Action
OCA 86-1590

OFFICE OF CONGRESSIONAL AFFAIRS

Routing Slip

	ACTION	INFO
1. D/OCA		X
2. DD/Legislation	X	
3. DD/Senate Affairs		X
4. Ch/Senate Affairs		
5. DD/House Affairs		
6. Ch/House Affairs		
7. Admin Officer		
8. Executive Officer		X
9. FOIA Officer		
10. Constituent Inquiries Officer		
11.		X
12.		

SUSPENSE 19 May 86
Date

Action Officer: STAT

Remarks: action completed by notification to OMB Josie Dodd : no comment

BC / 16 May 86 STAT
Name/Date

Action
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OGA FILE 1124

RECPT #

SPECIAL

86-1590

EXECUTIVE OFFICE OF THE PRESIDENT
OFFICE OF MANAGEMENT AND BUDGET
WASHINGTON, D.C. 20503
May 14, 1986

LEGISLATIVE REFERRAL MEMORANDUM

TO: **Legislative Liaison Officer -**
Department of Agriculture-David Hoyt-382-1516
Department of Commerce-Michael A. Levitt-377-3151
Department of Defense-Werner Windus-697-1305
Department of Education-JoAnne Durako-732-2670
Department of Energy-Bob Rabben-252-6718
Department of Health and Human Services-F White-245-7308
Department of Housing and Urban Development-E Murphy-755-7093
Department of the Interior-Linda Moore-343-4371
Department of Justice-Jack Perkins-633-2113
Department of Labor-Seth Zinman-523-8201
Department of State-Lee Ann Berkinbile-647-8794
Department of Transportation-John Collins-426-4694
Department of the Treasury-Art Schissel-566-8523
Council of Economic Advisers
Agency for International Development-R. Lester-632-8404
Central Intelligence Agency
Environmental Protection Agency-Stead Overman-382-5414
General Services Administration
National Aeronautics and Space Administration-J.Murphy-453-1948
National Science Foundation
Office of Personnel Management-J. Woodruff-632-4682
Small Business Administration-Janine Perrignon-653-6545
U.S. Information Agency
Veterans Administration-Donald Ivers-389-3831
U.S. Postal Service-Fred Eggleston-268-2958

SUBJECT: Department of Justice testimony before the Administrative Law and Governmental Relations Subcommittee of the House Judiciary Committee on Revolving Door Legislation.

The Office of Management and Budget requests the views of your agency on the above subject before advising on its relationship to the program of the President, in accordance with OMB Circular A-19.

A response to this request for your views is needed no later than NOON MAY 19, 1986. Hearing is May 21, 1986.

Questions should be referred to Hilda Schreiber (395-7362), the legislative analyst in this office.

Jeffrey A. Weinberg for
Assistant Director for
Legislative Reference

Enclosures

Rec'd OMB/LRD
5/14/86

U.S. Department of Justice
Office of Legislative and
Intergovernmental Affairs

Deputy Assistant Attorney General Washington, D.C. 20530

Telefax to

Hilda Schreiber 395-7362
OMB

Attached is a rough draft of testimony for the revolving door hrg before the Glickman Subcommittee. We are continuing to study this but wanted you to have this very tentative draft, particularly to get a reaction to the suggested alternative.

Cary Copeland

5-12-86 -PM

DRAFT

Rec'd OMB/LRD
5/14/86

Mr. Chairman and Members of the Subcommittee --

I appreciate the opportunity to appear today to testify regarding revolving door legislation. As the letter requesting Department of Justice participation in this hearing did not ask that we focus specifically upon particular legislative proposals, I will generally address the issue of appropriate restraints upon former government officials who seek to undertake employment on behalf of foreign governments or foreign legal entities. In the process, I will sketch out legislation which the law enforcement community could support.

Preface

Before commencing, let me make two important disclaimers. First, the Department of Justice claims no expertise with respect to the potential impact of such legislation upon the ability of the Government to attract highly qualified persons to public service. Some within the Executive Branch are strongly of the view that such post-employment restraints would be detrimental to

the public interest. The Committee may wish to solicit the views of others, in the governmental and non-governmental communities as to the effects, if any, such legislation might have upon government recruitment and retention of key personnel.

Second, nothing I say today should be construed as applying to any matter or case now pending in the Department of Justice.

Pitfalls in Hasty Drafting of Criminal Justice Legislation

At the outset, I should note that law enforcement professionals are often disconcerted by efforts, usually unsuccessful, to rush criminal measures through the Congress in response to perceived abuses which have neither been carefully studied nor analyzed. Those who have conducted prosecutions which have resulted in the incarceration of defendants, i.e., virtually total deprivation of civil liberties, have a unique perspective upon the criminal law. Criminal laws are serious business -- among the most serious and sobering business in which the government is involved. Law enforcement professionals believe that it is rarely wise to enact criminal justice legislation hastily in response to press reports of alleged wrongdoing. Rather, we should prefer to wait and see if present laws provide a basis for prosecuting wrongdoing that is clearly established.

The statute books at the state level are replete with ill advised, questionably constitutional, and virtually unenforceable criminal statutes. At the federal level we have our own classic example, 18 U.S.C. 3567, in which the Congress decreed in 1909 that death is too good for some offenders; 18 U.S.C. 3567 specifies that sentencing courts imposing a sentence of death may require that, after execution, the dead body of the offender be dissected. The Congress was so concerned that court-ordered dissections be carried out that it also enacted what is now 18 U.S.C. 754 making it a federal criminal offense to rescue or attempt to rescue dead bodies ordered to be dissected. These two sections of Title 18 are still on the books today. Certainly, Members of the Congress in 1909 made a strong statement that criminals should be dealt with harshly. [The wisdom, good judgment, and responsibility of the 1909 legislation are, however, open to serious question in the enlightened 1980's.]

