# Office of Government Ethics
## 81 x 5(1) -- 02/17/81

### Letter to a Designated Agency Ethics Official dated February 17, 1981

On January 14, 1981, you wrote to this Office requesting our interpretation of the application of the post-employment provisions of 18 U.S.C. § 207 to certain contemplated future activities of [an employee of your agency]. We then discussed the matter with you by phone on January 19, 1981, and now follow up that discussion with written confirmation of our position.

[The employee] had indicated his intent to leave Federal service on January 20, 1981, and become employed by a non-profit organization where he would work on environmental matters. Specifically, he had requested advice as to the restrictions which might apply to his representing his new employer with respect to legislative proposals dealing with the Clean Air Act. He wished to know generally the extent to which a former Senior Employee must, under section 207(c), screen the members of his audience to determine if an employee of his former agency was present before making a statement on behalf of his new employer to, for example, another agency, the Executive Office of the President, a conference, or a newspaper.

First, as you are aware, [the employee] is subject to all restrictions of 18 U.S.C. § 207, as he was an advice and consent appointee and, therefore, fell within the definition of a Senior Employee for purposes of sections 207(b)(ii) and 207(c).

Sections 207(a) and (b) do not prohibit a former executive branch employee from appearing before Congress on any matter. Both sections state that the restrictions apply only to representations before or communications to -- "any department, agency, court, court-martial, or any civil, military or naval commission of the United States or the District of Columbia, or any officer or employee thereof . . . ." This does not include Congress.

Further, the restrictions of section 207(c) apply only to appearances before or communications to "the department or agency in which . . . [the former Senior Employee] served as an officer or employee, or any officer or employee thereof." Clearly, Congress is not an agency or Department

as those terms are defined in 18 U.S.C. § 6 and [the then former employee] may represent his new employer to or before Congress. (As discussed later, however, appearances before Congress on matters in which his former agency has a direct and substantial interest are replete with the very practical problems of avoiding prohibited communications to officers or employees of his former agency who may be "before Congress" at the same time.)

You referred to a statement in 5 C.F.R. § 737.19(b) which you felt suggested that there were statutory prohibitions to appearing before or communicating to a legislative body. The statement was included in that portion of the regulations implementing 18 U.S.C. § 207(h) in order to resolve the language of the statute with the legislative history dealing with the use of expert witnesses. The regulation was not intended to cast doubt on the application of sections 207(a), (b) and (c) with regard to appearances before or communications to Congress. The statement was therefore couched in positive terms.

While [the then former employee] may appear before Congress, he should, however, be careful when so doing to avoid attempting to represent his present employer's position to employees of his former agency who also may be appearing at the same hearing. Such representations or communications with intent to influence could take place in the halls or hearing room before or after the hearing. The statute certainly does not prohibit him from speaking with friends who are agency employees, but he must be careful to keep the conversation away from the subject matter and the position he wishes to represent to Congress.

With regard to [this employee's] second question, section 207(c) requires that the representation must be made to "the department or agency in which he served as an officer or employee, or any officer or employee thereof . . ." before it is prohibited. Technically, regardless of the degree of interest of [the agency] in a matter, section 207(c) would not prohibit [him] from representing his new (non-Government) employer on a matter (not otherwise prohibited by sections 207 (a) or (b)) before any other agency, the Executive Office of the President or even the press. Practically, however, he may find that employees of [the agency] may be present at those times he is attempting to persuade another agency on a matter in which [the agency] has a direct and substantial interest. It may be difficult, if not impossible, to communicate to the other agency and at the same time avoid a discus-

sion or debate with the [agency] employees present. Such communications made to and with the intent to influence [agency] personnel on a matter in which [the agency] has a direct and substantial interest would be prohibited. [The employee] should take this restriction into account in deciding how to be a spokesperson for the positions of his new employer.

Finally, [the employee's] memo, which you included in your letter, reveals a particular concern about the degree to which section 207(c) might require him to survey who his audience was before he argued a certain position to any group of individuals. Specifically, he asked if he would be prohibited from speaking to a conference if [agency] officials happened to be present. The restrictions of section 207(c) must be read with reason, keeping in mind that the rationale for such a statute was an attempt to provide a "cooling-off" period so that employees of an agency and the former Senior Employee with significant personal influence would have an opportunity to adjust to their new positions with relation to one another. Accordingly, if the conference was sponsored or co-sponsored by the [agency] and [the then former employee] was asked to speak on behalf of his new employer, his speech would have to be considered as one to [the agency] and its employees and thus prohibited. If the conference was sponsored by the private sector and employees of [the agency] happened to attend, their presence, without more, would not give rise to a situation in which [the then former employee] would be prohibited from speaking. Certainly, a letter from [him] to the editor of a newspaper which may be read by an [agency] employee is not a prohibited communication made to that employee. [The then former employee] will have to use discretion in those instances where the audience may, in fact, be his former agency, and he may wish to consult with [the agency's] ethics counsel when necessary during his one-year "cooling-- off" period under section 207(c).

If you have any further questions with regard to this matter, please feel free to contact my staff.

Sincerely,

J. Jackson Walter
Director