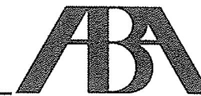

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February 11, 1997

U.S. Senate
Washington, D.C. 20510

Re: ABA Recommendation on Pre-Government Employment and Post-Government Employment Restrictions on Senior Executive and Judicial Appointees

Dear

Last week, the House of Delegates of the American Bar Association voted to approve as ABA Policy three recommendations on the subject of pre-government employment and post-government employment restrictions on senior executive and judicial appointees. These recommendations and the accompanying report, copies of which are enclosed, were developed by the ABA's Section of International Law and Practice and co-sponsored in the House of Delegates by three other ABA Sections--Administrative Law and Regulatory Practice, Antitrust Law, and Individual Rights and Responsibilities. The recommendations also received active support in the House of Delegates from several other entities, including the Government and Public Sector Lawyers Division and the Senior Lawyers Division. They were overwhelmingly approved by voice vote in the House.

In brief, the recommendations urge Congress to avoid legislating disqualifications for government service based on clients previously represented by senior executive or judicial appointees and to repeal recent legislation (attached as Appendix I) that affects the pre and post-employment activities of certain senior trade officials. The legislation in question is implicated by the pending nomination for U.S. Trade Representative. As you know, the Administration has proposed a waiver of this legislation as to the pending nominee. The recommendation and the Association take no position on the qualifications of the nominee, but only on the general issue of statutory disqualification.

Although the existing legislation affects only a limited class of nominees, it implicates a central issue for the legal profession---the concept that a lawyer is forever

tainted by the clients he or she has represented. As discussed in our report, this statutory presumption of taint is inconsistent with the role and duties of an advocate and advisor as an independent professional. We are concerned about this type of presumption in the current context and in its potential application to other areas of government service. Taken to its logical extreme, such a presumption could bar from service as a judge any lawyer who has represented criminal defendants or any class of clients deemed "objectionable."

We have included the full report and its appendices for your information. The ABA's House of Delegates considered this report when it adopted the recommendation on pre-government and post-government employment restrictions on senior executive and judicial appointments as ABA policy. The report, although not ABA policy, provides useful legislative history with respect to the recommendations and their adaption as ABA policy. The appendices in particular include extensive research that demonstrates the uniqueness of this provision. Appendix II is a Table of Statutory Qualifications for Primary U.S. Officers; it contains a review of all relevant provisions in the *United States Code* that we could identify. Appendix III traces the development of federal legislation dealing with post-government employment restrictions.

We would be happy to discuss the recommendations and accompanying materials with you or your staff. Please contact Alan Raul, our Government Relations officer, at (202) 789-6021 with any inquiries you may have.

Respectfully yours,

Lucinda A. Low
Chair

cc: Robert Evans

AMERICAN BAR ASSOCIATION
SECTION OF INTERNATIONAL LAW AND PRACTICE
RECOMMENDATION TO THE HOUSE OF DELEGATES

RECOMMENDATION

BE IT RESOLVED, That the American Bar Association urges the Government of the United States to proceed as follows: 1 2 3

I. Congress should avoid statutory provisions that disqualify senior executive or judicial appointees on the basis of clients they have previously represented. 4 5 6 7

II. Congress and the Administration should continue to utilize traditional mechanisms (including the Senate's power of confirmation), rather than special pre- or post-employment rules, to ensure that senior executive and judicial positions are filled only by highly qualified persons who will fulfill the responsibilities of their positions with complete integrity. 8 9 10 11 12 13 14 15

III. Ethics-in-government rules, whether addressed to pre- or post-government employment activities, should not single out foreign policy or trade functions for special, restrictive treatment. Congress should repeal the 1995 amendments to 18 U.S.C. §207 and 19 U.S.C. §2171(b), whose effect is to restrict the pre- and post-employment activities of U.S. Trade Representatives ("USTRs") and Deputy USTRs on behalf of foreign interests, and should not extend those provisions to cover other senior government positions. 16 17 18 19 20 21 22 23 24

AMERICAN BAR ASSOCIATION
SECTION OF INTERNATIONAL LAW AND PRACTICE
REPORT TO THE HOUSE OF DELEGATES

I. INTRODUCTION

On July 24, 1995, while debating the Lobbying Disclosure Act of 1995 ("LDA"),[1] the Senate accepted an amendment creating a new restriction on who could serve as United States Trade Representative ("USTR") or Deputy USTR.[2] Specifically, the statute defining the positions of USTR and Deputy USTR, 19 U.S.C. § 2171(b), was amended to disqualify from eligibility anyone who at any time in the past had directly represented, aided or advised a foreign government or political party in a trade negotiation or trade dispute with the United States. A related section of the LDA created new restrictions on the post-employment conduct of persons who have served as USTR or Deputy USTR. Prior law had contained a special restriction, enacted in 1992, against a former USTR's representing, aiding or assisting any foreign government within three years of having served as USTR.[3] The LDA extended the ban's duration to a lifetime ban and its coverage to include Deputy USTRs.

The Senate accepted these two provisions (hereinafter the "USTR Amendment," reproduced in full at Appendix I to this Report) virtually without debate, and the provisions passed the House after some unsuccessful attempts to expand their reach. The President signed the Lobbying Disclosure Act, including the USTR Amendment, while recognizing the Justice Department's concern that the new pre-government employment restrictions may unconstitutionally impinge on the President's appointments power. In 1996, more bills were introduced to expand these restrictions to other government officials, but none were enacted.

The American Bar Association ("ABA") urges repeal of the USTR Amendment. While both the pre- and post-employment restrictions are objectionable, as discussed below, it is the pre-

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1/ Pub. L. No. 104-65, 109 Stat. 691 (1995).

2/ *See* 141 Cong. Rec. S10560-61 (daily ed. July 24, 1995).

3/ Pub. L. No. 102-395, 106 Stat. 1873, codified at 18 U.S.C. § 207(f)(2).

employment disqualification that raises the most serious issues, and it is this provision that most urgently should be repealed. The provision sets a dangerous precedent for limiting the availability of qualified candidates to serve in the U.S. Government. It automatically disqualifies potential nominees solely based on a prior relationship with a particular type of client. Such a rule, which effectively equates an advocate's personal views with those of his or her client, reflects an unwarranted and incorrect view of the lawyer/client relationship, especially in view of the ethical obligations of lawyers and the constitutionally-recognized right to counsel. In addition, such a rule takes no account of the nature, length, significance or contemporaneity of the relationship with the former client. With regard to the new lifetime post-employment restrictions for USTRs and Deputy USTRs, there has been no demonstration that such a ban is needed to address any real problem, and there are compelling reasons not to restrict the post-employment conduct of trade negotiators in such an unusual and severe manner.

In sum, this Report supports the accompanying ABA resolution urging that the Congress: avoid enacting disqualifications for service in the U.S. Government which presume that lawyers and other advisors take on the views of their clients; avoid singling out foreign policy and trade functions for extra-restrictive pre- or post-government employment rules; and promptly repeal the USTR Amendment.

II. THE PRE-EMPLOYMENT RESTRICTIONS

The new pre-employment restriction is unique among provisions in the U.S. Code creating "primary officers" of the U.S. Government (*i.e.*, positions requiring nomination by the President and the advice and consent of the Senate). Of the hundreds of appointees in this category, only USTR and Deputy USTR candidates can be disqualified based solely on the identity of their former clients.

There is a serious constitutional objection to this new pre-employment restriction, in that it infringes on the President's appointments power. The ABA notes, but does not rest its concerns on, that objection. The new pre-employment restriction is also troubling on several policy grounds: (1) it arbitrarily limits the flexibility of the President to choose, and the Senate

to confirm, the best possible person for a particular government position; (2) it presumes, without justification, that a person advising a foreign government personally embraces and retains views antithetical to those of the U.S. Government; (3) it creates perverse anomalies unconnected to any legitimate interest in ensuring the loyalty of senior appointees; and (4) comparable disqualifications could easily be enacted, based on the same flawed rationale, for other government positions.

A. The New Disqualification Is of Doubtful Constitutionality

As mentioned above, there is virtually no legislative history accompanying the USTR Amendment and thus, unlike the debate surrounding provisions restricting post-government employment activities, no discussion by the Congress of the legality of the new pre-employment restriction. As also noted above, before the USTR Amendment there were no statutory provisions disqualifying any class of persons from service as USTR or Deputy USTR.

It is well accepted that the Congress has the constitutional responsibility for creating the various government offices not specifically enumerated in the Constitution.[4/] Further, it is well accepted that the Congress can attach qualifications to those government offices:

> While Congress may not appoint those who execute the laws, it may lay down qualifications of age, experience, and so on. Sometimes these qualifications significantly narrow the field of choice. However, any Congressionally imposed qualifications must have a reasonable relation to the office. Otherwise, Congress would be, in effect, creating the appointing power in Congress, rather than in the President.
>
> Congress may, in short, create the office but may not appoint the officer. To distinguish between these two powers, the Court has developed a *germaneness* test.[5/]

4/ *See generally* LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 244 (2d ed. 1988) (analyzing the wording of Art. II, § 2, cl. 2).

5/ JOHN E. NOWAK & RONALD D. ROTUNDA, CONSTITUTIONAL LAW 265 (5th ed. 1995) (footnotes omitted).

The Department of Justice articulated just such serious constitutional concerns with the USTR Amendment as it relates to the President's appointments power:

> The Department of Justice has long opposed broad restrictions on the President's constitutional prerogative to nominate persons of his choosing to senior executive branch positions. The restriction in the bill is particularly problematic because it operates in an area in which the Constitution commits special responsibility to the President, who "is the constitutional representative of the United States in its dealings with foreign nations." See, e.g., United States v. Louisiana, 363 U.S. 1, 35 (1960). The officers in question perform diplomatic functions as the direct representative of the President, a fact that Congress itself has recognized by providing that they should enjoy the rank of ambassador. 19 U.S.C. § 2171(b). Regardless of whether the President would, as a policy matter, be willing to accept this particular restriction, Congress would exceed its constitutionally assigned role by setting such a broad disqualification. See, e.g., Civil Service Commission, 13 Op. Att'y Gen. 516, 520-21 (1871).[6/]

After passage of the Lobbying Disclosure Act by both the Senate and the House, Justice continued to express serious concerns about the new pre-employment provision, but did not recommend that the President veto the Act on this basis.[7/] The President in signing the bill noted the constitutional issue.[8/]

The new disqualification raises serious separation of powers questions. When such provisions are enacted without hearings, with virtually no floor debate or legislative history, and despite constitutional objections noted by the Department of Justice, the justifications underlying them should be carefully

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6/ Letter from Andrew Fois, Assistant Attorney General, Office of Legislative Affairs, U.S. Department of Justice to the Hon. Henry Hyde, Chairman, House Committee on the Judiciary, concerning S. 1060 [the Senate bill pending before the House] 2-3 (Nov. 7, 1995).

7/ Letter from Andrew Fois, Assistant Attorney General, Office of Legislative Affairs, U.S. Department of Justice to the Hon. Alice M. Rivlin, Director, Office of Management and Budget concerning S. 1060 2 (Dec. 18, 1995).

8/ *See* 51 Weekly Compilation of Presidential Documents 2205-06 (December 25, 1995).

examined. Where such provisions are not only constitutionally suspect but also premised on a mistaken and troublesome view of the lawyer-client relationship, they should be removed.

B. It Is In The Public Interest for the President to Be Free to Appoint the Most Highly Qualified Nominees, Regardless of Past Clients

The new disqualification rules out many qualified individuals who could otherwise serve the nation effectively as senior trade negotiators. The best qualified candidate for a particular USTR or Deputy USTR appointment may be someone who has some experience advising foreign clients. (We note, in this regard, the adage that it is useful for a prosecutor to have experience serving as defense counsel.) Yet, the USTR Amendment would prevent such a person from serving.

While it is wrong to presume a link between advocacy and personal belief, it is even more wrong to freeze such a presumption into a statute. Categorical and difficult-to-amend statutory disqualifications cannot take into account the nuances of a particular candidate's history. These are precisely the factors that the President should weigh in choosing a nominee and the Senate should review in the confirmation process.

