November 17, 2000
DO-00-044

MEMORANDUM

TO: Designated Agency Ethics Officials

FROM: Amy L. Comstock
Director

SUBJECT: Recent Office of Legal Counsel Opinions Concerning 18 U.S.C. § 207

The Office of Legal Counsel (OLC) recently issued two opinions concerning 18 U.S.C. § 207. One addresses the question of when a person is no longer a candidate for purposes of the exemption at section 207(j)(7) for representations made by former senior and very senior executive branch employees solely on behalf of a candidate. The other addresses who is covered by the one-year restriction on certain communications or appearances by very senior employees back to the Government, at 18 U.S.C. § 207(d).

## I. Opinion Concerning the Scope of the Exemption at 18 U.S.C. § 207(j)(7)

Section 207(j)(7) exempts certain individuals who communicate or appear solely on behalf of a candidate or certain political organizations from the restrictions on former senior and very senior employees imposed by 18 U.S.C. §§ 207(c) and 207(d).[1] A candidate is a person who seeks (or who has authorized others to explore on his or her behalf) election to Federal or State office.

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[1] The exemption does not apply if the person making the communication is employed by anyone other than a candidate, one of the specified political organizations, or a person or entity who represents or advises only such candidates or political organizations; nor does the statute apply to former employees of the Federal Election Commission with respect to communications to or appearances before the Federal Election Commission.

Section 207(j)(7) does not explain when a candidate for the Office of President or Vice President ceases to be a candidate. In order to permit an orderly and effective transition, the Office of Government Ethics (OGE) asked OLC, on October 6, 2000, whether, under section 207(j)(7), a President-elect and Vice President-elect are deemed "candidates" up until the point of inauguration.

OLC, in an opinion issued November 6, 2000, concluded that a candidate for the Office of President of the United States is seeking office as a candidate until he or she actually assumes that office. Accordingly, notwithstanding the post-employment restrictions at 18 U.S.C. §§ 207(c) and (d), a person who otherwise meets the conditions of the exemption at section 207(j)(7) may communicate on behalf of a person who is a "candidate" until that person assumes the office to which he or she was elected.

II. Opinion Addressing the Scope of 18 U.S.C. § 207(d)

Among the persons subject to the restriction at 18 U.S.C. § 207(d) are those "employed in a position . . . at a rate of pay payable for level I of the Executive Schedule . . . ." See section 207(d)(1)(B). Positions at level I of the Executive Schedule are listed in 5 U.S.C. § 5312 and include members of the cabinet, the Director of the Office of Management and Budget, and the Commissioner of Social Security. OLC was asked whether section 207(d) applies to other persons who are paid, pursuant to various pay authorities, amounts in excess of the amount paid persons at level I of the Executive Schedule.

In an opinion issued November 3, 2000, OLC concluded that section 207(d) applies only to employees whose pay is exactly the same as that set for level I positions. OLC, as a basis for its conclusion, cited the express language of section 207(d). Persons paid above that level would be covered by the one-year bar of 18 U.S.C. § 207(c) for senior employees rather than the more restrictive one-year bar at section 207(d) for very senior employees. If an employee's salary is set administratively at the level I rate, OLC concluded that the decision to so set the employee's pay would presumably reflect an agency determination that the more stringent restrictions of section 207(d) should apply.

Copies of the two OLC opinions may be obtained from OGE’s Website at www.usoge.gov.

Attachment A

**U.S. Department of Justice**

Office of Legal Counsel

Office of the Deputy Assistant Attorney General

*Washington, D.C. 20530*

November 3, 2000

**MEMORANDUM FOR KENNETH R. SCHMALZBACH**
**ASSISTANT GENERAL COUNSEL, DEPARTMENT OF THE TREASURY**

From: Daniel L. Koffsky
Acting Deputy Assistant Attorney General

Re: Application of 18 U.S.C. § 207(d) to Certain Employees of the Treasury Department

You have asked for our opinion whether the post-employment restrictions of 18 U.S.C. § 207(d) (1994), which apply to "very senior" executive branch personnel, cover certain employees of the Department of the Treasury ("Treasury") who are compensated at a rate of pay exceeding that for level I of the Executive Schedule ("level I"). *See* Letter for Randolph Moss, Acting Assistant Attorney General, Office of Legal Counsel, from Kenneth R. Schmalzbach, Assistant General Counsel, Department of the Treasury (Mar. 17, 2000) ("Schmalzbach letter"). We conclude that § 207(d) does not apply to the Treasury Department employees specified in your letter.

