated with any urgency.

50d. In practice, when necessary, the internal reporting mechanism for public sector corruption initiates investigations.

100 | 75 | 50 | 25 | 0

Comments:

The internal reporting mechanism for public sector corruption, the Office of Special Counsel (OSC), does not initiate investigations. Rather, it reviews issues that whistle-blowers raise. Should the OSC's Disclosure Unit (DU) see the issue fit, the DU will refer the case to either the head of the agency involved for investigation or to the inspector general of the agency involved. If the DU does not believe the issue is fit for investigation, the DU will close the case without further action. The U.S. Office of Special Counsel's 2010 performance and accountability report states that only 2 percent of whistle-blowing disclosures were referred to agency heads or inspectors general.

Angela Canterbury of the Project on Government Accountability does not have much confidence in OSC's investigations, as most do not pass the threshold review. Ninety-eight percent of cases are never investigated.

References:

Source 1: U.S. Office of Special Counsel, "Performance and Accountability Report Fiscal year 2010," at Pages 34-35. <http://www.osc.gov/documents/gpra/PAF%20FY%202010.pdf>

100: When irregularities are discovered, the agency/entity is aggressive in investigating the government or in cooperating with other agencies' investigations.

75:

50: The agency/entity starts investigations, but is limited in its effectiveness. The agency/entity may be slow to act, unwilling to take on politically powerful offenders, reluctant to cooperate with other investigative agencies, or occasionally unable to enforce its judgments.

25:

0: The agency/entity does not effectively investigate. The agency/entity may start investigations but not complete them, may refuse to cooperate with other investigative agencies, or may fail to detect offenders. The agency/entity may be partisan in its application of power.

79

4.3. Government Procurement: Transparency, Fairness, and Conflicts of Interest Safeguards

51. Is the public procurement process effective?

80

51a. In law, there are regulations addressing conflicts of interest for public procurement officials.

Yes

No

Comments:

Federal laws and agency regulations govern conflicts of interest for public procurement officials. The Office of Federal Procurement Policy (OFPP) influences federal agency policies and practices regarding acquisition of goods and services. OFPP is headed by an administrator who is appointed by the president and confirmed by the Senate. Federal and agency regulations govern solicitation provisions and contracts.

References:

Law: 41 U.S.C. §§405(b)-(c). Office of Federal Procurement Policy, Conflict of Interest Standards for Individuals Providing Consulting Services (§405(b)) and Ethics Safeguards Related to Contractor Conflicts of Interest (§405(c)). <http://www.law.cornell.edu/uscode/42/405.html>

Law 2: 41 U.S.C. § 401-440. Office of Federal Procurement Policy Act (1974). http://www.law.cornell.edu/uscode/html/uscode41/usc_sup_01_41_10_7.html

Law 3: 48 C.F.R. Federal Acquisition Regulations. <https://www.acquisition.gov/far/index.html>.

Source 1: Federal agency supplementary acquisition regulations. https://www.acquisition.gov/agency_supp_regs.asp

Yes: A YES score is earned if there are specific formal regulations defining and regulating conflicts of interest between official public duty and private interests for public procurement officials. A YES score is earned if such regulations cover all civil servants, including procurement officials.

No: A NO score is earned if no such rules exist.

51b. In law, there is mandatory professional training for public procurement officials.

Yes | No

Comments:

Laws mandate that the Office of Federal Procurement Policy have an associate administrator for acquisition workforce programs and provide acquisition and contracting training programs within executive agencies. There are numerous other training opportunities for contractors and civil servants.

References:

Law: 41 U.S.C. §433a. Office of Federal Procurement Policy, Federal Acquisition Workforce Improvements. http://www.law.cornell.edu/uscode/html/uscode41/usc_sup_01_41_10_7.html

Yes: A YES score is earned if public procurement officials receive regular mandatory training to ensure professional standards in supervising the tendering process. A YES score is earned if such training is mandated for portions of the broader civil service, to include procurement officials.

No: A NO score is earned if there is no regular required training of public procurement officials or if training is sporadic, inconsistent, unrelated to procurement processes, or voluntary.

51c. In practice, the conflicts of interest regulations for public procurement officials are enforced.

100 | 75 | 50 | 25 | 0

Comments:

The Office of Public Procurement and agency ethics officers help contract employees learn conflict of interest rules and file financial disclosure forms. Many conflicts of interest are avoided by recusal and other preventive measures (such as selling an asset or resigning from another position) because employees have been trained to recognize and anticipate potential ethics breaches.

A senior official at the Office of Government Ethics emphasized that Washington has considerable public and press oversight. Government agencies will investigate ethics issues that are brought to their attention by the press or an employee.

References:

Source 1: Government Ethics Newsgram, Vol. 12, No. 2, pp. 1-3, "Privatization Issues Affect Federal Employees," Summer 1995. <http://www.oge.gov/DisplayTemplates/ModelSub.aspx?id=1385>

Source 2: In-person interview with interviewee who requested anonymity at the Office of Government Ethics on October 6, 2011.

100: Regulations regarding conflicts of interest for procurement officials are aggressively enforced.

75:

50: Conflict-of-interest regulations exist, but are flawed. Some violations may not be enforced, or some officials may be exempt from regulations.

25:

0: Conflict-of-interest regulations do not exist, or are consistently ineffective.

51d. In law, there is a mechanism that monitors the assets, incomes and spending habits of public procurement officials.

Yes | No

Comments:

Although the Office of Federal Procurement Policy (OFPP) in the Office of Management and Budget shapes federal procurement policies and practices, it is not mandated to monitor the assets, incomes and spending habits of public procurement officials. Congress established the OFPP in 1974 to provide overall direction for government-wide procurement policies, regulations and procedures and to promote economy, efficiency and effectiveness in acquisition processes.

No other entity is charged with monitoring assets, incomes and spending habits of public procurement officials, although various agencies and sub-agencies may have discretionary authority to monitor procurement officials (such as executive agencies, offices of inspectors general, the attorney general and its sub-agencies, etc.).

References:

The White House. Office of Management and Budget. Office of Public Procurement Policy. http://www.whitehouse.gov/omb/procurement_default

41 U.S.C. §§ 401, 402—440. Title 41, Chapter 7, Office of Federal Procurement Policy. http://www.law.cornell.edu/uscode/usc_sup_01_41_10_7.html

Yes: A YES score is earned if there is a formal mandate to some agency to monitor the assets, incomes and spending habits of public procurement officials, such as an inspector general, or ombudsman.

No: A NO score is earned if no such mandate exists.

51e. In law, major procurements require competitive bidding.

Yes | No

Comments:

The law requires contracting officers to promote and provide for full and open competition in soliciting offers and awarding government contracts. There are exceptions in Subparts 6.2 and 6.3.

References:

Law 1: 10 U.S.C. §2304. Armed Services, Contracting. <http://www.law.cornell.edu/uscode/10/2304.html>

Law 2: 41 U.S.C. §253. Public Contracts. http://www.law.cornell.edu/uscode/html/uscode41/usc_sup_01_41_10_4_20_IV.html

Yes: A YES score is earned if all major procurements (defined as those greater than 0.5% of GDP) require competitive bidding.

No: A NO score is earned if competitive bidding is not required by law or regulation for major procurement (greater than 0.5% OF GDP).

51f. In law, strict formal requirements limit the extent of sole sourcing.

Yes | No

Comments:

There are strict formal requirements that limit the extent of sole sourcing. Sole sourcing is only allowed in two circumstances: when the procurement seeks goods or services that are available from only one responsible source; or if specific agencies – the

Department of Defense, National Aeronautics and Space Administration and the Coast Guard – can only satisfy agency requirements with goods or services from one or a limited number of responsible sources.

References:

Law 1: 10 U.S.C. §2304. Armed Services Contracting. <http://www.law.cornell.edu/uscode/10/2304.html>

Law 2: 41 U.S.C. §253. Public Contracts. http://www.law.cornell.edu/uscode/html/uscode41/usc_sup_01_41_10_4_20_IV.html

Yes: A YES score is earned if sole sourcing is limited to specific, tightly defined conditions, such as when a supplier is the only source of a skill or technology.

No: A NO score is earned if there are no prohibitions on sole sourcing. A NO score is earned if the prohibitions on sole sourcing are general and unspecific.

51g. In law, unsuccessful bidders can instigate an official review of procurement decisions.

Yes | No

Comments:

Bidders can instigate a “protest” to the necessary agency for a formal review of procurement decisions. Further, the administrative agency has its own appeal mechanisms. Thus, bidders can file a complaint and, subsequently, an appeal from an administrative decision of that complaint.

Several Boards of Contract Appeals have jurisdiction to hear appeals from a decision of claims and disputes relating to contracts with the U.S. government. They are the Armed Services (Department of Defense), Tennessee Valley Authority, Postal Service and Civilian Boards. In exercising jurisdiction, an agency board may grant any relief that would be available to a litigant, asserting a contract claim in the U.S. Court of Federal Claims.

References:

Regulation: FAR 33.103(c). Federal Acquisition Regulations, General Contracting Requirements, Protests to the Agency. https://www.acquisition.gov/far/html/Subpart%2033_1.html

Law: 41 U.S.C. §607. Agency Boards of Contract Appeals. http://www.law.cornell.edu/uscode/html/uscode41/usc_sec_41_00000607---000-.html

Law: 41 U.S.C. §438, Civilian Board of Contract Appeals. http://www.law.cornell.edu/uscode/html/uscode41/usc_sec_41_00000438---000-.html

Yes: A YES score is earned if there is a formal appeal process for unsuccessful bidders.

No: A NO score is earned if no such process exists.

51h. In law, unsuccessful bidders can challenge procurement decisions in a court of law.

Yes | No

Comments:

An unsuccessful bidder may seek remedy in a court of law.

Section 607 of Title 41 says an unsuccessful bidder may seek remedy in a court of law within 120 days from the agency’s receipt of the board’s administrative decision. The agency head must determine that an appeal should be taken and obtain the prior approval of the attorney general. The Court of Appeals for the Federal Circuit will have jurisdiction and powers of judicial review under Title 28 Section 1295 of the U.S. Code.

Alternately, under Title 41 Section 609 of the U.S. Code, a contractor may bring an action directly on the claim in the U.S. Court of Federal Claims, notwithstanding any contract provision, regulation or rule of law to the contrary. Finally, Title 41 Sections 321 and 322 of the U.S. Code reinforce judicial review of administrative decisions.

References:

Law 1: 41 U.S.C. §607(g)(1)(B). Contract Disputes, Agency Board of Contract Appeals. http://www.law.cornell.edu/uscode/html/uscode41/usc_sec_41_00000607---000-.html

Law 2: 41 U.S.C. §609. Contract Disputes, Judicial Review of Board Decisions. http://www.law.cornell.edu/uscode/html/uscode41/usc_sec_41_00000609---000-.html

Law 3: 41 U.S.C. §§321-322 Judicial Review of Administrative Decisions, Limitation on Pleading Contract Provisions Relating to Finality; Standards of Review and Contract Provisions Making Decisions Final on Questions of Law. http://www.law.cornell.edu/uscode/usc_sup_01_41_10_5.html

Yes: A YES score is earned if unsuccessful bidders can use the courts to appeal a procurement decision.

No: A NO score is earned if no such process exists.

51i. In law, companies guilty of major violations of procurement regulations (i.e. bribery) are prohibited from participating in future procurement bids.

Yes | No

Comments:

Companies guilty of major violations of procurement regulations are not automatically prohibited from participating in future procurement bids. Rather, the law grants the federal government discretion: it may, but need not, prohibit such companies.

The federal government is permitted to debar or suspend a contractor for reasons set forth in Federal Acquisition Regulation Subpart 9.406(2), using the procedures in Subpart 9.407(3), if it is in the government's interest. Reasons for debarment or suspension set forth in Subpart 9.406(2) include bribery, embezzlement, fraud, criminal offense, conflict of interest or gratuity violations found in Title 18 of the U.S. Code, or any other offense indicating a lack of business integrity or business honesty that seriously and directly affects the contractor's responsibility.

However, the existence of a reason to debar or suspend a contractor does not necessarily require that the contractor be debarred or suspended; rather, "the seriousness of the contractor's acts or omissions and any remedial measures or mitigating factors should be considered" (Subpart 9.406(1)(a) and Subpart 9.407(2)). Moreover, companies in highly technical and costly industries (such as defense, air, oil and gas) may be the only eligible or cost-effective bidder, so "in practice" it can be impossible for the government to deny their bid, despite previous procurement violations. (See, The New York Times, "Size Protects Government Contractors That Stray.")

Thus, although the law gives the government discretion to prevent a contractor from procuring future bids, no law affirmatively prohibits contractors from participating in future procurement bids after violating procurement regulations, and it is not uncommon.

References:

48 C.F.R. Part 9, Subpart 9.4. Federal Acquisition Regulation, Debarment, Suspension and Ineligibility. https://www.acquisition.gov/far/current/html/Subpart%209_4.html#wp1083280

Source 1: Ron Nixon, The New York Times, "Size Protects Government Contractors That Stray." December 17, 2010. <http://www.nytimes.com/2010/12/18/us/politics/18contractor.html>

Yes: A YES score is earned if there are formal procurement blacklists, designed to prevent convicted companies from doing business with the government.

No: A NO score is earned if no such process exists.

51j. In practice, companies guilty of major violations of procurement regulations (i.e. bribery) are prohibited from participating in future procurement bids.

Comments:

Companies guilty of major violations of procurement regulations are not effectively penalized or prohibited from participating in future procurement bids. Unfortunately, as highlighted by the Project on Government Oversight, virtually no official information about federal contractors' misconduct or criminal records has been disclosed to the public. What information is available points to gross lack of enforcement.

The New York Times reported in December 2010 that the largest contractor companies often escape the stiffest penalties because government agencies are too dependent on them. Even when a company is disciplined with suspensions or debarments, these measures usually affect only individuals or a small unit within the company, not the whole company. The New York Times reported that the federal government wanted to stop BP from getting government contracts until it addressed various environmental and safety violations, but the Pentagon objected; BP was its biggest supplier of fuel.

The New York Times also reported that only three agencies in the federal government have full-time debarment officials, the Environmental Protection Agency, Air Force and Navy. The other agencies have part-time officials who are part of the procurement office, creating a potential conflict because these officials are also trying to arrange contracts for their agencies.

In January 2011, another report found that from fiscal year 2007 to fiscal year 2009, the Department of Defense awarded almost \$270 billion in contracts to 91 contractors found liable in civil fraud cases and \$682 million to 30 contractors convicted of criminal fraud. It also found that companies barred from federal contracting continued to receive millions of taxpayer dollars in contracts.

References:

Source 1: Ron Nixon, The New York Times, "Size Protects Government Contractors That Stray," December 18, 2010. <http://www.nytimes.com/2010/12/18/us/politics/18contractor.html>

Source 2: Government Executive, "Young Arms Dealer Gets Into More Trouble." <http://www.govexec.com/dailyfed/0810/082410rb1.htm>

Source 3: Neil Gordon, Project on Government Oversight, "POGO Argues Public Deserves to Know Whether Contractor Misconduct Reporting Rule Has Been Effective," August 25, 2011. <http://www.pogo.org/pogo-files/letters/contract-oversight/co-fcmd-20110825.html>

Source 4: Project on Government Oversight, Federal Contractor Misconduct Database. Last accessed October 8, 2011. <http://www.contractormisconduct.org/>

Source 5: Danielle Brian, Op-Ed Contributor, Washington Examiner, "Test-Public Should Know If Government Contractors Have Rap Sheets," April 6, 2011. <http://www.pogo.org/test-pages/test-co-fcmd-20110406.html>

Source 6: Department of Defense, "Report to Congress on Contracting Fraud." January 2011. http://sanderson.senate.gov/graphics/Defense_Fraud_Report1.pdf

100: A system of formal blacklists and cooling off periods is in place for companies convicted of corruption. All companies are subject to this system.

75:

50: A system of formal blacklists and cooling off periods is in place, but the system has flaws. Some procurements or companies may not be affected by the system, or the prohibitions are sometimes not effective.

25:

0: There is no such system, or the system is consistently ineffective in prohibiting future hiring of blacklisted companies.

52. Can citizens access the public procurement process?

92

52a. In law, citizens can access public procurement regulations.

Yes | No

Comments:

Current federal procurement laws and regulations are public through Acquisition.gov and the White House's Office of Public Procurement Policy. Any proposed changes must be published in the Federal Register. Notice must include the proposed procurement policy, regulation, procedure or form and be accompanied by a public comment period for receiving and considering the views of all interested parties on such a proposal.

References:

Law: 41 U.S.C. §418, Office of Federal Procurement Policy, Publication of Proposed Regulations. http://www.law.cornell.edu/uscode/html/uscode41/usc_sec_41_00000418--b000-.html

Source 1: The Office of Federal Procurement Policy. Last accessed September 26, 2011. http://www.whitehouse.gov/omb/procurement_default

Source 2: Federal Acquisition Regulation. Last accessed September 26, 2011. <https://www.acquisition.gov/far/>

Yes: A YES score is earned if procurement rules are, by law, open to the public. These regulations are defined here as the rules governing the competitive procurement process.

No: A NO score is earned if procurement rules are officially secret for any reason or if there are no procurement rules.

52b. In law, the government is required to publicly announce the results of procurement decisions.

Yes | No

Comments:

The government is required to publicly announce the results of procurement decisions. Each executive agency must establish and maintain an electronic database of procurements, including the date of the contract award, to which contractor it was awarded, goods or services obtained and total cost of the procurement. Further, Federal Acquisition Regulation requires contracting officers to make information available on awards over \$3 million on the day of award.

References:

Law: 41 U.S.C. §417, Record Requirements. http://www.law.cornell.edu/uscode/html/uscode41/usc_sec_41_00000417--000-.html

Federal Regulation: FAR §5.303. Synopses of Contract Awards, announcement of contract awards. <https://www.acquisition.gov/far/current/html/Subpart%205.3.html#wp1083932>

Yes: A YES score is earned if the government is required to publicly post or announce the results of the public procurement process. This can be done through major media outlets or on a publicly-accessible government register or log.

No: A NO score is earned if there is no requirement for the government to publicly announce the results of the public procurement process.

52c. In practice, citizens can access public procurement regulations within a reasonable time period.

100 | 75 | 50 | 25 | 0

Comments:

Citizens can access public procurement regulations within a reasonable time period. Current federal procurement laws and

regulations are free to the public online through the Government Services Agency website, Acquisition.gov, and the White House's Office of Public Procurement Policy.

References:

Source 1: The Office of Federal Procurement Policy. Last accessed September 26, 2011. http://www.whitehouse.gov/omb/procurement_default

Source 2: Federal Acquisition Regulation. Last accessed September 26, 2011. <https://www.acquisition.gov/far/>

100: Records are available on-line, or records can be obtained within two days. Records are uniformly available; there are no delays for politically sensitive information. These records are defined here as the rules governing the competitive procurement process.

75:

50: Records take around two weeks to obtain. Some delays may be experienced.

25:

0: Records take more than a month to acquire. In some cases, most records may be available sooner, but there may be persistent delays in obtaining politically sensitive records.

52d. In practice, citizens can access public procurement regulations at a reasonable cost.

100 | 75 | 50 | 25 | 0

Comments:

Citizens can access public procurement regulations at a reasonable cost. Current regulations are available free on several government websites.

References:

Source 1: The Office of Federal Procurement Policy. Last accessed September 26, 2011. http://www.whitehouse.gov/omb/procurement_default

Source 2: Government Services Agency, Federal Acquisition Regulation. Last accessed September 26, 2011. <https://www.acquisition.gov/far/>

100: Records are free to all citizens, or available for the cost of photocopying. Records can be obtained at little cost, such as by mail, or on-line. These records are defined here as the rules governing the competitive procurement process.

75:

50: Records impose a financial burden on citizens, journalists or NGOs. Retrieving records may require a visit to a specific office, such as a regional or national capital.

25:

0: Retrieving records imposes a major financial burden on citizens. Records costs are prohibitive to most citizens, journalists, or NGOs trying to access this information.

52e. In practice, major public procurements are effectively advertised.

100 | 75 | 50 | 25 | 0

Comments:

Citizens can access public procurement regulations and announcement within a reasonable time period. Current federal procurement laws, regulations and announcements are free to the public online through the Government Services Agency website, Acquisition.gov, and the White House's Office of Public Procurement Policy.

References:

Source 1: The Office of Federal Procurement Policy. Last accessed September 26, 2011. http://www.whitehouse.gov/omb/procurement_default

Source 2: Government Services Agency, Federal Acquisition Regulation. Last accessed September 26, 2011. <https://www.acquisition.gov/far/>

Source 3: Government Services Agency, Federal Business Opportunities. Last accessed October 5, 2011. <https://www.fbo.gov/>

100: There is a formal process of advertising public procurements. This may include a government website, newspaper advertising, or other official announcements. All major procurements are advertised in this way. Sufficient time is allowed for bidders to respond to advertisements.

75:

50: There is a formal process of advertisement but it is flawed. Some major procurements may not be advertised, or the advertising process may not be effective. The time between advertisements and bidding may be too short to allow full participation.

25:

0: There is no formal process of advertising major public procurements or the process is superficial and ineffective.

52f. In practice, citizens can access the results of major public procurement bids.

100 | 75 | 50 | 25 | 0

Comments:

Myriad official government websites provide information about the results of procurement bids. Federal Procurement Data System Next Generation lists federal contracts. One must register for access and The Project on Government Oversight (POGO) says only "bare-bones contract information is included." FSRS.gov is the result of the Federal Funding Accountability and Transparency Act (FFATA) created by Senators Coburn (R-OK) and Obama (D-IL) to add transparency to government federal contracts and grants. It provides information about sub-awards.

The principle website for information about awards is Federal Business Opportunities (FedBizOpps.gov or FBO). The website is the single government point-of-entry for current and archived federal government procurement opportunities over \$25,000. This site lists the requests for proposal and solicitations and notifies contractors about future business opportunities.

NGO websites also provide information about contracts. OMB Watch, an NGO, offers a free, searchable database of federal government spending on contracts and grants, searchable by contractor, congressional district, agency or place of performance. POGO runs a Federal Contractor Misconduct database.

The NGO websites give insight into a less than perfect contract bid and award system: oversight is needed as many contracts are not reported, whether through misconduct or loophole exceptions. For example, only contracts over \$25,000 are in the citizen-accessible government report of bid awards. Small contracts awards are difficult to track. Similarly, contracting for defense and security-related agencies is known for its lack of public accounting.

References:

Source 1: The Office of Federal Procurement Policy. Last accessed September 26, 2011. http://www.whitehouse.gov/omb/procurement_default

Source 2: Government Services Agency, Federal Acquisition Regulation. Last accessed September 26, 2011. <https://www.acquisition.gov/far/>

Source 3: Government Services Agency, Federal Business Opportunities. Last accessed October 5, 2011. <https://www.fbo.gov/>

Source 4: Project on Government Oversight. Federal Contractor Resources. Last accessed October 5, 2011. <http://www.pogo.org/investigations/contract-oversight/federal-contracting-resources.html>

Source 5: Federal Procurement Data System Next Generation (FPDS-NG). Last accessed October 5, 2011. <https://www.fpds.gov/>

Source 6: Federal Funding Accountability and Transparency Act Subaward Reporting System. Last accessed October 5, 2011. <https://www.ftrs.gov/>

Source 7: OMB Watch. Fedspending.org. Last accessed October 5, 2011. <http://www.fedspending.org/>

Source 8: Project on Government Oversight. Federal Contractor Misconduct. Last accessed October 5, 2011. <http://www.contractormisconduct.org>

100: Records of public procurement results are publicly available through a formal process.

75:

50: Records of public procurements are available, but there are exceptions to this practice. Some information may not be available, or some citizens may not be able to access information.

25:

0: This information is not available to the public through an official process.

4.4. Privatization of Public Administrative Functions: Transparency, Fairness, and Conflicts of Interest Safeguards

53. Is the privatization process effective?

83

53a. In law, all businesses are eligible to compete for privatized state assets.

Yes

No

Comments:

The Office of Management and Budget's Circular No. A-76 requires that agencies comply with procurement integrity, ethics and standards of conduct rules, including the restrictions of Title 18 Section 208 of the U.S. Code, when performing streamlined and standard competitions.

References:

Law: 18 U.S.C. § 208. Criminal Law, Bribery, Graft and Conflicts of Interest: Acts Affecting a Personal Financial Interest. http://www.law.cornell.edu/uscode/18/uscode_sec_18_00000208--000-.html

Source 1: The White House, "Circular No. A-76 Revised," May 29, 2003. http://www.whitehouse.gov/omb/circulars_a076_a76_incl_tech_correction/#b

Yes: A YES score is earned if all businesses are equally eligible to compete for privatized assets. A YES score is still earned if the government did not privatize any state-owned assets during the study period.

No: A NO score is earned if any group of businesses (other than those blacklisted due to corruption charges) is excluded by law.

