THE WHITE HOUSE
WASHINGTON

TO: PJW

FROM: JAY B. STEPHENS
Deputy Counsel to the President

FYI: ✓ Testimony on Thurmond's Conflicts legislation

COMMENT: _____

ACTION: to file after you have reviewed.

THE WHITE HOUSE
WASHINGTON

6-19-86

TO: Jay Stephens

FROM: ROBERT M. KRUGER
Associate Counsel
to the President

☒ FYI

☐ COMMENT

☐ ACTION

The Committee met to discuss S. 2334 today but did no marking up + took no other action. The bill will next be considered by the Committee Thursday June 27.

Bob

File - Thurmond Bill

WITNESS LIST

FOR HEARING ON

S.2334 - Integrity in Post Government Employment Act of 1986

Wednesday, June 18, 1986, 10:00 A.M.

Honorable Stephen S. Trott
Assistant Attorney General
Criminal Division
Department of Justice
Washington, D.C.

Honorable Michael G. Kozak
Principal Deputy Legal Adviser
Department of State
Washington, D.C.

PANEL #1

Honorable H. Lawrence Garrett, III
General Counsel
Department of Defense
Washington, D.C.

Honorable John F. Banzhaf
Professor
George Washington University School of Law
Washington, D.C.

Honorable Benjamin R. Civiletti
Partner
Venable, Baetjer, Howard & Civiletti
Washington, D.C.

PANEL #2

Honorable Lloyd Cutler
Partner
Wilmer, Cutler & Pickering
Washington, D.C.

Ann McBride
Senior Vice President
Common Cause
Washington, D.C.

Continued:

Norman J. Ornstein
Political Scientist
American Enterprise Institute
Washington, D.C.

Carol Bonosaro
Executive Director
Senior Executives Association
Washington, D.C.

PANEL #3

Mort H. Halperin & Jerry Berman
American Civil Liberties Union
Washington, D.C.

PRESS

STATEMENT BY SENATOR STROM THURMOND (R-S.C.) BEFORE THE SENATE COMMITTEE ON THE JUDICIARY, REFERENCE S.2334, INTEGRITY IN POST GOVERNMENT EMPLOYMENT ACT OF 1986. 226 DIRKSEN SENATE OFFICE BUILDING, WEDNESDAY, JUNE 18, 1986, 10:00 A.M.

TODAY WE ARE HOLDING THIS SECOND HEARING ON THE S.2334 SUBSTITUTE, LEGISLATION THAT WILL RESTRICT MEMBERS OF CONGRESS AND FEDERAL EMPLOYEES AND OFFICERS OF ALL THREE BRANCHES FROM LOBBYING THE FEDERAL GOVERNMENT ON BEHALF OF BOTH DOMESTIC AND FOREIGN ENTITIES. THE ORIGINAL PROPOSAL - AND THE SUBSTITUTE AMENDMENT - MANDATE A PROHIBITION ON HIGHER LEVEL OFFICIALS AND EMPLOYEES, INCLUDING MEMBERS OF CONGRESS, PROHIBITING THEM FROM BEING EMPLOYED BY, REPRESENTING, ASSISTING, OR ADVISING A FOREIGN GOVERNMENT OR ENTITY.

THERE IS SOMETHING VERY DISQUIETING TO ME, AND I SUSPECT THE GREAT MAJORITY OF AMERICANS, ABOUT GOVERNMENT OFFICIALS LEAVING PUBLIC SERVICE AND GOING TO WORK FOR, ASSISTING, ADVISING, LOBBYING OR IN ANY WAY REPRESENTING A FOREIGN INTEREST. THE TEN-YEAR PROHIBITION MANDATED BY THIS LEGISLATION AGAINST THIS PRACTICE WOULD HELP END THE PROBLEM OF FOREIGN ENTITIES GAINING KNOWLEDGE AND INFORMATION, IN ANY WAY, ABOUT SUCH THINGS AS OUR NATION'S INTERNATIONAL TRADE STRATEGY OR DEFENSE POSTURE FROM FORMER OFFICIALS WHOSE KNOWLEDGE OF THOSE ISSUES COULD DO HARM TO THIS COUNTRY IF IT IS CONVEYED TO OTHERS.

AN INITIAL HEARING WAS HELD ON THIS LEGISLATION ON APRIL 29TH. AFTER THIS HEARING, WE REQUESTED THAT ANYONE INTERESTED IN MODIFICATIONS TO THE BILL SHOULD RESPOND WITH THEIR SUGGESTIONS. SENATOR METZENBAUM, SENATOR SIMON AND SENATOR BIDEN SUBMITTED AMENDMENTS. I MET WITH SENATOR METZENBAUM AND SENATOR SIMON TO DISCUSS THEIR PROPOSED AMENDMENTS. WE REACHED A CONSENSUS WHICH LED TO A SUBSTITUTE AMENDMENT FOR MY ORIGINAL BILL.

SENATOR MATHIAS REQUESTED THAT AN ADDITIONAL HEARING BE HELD ON THIS SUBSTITUTE. THE PURPOSE OF THIS HEARING TODAY IS TO CONSIDER THE SUBSTITUTE AND OTHER RELEVANT MATTERS CONCERNING THIS LEGISLATION. TOMORROW, THE FULL COMMITTEE WILL CONSIDER AND VOTE ON THIS LEGISLATION.

IN CONCLUSION, I BELIEVE S.2334 WAS A STARTING PLACE FOR CONGRESS TO CONSIDER MUCH-NEEDED CHANGES TO THE CONFUSING AND OFTENTIMES CONFLICTING LAWS GOVERNING FORMER MEMBERS AND FEDERAL OFFICIALS WHO LOBBY THE GOVERNMENT OR WORK FOR A FOREIGN ENTITY. THE CONSENSUS SUBSTITUTE FINE TUNES AND IMPROVES THE ORIGINAL PROPOSAL.

WHEN WE FACE A SERIOUS PROBLEM SUCH AS THE MISUSE OF INFLUENCE AND ACCESS, WE HAVE TWO ALTERNATIVES - DO NOTHING, OR TAKE STEPS TO RESOLVE THE PROBLEM. I BELIEVE WE MUST TAKE ACTION TO PREVENT IRREPARABLE DAMAGE TO OUR NATION AND TO RESTORE PUBLIC CONFIDENCE AND INTEGRITY IN OUR SYSTEM OF GOVERNMENT. IT IS TIME THAT PUBLIC SERVICE BE JUST THAT - NOT A STEPPING STONE FOR FUTURE EMPLOYMENT OR PROFIT. THIS LEGISLATION WILL HELP TO ENSURE THAT FUTURE FEDERAL OFFICIALS AND EMPLOYEES SERVE THEIR COUNTRY - NOT THEMSELVES OR FOREIGN INTERESTS.

WE HAVE AN IMPRESSIVE PANEL OF WITNESSES ASSEMBLED FOR THIS HEARING. I EXPECT AN INFORMATIVE HEARING AS WE CONTINUE EXAMINATION OF THIS CRITICAL AREA.

Department of Justice

STATEMENT

OF

STEPHEN S. TROTT
ASSISTANT ATTORNEY GENERAL
CRIMINAL DIVISION

BEFORE

THE

COMMITTEE ON THE JUDICIARY
UNITED STATES SENATE

CONCERNING

S. 2334
INTEGRITY IN POST EMPLOYMENT ACT OF 1986

ON

JUNE 18, 1986

Mr. Chairman and Members of the Committee, I am pleased to be here today to present the views of the Department of Justice on S. 2334, the Integrity in Post Employment Act of 1986.

As we indicated to you in our June 11 letter, the Department of Justice has serious reservations about certain aspects of this legislation. As I will explain in greater detail shortly, we have two primary concerns: the bill would repeal a number of valid and important conflict of interest provisions in current law, and would put in their place sweeping prohibitions that are in some respects far too broad and in others far too narrow to serve what we understand are the legislation's several purposes. We understand that major amendments are expected to be offered to S. 2334 during Committee mark-up, though we do not know exactly what form they may take. What we do know about the modifications currently being considered suggests that they would not substantially alleviate the problems we see in the bill.

I. Repeal of Existing Postemployment Restrictions

S. 2334 would repeal a number of provisions in current law that are aimed at controlling and preventing post-employment conflicts of interest. We believe that these provisions have proven effective tools for enforcement and deterrence. The

provisions to be repealed include the prohibition in 18 U.S.C. 207(b), effective for a two-year period, against a former employee's acting in someone else's behalf, with or without compensation, in any matter that was under his official responsibility while in the government. Also to be repealed is the two-year ban on former high government officials' giving certain types of assistance in matters in which they were personally and substantially involved while in government.