I.

Section 207(d) states:

> (1) [A]ny person who . . . is employed in a position in the executive branch of the United States (including any independent agency) *at a rate of pay payable for level I of the Executive Schedule* . . . and who, within 1 year after the termination of that person's service in that position, knowingly makes, with the intent to influence, any communication to or appearance before any person described in paragraph (2), on behalf of any other person (except the United States), in connection with any matter on which such person seeks official action by any officer or employee of the executive branch of the United States, shall be punished as provided in section 216 of this title.
> (2) Persons who may not be contacted.--The persons referred to in paragraph (1) with respect to appearances or communications . . . are--(A) any officer or employee of any department or agency in

> which such person served in such position within a period of 1 year before such person's service or employment with the United States Government terminated, and (B) any person appointed to a position in the executive branch which is listed in section 5312, 5313, 5314, 5315, or 5316 of title 5.

18 U.S.C. § 207(d) (emphasis added).

We understand that there are some Treasury employees, including seven at the Internal Revenue Service ("IRS") and thirteen at the Office of Thrift Supervision ("OTS"), whose salaries exceed the rate of pay for level I. *See* Schmalzbach letter at 2-3. These employees' salaries are authorized by three statutory provisions. First, the Secretary of Treasury may request approval from the Office of Management and Budget to disburse "critical pay" for one or more positions within the IRS. 5 U.S.C. § 9502(a) (Supp. IV 1998). Second, the Secretary may "fix the compensation of, and appoint individuals to, designated critical administrative, technical, and professional positions needed to carry out the functions of the Internal Revenue Service." *Id.* § 9503. Both of these provisions allow the employees' salaries to exceed the salary for level I officials ($157,000), but not that of the Vice President ($181,400). *See id.* §§ 9502(b) & 9503(a)(7). Third, the Director of OTS, a Treasury Department component, may fix the salaries of OTS employees "without regard to the provisions of other laws applicable to officers or employees of the United States." 12 U.S.C. § 1462a(h)(1) (1994).

The issue here is whether employees receiving, under these provisions, pay exceeding that for level I are subject to the general "cooling off" prohibition of 18 U.S.C. § 207(c) (1994 & Supp. IV 1998) or the broader prohibition of 18 U.S.C. § 207(d). Under § 207(c), for one year after leaving a "senior" position, a former official may not make any communication to or appearance before his or her former agency with an intent to influence, in connection with seeking official action, unless one of several statutory exceptions applies. Moreover, the scope of § 207(c) ordinarily is subject to narrowing, as to certain categories of former officials, if the Director of the Office of Government Ethics ("OGE") determines that an agency or bureau within another agency should be treated as a separate agency because it "exercises functions which are distinct and separate from the remaining functions of the department or agency and that there exists no potential for use of undue influence or unfair advantage based on past Government service." *Id.* § 207(h)(1). Insofar as § 207(c) would otherwise raise a bar, this determination enables anyone formerly employed in such a separate agency or bureau to make communications to or appearances before other components of the larger agency. You give, as an example, a representation before OTS by a former official of the IRS. Schmalzbach letter at 2. A former "very senior" official covered by § 207(d), however, may not make a communication to or appearance before any official of his or her former agency and is not eligible for any narrowing determination by OGE; and former very senior officials are under an additional prohibition reaching communications to or appearances before any official, whether at the former agency or another one, if the current official is in an Executive Schedule position under 5 U.S.C.A. §§ 5312-5316 (West Supp. 2000).

II.