The new disqualification does not only restrict the President's appointments power. It also represents a failure to respect the Senate's constitutional role to consider, and where appropriate disapprove, the President's nominees. The Senate should preserve its prerogative to consider a particular nominee's record of advocacy for foreign clients, or foreign government clients, in the confirmation process and to determine whether anything in that record is sufficiently troubling to justify withholding confirmation.[9/]

9/ The unwarranted breadth of the new disqualification is demonstrated by the more narrowly drawn alternatives that Congress did not select. Even assuming *arguendo* that assertive use of the Senate's confirmation authority is insufficient, narrower solutions are available. One is mandatory recusal with penalties for failure to do so, combined with strict reporting of prior activities. *See, e.g.*, 28 U.S.C. § 528 (Justice Department employees). Recent USTR and Deputy USTR nominees have disclosed prior representations, including foreign representations, and have voluntarily recused themselves (temporarily or permanently, as appropriate) with respect to issues involving those particular clients. *Hearing to consider nomination of Michael Kantor Before Senate Comm. on Finance*, 103rd Cong., 1st Sess. (1993); *Nomina-*
(continued...)

C. The Unstated Premise of the New Disqualification -- That An Advocate is Either Tainted By or Continuously Captive to the Interests of a Former Client -- Is Inconsistent with U.S. Traditions and Values

During the 1974 Senate consideration of legislation to establish the office of special prosecutor and to depoliticize the position of Attorney General, former Supreme Court Justice Arthur Goldberg described the attorney-client relationship in the following manner:[10/]

> One of the traditional concepts applicable to the bar at large is too often overlooked in senatorial confirmation hearings involving nominees for Attorney General, Assistant Attorney General, Deputy, and U.S. Attorneys. That concept -- which I fear, Mr. Chairman, in the day of the organization man and big interests which lawyers are called upon to serve, is too often overlooked -- is that *the bar is independent, that it is not a servant of a client, but services a client; and that the men and women of the bar are independent and give counsel and advise independently.* The principal law enforcement officers of the Government should be lawyers in that sense, ... Any nominee of a different mind or character should not be confirmed by the Senate.

9/(...continued)
tion of Carla Anderson Hills: Before Senate Comm. on Finance, 101st Cong., 1st Sess. (1989). *Nominations of Rufus Hawkins Yerxa, Charlene Barshefsky, Walter Broadnex, Avis Lavelle, Jerry Klegner, David Ellwood, Kenneth Apfel, Bruce Vladeck, Hariet Rabb and Jean Hanson: Before Senate Comm. on Finance*, 103rd Cong., 1st Sess. (1993). Other trade officials have done likewise. *See, e.g.*, Rick Jenkins, "Trade Nomination Raises 'Revolving Door' Issue," *Christian Science Monitor* at 8 (Jan. 14, 1994). Another alternative is more extensive mandatory reporting of pre-employment activities over a set period before Senate confirmation, enhancing the Senate's ability to reject a nominee based on prior activities if it wishes. *See, e.g., Hearings on S. 555 (Public Officials Integrity Act of 1977, Blind Trusts and Other Conflict of Interest Matters) Before the Senate Comm. on Governmental Affairs*, 95th Cong., 1st Sess. 108-09 (1977) (testimony of Fred Wertheimer, Vice President for Operations, Common Cause). Requiring disclosure of clients is not without its problems. As noted by the ABA in 1977, such a regime could place a professional person in the position of having to violate the confidentiality of a privileged relationship. *See Financial Disclosure Act: Hearings on H.R. 1, H.R. 9, H.R. 6954, and Companion Bills Before the Subcommittee on Administrative Law and Governmental Relations of the House Comm. on the Judiciary*, 95th Cong., 1st Sess. 487, 490 (1977) (testimony of Prof. Livingston Hall and Prof. Herbert S. Miller on behalf of the American Bar Association).

10/ *Removing Politics from the Administration of Justice: Hearings on S. 2803, S. 2978 Before the Subcommittee on Separation of Powers of the Senate Comm. on the Judiciary*, 93rd Cong., 2d Sess. 62 (1974) (emphasis added).

For just such reasons, it is widely accepted that a lawyer should not be ineligible for nomination as a judge solely because of past representation of, for example, criminal defendants.

The USTR Amendment, and the proposals to extend the disqualification so that it applies to other government positions, adopts a different and inaccurate view of the relationship between advocates and their clients. It is wrong to assume that an outside advisor, such as a lawyer, necessarily concurs with the views or actions of his or her client, or will apply those views in carrying out the duties of a public office. Certainly, if someone represents more than one group of clients -- for example, foreign governments in some matters and U.S. corporations in others -- it cannot fairly be presumed that the foreign government representation determines or more accurately represents the person's own beliefs.

When an individual leaves the private sector and becomes a government official, he or she takes on totally new responsibilities and must move beyond *all* prior client interests -- those of domestic and foreign clients alike. Other than preserving their confidences, an appointee has no continuing obligation to prior clients. The USTR Amendment wrongly ignores this aspect of public service.

Reflecting its inconsistency with U.S. traditions and values, the new disqualification is utterly without precedent in the U.S. Code. Appendix 2 to this Report identifies 126 statutory provisions, relating to U.S. Government civilian offices, that impose qualifications in addition to Senate confirmation.[11/] As shown there, those 126 provisions fall into seven groupings:

- 3 provisions requiring that appointees be U.S. citizens;
- 19 provisions requiring that appointees be civilians at the time of their appointment;

11/ These are all the provisions that could be identified through review of the U.S. Code, 1994 Edition, and Supplement I to that Edition. Some of these positions are also subject to statutory requirements designed to ensure a balance of political affiliation on Boards and Commissions, *e.g.*, an equal number of Democrats and Republicans on the U.S. International Trade Commission. Additionally, in some cases an office is required by statute to be filled by an existing federal, state or local government official. Appendix II largely ignores such requirements.

- provisions that establish minimum representation on a board or commission of certain constituent groups;
- provisions requiring technical expertise;
- 6 provisions imposing "cooling off" periods to ensure civilian control of the military;
- 7 provisions imposing other temporary "cooling off" periods (*e.g.*, sitting members of the U.S. Postal Service Board of Governors may not simultaneously be representatives of "special interests using the Postal Service");
- 2 provisions containing permanent, uncurable, disqualifications. Of these, only the USTR disqualification is based on advocacy activities. The other provides that members of the permanent board of the Federal Agriculture Mortgage Corporation shall not be, or have been, officers or directors of a financial institution.

D. The New Disqualification Creates Perverse Anomalies

Before the USTR Amendment, there were no statutory qualifications upon who could be nominated and confirmed to serve as USTR or Deputy USTR. Not even U.S. citizenship, or a record free of criminal behavior, was (or is) statutorily required. Thus, the effect of the new pre-government employment restriction is that a non-citizen, a felon or even a juvenile could in principle be nominated and confirmed as USTR, while a highly skilled trade specialist who briefly advised a foreign government twenty years ago could not.

Such a rule could also deprive the nation of highly skilled and effective public servants. Had it been in effect at the time, the USTR Amendment might have disqualified one of President Reagan's USTRs, Dr. Clayton K. Yeutter, for activities that apparently did not dominate his pre-government professional work.[12/] Extending the principle, as some have proposed, to representing, aiding or advising foreign private companies might

12/ Dr. Yeutter had served on the board of directors of the Swiss Commodities and Futures Association and had been the first American businessman invited to Japan (in 1982) under a Japanese government program to improve trade relations with the United States. *See Hearing on the Nomination of Dr. Clayton K. Yeutter Before the Senate Comm. on Finance*, 99th Cong., 1st Sess. 28-29 (1985) (vita submitted on behalf of Dr. Yeutter).

have disqualified President Bush's USTR, Carla Hills.[13/] Again, to the extent that questions arise in a particular case about the overlap between prior advocacy efforts and the advocate's own current beliefs, such questions can be effectively explored during the Senate confirmation process.

Broad and seemingly arbitrary interpretations of the USTR Amendment are possible given the lack of definitions, in either the statute or the legislative history, for crucial and open-ended terms such as, but not limited to, "aided" and "advised." For example, if a Senator meets with foreign government officials in an attempt to find a mutually advantageous solution to a particular bilateral trade dispute, it could be argued that he or she has "aided" or "advised" the foreign government in such a manner as to trigger disqualification from future service as USTR. On the other hand, it has been observed that the USTR Amendment would not prevent appointment of a corporate executive who, in order to increase profits at his ailing company, negotiates an enormous tax subsidy from a foreign government in order to move parts of his factory abroad and subsequently fires hundreds of his U.S. workers.[14/]

E. The New Disqualification Sets An Undesirable Precedent for Other Government Positions

A significant danger of the USTR Amendment is that the same principle could be applied to other government positions involving disciplines other than international trade negotiation. Persons could be disqualified, by statute, from being federal judges because they had at some time in their past represented criminal defendants, even if their representations had been the result of occasional court appointment. Positions at the Environmental Protection Agency could be conditioned, by statute, on never having represented, aided or assisted clients in favor of, or opposed to, toxic dump cleanup. Positions at the Department

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13/ According to third-party testimony at the time of her appointment, Ambassador Hills had previously been registered under the Foreign Agents Registration Act as an agent for Daewoo Industrial Co. *See Hearing on the Nomination of Carla Anderson Hills Before the Senate Comm. on Finance*, 101st Cong., 1st Sess. 32, 51 (1989) (testimony of Anthony Harrigan, President, U.S. Business and Industrial Council).

14/ *See* Donald DeKieffer, "The 1995 `Irrelevant Qualifications Act'" *Journal of Commerce* at 7A (Dec. 30, 1996).

of Energy could be conditioned, by statute, on never having represented, aided or assisted clients in favor of, or opposed to, offshore drilling. Positions at the Consumer Product Safety Commission could be conditioned, by statute, on never having represented, aided or assisted clients supporting, or opposing, specific product liability actions. More broadly, anyone who has given advice to entities in a regulated industry could be disqualified from putting his or her expertise to use as a regulator in that industry. Such a rule would dramatically restrict the pool of qualified regulators.

The ABA historically has advanced the view that rigid (*i.e.*, statutory) pre-employment restrictions for government appointments should be avoided. For example, in the wake of the perceived politicization of Justice Department functions during the Watergate period, during consideration of what eventually became the Ethics in Government Act of 1978, the ABA was asked to comment on possible eligibility restrictions for senior law enforcement positions:

> Question. There have been many recommendations to set the statutory requirements for appointees to the Offices of Attorney General, Deputy Attorney General, Director of the FBI, and others. Do you generally believe it is a good idea to set rigid eligibility standards by statute, considering that many highly qualified individuals would be arbitrarily excluded from consideration by such standards? If so, what sorts of standards would you suggest?
>
> Answer. The ABA has not suggested rigid standards for appointment to any of the above-mentioned positions nor does it believe rigid standards are advisable.[15]

The USTR Amendment, by contrast, fails the test of narrow drafting and scope. It reaches backward in time without limit, disqualifying otherwise qualified candidates by reason of any

15/ *Watergate Reorganization and Reform Act of 1975: Hearings on S. 495 Before the Senate Comm. on Government Operations*, 94th Cong., 1st Sess., pt. 2 at 174 (1976) (testimony of William B. Spann, Jr., President-Elect Nominee of the American Bar Association and Chairman, American Bar Association Special Committee to Study Federal Law Enforcement Agencies). The ABA did recommend limited measures to address perceived problems of politicization of the Department of Justice. *See also id.* at 270-71, 295, 298.

covered representation or assistance at any earlier point in their careers. The amendment reaches candidates who agreed to assist foreign governments with no idea that doing so might preclude later public service. The amendment applies not to a carefully circumscribed category of activities, but to any representation or assistance, whether significant or insignificant, to any foreign government on any trade "negotiation" or "dispute" involving the United States. Finally, the amendment confuses the advocate's required role with his or her personal views.