S. 2334 would also repeal the "no-contact" rule of 18 U.S.C. 207(c), under which certain high government officials are barred for one year from communicating with their former agency in someone else's behalf on any matter. This one-year bar was enacted in 1978 to deal with the disproportionate influence former government officers might have upon the decision-making process in their former agencies when they leave the federal government. Like section 207(b), section 207(c) does not require that the offending representation be compensated, since the harm sought to be avoided is the unrestrained exercise of influence, without regard to whether it can be shown to have resulted in personal financial gain in a particular case.

As I stated, we believe both sections 207(b) and 207(c) have proven to be useful tools for controlling postemployment conflict of interest, and strongly recommend that they not be repealed. If S. 2334 were enacted in its present form, the two-year bar in section 207(b) would be reduced to one year in cases

of domestic representation, and eliminated entirely where such representation was uncompensated. The one-year no-contact rule applicable to high agency officials would no longer apply where the representation was uncompensated, thus leaving largely unaddressed the very problem for which section 207(c) was enacted in 1978.

No reason has been given for repealing these laws. And, in candor, we can think of no justification for doing so. We strongly recommend that the committee reconsider the wisdom of creating what will be major gaps in a system of laws that has been enacted with considerable care over the years.

II. New Prohibitions of S. 2334

The prohibitions that would be enacted by S. 2334 in its current form would mark a qualitative change from the approach previously taken by Congress in enacting conflict of interest laws. Existing conflict of interest laws have been carefully tailored to address particular situations in which the potential for a conflict (or for the exercise of influence) is likely to be present.

This is not true about all of the provisions of S. 2334. Many of its prohibitions reach out to situations that could not imaginably involve a conflict of interest or raise an ethical

concern. This is true of the proposed ban against any former government employee having any communication with any government agency on behalf of any other person for a period of one year. It is equally true with respect to the two-year ban - also applicable to all former government employees - against being employed in any capacity by any "foreign entity." These absolute prohibitions go far beyond what might be regarded as reasonable prophylactic measures to prevent former government employees from sharing privileged information with foreign governments or exercising improper influence because of their former government connections.

Ironically, a violation of either of the above prohibitions would depend upon a former employee's receipt of compensation. As I noted in connection with the laws that S. 2334 would repeal, most existing conflicts laws do not make receipt of compensation an element of the offense, for the sensible reason that this is simply not the evil sought to be checked. The problem lies in the very use of privileged information or position, not in the receipt of compensation in a particular situation. Thus, the proposed prohibitions in S. 2334 would in this sense actually represent a narrowing of the range of conduct prohibited by the postemployment conflicts laws.

We are aware that certain amendments to S. 2334 are being considered that would narrow the class of employees to which these broad postemployment restrictions would apply. However,

we do not believe that these amendments will necessarily cure the fundamental problems to which we have briefly alluded. The effectiveness of the blanket prohibition approach is not improved simply by limiting its applicability to employees above a GS-11 grade level, without regard to whether these individuals' situation may in fact present any possibility of a conflict of interest. While the amendments do introduce some additional latitude for attorneys performing representational work before courts and administrative agencies, such a blanket exception is subject to the same general objection as the blanket prohibition - not to mention an objection based on unexplained preferential treatment for attorneys! The Department of Justice believes that the approach embodied in the postemployment restrictions in current law - which links postemployment restrictions to an employee's actual experience or position - better serves the government's purpose of avoiding conflicts and the improper exercise of influence.

Our objections extend to the proposed lifetime ban on high officials' representing foreign "entities" under any circumstance which appears, in our judgment, to be far broader and harsher than is warranted by the expressed concerns of the sponsors of this legislation. As this Department has indicated in the past, it would also raise serious constitutional questions if it could be shown to deny a person his livelihood. We are not persuaded that reducing this blanket ban to ten years and introducing specified exceptions, as has been proposed in the amendments, is sufficient to resolve these legal and policy doubts.

I would like to end my prepared testimony on a more positive note. The Department of Justice is gratified to see that most of the prohibitions contained in S. 2334 would be extended evenhandedly to employees of the legislative and judicial branches of government as well as to those in the executive branch. As you know, in the past most of the criminal conflicts of interest laws have had a rather lopsided applicability only to employees of the executive branch. This has resulted in a certain unfairness, insofar as employees in the other two branches are permitted to engage with impunity in conduct apparently having the same potential for generating conflicts and ethical breaches as that forbidden to those of us in the executive branch. At least in the area of postemployment restrictions, there seems to be no justification for the difference in treatment, and we commend the committee for taking this important step.

STATEMENT OF

MICHAEL G. KOZAK
DEPUTY LEGAL ADVISER, DEPARTMENT OF STATE

BEFORE THE COMMITTEE ON THE JUDICIARY
UNITED STATES SENATE

ON S. 2334
INTEGRITY IN POST EMPLOYMENT ACT OF 1986

MR. CHAIRMAN AND MEMBERS OF THE COMMITTEE

I am pleased to appear before you today to discuss an issue that has been with us since the days of the founding fathers -- how to attract people of the highest integrity to government, and how to ensure that they maintain the highest standards of integrity both during their public service and after they return to private life. I would like to begin by setting out some general considerations regarding restrictions on post-government employment and then focus on some specific questions to show why the Department of State is troubled by the amendments now pending. I will address my comments to S. 2334 as it would be modified by a substitute amendment now before the Committee.

Over the years, our country has developed a complex structure of laws and regulations that defines proper behavior for employees of the government and for those who seek to influence it. A number of statutues were first enacted in 1872 in response to the rampant corruption in connection with the procurement of goods and services and the handling of claims against the United States during the Civil War. These laws formed the basis of a comprehensive statutory scheme enacted in 1962. The present post-government requirements are derived from the 1978 amendments, which substantially tightened the 1962 provisions in that area. The intent of current law is clear: to promote honest government and impartial decisions; to prevent corruption and other official misconduct before it occurs; and to penalize wrongdoing once it is found.

Recent reports have again raised widespread concern about improper and unethical lobbying. We deeply share this concern. We can neither condone nor tolerate the use of federal employment to gain privileged information to be later used for profit in the private sector. Nor can we tolerate the practice of improperly selling influence and access. But at the same time, we cannot afford disincentives to honest and

publicly spirited citizens entering government service. The balance between encouraging public service and deterring abuse of public office is not easy to strike.

Even when the system seems to be working well we should not become complacent. Thus, we welcome the opportunity to take stock of what current law prohibits and whether its enforcement is sufficient to restrain improper practices. Our basic approach can be summarized as follows: if as a result of this process loopholes are found to exist, we will work with you to close them. If current enforcement is lax, we will take steps to make enforcement more vigorous. But we must be careful to insure that any proposed changes will in fact increase government integrity or otherwise advance the public interest. We must insure that we do not make into criminal violations those activities which are inherently legitimate and which enhance the functioning of good government.

In considering this entire issue, we must keep in mind that the very structure of our free society is based upon the concept that it is in the public interest that individual citizens should come into and leave government service periodically. Political appointees, like the President and members of Congress they serve, enter and leave public service in accordance with national elections. While career civil servants are insulated from such electoral shifts, it is both expected and, I believe, desirable, that many people will, during their careers, work both in government and in the private sector. Under our system, government service is part of the free marketplace of employment, as well as an important means by which the political choices of the American people are represented. The healthy exchange of experience and expertise between government and the private sector serves the public interest, both in political and economic terms. We cannot afford to create overly broad impediments to the infusion of new blood and ideas into our government, just as we must not create unjustified incentives for the departure of career employees with essential experience and skills. I am concerned that the proposed amendments do just that.

The United States Government, by and large, functions with competence and integrity. Traditionally, we have believed in the free exchange of ideas. For each former government employee who seeks to lobby the government in one direction, there is another former employee lobbying the government in another -- along with hosts of other private citizens. The U.S. Government is well able to sort through these various views and influences. A former employee may have learned in some ways how to make a more persuasive case to his former agency and colleagues. But there are many others in Washington

who have this type of expertise, or who may have special influence for various reasons quite unrelated to government employment. We must honestly ask whether the United States Government -- the federal departments and agencies, the Congress, and our courts -- is really so open to abuse by its former employees, and so defenseless, that new and sweeping restrictions are required. And more importantly, we must consider the dangers and costs if we go too far in creating a wall between the government and the private sector. We believe the proposed bill goes too far. The judgment of Congress up until now -- which we believe to be sound -- has been to focus on the areas of abuse, while preserving the benefits of our current system.

