

Office of Government Ethics

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Letter to the Counsel to the Head of an Agency dated November 24, 1980

This letter responds to your October 16, 1980 request for our opinion on the impact of the post-employment restrictions of 18 U.S.C. § 207 on [an officer in the executive branch], presently [an advisor to the President] and director of [a Federal office within an executive agency (the "Office")] should he assume the Presidency of [a private organization ("Organization")].

We will discuss the relevant statutory restrictions of 18 U.S.C. §§ 207(a) and (b)(i), the particular matters (contracts) that may be involved and the possibility of waiver of those restrictions.

At the outset, we conclude that [this officer] is a Senior Employee,¹ as that term is used in the regulations issued by the Office of Personnel Management for this Office on February 1, 1980, to whom all of the post-employment restrictions of 18 U.S.C. § 207 apply.² We assume in this opinion that the [Organization,] a private, cooperative society of distinguished scholars is neither an "agency" nor an instrumentality of the executive branch of the Government for purposes of the provisions of 18 U.S.C. § 207.³ Accordingly, based upon that assumption, if [the officer] were to become president of the [Organization] the post-employment restrictions of 18 U.S.C. § 207 would apply to him.

Even in that framework, a former Director of [this Office] could assume the duties of president of the [Organization] with relatively few impediments. We come to this opinion mindful that the responsibilities of [that Organization's] president might require that he act as spokesman for the [Organization] before departments and agencies of the executive branch. This conclusion is based on our interpretation of the post-employment provisions of 18 U.S.C. §§ 207(a) and (b)(i), and our understanding of the duties of both the president of the [Organization], as described to us by the incumbent, and the Director of [the Office (the officer)], as described to us by [the officer] and members of the [Office's] staff.

You asked that we focus our attention on the statutory limitations of sections 207(a) and (b)(i) as they may affect [the officer] and not on the one-year "cooling off" bar of section 207(c). Thus, as to section 207(c), we would merely point out that we concur in your conclusion that while the subject matter covered by the section 207(c) restrictions is broad in scope, the term of its applicability is relatively short -- one year from termination of Government employment. If [the officer] were to leave Government on December 31, 1980, and assume the presidency of the [Organization] on July 1, 1981, the "cooling-off" period would cover only his first six months in office. Moreover, the restriction applies to representational activities and communications on "particular matters"⁴ and would extend only to [the Office of which he is presently the Director] and other offices with [that same agency].

The Statutory Restrictions

To place the discussion concerning the categories of matters in which [the officer] has been involved and to which certain of the post-employment restrictions may apply in its proper perspective, we first discuss the limits of the statutory restrictions (18 U.S.C. § 207).

The statutory restrictions are focused on representational activities before, as well as communications to, a Department or agency by a former Government employee. Thus, for example, no limitation would be placed on [the officer's] involvement in the internal governance of the [Organization's] business, including the internal administration of matters on which representational activities would be forbidden. No limitation would be placed on his capacity to speak to the public or to the Congress on any matter. Further, the applicable post-employment restrictions would be personal to him and would not be imputed to any other employee [of the Organization].

The restrictions that the statute imposes are narrowly circumscribed. Generally, 18 U.S.C. § 207(a) prohibits a former officer or employee of the executive branch from acting as agent or attorney for anyone other than the United States in connection with any "particular matter involving a specific party or parties" in which the United States is a party or has a direct and substantial interest and in which he or she participated personally and substantially when employed by the Government. The phrase "particular matter involving a specific party or

parties" refers to a discrete and isolatable transaction between identifiable parties. Section 207(b)(i) prohibits a former officer or employee, for two years after leaving his or her Government position, from acting as agent or attorney for anyone other than the United States in any "particular matter involving a specific party or parties" that was actually pending under such employee's "official responsibility" within a period of one year prior to the termination of such responsibility. (emphasis added).