III. THE POST-EMPLOYMENT RESTRICTIONS

A. Post-Employment Restrictions of General Application

There have been restrictions on the post-employment activities of various categories of federal workers since 1872.[16] The earliest versions approximating the current provisions were adopted in 1962, as part of an overall revision of the conflict-of-interest statutes.[17] In short, a full and generally effective array of government-wide post-employment restrictions has been in place for many years. Those restrictions, subjected to substantial revision and fine-tuning in the Ethics in Government Act of 1978[18] and the Ethics Reform Act of 1989,[19] include:

- a lifetime ban on appearing before or communicating with any U.S. Government body on behalf of a party other than the United States, on matters in which the official "participated personally and substantially" while a federal employee;[20]
- a two-year ban on appearing or communicating with any U.S. Government body on behalf of a party other than the United States on matters that were pending under his or her offi-

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16/ *See* S. Rep. No. 99-396, 99th Cong., 2d Sess. 13-14 (1986); S. Rep. No. 100-101, 100th Cong., 1st Sess. 8-9 (1987).

17/ Prior provisions had barred former employees from prosecuting claims against the United States for two years after terminating government employment. *See* H. Rep. No. 748, 87th Cong., 1st Sess. 2-4 (1961).

18/ Pub. L. No. 95-521, 92 Stat. 1824, 1864-66 (1978).

19/ Pub. L. No. 101-194, 103 Stat. 1716-24 (Nov. 30, 1989).

20/ 18 U.S.C. § 207(a)(1) (1996).

cial responsibility in the year prior to departure from the agency;[21/]

- a one-year ban for enumerated senior officials on all substantive contact with the former agency on behalf of a party other than the United States, which for Cabinet officers and certain other very senior officials extends to contacts with specified top officers of other agencies as well;[22/] and
- a one-year ban prohibiting senior officials of all departments and agencies from (i) representing the interests of a foreign government or political party before any agency or department or (ii) aiding or advising a foreign government or political party with the intent to influence a decision of any department or agency.[23/]

The last of these provisions, a special rule against senior officials' representing or advising foreign governments, drew a number of policy and constitutional objections prior to and at the time of its enactment.[24/] This Report does not address the propriety of a broad, government-wide, one-year ban on post-employment activity for foreign governments. It is noteworthy, however, that this provision was justified against due process attack on the ground that it presented no absolute bar to pursuit of employment by covered officials, but "merely imposed a waiting period" of one year.[25/]

21/ 18 U.S.C. § 207(a)(2).

22/ 18 U.S.C. §§ 207(c), (d).

23/ 18 U.S.C. § 207(f).

24/ H. Rep. No. 1068, 100th Cong., 2d Sess. 13 (1988) (regarding H.R. 5043); *Post-Employment Conflicts of Interest: Hearings on H.R. 5097 and Related Bills Before the Subcommittee on Administrative Law and Governmental Relations of the House Comm. on the Judiciary*, 99th Cong., 2d Sess. 79-80 (1986) (testimony of John C. Keeney, Deputy Assistant Attorney General, Criminal Division, Department of Justice, on legislation leading up to the 1989 Act, arguing that post-employment restrictions could prohibit representations which were in the national interest). Similar views were forwarded by the ACLU, which maintained that a statute prohibiting the representation of foreign interests regulated political activity and, to be upheld, must withstand strict judicial scrutiny. *See Post-Employment Restrictions for Federal Officers and Employees: Hearings on H.R. 2267 and Related Bills Before the Subcommittee on Administrative Law and Governmental Relations of the House Comm. on the Judiciary*, 101st Cong., 1st Sess. 200, 204-06 (1989). *See also* Appendix III to this Report.

25/ S. Rep. No. 101, 100th Cong., 1st Sess. 14 (1987).

These post-employment restrictions establish a comprehensive set of rules that apply across the board to federal officials and employees in all agencies and departments. For the most part, these rules appear to have worked successfully.[26] They apply with full force to USTRs and Deputy USTRs, and thereby provide a solid framework for protecting the public interest in regulating the post-employment activity of persons who occupy those positions.

B. Special Restrictions Placed Upon Senior Trade Negotiators

Beginning in 1992 and by expansion in the 1995 USTR Amendment, Congress created a special rule that singles out former USTRs and Deputy USTRs for special, more restrictive treatment than other, similarly-situated, former senior officials. Congress did so with virtually no meaningful deliberation or explanation. It is the ABA's view that, in so doing, Congress created a separate category of post-employment treatment for the senior U.S. trade officials that cannot be justified and should be eliminated.

The first step along this path occurred in 1992, when Congress, as part of an appropriations bill, enacted a new Section 207(f)(2) which lengthened to three years the foreign entity ban as it applied to the USTR.[27] The Senate report describing this provision contained no meaningful explanation or justification of the longer period.[28] In signing the bill, President Bush took strong objection, noting that the change had been passed without any public discussion of the merits, without consideration of its relationship to the comprehensive amendments passed in the Ethics Reform Act of 1989, and without evaluation of "the implications of targeting for coverage just one posi-

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26/ The ABA may, of course, have occasion in the future to comment or suggest improvements that would enhance the effectiveness of these rules. That is not the subject of this Report.

27/ Departments of Commerce, Justice, and State, the Judiciary, and Related Agencies Appropriations Act, 1993, Section 609, Pub. L. No. 102-395, 106 Stat. 1828, 1873 (1992).

28/ *See* S. Rep. No. 102-331, 102d Cong., 2d Sess. 118 (1992).

tion."[29] President Bush signed the bill because it was a necessary funding measure.

Continuing this pattern of acting without legislative hearings or development, the 1995 USTR Amendment enlarged this special USTR restriction to a lifetime ban, and expanded the ban to cover Deputy USTRs as well as USTRs. Like the initial 1992 creation of the special post-employment rule for USTRs -- and unlike the broadly-applicable post-employment rules of the Ethics in Government Act of 1978 or the Ethics Reform Act of 1989, each of which underwent extensive legislative consideration -- the USTR Amendment did so without any meaningful legislative background.

This action raises serious legal and policy questions. In departing from the "waiting period" rationale that underlay the general one-year ban on representation of foreign governments in the Ethics Reform Act of 1989,[30] the new lifetime ban raises the very constitutional questions that led the Justice Department and other witnesses to express concern during the 1989 reform legislation. One of the bills leading to the 1989 Act contained a lifetime ban on certain high ranking officials representing or advising foreign entities. In hearings on that bill, a Justice Department spokesman agreed that the lifetime ban raised a serious constitutional problem.[31] Another Justice Department official doubted that reducing the ban to 10 years would remove the constitutional problem.[32] Commenting on a substitute version of the bill, a spokesperson for Common Cause agreed with shifting away from a lifetime ban on representing foreign governments in favor of a shorter period. While believing that the period for the ban should be longer than for other representations, Common Cause was "very troubled by a lifetime ban and would not recom-

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29/ 28 Weekly Compilation of Presidential Documents 1874 (Oct. 12, 1992) (statement by President George Bush upon signing H.R. 5678).

30/ *See supra*, fn. 25.

31/ *Integrity in Post Employment Act of 1986: Hearings on S. 2334 Before the Senate Comm. on the Judiciary*, 99th Cong., 2d Sess. 37-38, 41-43, 66 (1986) (testimony of John C. Keeney, Deputy Assistant Attorney General, Criminal Division, Department of Justice).

32/ *Id.* at 87-88 (testimony of Stephen S. Trott, Assistant Attorney General for the Criminal Division, Department of Justice).

mend that."[33] Others testified that even a 10-year ban was too long.[34] The ACLU suggested that "[a]t the very least such a prohibition should expire if the party controlling the White House changes in the interim."[35]

More importantly, no persuasive rationale has been advanced for applying special rules to senior trade officials. Former USTRs were barred by pre-1992 law, for example:

- from ever assisting foreign governments in any matter in which they had direct involvement while in government;[36]
- from communicating with USTR officials on any policy issue for a period of one year;[37]
- from communicating with USTR officials within two years on any matter that was active within USTR during the last year of the former USTR's service;[38] and
- from appearing before any agency, within one year after leaving government, on behalf of a foreign government or political party.[39]

Taken together, these rules adequately protect against the possibility, *and against the appearance* of "influence peddling" or "misuse of inside information" by former trade officials on behalf of foreign interests.

33/ *See id.* at 179 (testimony of Ann McBride, Senior Vice President, Common Cause); *Post-Employment Conflicts of Interest: Hearings on H.R. 5097 and Related Bills Before the Subcommittee on Administrative Law and Governmental Relations of the House Comm. on the Judiciary*, 99th Cong., 2d Sess. 103-04 (1986) (testimony of Ann McBride, Senior Vice President, Common Cause).

34/ *See id.* at 183, 186 (testimony of Norman J. Ornstein, American Enterprise Institute).

35/ *Hearings on S. 2334 (Integrity in Post Employment Act of 1986) Before the Senate Comm. on the Judiciary*, 99th Cong., 2d Sess. 199 (1986) (testimony of Morton H. Halperin and Jerry J. Berman on behalf of the American Civil Liberties Union).

36/ 18 U.S.C. § 207(a)(1) (1989).

37/ 18 U.S.C. § 207(c).

38/ 18 U.S.C. § 207(a)(2).

39/ 18 U.S.C. § 207(f).

There are at least three other compelling reasons to repeal the new post-employment restrictions. First, the restrictions could easily hinder advancement of U.S. interests by diminishing the pool of qualified senior trade negotiator candidates. Among the factors cited in discouraging people from public service are increasingly severe post-employment restrictions. Past USTRs and Deputy USTRs have not made a full career of public service; like other senior appointees, they have returned to their communities and their private practices after serving in public office. Qualified candidates may decline to serve if their livelihoods -- often after a relatively short period of government service -- would thereby be materially jeopardized. Second, there has been no documented misconduct by former USTRs or Deputy USTRs which would justify the new, heightened restrictions. Third, there is no principled reason to single out trade negotiators; rather, the new restrictions simply penalize or demonize the representation of foreigners. Other government officials -- *e.g.*, the Secretaries of Defense or Transportation, or the Attorney General -- could just as easily be subject to the same lifetime ban.

Meanwhile, there has been absolutely no showing that the general rules applicable to all other government officials insufficiently protect the interests of the United States. The public interest is in having nominees who become public officials adhere to the highest standards while executing the duties of their office. After someone leaves office, the government's interest is properly limited to preventing the misuse of its confidential information and the misuse of influence.[40/]

IV. CONCLUSIONS AND RECOMMENDATIONS

For the reasons set out above, it is the view of the ABA that:

40/ *See Integrity in Post Employment Act of 1986: Hearings on S. 2334 Before the Senate Comm. on the Judiciary*, 99th Cong., 2d Sess. 79-80 (1986) (testimony of David H. Martin, Director, Office of Government Ethics). The American Civil Liberties Union ("ACLU") also opined that the misuse of inside information should be the focus of ethics laws, rather than the identity of the client. *Id.* at 198 (testimony of Morton H. Halperin and Jerry J. Berman on behalf of the American Civil Liberties Union); *Hearings on H.R. 2267 and Related Bills (Post-Employment Restrictions for Federal Officers and Employees) Before the Subcommittee on Administrative Law and Governmental Relations of the House Comm. on the Judiciary*, 101st Cong., 1st Sess. 200, 210-11 (1989).

- Congress should avoid statutory provisions that disqualify senior executive or judicial appointees on the basis of clients they have previously represented.

- Congress and the Administration should continue to utilize traditional mechanisms (including the Senate's power of confirmation), rather than special pre- or post-employment rules, to ensure that senior executive or judicial positions are filled only by highly qualified persons who will fulfill the responsibilities of their positions with complete integrity.

- Ethics-in-government rules, whether addressed to pre- or post-government employment activities, should not single out foreign policy or trade functions for special, restrictive treatment. Congress should repeal the 1995 amendments to 18 U.S.C. §207 and 19 U.S.C. §2171(b), whose effect is to restrict the pre- and post-employment activities of U.S. Trade Representatives ("USTRs") and Deputy USTRs on behalf of foreign interests, and should not extend those provisions to cover other senior government positions.