53b. In law, there are regulations addressing conflicts of interest for government officials involved in privatization.

Yes | No

Comments:

Title 41 of the U.S. Code includes conflicts of interest provisions in the procurement regulations. The Office of Government Ethics website states that employees involved in privatizing government functions need to understand that the conflict of interest restrictions contained in Title 18 of the U.S. Code and the procurement integrity provisions in Title 41 may apply to their activities. Even when downsizing agency operations is a top priority, employees involved in implementing a proposal to privatize a certain agency function must comply with the requirements of these provisions.

References:

Law: 41 U.S.C. § 405b. Conflict of Interest Standards for Individuals Providing Consulting Services. http://www.law.cornell.edu/uscode/usc_sup_01_41_10_7.html

Law: 18 U.S.C. Crimes and Criminal Procedure. http://www.law.cornell.edu/uscode/usc_sup_01_18.html

Source 1: Government Ethics Newsgram, Vol. 12, no. 2, pp. 1-3, "Privatization Issues Affect Federal Employees," Summer 1995. <http://www.oge.gov/DisplayTemplates/ModelSub.aspx?id=1385>

Yes: A YES score is earned if there are specific formal regulations defining and regulating conflicts of interest between official public duty and private interests for privatization officials. A YES score is earned if such regulations cover all civil servants, including privatization officials.

No: A NO score is earned if there are no such formal regulations.

53c. In practice, conflicts of interest regulations for government officials involved in privatization are enforced.

100 | 75 | 50 | 25 | 0

Comments:

Privatization has not occurred in the United States at the federal level in this time period. There are partial privatizations in the form of public-private partnerships, but these occur primarily at the state level. Discussion of state public-private partnerships causes dispute over conflicts of interest.

References:

Source 1: Government Ethics Newsgram, Vol. 12, no. 2, pp. 1-3, "Privatization Issues Affect Federal Employees," Summer 1995. <http://www.oge.gov/DisplayTemplates/ModelSub.aspx?id=1385>

Source 2: Business Week, "Solantic Won't Contract with FL While Scott is Gov," April 6, 2011. <http://www.businessweek.com/ap/financialnews/D9ME87JG1.htm>

100: Regulations regarding conflicts of interest for privatization officials are aggressively enforced.

75:

50: Conflict-of-interest regulations exist, but are flawed. Some violations may not be enforced, or some officials may be exempt from the regulations.

25:

0: Conflict of interest regulations do not exist, or are consistently ineffective.

54. Can citizens access the terms and conditions of privatization bids?

100

54a. In law, citizens can access privatization regulations.

Yes

No

Comments:

Citizens can access privatization regulations.

References:

Law: 10 U.S.C. §§ 2201-2925. Service, Supply and Procurement. http://www.law.cornell.edu/uscode/usc_sup_01_10_10_A_20_IV.html

Law: 41 U.S.C. §§ 1-707. Public Contracts. http://www.law.cornell.edu/uscode/usc_sup_01_41.html

Yes: A YES score is earned if privatization rules (defined here as the rules governing the competitive privatization process) are, by law, open to the public. Even if privatization is infrequent or rare, the most recent privatization should be used as the basis for scoring this indicator.

No: A NO score is earned if privatization rules are officially secret for any reason or if there are no privatization rules.

54b. In practice, privatizations are effectively advertised.

100

75

50

25

0

Comments:

Information is provided and publicly available on the Federal Procurement Data System. The USAspending.gov website, part of the Federal Funding Accountability and Transparency Act, allows one to see how the U.S. government spends money through the keyword searches "Prime Award" and "Sub-award."

References:

Source 1: General Services Administration. Federal Procurement Data System. https://www.fpds.gov/fpdsng_cms/

Source 2: USA Spending. <http://www.usaspending.gov/>

100: There is a formal process of advertising privatizations. This may include a government website, newspaper advertising, or other official announcements. All major procurements are advertised in this way. Sufficient time is allowed for bidders to respond to advertisements.

75:

50: There is a formal process of advertisement but it is flawed. Some privatizations may not be advertised, or the advertising process may not be effective. The time between advertisements and bidding may be too short to allow full participation.

25:

0: There is no formal process of advertising privatizations or the process is superficial and ineffective.

54c. In law, the government is required to publicly announce the results of privatization decisions.

Yes | No

Comments:

By law, the head of the agency must make publicly available the documents containing the justification and approval of procurement within 14 days (30 days for some cases) after the award of the contract. The documents must be made publicly available on the website of the agency and through a government-wide website selected by the administrator for federal procurement policy.

References:

Law: 10 U.S.C. § 2304(i)(1)-(2). Contracts: Competition Requirements. http://www.law.cornell.edu/uscode/usc_sec_10_00002304_--000-.html

Law: 41 U.S.C. § 253(j)(1)-(2). Competition Requirements. http://www.law.cornell.edu/uscode/usc_sec_41_00000253_--000-.html

Yes: A YES score is earned if the government is required to publicly post or announce the results of the privatization process. This can be done through major media outlets or on a publicly-accessible government register or log.

No: A NO score is earned if there is no requirement for the government to publicly announce the results of the privatization process.

54d. In practice, citizens can access privatization regulations within a reasonable time period.

100 | 75 | 50 | 25 | 0

Comments:

The laws and regulations are available free as part of the Federal Business Opportunities website. The laws of the United States also are available on several free databases. Corresponding federal regulation rules are available at no cost on each agency's website, as well as through the General Services Administration.

Privatizations are rare in the United States and usually done to provide a public service (postal mail, transit) or to protect national security. The most recent privatization-like act on behalf of the government was in 2001 after the attacks on September 11. The then-private airport security industry in the United States was made into the Transportation Security Administration, a sub-agency under the authority of a larger federal agency, the U.S. Department of Homeland Security.

References:

Source 1: Federal Business Opportunities. <https://www.fbo.gov/>

Source 2: Transportation Security Administration. <http://www.tsa.gov/>

Source 3: General Services Administration. <http://www.gsa.gov/portal/category/100000>

Source 4: Cornell University, Legal Information Institute. <http://www.law.cornell.edu/>

100: Records (defined here as the rules governing the competitive privatization process) are available on-line, or records can be obtained within two days. Records are uniformly available; there are no delays for politically sensitive information.

75:

50: Records take around two weeks to obtain. Some delays may be experienced.

25:

0: Records take more than a month to acquire. In some cases, most records may be available sooner, but there may be persistent delays in obtaining politically sensitive records.

54e. In practice, citizens can access privatization regulations at a reasonable cost.

100 | 75 | 50 | 25 | 0

Comments:

The laws and regulations are available as part of the Federal Business Opportunities website. The laws of the United States are available on several free databases. Corresponding Federal Regulation rules are available on each agency's website, as well as through the General Services Administration.

Privatizations are rare in the United States and usually done to provide a public service (postal mail, transit) or to protect national security. The most recent privatization-like act on behalf of the government was in 2001 after the attacks on September 11. The then-private airport security industry in the United States was made into the Transportation Security Administration, a sub-agency under the authority of a larger federal agency, the U.S. Department of Homeland Security.

References:

Source 1: Federal Business Opportunities. <https://www.fbo.gov/>

Source 2: Transportation Security Administration. <http://www.tsa.gov/>

Source 3: General Services Administration. <http://www.gsa.gov/portal/category/100000>

Source 4: Cornell University, Legal Information Institute. <http://www.law.cornell.edu/>

100: Records (defined here as the rules governing the competitive privatization process) are free to all citizens, or available for the cost of photocopying. Records can be obtained at little cost, such as by mail, or on-line.

75:

50: Records impose a financial burden on citizens, journalists or NGOs. Retrieving records may require a visit to a specific office, such as a regional or national capital.

25:

0: Retrieving records imposes a major financial burden on citizens. Records costs are prohibitive to most citizens, journalists, or NGOs trying to access this information.

Category 5. Government Oversight and Controls

5.1. National Ombudsman

55. In law, is there a national ombudsman, public protector or equivalent agency (or collection of agencies) covering the entire public sector?

0

55a. In law, is there a national ombudsman, public protector or equivalent agency (or collection of agencies) covering the entire public sector?

Yes

No

Comments:

No law establishes a national ombudsman for the public sector. In the United States, some of the functions of an ombudsman are dispersed throughout federal government executive agencies and legislative committees.

The agency most like a national ombudsman is the Department of Justice's Office of the Attorney General. It is responsible for overall investigations (by the Federal Bureau of Investigation) and prosecutions (by the Public Integrity Section) of government officials and citizens on behalf of the public. Sub-offices in the Department of Justice also implement and enforce a broad range of civil and criminal justice matters on behalf of the public. For instance, the Office of the Associate Attorney General implements policies and programs pertaining to a broad range of civil justice, federal and local law enforcement and public safety matters. Similarly, the Criminal Division also serves the public interest through the enforcement of criminal statutes.

Other federal entities that engage in ombudsman-like functions include the following: The Offices of Inspector General (OIG) conduct independent and objective audits, investigations and inspections to prevent and detect waste, fraud and abuse and to promote economy, effectiveness and efficiency. The Government Accountability Office (GAO) conducts budget and performance audits at the request of Congress. The Office of Government Ethics (OGE) provides outreach and guidance for executive officials on conflicts of interest, financial disclosures and compliance with ethics code standards. Both chambers of Congress and the judiciary have ethics committees.

Finally, ombudsman offices exist at the state level, such as those in Arizona and Hawaii.

References:

Source 1: Council of Inspectors General on Integrity and Efficiency. <http://www.ignet.gov>

Source 2: Office of Government Ethics. <http://www.usoge.gov>

Source 3: Government Accountability Office. <http://www.gao.gov/>

Source 4: U.S. Senate Select Committee on Ethics. <http://www.ethics.senate.gov/>

Source 5: House Committee on Ethics. <http://www.ethics.house.gov>

Source 6: Department of Justice. <http://www.justice.gov/>

Source 7: Hawaii State Government, Ombudsman. <http://www.ombudsman.hawaii.gov/links>

Source 8: Arizona State Government, Ombudsman. <http://www.azleg.gov/ombudsman/default.asp>

Yes: A YES score is earned if there is a specific agency or set of agencies whose primary mandate is to investigate the actions of government on the behalf of common citizens. This agency or set of agencies should be specifically charged with seeking out and documenting abuses of power.

No: A NO score is earned if no such agency or set of agencies exists, or that function is a secondary concern of a larger body, such as the legislature.

56. Is the national ombudsman effective?

55

56a. In law, the ombudsman is protected from political interference.

Yes | No

Comments:

There is no ombudsman office. Further, the similar federal entities have politically appointed leaders who cannot be said to be independent or protected from political interference. At best, the decentralized approach to anti-corruption in the United States could offset political interference in that agencies pursue different anti-corruption agendas under different party leadership (for example, Republicans currently hold the majority in Congress, and the attorney general is a Democratic appointee).

References:

In law, there is no ombudsman office.

Yes: A YES score is earned only if the agency (or set of agencies) has some formal organizational independence from the government. A YES score is earned even if the entity is legally separate but in practice staffed by partisans.

No: A NO score is earned if the agency is a subordinate part of any government ministry or agency, such as the Department of Interior or the Justice Department.

56b. In practice, the ombudsman is protected from political interference.

100 | 75 | 50 | 25 | 0

Comments:

There is no ombudsman office. Further, the similar federal entities have politically appointed leaders who cannot be said to be independent or protected from political interference.

At best, the decentralized approach to anti-corruption in the United States could offset political interference in that agencies pursue different anti-corruption agendas under different party leadership (for example, Republicans currently hold the majority in Congress, and the attorney general is a Democratic appointee).

The Office of the Attorney General, for example, has been criticized for political interference. The agency's broad mandate to enforce and uphold laws exceeds its resources to investigate all allegations of criminal misconduct. Thus, as written in a letter from 34 Republican Senators to President Barack Obama, there is criticism that the agency's investigation selections are politically motivated. Huffington Post journalist Melina Milazzo suggests that political interference may taint the legitimacy of and delay an investigation's outcome. Notably, the political persuasion of the attorney general is not for personal incentives (conflicting family relationships, professional partnerships) or negative consequences (threats, harassment).

References:

Source 1: Charlie Savage, The New York Times, "For Holder, New Congress Means New Headaches," December 30, 2010. <http://www.nytimes.com/2010/12/31/us/politics/31holder.html?scp=2&sq=eric%20holder%20political&st=cse>

Source 2: Charlie Savage, The New York Times, "A Step to Deal With Prosecutors' Misconduct," January 18, 2011. <http://thecaucus.blogs.nytimes.com/2011/01/18/a-step-to-deal-with-prosecutors-misconduct/?scp=41&sq=eric%20holder%20political&st=cse>

Source 3: Melina Milazzo, The Huffington Post, "Political Interference With Torture Investigations Is Un-American," June 16, 2011. http://www.huffingtonpost.com/human-rights-first/political-interference-wi_b_878666.html

100: This agency (or set of agencies) operates independently of the political process, without incentive or pressure to render favorable judgments in politically sensitive cases. Investigations can operate without hindrance from the government, including access to politically sensitive information.

75:

50: This agency (or set of agencies) is typically independent, yet is sometimes influenced in its work by negative or positive political incentives. This may include public criticism or praise by the government. The ombudsman may not be provided with some information needed to carry out its investigations.

25:

0: This agency (or set of agencies) is commonly influenced by political or personal incentives. This may include conflicting family relationships, professional partnerships, or other personal loyalties. Negative incentives may include threats, harassment or other abuses of power. The ombudsman cannot compel the government to reveal sensitive information.

56c. In practice, the head of the ombudsman agency/entity is protected from removal without relevant justification.

100 | 75 | 50 | 25 | 0

Comments:

There is no national ombudsman office. Federal agencies with similar ombudsman-like functions are somewhat subject to removal at political pressure.

The attorney general is appointed by the president with consent of the Senate. The president can remove the attorney general at any time, and the attorney general may be impeached by the House of Representatives and tried in the Senate for treason, bribery and other high crimes and misdemeanors.

The Government Accountability Office's comptroller general of the United States is appointed by the president by and with the advice and consent of the Senate for a 15-year, nonrenewable term. The comptroller general may not be removed by the president, only by Congress through impeachment or joint resolution for specific reasons.

Regarding inspectors general, the president nominates inspectors general at Cabinet-level departments and major agencies with Senate confirmation. Only the president can remove inspectors general upon notice to Congress. At designated federal agencies, the agency heads can appoint and remove inspectors general also upon notice to Congress.

References:

Source 1: Council of Inspectors General on Integrity and Efficiency. <http://www.ignet.gov>

Source 2: Office of Government Ethics. <http://www.usoge.gov>

Source 3: Government Accountability Office. <http://www.gao.gov/>

Source 4: U.S. Senate Select Committee on Ethics. <http://www.ethics.senate.gov/>

Source 5: House Committee on Ethics. <http://www.ethics.house.gov>

Source 6: Department of Justice. <http://www.justice.gov/>

100: The director of the ombudsman (or directors of multiple agencies) serves a defined term and cannot be removed without a significant justification through a formal process, such as impeachment for abuse of power.

75:

50: The director of the ombudsman (or directors of multiple agencies) serves a defined term, but can in some cases be removed through a combination of official or unofficial pressure.

25:

0: The director of the ombudsman (or directors of multiple agencies) can be removed at the will of political leadership.

56d. In practice, the ombudsman agency (or agencies) has a professional, full-time staff.

100 | 75 | 50 | 25 | 0

Comments:

There is no national ombudsman. Federal agencies that perform ombudsman-like activities are adequately staffed and selected based on professional qualifications.

For instance, the presidentially appointed inspectors general and the designated federal entity (DFE) inspectors general reported to the Government Accountability Office (GAO) total budget authority for fiscal year 2010 of about \$2.2 billion with approximately 13,652 authorized full-time equivalent staff and 13,390 staff on board at the end of fiscal year 2010. The presidentially appointed inspectors general's budget authority constituted about 84 percent (about \$1.8 billion) of the total, and they had about 86 percent (11,564) of the total staff on board.

References:

Source 1: Council of Inspectors General on Integrity and Efficiency. <http://www.ignet.gov>

Source 2: Office of Government Ethics. <http://www.usoge.gov>

Source 3: Government Accountability Office. <http://www.gao.gov/>

Source 4: Department of Justice. <http://www.justice.gov/>

Source 5: Government Accountability Office, Report to Congressional Committee, "Inspectors General: Reporting on Independence, Effectiveness, and Expertise," September 2011. <http://www.gao.gov/new.items/d11770.pdf>

100: The ombudsman agency (or agencies) has staff sufficient to fulfill its basic mandate.

75:

50: The ombudsman agency (or agencies) has limited staff that hinders its ability to fulfill its basic mandate.

25:

0: The ombudsman agency (or agencies) has no staff, or a limited staff that is clearly unqualified to fulfill its mandate.

56e. In practice, agency appointments support the independence of the ombudsman agency (or agencies).

100 | 75 | 50 | 25 | 0

Comments:

There is no ombudsman office. Further, the similar federal entities have politically appointed leaders who cannot be said to be wholly independent or protected from political interference. Appointments are made based on professional qualifications, but also often on political considerations.

The attorney general, for example, has been criticized for political bias. The Office of the Attorney General's broad mandate to enforce and uphold laws exceeds its resources to investigate all allegations of criminal misconduct. Thus, as written in a letter from 34 Republican Senators to Democratic President Barack Obama, there is criticism that under his appointee, Attorney General Eric Holder, investigation selections are politically motivated. Huffington Post journalist Melina Milazzo suggests that political interference may taint the legitimacy of and delay an investigation's outcome. Notably, the political persuasion of the attorney general is not for personal incentives (conflicting family relationships, professional partnerships) or negative consequences (threats, harassment).

References:

Source 1: Council of Inspectors General on Integrity and Efficiency. <http://www.ignet.gov>

Source 2: Office of Government Ethics. <http://www.usoge.gov>

Source 3: Government Accountability Office. <http://www.gao.gov/>

Source 4: U.S. Senate Select Committee on Ethics. <http://www.ethics.senate.gov/>

Source 5: House Committee on Ethics. <http://www.ethics.house.gov>

Source 6: Department of Justice. <http://www.justice.gov/>

Source 1: Charlie Savage, New York Times, "For Holder, New Congress Means New Headaches," December 30, 2010. <http://www.nytimes.com/2010/12/31/us/politics/31holder.html?scp=2&sq=eric%20holder%20political&st=cse>

Source 2: Charlie Savage, New York Times, "A Step to Deal With Prosecutors' Misconduct," January 18, 2011. <http://thecaucus.blogs.nytimes.com/2011/01/18/a-step-to-deal-with-prosecutors-misconduct/?scp=41&sq=eric%20holder%20political&st=cse>

Source 3: Melina Milazzo, Huffington Post, "Political Interference With Torture Investigations Is Un-American," June 16, 2011. http://www.huffingtonpost.com/human-rights-first/political-interference-wi_b_878666.html

100: Appointments to the agency (or agencies) are made based on professional qualifications. Individuals appointed are free of conflicts of interest due to personal loyalties, family connections or other biases. Individuals appointed usually do not have clear political party affiliations.

75:

50: Appointments are usually based on professional qualifications. Individuals appointed may have clear party loyalties.

25:

0: Appointments are often based on political considerations. Individuals appointed often have conflicts of interest due to personal loyalties, family connections or other biases. Individuals appointed often have clear party loyalties.

56f. In practice, the ombudsman agency (or agencies) receives regular funding.

100 | 75 | 50 | 25 | 0

Comments:

There is no national ombudsman. Similar federal agencies such as the Office of the Attorney General, Government Accountability Office and Office of Inspectors General are major agencies with regular funding, despite minimal budget fluctuation due to political and economic changes.

For instance, the presidentially appointed inspectors general and the designated federal entity (DFE) inspectors general reported to the Government Accountability Office (GAO) a total budget authority for fiscal year 2010 of about \$2.2 billion with approximately 13,652 authorized full-time equivalent staff and 13,390 staff on board at the end of fiscal year 2010. The presidentially appointed inspectors general's budget authority constituted about 84 percent (about \$1.8 billion) of the total, and they had about 86 percent (11,564) of the total staff on board. The budgets of the DFE inspectors general made up about 16 percent (about \$352 million) of the total budget authority for inspectors general, and they had about 14 percent (1,826) of the total staff on board at the end of fiscal year 2010.

References:

Source 1: Council of Inspectors General on Integrity and Efficiency. <http://www.ignet.gov>

Source 2: Office of Government Ethics. <http://www.usoge.gov>

Source 3: Government Accountability Office. <http://www.gao.gov/>

Source 4: Department of Justice. <http://www.justice.gov/>

Source 5: Government Accountability Office, Report for Congressional Committees, "Inspectors General: Report on Investigation, Effectiveness, and Expertise," September 2011. <http://www.gao.gov/new.items/d11770.pdf>

100: The agency (or agencies) has a predictable source of funding that is fairly consistent from year to year. Political considerations are not a major factor in determining agency funding.

75:

50: The agency (or agencies) has a regular source of funding, but may be pressured by cuts, or threats of cuts to the agency budget. Political considerations have an effect on agency funding.

25:

0: Funding source is unreliable. Funding may be removed arbitrarily or as retaliation for agency functions.

56g. In practice, the ombudsman agency (or agencies) makes publicly available reports.

100 | 75 | 50 | 25 | 0

Comments:

There is no national ombudsman office. Most federal agencies that perform ombudsman-like activities generally make their policies, programs and activities known through publicly available reports. However, the Project on Government Oversight reports that agencies over-redact, delay or completely block the release of government oversight investigative reports.

References:

Source 1: Open Government at the Department of Justice. <http://www.justice.gov/open/>

Source 2: Government Accountability Office. Reports and Testimonies. <http://www.gao.gov/docsearch/repandtest.html>

Source 3: Government Accountability Office, Report to Congressional Committees, "Inspectors General: Reporting on Independence, Effectiveness, and Expertise," September 2011. <http://www.gao.gov/new.items/d11770.pdf>

Source 4: Project on Government Oversight, "The Case of the Missing Inspector General Reports," November 3, 2010. <http://www.pogo.org/pogo-files/alerts/government-oversight/go-igi-20101103.html>

100: The agency (or agencies) makes regular, publicly available, substantial reports either to the legislature or directly to the public outlining the full scope of its work.

75:

50: The agency (or agencies) makes publicly available reports to the legislature and/or directly to the public that are sometimes delayed or incomplete.

25:

0: The agency (or agencies) makes no reports of its activities, or makes reports that are consistently out of date, unavailable to the public, or insubstantial.

56h. In practice, when necessary, the national ombudsman (or equivalent agency or agencies) initiates investigations.

100 | 75 | 50 | 25 | 0

Comments:

There is no ombudsman office. The federal entities that take on similar functions will start or cooperate in investigations, but many rely on external government entities to set priorities or are partisan in their selection of cases to investigate.

The Office of Inspectors General and agency inspectors general have perhaps the most independence to initiate investigations, as neither the agency head nor the deputy can prevent or prohibit an inspector general from conducting an audit or investigation. However, the Project on Government Oversight also reported that agencies over-redact, delay or completely block the release of investigative reports.

The Office of the Attorney General, for example, has a broad mandate to enforce and uphold laws that exceeds its resources to investigate all allegations of criminal misconduct. But, as written in a letter from 34 Republican senators to President Barack Obama, there is criticism that the attorney general investigation selections are politically motivated. Notably, the political persuasion of the attorney general is not for personal incentives or negative consequences.

The Government Accountability Office initiates audits, investigations and performance reviews at the request of Congress.

References:

Source 1: Department of Justice. FOIA Library. http://www.justice.gov/oip/oip_foia1.htm

Source 2: Government Accountability Office. Reports and Testimonies. <http://www.gao.gov/docsearch/repandtest.html>

Source 3: Government Accountability Office, Report to Congressional Committees, "Inspectors General: Reporting on Independence, Effectiveness, and Expertise," September 2011. <http://www.gao.gov/new.items/d11770.pdf>

Source 4: In person interview with Director of Public Policy Angela Canterbury at the Project on Government Oversight on September 23, 2011.

Source 5: Project on Government Oversight, "The Case of the Missing Inspector General Reports," November 3, 2010. <http://www.pogo.org/pogo-files/alerts/government-oversight/go-igi-20101103.html>

100: The agency aggressively starts investigations — or participates fully with cooperating agencies' investigations — into judicial misconduct. The agency is fair in its application of this power.

75:

50: The agency will start or cooperate in investigations, but often relies on external pressure to set priorities, or has limited effectiveness when investigating. The agency, though limited in effectiveness, is still fair in its application of power.

25:

0: The agency rarely investigates on its own or cooperates in other agencies' investigations, or the agency is partisan in its application of this power.

56i. In practice, when necessary, the national ombudsman (or equivalent agency or agencies) imposes penalties on offenders.