The vice of improper lobbying is not that ex-officials seek to communicate with the federal government on behalf of another, whether foreign or domestic, but that some ex-officials may gain improper access not available to others, use inside information gained from their government employment, or exert personal influence unrelated to the merits of their case. If the government's decision-making process is flawed, and improper influence is brought to bear, it makes no difference who is doing the lobbying -- a former employee, a personal friend of a government official, or a campaign contributor. But if the process is working properly, the government profits by hearing all points of view prior to reaching an impartial conclusion. We must resist broad prohibitions that limit an ex-official's ability to impart information, and to seek employment for which he is qualified, where no danger exists of use of inside information or improper personal influence.

The Pending Amendments

The Committee is now considering a broad revision of one of the current laws governing activities of former government employees, 18 U.S.C. section 207. The amendments before the Committee represent in some respects rather drastic changes in the rules governing public service.

Let me summarize briefly how the amendments before the Committee would alter current law. Section 207 now contains four general restrictions on the post-employment activities of former government employees. Two are applicable to all former employees:

-- a life-time ban on representing any other person (except the U.S.) before a U.S. Department, agency or court in any particular matter involving specific parties in which the employee participated personally and substantially (section 207(a)); and

-- a two-year ban on representing any other person (except the U.S.) before a U.S. Department, agency or court in any particular matter involving specific parties which was actually pending under the employee's official responsibility during his last year with the Government, whether or not the employee participated in or had knowledge of the matter (section 207(b)(i)).

Two additional restrictions apply only to former "senior" employees, that is, persons at Executive Schedule pay rates or equivalent, and others in comparable designated positions. These additional restrictions are:

-- a two-year ban on helping to represent any other person (except the U.S.) by being present at an appearance of another before a U.S. Department, agency or court on any particular matter involving specific parties in which the employee participated personally and substantially (section 207(b)(ii)); and

-- the so-called "cooling off period" -- a one-year ban on attempting to influence the employee's former Department or agency on any particular matter pending before, or of substantial interest to, that Department or agency, regardless of the employee's prior involvement in the matter (section 207(c)).

Although the amendments now before the Committee would retain the current lifetime ban in section 207(a) on representations involving particular matters in which an employee participated personally and substantially, the other restrictions would be revised, to be greatly expanded in some respects, but inexplicably narrowed in others.

These proposed amendments would extend the current one-year cooling off period down to officials above GS-10 or equivalent, and would expand the scope of its prohibition for higher officials over GS-14 or equivalent. The amendments would apply the following to all executive branch, judicial and congressional employees leaving government, as well as members of Congress:

-- All employees, officials and members over GS-14 would be subject to a one-year ban (two years for members of Congress) on any communication with any branch of the federal government, including the executive, Congress, and the courts, on any matter where they are representing another person for compensation, regardless of the employee's prior involvement in the matter, while

-- GS-11 to GS-14 employees would be subject to this ban on contact only with respect to their former department or agency, but apparently without regard to whether or not compensated.

In addition, the proposed revisions would add special limitations on post-employment activities in connection with foreign entities:

-- a ban of varying periods from being employed by, advising, representing or assisting in any way, directly or indirectly, any "foreign entity" or attempting to influence any branch of the federal government on its behalf, whether or not remunerated (10 years for the highest Executive officials, 5 years for members of Congress, and 2 years for all mid-level employees of the three branches only if remunerated for their services).

"Foreign entity" is defined very broadly, to include not only foreign government interests, but U.S. branches of foreign companies, foreign subsidiaries of U.S. companies, and all persons located abroad who are not U.S. citizens. It is unclear as to inclusion of international organizations such as the UN and specialized agencies.

These same amendments now under consideration, on the other hand, would quietly lift the current two-year bans on representation or presence on matters within an Executive Branch employee's official responsibility or on which he participated personally and substantially (section 207(b)).

In considering these amendments, we in the State Department have asked several questions: Do we have a need for these changes? Will these amendments solve this need without also intruding into areas where there is no governmental interest? Will these amendments encourage experienced employees to leave government before enactment or effective date? Will they discourage others from taking their place? Let me share with you our thoughts on these issues.

<u>First, it appears that current law is already adequate to prohibit abuse, or at most requires relatively minor changes</u>

A primary purpose of the current conflict of interest law is to protect the integrity of the decision-making process of the government so that it is honest, decisions are impartial, and corruption and other misconduct are prevented. Existing law is broad and comprehensive and, I believe, well-considered. It bars improper influence by those who leave and prohibits preferential treatment by those who remain.

Current law (including regulation) broadly prohibits ex-officials from lobbying the government on matters they worked on or supervised while in government. It limits a former official's ability to use inside information for private gain. It bars a government employee from handling a matter in which a prospective employer stands to gain. It provides special disclosure requirements to protect against hidden foreign interests. It already prohibits a current government employee from providing preferential treatment to an ex-official, or any person whatsoever.

-- Requirements for those leaving government

As a result of the considerable examination of this area by Congress in the late 1970's, a whole series of criminal provisions now prevent lobbying on behalf of a client for varying lengths of time depending upon the degree of prior government involvement of the ex-official. For example, a government officer who worked on a particular contract could not, after leaving the Government, ever come back before a U.S. Department, agency or court to represent a private firm as to that contract. See 18 U.S.C. 207(a). Likewise, if a company were involved in a particular negotiation, a former official who handled that negotiation for the government could not ever represent any company before the U.S.G. as to that specific negotiation. If a former employee had been supervisor for a contract when working for the government, even though he did not personally handle it, he would be barred for two years from representing any private party before the U.S.G. with respect to it. See 18 U.S.C. 207(b)(i).

Senior officials are subject to more stringent criminal constraints. Such a former official may not even be present at an appearance by another representative before the government on a matter on which he worked. See 18 U.S.C. 207(b)(ii). In addition, a former senior level official may not, during the first year after government service, represent anyone, including himself, on a particular matter of business (except a purely personal matter or other narrowly-defined excepted matter) before his old agency (see 18 U.S.C. 207(c)). This severe constraint, unlike the preceding ones mentioned, applies just to the agency in which the official served (where the potential for influence would be the greatest) and not government-wide. Moreover, this bar is not dependent on prior involvement or official responsibility; even a matter arising after the official departed the agency is covered for the one year period.

Violators of these post-government constraints may be subject to administrative sanctions in addition to the criminal

sanctions. See 18 U.S.C. 207(j). Such disciplinary action could include debarment from practice before the agency for up to five years. See 22 C.F.R. Part 18 for the State Department's regulations.

The Foreign Agents Registration Act and a special notification statute are also applicable when foreign government representations are involved. See 22 U.S.C. 611-621 and 18 U.S.C. 951. These laws, which are administered by the Justice Department, require registration in order to engage in various kinds of representational activities on behalf of foreign principals and provide for notification to the federal government which is available to the public. Such activities can thus be monitored and any abuses more easily detected.

Several requirements limit a former employee's ability to use inside information for private gain. The lifetime bar on lobbying the government on particular matters an ex-official personally handled, the two limited post-government bars and the one-year cooling off period for senior officials serve as major deterrents to capitalizing on inside information. During these time periods, the inside information and close professional relationships of the former officials tend to wane, thereby decreasing their value and diminishing the ability improperly to influence or gain undue access. In addition, as to classified information, specific statutes bar disclosure. See 18 U.S.C. 798 and 42 U.S.C. 2277. Finally, certain ex-officials may also be subject to continuing constraints on disclosure or use of sensitive government information based on non-disclosure undertakings.

Former government attorneys are subject under the ethics rules governing their profession to a broad constraint against any employment in a matter on which they personally worked, whether or not they are communicating with the government. See Disciplinary Rule 9-101(B) of the ABA Model Code of Professional Responsibility and Rule 1.11 of the ABA Model Rules of Professional Conduct. Neither private gain nor switching sides is condoned under current law.

One of the conflict of interest statutes (18 U.S.C. 208) prohibits an employee from participating personally and substantially in a particular matter in which, to his or her knowledge, any person with whom he or she is negotiating, or has an arrangement concerning prospective employment, has a financial interest. Thus, an employee working on an arms export license matter for the government cannot simultaneously seek a job with one of the munitions manufacturers involved in the license matter.

-- Requirements for those making government decisions

The conduct of former employees is only part of the problem of integrity in government, since former employees are only a small part of the wide range of people and groups seeking to influence government decisions. In many ways more important is how current employees respond to both proper and improper attempts to influence the conduct of their official responsbilities.