Respectfully submitted,

Lucinda A. Low
Chair,
Section of International Law and Practice
January, 1997

Appendix I LAN NO. 181421

The USTR Amendment

SEC. 21. BAN ON TRADE REPRESENTATIVE REPRESENTING OR ADVISING FOREIGN ENTITIES.

(a) REPRESENTING AFTER SERVICE.-- Section 207(f)(2) of title 18, United States Code, is amended by --

(1) inserting "or Deputy United States Trade Representative" after "is the United States Trade Representative"; and

(2) striking "within 3 years" and inserting "at any time".

(b) LIMITATION ON APPOINTMENT AS UNITED STATES TRADE REPRESENTATIVE AND DEPUTY UNITED STATES TRADE REPRESENTATIVE.-- Section 141(b) of the Trade Act of 1974 (19 U.S.C. 2171(b)) is amended by adding at the end the following new paragraph:

> *"(3) LIMITATION ON APPOINTMENTS. -- A person who has directly represented, aided, or advised a foreign entity (as defined by section 207(f)(3) of title 18, United States Code) in any trade negotiation, or trade dispute, with the United States may not be appointed as United States Trade Representative or as a Deputy United States Trade Representative."*

(c) EFFECTIVE DATE.-- The amendments made by this section shall apply with respect to an individual appointed as United States Trade Representative or as a Deputy United States Trade Representative on or after the date of enactment of this Act.

Table of Statutory Qualifications for Primary U.S. Officers

A. PERMANENT DISQUALIFICATIONS

Cite	Agency/Board Position	Disqualifications
12 USC § 2279aa-2(b)	Federal Agricultural Mortgage Corporation; Permanent Board	Shall not be, or have been, officers or directors of any financial institutions or entities; members shall be representatives of the general public; at least 2 shall be experienced in farming or ranching.
19 USC § 2171(b)(3)	United States Trade Representative; Deputy United States Trade Representatives	A person who has directly represented, aided, or advised a foreign entity in any trade negotiation, or trade dispute, with the United States may not be appointed as United States Trade Representative or as a Deputy United States Trade Representative.

B. MILITARY "COOLING OFF" PERIODS

Cite	Agency/Board Position	Disqualifications
10 USC § 113(a)	Department of Defense; Secretary of Defense	Appointed from civilian life by the President. A person may not be appointed as Secretary of Defense within 10 years after relief from active duty as a commissioned officer of a regular component of an armed force.
10 USC § 132(a)	Department of Defense; Deputy Secretary of Defense	Appointed from civilian life. A person may not be appointed as Deputy Secretary of Defense within 10 years after relief from active duty as a commissioned officer of a regular component of an armed force.
10 USC § 134(a)	Department of Defense; Under Secretary of Defense for Policy	Appointed from civilian life by the President. A person may not be appointed as Under Secretary within 10 years after relief from active duty as a commissioned officer of a regular component of an armed force.
10 USC § 3013	Department of Defense; Secretary of the Army	Appointed from civilian life by the President. A person may not be appointed as Secretary of the Army within five years after relief from active duty as a commissioned officer of a regular component of an armed force.
10 USC § 5013	Department of Defense; Secretary of the Navy	Appointed from civilian life by the President. A person may not be appointed as Secretary of the Navy within five years after relief from active duty as a commissioned officer of a regular component of an armed force.
10 USC § 8013	Department of Defense; Secretary of the Air Force	Appointed from civilian life by the President. A person may not be appointed as Secretary of the Air Force within five years after relief from active duty as a commissioned officer of a regular component of an armed force.

C. OTHER TEMPORARY DISQUALIFICATIONS

Cite	Agency/Board Position	Disqualifications
12 USC § 1701j-2(c)(1)	National Institute of Building Sciences; Board of Directors	Shall be representative of the various segments of the building community, of the various regions of the country, and of the consumers who are or would be affected by actions taken in the exercise of the functions and responsibilities of the Institute, and shall include (A) representatives of the construction industry, including representatives of construction labor organizations, product manufacturers, and builders, housing management experts, and experts in building standards, codes, and fire safety, and (B) members representative of the public interest, including architects, professional engineers, officials of Federal, State, and local agencies, and representatives of consumer organizations. Such members of the Board shall hold no financial interest or membership in, nor be employed by, or receive other compensation from, any company, association, or other group associated with the manufacture, distribution, installation, or maintenance of specialized building products, equipment, systems, subsystems, or other construction materials and techniques for which there are available substitutes.
15 USC § 78ccc(c)	Securities Investor Protection Corporation; Board of Directors	Five directors shall be appointed by the President as follows: (i) three such directors shall be selected from among persons who are associated with, and representative of different aspects of, the securities industry, not all of whom shall be from the same geographical area of the United States, and (ii) two such directors shall be selected from the general public from among persons who are not associated with a broker or dealer or associated with a member of a national securities exchange, or similarly associated with any self-regulatory organization or other securities industry group, and who have not had any such association during the two years preceding appointment.
16 USC § 1401(b)(1)	Marine Mammal Commission; Members	The President shall make his selection from a list of individuals knowledgeable in the fields of marine ecology and resource management, and who are not in a position to profit from the taking of marine mammals.
39 USC § 202(a)	United States Postal Service; Board of Governors	Shall be chosen to represent the public interest generally, and shall not be representatives of specific interests using the Postal Service.
42 USC § 2286(b)	Defense Nuclear Facilities Safety Board; Members	Shall be United States citizens from civilian life who are respected experts in the field of nuclear safety with a demonstrated competence and knowledge relevant to the independent investigative and oversight functions of the Board. No member may be an employee of, or have any significant financial relationship with, the Department of Energy or any contractor of the Department of Energy.

C. OTHER TEMPORARY DISQUALIFICATIONS

Cite	Agency/Board Position	Disqualifications
45 USC § 231f(a)	Railroad Retirement Board; Members	One shall be appointed from recommendations made by representatives of the employees and one shall be appointed from recommendations made by representatives of employers, in both cases as the President shall direct, so as to provide representation on the Board satisfactory to the largest number, respectively, of employees and employers concerned. One who shall be the chairman of the Board, shall be appointed without recommendation by either employers or employees and shall not be in the employment of or be pecuniarily or otherwise interested in any employer or organization of employees.
49 USC § 24302	Amtrak; Board of Directors	Must be a citizen of the United States. One must be selected from list submitted by Railway Labor Executives Association; one must be chief executive officer of a State; one must be representative of business, which does not compete against Amtrak, with an interest in rail transportation; two must be from a list nominated by commuter authorities; and two must be selected by holders of preferred stock of Amtrak. Must not have a financial or employment relationship with a rail carrier nor a significant financial relationship or an employment relationship with a person competing with Amtrak in providing passenger transportation.

D. TECHNICAL EXPERTISE

Cite	Agency/Board Position	Qualifications
2 USC § 437c(a)	Federal Election Commission; Members	President shall select members on the basis of their experience, integrity, impartiality, and good judgment.
5 USC § 3(a)	Inspectors General	At the head of each Office an Inspector General shall be appointed solely on the basis of integrity and demonstrated ability in accounting, auditing, financial analysis, law, management analysis, public administration, or investigations.
5 USC § 1201	Merit Systems Protection Board; Members	Shall be individuals who, by demonstrated ability, background, training, or experience are especially qualified to carry out the functions of the Board.
7 USC § 4a(a)(1)	Commodity Futures Trading Commission; Commissioners	President shall select persons who shall each have demonstrated knowledge in futures trading or its regulation, or the production, merchandising, procession or distribution of one or more of the commodities or other goods and articles, services, rights, and interests covered by this chapter; and seek to ensure that the demonstrated knowledge of the Commissioners is balanced with respect to such areas.
7 USC § 6981(a)	Department of Agriculture; Under Secretary of Agriculture for Food Safety	Shall be appointed from among individuals with specialized training or significant experience in food safety or public health programs.
10 USC § 133(a)	Department of Defense; Under Secretary of Defense for Acquisition and Technology	Shall be appointed from among persons who have an extensive management background in the private sector.
10 USC § 139(a)(1)	Department of Defense; Director of Operational Test and Evaluation	Appointed from civilian life solely on the basis of fitness to perform the duties of the office of Director.
10 USC § 2113(a)	Department of Defense; Board of Regents	Shall consist of nine persons outstanding in the fields of health and health education who shall be appointed from civilian life by the President.
12 USC § 1422a(b)(2)(A)	Federal Housing Finance Board; Board of Directors	Shall be from among persons with extensive experience or training in housing finance or with a commitment to providing specialized housing credit.
12 USC § 4512(a)	Department of Housing and Urban Development; Office of Federal Housing Enterprise Oversight; Director	From among individuals who are citizens of the United States, have a demonstrated understanding of financial management or oversight, and have a demonstrated understanding of mortgage security markets and housing finance.
15 USC § 790(a)(2)	Department of Energy; Office of Energy Information and Analysis; Director	A person who, by reason of professional background and experience, is specially qualified to manage an energy information system.

D. TECHNICAL EXPERTISE

Cite	Agency/Board Position	Qualifications
15 USC § 1023(a)	Council of Economic Advisers; Members	Each of whom shall be a person who, as a result of his training, experience, and attainments, is exceptionally qualified to analyze and interpret economic developments, to appraise programs and activities of the Government in the light of the policy declared in section 1021 of this title, and to formulate and recommend national economic policy to promote full employment, production and purchasing power under free competitive enterprise.
15 USC § 2053(a)	Consumer Product Safety Commission; Commissioners	Individuals who, by reason of their background and expertise in areas related to consumer products and protection of the public from risks to safety, are qualified to serve as members of the Commission.
15 USC § 2625(g)	Environmental Protection Agency; Assistant Administrator for Toxic Substances	Shall be a qualified individual who is, by reason of background and experience, especially qualified to direct a program concerning the effects of chemicals on human health and the environment.
16 USC § 742b(b)	Department of the Interior; United States Fish and Wildlife Service; Director	No individual may be appointed as the Director unless he is, by reason of scientific education and experience, knowledgeable in the principles of fisheries and wildlife management.
19 USC § 1330(a)	United States International Trade Commission; Commissioners	No person shall be eligible for appointment as a commissioner unless he is a citizen of the United States, and, in the judgment of the President, is possessed of qualifications requisite for developing expert knowledge of international trade problems and efficiency in administering the duties and functions of the Commission.
20 USC § 1505(a)	Commission on Libraries and Information Science; Commissioners	Five members shall be professional librarians or information specialists, and the remainder shall be persons having special competence or interest in the needs of our society for library and information services, at least one of whom shall be knowledgeable with respect to the technological aspects of library and information services and sciences, and at least one other of whom shall be knowledgeable with respect to the library and information service and science needs of the elderly.
20 USC § 3412(b)	Department of Education; Assistant Secretary for Educational Research and Improvement	Selected from among individuals who are distinguished educational researchers or practitioners; have proven management ability; and have substantial knowledge of education within the United States.
20 USC § 9002(b)(1)	Department of Education; National Center for Education Statistics; Commissioner	Shall have substantial knowledge of programs assisted by the Center.
22 USC § 2193(b)	Overseas Private Investment Corporation; Board of Directors	At least two of the eight appointed by the President shall be experienced in small business, one in organized labor, and one in cooperatives.
22 USC § 2384(a)	Department of State; International Development; Statutory Officers	The selection of one such person shall include due consideration to persons qualified as professional engineers.