What is the Problem Being Addressed

This leads me to the issue of whether former government employees should be prohibited from representing foreign governments. I think the first question to ask is: what do we want to accomplish in enacting such legislation. Certainly, we are not simply engaged in making a statement that the Congress condemns acceptance of foreign employment by high-level government officials. That could be done through a strongly worded Sense of the Congress Resolution.

Moreover, such legislation runs the risk of being misunderstood. Certainly, we do not mean to suggest to our allies overseas that all foreign governments are so evil or corrupt that we are going to make it a federal felony for high-level federal officials to accept employment with any foreign government, corporation or individual. That would reflect an isolationism and provincialism inconsistent with our ongoing efforts to enlist the help of foreign governments in combatting terrorism, drug trafficking and other international problems.

Some suggest that the rationale for this legislation is that such foreign employment can result in the disclosure of

sensitive national security or trade information. Of course, federal law already criminalizes the disclosure of classified information; 18 U.S.C. 798, provides for up to ten years in prison for such disclosures. Disclosures of national security information can also constitute espionage under 18 U.S.C. 793, also a ten-year felony. And comprise of our national security is also known by a more historic term -- treason -- which is a capital offense under 18 U.S.C. 2381 in time of war.

As to trade information, disclosure of confidential government information, including trade secrets, is a misdemeanor under 18 U.S.C. 1905 when perpetrated by a federal official. The effect of some bills we have seen would be to provide more serious penalties for acceptance of employment which might result in disclosure of such information by a former government official than is provided for an actual willful disclosure by a currently employed government officer, an anomaly that has no place in the federal criminal code.

Some suggest that such legislation is needed to curb influence peddling. No one endorses influence peddling and we have laws on the books today which make certain activities by former federal officials a criminal offense, particularly 18 U.S.C. 207. That statute has evolved gradually over a period of more than a century and focuses upon particular conduct based

upon the former government official's connection with the particular matter or appearances before his former agency. The effort in 18 U.S.C. 207 is to focus upon situations where activities by a former government official would give him or her an unfair advantage. We believe this focus is appropriate.

Another problem with some of the bills now being considered is that they do not attempt to discriminate among various types of activities by former government officials. Rather, they sweep broadly to render criminal any representation or advice to any foreign government or entity without any reference whatsoever to the nature of the employment or the nature of the former public official's prior governmental duties. These bills would ban beneficial and undesirable employment alike. One can imagine foreign employment which would be in our national interest: a former Attorney General might be engaged by a foreign government to help eliminate corruption in the police agencies of the foreign government; a former Secretary of Education, to assist in establishing a system of primary education in a developing nation; or a former Secretary of Agriculture to assist a Third World nation in creating a rural electrification program. Some of the bills would not permit such beneficial activities; instead, they would make such employment a federal felony.

By sweeping so broadly, the issue is squarely raised as to whether such legislation has a rational relation to any legitimate legislative purpose. In fact such a sweeping ban on foreign

employment by former federal officials might well be counter-productive.

An Alternative Approach

In light of the concern of the Congress over the appearance problem which is created when former high-level government officials go to work for foreign governments, we have offered suggestions for more constructive approaches. First, 18 U.S.C. 207 was amended by the Congress in 1979 with the result that federal conflict of interest statutes do not reach "behind the scenes" advice in circumstances where direct representation of domestic or foreign entities would currently be banned. We believe such conduct should be reached and would suggest modification of 207(b)(ii) to cover it. This would fill a significant gap in current law.

Second, if more is considered necessary, consideration should be given to a disclosure statute with civil enforcement mechanisms. In this regard, our general approach to new measures creating malum prohibitum offenses is to provide for administrative or civil enforcement. Criminal sanctions should be resorted to only where there is evidence that administrative or civil enforcement has been or will be inadequate.

In our view, such a proposal should:

(1) cover both domestic and foreign employment;

(2) apply only to high-level officials;

(3) apply to all three branches of government, or at least to the executive and legislative branches;

(4) require disclosure to the employing agency, and to the Congress if deemed appropriate;

(5) provide for a civil injunctive action if the employment is found to be detrimental to the public interest;

(6) provide for civil penalties for failure to file a disclosure statement; or criminal penalties for willful and knowing failure to file; and

(7) provide a sunset on the duty to report, perhaps two to five years; and

(8) apply prospectively.

Such an approach has several advantages over bills we have seen:

(1) it avoids sending the wrong message to our allies overseas;

(2) it avoids the First Amendment "right to associate" questions which arise from making it a crime to accept employment with particular classes of firms or with foreign governments;

(3) it avoids problems of overbreadth by limiting coverage to post-governmental employment which can reasonably be expected to be detrimental to the national interest; and

(4) it would likely be more effective than a criminal statute as our experience with American juries is that they are disinclined to convict for criminal violations which cannot be shown to have resulted in harm.

In short, we believe very strongly that the thrust of the various legislative proposals should primarily be civil rather than wholly criminal. I recognize that some persons may view our proposed alternative as insufficient. As a representative of the law enforcement community, I have an obligation to advise you of the defects we perceive in the various proposals and to suggest what we believe is a more appropriate approach to the problem of influence peddling. I hope we in the Department and in the Congress can work together in a responsible manner to identify the evil to be eradicated and then to frame an appropriate and balanced response to it that does not sweep into a criminal statute conduct which is entirely innocuous or which can even be in the national interest of the United States.