The phrase "particular matter" as used in 18 U.S.C. §§ 207(a) and (b)(i) is restricted in scope to mean "a particular contract, a particular case, a particular proceeding or a particular claim."⁵ That phrase is further restricted by the modifying phrase "involving a specific party or parties." Bayliss Manning, author of the authoritative treatise on this subject, commented on the importance of this limiting phrase, "involving a specific party or parties," by concluding:

Where the language is used, it is clear that the statute is concerned with discrete and isolatable transactions between identifiable parties A close standard of specificity is required in two different respects under subsection (a); for a matter to be swept under the subsection, it must involve a specific party both at the time the government employee acted upon it in his official capacity and at the subsequent time when he undertakes to act as an agent or attorney following termination of his government service.⁶

It should also be noted that the word "particular" was chosen "to emphasize that the restriction applies to a specific case or matter and not to a general area of activity." (emphasis added).⁷

And, as to sections 207(a) and (b)(i), the regulations of [the Office of Government Ethics (OGE)] which the Attorney General advised are consistent with his opinion as to the interpretation of the Act, provide that "[r]ulemaking, legislation, the formulation of general policy, standards or objectives, or other action of general application" are not particular matters involving a specific party or parties and participation in such matters would not, therefore, trigger the post-employment restrictions which might otherwise be applicable. (emphasis

added).⁸

**Activities of the [officer as the Director of this Office]
and President of the [Organization]**

The functions and activities of the [this officer as director of the Office in question] are set forth in [an Act of Congress].
9 As Director, [the officer's] chief functions are to advise the [head of his agency] on general scientific and technological issues, and to work with other parts of the [agency] in formulating policy and advice. We are advised that most of [his Office's] efforts have been of a general policy nature.
10 Since science and technology permeate many of the public issues of our time, it is difficult to enumerate succinctly the many policy areas in which the Director and his staff have been involved. The Office has been active on policy issues associated with the budget, national security, economic matters involving technology, energy policy, research and development, and international policy. The Office has worked closely with other parts of the [same agency] on these issues, as well as on regulatory matters, science and engineering manpower, and reorganization issues.

In carrying out his duties as Director, [the officer] of necessity has had substantial interaction not only with the President and his White House staff, but also with the Departments and agencies, the Congress, industrial representatives, foreign governments, scientists and engineers, as well as the [Organization in question] and other private sector entities. The role of the Director is much like that of other high-level policy officials: his involvement with policy issues necessarily results in frequent communications with those who might be affected by policy advice. Although the Director is centrally involved in the development of policy, we have been advised that he and his staff seldom are involved directly in the implementation of policy decisions.

[The Organization] is a non-profit organization incorporated by an Act of Congress in [the 1800s], with the primary purposes of providing an independent source of objective and expert scientific advice to the Federal Government and of serving as a permanent institution for the advancement of science. [The Organization] historically has performed services for the Federal Government by way of reports prepared under Government contracts. When the [Organization] undertakes such a project, it

usually forms a committee to prepare a report, which, after vigorous review, is delivered with the [Organization's] imprimatur. The members of the [Organization] are typically scientists from universities and the private sector with recognized expertise in specific technical fields; the application of their skills to problems of interest to the Government provides highly-valued advice.

The President of the [Organization] has responsibility for supervising the [Organization's] many projects. He is involved in the initiation of particular projects and in reviewing the ensuing reports. He serves as the chief spokesman for the [Organization] and as a principal spokesman for the scientific community, and, like the Director of [the Office], is in frequent communication with the departments and agencies, the Congress, foreign governments, and scientists and engineers.

We observe that there are similarities between the activities of the Director of [the Office] and the President of [the Organization]. Both are involved in major policy issues and may often communicate with each other and with Government officials on these matters. Nonetheless, in the event [this officer] assumes the presidency of the [Organization], his substantial policy involvements will, by themselves, impose no restrictions on his activities. Participation in the formulation of policy advice of a general rather than a specific nature, results in no post-employment limitations under sections 207(a) and 207(b)(i), even though the general policy may have resulted in specific contracts with the [Organization] or others.