D. TECHNICAL EXPERTISE

Cite	Agency/Board Position	Qualifications
22 USC § 2566(a)	Arms Control and Disarmament Agency; Scientific and Policy Advisory Committee; Members	Not less than eight of the fifteen shall be scientists; Chairman shall be a person of renown and distinction.
22 USC § 3612(a)	Panama Canal Commission; Supervisory Board	One shall be the Secretary of Defense or an officer of the Department of Defense designated by the Secretary. Not less than five members of the Board shall be nationals of the United States and the remaining members shall be nationals of the Republic of Panama. At least one of the members who are nationals of the United States shall be experienced and knowledgeable in the management or operation of an American-flag steamship line which has or had ships regularly transiting the Panama Canal, at least one other such member shall be experienced and knowledgeable in United States port operations or in the business of exporting or importing one of the regular commodities dependent on the Panama Canal as a transportation route, and at least one other such member shall be experienced and knowledgeable in labor matters in the United States. Three members of the Board shall hold no other office in or be employed by the Government of the United States.
22 USC § 3928	Foreign Service; Director General	Shall be a current or former career member of the Foreign Service.
22 USC § 4303	Department of State; Office of Foreign Missions; Director and Deputy	One should have served in the Foreign Service; other should have served in the United States intelligence community.
22 USC § 4605	United States Institute of Peace; Board of Directors	Eleven members appointed by the President shall have appropriate practical or academic experience in peace and conflict resolution efforts of the United States.
22 USC § 6203	United States Information Agency; Broadcasting Board of Governors; Members	Shall be citizens of the United States who are not regular full-time employees of the United States Government. Members shall be selected from among Americans distinguished in the fields of mass communications, print, broadcast media, or foreign affairs.
25 USC § 272	Department of the Interior; Superintendent of Indian schools	Shall be a person of knowledge and experience in the management, training, and practical education of children.
25 USC § 4042(b)(1)	Department of the Interior; Office of Special Trustee for American Indians; Special Trustee	Shall possess demonstrated ability in general management of large governmental or business entities and particular knowledge of trust fund management, management of financial institutions, and the investment of large sums of money.
28 USC § 505	Department of Justice; Solicitor General	Shall be a person learned in the law.
29 USC § 661(a)	Occupational Safety and Health Review Commission; Commissioners	From among persons who by reason of training, education, or experience are qualified to carry out the functions of the Commission.

D. TECHNICAL EXPERTISE

Cite	Agency/Board Position	Qualifications
29 USC § 702	Department of Labor; Rehabilitation Services Administration; Commissioner	Shall be an individual with substantial experience in rehabilitation and in rehabilitation program management.
30 USC § 1	Department of the Interior; United States Bureau of Mines; Director	Shall be thoroughly equipped for the duties of said office by technical education and experience.
30 USC § 823(a)	Federal Mine Safety and Health Review Commission; Commissioners	Shall be persons who by reason of training, education, or experience are qualified to carry out the functions of the Commission.
30 USC § 1802	National Critical Materials Council; Members	Shall be persons who, as a result of training, experience, and achievement, are qualified to carry out the duties and functions of the Council, with particular emphasis placed on fields relating to materials policy or materials science and engineering. In addition, at least one of the members shall have a background in and understanding of environmentally related issues.
31 USC § 504(b)	Office of Management and Budget; Office of Federal Financial Management; Controller	Appointed from among individuals who possess: (1) demonstrated ability and practical experience in accounting, financial management, and financial systems; and (2) extensive practical experience in financial management in large governmental or business entities.
31 USC § 901(a)	Chief Financial Officers	Shall possess demonstrated ability in general management of, and knowledge of and extensive practical experience in financial management practices in large governmental or business entities.
33 USC § 642	Mississippi River Commission; Commissioners	Three shall be selected from the Engineer Corps of the Army, one from the National Ocean Survey, and three from civil life, two of whom shall be civil engineers.
33 USC § 702a	Mississippi River Commission; Board	One member shall be a civil engineer chosen from civil life.
38 USC § 305(a)	Department of Veterans Affairs; Under Secretary of Health	Shall be a doctor of medicine and appointed solely on the basis of demonstrated ability in the medical profession, in health-care administration and policy formulation, and in health-care fiscal management; and on the basis of substantial experience in connection with the programs of the Veterans Health Administration or programs of similar content and scope.
38 USC § 306(a)	Department of Veterans Affairs; Under Secretary for Benefits	Shall be a doctor of medicine and appointed solely on the basis of demonstrated ability in fiscal management and the administration of programs within the Veterans Benefits Administration or programs of similar content and scope.
39 USC § 3601(a)	Postal Rate Commission; Commissioners	Shall be chosen on the basis of their professional qualifications.
42 USC § 205	Public Health Service; Surgeon General	Shall be appointed from individuals who (1) are members of the Regular Corps, and (2) have specialized training or significant experience in public health programs.

D. TECHNICAL EXPERTISE

Cite	Agency/Board Position	Qualifications
42 USC § 903	Social Security Advisory Board; Members	Shall be chosen on the basis of their integrity, impartiality, and good judgment, and shall be individuals who are, by reason of their education, experience, and attainments, exceptionally qualified to perform the duties of members of the Board.
42 USC § 3722	Department of Justice; National Institute of Justice; Director	Shall have had experience in justice research.
42 USC § 3732(b)	Department of Justice; Bureau of Justice Statistics; Director	Shall have had experience in statistical programs.
42 USC § 5611(b)	Department of Justice; Office of Juvenile Justice and Delinquency Prevention; Administrator	Shall have had experience in juvenile justice programs.
42 USC § 5812(c)	Energy Research and Development Administration; Administrator	Shall, by reason of general background and experience, be specially qualified to manage a full range of energy research and development programs.
42 USC § 7135(a)(1)	Department of Energy; Energy Information Administration; Administrator	Shall, by reason of professional background and experience, be specially qualified to manage an energy information system.
42 USC § 7136(a)	Department of Energy; Economic Regulatory Administration; Administrator	Shall be, by demonstrated ability, background, training, or experience, an individual who is specially qualified to assess fairly the needs and concerns of all interests affected by Federal energy policy.
42 USC § 7412	Environmental Protection Agency; Risk Assessment and Management Commission; Members	Shall have knowledge or experience in fields of risk assessment or risk management.
43 USC § 1731(a)	Department of the Interior; Bureau of Land Management; Director	Shall have a broad background and substantial experience in public land and natural resource management.
44 USC § 301	Government Printing Office; Public Printer	Must be a practical printer and versed in the art of bookbinding.
44 USC § 302	Government Printing Office; Deputy Public Printer	Must be a practical printer and versed in the art of bookbinding.
44 USC § 2103	Archivist of the United States	Shall be appointed solely on the basis of the professional qualifications required to perform the duties and responsibilities of the office of Archivist.
44 USC § 3318	National Study Commission on Records and Documents of Federal Officials; Members	Three members appointed by the President shall not be officers or employees of any government and shall be specially qualified to serve on the Commission by virtue of their education, training, or experience.

D. TECHNICAL EXPERTISE

Cite	Agency/Board Position	Qualifications
49 USC § 106	Department of Transportation; Federal Aviation Administration; Administrator	Must be a citizen of the United States; be a civilian; and have experience in a field directly related to aviation.
49 USC § 111	Department of Transportation; Bureau of Transportation Statistics; Director	Shall be qualified by virtue of training and experience in the compilation and analysis of transportation statistics.
49 USC § 1111	National Transportation Safety Board; Members	At least 3 shall be appointed on the basis of technical qualification, professional standing, and demonstrated knowledge in accident reconstruction, safety engineering, human factors, transportation safety, or transportation regulation.
50 USC § 403	Central Intelligence Agency; Director and Deputy Director	Both may not be commissioned officers of the Armed Forces (whether in active or retired status). Under ordinary circumstances, one should be a commissioned officer of the Armed Forces or otherwise have, by training or experience, an appreciation of military intelligence activities and requirements.
50 USC § 403q	Central Intelligence Agency; Inspector General	Shall be appointed solely on the basis of integrity, compliance with the security standards of the Agency, and prior experience in the field of foreign intelligence.

E. CONSTITUENT REPRESENTATIVE

Cite	Agency/Board Position	Qualifications
12 USC § 241	Federal Reserve System; Board of Governors	In selecting the members of the Board, not more than one of whom shall be selected from any one Federal Reserve District, the President shall have due regard to a fair representation of the financial, agricultural, industrial, and commercial interests, and geographical divisions of the country.
12 USC § 1422a(b)(2)(B)	Federal Housing Finance Board; Directors	At least 1 shall be chosen from an organization with more than a 2-year history of representing consumer or community interests on banking service, credit needs, housing, or financial consumer protections.
12 USC § 1723(b)	Federal National Mortgage Association; Board of Directors	Shall include at least one person from the homebuilding industry, at least one person from the mortgage lending industry, at least one person from the real estate industry, and at least one person from an organization that has represented consumer or community interest for not less than 2 years or one person who has demonstrated a career commitment to the provision of housing for low-income households.
12 USC § 3013	National Consumer Cooperative Bank; Board of Directors	One member shall be selected from among proprietors of small business concerns, which are manufacturers or retailers; one member shall be selected from among the officers of the agencies and departments of the United States; and one member shall be selected from among persons having experience in the cooperative field representing low-income cooperatives eligible to borrow from the Bank.

E. CONSTITUENT REPRESENTATIVE

Cite	Agency/Board Position	Qualifications
15 USC § 205d(b)	United States Metric Board; Members	(A) one to be selected from lists of qualified individuals recommended by engineers and organizations representative of engineering interests; (B) one to be selected from lists of qualified individuals recommended by scientists, the scientific and technical community, and organizations representative of scientists and technicians; (C) one to be selected from a list of qualified individuals recommended by the National Association of Manufacturers or its successor; (D) one to be selected from lists of qualified individuals recommended by the United States Chamber of Commerce, or its successor, retailers, and other commercial organizations; (E) two to be selected from lists of qualified individuals recommended by the American Federation of Labor and Congress of Industrial Organizations or its successor, who are representative of workers directly affected by metric conversion, and by other organizations representing labor; (F) one to be selected from a list of qualified individuals recommended by the National Governors Conference, the National Council of State Legislatures, and organizations representative of State and local government; (G) two to be selected from lists of qualified individuals recommended by organizations representative of small business; (H) one to be selected from lists of qualified individuals representative of the construction industry; (I) one to be selected from a list of qualified individuals recommended by the National Conference on Weights and Measures and standards making organizations; (J) one to be selected from lists of qualified individuals recommended by educators, the educational community, and organizations representative of educational interests; and (K) four at-large members to represent consumers and other interests deemed suitable by the President and who shall be qualified individuals.
15 USC § 633(b)(1)	Small Business Administration; Administrator	Appointed from civilian life. Shall be a person of outstanding qualifications known to be familiar and sympathetic with small-business needs and problems.
15 USC § 2412(a)	National Center for Productivity and Quality of Working Life; Board of Directors	Shall have at least five members from among qualified private individuals in manufacturing and service industries; at least five members from among qualified private individuals from labor organizations; at least two members from among qualified individuals in State or local governments; at least one member from among the general public; and at least one member from among qualified individuals associated with leading institutions of higher education.
16 USC § 3181(c)	Alaska Land Use Council; Members	In addition to the Cochairmen, the Council shall consist of the following members: (1) the head of the Alaska offices of each of the following Federal agencies: National Park Service, United States Fish and Wildlife Service, United States Forest Service, Bureau of Land Management, Heritage Conservation and Recreation Service, National Oceanic and Atmospheric Administration, and Department of Transportation; (2) the Commissioners of the Alaska Departments of Natural Resources, Fish and Game, Environmental Conservation, and Transportation; and (3) two representatives selected by the Alaska Native Regional Corporations which represent the twelve geographic regions.