Current law prohibits a current employee from giving preferential treatment to anyone -- including former employees -- on pending matters before a government agency. Under Executive Order 11222 and the implementing Office of Personnel Management and particular agency standards of conduct, current employees are subject to a number of ethical requirements which help to insure that fair and equal treatment is accorded to all persons coming before them. Employees are under a duty not to take any action that could result in, or give the appearance of, among other things, giving preferential treatment to any person, losing independence or impartiality, or affecting adversely the public's confidence in the government. Similarly, there is a general prohibition on receipt of gifts from persons having or seeking business before the agency.

These standards of conduct are published regulations with binding effect. (See 22 C.F.R. Part 10 for the State Department regulations.) Any knowing violation subjects an employee to possible disciplinary action, including separation for cause. The constraints on those within the government, coupled with the constraints on those who leave it, constitute an effective safety net to ward off most attempts to seek favored treatment or other impropriety as well as to take appropriate remedial action when warranted.

Second, the pending amendments would broadly interfere with legitimate behavior, would add little to the integrity of government, and would eliminate useful requirements.

When the Congress enacted the 1978 revisions to section 207, it weighed carefully the necessity for further limitations to prevent abuse against the harm which might be caused to individuals and to the system by undue restrictions. It does not appear that the experience to date under the 1978 amendments truly calls for a radical shift in the balance which was struck. In making the 1978 revisions, Congress determined that only truly senior officials had such potential influence as to warrant a general prohibition on contact with the former

agency for a cooling off period. It does not appear that recent events have seriously called into question the soundness of Congress' earlier judgment. It does not appear that current post-employment restrictions are seriously inadequate, nor that such sweeping revisions as are now under consideration are necessary to remedy such loopholes as might exist.

The reach of the proposed amendments is extremely broad, going well beyond that I believe appears necessary to preserve the integrity of the government processes. In addition, the amendments appear premised on the dubious assumptions that thousands of middle and upper level employees who leave government each year have such power to influence the U.S. Government, or at least their own former department, that they must be essentially quarantined for one to two years. I have provided below several examples of what appears on preliminary study to be the reach of these changes.

The amendments would extend the one year "cooling off period", which bans contacts with the former employing Department or agency, to employees over GS-10 of all three branches -- not just to senior employees of the Executive Branch (such as Deputy Assistant Secretaries and above for the State Department). For persons over GS-14, contacts with the entire federal Government, including Congress, would be prohibited, even when there is no nexus, no connection with the prior employment.

This absence of any relationship between the employee's former job and the scope of the prohibition can lead to absurd results for departing employees that contribute little to correcting problems of improper influence. For example, a lawyer formerly retained by the Defense Department to draft U.S. Government contracts would be barred for compensation from talking to the State Department on a visa or from lobbying the Congress on tax reform legislation.

Under the proposed amendments, when the former employee is acting on behalf of a foreign entity, as opposed to a U.S. entity, this general ban on contact applies for two or more years rather than only one year. As I mentioned earlier, foreign entity is defined very broadly to include not only foreign government interests, but U.S. branches of foreign companies, foreign subsidiaries of U.S. companies, and all persons located abroad who are not U.S. citizens.

We question the logic of this sweeping distinction between U.S. and foreign entities. Under the proposed new section 207, it appears that a State Department official could still, a year after he retires, lobby Congress on behalf of an American

manufacturer on a trade issue in which he was personally and substantially involved, but he would be prohibited for two years from contacting the Department of Labor on behalf of a General Motors subsidiary in Canada. In addition, he could not even work for such a subsidiary, even if his job had nothing to do with representation before the U.S. Government.

The proposed prohibition for ex-officials on employment by, advising, representing, or even assisting indirectly a foreign entity seems far to exceed any legitimate government interest and is unrelated to any argument that such an association would undermine government decision-making. This amendment would prohibit all employment by or on behalf of foreign entities and persons for two or more years without regard to any possible interest of the U.S. in the employment. As a practical matter, former government employees could not take a job abroad during the periods of prohibition -- not selling airline tickets for a foreign airline, nor waiting tables in a Parisian bistro, nor working for a foreign subsidiary of Ford. Working in the United States, at whatever location and in whatever occupation, a former employee couldn't have a foreign client. Indeed, a Vice-President of IBM may even need to recuse himself from assisting the company's foreign subsidiaries. We consider this provision in particular to have grave constitutional defects.

We also question why it is necessary to have such a provision, if there is also a separate ban on contact with the U.S. Government during the same period. In a number of situations, it could be in the United States national interest for a former employee to be employed by or assist a foreign entity. We are concerned, for example, whether these amendments would prohibit U.S. Government employees from working for international organizations. Current law (e.g., 5 U.S.C. 3184-89) recognizes that it is often to the advantage of the United States to be able to place U.S. Government employees with such organizations. (See also 5 C.F.R. 737.23(b)(2). Under the proposed legislation, however, it appears that international organizations could fall within the definition of foreign entity and such placement would be barred during the periods of prohibition.

As the above examples demonstrate, this legislation's reach far exceeds the reasonable prospects of possible abuse. As recognized in the present law, the possibilities for abuse are greatest when a former employee is dealing with the same people and issues in his private capacity with which he dealt in his official capacity. This is the more usual case, since people generally continue to work during their careers in a given area of knowledge and expertise.

The proposed amendments also appear to have an inconsistent effect. On the one hand, the proposed amendments seem in general unduly sweeping. On the other hand, however, they would actually weaken the current restrictions in some respects. In the areas where the potential for abuse is greatest -- when the contacts concern matters in which the employee was actually involved or for which he had official responsibilities -- this legislation would actually eliminate certain prohibitions on contacts now in law.

Current law provides a two year ban on contacts with the executive and judicial branches regarding particular matters pending under the employee's official responsibility during his last year of government employment. This legislation would substitute a more general ban on contact, but this ban would only apply for one year. Thus, after a year, a former employee could lobby his former subordinates on various matters over which he was responsible, where this is prohibited under current law (See 18 U.S.C. 207(b)).

Moreover, the proposed amendments could open up significant loopholes for senior officials in the current one-year cooling off ban and undermine its clarity and effectiveness. Under current law, any contact which is not purely informational is presumed to be prohibited. There are only certain narrow exceptions, for example, where an individual is acting on behalf of his strictly personal interests such as his own tax returns or retirement annuity. Under the proposed revisions, however, contacts during the one-year cooling-off period would not be prohibited unless the individual is acting on behalf of another person for compensation. So under the revisions, a former senior employee could apparently call up his former colleagues and lobby on any matter except one in which he was personally and substantially involved, and it would be extremely difficult to show whether the contact is on behalf of someone else for compensation. If the former official is lobbying on behalf of his own business interests, this appears to be permitted. If he is lobbying on behalf of a friend, as a favor, this would appear to be permitted, or at least it would be hard to establish that it is not.

In this respect, the proposed new prohibitions are weaker than the current restrictions. For senior officials with greatest influence, significant personal business interests, or numerous powerful friends, it seems that there would be possibilities for lobbying under the proposed restrictions which are prohibited under current law. For lower-level officials, however, the restrictions would inexplicably be much more severe.

We are also concerned that the proposed amendments would eliminate certain existing exceptions which would appear to be necessary and useful. Under current law, the present subsection 207(f) provides an exception to the bans on contact for former employees to furnish scientific or technological information to the Government. Under the amendments, this exception would be allowed only to the lifetime ban on matters in which the employee participated personally and substantially. Thus, a former NIH researcher on anti-virus drugs who goes to work for a pharmaceutical firm could apparently not provide the results of his further research to the Food and Drug Administration, or to Congress during his first year after departing government, because the FDA or Congress might be influenced by such information. The present subsection 207(h), which provides that employees are not prevented from giving testimony under oath, or making statements under penalty of perjury, would be eliminated. In some cases, eliminating this exception could, it seems, lead to injustice.

Third, the pending amendments could encourage a significant exodus of the best government officials, and discourage others from taking their place.

Individuals have long debated whether the Ethics in Government Act and other ethical provisions have been obstacles to the Federal Government's ability to employ and retain highly qualified individuals. Because of the complexity of the factors -- legal, political, economic, social, and personal -- which can affect an individual's decision to accept or reject an offer of Federal employment, it has been difficult to determine what effect any ethical requirement may have had on an individual's refusal to enter government service. To date, the current law, as strengthened in 1978 as to post-government constraints, has struck a fair balance between the need to assure honest government, and the need to avoid deterring capable people from entering or continuing to serve the government.