We conclude that most of [this officer's] policy activities of which we are aware will result in no post-employment restrictions. Based on our discussions with the [Office's] staff, we have been able to identify only two general areas where post-employment restrictions may arise -- "[Office] contracts" and "[Office]-inspired" contracts -- and we turn to these matters now.

[The Office's] Direct Contracts

Staff members of [the Office] represented to us that [the officer] rarely becomes involved personally and substantially in the contracting process. We were advised that generally all [Office] contracts are negotiated and signed on behalf of [the Office] by the Executive Officer. The typical process, as

explained to us, commences with an [Office] request for a proposal from the [Organization] on an issue of interest. The proposal will be reviewed by a senior staff person, i.e., an associate director or a senior policy analyst, for adequacy and then turned over to the Executive Officer for final action. Our review, as well as the oral representations of those staff members [of the Office that] we interviewed, revealed that each contract with the [Organization] was for a specific term and product, usually a report or analysis to be utilized by the Government as a source of policy advice and direction concerning a much broader scientific problem or phenomenon.¹¹

During the course of our inquiry we reviewed a list of 84 contracts entered into between [the Office] and the [Organization], and [the Office] and other entities. There were 24 such contracts with the [Organization]. All of the [Office] contracts constitute particular matters involving a specific party or parties. However, that does not mean that [the officer] would be barred from representing the [Organization] as to all of the contracts nor as to the subject matter which generated the need for the studies.

It is clear that all such contracts come under the official responsibility of [the officer]. Our review further reveals that if [he] were to be elected president of the [Organization] and assume office on July 1, 1981, having left Government on December 31, 1980, the two year "official responsibility" bar would not apply to 63 of these contracts because his responsibility for those matters terminated prior to the onset of the last year of his Government service. Within six months of assuming office, which coincides with the expiration of the one year "cooling off" period of section 207(c), the restrictions of section 207(b)(i) would have run as to all but eight of the 24 contracts entered into between the [Organization] and [the Office].¹² Accordingly, as to those eight contracts, [the officer] would be barred from representing the [Organization] before any executive branch agency for the two-year period measured from the date when his official responsibility for the contract terminated.¹³

It is possible, in light of his position, that [the officer's] involvement with some of the [Office's] direct contracts was so substantial as to give rise to a lifetime disqualification. But the restriction, as in the case of the two-year disqualification, would apply only to those specific contracts, i.e., their terms,

funding, the scope of the report, research criteria, etc. He could not, therefore, represent the [Organization] concerning any dispute arising out of those contracts during the term of the disqualification. On the other hand, he could transmit reports, brief agencies as to the reports' conclusions, or otherwise communicate factual information.¹⁴ For practical purposes, however, since all of the contracts will have expired and the work will have been completed before [the officer] could assume the [position of president of the Organization], the likelihood of a dispute arising as to the [Office's] contracts, unless follow-on contracts were contemplated, is so slight as to effectively moot the issue.

There is another more complex aspect of the treatment of the contracts entered into by [this Office]. Almost all of the contracts for which the Director [of this Office] had "official responsibility" or in which he was "personally and substantially" involved were executed for the purpose of studying or reporting on very broad scientific issues of concern to the Government. Generally, the Government contracted for such reports in order to establish a basis upon which policy recommendations or decisions could be made. As noted above, participation in general policy issues does not trigger the restrictions of 18 U.S.C. § 207 as to future involvement with that issue. For example, although a specific contract between [the Office] and [a subdivision of the Organization] to produce a study of research on stress in health and disease would constitute a particular matter involving a specific party to which the section 207(a) or section 207(b)(i) bar would attach, the underlying generic issue, i.e., research on stress in health and disease is not such a particular matter. The law is concerned with the specific contract -- "switching sides" on that particular matter or attempting to gain a benefit for a party adverse to the Government. Follow-on contracts to further study an issue will generally be regarded as different matters from the initial contract.¹⁵ Therefore, if after [the officer] had left the Government, [the Office] were to request a follow-on study of research on stress in health and disease, a new contract with the [Organization] to accomplish such an end would, in and of itself, constitute a separate particular matter. [The officer] neither would have participated personally and substantially in this new contract nor would have had any official responsibility over it and therefore he could represent the [Organization]. However, there may be a few situations, such as where the initial contract contemplated a follow-on contract, where a future contract might be found to be the same particular