100 | 75 | 50 | 25 | 0

Comments:

There is no national ombudsman office. However, for the most part, the ombudsman-like agencies impose penalties on offenders. The penalties vary according to federal agency. The inspectors general's final action, for example, will be in the form of recommendations or imposition of civil fines. The Office of the Attorney General will prosecute offenders, potentially leading to conviction, fines and imprisonment. The Government Accountability Office advises Congress and the heads of executive agencies. Although it has no enforcement power, its reports are highly regarded, and government agencies generally pay heed to the recommendations.

References:

Source 1: Department of Justice. FOIA Library. http://www.justice.gov/oip/oip_foia1.htm

Source 2: Government Accountability Office. Reports and Testimonies. <http://www.gao.gov/docsearch/repandtest.html>

Source 3: Government Accountability Office, Report to Congressional Committees, "Inspectors General: Reporting on Independence, Effectiveness, and Expertise," September 2011. <http://www.gao.gov/new.items/d11770.pdf>

Source 4: In -erson interview with Director of Public Policy Angela Canterbury at the Project on Government Oversight on September 23, 2011.

Source 5: <http://www.ignet.gov/pande/leg/igactasof0609.pdf>

100: When rules violations are discovered, the agency is aggressive in penalizing offenders or in cooperating with other agencies who penalize offenders.

75:

50: The agency enforces rules, but is limited in its effectiveness. The agency may be slow to act, unwilling to take on politically powerful offenders, resistant to cooperating with other agencies, or occasionally unable to enforce its judgments.

25:

0: The agency does not effectively penalize offenders. The agency may make judgments but not enforce them, does not cooperate with other agencies in enforcing penalties, or may fail to make reasonable judgments against offenders. The

agency may be partisan in its application of power.

56j. In practice, the government acts on the findings of the ombudsman agency (or agencies).

100 | 75 | 50 | 25 | 0

Comments:

There is no national ombudsman office. However, for the most part, ombudsman-like government agencies acts on their findings. The ability to do so varies according to federal agency. The inspectors general's final action, for example, will be in the form of recommendations, civil fines, criminal or civil actions, suspensions or debarments. The Office of the Attorney General will prosecute offenders, potentially leading to conviction, fines and imprisonment. The Government Accountability Office advises Congress and heads of executive agencies. Although it has no enforcement power, its reports are highly regarded and government agencies generally pay heed to the recommendations.

While the government generally acts on investigations that result in a finding of anti-corruption, some doubt agency effectiveness and responsiveness. For example, Angela Canterbury from the Project on Government Oversight says that many inspectors general dismiss cases during a threshold inquiry, never launching a full investigation. Judicial Watch president Tom Fitton also stated that there is an inherent conflict of interest when anti-corruption commissions comprising government employees are asked to review and audit their peers. Of note, the Government Accountability Office rarely refuses to audit or investigate a request from Congress, and its reports are held in high regard.

Another issue of concern is improper procedure in conducting the investigations. For instance, an investigation by the Office of Inspector General found that the Department of Justice's Federal Bureau of Investigations inappropriately tracked domestic advocacy groups. In another case, the public criticized the inspector general of the Department of Health and Human Service's Office for dismissing complaints by Food and Drug Administration employees who reported managerial pressure and harassment to approve medical devices against their expert judgment. Distressingly, one whistle-blower employee said the Office of Inspector General had not contacted him in the course of the investigation before dismissing the complaint.

The Project on Government Oversight also reported that agencies over-redact, delay or completely block the release of inspector general investigative reports.

References:

Source 1: In-person interview with Director of Public Policy Angela Canterbury at the Project on Government Oversight on September 23, 2011.

Source 2: In-person interview with Judicial Watch President Tom Fitton on September 21, 2011.

Source 3: Project on Government Oversight. Government Oversight: Inspector General Investigations. Last accessed October 4, 2011. <http://www.pogo.org/investigations/government-oversight/inspector-general.html>

Source 4: Andrew Cohen, The Atlantic, "OIG: FBI Inappropriately Tracked Domestic Advocacy Groups," September 20, 2010. <http://www.theatlantic.com/national/archive/2010/09/oig-fbi-inappropriately-tracked-domestic-advocacy-groups/63276/>

Source 5: Matthew Perrone, Business Week, "Feds Dismiss Misconduct Claims at FDA Device Unit," November 9, 2010. <http://www.businessweek.com/ap/financialnews/D9JCM9N00.htm>

Source 6: Government Accountability Office, Report to Congressional Committees, "Inspectors General: Reporting on Independence, Effectiveness, and Expertise," September 2011. <http://www.gao.gov/new.items/d11770.pdf>

100: Ombudsman's reports are taken seriously, with negative findings drawing prompt corrective action.

75:

50: In most cases, ombudsman's reports are acted on, though some exceptions may occur for politically sensitive issues, or particularly resistant agencies.

25:

0: Ombudsman's reports are often ignored, or given superficial attention. Ombudsman's reports do not lead to policy changes.

56k. In practice, the ombudsman agency (or agencies) acts on citizen complaints within a reasonable time period.

100 | 75 | 50 | 25 | 0

Comments:

There is no national ombudsman office. Federal entities that perform ombudsman-like duties sometimes act on citizen complaints within a reasonable time period. Response time varies widely across agencies, ranging from weeks to years.

References:

Source 1: In-person interview with Director of Public Policy Angela Canterbury at the Project on Government Oversight on September 23, 2011.

Source 2: Project on Government Oversight. Government Oversight: Inspector General Investigations. Last accessed October 4, 2011. <http://www.pogo.org/investigations/government-oversight/inspector-general.html>

Source 3: Andrew Cohen, The Atlantic, "OIG: FBI Inappropriately Tracked Domestic Advocacy Groups," September 20, 2010. <http://www.theatlantic.com/national/archive/2010/09/oig-fbi-inappropriately-tracked-domestic-advocacy-groups/63276/>

Source 4: Matthew Perrone, Business Week, "Feds Dismiss Misconduct Claims at FDA Device Unit," November 9, 2010. <http://www.businessweek.com/ap/financialnews/D9JCM9N00.htm>

Source 5: Government Accountability Office, Report to Congressional Committees, "Inspectors General: Reporting on Independence, Effectiveness and Expertise," September 2011. <http://www.gao.gov/new.items/d11770.pdf>

100: The agency (or agencies) acts on complaints quickly. While some backlog is expected and inevitable, complaints are acknowledged promptly and investigations into serious abuses move steadily towards resolution. Citizens with simple issues can expect a resolution within a month.

75:

50: The agency (or agencies) acts on complaints quickly, with some exceptions. Some complaints may not be acknowledged, and simple issues may take more than two months to resolve.

25:

0: The agency (or agencies) cannot resolve complaints quickly. Complaints may be unacknowledged for more than a month, and simple issues may take more than three months to resolve. Serious abuses are not investigated with any urgency.

57. Can citizens access the reports of the ombudsman?

83

57a. In law, citizens can access reports of the ombudsman(s).

Yes | No

Comments:

There is no national ombudsman. Federal agencies generally are subject to reporting laws and policies, such as FOIA and open government, that require providing access to reports.

Notably, agencies that conduct activities related to national security or intelligence have the authority to redact reports, releasing a less-detailed public version.

References:

There is no national ombudsman agency.

Yes: A YES score is earned if all ombudsman reports are publicly available.

No: A NO score is earned if any ombudsman reports are not publicly available. This may include reports made exclusively to the legislature or the executive, which those bodies may choose not to distribute the reports.

57b. In practice, citizens can access the reports of the ombudsman(s) within a reasonable time period.

100 | 75 | 50 | 25 | 0

Comments:

There is no national ombudsman agency. Federal agencies usually provide access to investigations, audits and reports. Agencies that conduct activities related to national security or intelligence may redact reports, releasing a less-detailed public version.

The Government Accountability Office, for example, has a search function for all its reports and testimonies. Citizens can also receive email alerts and messages over social media (such as Twitter) from the GAO. Inspectors general also make their reports and findings publicly available (see the Department of Justice Office of Inspector General at <http://www.justice.gov/oig/reports/index.htm>).

The Project on Government Oversight reported some missing inspector general reports, causing concern of political maneuvering or unjustified delays.

References:

Source 1: Project on Government Oversight, "These Are the Investigative Reports the SEC Doesn't Want You to See," January 20, 2011. <http://www.pogo.org/pogo-files/alerts/financial-oversight/fo-fra-20110120.html>

Source 2: Project on Government Oversight, "The Case of the Missing Inspector General Reports," November 3, 2010. <http://www.pogo.org/pogo-files/alerts/government-oversight/go-igi-20101103.html>

Source 3: Government Accountability Office. Reports and Testimonies. <http://www.gao.gov/docsearch/repandtest.html>

Source 4: Department of Justice, Office of Inspector General. Reports. Last accessed October 4, 2011. <http://www.justice.gov/oig/reports/index.htm>

100: Reports are available on-line, or records can be obtained within two days. Records are uniformly available; there are no delays for politically sensitive information.

75:

50: Reports take around two weeks to obtain. Some delays may be experienced.

25:

0: Reports take more than a month to acquire. In some cases, most records may be available sooner, but there may be persistent delays in obtaining politically sensitive records.

57c. In practice, citizens can access the reports of the ombudsman(s) at a reasonable cost.

100 | 75 | 50 | 25 | 0

Comments:

There is no national ombudsman. Federal agencies generally make their reports and investigations available at no cost online. (See GAO "Reports and Testimonies.") Information not readily available may be accessible at the cost of transmission (mail, electronic file, etc.) through Freedom of Information Act requests. The cost of FOIA requests may be prohibitive if citizens cannot obtain a waiver, use legal counsel to file a request or request large volumes of information.

References:

Source 1: Government Accountability Office. Reports and Testimonies. <http://www.gao.gov/docsearch/repandtest.html>

Source 2: Department of Justice, Office of Inspector General. Reports. Last accessed October 4, 2011. <http://www.justice.gov/oig/reports/index.htm>

Source 3: Lucy Dalglish, Executive Director, Reporters Committee for Freedom of the Press. Phone Interview on August 16, 2011.

Source 4: Professor Angela Campbell, Georgetown University professor of law; co-director, Institute for Public Representation. In-person interview on August 24, 2011.

Source 5: FOIA Representative at the National Security Archives. Phone interview on September 22, 2011.

100: Reports are free to all citizens, or available for the cost of photocopying. Reports can be obtained at little cost, such as by mail, or on-line.

75:

50: Reports impose a financial burden on citizens, journalists or NGOs. Retrieving reports may require a visit to a specific office, such as a regional or national capital.

25:

0: Retrieving reports imposes a major financial burden on citizens. Reports costs are prohibitive to most citizens, journalists, or NGOs trying to access this information.

5.2. Supreme Audit Institution

58. In law, is there a national supreme audit institution, auditor general or equivalent agency covering the entire public sector?

100

58a. In law, is there a national supreme audit institution, auditor general or equivalent agency covering the entire public sector?

Yes

No

Comments:

The Budget and Accounting Act, codified in Title 31 of the U.S. Code, established the Government Accountability Office (GAO). The GAO is the primary auditing and oversight entity, responsible for requesting and analyzing agency expenditures. The GAO operates under the direction of the comptroller general and conducts performance and financial audits of executive agency programs at the request of Congress. Specifically, the GAO audits agency programs to determine whether federal funds are being spent efficiently and effectively; investigates allegations of illegal and improper activities; reports on how well government programs and policies are meeting their objectives; performs policy analyses and outlines options for congressional consideration; and issues legal decisions and opinions, such as bid protest rulings and reports on agency rules. With the consent of the comptroller general, executive agencies may refuse an audit by the GAO. Sometimes the GAO will initiate research under the authority of the comptroller general. The comptroller general is appointed to a 15-year term by the president from a slate of candidates Congress proposes and provides macro-level reports with budget recommendations to the president and Congress.

The GAO is subject to peer review audits.

References:

Law: 31 U.S.C. §§ 3501-3567. Accounting and Collecting. http://www.law.cornell.edu/uscode/usc_sup_01_31_08_III_10_35.html

Yes: A YES score is earned if there is a specific agency whose primary mandate is to audit and track the movement of money through the government. This agency should be specifically charged to investigate and document the misuse of funds. A system of agencies located in each department is equivalent.

No: A NO score is earned if no such agency exists, or that function is a secondary concern of a larger body, such as the executive.

59. Is the supreme audit institution effective?

88

59a. In law, the supreme audit institution is protected from political interference.

Yes | No

Comments:
The supreme audit institution, the Government Accountability Office (GAO), does not have formal organizational independence from the government. The agency is a subordinate part of the legislature that is also subject to executive oversight.

The Government Accountability Office is a legislative entity under the direction of the comptroller general. The comptroller general is appointed to a 15-year term by the president from a slate of candidates Congress proposes and provides macro-level reports with budget recommendations to the president and Congress. At the request of Congress, the GAO conducts performance and financial audits of executive agency programs. Sometimes the GAO will initiate its own investigations. With the consent of the comptroller general, executive agencies may refuse to be audited.

Note that although the entity is not formally independent from other branches of government, in practice the GAO is subject to reasonable checks and balances and is staffed by nonpartisan employees. The GAO is highly respected for its accurate and impartial work.

References:
Law: 31 U.S.C. §§ 3501-3567. Accounting and Collecting. http://www.law.cornell.edu/uscode/usc_sup_01_31_08_III_10_35.html

Source 1: Government Accountability Office. About. Last accessed October 7, 2011. <http://www.gao.gov/about/index.html>

Yes: A YES score is earned only if the agency has some formal organizational independence from the government. A YES score is earned even if the entity is legally separate but in practice staffed by partisans.

No: A NO score is earned if the agency is a subordinate part of any government ministry or agency, such as the Department of Interior or the Justice Department.

59b. In practice, the head of the audit agency is protected from removal without relevant justification.

100 | 75 | 50 | 25 | 0

Comments:
Comptrollers general are appointed for one nonrenewable 15-year term. The comptroller general may not be removed by the president. Only Congress can remove the comptroller general through impeachment or joint resolution for limited reasons. No comptroller general has ever been removed.

References:

Source 1: Government Accountability Office, "How the Comptroller General is Selected." Last accessed October 6, 2011. <http://www.gao.gov/cghome/cgprocess.html>

Source 2: Bowsher v. Synar, 626 F.Supp. 1374 (1986).

http://www.law.cornell.edu/supct/html/.../USSC_CR_0478_0714_ZS.html

100: The director of the agency serves a defined term and cannot be removed without a significant justification through a formal process, such as impeachment for abuse of power.

75:

50: The director of the agency serves a defined term, but can in some cases be removed through a combination of official or unofficial pressure.

25:

0: The director of the agency can be removed at the will of political leadership.

59c. In practice, the audit agency has a professional, full-time staff.

100 | 75 | 50 | 25 | 0

Comments:

The Government Accountability Office (GAO) is headquartered in Washington, with offices in 11 other cities, and employs approximately 3,300 people. Two-thirds of GAO employees work at the headquarters. GAO is professionally staffed by career employees who are expert economists, social scientists, accountants, public policy analysts, attorneys and computer experts, as well as specialists in fields ranging from foreign policy to health care.

References:

Source 1: Government Accountability Office. About. Last accessed October 7, 2011. <http://www.gao.gov/about/index.html>

100: The agency has staff sufficient to fulfill its basic mandate.

75:

50: The agency has limited staff that hinders its ability to fulfill its basic mandate.

25:

0: The agency has no staff, or a limited staff that is clearly unqualified to fulfill its mandate.

59d. In practice, audit agency appointments support the independence of the agency.

100 | 75 | 50 | 25 | 0

Comments:

The current comptroller general, Gene Dodaro, was confirmed in December 2010. Dodaro, like all comptrollers general, was selected on the basis of professional criteria. He is the first career civil servant to be appointed to the post, having risen through the ranks from an entry-level auditing job that he took at the GAO in 1973. He upholds the agency's reputation for being nonpartisan and fact-based.

References:

Source 1: Lisa Rein, The Washington Post, "Conversations: Gene Dodaro, U.S. Comptroller General," December 29, 2010. <http://www.washingtonpost.com/wp-dyn/content/article/2010/12/29/AR2010122903967.html>

100: Appointments to the agency are made based on professional qualifications. Individuals appointed are free of conflicts of interest due to personal loyalties, family connections or other biases. Individuals appointed usually do not have clear political party affiliations.

75:

50: Appointments are usually based on professional qualifications. Individuals appointed may have clear party loyalties.

25:

0: Appointments are often based on political considerations. Individuals appointed often have conflicts of interest due to personal loyalties, family connections or other biases. Individuals appointed often have clear party loyalties.

59e. In practice, the audit agency receives regular funding.

100 | 75 | 50 | 25 | 0

Comments:

The Government Accountability Office (GAO) receives regular funding that does not deviate greatly with changes in political party administrations. The GAO's current fiscal year 2011 operates with funding that equals the operating budget of fiscal year 2010: \$556.8 million. Its budget request for fiscal year 2012 is the same. The GAO maintains that if its funding is reduced below the requested level, it would need to reduce staff capacity, which would increase delays in responding to congressional requests, limit its ability to provide timely responses to support congressional oversight and reduce the number of requests that it could complete.

Currently (October 2011), the GAO stands to lose up to \$50 million in funding for the fiscal year 2012 budget. This would force widespread layoffs and the closure of its regional offices. However, the budget cuts GAO faces are not unusual because all government entities face cuts due to the severe national debt.

References:

Source 1: Ed O'Keefe, The Washington Post, "GAO Faces Stiff Budget Cuts," October 3, 2011. http://www.washingtonpost.com/politics/gao-faces-stiff-budget-cuts/2011/10/03/gIQAfPHJL_story.html

Source 2: Government Accountability Office, GAO-11-453T: "Fiscal Year 2012 Budget Request," March 11, 2011. <http://www.gao.gov/products/GAO-11-453T>

100: The agency has a predictable source of funding that is fairly consistent from year to year. Political considerations are not a major factor in determining agency funding.

75:

50: The agency has a regular source of funding, but may be pressured by cuts, or threats of cuts to the agency budget. Political considerations have an effect on agency funding.

25:

0: Funding source is unreliable. Funding may be removed arbitrarily or as retaliation for agency actions.

59f. In practice, the audit agency makes regular public reports.

100 | 75 | 50 | 25 | 0

Comments:

The Government Accountability Office (GAO) and the comptroller general make public, timely reports to the legislature. The GAO is highly regarded for producing accurate, impartial reports. The reports also are available to the public through a free, online searchable database. GAO also informs the public through daily email and Twitter updates (citizens must subscribe). GAO reports also receive considerable press attention in major newspapers.

References:

Source 1: Government Accountability Office, "Reports and Testimonies." Last accessed October 6, 2011. <http://www.gao.gov/browse/date/week>

Source 2: Lisa Rein, The Washington Post, "Conversations: Gene Dodaro, U.S. Comptroller General," December 29, 2010. <http://www.washingtonpost.com/wp-dyn/content/article/2010/12/29/AR2010122903967.html>

100: The agency makes regular, publicly available, substantial reports to the legislature and/or to the public directly outlining the full scope of its work.

75:

50: The agency makes publicly available reports to the legislature and/or to the public directly that are sometimes delayed or incomplete.

25:

0: The agency makes no reports of its activities, or makes reports that are consistently out of date, unavailable to the public, or insubstantial.

59g. In practice, the government acts on the findings of the audit agency.

100 | 75 | 50 | 25 | 0

Comments:

Almost all GAO reports include recommendations whose implementation is tracked in a very methodical way. The GAO has no authority to enforce the recommendations made in its reports. The reports are passed onto the agencies that were audited. Agencies add their comments to the audit, which is then given to Congress. Congress will direct the target agency or agencies on the necessary next steps. The agency must act on GAO's recommendations and submit a follow-up report to the GAO 60 days after the initial study was complete. Innumerable agencies use GAO recommendations as benchmarks for — and indicators of — agency improvements. The GAO will review the agency's actions and remove pending recommendations as they are completed.

References:

Source 1: Government Accountability Office, "Reports and Testimonies." Last accessed October 6, 2011. <http://www.gao.gov/browse/date/week>

Source 2: Lisa Rein, The Washington Post, "Conversations: Gene Dodaro, U.S. Comptroller General," December 29, 2010. <http://www.washingtonpost.com/wp-dyn/content/article/2010/12/29/AR2010122903967.html>

Source 3: Gregory Korte, USA Today, "GAO Provides Lawmakers with 'Road Map' for Cutbacks," March 4, 2011. http://www.usatoday.com/news/washington/2011-03-04-budget04_ST_N.htm

Source 4: U.S. Food and Drug Administration, "Government Accountability Office (GAO) Recommendations Update for 2011." Last accessed October 6, 2011. <http://www.accessdata.fda.gov/FDATrack/track-proj?program=oc-administrative&id=OC-Admin-OPPB-GAO-Recommendations-Update-for-2011>

100: Audit agency reports are taken seriously, with negative findings drawing prompt corrective action.

75:

50: In most cases, audit agency reports are acted on, though some exceptions may occur for politically sensitive issues, or particularly resistant agencies.

25:

0: Audit reports are often ignored, or given superficial attention. Audit reports do not lead to policy changes.

59h. In practice, the audit agency is able to initiate its own investigations.

100 | 75 | 50 | 25 | 0

Comments:

The Government Accountability Office is able to initiate its own investigations in addition to the audits it conducts at the request of Congress. Some audits must be expedient to provide timely information to the legislature. For all audit reviews, the GAO controls the methodology and pace of its investigations. Each report outlines why and by what methodology GAO conducted an audit.

In addition to its issue-oriented analyst teams, the GAO has a strategic issues team that identifies issues and sets its agenda, focusing on comprehensive reform at a macro level.

References:

Source 1: Government Accountability Office, "Strategic Issues Team." Last accessed October 6, 2011. <http://gao.gov/careers/strategicissues.html>

Source 2: Government Accountability Office, GAO-11-772R: "Department of State Overseas Comparability Pay," June 30, 2011. <http://www.gao.gov/new.items/d11772r.pdf>

Source 3: Government Accountability Office, "About GAO Reports." Last accessed October 6, 2011. <http://gao.gov/about/products/about-gao-reports.html>

100: The supreme audit institution can control the timing and pace of its investigations without any input from the executive or legislature.

75:

50: The supreme audit institution can generally decide what to investigate, and when, but is subject to pressure from the executive or legislature on politically sensitive issues.

25:

0: The supreme audit institution must rely on approval from the executive or legislature before initiating investigations. Politically sensitive investigations are almost impossible to move forward on.

60. Can citizens access reports of the supreme audit institution?

92

60a. In law, citizens can access reports of the audit agency.

Yes | No

Comments:

GAO is not subject to FOIA requests, but Title 4, Section 81, of the Federal Code of Regulations details public reporting requirements. It includes sections on records exempt from disclosure, fees and charges and a public reading facility.

GAO maintains public archives of its reports issued since 1971 on its website. All published reports, testimonies, correspondence and special publications are included, as are some products issued as far back as 1922, although that part of the collection is not comprehensive. All unclassified GAO reports are available to the public. However, congressional requesters of GAO work are allowed to restrict reports for up to 30 days before public release. This restriction can sometimes mean that the public release date of the report is up to 30 days after the publication date. Products that are restricted or classified are not included.

References:

Federal Regulation: 4 C.F.R. §81. <http://www.gao.gov/about/publicrecords/policy.html>

Source 1: Government Accountability Office, "About GAO Reports." Last accessed October 6, 2011. <http://gao.gov/about/products/about-gao-reports.html>

Source 2: <http://www.gao.gov/about/publicrecords/4cfr81.6.htm>

Yes: A YES score is earned if all supreme auditor reports are available to the general public.

No: A NO score is earned if any auditor reports are not publicly available. This may include reports made exclusively to the legislature or the executive, which those bodies may choose not to distribute.

60b. In practice, citizens can access audit reports within a reasonable time period.

100 | 75 | 50 | 25 | 0

Comments:

All unclassified GAO reports are available to the public within a reasonable time period. However, congressional requesters of GAO work are allowed to restrict reports for up to 30 days before public release. This restriction can sometimes mean that the public release date of the report is up to 30 days after the publication date. Audits that are restricted or classified are not included.

References:

Federal Regulation: 4 C.F.R. §81. <http://www.gao.gov/about/publicrecords/policy.html>

Source 1: Government Accountability Office, "About GAO Reports." Last accessed October 6, 2011. <http://gao.gov/about/products/about-gao-reports.html>

Source 2: <http://www.gao.gov/about/publicrecords/4cfr81.6.htm>

100: Reports are available on-line, or records can be obtained within two days. Reports are uniformly available; there are no delays for politically sensitive information.

75:

50: Reports take around two weeks to obtain. Some delays may be experienced.

25:

0: Reports take more than a month to acquire. In some cases, most reports may be available sooner, but there may be persistent delays in obtaining politically sensitive records.

60c. In practice, citizens can access the audit reports at a reasonable cost.