The text of subsection (d) is unambiguous. Because the bar applies to "any person . . . employed in a position in the executive branch of the United States (including any independent agency) *at* a rate of pay payable for level I of the Executive Schedule," 18 U.S.C. § 207(d)(1) (emphasis added), the language signifies that § 207(d) applies only to employees whose pay is the same as that of a level I official.[1]

An examination of § 207 as a whole buttresses this interpretation. The language describing the scope of subsection (d) is notably different from that of subsection (c), which includes employees whose basic rate of pay "is *equal to or greater than* the rate of basic pay payable for level 5 of the Senior Executive Service." 18 U.S.C. § 207(c)(2)(A)(ii) (emphasis added); *see also id.* § 207(c)(2)(A)(iv) (stating that subsection (c) also applies to officers of the uniformed services whose pay grade "is pay grade O-7 or above"). Congress presumably was aware that various statutes authorized pay above that for level I, yet chose the narrower and more targeted language of subsection (d). "[W]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." *Bates v. United States*, 522 U.S. 23, 29-30 (1997) (quoting *Russello v. United States*, 464 U.S. 16, 23 (1983)); *see also Crandon v. United States*, 494 U.S. 152, 166-67 (1990) (looking to the ethics statute as a whole in interpreting a particular provision).

This reading may appear to lead to anomalous consequences. Section 207 uses a former official's salary as a proxy for ability to exercise influence, so that higher salaries in general lead to greater post-employment restrictions. *See* Memorandum for Susan F. Beard, Acting Deputy Assistant General Counsel, Department of Energy, from Daniel L. Koffsky, Acting Deputy Assistant Attorney General, *Re: Applicability of the Post-Employment Restrictions of 18 U.S.C. § 207(c) to Assignees Under the Intergovernmental Personnel Act* at 3-4 (June 26, 2000). Here, former officials who received pay above level I would be subject to lesser restrictions than the lower-paid former officials who were paid at level I. This apparent anomaly, however, can be resolved in light of the statutory purpose. The officials paid at level I, listed in 5 U.S.C.A. § 5312, include the members of the cabinet, the Director of the Office of Management and Budget, and the Commissioner of Social Security. Section 207(d) also specifically applies to the Vice President of the United States. *See* 18 U.S.C. § 207(d)(1)(A). As you observe, the Treasury employees in question here lack the authority and stature of level I officials, whose positions create the potential "to exercise unusual continuing influence over former Level I colleagues for a period of time after leaving the Government." Schmalzbach letter at 4. Unlike the Secretary of the Treasury, these IRS employees are typically hired for temporary work and do not have offices of substantial, continuing authority. *See, e.g.*, 5 U.S.C. § 9503. Although the tenure of the OTS employees in question is not similarly limited by statute, they are subordinate to the Director of OTS, who himself is subordinate to the Secretary. Thus, these OTS employees also lack the

[1] The legislative history, which scarcely refers to subsection (d), does not suggest a broader interpretation.

stature of level I officials. In sum, the Treasury employees in question, while receiving a higher salary than officials paid at level I, will have less ability to exercise post-employment influence than those listed in 5 U.S.C.A. § 5312, and their former positions will also be far less likely to create an appearance of undue influence.

In arriving at this conclusion, we are also mindful, too, that "[c]riminal statutes should be given the meaning their language most obviously invites. Their scope should not be extended to conduct not clearly within their terms." *United States v. Williams*, 341 U.S. 70, 82 (1951) (plurality opinion); *see also Crandon*, 494 U.S. at 168. Because the apparent anomaly can be reconciled, we would not give § 207(d) a broader reading than the language would suggest.

One problem remains. If the salary of the Treasury employees in question had been set *exactly* at the rate for level I, subsection (d) by its terms would seem to apply. Although the Treasury employees happen now to be paid at a rate that *exceeds* the salary fixed for level I, *see* Schmalzbach letter at 3, other employees in the future might receive pay exactly at the level I rate. Thus, lowering the pay for one of these subordinate positions to the rate for level I would have the truly anomalous effect of increasing the post-employment restrictions. This result, however, follows from the precise language chosen by Congress. Furthermore, in view of the present opinion, any future decision to set a salary exactly at the rate for level I will presumably reflect at least an administrative determination that the more stringent post-employment restrictions should apply.[2]

Please let us know if we may be of further assistance.