matter as the contract that commenced during [the officer's] tenure.¹⁶

[Contracts Inspired by the Office]

There is another category of matters in which the Director of [the Office] or his staff occasionally have involved themselves directly in regard to the relationship between the [Organization] and Governmental entities other than [the Office] on particular matters. We now address the question whether [the officer] would be barred from subsequent representational activities as to these matters, whether permanently (section 207(a)) or for a period of two years (section 207(b)(i)).

An example of this category of matters is a study by the [Organization] funded by the [two Departments and an agency], regarding the risks and benefits of the introduction of a greater number of diesel-powered light vehicles into the passenger car fleet. We were advised that this is an issue of great concern to the Government and that the [Officer] and [other staff members of the Office] decided early on that an outside expert and objective entity was required to assess and review experimental procedures and their results. [The officer] recommended that officials of [the two Departments and the agency] retain the [Organization] to conduct such a study and the agencies did so. The existing contract is finite, with fixed responsibility and term. The underlying issue concerning diesel particulates, however, is an extremely complex multifaceted problem which no doubt will be examined through the next decade. We are advised, however, that [the Office] presently does not anticipate a follow-on study by the [Organization].

The question to be answered with regard to this matter is what restrictions would inhere to [the officer] while serving as the president of the [Organization]: Could he represent the [Organization] as to the ongoing contract? Could he represent the [Organization] as to other contracts which might subsequently be entered into by the [Organization] with [the Office] or other Government agencies?

We conclude that the ongoing contract between the [Organization and the two Departments and an agency] constitutes a particular matter involving a specific party or parties. Further, because [the Officer] was involved personally in recommending that the agencies retain the [Organization] to carry

out the study, his participation is considered to have been personal and substantial. Consequently, he would be permanently barred from representing the [Organization] before the Government as to the existing specific contract, absent a waiver under section 207(f). He would not, however, be barred from representing the [Organization] or acting as spokesman for the scientific community as to other Government contracts on the general matter subsequent to the completion in January 1981 of the present contract.¹⁷

The same result would obtain in all like circumstances where [the officer] participated personally and substantially in a particular matter involving a specific party or parties -- the bar applies only to those particular matters involving a specific party in which he had personal and substantial participation exercised through decision, approval, disapproval, recommendation, the rendering of advice, investigation or otherwise. To participate "personally" means directly, including the participation of a subordinate when actually directed by [the officer as director of this Office]. To participate "substantially" means that [the officer's] involvement must have been of significance to the matter, or form the basis for a reasonable appearance of such significance. It requires more than official responsibility, knowledge, perfunctory involvement, or involvement on an administrative or peripheral issue. A finding of substantiality should be based not only on the effort devoted to a matter, but on the importance of the effort. While a series of peripheral involvements may be insubstantial, the single act of appearing or participating in a critical step such as recommendation of the selection of a contractor, may be substantial.¹⁸

There are other such matters in which [the officer] has been involved but our review reveals that they are very limited in number.¹⁹

Limitations and Exemptions

As our letter indicates, the actual restrictions that will affect [the officer] if he should assume the office of President of the [Organization] are limited. Moreover, notwithstanding a section 207(a) or section 207(b)(i) bar, he may communicate with the Government so long as the communications, written or oral, do not accept to influence the Government. There is no prohibition against a communication, not in connection with an adversary

proceeding, imparting purely factual information.²⁰ Moreover, project responses are not prohibited in a context not involving a potential controversy involving the Government. The regulations of [OGE] provide that no finding of an intent to influence shall be based upon whatever influential effect inheres in furnishing meritorious or convincing scientific or technological proposals on reports.²¹ In such cases, no violation of law would occur should [this then former officer serving] as president of the [Organization] transmit in writing to the Government a meritorious proposal by the [Organization] without arguing for its acceptance.