100 | 75 | 50 | 25 | 0

Comments:

There is no cost for records that take less than an hour to retrieve and are less than 50 pages of photocopying. Beyond that, copies are 20 cents a page, and authenticity certification is \$10. Manual searches by office personnel cost \$12, \$25 or \$45 per hour, depending on the individual. Media entities and education or noncommercial scientific institutions pay only the cost to copy, unless such a request requires extraordinary search or review. Waivers or fee reductions are available from the chief quality officer if the records are in the interest of the public.

Requesters seeking records for commercial use will be charged for document duplication, search and review costs.

References:

Federal Regulation: 4 C.F.R. §81.7. Fees and Charges. <http://www.gao.gov/about/publicrecords/4cfr81.7.htm>

Source 1: Government Accountability Office, "About GAO Reports." Last accessed October 6, 2011. <http://gao.gov/about/products/about-gao-reports.html>

Source 2: <http://www.gao.gov/about/publicrecords/4cfr81.6.htm>

100: Reports are free to all citizens, or available for the cost of photocopying. Reports can be obtained at little cost, such as by mail, or on-line.

75:

50: Reports impose a financial burden on citizens, journalists or NGOs. Retrieving reports may require a visit to a specific office, such as a regional or national capital.

25:

0: Retrieving reports imposes a major financial burden on citizens. Report costs are prohibitive to most citizens, journalists, or NGOs trying to access this information.

93
5.3. Taxes and Customs: Fairness and Capacity

61. In law, is there a national tax collection agency?

100

61a. In law, is there a national tax collection agency?

Yes

No

Comments:

The Internal Revenue Service is a bureau of the Department of the Treasury whose mission is to help American taxpayers understand and meet their tax responsibilities and to enforce the law with integrity and fairness to all.

References:

Law: 26 U.S.C. § 7801. Internal Revenue Code. http://www.law.cornell.edu/uscode/26/usc_sec_26_00007801---000-.html

Source 1: The Internal Revenue Service. <http://www.irs.gov/irs/article/0,,id=98141,00.html>

Yes: A YES score is earned if there is a national agency formally mandated to collect taxes.

No: A NO score is earned if that function is spread over several agencies, or does not exist. A NO score is earned if national government ministries can collect taxes independently.

62. Is the tax collection agency effective?

62a. In practice, the tax collection agency has a professional, full-time staff.

100 | 75 | 50 | 25 | 0

Comments:

The IRS is severely understaffed. A report by the Treasury's inspector general for tax administration found that despite 1,515 new employees, the IRS still does not have the staff needed to collect the nation's taxes. Due to attrition and workload, the new hires resulted in a net gain of just 580 revenue officers by the end of fiscal 2010.

The report cited poor performance due to the insufficient staff. For instance, the percentage of delinquent accounts closed has steadily decreased because of increasing inventory. The report concludes that there is more than enough inventory to justify staffing increases. Unfortunately, in the IRS — and the U.S. federal agency system — staff increases are based on budget, not need.

References:

Source 1: Boston Globe, "IRS is Understaffed, Inspector Says," June 07, 2011. http://articles.boston.com/2011-06-07/business/29630279_1_revenue-officers-irs-official-irs-commissioner-douglas-shulman

Source 2: Treasury Inspector General for Tax Administration, Challenges Remain to Balance Revenue Officer Staffing With Attrition and Workload Demands," May 6, 2011. <http://www.treasury.gov/tigta/auditreports/2011reports/201130039fr.pdf>

Source 3: Steven Sloan, "IRS Hiring Binge Isn't Enough to Stop Tax Cheats, Watchdog Says," June 6, 2011. <http://www.bloomberg.com/news/2011-06-06/irs-hiring-binge-isn-t-enough-to-stop-tax-cheats-watchdog-says.html>

Source 4: Corey Boles, The Wall Street Journal, "When Spending Cuts Raise the Deficit," March 31, 2011. <http://blogs.wsj.com/economics/2011/03/31/when-spending-cuts-raise-the-deficit/>

100: The agency has staff sufficient to fulfill its basic mandate.

75:

50: The agency has limited staff that hinders its ability to fulfill its basic mandate.

25:

0: The agency has no staff, or a limited staff that is clearly unqualified to fulfill its mandate.

62b. In practice, the tax agency receives regular funding.

100 | 75 | 50 | 25 | 0

Comments:

In practice, the IRS receives regular funding that is not subject to political will. However, like virtually all federal agencies, the IRS faces steep budget cuts due to the poor economic climate.

The IRS budget in fiscal 2010 was just over \$12 billion. While fiscal 2010 ended last Sept. 30, it was still the basis for the federal government's budget of fiscal year 2011 because Congress failed to pass a budget for the 2011 fiscal year.

References:

Source 1: Corey Boles, The Wall Street Journal, "When Spending Cuts Raise the Deficit," March 31, 2011. <http://blogs.wsj.com/economics/2011/03/31/when-spending-cuts-raise-the-deficit/>

100: The agency has a predictable source of funding that is fairly consistent from year to year. Political considerations are not a major factor in determining agency funding.

75:

50: The agency has a regular source of funding, but may be pressured by cuts, or threats of cuts to the agency budget. Political considerations have an effect on agency funding.

25:

0: Funding source is unreliable. Funding may be removed arbitrarily or as retaliation for agency actions.

63. In practice, are tax laws enforced uniformly and without discrimination?

50

63a. In practice, are tax laws enforced uniformly and without discrimination?

100 | 75 | 50 | 25 | 0

Comments:

Tax laws are generally enforced consistently, but some exceptions exist.

There is a history of high-income adults and some major corporations occasionally evading tax law. Often the IRS' non-enforcement is because Americans use foreign banks as a way to hide money. The Financial Secrecy Index 2011 report ranked the United States as fifth because of moderate secrecy and weak laws to prevent the U.S. from being a tax haven. In 2007, for example, UBS bank blew the whistle on its Swiss branch, which maintained around 17,000 undisclosed accounts for U.S. citizens. Although it's still a problem, recently there have been improvements in enforcing tax laws against offshore tax evasion. A report in spring 2011 stated that prosecutions of offshore tax evasion rose 25 percent over the past 10 years.

But sometimes the non-enforcement is because of agency incompetency. In one instance, the IRS did not stop "billions of improper tax cuts" that affected low-income families. An audit by the Treasury Department's inspector general for tax administration raised doubts as to the IRS' ability to process and enforce claims for homeowner credits.

References:

Source 1: Michael Hudson, Center for Public Integrity iWatch, "As IRS Crusades Against Americans Hiding Money Offshore, Latin American Tax Cheats Flock to U.S. Banks," May 18, 2011. <http://www.iwatchnews.org/2011/05/18/4638/irs-crusades-against-americans-hiding-money-offshore-latin-american-tax-cheats-flock>

Source 2: Charles Lewis and Bill Allison, "The Cheating of America: How Tax Avoidance and Evasion by the Super Rich Are Costing the Country Billions — and What You Can Do About It." Published by Perennial (2001).

Source 3: Tax Justice Network, "Financial Secrecy Index 2011, Report on USA." October 4, 2011. <http://www.financialsecrecyindex.com/2011results.html>

Source 4: Stephen Ohlemacher, ABC News, "IG: IRS Not Stopping Billions (in) Improper Tax Credits," February 10, 2011. <http://abcnews.go.com/US/wireStory?id=12878593>

Source 5: Kenneth R. Harney, Los Angeles Times, "Audit Raises Questions About IRS' Ability to Track Home Buyer Tax Credits," September 19, 2010. <http://articles.latimes.com/2010/sep/19/business/la-fi-harney-20100919>

Source 6: Kevin McCoy, USA Today, "Prosecutions of Tax Evaders Up 25%," April 17, 2011. <http://www.usatoday.com/story/money/perfi/taxes/2011-04-17-Prosecutions-of-tax-evaders-up.htm>

Source 7: Lynnley Browning, The New York Times, "HSBC Is Said to Be the Focus of a Tax-Evasion Investigation," January 26 2011. <http://www.nytimes.com/2011/01/27/business/global/27hsbc.html>

100: Tax laws (which may be economically unfair as written) are enforced consistently for all citizens. No general group of citizens is more or less likely to evade tax law than another.

75:

50: Tax laws are generally enforced consistently, but some exceptions exist. For example, some groups may occasionally evade tax law. Some arbitrary and discriminatory tax rules exist.

25:

0: Tax law is unequally applied. Some groups of citizens are consistently more or less likely to evade tax law than others. Tax regulations are, as a rule, written to be discriminatory and/or arbitrary.

64. In law, is there a national customs and excise agency?

100

64a. In law, is there a national customs and excise agency?

Yes

No

Comments:

U.S. Customs and Border Protection (CBP) is a federal law enforcement agency of the U.S. Department of Homeland Security. It regulates and facilitates international trade, collects import duties and enforces U.S. regulations on trade, customs and immigration. It is the largest law enforcement agency in the U.S.

Producers and retailers remit excise taxes to the Internal Revenue Service (IRS), a division of the U.S. Department of the Treasury. Other federal agencies receive and enforce payment of specific excise taxes. For example, the Bureau of Alcohol, Tobacco, Firearms and Explosives (ATF), a U.S. Department of Justice (DOJ) division, enforces payment of federal excise taxes on firearms, explosives, alcohol and tobacco products.

References:

Law: 19 U.S.C. Customs Duties. http://www.law.cornell.edu/uscode/html/uscode19/usc_sup_01_19.html

Law: Customs Modernization Act of 1993. <http://www.gpo.gov/fdsys/pkg/FR-2011-06-13/html/2011-14536.htm>

Yes: A YES score is earned if there is an agency formally mandated to collect excises and inspect customs.

No: A NO score is earned if that function is spread over several agencies, or does not exist.

65. Is the customs and excise agency effective?

100

65a. In practice, the customs and excise agency has a professional, full-time staff.

100

75

50

25

0

Comments:

The U.S. agency charged with customs and excise functions has a professional, full-time staff. The Customs and Border Protection Agency is better staffed now than at any time in its 86-year history. In addition to the 58,000 Border Patrol employees, CBP includes more than 20,600 officers at ports of entry.

References:

Source 1: Customs and Border Patrol, "Securing America's Borders: CBP Fiscal Year 2010 in Review Fact Sheet," http://www.cbp.gov/xp/cgov/newsroom/fact_sheets/cbp_overview/fy2010_factsheet.xml

100: The agency has staff sufficient to fulfill its basic mandate.

75:

50: The agency has limited staff that hinders its ability to fulfill its basic mandate.

25:

0: The agency has no staff, or a limited staff that is clearly unqualified to fulfill its mandate.

65b. In practice, the customs and excise agency receives regular funding.

100 | 75 | 50 | 25 | 0

Comments:

The Customs and Border Protection agency, a sub-agency of the Department of Homeland Security, is adequately funded. The total budget authority for fiscal year 2011 was approximately \$11.1 billion. This did not differ substantially from fiscal year 2010 (\$11.4 billion) or fiscal year 2009 (\$11.9 billion). Although exact funding changes in response to different administration priorities, major cuts that would threaten its existence are not a concern.

References:

Department of Homeland Security, "Budget-in-Brief: Fiscal Year 2011," http://www.dhs.gov/xlibrary/assets/budget_bib_fy2011.pdf at page 51.

100: The agency has a predictable source of funding that is fairly consistent from year to year. Political considerations are not a major factor in determining agency funding.

75:

50: The agency has a regular source of funding, but may be pressured by cuts, or threats of cuts to the agency budget. Political considerations have an effect on agency funding.

25:

0: Funding source is unreliable. Funding may be removed arbitrarily or as retaliation for agency actions.

66. In practice, are customs and excise laws enforced uniformly and without discrimination?

75

66a. In practice, are customs and excise laws enforced uniformly and without discrimination?

100 | 75 | 50 | 25 | 0

Comments:

Generally, regulations on import taxes and inspection are applied fairly in the United States.

However, GAO and press reports show U.S. Customs and Border Protection officials have problems with enforcement. Forty-four percent of Homeland Security Department internal investigations focused on Customs and Border Protection agents assisting in illegal immigration and drug trafficking, called instances of "mission-compromising corruption." For example, Customs and Border Protection agent Luis Enrique Ramirez pleaded guilty to drug trafficking, human smuggling and bribery. Ramirez confessed to helping a Mexican drug cartel smuggle more than 26 pounds of cocaine into the United States, and court records show he accepted at least \$800,000 in bribes.

The Government Accountability Office recently issued several reports on increased efforts to improve Customs and Border Patrol enforcement of drug smuggling and money laundering. One report stated that a range of tobacco product tax evasion schemes enable profitable illicit trade. Schemes can range from individual consumers purchasing tax-free cigarettes from Internet websites, to larger-scale interstate trafficking of tobacco products, to smuggling cigarettes into the country by criminal organizations. For example, a California distributor purchased approximately \$1.4 million in tobacco products from an out-of state distributor, who disguised the shipments using falsified documents and black plastic wrapping. The California distributor then sold the products to customers and failed to pay state excise taxes. In another recent case, a criminal organization attempted to conceal two containers of counterfeit cigarettes and pass them through Customs at the Los Angeles/Long Beach port by declaring them as toys and plastic goods. A separate GAO report found that “challenges exist” for the federal government to stem cross-border currency smuggling, where travelers cross international borders without declaring large amounts of cash.

Notably, non-enforcement stems equally from the massive scope, organization and complexity of the problem and federal law enforcement impropriety (corrupt officers, inconsistent application or political will).

References:

Source 1: Government Accountability Office, Testimony of Director of Homeland Security and Security Issues Richard M. Stana, “Moving Illegal Proceeds: Opportunities Exist for Strengthening the Federal Government’s Efforts to Stem Cross-Border Currency Smuggling,” March 9, 2011. <http://www.gao.gov/new.items/d11407t.pdf>

Source 2: Government Accountability Office, Report to Congressional Committee, “Illicit Tobacco: Various Schemes Are Used to Evade Taxes and Fees,” March 2011. <http://www.gao.gov/new.items/d11313.pdf>

Source 3: Government Accountability Office, Report to Congressional Committee, “Moving Illegal Proceeds: Challenges Exist in the Federal Government’s Effort to Stem Cross-Border Currency Smuggling,” October 2010. <http://www.gao.gov/new.items/d1173.pdf>

Source 4: Government Accountability Office, Testimony of Richard M. Stana, director Homeland Security and Justice Issues, “Alien Smuggling: DHS Could Better Address Alien Smuggling along the Southwest Border by Leveraging Investigative Resources and Measuring Program Performance,” July 2010. <http://www.gao.gov/new.items/d10919t.pdf>

Source 5: Tom Ramstack, All Headline News, “Customs Agency Could Lose Authority to Investigate its Own Officers,” June 9, 2011. <http://www.allheadlinenews.com/articles/90051041?Customs%20Agency%20Could%20Lose%20Authority%20to%20Investigate%20its%20Own%20Officers>

Source 6: Ceci Connolly, The Washington Post, “At Border, Corruption of U.S. Officials Leaves an Open Door For Drug Cartels,” September 13, 2010. http://www.dallasnews.com/news/state/headlines/20100913-At-border-corruption-of-U-1678_ece

100: Customs and excise laws (which may be economically unfair as written) are enforced consistently for all citizens. No general group of citizens is more or less likely to evade customs than another.

75:

50: Customs and excise laws are generally enforced consistently, but some exceptions exist. For example, some groups may occasionally evade customs requirements.

25:

0: Customs and excise laws are unequally applied. Some groups of citizens are consistently more or less likely to evade customs and excise laws than others.

5.4. Oversight of State-Owned Enterprises

67. In law, is there an agency, series of agencies, or equivalent mechanism overseeing state-owned companies?

100

67a. In law, is there an agency, series of agencies, or equivalent mechanism overseeing state-owned companies?

Yes | No

Comments:

Few companies in the U.S. are state-owned. The U.S. owns the National Railroad Passenger Corporation (Amtrak) and the U.S. Postal Service. Each has an Office of Inspector General that conducts independent audits and investigations.

The Inspector General Act of 1978, Title 5, Appendix 3, of the U.S. Code, as amended in 1988, established the Office of Inspector General for Amtrak and the U.S. Postal Service to consolidate existing investigative and auditing resources into independent organizations headed by an inspector general to promote economy, efficiency and effectiveness; and to prevent and detect fraud, waste and abuse. Subsequently, the Inspector General Reform Act of 2008 (Public Law 110-409) amended and strengthened the authority of the offices of the Inspectors General.

References:

Law: The Inspector General Act of 1978, 5 U.S.C. Appendix 3 (as amended in 1988). http://www.law.cornell.edu/uscode/html/uscode05a/usc_sec_05a_01000003--000-.html

Source 1: <http://www.amtrakoig.gov/>

Source 2: <http://www.uspsoig.gov/history.htm>

Yes: A YES score is earned if there is an agency, series of agencies, or equivalent mechanism tasked with overseeing the conduct and performance of state-owned companies on behalf of the public. A YES score can be earned if several government agencies or ministries oversee different state-owned enterprises. State-owned companies are defined as companies owned in whole or in part by the government.

No: A NO score is earned if this function does not exist, or if some state-owned companies are free from government oversight.

68. Is the agency, series of agencies, or equivalent mechanism overseeing state-owned companies effective?

95

68a. In law, the agency, series of agencies, or equivalent mechanism overseeing state-owned companies is protected from political interference.

Yes | No

Comments:

The U.S. Postal Service inspector general is appointed by the nine appointed governors of the Postal Service. The inspector general serves a term of seven years.

The head of Amtrak appoints and removes its inspectors general. For example, the last inspector general was appointed after a selection committee and the Council of Inspectors General on Integrity and Efficiency (CIGIE) worked with an executive search firm to review nearly 200 applicants.

Note that recently Amtrak's Office of Inspector General has been subject to political influence.

References:

Law: 5 U.S.C. Appendix 3 The Inspector General Act of 1978, as amended in 1988. http://www.law.cornell.edu/uscode/html/uscode05a/usc_sec_05a_01000003--000-.html

Source 1: U.S. Postal Service Office of Inspector General. <http://www.uspsoig.gov/faq.cfm?SECTION=GEN>

Source 2: News Release, Amtrak, "Amtrak Chairman Appoints New Inspector General." November 5, 2009. <http://www.amtrak.com/>

Source 3: Ed O'Keefe, The Washington Post, "Report: Amtrak Improperly Removed Its Watchdog," September 14, 2010. http://voices.washingtonpost.com/federal-eye/2010/09/amtrak_improperly_removed_its.html

Yes: A YES score is earned only if the agency, series of agencies, or equivalent mechanism has some formal operational independence from the government. A YES score is earned even if the entity is legally separate but in practice staffed by partisans.

No: A NO score is earned if the agency, series of agencies, or equivalent mechanism is a subordinate part of any government ministry or agency.

68b. In practice, the agency, series of agencies, or equivalent mechanism overseeing state-owned companies has a professional, full-time staff.

100 | 75 | 50 | 25 | 0

Comments:

Amtrak states that its Office of Inspector General has a staff of 30 employees and locations in Baltimore, Boston, Chicago, Los Angeles, New York, Philadelphia and Washington.

The U.S. Postal Service Office of Inspector General, an independent agency within the Postal Service under the general supervision of nine appointed governors, employs more than 1,100 auditors, investigators and professional support personnel stationed in more than 100 offices to meet the challenge of preserving this trust.

References:

Source 1: Amtrak Office of Inspector General, "Investigations." Last accessed September 26, 2011. <http://www.amtrakoig.gov/content/investigations>

Source 2: The U.S. Postal Service Office of the Inspector General, "About." Last accessed September 26, 2011. <http://www.uspsoig.gov/about.htm>

100: The agency, series of agencies, or equivalent mechanism has staff sufficient to fulfill its basic mandate.

75:

50: The agency, series of agencies, or equivalent mechanism has limited staff that hinders its ability to fulfill its basic mandate.

25:

0: The agency, series of agencies, or equivalent mechanism has no staff, or a limited staff that is clearly unqualified to fulfill its mandate.

68c. In practice, the agency, series of agencies, or equivalent mechanism overseeing state-owned companies receives regular funding.

100 | 75 | 50 | 25 | 0

Comments:

The U.S. Postal Service Office of Inspector General budget request for fiscal year 2011 (October 1, 2010, to September 30, 2011) remained the same from the previous year at \$244,397. The U.S. Postal Service is facing serious financial problems as mail service no longer generates revenue and the agency is required to provide health and retirement benefits for hundreds of thousands of current and former employees. With an \$8.5 billion loss for fiscal year 2010 and benefit costs totaling more than \$5 billion a year, the Postal Service has been driven to the brink of insolvency.

The budget for Amtrak's Office of Inspector General was unavailable and is not included in the overall Amtrak budget.

Both state-owned corporations face financial problems due to market viability, not political interference.

References:

Source 1: U.S. Postal Service Office of Inspector General, "Budget Fiscal Year 2011 Congressional Budget Document," February 2010. http://www.uspsaig.gov/OIG_Budget_FY2011.pdf

Source 2: James Cartledge, Post and Parcel, "Obama Budget to Address Major Financial Concerns of USPS," February 2, 2011. <http://postandparcel.info/36168/news/obama-budget-to-address-major-financial-concerns-of-usps/>

100: The agency, series of agencies, or equivalent mechanism has a predictable source of funding that is fairly consistent from year to year. Political considerations are not a major factor in determining agency funding.

75:

50: The agency, series of agencies, or equivalent mechanism has a regular source of funding, but may be pressured by cuts, or threats of cuts to the agency budget. Political considerations have an effect on agency funding.

25:

0: Funding source is unreliable. Funding may be removed arbitrarily or as retaliation for agency functions.

68d. In practice, when necessary, the agency, series of agencies, or equivalent mechanism overseeing state-owned companies independently initiates investigations.

100 | 75 | 50 | 25 | 0

Comments:

The U.S. Postal Service Office of Inspector General's mission is to maintain confidence in the postal system through independent audits and investigations. Its audits of postal programs and operations aim to determine whether the programs and operations are efficient and cost-effective. Investigations help prevent and detect fraud, waste and misconduct and have a deterrent effect on postal crimes. The agency prepares reports of its investigations and makes them available publicly in its virtual "reading room." For example, one report reviewed the Postal Service's excess physical space.

Amtrak's Office of Inspector General prepares reports of its investigations and audits and makes them available publicly in its virtual "reading room," as well. Its mission is to investigate procurement and contract fraud and serious misconduct by employees. It also prevents fraud by providing fraud awareness training and conducting proactive investigations.

The agencies do not track or make available the number of complaints received. Thus, it is difficult to assess how many of these investigations were independently initiated or initiated in response to complaints they received. The agencies cooperate with, and are subject to, investigations from other agencies such as the Department of Justice.

References:

Source 1: U.S. Postal Service Office of Inspector General, "Reading Room." Last accessed September 26, 2011. http://www.uspsaig.gov/reading_room.cfm

Source 2: U.S. Postal Service Office of Inspector General, Report No. DA-AR-11-009, "Nationwide Facility Optimization Audit Report," August 26, 2011. http://www.uspsaig.gov/foia_files/DA-AR-11-009.pdf

Source 3: Amtrak's Office of Inspector General, "Reading Room." Last accessed September 26, 2011. <http://www.amtrakaig.gov/reading-room>

100: When irregularities are discovered, the agency, series of agencies, or equivalent mechanism is aggressive in investigating and/or in cooperating with other investigative bodies.

75:

50: The agency, series of agencies, or equivalent mechanism starts investigations, but is limited in its effectiveness or in its cooperation with other investigative agencies. The agency, series of agencies, or equivalent mechanism may be slow to act, unwilling to take on politically powerful offenders, or occasionally unable to enforce its judgments.

25:

0: The agency, series of agencies, or equivalent mechanism does not effectively investigate financial irregularities or cooperate with other investigative agencies. The agency, series of agencies, or equivalent mechanism may start investigations but not complete them, or may fail to detect offenders. The agency may be partisan in its application of power.

68e. In practice, when necessary, the agency, series of agencies, or equivalent mechanism overseeing state-owned companies imposes penalties on offenders.

100 | 75 | 50 | 25 | 0

Comments:

The offices of Inspector General overseeing state-owned companies initiated and concluded investigations that imposed penalties on offenders. They worked in conjunction with the Department of Justice.

The U.S. Postal Service Office of Inspector General keeps statistics on investigative activity. For fiscal year 2010, it completed 3,983 investigations, 1,662 arrests/information/indictments, 935 convictions and 2,477 administrative actions. Some \$227 million in costs were avoided, and \$48.6 million in fines, restitutions and recoveries to the Postal Service were recuperated.

Amtrak's Office of Inspector General also keeps statistics on investigative activity. For the first half of fiscal year 2011 (October 1, 2010, to March 31, 2011), it recuperated more than \$116,000 in fines, restitution and cost savings. The Audit and Evaluation Units issued seven reports that identified over \$17 million in questioned costs from schemes involving health care fraud, theft, contracts compliance, and employee attendance fraud resulted in two convictions and one indictment. The same report discussed strategic plans for future independent audits and reviews, as well as ongoing investigations.