E. CONSTITUENT REPRESENTATIVE

Cite	Agency/Board Position	Qualifications
20 USC § 955(b)	National Endowment for the Arts; National Council on the Arts; Members	Shall be private citizens of the United States who are widely recognized for their broad knowledge of, or expertise in, or for their profound interest in, the arts and have established records of distinguished service, or achieved eminence, in the arts; shall include practicing artists, civic cultural leaders, members of the museum profession, and others who are professionally engaged in the arts; and shall collectively provide an appropriate distribution of membership among the major art fields.
20 USC § 957(b)	National Endowment for the Humanities; National Council on the Humanities; Members	Shall be private citizens who are recognized for their broad knowledge of, expertise in, or commitment to the humanities, and have established records of distinguished service and scholarship or creativity and in a manner which will provide a comprehensive representation of the views of scholars and professional practitioners in the humanities and of the public throughout the United States.
20 USC § 963(a)(1)	National Foundation on the Arts and the Humanities; National Museum Service Board; Members	Shall be members of the general public and citizens of the United States who are broadly representative of the various museums, including museums relating to science, history, technology, art, zoos, and botanical gardens, and of the curatorial, conservation, educational, and cultural resources of the United States; and recognized for their broad knowledge, expertise, or experience in museums or commitment to museums.
20 USC § 1213c(f)(1)	National Institute for Literacy; Board	Shall be individuals who are representative of literacy organizations and providers of literacy services, businesses that have demonstrated interest in literacy programs, literacy students, experts in literacy research, state and local governments, and organized labor.
20 USC § 2004(b)(1)	Harry S. Truman Scholarship Foundation; Board of Trustees	One shall be a chief executive officer of a State, one a chief executive officer of a city or county, one a member of a Federal court, one a member of a State court, one a person active in post-secondary education, and three representatives of the general public.
20 USC § 4412(a)(1)	Institute of American Indian and Alaska Native Culture and Arts Development; Board of Trustees	Shall be individuals from private life who are Indians, or other individuals, widely recognized in the field of Indian art and culture and who represent diverse political views, and diverse fields of expertise, including finance, law, fine arts, and higher education administration.
20 USC § 4502(b)	James Madison Memorial Fellowship Foundation; Board of Trustees	One shall be a chief executive officer of a State, two shall be members of the general public, and three shall be members of the academic community, appointed upon the recommendation of the Librarian of Congress.
20 USC § 5603(b)	Morris K. Udall Scholarship and Excellence in National Environmental Policy Foundation; Board of Trustees	Five Trustees shall have shown leadership and interest in: (A) the continued use, enjoyment, education, and exploration of our Nation's rich and bountiful natural resources; or (B) the improvement of the health status of Native Americans and Alaska Natives and in strengthening tribal self-governance, such as tribal leaders involved in health and public policy development affecting Native American and Alaska Native Communities.

E. CONSTITUENT REPRESENTATIVE

Cite	Agency/Board Position	Qualifications
22 USC § 290f(g)	Inter-American Foundation; Board of Directors	Shall possess an understanding of and sensitivity to community level development processes.
22 USC § 290h-5(a)(1)	African Development Foundation; Board of Directors	Five shall be appointed from private life; two shall be appointed from among officers and employees of agencies of the United States concerned with African affairs. All shall be appointed on the basis of their understanding of and sensitivity to community level development processes.
22 USC § 1469(a)(2)	United States Advisory Commission on Public Diplomacy; Members	Shall be selected from a cross section of educational, communications, cultural, scientific, technical, public service, labor, business, and professional backgrounds.
22 USC § 2511(c)	Peace Corps; National Advisory Council; Members	Shall be broadly representative of the general public, including educational institutions, private volunteer agencies, private industry, farm organizations, labor unions, different regions of the United States, different backgrounds and age groupings, and both sexes. At least seven shall be former Peace Corps volunteers.
29 USC § 780(a)(1)(C)	National Council of Disability; Members	Shall be individuals with disabilities or individuals who have substantial knowledge or experience relating to disability policy or programs. Shall be representative of individuals with disabilities, national organizations concerned with individuals with disabilities, providers and administrators of services to individuals with disabilities, individuals engaged in conducting medical or scientific research relating to individuals with disabilities, business concerns, and labor organizations. A majority shall be individuals with disabilities or parents of guardians of individuals with disabilities. Members shall be broadly representative of minority and other individuals and groups.
42 USC § 907a(a)(1)(C)	National Commission on Social Security; Commissioners	Shall be individuals who are of recognized standing and distinction and who possess the demonstrated capacity to discharge the duties imposed on the Commission, and shall include representatives of the private insurance industry and of recipients and potential recipients of benefits under the programs involved as well as individuals whose capacity is based on a special knowledge or expertise in those programs.
42 USC § 1863	National Science Board; Members	Shall be eminent in the fields of the basic, medical, or social sciences, engineering, agriculture, education, research management, or public affairs; shall be selected solely on the basis of established records of distinguished service; and shall be so selected as to provide representation of the views of scientific and engineering leaders in all areas of the Nation. Selection shall give due regard to representation of women and minorities.

E. CONSTITUENT REPRESENTATIVE

Cite	Agency/Board Position	Qualifications
42 USC § 2996c	Legal Services Corporation; Board of Directors	A majority shall be members of the bar of the highest court of any State, and none shall be a full-time employee of the United States. Membership shall include eligible clients and be generally representative of the organized bar, attorneys providing legal assistance to eligible clients, and the general public.
42 USC § 3015(a)(1)	Federal Council on the Aging; Members	Shall have expertise and experience in the field of aging so as to be representative of rural and urban older individuals, national organizations with an interest in aging, business, labor, minorities, Indian tribes, and the general public. At lease three of the members appointed by each appointing authority shall be older individuals.
42 USC § 10703	State Justice Institute; Board of Directors	Shall have both judicial and nonjudicial members, and shall, to the extent practicable, have a membership representing a variety of backgrounds and reflecting participation and interest in the administration of justice.
42 USC § 12651a(a)	Corporation for National and Community Service; Board of Directors	Shall include an individual between the ages of 16 and 25 who has served in a school-based or community-based service-learning program. Members shall, to the extent possible, (A) have extensive experience in volunteer or service activities, which may include programs funded under one of the national service laws, and in State government; (B) represent a broad range of view-points; (C) be experts in the delivery of human, educational, environmental, or public safety services; (D) be diverse according to race, ethnicity, age, gender, and disability characteristics.
42 USC § 12851(b)	Department of Housing and Urban Development; National Home Ownership Trust; Trustees	One individual shall be appointed representing consumer interests.
47 USC § 396(c)	Corporation for Public Broadcasting; Board of Directors; Members	Shall be selected from among citizens of the United States (not regular full-time employees of the United States) who are eminent in such fields as education, cultural and civic affairs, or the arts, including radio and television; and shall be selected so as to provide as nearly as practicable a broad representation of various regions of the Nation, various professions and occupations, and various kinds of talent and experience appropriate to the functions and responsibilities of the Corporation. Of the members of the Board appointed by the President, one shall be selected from among individuals who represent the licensees and permittees of public television stations, and one shall be selected from among individuals who represent the licensees and permittees of public radio stations.

F. CIVILIANS

Cite	Agency/Board Position	Qualifications
10 USC § 134a	Department of Defense; Deputy Under Secretary of Defense for Policy	Appointed from civilian life.
10 USC § 135	Department of Defense; Under Secretary of Defense (Comptroller)	Appointed from civilian life.
10 USC § 137	Department of Defense; Director of Defense Research and Engineering	Appointed from civilian life.
10 USC § 138(a)	Department of Defense; Assistant Secretaries of Defense	Appointed from civilian life.
10 USC § 140(a)	Department of Defense; General Counsel	Appointed from civilian life.
10 USC § 720	Department of Defense; Chief of Staff to President	Appointed from civilian life.
10 USC § 3015(a)	Department of Defense; Under Secretary of the Army	Appointed from civilian life.
10 USC § 3016(a)	Department of Defense; Assistant Secretaries of the Army	Appointed from civilian life.
10 USC § 3019(a)	Department of Defense; General Counsel of the Department of the Army	Appointed from civilian life.
10 USC § 5015(a)	Department of Defense; Under Secretary of the Navy	Appointed from civilian life.
10 USC § 5016(a)	Department of Defense; Assistant Secretaries of the Navy	Appointed from civilian life.
10 USC § 5019(a)	Department of Defense; General Counsel of the Department of the Navy	Appointed from civilian life.
10 USC § 8015(a)	Department of Defense; Under Secretary of the Air Force	Appointed from civilian life.
10 USC § 8016(a)	Department of Defense; Assistant Secretaries of the Air Force	Appointed from civilian life.
10 USC § 8019(a)	Department of Defense; General Counsel of the Department of the Air Force	Appointed from civilian life.

F. CIVILIANS

Cite	Agency/Board Position	Qualifications
15 USC § 634a	Small Business Administration; Office of Advocacy; Chief Counsel for Advocacy	Appointed from civilian life.
22 USC § 2562(a)	United States Arms Control and Disarmament Agency; Director	Appointed from civilian life. No person serving on active duty as a commissioned officer of the Armed Forces of the United States may be appointed Director.
22 USC § 2563	United States Arms Control and Disarmament Agency; Deputy Director	Appointed from civilian life. No person serving on active duty as a commissioned officer of the Armed Forces of the United States may be appointed Deputy Director.
42 USC § 2472(a)	National Aeronautics and Space Administration; Administrator	Appointed from civilian life.

G. CITIZENS

Cite	Agency/Board Position	Qualifications
8 USC § 1103(b)	Department of Immigration and Naturalization Service; Commissioner	Shall be a citizen of the United States.
12 USC § 1462a	Office of Thrift Supervision; Director	Shall be appointed from among individuals who are citizens of the United States.
47 USC § 154	Federal Communications Commission; Commissioners	Shall be a citizen of the United States.

Appendix III

Post-Government Employment Restrictions: A Selected "Ethics-in-Government" Legislative History

There have been restrictions on the post-employment activities of various categories of federal workers since 1872.[1/] The earliest versions approximating the current provisions were adopted in 1962, as part of an overall revision of the conflict-of-interest statutes.[2/] The 1962 amendments created two basic restrictions: one, a lifetime ban with regard to matters in which the former official had been personally and substantially involved while in government, the other, a two-year ban with regard to matters within the former official's realm of official responsibility. Review of federal conflict-of-interest rules had begun in earnest in 1957 by the House Committee on the Judiciary.[3/] At that time, the Committee staff summarized the underlying problem in the following manner:

> The obligations of fidelity and confidentiality survive the termination of employment. On the other hand, the skills and experience acquired over years of service as a Government specialist not only legitimately belong to the employee, but often constitute his sole stock in trade. Determination of the precise point at which legitimate utilization of professional skill and experience is transformed into antisocial exploitation of "inside information" and "influence" presents one of the outstanding dilemmas in this area.[4/]

These two themes -- "inside information" and "influence" -- have remained constant in the intervening years. For instance, in a 1978 revision of the law, entitled the "Ethics in Government Act," the goals were summarized in the following manner:

> Former officers should not be permitted to exercise undue influence over former colleagues, still in office, in matters pending before the agencies; they should not be permitted to utilize information on specific cases gained during government

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1/ *See* S. Rep. No. 396, 99th Cong., 2d Sess. 13-14 (1986); S. Rep. No. 101, 100th Cong., 1st Sess. 8-9 (1987).

2/ Prior provisions had barred former employees from prosecuting claims against the United States for two years after terminating government employment. *See* H. Rep. No. 748, 87th Cong., 1st Sess. 2-4 (1961).

3/ The 1962 review was preceded by a two-year study by a special committee of the Association of the Bar of the City of New York completed in 1960, and then by the 1961 President's Special Committee on Conflict of Interest, and it resulted in revised statutory provisions.