The continuing need for the free flow of scientific information and expertise between the private sector and the Government was expressly recognized by the Congress. It provided in section 207(f) that the prohibitions of 18 U.S.C. §§ 207(a), (b) and (c) shall not apply with respect to the making of communications solely for the purpose of furnishing scientific or technological information under procedures acceptable to the Department or agency concerned.²² Such information includes feasibility, risk, cost, and speed of implementation, when necessary to appreciate fairly the practical significance of the information.²³

Finally, in those situations where it is found (1) that [the officer] was either personally and substantially involved in a particular matter involving a specific party or parties, or (2) that such a matter was actually pending under his official responsibility during the last year of his Government employment, a broader exemption may be granted under the provisions of 18 U.S.C. § 207(f). This provision provides for a waiver or exemption if the head of the Department or agency concerned with a particular matter, in consultation with [OGE], certifies in the Federal Register that the former officer has outstanding qualifications in a scientific, technological or other technical discipline; is acting with respect to a particular matter which requires such qualifications; and that the national interest would be served by his or her participation.²⁴ Indeed, because of the nature of the [Organization's] role in providing scientific and technological advice to the Government, the exemption may be appropriate for the limited situations in which a bar would restrict [the then former officer], as president of the [Organization], from engaging in representational activities with the Government.

Accordingly, on a case by case basis, whenever it is determined that a section 207 restriction applies or when there is some doubt on the question, the exemption may be utilized to free [the officer] from any post-employment restrictions attendant to such matter. It should be noted that such an exemption, when authorized, may be limited in nature at the discretion of the head of the agency or Department granting such an exemption.

Summary

It is our view, based on the facts made available to us, that most activities [of the Office] will not result in any post-employment restrictions on the former [officer]. Based on our conversations with [the staff of the Office], we presently find only two areas where such limitations do apply -- [Office] contracts and contracts [inspired by the Office].

As to the direct contracts entered into by [the Office], [the officer] would not be significantly affected by the provisions of either section 207(a) because of his limited personal involvement in the contracting process or section 207(b)(i) because of the expiration dates of those contracts about which we were apprised. In any event, the need for further representational activity as to those contracts appears remote. However, there may be three or possibly four such contracts where further review of the specific facts may be required. Some disqualifications may attach to those contracts to which [the Office] is not a party, but where [the officer] or the Office encouraged an agency to undertake a contract with the [Organization]. But, based upon [the Office's] representations to us, we have been able to identify only three particular situations in which such a bar might exist. Moreover, as to those instances where a bar does exist, [the officer] could request an exemption from the head of the Department or agency involved in order to facilitate the unimpeded flow of scientific and technological information between the [Organization] and the Government.

This letter represents our opinion concerning the application of general rules of law stated in 18 U.S.C. § 207 to the factual situations set forth in your letter of October 16, 1980 as modified by us. The Office of Legal Counsel, Department of Justice, has reviewed this opinion and concurs in our legal conclusions.

Sincerely,

J. Jackson Walter
Director

1 18 U.S.C § 207(d)(1)(A); See also 5 C.F.R § 737.25(a)(1).

2 18 U.S.C. § 207 was amended by Title V of the Ethics in Government Act of 1978 (Pub. L. No. 95-521 and Pub. L. No. 96-28).

3 5 C.F.R. 737.3. We do not address the question whether the unique nature of the [Organization] and its relationship to the U.S. Government warrants sui generis treatment under 18 U.S.C. § 207. Cf. 5 C.F.R. § 737.23. But cf. Lombardo v. Handler, 397 F. Supp. 792 (D.D.C. 1975), aff'd 546 F.2d. 1043 (D.C. Cir. 1976), cert. denied, 431 U.S.C. 932 (1977).