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[2] As this discussion indicates, we do not believe that § 207(d) applies exclusively to officials listed in 5 U.S.C.A. § 5312, *see* Schmalzbach letter at 1 n.1, but rather to any executive branch employee who is paid the same level I rate of pay that the officials listed in 5 U.S.C.A. § 5312 receive.

Attachment B

**U.S. Department of Justice**

Office of Legal Counsel

Office of the Assistant Attorney General

*Washington, D.C. 20530*

November 6, 2000

**MEMORANDUM FOR AMY COMSTOCK**
**DIRECTOR**
**OFFICE OF GOVERNMENT ETHICS**

From: Randolph D. Moss RDM
Assistant Attorney General

Re: Definition of Candidate Under 18 U.S.C. § 207(j)

You have asked for our opinion regarding the application of the exemption contained in 18 U.S.C. § 207(j)(7) (Supp. IV 1998) to the activities of certain former executive branch employees who serve on a Presidential transition team. Specifically, you have asked us when an individual ceases to be a candidate for purposes of this exemption.

Subsection (c) of § 207 prohibits certain former officers or employees of the executive branch from communicating on behalf of any person except the United States, within one year of his or her termination, with the department or agency in which such person served. In the case of certain "very senior personnel of the executive branch," including the Vice President, subsection (d) extends this ban to communications to certain high level officials in other agencies. Subsection (j)(7)[1] provides an exemption from this restriction for individuals who communicate

[1] Subsections (j)(7)(A), (B) provide:

(A) Except as provided in subparagraph (B), the restrictions contained in subsections (c), (d), and (e) shall not apply to a communication or appearance made solely on behalf of a candidate in his or her capacity as a candidate, an authorized committee, a national committee, a national Federal campaign committee, a State committee, or a political party.
(B) Subparagraph (A) shall not apply to --
(i) any communication to, or appearance before, the Federal Election Commission by a former officer or employee of the Federal Election Commission; or
(ii) a communication or appearance made by a person who is subject to the restrictions contained in subsections (c), (d), or (e) if, at the time of the communication or appearance, the person is employed by a person or entity other than –
(I) a candidate, an authorized committee, a national committee, a national Federal campaign committee, a State committee, or a political party; or
(II) a person or entity who represents, aids, or advises only persons or entities described in subclause (I).

or appear solely on behalf of a candidate in his or her capacity as a candidate so long as, at the time of the communication or appearance, the person is not employed by a person or entity other than the candidate (except for a person or entity who only represents or advises candidates). Subsection (7)(j)(C)(i) defines the term "candidate" to mean:

> [A]ny person who seeks nomination for election, or election, to Federal or State office or who has authorized others to explore on his or her behalf the possibility of seeking nomination for election, or election, to Federal or State office.

18 U.S.C. § 207(j)(7)(C)(i).

The exemption provided for in § 207(j)(7) was added to the ethics statute in August of 1996 by the Office of Government Ethics Authorization Act of 1996. *See* 110 Stat. 1566, 1567 (1996). At a minimum, the definition of "candidate" set forth in subsection (j)(7)(C)(i) explicitly establishes that a person holds the status of a candidate so long as he "seeks . . . election" to office. Ordinarily, a candidate would be thought to seek election to an office up to the point at which his or her election to that office is determined. In the case of the office of President and Vice President, the actual election of the candidate takes place through the electoral college. *See* U.S. Const. art. II, § 1 & amend. XII. After the state electors cast their votes, the outcome of the election is declared by the President of the Senate, who, in the presence of the entire Congress, counts the votes. U.S. Const. amend. XII; *see also* 3 U.S.C. § 15 (1994) (after President of the Senate counts the vote, his announcement will be deemed a sufficient declaration of the persons elected to President and Vice President). You have informed us that the votes of the electors will likely be tallied on January 6, 2001. *See also* 3 U.S.C. § 15. Under the Constitution, until the votes of the electors have been tallied and certified, all candidates for President and Vice President retain their status as candidates. Neither the President nor the Vice President is "elected" until the conclusion of that procedure. *See* U.S. Const. art. II, § 1 & amend. XII.