The post-government amendments under consideration by the Committee will have a more predictably negative effect on federal employment. As discussed above, the pending amendments will broadly limit a professional government official's future employment opportunities. He will face a one-year "cooling off period" on contacts with all three branches of the federal government, even when there is no nexus with his government position, and no specific matter at issue. He will face a two-year ban on working for, acting on behalf of, or assisting any foreign entity, even if owned by U.S. persons. He effectively cannot work abroad, nor can he have foreign clients

in the United States. If the individual is in a profession, such as law, accounting, or business, where private practitioners are routinely in contact with the federal government at some point in a year, these requirements would be pervasive impediments to post-government employment.

This will have a signifricantly adverse effect in my own office. For example, we compete for new lawyers with firms paying $30,000 more than our starting pay. Many come with an expectation of staying a few years and then going into private practice. They do this not because the experience or contacts they gain in our office is particularly marketable. They do it because they want to experience public service in the best sense of the word and are willing to make a sacrifice to do so. If I tell these individuals that they will not only suffer a financial penalty while working for the government, but only face reduced job opportunities for one to two years after they leave, I fear we will lose the top quality graduates we now attract. These broad constraints are bound to be a disincentive to government service by individuals in the private sector. They are also powerful incentives for the most able government employees to leave now and put their experience and skills to work in the outside world. The risk that these predictions will come true is an unacceptable price to pay for overbroad constraints that I believe will do little to improve the integrity of government, especially given the rigor of current prohibitions on ex-officials.

I would be glad to answer any questions you may have.

1487K

STATEMENT OF

H. LAWRENCE GARRETT, III

GENERAL COUNSEL

DEPARTMENT OF DEFENSE

BEFORE

THE SENATE JUDICIARY COMMITTEE

ON

S. 2334

"INTEGRITY IN POST EMPLOYMENT ACT OF 1986"

JUNE 18, 1986

Mr. Chairman and Members of the Committee:

I appreciate the opportunity you have given me today to express the views of the Department of Defense regarding S. 2334, the proposed "Integrity in Post Employment Act of 1986."

The Department of Defense shares the concerns expressed by the other representatives of the Executive Branch. There is a fully developed body of law dealing with activities of officials and employees after they end their service with the Federal Government. It has been carefully crafted and refined over the years. It has been our experience that these laws adequately protect the interest of the U.S. Government and its taxpayers without intruding unduly upon the interests of those who serve it as civilians or military members.

Permit me to summarize the laws presently in force. Within the Executive Branch the various laws governing standards of conduct are supplemented by Executive Order 11222 (May 8, 1965) and regulations of the Office of Government Ethics (5 C.F.R. part 735). Within the Department of Defense we have implementing

regulations (32 C.F.R. Part 40), and the DoD components have also issued implementing regulations.

The purpose of this regulatory program, as stated in the Executive Order, is "that employees avoid any action, whether or not specifically prohibited . . . which might result in, or create the appearance of --

(1) using public office for private gain;

(2) giving preferential treatment to any organization or person;

(3) impeding government efficiency or economy;

(4) losing complete independence or impartiality of action;

(5) making a government decision outside official channels; or

(6) affecting adversely the confidence of the public in the integrity of the government."

Three current statutes relate to employment activities after government service:

1. 18 U.S.C. § 207 places the following restrictions on departing officers and employees of DoD, including military personnel:

- Permanent bar. A former government employee may never serve as another person's representative in an appearance before the government on a case, contractual matter or other particular matter involving specific parties in which he or she participated "personally and substantially" while a government employee. The restriction also applies to communicating with the government in a representative capacity.

- Two year bar. For a period of two years after leaving federal service, the individual may not serve as another person's representative in an appearance before the government or communicate as a representative on any particular matters involving a specific party or parties which were

actually pending under the former employee's "official responsibility" in his or her last year of service. This two year bar is even broader with respect to designated "senior employees" who may not even assist in such representation by personal presence.

- Senior employee, one year bar. For one year after leaving federal service, senior employees may not represent anyone other than the United States before their former agency on any particular matter pending before or of substantial interest to the agency.

2. 37 U.S.C. § 801(b) prohibits retired regular military officers from selling, or negotiating to sell, supplies or war materials to the Defense Department and related agencies for a period of three years after retirement.

3. 18 U.S.C. § 281 prohibits retired regular military officers permanently from selling to their own former military departments.

Under legislation recently passed by the Congress (P.L. 99-145), personnel of this Department became subject to new restrictions and to vastly expanded reporting requirements. A full array of administrative penalties and enforcement authority also are provided.

1. Section 921 of that criminal statute applies to anyone who was a "Presidential appointee in Federal employment." If such a person was a principal negotiator in a contract, or in the settlement of a contract, he or she may not go to work for such contractor for a period of two years.

2. Section 922 (10 U.S.C §2397) is a major expansion of an existing reporting system. It requires persons coming into the Department from industry, and departing personnel going to major contractors, to file detailed reports of their activities and the relationship between their government and nongovernment work.

3. Section 923 (10 U.S.C. §2397a) establishes a new reporting system for persons engaging in employment negotiations prior to their departure from DoD service. This systems insures that supervisors and ethics officials are made aware of pending job negotiations and are able to work with persons preparing to depart to avoid any real or apparent conflict of interest.

There are several closely related legislative proposals under consideration before this Committee. I understand that the versions I have been given may not be the most current. Thus, with your permission, Mr. Chairman, I propose to supplement this statement with a more detailed analysis of the several bills as they develop and limit myself at this time to a brief summary of the principal concerns of the Department of Defense and ask that the Committee not take any action on the bill until the Department provides its analysis.

Before considering limitations on the employment of former government officials by foreign governments, it may be useful to note the effect of a provision of the U.S. Constitution. Article I, section 9, clause 8 of the Constitution prohibits any person holding any office of profit or trust under the federal government from accepting any office or title of any kind from a foreign official or foreign state without the consent of Congress. All retired military personnel, both officer and enlisted, Regular and Reserve, are covered by this provision, according to the Comptroller General.

The Congress has established machinery for providing review of the applications of retired military members for such foreign

employment and the granting of approval in appropriate cases. This is accomplished by the Secretary of the applicant's military department and the Secretary of State after consideration of the relevant facts. In addition to this limitation, retired military members are subject to all of the restrictions on foreign representational activities applicable to former civilian officials of the government, including the Foreign Agents Registration Act of 1938.

The enactment of new law, in haste, may be counterproductive. The existing body of laws has developed over a long period of time and addresses the misconduct most citizens find inappropriate. Before enacting substantial changes in ethical standards governing former officials it would be prudent to allow existing law to be applied to the cases currently in the public eye. After all of the facts have been put on the table and decisions made regarding possible violations, then the need for additional legislation may be weighed.

Increased restrictions on postgovernment employment, will, in my opinion, greatly hamper the recruitment of qualified persons for DoD service. In addition, there is the real potential for a mass exodus of experienced personnel. I don't believe that the proposed new restrictions would improve the

ethical climate, but instead would be construed as evidence that persons who serve the government are not considered to be honest citizens. Because of the anticipated adverse consequences of further post-employment restrictions without concomitant benefits, I urge that no further action be taken at this time. The Department of Defense needs highly experienced and well qualified persons to manage its very complex programs. Anything that makes government service less attractive exacerbates these management burdens.

In conclusion, I want to emphasize that it is our desire in the Department of Defense to support the highest standards of conduct and integrity. Although we are most reluctant to see any changes in present laws in this area, we are prepared to work with the members of your staff, if desired, and with the other agencies of the Executive Branch to consider improvements. It is imperative that any changes to existing law be carefully considered to avoid prompting an exodus of talented officials or a barrier to future service from those not presently in the government. The enactment of S. 2334, and the proposed amendments I have seen, raise the very real prospect that this Department will be denied talent it desperately needs.