4 5 C.F.R. § 737.11.

5 B. Manning, Federal Conflict of Interest Law 55 (1964).

6 Id. at 204. It should be noted that Manning's discussion of the statutory language relates to 18 U.S.C. § 207 (Pub. L. No. 87-849) as enacted in 1962. The limiting language in the prior statute is unchanged in the present 18 U.S.C. § 207, as amended in 1978 and 1979.

7 B. Manning, supra at 55; H.R. Rep. No. 748, 87th Cong., 1st Sess. 20 (1961).

8 5 C.F.R § 737.5(c)(1).

9 [Statutory reference deleted.] Some of the functions and duties of the Director were transferred to the Director of [another agency] pursuant to [a Reorganization Plan] and [an executive order implementing plan].

10 In order to obtain an understanding of the role of [the Office] and [the officer] members of the staff fo [OGE] and a member of the staff of the Office of Legal Counsel, Department fo Justice, interviewed [the officer], his three Associate Directors, and a senior policy analyst [in the office]. We obtained many [of the Office's] documents to aid us.

11 In many cases [the officer] may not have had anything to do with

the contract. In those cases where [he] has had some involvement in connection with a contract, the specific facts would have to be reviewed to determine if a permanent bar would attach.

12 [Reference to an attachment (Tab A)] which lists those eight [Office] direct contracts to which the statement refers. [Tab A is not attached to this sanitized opinion.]

13 If responsibility for the contract terminated before the [officer's] departure from Government, the period is measured from the date of contract termination.

14 5 C.F.R. § 737.5(b)(5).

15 See 5 C.F.R. § 737.5(c)(4). The specific facts regarding follow-on contracts would, of course, determine the extent of any post-employment restrictions.

16 See 5 C.F.R. § 737.5(c)(4). [The staff of the Office] has been able to identify three, possible four, such situations: (1) a study required by [an Act], to examine the impact of increased carbon dioxide; (2) the [Organization's] program relating to the exchange of students and scholars with the People's Republic of China; (3) a Congressionally requested study of the independent research and development program of [a department and and agency]; and possibly (4) a study of federally sponsored water research, in which [the Office] transferred funds to [a Department] to pay for a portion of the study and has worked closely with [the Department] and the [Organization] in the study design. In the first three cases, [the Office] sponsored contracts that may be connected to future contracts. We do not resolve these matters now -- due to time constraints and the complicated factual issues involved -- but will provide advice in the future if requested. As indicated in the text, the post-employment restrictions would apply only to the particular matter and to representational activity with regard to it. Moreover, as indicated subsequently, if it should be found that restrictions do apply, section 207(f) authorizes the granting of an exemption as to those restrictions.

17 This, of course, would be subject to some factual scrutiny. Note, *supra* note 16.

18 5 C.F.R. § 737.5(c)(4).

19 Th [Office's] staff has been able to suggest only two situations beyond the one identified in the text: (1) a potential contract between [another agency] and the [Organization] that would involve the

[Organization] in providing scientific and technological assistance to Third World nations; and (2) [the Office's] involvement with [another agency's] contracts with the [Organization] related to the preparation of materials for the [certain] reports required by [a law]. See note 9, supra. These matters involve complicated factual issues which cannot be resolved here; if requested, [OGE] could review these matters in detail at a later date.

20 5 C.F.R. § 737.5(b)(5).

21 5 C.F.R. § 737.5(b)(7) and § 737.15(c). This regulation is limited to those cases in which the influential effect of the proposal being transmitted derives exclusively from its scientific and technological merits, and nothing more. Of course, the question of "intent to influence" is always a question of fact; each case should be considered on its own merits.

22 5 C.F.R. § 737.15.

23 5 C.F.R. § 737.15(b).

24 5 C.F.R. § 737.17.