References:

Source 1: U.S. Postal Service Office of Inspector General. Investigations. Last accessed October 7, 2011. http://www.uspsoig.gov/inv_sid.htm

Source 2: Amtrak National Railroad Passenger Corporation Office of Inspector General, "Semiannual Report to the United States Congress: Report #43 October 1, 2010–March 31, 2011," June 2011. http://www.amtrakoig.gov/sites/default/files/reports/for_web_june_14_amtrak_ii_oig_v22g_lr.pdf

100: When rules violations are discovered, the agency, series of agencies, or equivalent mechanism is aggressive in penalizing offenders and/or in cooperating with other agencies that impose penalties.

75:

50: The agency, series of agencies, or equivalent mechanism enforces rules, but is limited in its effectiveness or reluctant to cooperate with other agencies. The agency, series of agencies, or equivalent mechanism may be slow to act, unwilling to take on politically powerful offenders, or occasionally unable to enforce its judgments.

25:

0: The agency, series of agencies, or equivalent mechanism does not effectively penalize offenders or refuses to cooperate with other agencies that enforce penalties. The agency, series of agencies, or equivalent mechanism may make judgments but not enforce them, or may fail to make reasonable judgments against offenders. The agency, series of agencies, or equivalent mechanism may be partisan in its application of power.

69. Can citizens access the financial records of state-owned companies?

100

69a. In law, citizens can access the financial records of state-owned companies.

Yes | No

Comments:

The 2010 Consolidated Appropriations Act, Division A, mandated that the Department of Transportation (DOT), including Amtrak, disclose financial information.

The U.S. Postal Service is required to file financial reports with the Postal Regulatory Commission (PRC) that provide information from its Securities and Exchange Commission annual reporting Forms 10-Q, 10-K and 8-K, including executive compensation, equity, subsidiaries and audited financial statements. The Postal Service also is required to report certain financial information concerning pension and post-retirement health obligations based on data provided by the Office of Personnel Management.

References:

Law Citation: Amtrak Consolidated Appropriations Act (2010). http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=110_cong_bills&docid=f:h2764enr.txt.pdf

Law: U.S. Postal Service Postal Accountability and Enhancement Act (2006). <http://blog.uspsoig.gov/?tag=postal-accountability-and-enhancement-act>

Yes: A YES score is earned if the financial information of all state-owned companies is required by law to be public. State-owned companies are defined as companies owned in whole or in part by the government.

No: A NO score is earned if any category of state-owned company is exempt from this rule, or no such rules exist.

69b. In practice, the financial records of state-owned companies are regularly updated.

100 | 75 | 50 | 25 | 0

Comments:

As mandated by the fiscal year 2010 Consolidated Appropriations Act, the Department of Transportation (DOT) issued a semiannual report to the House and Senate Appropriations Committees on Amtrak's operational reforms and year-to-date financial performance.

The U.S. Postal Service Office of the Inspector General has quarterly reports on its auditing, investigative and security activities online in a searchable database.

References:

Source 1: Department of Transportation, Office of the Inspector General, "Library." Last accessed September 27, 2011. <http://www.oig.dot.gov/library-item/5577>

Source 2: U.S. Postal Service Office of the Inspector General, "Reading Room." Last accessed September 27, 2011. http://www.uspsoig.gov/reading_room.cfm

100: State-owned companies always publicly disclose financial data, which is generally accurate and up to date.

75:

50: State-owned companies disclose financial data, but it is flawed. Some companies may misstate financial data, file the information behind schedule, or not publicly disclose certain data.

25:

0: Financial data is not publicly available, or is consistently superficial or otherwise of no value.

69c. In practice, the financial records of state-owned companies are audited according to international accounting standards.

100 | 75 | 50 | 25 | 0

Comments:

Amtrak has an electronic reading room for public access and viewing of financial records.

The U.S. Postal Service Office of the Inspector General has quarterly reports on its auditing, investigative and security activities online in a public, searchable database.

References:

Source 1: Amtrak, "FOIA: Electronic Reading Room." Last Accessed September 27, 2011. <http://www.amtrak.com/servlet/ContentServer/Page/1241267362261/1241267362261>

Source 2: U.S. Postal Service Office of the Inspector General, "Reading Room." Last accessed September 27, 2011. http://www.uspsoig.gov/reading_room.cfm

100: Financial records of all state-owned companies are regularly audited by a trained third party auditor using accepted international standards.

75:

50: Financial records of state-owned companies are regularly audited, but exceptions may exist. Some companies may use flawed or deceptive accounting procedures, or some companies may be exempted from this requirement.

25:

0: State-owned companies are not audited, or the audits have no functional value. The auditors may collude with the companies in providing misleading or false information to the public.

69d. In practice, citizens can access the financial records of state-owned companies within a reasonable time period.

100 | 75 | 50 | 25 | 0

Comments:

Amtrak has an electronic reading room for ready public access and viewing of financial records.

The U.S. Postal Service Office of the Inspector General has quarterly reports readily available on its auditing, investigative and security activities online in a searchable database.

References:

Source 1: Amtrak, "FOIA: Electronic Reading Room." Last Accessed September 27, 2011. <http://www.amtrak.com/servlet/ContentServer/Page/1241267362261/1241267362261>

Source 2: U.S. Postal Service Office of the Inspector General, "Reading Room." Last accessed September 27, 2011. http://www.uspsoig.gov/reading_room.cfm

100: Records are available on-line, or records can be obtained within two days. Records are uniformly available; there are no delays for politically sensitive information.

75:

50: Records take around two weeks to obtain. Some delays may be experienced.

25:

0: Records take more than a month to acquire. In some cases, most records may be available sooner, but there may be persistent delays in obtaining politically sensitive records.

69e. In practice, citizens can access the financial records of state-owned companies at a reasonable cost.

100 | 75 | 50 | 25 | 0

Comments:

Amtrak has an electronic reading room for ready public access and viewing of financial records.

The U.S. Postal Service Office of the Inspector General has quarterly reports readily available on its auditing, investigative and security activities online in a searchable database.

References:

Source 1: Amtrak, "FOIA: Electronic Reading Room." Last Accessed September 27, 2011. <http://www.amtrak.com/servlet/ContentServer/Page/1241267362261/1241267362261>

Source 2: U.S. Postal Service Office of the Inspector General, "Reading Room." Last accessed September 27, 2011. http://www.uspsoig.gov/reading_room.cfm

100: Records are free to all citizens, or available for the cost of photocopying. Records can be obtained at little cost, such as by mail, or on-line.

75:

50: Records impose a financial burden on citizens, journalists or NGOs. Retrieving records may require a visit to a specific office, such as a regional or national capital.

25:

0: Retrieving records imposes a major financial burden on citizens. Records costs are prohibitive to most citizens, journalists, or NGOs trying to access this information.

98

5.5. Business Licensing and Regulation

70. Are business licenses available to all citizens?

100

70a. In law, anyone may apply for a business license.

Yes | No

Comments:

Licenses are primarily the domain of state and local entities, and they vary by industry, state and locality. However, federal licenses, which can range from a basic operating license to very specific permits, are needed if the business is involved in activities supervised and regulated by a federal agency, such as agriculture, alcohol, aviation, firearms, ammunition, explosives, marine transit, mining and drilling, nuclear energy, radio and television broadcasting, fish, wildlife, fisheries and transportation and logistics.

References:

Law: No law restricts citizens from applying for a business license.

Source 1: Small Business Association, "Obtaining Business Licenses and Permits." Last accessed September 27, 2011. <http://www.sba.gov/content/obtaining-business-licenses-permits>

Yes: A YES score is earned if no particular group or category of citizens is excluded from applying for a business license, when required. A YES score is also earned if basic business licenses are not required.

No: A NO score is earned if any group of citizens are categorically excluded from applying for a business license, when required.

70b. In law, a complaint mechanism exists if a business license request is denied.

Yes | No

Comments:

State agencies administer and regulate business licenses. In the federal District of Columbia, the Office of Administrative Hearings is the administrative agency that has jurisdiction over appeals regarding denied business licenses. Each state has a similar administrative agency that hears complaints regarding business license denials.

References:

Law: Office of Administrative Hearings Establishment Act of 2001. <http://oah.dc.gov/oah/frames.asp?doc=/oah/lib/oah/pdf/about/oahact.pdf>

Yes: A YES score is earned if there is a formal process for appealing a rejected license.

No: A NO score is earned if no such mechanism exists.

70c. In practice, citizens can obtain any necessary business license (i.e. for a small import business) within a reasonable time period.

100 | 75 | 50 | 25 | 0

Comments:

The World Bank's 2011 report "Doing Business" ranked the U.S. fifth out of 183 countries. According to the report, there are only six procedures, which each take only one day to complete.

References:

Source: The World Bank Institute, "Doing Business 2011, Ease of Doing Business in United States," (2011). <http://www.doingbusiness.org/~media/tpdkm/doing%20business/documents/annual-reports/english/db11-fullreport.pdf> (see PDF page 4 / browser page 12)

100: Licenses are not required, or licenses can be obtained within roughly one week.

75:

50: Licensing is required and takes around one month. Some groups may be delayed up to a three months

25:

0: Licensing takes more than three months for most groups. Some groups may wait six months to one year to get necessary licenses.

70d. In practice, citizens can obtain any necessary business license (i.e. for a small import business) at a reasonable cost.

100 | 75 | 50 | 25 | 0

Comments:

Citizens can obtain necessary business licenses at a reasonable cost.

The World Bank report "Doing Business 2011, Ease of Doing Business in United States" ranked the U.S. fifth out of 183 countries. According to the report, there are six procedures, four of which are free. The other two procedures cost relatively modest fees of \$200 to 275 and \$400.

The Department of Consumer and Regulatory Affairs (DCRA) issues business licenses to federal district citizens. A basic business license application fee is \$77. An additional fee of \$27.50 must be paid per business activity, as defined by DCRA categories. Exact fees vary according to the business activity and its respective requirements.

References:

Source 1: The World Bank, "Doing Business 2011, Ease of Doing Business in United States." (2011). <http://www.doingbusiness.org/~media/fpdkm/doing%20business/documents/annual-reports/english/db11-fullreport.pdf> (See PDF page 4 / browser page 12)

Source 2: The Department of Consumer and Regulatory Affairs, "For Business: Apply For a Business License." Last accessed September 27, 2011. <http://dcra.dc.gov/DC/DCRA/For+Business/Apply+for+a+Business+License>

100: Licenses are not required, or licenses are free. Licenses can be obtained at little cost to the organization, such as by mail, or on-line.

75:

50: Licenses are required, and impose a financial burden on the organization. Licenses may require a visit to a specific office, such as a regional or national capital.

25:

0: Licenses are required, and impose a major financial burden on the organization. Licensing costs are prohibitive to the organization.

71. Are there transparent business regulatory requirements for basic health, environmental, and safety standards?

100

71a. In law, basic business regulatory requirements for meeting public health standards are transparent and publicly available.

Yes | No

Comments:

The Occupational Safety and Health Act is the primary federal law that governs occupational health and safety in the private sector and federal government in the United States. Its main goal is to ensure that employers provide employees with an environment free from recognized hazards, such as exposure to toxic chemicals, excessive noise levels, mechanical dangers, heat or cold stress or unsanitary conditions. Additional state regulations apply to businesses.

References:

Law: 29 U.S.C. §§ 651-678. Occupational Safety and Health Act of 1970, Occupational Safety and Health. http://www.osha.gov/pls/oshaweb/owasrch.search_form?p_doc_type=OSHACT&p_toc_level=0&p_keyvalue=&p_status=CURRENT

Federal Regulations: 29 CFR. http://www.osha.gov/pls/oshaweb/owasrch.search_form?p_doc_type=STANDARDS&p_toc_level=0&p_keyvalue

Yes: A YES score is earned if basic regulatory requirements for meeting public health standards are publicly accessible and transparent.

No: A NO score is earned if such requirements are not made public or are otherwise not transparent.

71b. In law, basic business regulatory requirements for meeting public environmental standards are transparent and publicly available.

Yes | No

Comments:

Basic business regulatory requirements for meeting public environmental standards are transparent and publicly available through official and unofficial sources online. The Environmental Protection Agency (EPA) provides access to laws and regulations on its website. Citizens can search the database by industry for relevant laws, regulations, compliance, enforcement and policy.

References:

Law: 42 U.S.C. §§ 4321 et seq. National Environmental Policy Act of 1969. http://www.law.cornell.edu/uscode/42/usc_sup_01_42_10_55.html

Law: 40 CFR. http://www.law.cornell.edu/uscode/usc_sup_01_42_10_55.html

Source 1: U.S. Environmental Protection Agency, "Laws and Regulations." <http://www.epa.gov/regulations/>

Yes: A YES score is earned if basic regulatory requirements for meeting public environmental standards are publicly accessible and transparent.

No: A NO score is earned if such requirements are not made public or are otherwise not transparent.

71c. In law, basic business regulatory requirements for meeting public safety standards are transparent and publicly available.

Yes | No

Comments:

The Occupational Safety and Health Administration, the primary federal agency governing occupational health and safety in the United States, is required to make basic business regulatory requirements for meeting public safety standards transparent and publicly available. They are readily available at no cost on the OSHA website.

References:

Law: 29 U.S.C. Occupational Safety and Health Act of 1970, Chapter 15. http://www.osha.gov/pls/oshaweb/owasrch.search_form?p_doc_type=OSHACT&p_toc_level=0&p_keyvalue=&p_status=CURRENT

Source 1: Occupational Safety and Health Administration. <http://www.osha.gov/>

Yes: A YES score is earned if basic regulatory requirements for meeting public safety standards are publicly accessible and transparent.

No: A NO score is earned if such requirements are not made public or are otherwise not transparent.

72. Does government effectively enforce basic health, environmental, and safety standards on businesses?

75

72a. In practice, business inspections by government officials to ensure public health standards are being met and are carried out in a uniform and even-handed manner.

100 | 75 | 50 | 25 | 0

Comments:

Occupational Safety and Health Administration (OSHA) inspections of businesses are generally effective and administered fairly, when the agency conducts them. However, time and resource constraints make it virtually impossible for OSHA to inspect, and thus ensure, that all businesses meet public health standards. State and local offices assist in investigations, but federally licensed businesses must be inspected by federal OSHA officers. Moreover, a recent request from the congressional Committee on Education and the Workforce for the Government Accountability Office (GAO) to conduct a review of OSHA's enforcement program suggests that OSHA should be better.

A Government Accountability Office report on agency hiring shows that inspections are conducted evenly across businesses that vary in size and revenue generated. It also shows that OSHA enforces the regulations when inspections yield violations. The GAO report, which focuses on federal agency contracting, also shows that OSHA conducted inspections and fined companies working in food services, engineering, security, manufacturing, construction, furniture, the automobile industry and more.

A fact sheet on investigations issued by OSHA readily acknowledges that "OSHA cannot inspect all 7 million workplaces it covers each year." The agency focuses inspection resources on the most hazardous workplaces in the following order of priority: imminent danger situations (death or serious physical harm); fatalities and catastrophes (death or hospitalization of three or more employees); complaints; referrals of hazard information from other agencies, individuals, organizations and the media; follow-ups; and planned or programmed investigations.

Penalties may range up to \$7,000 for each serious violation and up to \$70,000 for each willful or repeated violation. Penalties may be reduced based on an employer's good faith, inspection history and size of business. For serious violations, OSHA may reduce the proposed penalty based on the gravity of the alleged violation.

References:

Source 1: Government Accountability Office, Report to Congressional Requesters, "Assessments and Citations of Federal Labor Law Violations by Selected Federal Contractors," September 2010. <http://www.gao.gov/new.items/d101033.pdf>

Source 2: Occupational Health and Safety Administration, "Inspections Fact Sheet." Last accessed October 7, 2011. http://www.osha.gov/OshDoc/data_General_Facts/factsheet-inspections.pdf

Source 3: Occupational Safety and Health Administration. Stats. Last accessed October 7, 2011. <http://www.osha.gov/oshstats/index.html>

Source 4: Education and the Workforce Committee, Press Release, "Inspector General Reports OSHA Has Not Evaluated Its Enforcement Program," June 16, 2011. <http://edworkforce.house.gov/News/DocumentSingle.aspx?DocumentID=247110>

100: Business inspections by the government to ensure that public health standards are being met are designed and carried out in such a way as to ensure comprehensive compliance by all businesses with transparent regulatory requirements.

75:

50: Business inspections by the government to ensure public health standards are met are generally carried out in an even-handed way though exceptions exist. Bribes are occasionally paid to extract favorable treatment or expedited processing.

25:

0: Business inspections to ensure that public health standards are met are routinely carried out by government officials in an ad hoc, arbitrary fashion designed to extract extra payments from businesses in exchange for favorable treatment.

72b. In practice, business inspections by government officials to ensure public environmental standards are being met are carried out in a uniform and even-handed manner.

100 | 75 | 50 | 25 | 0

Comments:

Business inspections by the government to ensure public environmental standards are met are generally carried out in an even-handed way, though exceptions exist. The exceptions are due to extensive scope of the task, not improper activity such as accepting bribes or extracting favorable treatment.

The Environmental Protection Agency (EPA) visits businesses to gather information about whether the business is in compliance. Inspections generally include pre-inspection activities and on-site interviews, reviewing records and reports, taking photographs, collecting samples, and observing facility or site operations. Given the scope of the task, the EPA relies on compliance monitoring programs, compliance incentives and auditing to determine some of the businesses it inspects. The EPA also relies on tips/complaints from the public. In fiscal year 2010, the EPA conducted over 21,000 inspections and made 268 referrals to the civil enforcement division of the DOJ, of which 172 were filed in court, as well as pressed criminal charges against 289 offenders.

The EPA also ensures that federal government properties, nearly 900,000 buildings and structures and 41 million acres of land, are in compliance. In fiscal year 2010, the EPA concluded 52 enforcement actions against federal agencies and contractors at federal facilities for alleged violations of environmental laws, issuing nearly \$749,000 in penalties and requiring an estimated \$163 million in cleanup.

References:

Source 1: Environmental Protection Agency, Enforcement History and Compliance Online. http://www.epa-echo.gov/echo/compliance_report_rcra.html

Source 2: Environmental Protection Agency, Federal Government Compliance. <http://www.epa.gov/compliance/resources/reports/endofyear/eoy2010/fedfacilities.html>

100: Business inspections by the government to ensure that public environmental standards are being met are designed and carried out in such a way as to ensure comprehensive compliance by all businesses with transparent regulatory requirements.

75:

50: Business inspections by the government to ensure public environmental standards are met are generally carried out in an even-handed way though exceptions exist. Bribes are occasionally paid to extract favorable treatment or expedited processing.

25:

0: Business inspections to ensure that public environmental standards are met are routinely carried out by government officials in an ad hoc, arbitrary fashion designed to extract extra payments from businesses in exchange for favorable treatment.

72c. In practice, business inspections by government officials to ensure public safety standards are being met are carried out in a uniform and even-handed manner.

100 | 75 | 50 | 25 | 0

Comments:

Occupational Safety and Health Administration (OSHA) inspections of businesses are generally effective and administered fairly, when the agency conducts them. However, time and resource constraints make it virtually impossible for OSHA to inspect, and thus ensure, that all businesses meet public health standards. State and local offices assist in investigations, but federally licensed businesses must be inspected by federal OSHA officers. Moreover, a recent request from the congressional Committee on Education and the Workforce for the Government Accountability Office (GAO) to conduct a review of OSHA's enforcement program suggests that OSHA should be better. The Bureau of Labor Statistics provides accurate statistics on injuries, illnesses and fatalities.

A Government Accountability Office report on agency hiring shows that inspections are conducted evenly across businesses that vary in size and revenue generation. It also shows that OSHA enforces the regulations when inspections yield violations. The GAO report, which focuses on federal agency contracting, also shows that OSHA conducted inspections and fined companies working in food services, engineering, security, manufacturing, construction, furniture, automobile industry and more.

A fact sheet on investigations issued by OSHA readily acknowledges that "OSHA cannot inspect all 7 million workplaces it covers each year." The agency focuses inspection resources on the most hazardous workplaces in the following order of priority: imminent danger situations (death or serious physical harm); fatalities and catastrophes (death or hospitalization of three or more employees); complaints; referrals of hazard information from other agencies, individuals, organizations and the media; follow-ups; and planned or programmed investigations.

Penalties may range up to \$7,000 for each serious violation and up to \$70,000 for each willful or repeated violation. Penalties may be reduced based on an employer's good faith, inspection history and size of business. For serious violations, OSHA may also reduce the proposed penalty based on the gravity of the alleged violation.

References:

Source 1: Government Accountability Office, Report to Congressional Requesters, "Assessments and Citations of Federal Labor Law Violations by Selected Federal Contractors," September 2010. <http://www.gao.gov/new.items/d101033.pdf>

Source 2: Occupational Health and Safety Administration, "Inspections Fact Sheet." Last accessed October 7, 2011. http://www.osha.gov/OshDoc/data_General_Facts/factsheet-inspections.pdf

Source 3: Occupational Safety and Health Administration. Stats. Last accessed October 7, 2011. <http://www.osha.gov/oshstats/index.html>

Source 4: Education and the Workforce Committee, Press Release, "Inspector General Reports OSHA Has Not Evaluated Its Enforcement Program," June 16, 2011. <http://edworkforce.house.gov/News/DocumentSingle.aspx?DocumentID=247110>

Source 5: Bureau of Labor Statistics. Injuries, Illnesses, and Fatalities. <http://www.bls.gov/iif/>

100: Business inspections by the government to ensure that public safety standards are being met are designed and carried out in such a way as to ensure comprehensive compliance by all businesses with transparent regulatory requirements.

75:

50: Business inspections by the government to ensure public safety standards are met are generally carried out in an even-handed way though exceptions exist. Bribes are occasionally paid to extract favorable treatment or expedited processing.

25:

0: Business inspections to ensure that public safety standards are met are routinely carried out by government officials in an ad hoc, arbitrary fashion designed to extract extra payments from businesses in exchange for favorable treatment.

Category 6. Anti-Corruption Legal Framework, Judicial Impartiality, and Law Enforcement Professionalism

6.1. ⁸⁶Anti-Corruption Law

73. Is there legislation criminalizing corruption?

73a. In law, attempted corruption is illegal.

Yes | No

Comments:

Title 18 makes it a federal crime to commit acts of bribery or graft or acts that result in various conflicts of interests. The Hobbs Act prohibits actual or attempted – or conspiracy to commit – robbery or extortion affecting interstate or foreign commerce, including cases of public corruption, bribes, kickbacks and gratuities.

References:

Law: 18 U.S.C. §§ 215, 201, 666, Bribery, Graft, and Conflicts of Interest. http://www.law.cornell.edu/uscode/usc_sup_01_18_10_I_20_11.html

Law: 18 U.S.C. § 1951. The Hobbs Act. http://www.law.cornell.edu/uscode/usc_sec_18_00001951_--000-.html

Yes: A YES score is earned if corruption laws include attempted acts.

No: A NO score is earned if this is not illegal.

73b. In law, extortion is illegal.

Yes | No

Comments:

Extortion and threats are illegal by law.

References:

Law: 18 U.S.C. §§ 871-80, Extortion and Threats. http://www.law.cornell.edu/uscode/18/usc_sup_01_18_10_I_20_41.html

Yes: A YES score is earned if corruption laws include extortion. Extortion is defined as demanding favorable treatment (such as a bribe) to withhold a punishment.

No: A NO score is earned if this is not illegal.

73c. In law, offering a bribe (i.e. active corruption) is illegal.

Yes | No

Comments:

Federal law makes it a crime to bribe domestic public officials. The Foreign Corrupt Practices Act (FCPA) has antibribery provisions that make it a crime, directly or indirectly, to offer, promise, authorize or make a corrupt payment (such as, a bribe) of money or anything else of value to a foreign official. The reach of the FCPA is broad, applying to “issuers” and “domestic concerns,” as well as officers, directors, employees, agents or shareholders acting on behalf of the issuer, domestic concern or person.

References:

Law: 18 U.S.C. § 201(b). Bribery of Public Officials and Witnesses. http://www.law.cornell.edu/uscode/18/usc_sec_18_00000201_--000-.html

Law: 15 U.S.C. §§ 78dd.1(a) and 78dd.2(a). Foreign Corrupt Practices

Act. http://www.law.cornell.edu/uscode/html/uscode15/usc_sec_15_00000078-dd000-.html.

Yes: A YES score is earned if offering a bribe is illegal.

No: A NO score is earned if this is not illegal.

73d. In law, receiving a bribe (i.e. passive corruption) is illegal.

Yes

No

Comments:

Federal law makes it a crime to bribe domestic public officials.

The Foreign Corrupt Practices Act (FCPA) has antibribery provisions that make it a crime, directly or indirectly, to offer, promise, authorize or make a corrupt payment (such as a bribe) of money or anything else of value to a foreign official. The reach of the FCPA is broad, applying to "issuers" and "domestic concerns," as well as officers, directors, employees, agents or shareholders acting on behalf of the issuer, domestic concern or person.