You have noted, however, that "even if a candidate continues to be a candidate up to the day of the presentation of the electors' votes to the Congress, this would still leave a significant period of time in which transition activities will continue prior to the day of the inauguration of the President." Letter for Randolph D. Moss, Assistant Attorney General , Office of Legal Counsel, from F. Gary Davis, Acting Director, Office of Government Ethics at 2 (Oct. 6, 2000). Implicit in your letter is the question whether a candidate for President or Vice President can be deemed a "candidate" up until the point of inauguration in order to permit an orderly and effective transition from one elected official to another.[2] The general understanding of a

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18 U.S.C. § 207(j)(7)(A), (B).

[2] We previously addressed the issue of whether the one year bar prohibiting certain former government employees from contacting their former agency, contained in 18 U.S.C. § 207(c), applied to former government employees who were working for the President-elect's transition team. *See* Letter for Judge Frank Q. Nebeker, Director, Office of Government Ethics, from Douglas W. Kmiec, Assistant Attorney General, Office of Legal Counsel (Nov. 18, 1988) ("Nebeker Letter"). However, that advice predated the enactment of § 207(j)(7)'s

"candidate" is "one that presents himself or is presented by others . . . as suitable for and aspiring to an office." Webster's Third New International Dictionary at 325 (1993). This is consistent with the statutory definition, which refers to a person who "seeks nomination for election, or election." To "elect," in the context of an election to office, is generally defined as "to choose (a person) for an office," and when used as an adjective ordinarily means "chosen for office or position but not yet installed." *Id.* at 731. This would appear to support a reading of the statute that would terminate a person's status as a candidate once the final selection had taken place, even though he or she had not yet been sworn into office. As previously discussed, for a presidential candidate, this would occur on January 6th.

However, in light of the legislative history and purpose of this statutory amendment, giving the term "candidate" its ordinary meaning in applying this exemption creates an irrational distinction between those communications made by former government officials and employees on behalf of a candidate prior to that candidate's election and those communications that take place after the election, when the candidate has become the President-elect or Vice President-elect. When the literal interpretation of a statute would produce an absurd result, the words at issue should be given alternative meaning to avoid such a consequence. *Green v. Bock Laundry Machines Co.*, 490 U.S. 504, 527 (1989) (Scalia, J., concurring). *See also South Dakota v. Yankton Sioux Tribe*, 522 U.S. 329, 346 (1998). In this case, not only does the legislative history and purpose of this statutory amendment support an application of the word "candidate" that is broader in scope than its ordinary meaning, extending until the person in question assumes office, but they also make clear that a narrower interpretation would yield a bizarre result.

The House Report to the ethics amendment explains that:

> The purpose of the post-employment restrictions for former staff is to prevent pecuniary gain by individuals due to a prior relationship within his or her former office. In the case of a leave of absence or resignation to work on a campaign, however, the "cooling-off" period should not apply.

H.R. Rep. No. 104-595, at 9 (1996), *reprinted in*, 1996 U.S.C.C.A.N. 1356, 1364. Accordingly, communications or appearances "made solely on behalf of a candidate . . . are excepted from the post-employment restrictions." *Id.* Congress enacted this exception to ensure that the ethics statute did not have an unintended, and wholly irrational, consequence. Without it, a person who worked for a member of Congress or the President or Vice President, and then joined that person's campaign team, would have committed a criminal offense if he or she communicated with that person or his or her staff within a one year period. As Senator Levin explained:

> What we overlooked at the time was the situation where congressional staff and top executive department officials may leave their Government positions to work on the reelection campaigns of the persons for whom they worked while in the

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exemption.

> Government. For example, the administrative assistant of one of our colleagues may take a leave of absence and work on the reelection campaign for that same Member. If that happens, that administrative assistant should not be barred from contacting the Member or his staff on behalf of the campaign, since the interests of the campaign and the Member are really the same. Such a bar, which was never intended, would basically make such employment impossible.