THE
GEORGE
WASHINGTON
UNIVERSITY
Washington, D.C. 20052 / The National Law Center

JOHN F. BANZHAF III
Suite 502, Burns Hall
720 20th Street, N.W.
Washington, D.C. 20052
(202) 676-7229

TESTIMONY OF JOHN F. BANZHAF III, PROFESSOR OF LAW
THE NATIONAL LAW CENTER, GEORGE WASHINGTON UNIVERSITY

BEFORE THE
COMMITTEE ON THE JUDICIARY, UNITED STATES SENATE
WEDNESDAY, JUNE 18, 1986

ON THE
CONSTITUTIONALITY OF PROHIBITING FORMER HIGH-LEVEL GOVERNMENT OFFICIALS FROM LOBBYING ON BEHALF OF FOREIGN GOVERNMENTS:

S. 2334 - INTEGRITY IN POST-EMPLOYMENT ACT OF 1986

SUMMARY

As a law professor with considerable experience concerning constitutional issues asked to testify as an impartial witness, I conclude that it clearly would be constitutional for the government to prohibit former high-level government officials from accepting employment to represent foreign powers, and that those who raise constitutional issues appear to ignore two important points:

(1) that the government has far greater leeway in establishing conditions of employment than it does in imposing identical restrictions through its general police powers; and

(2) that the bill would not prohibit persons from speaking, associating, or from petitioning for redress of grievances, but only from seeking to do so for profit.

I would also suggest that:

(1) to prevent people from profiting from their wrongdoing, and to help avoid the difficult burdens a criminal prosecution often presents, the law contain civil forfeiture provisions like those in R.I.C.O., "Son of Sam," and similar laws; and

(2) to help insure that wrongdoing will not go undetected, and that wrongdoers will not escape legal action for political, budgetary, and other reasons, the law permit actions to be brought by private citizens, who would then receive a portion of any judgment, as do similar laws relating to governmental fraud, water pollution, etc.

My name is John Banzhaf, and I am a Professor of Law at the National Law Center of the George Washington University.

I have asked by the staff in the last several days to consider and then to testify as an impartial witness on the constitutionality of a bill which would prohibit former high-level officials from lobbying or attempting to influence governmental decisions on behalf of foreign governments; a prohibition which could last either for many years, or even for the remaining life of the former employee. For the reasons set forth very briefly here, I believe that such a prohibition does not raise major constitutional problems.

I would also like to briefly suggest two simple additions, modeled on existing laws, which I believe would make the bill far stronger and much more effective. Specifically, these suggestions are to provide that any money earned in violation of this law be subject to forfeiture in a civil proceeding, and that such proceedings may be initiated -- and if necessary, prosecuted -- by private citizens, who would then be eligible to share in any monetary judgment.

MY QUALIFICATIONS AND BACKGROUND

Let me begin by briefly stating my qualifications and background. First, I have taught Administrative Law for over a decade; a course which deals with, and to a large extent is built upon, various constitutional principles. Second, as an activist

public interest lawyer, I have been directly involved in a number of legal proceedings which raised major constitutional issues, and I am proud to say that in a number of these cases I helped to establish important principles of constitutional law.

For example:

(A) I successfully defended the constitutionality of a decision I had obtained from the Federal Communications Commission requiring stations under the "Fairness Doctrine" to make available millions of dollars in free broadcast time for anti-smoking messages, Banzhaf v. F.C.C., 405 F.2d 1082 (D.C. Cir. 1968), cert. denied, 396 U.S. 842 (1969);

(B) invited to participate as amicus curiae, I helped to defend the constitutionality of the congressional statute banning cigarette commercials on radio and television, Capital Broadcasting Co. v. John M. Mitchell, 333 F. Supp. 582 (3-judge, D.D.C. 1971), aff'd, 405 U.S. 1000 (1972);

(C) a suit, brought under my supervision by students at the National Law Center, helped to establish constitutional "standing" in environmental actions, and is one of the leading cases on this constitutional issue, United States v. Students Challenging Regulatory Agency Procedures (SCRAP), 412 U.S. 669 (1973);

(D) in a recent proceeding, I convinced a federal judge it was constitutional for him to require the Attorney General to seek the appointment of an Independent Counsel to investigate "Debategate", Banzhaf v. Smith, 588 F. Supp. 1167 (1984), a

determination later overturned but only on non-constitutional grounds, 737 F.2d 1167 (D.C. Cir. 1984);

(E) and in another recent case, invited again to participate as amicus curiae, I developed a new constitutional theory concerning restrictions on the advertising of dangerous products which the court cited with apparent approval, Dunagin v. City of Oxford, Miss., 718 F.2d 738 (5th Cir. en banc 1983).

In summary, as both a law professor and as a legal activist, I have had considerable theoretical as well as practical experience related to various constitutional law issues, and it is upon this basis that I testify.

INITIAL CONSIDERATIONS

Usually, in trying to determine whether a proposed law might violate the Constitution, it is appropriate to begin by considering what specific provisions of the Constitution might be offended. However, here it appears, at least from my brief reading of the April 29th hearing record, that the Deputy Assistant Attorney General, while often referring to constitutional problems or even "pitfalls," cited no cases nor even any specific portion of the Constitution. The closest he seems to have come is a vague reference at page 72 to a "right to associate . . to speak out . . to make a living . . ."

Thus, with all due respect, it seems to me that much of the discussion of what interests a court might seek to balance, and the result of any such balancing, is premature. Indeed, in

considering the individual constitutional issues which might be implicated, I can find no significant problems.

FREEDOM OF SPEECH

It must be carefully noted that the proposed law would not prevent the former employee from speaking on any topic, or on behalf of any individual or entity. Instead, all that which would be restricted is his or her ability to do so for profit; an interest which by itself is not protected by the Constitution.

This very issue was raised in the case in which I successfully defended the constitutionality of the statute banning radio and television advertising of cigarettes. Here the broadcasters argued that their right of Free Speech was infringed because they could not be paid by cigarette manufacturers to speak on their behalf. The court held not only that the right was not infringed, but that there was no such right!:

> In that regard it is dispositive that the Act has no substantial effect on the exercise of petitioners' First Amendment rights. Even assuming that loss of revenue from cigarette advertisements affects petitioners with sufficient First Amendment interest, petitioners, themselves, have lost no right to speak- they have only lost an ability to collect revenues from others for broadcasting their commercial messages. . . Finding nothing in the Act or its legislative history which precludes a broadcast licensee from airing its own point of view on any aspect of the cigarette smoking question, it is clear that petitioners' speech is not at issue. Thus, contrary to the assertions made by petitioners, Section 6 does not prohibit them from disseminating information about cigarettes, and, therefore, does not conflict with the exercise of their

First Amendment rights. Capital Broadcasting Co. v. Mitchell, 333 F. Supp. 583, 584 (3-judge, D.C. Cir. 1971), affd, 405 U.S. 1000 (1972) [emphasis added]

Similarly, it would appear, former employees under this bill would not lose any First Amendment rights, since they would be free to express their own beliefs concerning even the issues of concern to a foreign country. The prohibition would apply only if they sought to profit from making such statements; an interest which is not constitutionally protected.

Similarly, any First Amendment rights foreign countries or foreign entities may have would not be impinged, because they would be free to employ any one or more of a very large number of lawyers, lobbyists, public relations specialists, spokespersons, and others both able and willing to plead their cause. Surely it cannot be argued that only former high-level government officials have the ability to effectively speak for foreign governments. Thus, short of a prohibition which is so broad that no effective representative could be found by a foreign entity seeking to be heard, any rights they may have to Free Speech are not adversely affected.

This point, simple yet crucial to understanding the underlying constitutional issues, can perhaps also be illustrated by a simple analogy. The right to be represented by legal counsel is also of fundamental constitutional importance. Indeed, in criminal proceedings, a defendant is entitled to have counsel appointed if he cannot afford it himself. In civil proceedings, although the government cannot be forced to pay for

his counsel, a party is nevertheless constitutionally entitled to be represented by one.

But no one would suggest that any individual attorney has a constitutional right to represent any client in the world, and that his privilege to represent a particular client cannot be negated by possible conflicts of interest or other factors. A law prohibiting any former US attorney from representing as a criminal defendant a person whose prosecution was initiated by his office would certainly not be unconstitutional, although it arguably involves elements of both Free Speech and Right to Counsel.

Likewise, an attorney's privilege to represent any and all clients may be taken away if he fails to meet certain standards, or if he even fails to pay his bar dues. The U.S. Supreme Court has held that an attorney's privilege to represent a client in a foreign jurisdiction can be denied even without a hearing, Leis v. Flynt, 99 S.Ct. 686 (1979).

From the point of view of the client, the analysis is similar. He has no right to be represented by a particular attorney, particularly where, for example, a particular attorney would be barred from representing a person because of a conflict of interest. Indeed, the prohibition may extend not only to an individual attorney, but in some cases to an entire law firm. Yet, assuming that not all counsel potentially competant and able to represent a person are barred from assisting him, the client's constitutional rights are likewise not infringed.