4/ Staff of the Antitrust Subcommittee (Subcommittee No. 5) of the House Comm. on the Judiciary, 85th Cong., 2d Sess., Federal Conflict of Interest Legislation, pt. 1, at 4 (Comm. Print 1958).

service for their own benefit and that of private clients. Both are forms of unfair advantage.[5]

A detailed web of post-employment restrictions exists today, roughly divisible into those which address "switching sides" and those which address "influence peddling." As explained below, existing rules single out senior trade negotiators for special, restrictive treatment. However, those rules are unwise and quite possibly unconstitutional, and the USTR Amendment, by increasing such restrictions, goes even further in the wrong direction. Following is a short summary of the bans now in existence.[6]

I. Restrictions of General Application

A. Switching Sides: The "Personal and Substantial Involvement" Bans

1. Representation and Appearance: Permanent Ban

Among the changes enacted in 1962, a new Section 207(a) of title 18 of the United States Code contained a permanent ban on knowingly acting as agent or attorney for a specific party in a particular matter in which the United States was a party or had a direct and substantial interest and in which the former employee participated personally and substantially during his or her government employment.[7]

In 1978, Congress through title V of the Ethics in Government Act expanded the permanent ban to cover the additional activity of "or otherwise represent[ing] . . . in any formal or informal appearance before, or, with the intent to influence, mak[ing] any oral or written communication" to any Government body for a private party in a particular matter in which the former employee participated personally and substantially.[8]

In 1989, Congress enacted the Ethics Reform Act ("1989 Act"), title I of which restructured and revised Section 207. Section 207(a)(1), as amended and as currently in force,[9] contains a lifetime ban against "knowingly mak[ing], with the intent to influence, any communication to or appearance before any officer or employee of any department . . . in connection with a

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5/ S. Rep. No. 170, 95th Cong., 1st Sess. 31 (1977). *See also Hearings on S. 2334 (Integrity in Post Employment Act of 1986) Before the Senate Comm. on the Judiciary*, 99th Cong., 2d Sess. 79-80 (1986) (testimony of David H. Martin, Director, Office of Government Ethics).

6/ This review does not focus on the penalties for violations. The ABA's concern is not so much with mitigating the penalties applicable to USTR Amendment offenses but rather the underlying legality and wisdom of singling out such activities and individuals.

7/ Pub. L. No. 87-849, 76 Stat. 1119, 1123-24 (1962); 18 U.S.C. § 207(a) (1976).

8/ Pub. L. No. 95-521, 92 Stat. 1824, 1864-66 (1978); 18 U.S.C. § 207(a) (1988).

9/ 18 U.S.C. § 207 (1994).

particular matter" involving specific parties and in which the former employee had "participated personally and substantially."

2. Aid and Assistance: No General Ban

The Ethics in Government Act also created a two-year ban which prohibited a former public servant from knowingly aiding, counseling, advising, consulting or assisting in a representation in any matter in which that individual participated "personally and substantially" while in public service. The new provision was contained in Sections 207(b)(ii) and (b)(3).[10/] However, the 1989 Act dropped any general ban against aiding or advising on such matters.

3. "Switching Sides" In Trade Negotiations

The 1989 Act created a new one-year ban affecting any former official who:

(1) personally and substantially participated in any ongoing trade or treaty negotiation during his or her last year of government employment,

(2) had access to information about such negotiation which was exempt from disclosure under the Freedom of Information Act, and

(3) was so designated by the appropriate government department or agency.

Under Section 207(b)(1) as currently in effect,[11/] such a former official, for one year after employment, cannot on the basis of that information "knowingly represent, aid, or advise" any other person about the negotiation. "Trade negotiation" is defined by Section 207(b)(2)(A) to mean negotiations initiated after the President determines to undertake negotiations leading to a trade agreement pursuant to Section 1102 of the Omnibus Trade and Competitiveness Act of 1988 (concerning authority to enter into certain trade agreements with foreign countries, providing for the harmonization, reduction or elimination of trade barriers, including non-tariff barriers, under the "fast track" approval procedure).

Unlike the broad post-employment bans contained in the USTR Amendment, this particular restriction arguably falls within the traditional rules for "switching sides" and the government's legitimate interest in preventing the misuse of information obtained during government employment. One member of the 1989 President's Commission on Federal Ethics Law Reform found this narrowly drawn one-year ban to be relatively unobjectionable.[12/]

10/ *Id.*

11/ *Id.*

12/ *See Hearings on H.R. 2267 and Related Bills (Post-Employment Restrictions for Federal Officers and Employees) Before the Subcommittee on Administrative Law and Governmental Relations of the House*
(continued...)

B. The Influence Peddling Bans

1. The Two-Year "Official Responsibility" Ban

a. Representations and Appearances

Section 207(b), as enacted in 1962, contained a one-year ban on personally appearing as agent or attorney in any matter in which the United States is a party or has a direct and substantial interest and which was under the official responsibility of the former employee during a one-year period before the termination of his or her federal employment.[13/]

In 1978, Congress through title V of the Ethics in Government Act extended the official responsibility ban to a two-year ban on acting in the roles clarified under the new Section 207(a), namely knowingly acting as an agent, attorney or otherwise representing or communicating with any Government body. The revised provision was contained in Sections 207(b)(i) and (b)(3).[14/]

In 1989, as part of the revision of Section 207, the two-year official responsibility ban was moved to Section 207(a)(2) (where it remains)[15/] and aligned with the new wording on appearances, namely that the official was barred from "knowingly mak[ing], with the intent to influence, any communication to or appearance before any officer or employee of any department . . . in connection with a particular matter" involving specific parties and pending under his or her official responsibility during the last year of employment.

b. Aid and Assistance: No General Ban After 1989 Revisions

Under the 1978 revisions, former officials had to wait for a two-year ban to run its course before providing any aid and assistance on matters in which they were personally and substantially involved while in office.[16/] After two years had passed from their termination of employment with the government, former officials were free to aid, counsel, advise, consult or assist in such matters, so long as there was not a "formal or informal" appearance before a federal

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12/(...continued)
Comm. on the Judiciary, 101st Cong., 1st Sess. 33-34 (1989) (testimony of R. James Woolsey, Member, President's Commission on Federal Ethics Law Reform).

13/ Pub. L. No. 87-849, 76 Stat. 1119, 1123-24 (1962); 18 U.S.C. § 207(a) (1976); H. Rep. No. 748, *supra* n. 2, 22-23; S. Rep. No. 2213, 87th Cong., 2d Sess. 5-6 (1962). The one year prohibition regarding official responsibility matters was a Senate reduction of the House-passed two-year ban. The Senate reduced the ban to one year in order to protect recruiting efforts of government scientific agencies. *See* S. Rep. No. 2213 at 13.

14/ Pub. L. No. 95-521, 92 Stat. 1824, 1864-66 (1978); 18 U.S.C. § 207(b) (1988).

15/ 18 U.S.C. § 207(a)(2) (1994).

16/ *See* H.R. Conf. Rep. No. 1756, 95th Cong., 2d Sess. 74 (1978).

agency or department. Under the 1989 revision, there was no general ban on aid and assistance, other than the one-year trade negotiation ban referenced above.[17]

The underlying purpose of the two-year official responsibility ban has always been to create a reasonable cooling off period for Cabinet officers and similar high ranking officials for matters in which they had no direct participation. During the 1962 hearings on the initial cooling off provision, the Dean of the University of Pennsylvania Law School summarized the intent in the following way:

> I think it is a practical proposition that [sic] if a man is not going to be in Government service all his life, by and large; there are of course some people who make the Government service a career -- but most of the top people in Government will not do so. A man is going back into the general framework of the community. And, on balance, there should not be too much limitation on what a man can do when he goes back into the community. So it is a question of drawing a line.[18]

The Kennedy Administration, in its bill, actively opposed the inclusion of a proposal along the lines addressed in the 1962 hearings.[19] The American Bar Association agreed with the Administration's position:

> Now, we agree with Mr. Katzenbach in recommending the elimination of section 207(b) of H.R. 8140, which would completely bar a former Government employee for 2 years after termination of his employment from appearing before any court or agency in a manner [sic] "which was under his official responsibility" during his employment. And we agree with the Department of Justice that this subsection --
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> > would unfairly impair the private employment opportunities of many non-career Government officials who may have had responsibility for a broad area of Government operation, but no personal or substantial participation

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17/ In short, the two-year assistance ban was reduced to one year, and was converted to apply only with respect to an official who "personally and substantially participated in any ongoing trade or treaty negotiation." *See* Pub. L. No. 101-194, 103 Stat. 1716, 1717 (1989); 18 U.S.C. § 207(b). The former official could not provide aid and assistance to other persons for a year after leaving United States government employment, on matters "concerning such ongoing trade or treaty negotiation." *Id.*

18/ *Hearings on H.R. 302, H.R. 3050, H.R. 3411, H.R. 3412, and H.R. 7139 (General Conflict of Interest Legislation) Before the Antitrust Subcommittee (Subcommittee No. 5) of the House Comm. on the Judiciary*, 87th Cong., 1st Sess. 136-37, 142 (1961) (testimony of Jefferson B. Fordham, Dean, University of Pennsylvania Law School).

19/ *See Hearing on H.R. 8140 (Conflicts of Interest) Before the Senate Comm. on the Judiciary*, 87th Cong., 2d Sess. 21 (1962) (testimony of Nicholas de B. Katzenbach, Deputy Attorney General).

in a vast number of particular matters for which they were ultimately responsible.

As you know, Mr. Chairman, in many agencies the top officials or those close to the top have a perfect flood of papers that float in front of them, so that they have to sign merely in reliance on an OK by some subordinate. Some documents that they don't even see are signed by subordinates. And this sort of official responsibility is simply too large for the net to catch.

We concur with the Department of Justice that section 207(a) provides adequate protection for the Government, since it embodies the rule of ethics expressed in Canon 36 of the Canons of Professional Ethics, the rule against switching sides -- this has worked for generations in the law, and we think it would work equally well in Government.

. . .

. . . And I think it would be unjust to preserve 207(b) with its vast "official responsibility," because many of the finest men that you have to draw into the Government never have personal contacts with problems over which they have official responsibility, and it is utterly unfair and unjust to them, and impairs recruitment of the ablest men.[20/]

2. For Senior Officials, A One-Year, Agency-Specific, No Contact Rule

a. Representations and Appearances

The Ethics in Government Act of 1978 created a third prohibition, as new Section 207(c). It was a general one-year no contact rule for certain enumerated senior officials with regard to their prior department or agency for any particular matter pending before the agency during the cooling off period or of direct and substantial interest to the agency during the cooling off period.[21/]

The 1989 revisions aligned Subsection (c) with the new wording on appearances, namely that the official was barred from "knowingly mak[ing], with the intent to influence, any communication to or appearance before. . . . " The ban remained limited to the agency where the

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20/ *See id.* at 53-55 (testimony of Raoul Berger, Chairman, Section of Administrative Law, American Bar Association). Reproducing this 1962 testimony should not be taken as an indication that the ABA continues to oppose "official responsibility" bans, which have now been a feature of the landscape for many years.

21/ *See* Conf. Rep. No. 1756, 95th Cong., 2d Sess. 74-77 (1978).

former official worked one year before termination of his or her government service. This no contact rule now applied to any matter on which the former employee sought "official action."[22]

b. Aid and Assistance: No General Ban

As referenced above in Part 1, the two-year general ban of the 1978 revision was removed under the 1989 revisions, and replaced with a one-year trade and treaty negotiation ban. After the expiration of the applicable period, the official remained free to aid, counsel, advise, consult or assist in trade or treaty negotiation matters in which the official participated while in government service.

3. For Very Senior Officials, A Broader One-Year No Contact Rule

The 1989 legislation also created a new ban directed against Cabinet officers and other very senior officials. For such officials, new Section 207(d) banned for one year following employment any contact ("knowingly mak[ing], with the intent to influence, any communication to or appearance before . . . ") with (1) any employee of the former official's agency during the last year of employment and (2) enumerated senior officials of any other agency.[23]

II. The Special Ban on Representing, Aiding or Advising Foreign Governments

The 1989 Act also created new Section 207(f)(1), banning senior officials and very senior officials (as defined in Sections 207(c) and (d)), for one year after leaving government service, from (1) "represent[ing] the interests of a foreign entity" before any department or agency "with the intent to influence a decision" or (2) "aid[ing] or advis[ing] a foreign entity with the intent to influence a decision" of any department or agency. The affected foreign entities were defined to be foreign governments or political parties.

This ban has been extensively questioned both legally and as a matter of policy, as it singles out particular types of clients for additional restrictions. The effort to adopt these restrictions (which, at various times during the legislative activity, was also aimed at foreign companies) began in earnest in 1986. The Senate Judiciary Committee favorably reported such a provision that year,[24] and in favorably reporting the successor bill the next year, sought to justify such singling out on the grounds that the concerns over misuse of information or influence peddling were "more immediate," and "very disquieting" when former officials are employed by

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22/ The no contact rule continues to apply in the same manner. 18 U.S.C. § 207(c)(1)(1994).