References:

Law: 18 U.S.C. § 201(b). Bribery of Public Officials and Witnesses. http://www.law.cornell.edu/uscode/18/usc_sec_18_00000201_--000-.html

Law: 15 U.S.C. §§ 78dd.1(a) and 78dd.2(a). Foreign Corrupt Practices

Act. http://www.law.cornell.edu/uscode/html/uscode15/usc_sec_15_00000078-dd000-.html.

Yes: A YES score is earned if receiving a bribe is illegal.

No: A NO score is earned if this is not illegal.

73e. In law, bribing a foreign official is illegal.

Yes

No

Comments:

The Foreign Corrupt Practices Act (FCPA) has antibribery provisions that make it a crime, directly or indirectly, to offer, promise, authorize or make a corrupt payment (such as a bribe) of money or anything else of value to a foreign official. The reach of the FCPA is broad, applying to "issuers" and "domestic concerns," as well as officers, directors, employees, agents or shareholders acting on behalf of the issuer, domestic concern or person.

References:

Law: 15 U.S.C. §§ 78dd.1(a) and 78dd.2(a). Foreign Corrupt Practices

Act. http://www.law.cornell.edu/uscode/html/uscode15/usc_sec_15_00000078-dd000-.html

Yes: A YES score is earned if bribing a foreign official is illegal.

No: A NO score is earned if this is not illegal.

73f. In law, using public resources for private gain is illegal.

Yes | No

Comments:

Many provisions in Title 18 prohibit misuse or theft of public funds.

References:

Law: 18 U.S.C. §§643-44, 648-53. Embezzlement and

Theft. http://www.law.cornell.edu/uscode/usc_sup_01_18_10_120_31.html

Yes: A YES score is earned if using public resources for private gain is illegal.

No: A NO score is earned if this is not illegal.

73g. In law, using confidential state information for private gain is illegal.

Yes | No

Comments:

Laws make it illegal to use confidential state information for private gain. The relevant statute states: "Whoever, being an officer or employee of the United States ... publishes, divulges, discloses, or makes known in any manner or to any extent not authorized by law any information coming to him in the course of his employment or official duties or by reason of any examination or investigation made by, or return, report or record made to or filed with, such department or agency or officer or employee thereof, which information concerns or relates to the trade secrets, processes, operations, style of work, or apparatus, or to the identity, confidential statistical data, amount or source of any income, profits, losses, or expenditures of any person, firm, partnership, corporation, or association; or permits any income return or copy thereof or any book containing any abstract or particulars thereof to be seen or examined by any person except as provided by law; shall be fined under this title, or imprisoned not more than one year, or both; and shall be removed from office or employment."

References:

Law: 18 U.S.C. § 1905, Disclosure of Confidential Information

Generally. http://www.law.cornell.edu/uscode/usc_sec_18_00001905---000-.html

Yes: A YES score is earned if using confidential state information for private gain is illegal.

No: A NO score is earned if this is not illegal.

73h. In law, money laundering is illegal.

Yes | No

Comments:

Federal law prohibits laundering of monetary instruments.

References:

Law: 18 U.S.C. § 1956. Laundering of Monetary Instruments. http://www.law.cornell.edu/uscode/usc_sec_18_00001956--000-.html

Law: 18 U.S.C. § 1957. Racketeering. http://www.law.cornell.edu/uscode/usc_sup_01_18_10_I_20_95.html

Yes: A YES score is earned if money laundering is illegal. Money laundering is defined as concealing the origin of funds to hide wrongdoing or avoid confiscation.

No: A NO score is earned if this is not illegal.

73i. In law, conspiracy to commit a crime (i.e. organized crime) is illegal.

Yes

No

Comments:

The Racketeer Influenced and Corrupt Organizations (RICO) Act extended criminal penalties and a civil cause of action for acts performed as part of an ongoing criminal organization. It allows for the leaders of a syndicate to be tried for the crimes that they ordered others to do or assisted them in doing, closing a perceived loophole that allowed someone who told a man to, for example, murder, to be exempt from the trial because they did not actually do it. While the original intention was to prosecute the Mafia as well as others who were actively engaged in organized crime, it is applied more widely. RICO was enacted by Section 901(a) of the Organized Crime Control Act of 1970.

References:

Law: 18 U.S.C. §§ 1961-68. Racketeer Influenced and Corrupt Organizations. <http://www.law.cornell.edu/uscode/18/plch96.html>

Yes: A YES score is earned if organized crime is illegal.

No: A NO score is earned if this is not illegal.

6.2. Anti-Corruption Agency or Equivalent Mechanisms

74. In law, is there an agency (or group of agencies) with a legal mandate to address corruption?

100

74a. In law, is there an agency (or group of agencies) with a legal mandate to address corruption?

Yes

No

Comments:

The U.S. has a multi-agency approach to fighting bureaucratic corruption. The primary anti-corruption agency is the Department of Justice and its sub-agencies, the Federal Bureau of Investigation (FBI) and the Public Integrity Section.

In addition to investigation, policing and prosecution functions in the Justice Department, other anticorruption functions are pursued at the Office of Government Ethics (OGE), Office of Management and Budget (OMB) and Government Accounting Office (GAO), as well as ethics commissions and inspectors general offices within various federal agencies and legislative bodies.

References:

Law: 28 U.S.C. §§ 501—599B. Department of Justice. http://www.law.cornell.edu/uscode/28/usc_sup_01_28_10_II.html

Law: 28 U.S.C. §§ 531—540C. Federal Bureau of Investigation. http://www.law.cornell.edu/uscode/28/usc_sup_01_28_10_II_20_33.html

Source 1: Department of Justice, Federal Bureau of Investigation, “Public Corruption.” Last accessed September 27, 2011. http://www.fbi.gov/about-us/investigate/corruption/public_corruption

Source 2: Department of Justice, Public Integrity Section (“PIN”). Last accessed September 27, 2011. <http://www.justice.gov/criminal/pin/>

Source 3: John R. Heilbrunn, World Bank Institute, “Anti-Corruption Commissions Panacea or Real Medicine to Fight Corruption,” (2004) at page 9. <http://siteresources.worldbank.org/WBI/Resources/wbi37234Heilbrunn.pdf>

Yes: A YES score is earned if an agency is specifically mandated to address corruption. A YES score is earned if there are several agencies or entities with specific roles in fighting corruption, including special prosecutorial entities.

No: A NO score is earned if no agency (or group of agencies/entities) is specifically mandated to prevent or prosecute corruption.

75. Is the anti-corruption agency effective?

61

75a. In law, the anti-corruption agency (or agencies) is protected from political interference.

Yes

No

Comments:

There is no one agency or entity in charge of anti-corruption. Many of the agencies that deal with criminal behavior are within the executive branch of government. Some of those agencies are the Department of Justice’s Office of the Attorney General and Federal Bureau of Investigation, as well as the Office of Special Counsel, offices of Inspector General at 69 agencies and the Office of Government Ethics. Heads of agencies and inspectors general are appointed by and serve under the president.

References:

Law: 28 U.S.C. §§ 501—530D. The Attorney General. http://www.law.cornell.edu/uscode/28/usc_sup_01_28_10_II.html [Formerly Judiciary Act of 1789, 1 Stat. 73 § 35. http://www.constitution.org/uslaw/judiciary_1789.htm]

Source 1: In-person interview on October 6, 2011, with interviewee who requested anonymity at the Office of Government Ethics.

Source 2: Council of the Inspectors General on Integrity and Efficiency, “A Progress Report to the President, Fiscal Year 2010.” <http://www.ignet.gov/randp/fy10apr.pdf>

Yes: A YES score is earned only if the agency (or agencies) has some formal organizational or operational independence from the government. A YES score is earned even if the agency/agencies is legally separate but in practice staffed by partisans.

No: A NO score is earned if the agency (or agencies) is a subordinate part of any government ministry or agency, such as the Department of Interior or the Justice Department, in such a way that limits its operational independence.

75b. In practice, the anti-corruption agency (or agencies) is protected from political interference.

100 | 75 | 50 | 25 | 0

Comments:

There is no one agency or entity in charge of anticorruption. Many of the agencies that deal with criminal behavior are within the executive branch of government. Some of those agencies are the Department of Justice's Office of the Attorney General and Federal Bureau of Investigation, as well as the Office of Special Counsel, offices of Inspector General at 69 agencies and the Office of Government Ethics.

Although heads of agencies and inspectors general are appointed by and serve under the president, they operate relatively independently. Anticorruption agencies can render favorable judgments in politically sensitive cases without incentive or pressure, and investigators have access to politically sensitive information.

Despite this, there are ways in which anticorruption agencies do not maintain independence. Agency heads and inspectors general exercise discretion in choosing which complaints to investigate and, should they find illicit behavior, whether to pursue criminal and/or civil prosecution. As reported in one "New York Times" article, "The Justice Department has a policy of not discussing or confirming investigations that end without charges." For example, it did not prosecute a Mexican producer of poultry that accepted bribes in violation of the Foreign Corrupt Practices Act. In another high-profile case, the Justice Department did not prosecute former House Majority Leader Tom DeLay, who resigned for ethics violations such as accepting gifts, trips and campaign donations. In yet another case, the Senate decided to impeach and remove a federal judge, after the Department of Justice declined to prosecute, for accepting kickbacks and lying to the Senate and FBI.

Moreover, the GAO has raised concerns about the independence of at least one inspector general's office. The GAO raised concerns that the State Department's head of its Office of Inspector General has been vacant since 2007. The Washington Post quoted an official suggesting that State "opposed filling the top slot because it prefers the office to remain under Geisel's supervision."

References:

Source 1: In-person interview with Director of Public Policy Angela Canterbury at the Project on Government Oversight on September 23, 2011.

Source 2: In-person interview on October 6, 2011, with interviewee who requested anonymity at the Office of Government Ethics.

Source 3: Editorial, The New York Times, "Justice and the I.G.," February 1, 2011. <http://www.nytimes.com/2011/02/02/opinion/02wed4.html>

Source 4: William Neuman, The New York Times, "Tyson Settles U.S. Charges of Bribery," February 11, 2011. <http://www.nytimes.com/2011/02/11/business/11tyson.html>

Source 5: Charlie Savage, The New York Times, "No Charges Against DeLay in Abramoff Inquiry," August 17, 2010. <http://www.nytimes.com/2010/08/17/us/politics/17delay.html>

Source 6: Wire Staff, CNN International, "Senate Removes Federal Judge in Impeachment Conviction," December 8, 2010. http://articles.cnn.com/2010-12-08/politics/washington.impeach.judge_1_judge-walter-l-nixon-judicial-impeachment-previous-impeachment?_s=PM:POLITICS

Source 7: R. Jeffrey Smith, The Washington Post, "Vacant State Department Inspector General Position Draws Criticism," April 22, 2011. http://www.washingtonpost.com/politics/vacant-state-department-inspector-general-position-draws-criticism/2011/04/22/AFzrzLIE_story.html

100: This agency (or agencies) operates independently of the political process, without incentive or pressure to render favorable judgments in politically sensitive cases. Investigations can operate without hindrance from the government, including access to politically sensitive information.

75:

50: This agency (or agencies) is typically independent, yet is sometimes influenced in its work by negative or positive political incentives. This may include favorable or unfavorable public criticism by the government, political appointments, or other forms of influence. The agency (or agencies) may not be provided with some information needed to carry out its investigations.

25:

0: This agency (or agencies) is commonly influenced by political or personal incentives. These may include conflicting family relationships, professional partnerships, or other personal loyalties. Negative incentives may include threats, harassment or other abuses of power. The agency (or agencies) cannot compel the government to reveal sensitive information.

75c. In practice, the head of the anti-corruption agency (or agencies) is protected from removal without relevant justification.

100 | 75 | 50 | 25 | 0

Comments:

For the time period this report covers, there is no indication that anticorruption agency heads were removed, let alone without a formal process.

As discussed in previous indicators, there is no one agency or entity in charge of anticorruption. Many of the agencies that deal with criminal behavior are within the executive branch of government. Heads of agencies and inspectors general are appointed by and serve under the president. Some of those agencies are the Department of Justice's Office of the Attorney General and Federal Bureau of Investigation, as well as the Office of Special Counsel, offices of Inspector General at 69 agencies and the Office of Government Ethics.

References:

Review of major newspapers and reports from NGOs conducting oversight.

100: The director(s) cannot be removed without a significant justification through a formal process, such as impeachment for abuse of power.

75:

50: The director(s) can in some cases be removed through a combination of official or unofficial pressure.

25:

0: The director(s) can be removed at the will of political leadership.

75d. In practice, appointments to the anti-corruption agency (or agencies) are based on professional criteria.

100 | 75 | 50 | 25 | 0

Comments:

There is no one agency or entity in charge of anticorruption. Many of the agencies that deal with criminal behavior are within the executive branch of government. Some of those agencies are the Department of Justice's Office of the Attorney General and Federal Bureau of Investigation, as well as the Office of Special Counsel, offices of Inspector General at 69 agencies and the Office of Government Ethics. Heads of agencies and inspectors general are appointed by and serve under the president.

Appointments to the agencies are made based on professional qualifications and undergo a rigorous formal confirmation process. However, individuals appointed often have clear political party affiliations and there is some political machination. For instance, "The Washington Post" quoted an official who suggested that the State Department is holding up a White House recommendation for the Inspector General position, which has been vacant since 2007, because State prefers the office to remain under Geisel's interim supervision.

References:

Source 1: Boston Globe, "Veteran Investigator is Named CIA Watchdog," August 7, 2010. http://www.boston.com/news/nation/washington/articles/2010/08/07/veteran_investigator_is_named_cia_watchdog/

Source 2: Sunlen Miller, Kirit Radia and Yunji de Nies, ABC News, "Working Vacation: Obama Makes Controversial Appointments," December 29, 2010. <http://abcnews.go.com/Politics/working-vacation-obama-makes-controversial-appointments-james-cole/story?id=12503156>

Source 7: R. Jeffrey Smith, Washington Post, "Vacant State Department Inspector General Position Draws Criticism." April 22, 2011. http://www.washingtonpost.com/politics/vacant-state-department-inspector-general-position-draws-criticism/2011/04/22/AFzrzLIE_story.html

100: Appointments to the agency (or agencies) are made based on professional qualifications. Individuals appointed are free of conflicts of interest arising from personal loyalties, family connections or other biases. Individuals appointed usually do not have clear political party affiliations.

75:

50: Appointments are usually based on professional qualifications. Individuals appointed may have clear party loyalties, however.

25:

0: Appointments are often based on political considerations. Individuals appointed often have conflicts of interest arising from personal loyalties, family connections or other biases. Individuals appointed often have clear party loyalties.

75e. In practice, the anti-corruption agency (or agencies) has a professional, full-time staff.

100 | 75 | 50 | 25 | 0

Comments:

There is no one agency or entity in charge of anticorruption. Many of the agencies that deal with criminal behavior are within the executive branch of government. Some of those agencies are the Department of Justice's Office of the Attorney General and Federal Bureau of Investigation, as well as the Office of Special Counsel, offices of Inspector General at 69 agencies and the Office of Government Ethics. Heads of agencies and inspectors general are appointed by and serve under the president.

Anticorruption agencies have professional workforces that for the most part are adequately staffed with full-time employees. However, many high-level positions remain vacant at any given time. A May 2010 report by the Center for Public Integrity stated that 15 of the 73 inspectors general, chief auditors or whistle-blower protection jobs across government were vacant or were being covered by acting officials (who have limited authority). The center also reported that the Office of Special Counsel and the Comptroller General of the Government Accountability Office had vacancies for more than 18 months and two years, respectively. More recently, in April 2011, there were 11 unfilled inspector general appointments at major federal departments and agencies, including the Department of Justice.

Some of the vacancies last months and even years. The CIA inspector general, for example, was vacant for more than a year, and the State Department inspector general has been vacant since 2007.

References:

Source 1: Boston Globe, "Veteran Investigator is Named CIA Watchdog," August 7, 2010. http://www.boston.com/news/nation/washington/articles/2010/08/07/veteran_investigator_is_named_cia_watchdog/

Source 2: Sunlen Miller, Kirit Radia, and Yunji de Nies, ABC News, "Working Vacation: Obama Makes Controversial Appointments," December 29, 2010. <http://abcnews.go.com/Politics/working-vacation-obama-makes-controversial-appointments-james-cole/story?id=12503156>

Source 3: All Gov, "State Department Inspector General Position Vacant for More Than 3 Years," June 1, 2011. http://www.allgov.com/Appointments_and_Resignations/ViewNews/State_Dept_Inspector_General_Position_Vacant_for_More_Than_3_Years

Source 4: Adam Goldman, The Huffington Post, "CIA Inspector General Position Vacant For 14 Months," June 8, 2010. http://www.huffingtonpost.com/2010/06/08/cia-inspector-general-pos_n_604008.html

Source 5: John Solomon, Center for Public Integrity, iWatchNews, "Where Are the Watchdogs," May 4, 2010. <http://www.iwatchnews.org/2010/05/04/2684/where-are-watchdogs>

100: The agency (or agencies) has staff sufficient to fulfill its basic mandate.

75:

50: The agency (or agencies) has limited staff, or staff without necessary qualifications to fulfill its basic mandate.

25:

0: The agency (or agencies) has no staff, or a limited staff, that is clearly unqualified to fulfill its mandate.

75f. In practice, the anti-corruption agency (or agencies) receives regular funding.

100 | 75 | 50 | 25 | 0

Comments:

Like most government entities during the recent economic downturn and current budget crisis, entities related to anticorruption also currently are subject to budget cuts. For instance, a major newspaper reported that Department of Justice budget cuts of nearly \$1 billion were not expected to have a significant impact on the department's core law enforcement functions. The impact of the budget cuts was expected primarily at the state and local levels of law enforcement.

Funding is likely to deviate slightly with changes in political administration. However, budget cuts and deviations neither target nor threaten the existence of anticorruption work.

References:

Source 1: Lisa Mascaro, "New Cuts Detailed in Federal Budget Compromise," April 13, 2011. <http://articles.latimes.com/2011/apr/12/nation/la-na-congress-spending-20110413>

Source 2: Ed O'Keefe, The Washington Post, "What's Getting Cut in the FY 2011 Budget?" April 12, 2011. http://www.washingtonpost.com/blogs/federal-eye/post/whats-getting-cut-in-the-fy-2011-budget/2011/04/11/AFMlynLD_blog.html

Source 3: Department of Justice. <http://www.justice.gov/>

Source 4: Government Accountability Office, Report for Congressional Committees, "Inspectors General: Report on Investigation, Effectiveness, and Expertise," September 2011. <http://www.gao.gov/new.items/d11770.pdf>

100: The agency (or agencies) has a predictable source of funding that is fairly consistent from year to year. Political considerations are not a major factor in determining agency funding.

75:

50: The agency (or agencies) has a regular source of funding, but may be pressured by cuts, or threats of cuts to the agency budget. Political considerations have an effect on agency funding.

25:

0: The agency's funding sources are unreliable. Funding may be removed arbitrarily or as retaliation for agency actions.

75g. In practice, the anti-corruption agency (or agencies) makes regular public reports.

100 | 75 | 50 | 25 | 0

Comments:

There is no one agency or entity in charge of anticorruption. Some of the agencies that deal with criminal behavior include the Department of Justice's Office of the Attorney General and the Federal Bureau of Investigation, as well as the Office of Special Counsel and the inspectors general.

Most anti-corruption agencies makes regular, public reports. Each agency's reporting is different with respect to schedule, level of detail and ease of public access. For example, the Department of Justice's Office of Inspector General is an anticorruption entity with regular, detailed reports that are easily accessible. On its website, the public can access semiannual reports to Congress (two per year); all completed audits, inspections and special reviews (organized by Department of Justice component); joint DOJ sub-agency reports; special reports; and external reports.

However, other anti-corruption entities do not make all reports publicly available. The Project on Government Oversight (POGO) reported that the Securities and Exchange Commission (SEC) Office of Inspector General (OIG) investigative reports were "nowhere to be found on the agency or the OIG's website." POGO and citizens ultimately gained access to the reports through the Freedom of Information Act (FOIA).

References:

Source 1: Department of Justice Office of Inspector General. Semiannual Reports. Last accessed October 6, 2011. <http://www.justice.gov/oig/semiannual/index.htm>

Source 2: Department of Justice Office of Inspector General. Reports. Last accessed October 6, 2011. <http://www.justice.gov/oig/reports/index.htm>

Source 3: Michael Smallberg, Project on Government Oversight, "Unposted Inspector General Reports Showcase SEC Misconduct SEC IG," January 20, 2011. <http://pogoblog.typepad.com/pogo/2011/01/un-posted-inspector-general-reports-showcase-sec-misconduct.html>

100: The agency (or agencies) makes regular, publicly available, substantial reports to the legislature and/or to the public directly outlining the full scope of its work.

75:

50: The agency (or agencies) makes publicly available reports to the legislature that are sometimes delayed or incomplete.

25:

0: The agency (or agencies) makes no reports of its activities, or makes reports that are consistently out of date, unavailable to the public, or insubstantial.

75h. In practice, the anti-corruption agency (or agencies) has sufficient powers to carry out its mandate.

100 | 75 | **50** | 25 | 0

Comments:

Agencies that deal with anticorruption efforts have sufficient capacity, but in practice fragmentation hinders exercise of powers. As stated previously, there is no one agency or entity in charge of anticorruption. Some of the agencies that deal with criminal behavior include the Department of Justice's Office of the Attorney General and the Federal Bureau of Investigation, as well as the Office of Special Counsel and the inspectors general. Each agency has different powers at various stages of the anticorruption process. Unfortunately, there is considerable lack of coordination among the agencies.

For example, inspectors general are charged with detecting and deterring waste, fraud, abuse and misconduct. However, as "The New York Times" argues, their authority is "oddly limited." An inspector general has considerable authority, reporting directly to Congress and the attorney general, and only the president can fire an inspector general. Yet inspectors general do not have power to investigate alleged misconduct by a department's lawyers in their legal work or to enforce criminal laws.

References:

Source 1: In-person interview on October 6, 2011, with interviewee who requested anonymity at the Office of Government Ethics.

Source 2: Editorial, The New York Times, "Justice and the I.G.," February 1, 2011. <http://www.nytimes.com/2011/02/02/opinion/02wed4.html>

Source 3: In-person interview on September 23, 2011, with Director of Public Policy at the Project on Government Oversight.

100: The agency (or agencies) has powers to gather information, including politically sensitive information. The agency (or agencies) can question suspects, order arrests and bring suspects to trial (or rely on related agencies or law enforcement authorities to perform such functions).

75:

50: The agency (or agencies) has most of the powers needed to carry out its mandate with some exceptions.

25:

0: The agency (or agencies) lacks significant powers which limit its effectiveness.

75i. In practice, when necessary, the anti-corruption agency (or agencies) independently initiates investigations.

100 | 75 | 50 | 25 | 0

Comments:

There is no one agency or entity in charge of anticorruption. Some of the agencies that deal with criminal behavior include the Department of Justice's Office of the Attorney General and the Federal Bureau of Investigation, as well as the Office of Special Counsel and the inspectors general. Thus, anticorruption agencies work together to initiate investigations because they have to: some agencies have only investigatory power, while others focus only on enforcement. For example, as reported by "The New York Times," the inspectors general are "oddly limited" because they do not have power to enforce criminal law or to "investigate alleged misconduct by the department's lawyers in their legal work."

Yet this power sharing creates ambiguity because there is no tracking system across the multiple agencies. Thus, it is virtually impossible to find statistics on how many anticorruption investigations agencies were initiated. One anticorruption agency, the Department of Justice's Federal Bureau of Investigation's Public Corruption division, says it is working on more than 2,000 corruption investigations involving public officials around the country. During fiscal year 2010, FBI cases led to more than 1,330 information/indictments and over 900 convictions, primarily at the federal level.

But perhaps the closest estimate of all anticorruption-initiated investigations is through the Council of the Inspectors General on Integrity and Efficiency (CIGIE). The CIGIE comprises leaders from many anticorruption agencies: 69 federal inspectors general, six integrity-related senior officials and four inspectors general from the intelligence community. The CIGIE reported that in fiscal year 2010, offices of Inspector General issued 6,784 audit, inspection and evaluation reports; closed 25,589 investigations; and processed 440,362 hot-line complaints. Their work resulted in 5,610 indictments and criminal informations; 5,593 successful prosecutions; 973 successful civil actions; 5,114 suspensions or debarments; and 4,249 personnel actions.

In short, investigations by anticorruption entities in the U.S. appear to be limited in effectiveness not from a reluctance to cooperate or being slow to act, but rather a lack of coordination between anticorruption entities for seamless investigations from complaint to prosecution.

References:

Source 1: In-person interview on October 6, 2011, with interviewee who requested anonymity at the Office of Government Ethics.