142 Cong. Rec. at 18,869, 18,871 (1996). Senator Cohen, in articulating his support of the bill, made it clear that fear of a former government employee taking unfair advantage of his access to his former office was not an issue:

> [L]eaving Government service to work on a campaign doesn't involve the kind of abuse the revolving door rules are intended to address, that is, individuals trading on Government information and access for private gain.

*Id.* at 18,870. Representative Canady further articulated the principle behind the amendment as

> one of allowing necessary communications integral to any campaign-related employment. Therefore, where the intention of the former employee is to participate in the electoral process subject to the narrow exception established by the protection of this bill, the revolving door restrictions of title 18 will no longer apply.

142 Cong. Rec. 12,943, 12,945. Senator Levin also emphasized that the amendment would in no way undermine the general purposes of the ethics statute because:

> this bill would not permit [a] former staff person to contact his or her former office during the 1 year cooling off period on behalf of a client for whom he is serving as a lobbyist. The exception this bill makes is only for contacts by former staff on behalf of the campaign organizations of the Member or President-Vice President for whom the staff person previously worked. This limitation avoids giving an otherwise reasonable exception an unintended consequence.

*Id.* at 18,871.

Communications made by individuals who work solely for a candidate after the election but prior to that candidate being sworn into office are equally as unlikely to result in private pecuniary gain for the former government employee and serve the same legitimate purposes as communications made by such individuals prior to the voting that determines the winner of the election. The purpose of the subsection (j) exemption is to permit communications necessary to the campaign-related responsibilities of the employee. In light of these concerns and policies, we can discern no rational basis, under the subsection (j) exemption, for permitting a former government official to communicate with his former office on behalf of a candidate prior to

January 5th, but prohibiting that same communication after the candidate's formal election on January 6th. In fact, it would seem logical that the principles of the ethics statute are even less at risk when the communication is made exclusively on behalf of a President-elect, rather than on behalf of a mere candidate for that office. To construe the statute to create such a distinction would be to create an absurdity.[3]

We acknowledge that the case of a former executive branch agency official or employee who joins a President-elect's transition team to assist with issues related to his or her former agency presents a slightly different situation than a former presidential, vice presidential or congressional staff member. In this situation, even absent the (j)(7) exemption, the former agency official would be able to communicate freely with his or her "candidate" and his or her candidate's office. Instead, the prohibition would apply to his or her communications with another government agency with which the President-elect or Vice President-elect presumably has an interest in dealing. Congress may not have had this precise situation in mind when it passed subsection (j)(7). However, the policy behind prohibiting a former government official from exercising undue influence on behalf of a private client or otherwise trading on government information or access for private gain, which is the concern expressed by Congress in the legislative history of the amendment, simply does not apply in this context either.

In sum, permitting an employee successfully to carry out his or her transition responsibilities may be even more crucial to the effective operation of our political system than the need to permit an employee to fulfill his or her campaign responsibilities. As we have previously acknowledged, the orderly transfer of the executive powers "is one of the most important public objectives in a democratic society." Nebeker Letter at 1. The transition period insures that the candidate will be able to perform effectively the important functions of his or her new office as expeditiously as possible. Therefore, to give full effect to the clear congressional intent behind subsection (j), it is apparent that individuals, who otherwise meet the specifications and limitations of § 207(j)(7)(A) & (B), should be deemed to be communicating on behalf of a "candidate" through the point at which that "candidate" assumes the office to which he or she was elected.[4] In other words, for purposes of § 207 (j), a successful candidate should be viewed as seeking office until he or she actually assumes that office. After that point, any communications by the former employee on behalf of the office holder will be communications on behalf of the "United States," and therefore exempt from the prohibitions of the Act. *See* 18 U.S.C. § 207(c)(1).

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[3] This conclusion is consistent with our discussion of the purpose of the Act contained in the Nebeker Letter.

[4] Certainly the same policy concerns do not apply to a candidate who is not elected to the office which he or she seeks. Rather, a candidate who is not elected to office would lose his or her status as a candidate at the point the outcome of the election was finalized.