23/ An earlier version of this no agency/no contact provision was a central reason for President Reagan's pocket veto of the 1988 legislative revisions contained in H.R. 5043 (a more extreme version of the legislation than the one that ultimately became law in 1989). *See* 24 Weekly Compilation of Presidential Documents 1561-62 (November 23, 1988).

24/ *See* S. Rep. No. 396, 99th Cong., 2d Sess. 24-27 (1986) (regarding S. 2334).

foreign interests.[25] The Committee defended restrictions on such representation as "necessarily stronger."[26]

A. Legal Questions

The 1987 Senate Report defended the new provisions (including the ban on representing foreign interests) as consistent with the First Amendment's free speech and association clauses, the Fifth Amendment's due process and bill of attainder clauses, and the Fourteen Amendment's equal protection clause.

With regard to the First Amendment, the Senate Committee acknowledged its receipt of contradictory testimony. Some witnesses took the position that former employees would retain their First Amendment right to express their personal views and would have only limited encumbrances on their ability to collect revenues for advocacy. Further, they noted that there was no constitutionally protected right to profit from such advocacy.[27] On the other hand, the American Civil Liberties Union ("ACLU") argued that it was incorrect to relegate the affected representational activities to the category of "commercial speech." Rather, according to the ACLU, they were political activities meriting the protection of judicial strict scrutiny, so that any

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25/ S. Rep. No. 101, 100th Cong., 1st Sess. 7 (1987) (regarding S. 237).

26/ *Id.*

27/ *Id.* at 12-13. *See Hearings on S. 2334 (Integrity in Post Employment Act of 1986) Before the Senate Comm. on the Judiciary*, 99th Cong., 2d Sess. 129-30, 134 (1986) (testimony of John F. Banzhaf III, Professor, George Washington University School of Law). Prof. Banzhaf did take the position that, if the ban applied to uncompensated advocacy, there would be a serious freedom of speech issue. *See id.* at 145. In later hearings, Common Cause took the position that it was doubtful that there was a First Amendment right to speak in a representative capacity. If anything, speaking in a representative capacity was more of a question of freedom of association. *See Hearing on H.R. 4917 and H.R. 5043 (Restrictions on the Post-Employment Activities of Federal Officers and Employees) Before the Subcommittee on Administrative Law and Governmental Relations of the House Comm. on the Judiciary*, 100th Cong., 2d Sess. 51 (1988) (letter from Archibald Cox, Chairman, Common Cause to the Hon. Strom Thurmond dated April 18, 1988); *Hearings on H.R. 2267 and Related Bills (Post-Employment Restrictions for Federal Officers and Employees) Before the Subcommittee on Administrative Law and Governmental Relations of the House Comm. on the Judiciary*, 101st Cong., 1st Sess. 195-96 (1989) (statement of Archibald Cox, Chairman, Common Cause).

regulation must be narrowly drawn to serve a compelling government interest.[28] The Senate Committee ultimately concluded that:

> Even if the "strict scrutiny" standard would apply, the Committee believes that S. 237 would be found constitutional. The legislation is supported by several compelling Government interests -- limiting the actuality and appearance of improper influence by former Government officials and combatting the potential for misuse of confidential information in a manner contrary to the interests of the United States. Furthermore, the legislation, as amended, is tailored to serve those compelling interests. It imposes "cooling off" periods on Government contracts [sic] of a scope and length suited to the officers affected, and it proscribes employment by foreign entities for periods during which confidential information acquired while in Government service would remain both useful and memorable.[29]

The House Committee was more certain that the strict scrutiny test would apply:

> Because the proposed prohibitions implicate constitutional rights under the First Amendment, the test which the Courts are likely to apply in determining whether they are constitutional is whether the prohibitions are:
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> 1. Necessary to serve a compelling state interest; and
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> 2. Drawn as narrowly as possible to achieve that compelling interest. Widmar v. Vincent, 454 U.S. 263 (1963).

28/ S. Rep. No. 101, *supra* n. 25, at 13. *See Hearings on S. 2334 (Integrity in Post Employment Act of 1986) Before the Senate Comm. on the Judiciary*, 99th Cong., 2d Sess. 195-97 (1986) (testimony of Morton H. Halperin and Jerry J. Berman on behalf of the ACLU). The ACLU maintained this position in later hearings. *See Hearing on H.R. 1231 (Foreign Agents Compulsory Ethics in Trade Act of 1987) Before the Subcommittee on Administrative Law and Governmental Relations of the House Comm. on the Judiciary*, 100th Cong., 1st Sess. 145-48 (1987) (testimony of Morton Halperin on behalf of the ACLU); *Hearing on H.R. 4917 and H.R. 5043 (Restrictions on the Post-Employment Activities of Federal Officers and Employees) Before the Subcommittee on Administrative Law and Governmental Relations of the House Comm. on the Judiciary*, 100th Cong., 2d Sess. 244-47 (1988) (testimony of Morton H. Halperin and Leslie Harris on behalf of the ACLU); *Hearings on H.R. 2267 and Related Bills (Post-Employment Restrictions for Federal Officers and Employees) Before the Subcommittee on Administrative Law and Governmental Relations of the House Comm. on the Judiciary*, 101st Cong., 1st Sess. 200, 204-06 (1989) (testimony of Leslie Harris, Legislative Counsel, ACLU).

29/ S. Rep. No. 101, *supra* n. 25, at 13.

> Thus, even if the courts find that the prohibitions address a compelling state interest, they will also need to conclude that the bans themselves are reasonable and are as narrow as possible to achieve that purpose.[30/]

However, the House report did not continue with application of those principles to the individual provisions of the bill.[31/]

With regard to the due process clause, the Senate Committee emphasized that the bill did not absolutely bar anyone from pursuing employment. Rather it "merely imposed a waiting period;" any negative effect on employment opportunities was outweighed by the strong public interest in avoiding abuse of confidential information or influence.[32/] This is in obvious contrast to the later lifetime ban now imposed on former USTRs and Deputy USTRs.

With regard to the equal protection clause, the Senate Committee took the position that the distinction between the various classes of individuals was subject to the lower "rational basis" test. The Committee believed that that test was met:

> Differences in responsibility and potential influence provide at least a rational basis for distinguishing between former high level officials . . . and all other Federal employees. . . . Similarly, the distinction in the bill between representation of foreign entities and representation of domestic entities is justified by the different effect these entities might have on the U.S. interests, particularly if they acquire confidential Government information. . . .[33/]

Thus, significant legal questions have been raised with regard to the 1989 general one-year ban against representing, aiding or advising foreign entities. This ban is the foundation for the special ban now placed upon USTRs and Deputy USTRs.

B. Policy Questions

As importantly, numerous witnesses testified that whether foreign entities were the represented or aided parties was not relevant to either of the central questions motivating conflict

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30/ H. Rep. No. 1068, 100th Cong., 2d Sess. 13 (1988) (regarding H.R. 5043).

31/ It did include an extended discussion of the constitutional issues surrounding "commercial speech" and whether the representation was for compensation. *See id.* at 13-15.

32/ S. Rep. No. 101, *supra* n. 25, at 14.

33/ *Id.* at 13-14. One academic witness testified that "rational basis", rather than some more strict test, would apply because there was no First Amendment freedom of speech or association right being impaired. *See Hearings on S. 2334 (Integrity in Post Employment Act of 1986) Before the Senate Comm. on the Judiciary*, 99th Cong., 2d Sess. 136 (1986) (testimony of John F. Banzhaf III, Professor, George Washington University School of Law).

of interest statutes: misuse of inside information or misuse of influence.[34] In the words of representatives of the ACLU:

> If a former official is abusing his or her trust by representing an interest seeking advantage from the government the abuse is present whether the entity being represented is a foreign power or a domestic firm.[35]

Even Common Cause, which was in favor of the new restriction, had taken a position more in line with the ACLU during the consideration of the senior official agency-specific no contact rules adopted by the 1978 Ethics in Government Act:

> Once, some argued that Government officials should be prohibited from going to work for specific organizations or agencies or private groups following Government employment. This does not do that. The 1-year ban which applies to top-level officials does not prohibit anyone from working for any organization upon leaving the Government, and it doesn't even prohibit the individual from working on those areas in which the individual may have worked at with the Government. It simply says that the individual, for a period of 1 year, cannot go back and work specifically with former colleagues and with the agency which the individual just left. And that is a breathing period that is designed, I think, to reach some kind of balance with dealing with the problem commonly referred to as revolving door problem, leaving flexibility but also providing some protections against abuse.[36]

The focus of the ethics laws should be on misconduct, not the identity of the client.[37] Put another way by a Justice Department spokesperson, what is the problem being addressed by special treatment for representing foreign governments? That witness believed that there was no unique problem of information disclosure or influence peddling to justify the restrictions.

34/ *See Hearings on S. 2334 (Integrity in Post Employment Act of 1986) Before the Senate Comm. on the Judiciary*, 99th Cong., 2d Sess. 79-80 (1986) (testimony of David H. Martin, Director, Office of Government Ethics).

35/ *Hearings on S. 2334 (Integrity in Post Employment Act of 1986) Before the Senate Comm. on the Judiciary*, 99th Cong., 2d Sess. 198 (1986) (testimony of Morton H. Halperin and Jerry J. Berman on behalf of the American Civil Liberties Union).

36/ *Hearings on H.R. 1, H.R. 9, H.R. 6954, and Companion Bills (Financial Disclosure Act) Before the Subcommittee on Administrative Law and Governmental Relations of the House Comm. on the Judiciary*, 95th Cong., 1st Sess. 575-76, 591-93 (1977) (testimony of Fred Wertheimer, Vice President, Common Cause, also distinguishing the aid from that covered by Section 207(a) where the individual has specific information about the matter stemming from the government service).

37/ *See Hearings on H.R. 2267 and Related Bills (Post-Employment Restrictions for Federal Officers and Employees) Before the Subcommittee on Administrative Law and Governmental Relations of the House Comm. on the Judiciary*, 101st Cong., 1st Sess. 210-11 (1989) (statement of Leslie Harris, Legislative Counsel, The American Civil Liberties Union).

Further, the post-employment restrictions under consideration would prohibit representations or assistance which the United States would find advantageous (*e.g.*, seeking U.S. Government funds to combat drug production in a foreign country).[38/] ***If a former official has influence to peddle, he or she should be regulated in doing so without regard to whom he or she is representing.***

Similarly, a State Department spokesperson (commenting upon a later bill) noted that there was no necessary problem with switching sides:

> [T]he prohibition is drawn so broadly that it covers general matters in which United States interests are only indirectly involved. Even if this were narrowed, the problem of "switching sides" does not appear to relate only to high-level officials or to foreign interests. In a particular case, a foreign interest may be complementary to or supportive of United States interests, while a particular American interest in a given case, may be opposed to the interests of the United States government or other American interests.[39/]

Therefore, as with the legal questions, significant policy questions remain with regard to the 1989 general one-year ban against representing, aiding or advising foreign entities, which ban is the basis for the 1992 and 1995 expanded bans affecting USTRs and Deputy USTRs. Proponents of the expanded bans have not demonstrated special justification for this special "cooling off" period. The only defense for the 1989 rule is that, because it is only one year in length, the inconvenience is minimal. Even that defense is unavailable for the new USTR Amendment.

38/ *Hearings on H.R. 5097 and Related Bills (Post-Employment Conflicts of Interest) Before the Subcommittee on Administrative Law and Governmental Relations of the House Comm. on the Judiciary*, 99th Cong., 2d Sess. 79-80 (1986) (testimony of John C. Keeney, Deputy Assistant Attorney General, Criminal Division, Department of Justice).

39/ *Hearing on H.R. 1231 (Foreign Agents Compulsory Ethics in Trade Act of 1987) Before the Subcommittee on Administrative Law and Governmental Relations of the House Comm. on the Judiciary*, 100th Cong., 1st Sess. 51 (1987) (testimony of Michael G. Kozak, Deputy Legal Adviser, Department of State).