Source 2: Federal Bureau of Investigation, Public Corruption, "Public Corruption Update A Busy Month Comes to a Close," June 30, 2011. http://www.fbi.gov/news/stories/2011/june/corruption_063011/corruption_063011

Source 3: Federal Bureau of Investigation, Public Corruption, "Operation Guard Shack," October 2010. <http://www.fbi.gov/news/stories/2010/october/operation-guard-shack/operation-guard-shack>

Source 4: Peter Hermann, The Baltimore Sun, "Crime Scenes: FBI Wiretap Captures Cops in Colorful Conversations," February 24, 2011. http://articles.baltimoresun.com/2011-02-24/news/bs-md-hermann-towing-wiretaps-20110224_1_fbi-wiretap-police-officers-repair-shop

Source 5: Editorial, The New York Times, "Justice and the I.G.," February 1, 2011. <http://www.nytimes.com/2011/02/02/opinion/02wed4.html>

Source 6: Council of the Inspectors General on Integrity and Efficiency, "A Progress Report to the President: Fiscal Year 2010," April 2011. <http://www.ignet.gov/randp/fy10apr.pdf>

100: When irregularities are discovered, the agency (or agencies) is aggressive in investigating the government or in cooperating with other investigative agencies.

75:

50: The agency (or agencies) starts investigations, but is limited in its effectiveness or is reluctant to cooperate with other investigative agencies. The agency (or agencies) may be slow to act, unwilling to take on politically powerful offenders, or occasionally unable to enforce its judgments.

25:

0: The agency (or agencies) does not effectively investigate or does not cooperate with other investigative agencies. The agency (or agencies) may start investigations but not complete them, or may fail to detect offenders. The agency (or agencies) may be partisan in its application of power.

76a. In practice, the anti-corruption agency (or agencies) acts on complaints within a reasonable time period.

100 | 75 | 50 | 25 | 0

Comments:

It is difficult to report whether anticorruption agencies act within a reasonable time period. There is no one agency or entity in charge of anticorruption, so many agencies share authority over various stages (inquiry, investigation, criminal and civil prosecution, civil enforcement, etc.) of the process. Some of the agencies that deal with criminal behavior are the Department of Justice's Office of the Attorney General and Federal Bureau of Investigation, as well as the Office of Special Counsel, 69 separate offices of Inspector General and the Office of Government Ethics. Unfortunately, there is no tracking system of complaints. Thus, it is virtually impossible to find statistics on complaints filed and the timeliness of their resolution. Further, each agency's response is different.

However, it is generally the case that investigations are backlogged. Not all complaints are acknowledged promptly. Investigations into serious abuses usually move steadily toward resolution, even if that results in years of investigation.

Perhaps the closest estimate of overall complaint resolution statistics is through the website of the Council of the Inspectors General on Integrity and Efficiency (CIGIE). The CIGIE is comprised of 69 federal inspectors general, six integrity-related senior officials and four inspectors general from the intelligence community. CIGIE reported that in fiscal year 2010, offices of Inspector General issued 6,784 audit, inspection and evaluation reports; closed 25,589 investigations; and processed 440,362 hot-line complaints. Their work resulted in 5,610 indictments and criminal informations; 5,593 successful prosecutions, 973 successful civil actions; 5,114 suspensions or debarments; and 4,249 personnel actions.

References:

Source 1: In-person interview on October 6, 2011, with interviewee who requested anonymity at the Office of Government Ethics.

Source 2: Editorial, The New York Times, "Justice and the I.G.," February 1, 2011. <http://www.nytimes.com/2011/02/02/opinion/02wed4.html>

Source 3: Council of the Inspectors General on Integrity and Efficiency, "A Progress Report to the President: Fiscal Year 2010," April 2011. <http://www.ignet.gov/randp/fy10apr.pdf>

100: The agency (or agencies) acts on complaints quickly. While some backlog is expected and inevitable, complaints are acknowledged promptly and investigations into serious abuses move steadily towards resolution. Citizens with simple issues can expect a resolution within a month.

75:

50: The agency (or agencies) acts on complaints quickly, with some exceptions. Some complaints may not be acknowledged, and simple issues may take more than two months to resolve.

25:

0: The agency (or agencies) cannot resolve complaints quickly. Complaints may be unacknowledged for more than a month, and simple issues may take more than three months to resolve. Serious abuses are not investigated with any urgency.

76b. In practice, citizens can complain to the anti-corruption agency (or agencies) without fear of recrimination.

100 | 75 | 50 | 25 | 0

Comments:

Citizens can complain to any anticorruption agency or government entity without fear of recrimination. Whistle-blowers can report abuses of power without fear of negative consequences because there are robust mechanisms to protect the identity of whistle-blowers and a strong culture that encourages disclosure.

The FBI, for example, allows online submission of suspected criminal activity from citizens.

References:

Source 1: Federal Bureau of Investigations, "Tips." Last accessed October 7, 2011. <https://tips.fbi.gov/>

100: Whistleblowers can report abuses of power without fear of negative consequences. This may be due to robust mechanisms to protect the identity of whistleblowers, or may be due to a culture that encourages disclosure and accountability.

75:

50: Whistleblowers are sometimes able to come forward without negative consequences, but in other cases, whistleblowers are punished for disclosing, either through official or unofficial means.

25:

0: Whistleblowers often face substantial negative consequences, such as losing a job, relocating to a less prominent position, or some form of harassment.

75 6.3. Judicial Independence, Fairness, and Citizen Access to Justice

77. Is there an appeals mechanism for challenging criminal judgments?

83

77a. In law, there is a general right of appeal.

Yes | No

Comments:

Clauses in the Fifth and 14th Amendments grant citizens the right to due process, including the right to appeal.

References:

Law: U.S. Constitution, Fifth Amendment and 14th Amendment. <http://www.law.cornell.edu/constitution/>

Yes: A YES score is earned if there is a formal process of appeal for challenging criminal judgments.

No: A NO score is earned if there is no such process.

77b. In practice, appeals are resolved within a reasonable time period.

100 | 75 | 50 | 25 | 0

Comments:

Federal appeals are resolved within a reasonable time period, despite some inevitable backlogs.

For the 12 U.S. Court of Appeals, between March 2010 and March 2011, 55,753 appeals were filed and 58,349 appeals were terminated (30,562 were terminated on the merits). At the end of March 2011, 44,440 appeals were pending. The median time for cases from filing an appeal to disposition was 11.4 months. Each of these statistics is consistent with those of the previous five years. In fact, March 2010 to March 2011 saw the fewest number of appeals filed and ended with the lowest number of pending appeals.

References:

Source 1: Administrative Office of the U.S. Courts, "Federal Court Management Statistics." Last accessed October 3, 2011. <http://www.uscourts.gov/Statistics/FederalCourtManagementStatistics.aspx>

Source 2: Phone interview with University of Pittsburgh School of Law Professor Arthur Hellman on September 22, 2011.

100: Appeals are acted upon quickly. While some backlog is expected and inevitable, appeals are acknowledged promptly and cases move steadily towards resolution.

75:

50: Appeals are generally acted upon quickly but with some exceptions. Some appeals may not be acknowledged, and simple cases may take years to resolve.

25:

0: Most appeals are not resolved in a timely fashion. Appeals may go unacknowledged for months or years and simple cases may never be resolved.

77c. In practice, citizens can use the appeals mechanism at a reasonable cost.

100 | 75 | **50** | 25 | 0

Comments:

The appeals mechanism is not always an affordable process for citizens seeking to challenge criminal judgments. In particular, the cost of attorney fees prevents citizens from filing an appeal.

The actual cost of filing a U.S. District Court appeal is approximately \$455. However, the costs of hiring an appellate attorney may be prohibitive. In a few select cases, NGOs or pro bono attorneys such as the American Civil Liberties Union may assume the cost of litigation on behalf of their petitioning client.

References:

Source 1: U.S. Court of Appeals for the Fifth Circuit, Clerk's Office, "Practitioner's Guide to the U.S. Court of Appeals for the Fifth Circuit," May 2011, at page 27. <http://www.ca5.uscourts.gov/clerk/docs/pracguide.pdf>

Source 2: American Civil Liberties Union. <http://www.aclu.org>

100: In most cases, the appeals mechanism is an affordable option to middle class citizens seeking to challenge criminal judgments. Attorney fees are not a barrier to appeals.

75:

50: In some cases, the appeals mechanism is not an affordable option to middle class citizens seeking to challenge criminal judgments. Attorney fees present somewhat of a barrier to pursuing appeal.

25:

0: The prohibitive cost of utilizing the appeals mechanism prevents middle class citizens from challenging criminal judgments. Attorney fees greatly discourage the use of the appeals process.

78. In practice, do judgments in the criminal system follow written law?

78a. In practice, do judgments in the criminal system follow written law?

100 | 75 | 50 | 25 | 0

Comments:

In the United states, criminal judgments follow written law.

University of Pittsburgh Law Professor Arthur Hellman confirms this. He says that precedent is a deep-seated part of our system, although it is less important for the Supreme Court. In his view, every judge views precedent as binding. There are “good faith disagreements,” but each side of the disagreement still is grounded in the precedent. Hellman admits that there are occasional exceptions, but those are individual aberrations, not part of a systemic disregard for the rule of law.

Hellman is confident that once judges get on the bench, they overwhelmingly put aside the political process that brought them there. He states, “Although political considerations do not affect judges, the appointment process of judges is affected by political considerations.” Once judges leave the political process, they try to follow the law and succeed overwhelmingly.

References:

Source 1: Law Professor Arthur Hellman at the University of Pittsburgh. Phone interview on September 22, 2011.

Source 2: Judicial Watch President Tom Fitton. In-person interview on September 21, 2011.

100: Judgments in the criminal system are made according to established legal code and conduct. There are no exceptional cases in which individuals are treated by a separate process. Political interference, bribery, cronyism or other flaws are rarely factors in judicial outcomes.

75:

50: Judgments in the criminal system usually follow the protocols of written law. There are sometimes exceptions when political concerns, corruption or other flaws in the system decide outcomes.

25:

0: Judgments in the criminal system are often decided by factors other than written law. Bribery and corruption in the criminal judicial process are common elements affecting decisions.

79. In practice, are judicial decisions enforced by the state?

79a. In practice, are judicial decisions enforced by the state?

100 | 75 | 50 | 25 | 0

Comments:

Generally speaking, there is enforcement of federal judicial decisions.

References:

Source 1: Law Professor Arthur Hellman at the University of Pittsburgh. Phone interview on September 22, 2011.

Source 2: Judicial Watch President Tom Fitton. In-person interview on September 21, 2011.

100: Judicial decisions are enforced quickly regardless of what is being decided or who is appearing before the court. Failure to comply brings penalties enforced by the state.

75:

50: Judicial decisions are generally enforced by the state, with some exceptions. Certain areas of law may be ignored, or certain parties appearing before the courts may evade or delay enforcement.

25:

0: Judicial decisions are often ignored. The state lacks the will or capacity to consistently enforce these decisions.

80. Is the judiciary able to act independently?

100

80a. In law, the independence of the judiciary is guaranteed.

Yes

No

Comments:

Article 3 of the U.S. Constitution establishes the judicial branch as separate from the executive and legislative branches and guarantees life tenure for federal judges. This preserves judicial independence.

References:

Law: U.S. Constitution, Article 3. <http://www.law.cornell.edu/constitution/articleiii>

Yes: A YES score is earned if there are formal rules establishing that the judiciary is independent from political interference by the executive and legislative branches. Independence includes financial issues (drafting, allocation, and managing the budget of the courts).

No: A NO score is earned if there are no formal rules establishing an independent judiciary.

80b. In practice, national-level judges are protected from political interference.

100

75

50

25

0

Comments:

Generally, the judiciary remains independent from political interference.

Law Professor Arthur Hellman confirms this. He says that precedent is a deep-seated part of our system, although it is less important for the Supreme Court. In his view, every judge views precedent as binding. There are “good faith disagreements,” but each side of the disagreement still is grounded in the precedent. Hellman admits that there are occasional exceptions. For example, in December 2010, a U.S. District Court judge was believed to have political and financial interests in a case over which he adjudicated. But those instances are individual aberrations, not part of a systemic disregard for the rule of law.

Hellman is confident that once judges get on the bench, they overwhelmingly put aside the political process that brought them there. He states, “Although political considerations do not affect judges, the appointment process of judges is affected by political considerations.” Once judges leave the political process, they try to follow the law and succeed overwhelmingly.

References:

Source 1: Law Professor Arthur Hellman at the University of Pittsburgh. Phone interview on September 22, 2011.

100: National-level judges operate independently of the political process, without incentive or pressure to render favorable judgments in politically sensitive cases. Judges never comment on political debates. Individual judgments are rarely praised or criticized by political figures.

75:

50: National-level judges are typically independent, yet are sometimes influenced in their judgments by negative or positive political incentives. This may include favorable or unfavorable treatment by the government or public criticism. Some judges may be demoted or relocated in retaliation for unfavorable decisions.

25:

0: National-level judges are commonly influenced by politics and personal biases or incentives. This may include conflicting family relationships, professional partnerships, or other personal loyalties. Negative incentives may include demotion, pay cuts, relocation, threats or harassment.

80c. In law, there is a transparent and objective system for distributing cases to national-level judges.

Yes | No

Comments:

Yes, there is a transparent and objective system for distributing cases to federal judges. The U.S. Judicial Conference Committee on Intercircuit Assignments oversees case distribution. Generally, when a case is filed in a federal district court, it is assigned randomly to one of the judges in that court. Each federal circuit has its own rules for random distributing cases. As a result of the random assignment process, a person filing a case does not know which judge will get the case.

It must be noted that after cases have been directed to the appropriate geographic or issue-specific court, a district court has broad discretion to arrange its own case docket. (See *In re Air Crash Disaster* (1996); *Reales v. Consolidated Rail Corp.* (1996); and *Ganther v. Ingle* (1996).)

References:

Law: 28 U.S.C. § 331. Judicial Conference of the United States. http://www.law.cornell.edu/uscode/usc_sec_28_00000331_--000-.html

Source 1: Ahmed E. Taha, University of Cincinnati Law Review, Vol. 78, "Judge Shopping: Testing Whether Judges' Political Orientations Affect Case Filings," Spring 2010, at page 1007.

Source 2: Susan Willett Bird, Stanford Law Review, Vol. 75, "The Assignment of Cases to Federal District Court Judges," January, 1975, at page 475.

Yes: A YES score is earned if there is an objective system that is transparent to the public that equitably or randomly assigns cases to individual judges. The executive branch does not control this process.

No: A NO score is earned if the case assignment system is non-transparent or subjective where judges themselves have influence over which cases they adjudicate. A NO score is also earned if the executive branch controls this process.

80d. In law, national-level judges are protected from removal without relevant justification.

Yes | No

Comments:

Yes, there are formal rules for removal of a justice, and removal must be related to abuse of power or other offenses related to job performance.

A judge may be removed only for incompetency, misconduct, neglect of duty, engaging in the practice of law or physical or mental disability. Only the United States Court of Appeals for the Federal Circuit has authority to remove a judge by majority vote. These provisions are applicable to federal circuit judges, district judges, bankruptcy judges and magistrate judges.

Notably, the provisions do not apply to the justices of the U.S. Supreme Court; and the U.S. Court of Federal Claims, the Court of International Trade and the Court of Appeals for the Federal Circuit each set forth their own body of consistent rules.

References:

Law: 28 U.S.C. § 176. Removal From Office. http://www.law.cornell.edu/uscode/28/usc_sec_28_00000176--000-.html

Law: 28 U.S.C. §§ 351-364. Complaints Against Judges and Judicial Discipline. http://www.law.cornell.edu/uscode/usc_sup_01_28_10_I_20_16.html

Source 1: Emily C. Barbour, Congressional Research Service, "Judicial Discipline Process: An Overview," April 7, 2011. <http://www.fas.org/sgp/crs/misc/R41758.pdf>

Yes: A YES score is earned if there are specific, formal rules for removal of a justice. Removal must be related to abuse of power or other offenses related to job performance.

No: A NO score is earned if justices can be removed without justification, or for purely political reasons. A NO score is earned if the removal process is not transparent, or not based on written rules.

81. Are judges safe when adjudicating corruption cases?

100

81a. In practice, in the last year, no judges have been physically harmed because of adjudicating corruption cases.

Yes

No

Comments:

According to the U.S. Marshals Service, from July 2010 through July 2011, there were 1,394 threats to federal judges and prosecutors. Although there is such a record of dangerous threats to federal judges and prosecutors, there is no indication that the cause is from adjudicating corruption cases. Rather, the cases seem to involve differences in political ideology (for example, one judge ruled to reinstate the Endangered Species Act for gray wolves and another judge upheld a Chicago ban on handguns).

References:

Source 1: Editorial, The New York Times, "Dangerous Threats," February 15, 2011. <http://www.nytimes.com/2011/02/16/opinion/16wed2.html>

Source 2: Michael A. Lindenberg, Time, "How the Tucson Massacre Has Rattled So Many Judges," January 9, 2011. <http://www.time.com/time/nation/article/0,8599,2041435,00.html>

Source 3: U.S. Marshals Service, "Judicial Service." Last accessed September 27, 2011. <http://www.usmarshals.gov/judicial/index.html>

Source 4: Geoff Grammer, The New Mexican, "Man Accused of Making Death Threats to Judge," June 16, 2011. <http://www.santafenewmexican.com/Local%20News/Man-accused-of-threatening-judge>

Source 5: In-person interview with Judicial Watch President Tom Fitton on September 21, 2011.

Yes: A YES score is earned if there were no documented cases of judges being assaulted because of their involvement in a corruption case during the specific study period. YES is a positive score.

No: A NO score is earned if there were any documented cases of assault to a judge related to his/her participation in a corruption trial. Corruption is defined broadly to include any abuses of power, not just the passing of bribes.

81b. In practice, in the last year, no judges have been killed because of adjudicating corruption cases.

Yes | No

Comments:

U.S. District Court Judge John McCarthy Roll was killed in the Arizona shooting that wounded Rep. Gabrielle Giffords. However, officials concluded that Roll was not the target of the shooting, nor was there a connection to adjudicating corruption cases.

References:

Source 1: Editorial, The New York Times, "Dangerous Threats," February 15, 2011. <http://www.nytimes.com/2011/02/16/opinion/16wed2.html>

Source 2: Michael A. Lindenberg, Time, "How the Tucson Massacre Has Rattled So Many Judges," January 9, 2011. <http://www.time.com/time/nation/article/0,8599,2041435,00.html>

Source 3: U.S. Marshals Service, "Judicial Service." Last accessed September 27, 2011. <http://www.usmarshals.gov/judicial/index.html>

Source 5: In-person interview with Judicial Watch President Tom Fitton on September 21, 2011.

Yes: A YES score is earned if there were no documented cases of judges being killed related to their involvement in a corruption case during the study period. YES is a positive score.

No: A NO score is earned if there were any documented cases where a judge was killed because of his/her participation in a corruption trial. The relationship between a mysterious death and a judge's involvement in a case may not be clear, however the burden of proof here is low. If it is a reasonable assumption that a judge was killed in relation to his or her work on corruption issues, then the indicator is scored as a NO. Corruption is defined broadly to include any abuses of power, not just the passing of bribes.

82. Do citizens have equal access to the justice system?

79

82a. In practice, judicial decisions are not affected by racial or ethnic bias.

100 | 75 | 50 | 25 | 0

Comments:

Judicial decisions generally are not affected by racial or ethnic bias. The National Consortium on Racial and Ethnic Fairness in the Courts says issues have changed such that now issues of race and ethnicity in the courts have to do with access, not explicit discrimination. The organization's primary issues are with respect to social justice, access to courts and fair and equal representation within the legal community. While instances of ethnic or racial bias occur in judicial decisions, they are isolated cases specific to individual judges, not government-mandated attempts to discriminate against particular groups of citizens.

However, it should be noted that there is considerable evidence suggesting racial or ethnic bias in other aspects of the criminal justice system, such as law enforcement arrests and charges, federal sentencing and the disproportionate incidence of minorities in the justice system.

References:

Source 1: National Consortium on Racial and Ethnic Fairness in the Courts. <http://www.consortiumonline.net/>

Source 2: Judicial Watch President Tom Fitton. In-person interview on September 21, 2011.

Source 3: Ben Feldmeyer and Jeffery T. Ulmer, Journal of Research in Crime and Delinquency, Vol. 48, No. 2, "Racial/Ethnic Threat and Federal Sentencing," January 30, 2011, Pages 238-270.

100: Judicial decisions are not affected by racial or ethnic bias.

75:

50: Judicial decisions are generally not affected by racial or ethnic bias, with some exceptions. Some groups may be occasionally discriminated against, or some groups may occasionally receive favorable treatment.

25:

0: Judicial decisions are regularly distorted by racial or ethnic bias. Some groups consistently receive favorable or unfavorable treatment by the courts.

82b. In practice, women have full access to the judicial system.

100 | 75 | 50 | 25 | 0

Comments:

Women have full and equal access to the justice system.

References:

Source 1: National Consortium on Racial and Ethnic Fairness in the Courts. <http://www.consortiumonline.net/>

Source 2: Judicial Watch President Tom Fitton. In-person interview on September 21, 2011.

Source 3: Alliance for Justice. <http://www.afj.org/>

100: Women enjoy full and equal status in the eyes of the courts. There are no exceptions or practices in which women are treated differently by the judicial system. For this indicator, discrimination against women should reflect specific biases that confront women in the justice system as opposed to difficulties resulting from broader socio-economic disadvantages or discrimination against women.

75:

50: Women generally have use of the judicial system, with some exceptions. In some cases, women may be limited in their access to courts, or gender biases may affect court outcomes. For this indicator, discrimination against women should reflect specific biases that confront women in the justice system as opposed to difficulties resulting from broader socio-economic disadvantages or discrimination against women.

25:

0: Women generally have less access to the courts than men. Court decisions are commonly distorted by gender bias. Women may have to go through intermediaries to interact with the court, or are unable to present evidence. For this indicator, discrimination against women should reflect specific biases that confront women in the justice system as opposed to difficulties resulting from broader socio-economic disadvantages or discrimination against women.

82c. In law, the state provides legal counsel for defendants in criminal cases who cannot afford it.

Yes | No

Comments:

In *Gideon v. Wainwright*, the U.S. Supreme Court ruled that indigents have a right to counsel in criminal cases. States and federal governments provide public defenders as counsel for criminal defendants. And, since 1974, Legal Services Corporation (LSC)

has provided federal funding for civil legal aid services through the Office of Federal Public Defenders, Legal Services Corporation and state public defenders.

References:

Law: 18 U.S.C. § 3006A. Criminal Justice Act of 1964. http://www.law.cornell.edu/uscode/18/usc_sec_18_00003006--A000-.html

Common Law: Gideon v. Wainwright, 372 U.S. 335 (1963). http://www.law.cornell.edu/supct/html/historics/USSC_CR_0372_0335_ZS.html

Source 1: Office of Federal Public Defenders. <http://www.fd.org/>

Source 2: Legal Services Corporation. <http://www.lsc.gov/about/lsc.php>

Yes: A YES score is earned if the government is required by law to provide impoverished defendants with legal counsel to defend themselves against criminal charges.

No: A NO score is earned if there is no legal requirement for the government to provide impoverished defendants with legal counsel to defend themselves against criminal charges.

82d. In practice, the state provides adequate legal counsel for defendants in criminal cases who cannot afford it.

100 | 75 | 50 | 25 | 0

Comments:

States do not provide adequate legal counsel for all defendants in criminal cases who cannot afford it. Legal counsel are well-trained and effective in representing the rights of impoverished defendants. But, attorneys often have too many cases and lack resources to oppose state prosecutors competently.

The Constitution Project's Right to Counsel program states that many public defender programs do not adequately fund and administer indigent defense delivery systems. As a consequence, attorneys carry excessive caseloads and lack investigators, experts and essential support services needed to provide adequate defense. The criminal public defender system lacks meaningful supervision of lawyers; suffers significantly delays in the appointment of counsel; and denies attorneys continued legal education and training. In short, the criminal public defender system is "dysfunctional" and unconstitutional.

References:

Source 1: The Constitution Project. National Right to Counsel Committee. <http://www.constitutionproject.org/>

Source 2: Editorial, The Washington Post, "The Sorry State of Indigent Defense," December 9, 2010. <http://www.washingtonpost.com/wp-dyn/content/article/2010/12/09/AR2010120905650.html>

Source 3: National Right to Counsel Committee, "Justice Denied: America's Continuing Neglect of Our Constitutional Right to Counsel," April, 2009. <http://www.constitutionproject.org/manage/file/139.pdf>

100: State-provided legal aid is basic, but well-trained and effective in representing the rights of impoverished defendants.

75:

50: State-provided legal aid is available, but flawed. Legal aid may be unavailable to some impoverished defendants. Legal aid/public defenders may be sometimes unable or unwilling to competently represent all defendants.