FREEDOM OF ASSOCIATION, AND TO PETITION THE GOVERNMENT

Similarly, and for exactly the same reasons, it would appear that the right of former officials to associate with those of their own choosing, and/or to "petition the government for a redress of grievances," is not adversely affected. Once again they may associate with whomever they wish, and make whatever pleas they wish to governmental officials or agencies, provided only that they do not seek to profit thereby.

It would also follow, for the reasons stated previously, that the foreign entities would not be impaired as to these rights since they are still free to persuade people to associate with them, and/or to file petitions on their behalf with the government. Again, short of a ban so broad that they would be denied any effective representation, no serious constitutional issues appear to be raised.

EQUAL PROTECTION

Obviously, the Equal Protection clause does not require that all persons be treated completely equally with no distinctions whatsoever. Generally all that it requires is that there be some "rational basis" for the distinction. Here it appears that the legislative history provides at least a rational basis for distinguishing between certain former high-level officials and other former government employees.

There are two exceptions to this rule; situations in

which the courts will require more than a "rational basis" for upholding a distinction. The first is where the distinction directly affects people in a "suspect category'; i.e., those who have suffered a history of invidious discrimination, and lack political power to protect their interests. Obviously high-level government officials do not qualify for this added protection.

The other exception occurs where a fundamental interest or freedom is impaired as a result of the distinction. However, since here, as discussed above, freedom of speech, association, etc. themselves are not being impaired, it would also seem that all that the courts would require is a rational basis for the distinction

RIGHT TO EMPLOYMENT, AND DUE PROCESS CONSIDERATIONS

At page 72 of the transcript of the earlier hearing, the Deputy Assistant Attorney General refers to "his [the former official's] right to make a living." Yet no such right is protected, by itself, in the Constitution.

The 14th Amendment provides that no state shall "deprive any person of life, liberty, or property, without due process of law." In some cases an employee's expectation of continued employment in an existing position protected by a tenure-like system has been held to constitute a "property" interest. But at most this means that he cannot be discharged on the basis of specific individualized factual allegations without some kind of hearing at which these individualized facts can be

determined; a principle which clearly has no application here.

Likewise, if the firing involves such a stigma that employment in one's chosen field is severely impaired, a "liberty" interest may be implicated. But again this means at most that before there can be such a stigmatizing finding, there must be some kind of hearing to determine the individualized facts. Here, since they would be no stigma and no individualized finding, no Due Process hearing would be required even if the prohibition was so broad as to effectively preclude employment in a chosen field. Since former high-level government officials will still remain free to represent a large number of different interests before the federal government, there would not even be a severe empairment of employment opportunities.

Finally, even if one attempts to analogize the instant situation to cases in which laws prohibit employment because of what courts term an "irrebuttable presumption," the U.S. Supreme Court has deferred to Congress with regard to foreign affairs, even in situations where an existing position must be terminated based upon requirements which may not have been in place when the employment began, see Vance v. Bradley, 440 U.S. 93 (1979) (upholding constitutionality of mandatory retirement age for foreign service officers). Here, since the bill would restrict only future employment and not an existing position, and since it would be applied only to persons who continued their employment knowing of the consequences, constitutional arguments are even weaker.

BILL OF ATTAINDER OR EX POST FACTO LAWS

Congress may easily avoid any argument that the proposed law would amount to a bill of attainder, or an ex post facto law, by being careful to see that its prohibitions would apply only to persons who accepted or continued in employment for a reasonable period after notice that such continued employment would preclude certain potentially profitable activities in the future. In that way the adverse consequences would occur only to those who knowingly and willingly accepted them.

With regard to Members of Congress, or the President and Vice President, it might be prudent to have the prohibition apply only to those who began a new term of office after the effective date of the act. Unlike appointed officials who are free to leave an office they are already in if they do not wish to have their future activities restricted, persons elected to an office have at least some moral obligation to continue in the office for its full term, and the persons who voted for them have interests -- which may rise to a constitutional level -- not to have them forced out of office by newly adopted conditions.

Under this analysis it should be noted that the government is exercising not its general police power to regulate the conduct of citizens generally, but rather a power it enjoys at least as much as private employers to place conditions upon those who choose to work for it. In this regard its power is far greater, and constitutional restrictions much weaker, than with

regard to non-governmental employees. Cases upholding the Hatch Act -- even though there, unlike here, Freedom of Speech and political association were directly impaired -- are familiar examples of this principle.

It apparently was in this regard that the Justice Department suggested that the courts were likely to attempt to balance the government's interests against those of the employee, and to prohibit restrictions which lasted longer than might be warranted by such a balancing. But, while this type of analysis is routinely used with regard to restrictions in contracts concerning private employment, the justification for its use here seems dubious.

An employment contract with a private firm which attempts to prevent an employee from working in certain lines of endeavor, or with certain competing employers, for excessive periods of time may be struck down. But it appears that this is only true because of certain important principles not applicable here. Thus courts will frequently refuse to enforce such restrictions in large part because they stifle free trade and open competition, or because they may tend to restrict the application of new technology and learning of potential benefit to the public.

But these considerations seem irrelevant here. There is no overriding public interest in encouraging competition with the government in its performance of governmental tasks; the kinds of activities in which high-level officials usually engage.

Nor is there any established public policy -- other than those spelled out with clearly defined statutory limits such as the Freedom of Information Act -- in seeing that foreign governments have ready access to information which our government desires to protect. Indeed, one of the major problems towards which the bill in directed is to help prevent the unauthorized disclosure or use by a foreign power of information which the federal government does not wish it to have.

In summary, since no specific constitutional provision seems to be implicated, and since the traditional balancing of interests concerning private employment contracts is based upon considerations absent here, it would seem unlikely that a court would apply such a test here and strike down time restrictions which it felt were too long or not necessary.

CIVIL FORFEITURE PROVISIONS SHOULD BE ADDED

An ancient legal maxim, as well as an essential element of fair play, is that a person should not be allowed to profit from his own wrongdoing. Here one of the problems with the current bill is that it apparently makes no provision to assure that this will not happen. This is ironic because the major impetus for the bill appears to be the public outcry resulting from the perception that a former high official is getting very rich by improperly and perhaps even illegally trading on his connections rather than his competence.

There are many reasons why a former official clearly

guilty of violating the proposed bill would never be prosecuted. These include political pressures and favoritism, limited prosecutorial resources, alternative law enforcement priorities, etc. Even if prosecuted, a plea bargain and/or a "slap on the wrist" sentence are all too often the result. In all such cases the criminal is allowed to keep the spoils.

Here one has only to remember the public outrage when former Vice President Spiro T. Agnew was allowed to "cop a plea," to go scot free, and to keep all of the money he had admittedly taken illegally. In that situation my law students initiated a novel legal action which eventually forced him to repay that money to the State of Maryland. But the suit was fraught with major legal problems, and such suits to recover the illegal profits of those who violate the proposed bill are unlikely to succeed absent express statutory authorization.

Another major problem of relying solely upon the criminal process is the difficulty of prosecuting such cases, as the testimony to date amply demonstrates. Generally, proof must be by the very high standard of "beyond a reasonable doubt," scienter must be clearly established, and the defendant enjoys a Fifth Amendment protection from discovery, a right to a speedy trial, etc.

Thus the alternative of a civil proceeding makes some kind of effective legal action much more likely, thereby substantially increasing not only the deterrence, but also the chance that the wrongdoer will not profit from his wrongdoing.

Many other statutes, of which R.I.C.O. and the "Son of Sam" laws are probably the best known examples, incorporate civil penalties and/or are designed to prevent criminals from profiting from their wrongdoing. Considering the magnitude of the problem, the public outrage from former officials enriching themselves by profiting from their former positions, and the demonstrated difficulties of relying solely upon criminal prosecution, the addition of a civil forfeiture provision would seem to be more than warranted.

PRIVATELY-INITIATED ACTIONS SHOULD BE EXPRESSLY PROVIDED

Although expressly providing for civil forfeiture actions will help to make the bill more effective, it will not deal with two remaining serious problems. The first is that, regardless of the ease of civil prosecution and the availability of strong evidence, legal actions may nevertheless not be brought by the Justice Department either because of political considerations or differences in enforcement priorities.

In cases of a popular president who serves for two terms, or even of a high-level official who leaves early in the administration and violates the proposed law while his party and his close associates remain in power, it is easy to see how the Justice Department would be very reluctant to initiate even a civil action against the violator. Moreover, their unwillingness to initiate either a criminal or a civil action in the face of what seems to be strong evidence, and the present state of the

law in which the Justice Department cannot be forced to seek the appointment of an Independent Counsel to investigate, see Banzhaf v. Smith, 737 F.2d 1167 (D.C. Cir en banc 1984), would provide no remedy for the feelings of public outrage this bill is designed to deal with.

