

Office of Government Ethics
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Letter to a Designated Agency Ethics
Official dated February 23, 1981

This is in response to your letters of February 5 and February 10, 1981. In connection with the question of whether the disqualification of 18 U.S.C. § 207(c) applies to an Inspector General of your Department with respect to [a major separate statutory agency within the Department], you raise the broad issue of the proper interpretation of the word "supervision" as used in 18 U.S.C. § 207(e). In the event of a finding of disqualification notwithstanding the application of section 207(e), you urge an alternative determination pursuant to 18 U.S.C. § 207(d)(1)(C) restricting the disqualification with respect to [this major agency] which would otherwise apply. While we have no desire to expansively construe a criminal statute, we are also mindful that a convoluted interpretation of these provisions is not permitted.

The drafters of section 207 had two differing formulations for referring to the range of relationships between former employees and previous executive assignments: "actually pending under his official responsibility" (subsection (b)(i)) and "whose official responsibilities included supervision" (subsection (e)). Your letter indicates that the Inspector General does not have the "direct line authority to order or direct specific action" by [this major agency]. Under our view of these statutory provisions, that argument would be appropriate to an analysis of the applicability of subsection (b)(i) not subsection (e). This is because both the legislative history of these provisions and our regulations regard the relationship referred to by subsection (b)(i) as "direct authority."¹ The Senate Committee report states that:

The term "official responsibility" [as used in subsection (b)(i)] is defined by 18 U.S.C. § 202(b) to mean: "the direct administrative or operating authority, whether intermediate or final, and

either exercisable alone or
with others, and either
personally or through
subordinates, to approve,
disapprove, or otherwise
direct Government action."2

Accordingly, we have to look further for the definition of the relationship referred to in subsection (e).

In creating a limitation to the application of section 207(c) for those in distinct and separate segments of a Department, the Congress wished to avoid unfairness to those who actually had work which was separable. However, the principal objective -- to address the problem of unfair or undue influence -- was retained. Influence is not coextensive with formal line authority, but is rather an intangible personal factor built upon contacts both at the level of those upon whom it would potentially be brought to bear and at higher levels in the organizational hierarchy.4

Under the statute and our regulations, the key to a determination pursuant to section 207(e) of whether section 207(c) is applicable to bar post-employment activity of a former Senior Employee of the parent agency is whether his or her responsibilities included supervision of the subordinate agency.5 In view of the concerns expressed in the preceding paragraph, the use of the "supervision" limitation in subsection (e) is appropriate. Webster's dictionary gives the ordinary usage of the term "supervision" to mean a critical watching and directing: oversight. This is certainly consistent with both the common notion of the Inspector General's function6 and the nature of supervision as discerned by managerial organization specialists.7 These organizational analysts demonstrate that the supervisory function is participatory with the efforts of several higher-ranking authorities, outside of those having line authority, bearing on activities below.8 The stature of the Inspector General is not diminished because his position was created not statutorily, but by delegation of authority. By delegation, he exercises the highest oversight authority which exists within your Department, that of the Secretary and Deputy Secretary to whom he reports directly. He is carrying out their role: the head of agency oversight function. In terms of the objectives of the statute, it would not seem possible to identify perches on a more prominent elevation in your organization.

Accordingly, with respect to your first alternative, we determine that the official responsibilities of the Inspector General of [your]

Department include supervision of [this major agency] within the meaning of 18 U.S.C. § 207(e) and that, therefore, the disqualification of 18 U.S.C. § 207(c) is applicable with respect to that agency.⁹

Under our regulations, subsection 207(d)(1)(C) is to be used "upon a determination by the Director that there exists no potential for the use of undue influence or unfair advantage based on past government service" to permit "separate" treatment for a subordinate agency or bureau with respect to different, unrelated agencies and bureaus.¹⁰ Where one departmental component has supervisory authority over another, use of the subsection is not permitted.¹¹ Also, our regulations are premised on determinations being made on the basis of findings with respect to the entire subordinate component, not individuals within it.¹² Accordingly, the issues you raise with respect to subsection 207(d)(1)(C) have caused us to re-examine the legislative history of this provision to establish what flexibility is permitted by the statute itself.

The floor debate is conclusive. We may not use subsection 207(d)(1)(C) to limit the otherwise applicable disqualification under 18 U.S.C. § 207(c) of the Inspector General with respect to [this major agency].¹³ Succinctly, "down-the-line" types of contacts are prohibited, and this Office is not permitted to split up organizational units so as to permit former high-ranking departmental officials to make contacts during the one-year period with the constituent components of the Department.

Sincerely,

J. Jackson Walter
Director

Enclosure

¹ See 5 C.F.R. § 737.(b)

² S. Rep. No. 170, 95th Cong., 1st Sess. 152(1977)

³ Id. at 154.

⁴ See Center for Applied Ethics of the New York Society for Ethical Culture, *The Revolving Door*, 9-13 (1977).

5 See 5 C.F.R. § 737.13(c)(3).

6 President Reagan has recently emphasized the role of the Inspectors General in attacking fraud, waste, and mismanagement.

7 See Peter F. Drucker, *Management: Tasks, Responsibilities, Practices*, especially 390 et seq. and 450 (1973).

8 With respect to your reference to the role of the Office of Government Ethics, we do condider that role to encompass "supervision" as that term is used in section 207(e). See 5 C.F.R. § 738.102.

9 The case for determining that a statutorily created Inspector General exercises supervisory responsibilities is apparent from this decision.

10 See 5 C.F.R §§ 737.13(a) and (b)(2).

11 See 5 C.F.R § 737.13(d)(2)(iii).

12 See 5 C.F.R § 737.13(d)(3).

13 See 96 Cong. Rec. S7659-60 (daily ed. June 14, 1979) (remarks of Senator Ribicoff), copy enclosed.