25:

0: State-provided legal aid is unavailable to most impoverished defendants. State legal aid/public defenders may be consistently incompetent or unwilling to fairly represent all defendants.

82e. In practice, citizens earning the median yearly income can afford to bring a legal suit.

100 | 75 | 50 | 25 | 0

Comments:

Some citizens earning the median yearly income can afford to bring a legal suit. The cost of litigation varies widely, depending on the claim, court, attorney fees (some lawyers charge upward of \$1,000 an hour) and fee schedule (contingent, hourly, etc.). By one estimate, pursuing a civil action in federal court costs an average of \$15,000, and cases involving scientific evidence, such as medical malpractice claims, often cost more than \$100,000. The cost of litigation may range anywhere from several hundred dollars to well over a million dollars. As cases concerning constitutional law issues generally have several appeals and numerous lawyers across several district and national courts, citizens often are unable to bring legal suit over important constitutional matters.

One important distinction that enables many middle-income citizens to afford legal suit are specialty courts. Small claims court allows pro se (self-representation) litigants who seek an award of \$5,000 or less. Another court, the Superior Court Limited Jurisdiction option, specializes in disputes of \$25,000 or less.

Middle-income citizens also have the opportunity to seek alternative dispute resolution at a significantly reduced cost. Options include negotiation, mediation or arbitration, all of which may be binding upon judicial enforcement.

References:

Source 1: Superior Court of the District of Columbia, "Small Claims and Conciliation Branch Information Handbook," May 2011. <http://www.dccourts.gov/dccourts/docs/civil/SmallClaimsHandbook.pdf>

Source 2: David W. Tate, "Options for Effectively Litigating Small Dollar California Business Disputes," September 4, 2010. http://davidtate.us/files/Options_for_Effectively_Litigating_Small_Dollar_California_Business_Disputes_Dave_Tate_Esq_090410.pdf

Source 3: Binyamin Appelbaum, The New York Times, "Investors Put Money on Lawsuits to Get Payouts," November 14, 2010. <http://www.nytimes.com/2010/11/15/business/15lawsuit.html?scp=1&sq=litigation%20fee%20prohibitive&st=cse>

Source 4: John Schwartz, The New York Times, "Exonerated Inmates Fight Lawyer's Lobbying Fees," May 9, 2011. <http://www.nytimes.com/2011/05/10/us/10exonerate.html?scp=2&sq=litigation%20fee%20prohibitive&st=cse>

Source 5: Center for Public Integrity. <http://www.iwatchnews.org>

100: In most cases, the legal system is an affordable option to middle class citizens seeking to redress a grievance. Attorney fees do not represent a major cost to citizens.

75:

50: In some cases, the legal system is an affordable option to middle class citizens seeking to redress a grievance. In other cases, the cost is prohibitive. Attorney fees are a significant consideration in whether to bring a case.

25:

0: The cost of engaging the legal system prevents middle class citizens from filing suits. Attorney fees are high enough to discourage most citizens from bringing a case.

82f. In practice, a typical small retail business can afford to bring a legal suit.

100 | 75 | 50 | 25 | 0

Comments:

Most small businesses can afford to bring small- and mid-size legal suits. The cost of litigation varies widely, depending on the claim, court, attorney fees (some lawyers charge upward of \$1,000 an hour) and fee schedule (contingent, hourly, etc.). By one estimate, pursuing a civil action in federal court costs an average of \$15,000, and cases involving scientific evidence, such as medical malpractice claims, often cost more than \$100,000. The cost of litigation may range anywhere from several hundred dollars to well over a million dollars.

One important distinction that enables many small businesses to afford legal suits are specialty courts. Small claims court allows pro se (self-representation) litigants who seek an award of \$5,000 or less. Another court, the Superior Court Limited Jurisdiction option, specializes in disputes of \$25,000 or less.

Small businesses also have the opportunity to seek alternative dispute resolution at a significantly reduced cost. Options include negotiation, mediation or arbitration, all of which may be binding on judicial enforcement.

References:

Source 1: Superior Court of the District of Columbia, "Small Claims and Conciliation Branch Information Handbook," May 2011. <http://www.dccourts.gov/dccourts/docs/civil/SmallClaimsHandbook.pdf>

Source 2: David W. Tate, "Options for Effectively Litigating Small Dollar California Business Disputes," September 4, 2010. http://davidtate.us/files/Options_for_Effectively_Litigating_Small_Dollar_California_Business_Disputes_Dave_Tate_Esq_090410.pdf

Source 3: Binyamin Appelbaum, The New York Times, "Investors Put Money on Lawsuits to Get Payouts," November 14, 2010. <http://www.nytimes.com/2010/11/15/business/15lawsuit.html?scp=1&sq=litigation%20fee%20prohibitive&st=cse>

Source 4: John Schwartz, The New York Times, "Exonerated Inmates Fight Lawyer's Lobbying Fees," May 9, 2011. <http://www.nytimes.com/2011/05/10/us/10exonerate.html?scp=2&sq=litigation%20fee%20prohibitive&st=cse>

Source 5: Center for Public Integrity. <http://www.iwatchnews.org>

100: In most cases, the legal system is an affordable option to a small retail business seeking to redress a grievance. Attorneys fees do not represent a major cost to small businesses.

75:

50: In some cases, the legal system is an affordable option to a small retail business seeking to redress a grievance. In other cases, the cost is prohibitive. Attorney fees are a significant consideration in whether to bring a case.

25:

0: The cost of engaging the legal system prevents small businesses from filing suits. Attorney fees are high enough to discourage most small businesses from bringing a case.

82g. In practice, all citizens have access to a court of law, regardless of geographic location.

100 | 75 | 50 | 25 | 0

Comments:

For the most part, geographic location is not prohibitive of using the U.S. court system. There are 94 judicial districts (plus the District of Columbia and Puerto Rico) that are organized into 12 regional circuits, each of which has a U.S. Court of Appeals. There are 735 federal district judgeships, 210 seats on all the federal appeals courts and nine Supreme Court justices. The number of judges on each district and each appeals court varies by the size and caseload of the circuit.

That said, there are organizations working to strengthen the quality and accessibility of rural courts. The Justice Management Institute says it is common for rural counties to have part-time judges and limited jurisdiction courts to have non-attorney judges, part-time prosecutors and very limited law enforcement presence. JMI is working to improve technology, procedures and practices for self-represented litigants; language barriers; access to substance abuse and mental health treatment services; and collaboration with the other branches of government.

References:

Source 1: Justice Management Institute, "Rural Court." Last accessed October 3, 2011. <http://www.jmijustice.org/board-and-staff/current-projects/rural-courts/>

Source 2: Hon. John C. McKeon and Hon. David G. Rice, University of Montana School of Law Montana Law Review, Vol. 70, "Administering Justice in Montana's Rural Courts," Summer 2009, at page 201.

Source 3: National Council of Jewish Women, The Federal Courts: Q & A. Last accessed October 3, 2011. http://www.ncjw.org/content_213.cfm?navID=279

100: Courtrooms are always accessible to citizens at low cost, either through rural courthouses or through a system of traveling magistrates.

75:

50: Courts are available to most citizens. Some citizens may be unable to reach a courtroom at low cost due to location.

25:

0: Courts are unavailable to some regions without significant travel on the part of citizens.

6.4. Law Enforcement: Conflicts of Interest Safeguards and Professionalism

83. Is the law enforcement agency (i.e. the police) effective?

75

83a. In practice, appointments to the law enforcement agency (or agencies) are made according to professional criteria.

100 | 75 | 50 | 25 | 0

Comments:

Leaders of law enforcement are always appointed according to professional criteria. However, appointee political affiliations are sometimes evident. In the United States, most law enforcement occurs at the state level, and federal law enforcement is dispersed through several agencies. The Department of Justice (DOJ) is responsible for most law enforcement duties at the federal level. Exact procedures may differ slightly by agency and sub-agency, but at the Federal Bureau of Investigation (FBI), for instance, the director is appointed by the president and confirmed by the Senate. Other law enforcement employees must meet the standards of a rigorous background check and security clearance, as well as complete training and recertification.

Other DOJ sub-agencies conduct law enforcement, including the Bureau of Alcohol, Tobacco, Firearms and Explosives (ATF), the U.S. Marshals Service and the Federal Bureau of Prisons. Department of Homeland Security (DHS) law enforcement also includes activity within various sub-agencies, such as U.S. Customs and Border Protection (CBP), U.S. Immigration and Customs Enforcement (ICE), U.S. Secret Service (USSS), U.S. Coast Guard (USCG) and the Transportation Security Administration (TSA).

References:

Law: 5 U.S.C. 1101. Omnibus Crime Control and Safe Streets Act, Confirmation of the Director of the Federal Bureau of Investigation.

Law: 5 U.S.C. 203, Term of FBI Director.

Source 1: Federal Bureau of Investigation, "History." Last accessed October 5, 2011. <http://www.fbi.gov/about-us/history/directors/the-position-of-fbi-director>

Source 2: Federal Bureau of Investigation, "Careers." Last accessed October 5, 2011. <http://www.fbijobs.gov/5.asp>

Source 3: Media-NewsWire.com, "Mark F. Giuliano Named Executive Assistant Director of the National Security Branch," September 15, 2011. http://media-newswire.com/release_1158707.html

Source 4: Charlie Savage and Jackie Calmes, The New York Times, "Obama Seeking Extension for Director of F.B.I.," May 12, 2011. http://www.nytimes.com/2011/05/13/us/politics/13mueller.html?_r=1

100: Appointments to the agency (or agencies) are made based on professional qualifications. Individuals appointed are free of conflicts of interest due to personal loyalties, family connections or other biases. Individuals appointed usually do not have clear political party affiliations.

75:

50: Appointments are usually based on professional qualifications. Individuals appointed may have clear party loyalties, however.

25:

0: Appointments are often based on political considerations. Individuals appointed often have conflicts of interest due to personal loyalties, family connections or other biases. Individuals appointed often have clear party loyalties.

83b. In practice, the law enforcement agency (or agencies) has a budget sufficient to carry out its mandate.

100 | 75 | 50 | 25 | 0

Comments:

As law enforcement in the U.S. is generally a state matter, and federal law enforcement is dispersed through several agencies and sub-agencies, it is difficult to adequately address this indicator.

Like most government entities during the recent economic downturn and current budget crisis, federal law enforcement entities currently suffer budget cuts. Major newspapers report that DOJ budget cuts of nearly \$1 billion were not expected to have a significant impact on the department's core law enforcement functions. The impact of the budget cuts was expected primarily at the state and local levels of law enforcement.

References:

Source 1: Lisa Mascaro, "New Cuts Detailed in Federal Budget Compromise," April 13, 2011. <http://articles.latimes.com/2011/apr/12/nation/la-na-congress-spending-20110413>

Source 2: Ed O'Keefe, The Washington Post, "What's Getting Cut in the FY 2011 Budget?" April 12, 2011. http://www.washingtonpost.com/blogs/federal-eye/post/whats-getting-cut-in-the-fy-2011-budget/2011/04/11/AFMlynLD_blog.html

100: The agency (or agencies) has a budget sufficient to fulfill its basic mandate.

75:

50: The agency (or agencies) has limited budget, generally considered somewhat insufficient to fulfill its basic mandate.

25:

0: The agency (or agencies) has no budget or an obviously insufficient budget that hinders the agency's ability to fulfill its mandate.

83c. In practice, the law enforcement agency is protected from political interference.

100 | 75 | 50 | 25 | 0

Comments:

As law enforcement in the U.S. is generally a state matter, and federal law enforcement is dispersed through several agencies and sub-agencies, it is difficult to adequately address this indicator.

Federal law enforcement agencies are typically independent, but sometimes are improperly influenced in investigations or enforcement actions. For example, the American Constitution Society reported political interference with the National Labor Relations Board's investigation of a complaint against Boeing. At least one organization, the National Institute of Ethics, is entirely devoted to law enforcement ethics training.

References:

Source 1: Jeremy Leaming, American Constitution Society, "Law Profs, Labor Experts Urge Lawmakers to Stop Pressuring NLRB

Over Boeing Case,” August 2, 2011. <http://www.acslaw.org/acsblog/all/professor-ann-c.-hodges>

Source 2: Neal Trautman, National Institute of Ethics, “Stopping Political Interference within Law Enforcement.” Last accessed October 5, 2011. <http://www.ethicsinstitute.com/pdf/Stopping%20Political%20Interference.pdf>

100: The agency (or agencies) operates independently of the political process and has operational independence from the government. All laws can be enforced regardless of the status of suspects or the sensitivity of the investigation.

75:

50: The agency (or agencies) is typically independent, yet is sometimes influenced in its investigations or enforcement actions by negative or positive political incentives. This may include favorable or unfavorable public criticism by the government or other forms of influence. The agency (or agencies) may not be provided with some information needed to carry out its investigations.

25:

0: The investigative and enforcement work of the agency (or agencies) is commonly influenced by political actors or the government. These may include conflicting family relationships, professional partnerships, or other personal loyalties. Negative incentives may include threats, harassment or other abuses of power by the government.

84. Can law enforcement officials be held accountable for their actions?

79

84a. In law, there is an independent mechanism for citizens to complain about police action.

Yes

No

Comments:

As law enforcement in the U.S. is generally a state matter, and federal law enforcement is dispersed through several agencies and sub-agencies, it is difficult to adequately address this indicator.

However, most federal law enforcement entities are agencies or sub-agencies, and, by law, most agencies have an independent mechanism for citizens to complain. Each agency has an Office of Inspector General that receives claims of waste, fraud, abuse or misconduct. Law enforcement agencies also conduct internal investigations. In the case of the Federal Bureau of Investigation, the primary federal law enforcement agency, a public corruption division investigates legislative, judicial, regulatory, contractual and law enforcement matters. For example, the FBI investigated corrupt police in Puerto Rico in 2010. One of the largest FBI corruption probes ever, 77 police were indicted for providing security for drug deals.

References:

Law: 28 U.S.C. 535. Federal Bureau of Investigations, Investigation of Crimes Involving Government Officers and Employees; Limitations. http://www.law.cornell.edu/uscode/usc_sec_28_00000535--000-.html

Source 1: Department of Justice Office of Inspector General. FBI. Last accessed October 5, 2011. <http://www.justice.gov/oig/reports/FBI/index.htm>

Source 2: Mike Melia, Sign On Sandiego, “Puerto Rico Police Swept Up in US Corruption Probe,” October 6, 2010. <http://www.signonsandiego.com/news/2010/oct/06/puerto-rico-police-swept-up-in-us-corruption-probe/>

Source 3: Federal Bureau of Investigation. Frequently Asked Questions. Last accessed October 5, 2011. <http://www.fbi.gov/about-us/faqs>

Yes: A YES score is earned if there is a formal process or mechanism by which citizens can complain about police actions. A YES score is earned if a broader mechanism such as the national ombudsman, human rights commission, or anti-corruption agency has jurisdiction over the police.

No: A NO score is earned if there is no such mechanism

84b. In practice, the independent law enforcement complaint reporting mechanism responds to citizen's complaints within a reasonable time period.

100 | 75 | 50 | 25 | 0

Comments:

As law enforcement in the U.S. is generally a state matter, and federal law enforcement is dispersed through several agencies and sub-agencies, it is difficult to adequately address this indicator.

The independent law enforcement complaint reporting mechanism sometimes responds to citizen's complaints within a reasonable time period. As discussed in previous indicators, the length of investigations conducted by inspectors general offices varies widely.

References:

Source 1: Department of Justice. Federal Bureau of Investigation. Last accessed October 5, 2011. <http://www.justice.gov/oig/reports/FBI/index.htm>

100: The agency/entity responds to complaints quickly. While some backlog is expected and inevitable, complaints are acknowledged promptly and investigations into serious abuses move steadily towards resolution. Citizens with simple issues can expect a resolution within a month.

75:

50: The agency/entity responds to complaints quickly, with some exceptions. Some complaints may not be acknowledged, and simple issues may take more than two months to resolve.

25:

0: The agency/entity cannot resolve complaints quickly. Complaints may be unacknowledged for more than a month, and simple issues may take three to six months to resolve. Serious abuses are not investigated with any urgency.

84c. In law, there is an agency/entity to investigate and prosecute corruption committed by law enforcement officials.

Yes | No

Comments:

The D.C. Office of Police Complaints (OPC) and the Police Complaints Board, independent agencies of the Metropolitan Police Department of the District of Columbia, were created by statute in 1999 and renamed in 2004. The OPC has its own staff to investigate complaints of police misconduct. The Metropolitan Police Department, Internal Affairs Division, also investigates complaints against its members.

The Federal Bureau of Investigation also investigates public corruption, civil rights and organized crime, among other issues.

The Department of Justice's Office of the Victims' Rights ombudsman has authority to review complaints filed against any attorney, investigator, law enforcement officer or other personnel employed by any division or office whose regular course of duties includes direct interaction with crime victims, including employees of the U.S. Attorneys' Offices, DOJ's Anti-trust Division, Bureau of Alcohol, Tobacco, Firearms and Explosives (ATF), Bureau of Prisons, Civil Division's Office of Consumer Litigation, Civil Rights Division, Criminal Division, Drug Enforcement Agency, Environmental and Natural Resources Division, Federal Bureau of Investigation, National Security Division, Tax Division, the U.S. Marshals Service and U.S. Parole Commission.

Of note, the Office of the Victims' Rights Ombudsman does not review complaints against state or local law enforcement officials, employees of other government agencies or members of the judiciary or legislature.

References:

Law: D.C. Official Code, Division 1, Title 5, Chapter 11, Subchapter

1. <http://dcpc.dc.gov/occr/site/default.asp> and http://mpdc.dc.gov/mpdc/cwp/view,a,1241,g,548649,mpdcNav_GID,1523,mpdcNav,l.asp

Source 1: The Federal Bureau of Investigation, "About Us." Last accessed September 27, 2011. <http://www.fbi.gov/about-us/investigate>

Source 2: The Department of Justice, Office of the Victims' Rights Ombudsman. Last accessed September 27, 2011. http://www.justice.gov/usao/eousa/vr/complaint.html#who_can_file

Yes: A YES score is earned if there is an agency/entity specifically mandated to investigate corruption-related activity within law enforcement. This agency/entity may be internal to the police department (provided it has a degree of independence, such as an internal affairs unit) or part of a broader national mechanism such as the national ombudsman, human rights commission, or anti-corruption agency.

No: A NO score is earned if no such agency/entity exists.

84d. In practice, when necessary, the agency/entity independently initiates investigations into allegations of corruption by law enforcement officials.

100 | 75 | 50 | 25 | 0

Comments:

The Federal Bureau of Investigation's Public Corruption division agency/entity independently initiates investigations into allegations of corruption by law enforcement officials. According to its website, the FBI says it is working on more than 2,000 corruption investigations involving public officials around the country. During fiscal year 2010, FBI cases led to more than 1,330 informations and indictments and over 900 convictions, primarily at the federal level. Bribery and border corruption are the most common forms of corruption the bureau investigates. It also investigates extortion, embezzlement, racketeering, kickbacks and money laundering. One recent example is the FBI's corruption probe in October 2010. The largest ever, the FBI charged 129 people with drug trafficking crimes and the use of a firearm in the commission of those crimes. Of those charged, over 90 were officers from various law enforcement agencies, including the Puerto Rico Police Department, municipal police departments, Department of Corrections officers, members of the National Guard and U.S. Army soldiers.

Despite recent improvement and several high-profile cases, public corruption remains a problem. Agencies work together because they have to (some agencies have only investigatory power, while others focus on only enforcement). Yet this decentralized approach may be exactly what enables public corruption to subsist.

References:

Source 1: Federal Bureau of Investigations, Public Corruption, "Public Corruption Update A Busy Month Comes to a Close," June 30, 2011. http://www.fbi.gov/news/stories/2011/june/corruption_063011/corruption_063011

Source 2: Federal Bureau of Investigations, Public Corruption, "Operation Guard Shack," October 2010. <http://www.fbi.gov/news/stories/2010/october/operation-guard-shack/operation-guard-shack>

Source 3: Peter Hermann, The Baltimore Sun, "Crime Scenes: FBI Wiretap Captures Cops in Colorful Conversations," February 24, 2011. http://articles.baltimoresun.com/2011-02-24/news/bs-md-hermann-towing-wiretaps-20110224_1_fbi-wiretap-police-officers-repair-shop

Source 4: Editorial, The New York Times, "Justice and the I.G.," February 1, 2011. <http://www.nytimes.com/2011/02/02/opinion/02wed4.html>

100: When irregularities are discovered, the agency/entity is aggressive in investigating government law enforcement officials or in cooperating with other investigative agencies.

75:

50: The agency/entity starts investigations, but is limited in its effectiveness or is reluctant to cooperate with other investigative agencies. The agency/entity may be slow to act, unwilling to take on politically powerful offenders, or occasionally unable to enforce its judgments.

25:

0: The agency/entity does not effectively investigate or does not cooperate with other investigative agencies. The agency may start investigations but not complete them, or may fail to detect offenders. The agency may be partisan in its application of power.

84e. In law, law enforcement officials are not immune from criminal proceedings.

Yes

No

Comments:

Two laws give broad discretion to initiate criminal proceedings against law enforcement officials. First, Section 1983 of Title 42 creates a private right of action against law enforcement officers who violate rights protected by federal law. Although Section 1983 applies only to state and local officers, a 1971 Supreme Court ruling inferred a parallel action against federal officers.

Second, Section 242 of Title 18 makes it a criminal offense for officers acting under color of federal, state, or local law willfully to deprive individuals of their rights under federal law.

However, the Supreme Court affords some “qualified immunity” to law enforcement in the interest of enabling officials to fulfill the course of their duties. Notably, the qualified immunity exists at common law, not as a constitutional right, and Congress could abolish it if it wished.

References:

Law 1: 42 U.S.C. § 1983 (1871). Civil Action for Deprivation of Rights. http://www.law.cornell.edu/uscode/html/uscode42/usc_sec_42_00001983---000-.html

Law 2: 18 U.S.C. § 242 (1866). Deprivation of Rights Under Color of Law. http://www.law.cornell.edu/uscode/18/usc_sec_18_00000242---000-.html

Common Law: Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics, 403 U.S. 388 (1971). http://www.hrcr.org/safrica/enforcement/bivens_narcotics.html

Common Law: Harlow v. Fitzgerald, 457 U.S. 800, 8181 (1982). http://www.law.cornell.edu/supct/html/historics/USSC_CR_0457_0800_ZS.html

Source 1: Matthew Waxman, “What Kind of Immunity? Federal Officers, State Criminal Law, and the Supremacy Clause,” The Yale Law Journal, Vol. 112: 2195, at 2209 (2003). <http://www.yalelawjournal.org/pdf/112-8/WaxmanFINAL.pdf>

Source 2: Karen M. Blum, Suffolk University Law School, “Section 1983: Qualified Immunity,” February 1, 2006. <http://www.njd.uscourts.gov/atty/3dCirqual06.pdf>

Yes: A YES score is earned if law enforcement officers are fully accountable for their actions under the law and can be investigated and prosecuted for their actions.

No: A NO score is earned if law enforcement enjoys any special protection from criminal investigation or prosecution.

84f. In practice, law enforcement officials are not immune from criminal proceedings.

100

75

50

25

0

Comments:

In practice, police officers may receive immunity from criminal proceedings for official misconduct. Several media reports give anecdotal evidence of police accountability for crimes. For instance, in the Washington, D.C., metro area, a police sergeant and corporal were charged with trafficking contraband cigarettes and alcohol during a broader corruption probe. Similarly, in Harlem, New York, criminal proceedings were initiated against law enforcement officers, showing a reasonable effort to determine whether law enforcement officers were due immunity.

However, other accounts show that law enforcement officials can be granted a substantial degree of immunity when carrying out their law enforcement functions.

References:

Source 1: Ruben Castaneda, The Washington Post, “Pr. George’s Officer Made Light of Drug Trafficking, Court Told,” November 18, 2010. <http://www.washingtonpost.com/wp-dyn/content/article/2010/11/17/AR2010111706814.html>

Source 2: William K. Rashbaum, Karen Zraick, & Ray Rivera, The New York Times, "Fatal Bullet in Harlem Probably Fired by Police," August 9, 2010. <http://www.nytimes.com/2010/08/10/nyregion/10shoot.html>

Source 3: Mandi Milligan, CBS Atlanta, "APD Officer Found Not Guilty in Shooting," August 11, 2011. <http://www.cbsatlanta.com/story/15250660/apd-officer-found-not-guilty-in-shooting>

100: Law enforcement officers are subject to criminal investigation for official misconduct. No crimes are exempt from prosecution.

75:

50: Law enforcement is generally subject to criminal investigation but exceptions may exist where criminal actions are overlooked by the police or prosecutors. Some crimes may be exempt from prosecution, such as actions taken in the line of duty.

25:

0: Law enforcement enjoys a general protection from most criminal investigation. This may be due to a formal immunity or an informal understanding that the law enforcement community protects itself.