Another major problem would be one of obtaining the information necessary for enforcement. Even assuming for the sake of argument that the Congress adopts detailed reporting provisions which will apply to former high-level officials years after they leave federal employment, no less than half-a-dozen different highly publicized situations in the past few years alone have indicated the very significant weaknesses of relying solely on mandated reports.

The only other alternative would be detailed federal investigation of all former high-level officials for years after leaving office. This obviously would not only be prohibitively expensive, but would also create too many opportunities for abuse, harassment, etc.

Another alternative would be to adopt the same remedy incorporated in the federal government-fraud, water-pollution, and other statutes under which private parties may initiate civil actions if the government refuses to do so. This remedy has a number of advantages.

First, because the initiator is eligible to receive a small portion of any amounts recovered, there is a strong incentive for citizens to assist in uncovering evidence of

wrongdoing.

Second, such actions provide an alternative in situations where prosecutorial officials refuse to bring meritorious cases because of political pressures, different enforcement priorities, and other factors extraneous to the merits of the situation.

Third, since the public will know that such actions are possible, it will dampen if not quell the public outrage which otherwise occurs when facts apparently crying out for legal action appear in the public press yet the Justice Department refuses to act.

To those who worry that such a privately-initiated cause of action could be abused, there are several answers. The first is that our courts have numerous remedies not only to dismiss frivolous and vexatious suits in their very early stages, but also to punish those who bring them.

The second answer is that there has been virtually no abuse concerning other statutes which similarly incorporate "private attorney general" provisions.

The third answer is that, to guard against any such abuse, Congress could require that any such privately-initiated actions must plead specific factual details relating to the alleged offense, and/or that the complaint must be accompanied by sufficient documentary evidence in the form of affidavits or otherwise to present a prima facie case. Such a provision would require the plaintiff no only to know the facts but also to be in

a position to prove them even before the suit can be initiated, rather than relying upon vague "upon information and belief" pleadings, and hoping that a "fishing expedition" type of wide-range discovery can eventually uncover evidence of wrongdoing.

In summary it is respectfully suggested that the Committee consider adding to the present bill a section providing for a civil action to recover for the federal government any money a person receives while acting in violation of the statute. Such actions should ordinarily be initiated by the Justice Department, but provisions should be made, incorporating appropriate safeguards, for such actions to be initiated by private persons in situations in which the Justice Department refuses to take action.

Senior Executives Association

TESTIMONY OF

THE

SENIOR EXECUTIVES ASSOCIATION

BEFORE THE

COMMITTEE ON THE JUDICIARY

UNITED STATES SENATE

ON S. 2334

INTEGRITY IN POST-EMPLOYMENT ACT OF 1986

PRESENTED BY

CAROL A. BONOSARO

EXECUTIVE DIRECTOR

JUNE 18, 1986

P.O. BOX 7810 • BEN FRANKLIN STATION • WASHINGTON, D.C. 20044

Thank you, Mr. Chairman, for the opportunity to be here and to present the views of the Senior Executives Association on S. 2334 and the related amendments.

The Senior Executives Association represents all the career executives who are members of the Senior Executive Service in the Federal government. Our members are responsible for managing the day-to-day operations of the government, and for ensuring the integrity of governmental processes. They do so by monitoring the integrity of the employees that they supervise and manage, and by monitoring their own integrity in relation to the law. As their professional association, we proudly present an annual seminar on ethics in government, providing updates for our members on issues of ethics that have arisen in the past year and how they have been handled by their peers.

In our view, S. 2334 goes too far. Current law, as you know, provides that high level former officials are barred for one year from any contact with their former agency for purposes of representing anyone, provides a two year bar on matters which were under the official's responsibility within the last year of his or her employment, and provides a permanent lifetime bar of the former official representing anyone on any matter in which he or she personally and substantially participated while in government. All of these restrictions are criminal in nature, and provide for heavy prison terms and fines if the former employee is found to have violated them.

S. 2334 and the Thurmond-Simon-Metzenbaum amendment would carry the current restrictions much further. GS-15's and above would be barred from representing anyone before any government agency, including Congress or the courts, for two years; GS-11's to 14's would not be allowed to represent anyone before their former agency for one year; and the representation of foreign entities (whether they be corporations, governments or individuals) would be even more strictly constrained.

We strongly believe that these proposals are over-reactions to the public outrage over former political officials attempting, according to the media, to misuse their positions immediately after having left government. We do not know the facts well enough to be able to make judgments about the allegations, and those are best left to the Department of Justice and others. However, as we all know, bad facts make bad law. To enact more stringent laws covering most government employees merely as a reaction to the abuse of one or two is, we believe, bad law.

Some of the current officers of SEA have served as agency ethics officials. They have informed us that, in nearly every instance where they saw a violation of the post-employment

restrictions, those violations were committed by former political officials who inadvertently had attempted to represent someone in a matter which had been under that individual's official responsibility, but about which the official knew nothing. When the problem was pointed out, the former political official immediately withdrew from their representation and took extra steps to ensure that similar mistakes never occurred again. Since these potential violations involved criminal statutes, even though the matter was inadvertent, it was required that they all be reported to the Department of Justice for investigation. Large inquiries would be mounted, the determination would be made that the violations, if they occurred, were inadvertent; and the matter would be closed after a tremendous expenditure of effort. It is not that real violations never occurred, but that, for the most part, everyone tried their best to comply with the law.

Because of the attempt to comply with the law, few criminal prosecutions, if any, ever occur. Most people do not want to prosecute and send to jail individuals who have inadvertently violated a criminal provision which is extremely difficult to monitor and enforce. The current criminal law in 207 Title 18 is such a law, and the proposed changes to 207 in S. 2334 (and the proposed amendments) would make it even worse. We just do not believe that even more stringent criminal laws are the answer to the problem.

As an alternative, we propose that the current sections of Title 18 involving post-employment conflicts be also enacted as civil proscriptions, possibly in Title 5 of the United States Code. We propose that the new proscriptions be civil in nature, such that the Department of Justice could seek injunctions against any former employee who violated them and could seek to recover on behalf of the United States any fees that were paid to the former employee who attempted the representation in violation of 205 - 208 of the current Title 18. The reason we believe this is a much better solution is <u>first</u>, because the burden of proving the violation would change from "beyond a reasonable doubt" to "a preponderance of the evidence," a civil rather than a criminal standard; <u>second</u>, enforcement would be easier and the stigma of marking former officials as criminals would not be present, thus making the decision to proceed against an individual easier for the Department of Justice, and making the likelihood of success much higher; <u>third</u>, the investigation of such violations could in many instances be carried out by the individual agencies, rather than having to rely on the FBI or other criminal investigative agencies, many of whom are extremely over burdened and thus unable to handle the number of investigations necessary under these amendments;

fourth, the deterrent effect to former official is every bit as strong as it is with the current criminal penalties because of the higher likelihood of prosecution and of recovery of the fees paid to them.

Finally, we suggest that the employment by a foreign entity provisions contained in the amendment which would bar for two years any representation by former employees down to and including GS-11's, should be amended to make the restrictions civil in nature, and to restrict representation of these foreign entities by Cabinet, sub-cabinet and congressional employees for a two year period. The presumption should be that, for these officials, the foreign entities issue was under their "official responsibility" since they were subject to lobbying or representation on behalf of others representing these foreign entities while in government. Thus, a two year proscription on their representing these entities before government appears reasonable. To go beyond that, again we think is an over-reaction; and, to bar everyone from GS-11 up from providing such representation is extreme. If it is decided that such restriction should extend further down into the civilian career ranks of the government, we suggest that the restriction only apply to those at the State Department, AID and other bureaus or agencies whose employees are commonly dealing with foreign entities during their employment in government.

To enact S. 2334 as proposed, or with the Thurmond-Simon-Metzenbaum amendment, would effectively bar extremely qualified people from government service. Few, if any, individuals who are familiar with the kinds of issues necessary to be dealt with in the international arena (such as those at the Department of Justice, AID, and Commerce) would be willing to accept public service in those departments and agencies under the proposed restrictions. We would lose a whole body of potential government employees who just could not accept the post-employment restrictions that would be imposed by this bill.

In summary, we urge you to modify this proposed legislation to make the penalties civil in nature, and to test the civil penalties for a period prior to expanding the criminal restrictions. Thank you very much for this opportunity to testify. I would be happy to answer any questions you might have.