



AMERICAN BAR ASSOCIATION

Section of International Law and Practice



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February 11, 1997

U.S. Senate  
Washington, D.C. 20510

Re: ABA Recommendation on Pre-Government Employment and Post-Government Employment Restrictions on Senior Executive and Judicial Appointees

Dear

Last week, the House of Delegates of the American Bar Association voted to approve as ABA Policy three recommendations on the subject of pre-government employment and post-government employment restrictions on senior executive and judicial appointees. These recommendations and the accompanying report, copies of which are enclosed, were developed by the ABA's Section of International Law and Practice and co-sponsored in the House of Delegates by three other ABA Sections-- Administrative Law and Regulatory Practice, Antitrust Law, and Individual Rights and Responsibilities. The recommendations also received active support in the House of Delegates from several other entities, including the Government and Public Sector Lawyers Division and the Senior Lawyers Division. They were overwhelmingly approved by voice vote in the House.

In brief, the recommendations urge Congress to avoid legislating disqualifications for government service based on clients previously represented by senior executive or judicial appointees and to repeal recent legislation (attached as Appendix I) that affects the pre and post-employment activities of certain senior trade officials. The legislation in question is implicated by the pending nomination for U.S. Trade Representative. As you know, the Administration has proposed a waiver of this legislation as to the pending nominee. The recommendation and the Association take no position on the qualifications of the nominee, but only on the general issue of statutory disqualification.

Although the existing legislation affects only a limited class of nominees, it implicates a central issue for the legal profession---the concept that a lawyer is forever

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tainted by the clients he or she has represented. As discussed in our report, this statutory presumption of taint is inconsistent with the role and duties of an advocate and advisor as an independent professional. We are concerned about this type of presumption in the current context and in its potential application to other areas of government service. Taken to its logical extreme, such a presumption could bar from service as a judge any lawyer who has represented criminal defendants or any class of clients deemed "objectionable."

We have included the full report and its appendices for your information. The ABA's House of Delegates considered this report when it adopted the recommendation on pre-government and post-government employment restrictions on senior executive and judicial appointments as ABA policy. The report, although not ABA policy, provides useful legislative history with respect to the recommendations and their adaption as ABA policy. The appendices in particular include extensive research that demonstrates the uniqueness of this provision. Appendix II is a Table of Statutory Qualifications for Primary U.S. Officers; it contains a review of all relevant provisions in the *United States Code* that we could identify. Appendix III traces the development of federal legislation dealing with post-government employment restrictions.

We would be happy to discuss the recommendations and accompanying materials with you or your staff. Please contact Alan Raul, our Government Relations officer, at (202) 789-6021 with any inquiries you may have.

Respectfully yours,

Lucinda A. Low  
Chair

cc: Robert Evans

AMERICAN BAR ASSOCIATION  
SECTION OF INTERNATIONAL LAW AND PRACTICE  
RECOMMENDATION TO THE HOUSE OF DELEGATES

RECOMMENDATION

**BE IT RESOLVED**, That the American Bar Association urges the Government of the United States to proceed as follows:

- I. Congress should avoid statutory provisions that disqualify senior executive or judicial appointees on the basis of clients they have previously represented.
- II. Congress and the Administration should continue to utilize traditional mechanisms (including the Senate's power of confirmation), rather than special pre- or post-employment rules, to ensure that senior executive and judicial positions are filled only by highly qualified persons who will fulfill the responsibilities of their positions with complete integrity.
- III. Ethics-in-government rules, whether addressed to pre- or post-government employment activities, should not single out foreign policy or trade functions for special, restrictive treatment. Congress should repeal the 1995 amendments to U.S.C. §207 and 19 U.S.C. §2171(b), whose effect is to restrict the pre- and post-employment activities of U.S. Trade Representatives ("USTRs") and Deputy USTRs on behalf of foreign interests, and should not extend those provisions to cover other senior government positions.

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AMERICAN BAR ASSOCIATION  
SECTION OF INTERNATIONAL LAW AND PRACTICE  
REPORT TO THE HOUSE OF DELEGATES

I. INTRODUCTION

On July 24, 1995, while debating the Lobbying Disclosure Act of 1995 ("LDA"),<sup>1/</sup> the Senate accepted an amendment creating a new restriction on who could serve as United States Trade Representative ("USTR") or Deputy USTR.<sup>2/</sup> Specifically, the statute defining the positions of USTR and Deputy USTR, 19 U.S.C. § 2171(b), was amended to disqualify from eligibility anyone who at any time in the past had directly represented, aided or advised a foreign government or political party in a trade negotiation or trade dispute with the United States. A related section of the LDA created new restrictions on the post-employment conduct of persons who have served as USTR or Deputy USTR. Prior law had contained a special restriction, enacted in 1992, against a former USTR's representing, aiding or assisting any foreign government within three years of having served as USTR.<sup>3/</sup> The LDA extended the ban's duration to a lifetime ban and its coverage to include Deputy USTRs.

The Senate accepted these two provisions (hereinafter the "USTR Amendment," reproduced in full at Appendix I to this Report) virtually without debate, and the provisions passed the House after some unsuccessful attempts to expand their reach. The President signed the Lobbying Disclosure Act, including the USTR Amendment, while recognizing the Justice Department's concern that the new pre-government employment restrictions may unconstitutionally impinge on the President's appointments power. In 1996, more bills were introduced to expand these restrictions to other government officials, but none were enacted.

The American Bar Association ("ABA") urges repeal of the USTR Amendment. While both the pre- and post-employment restrictions are objectionable, as discussed below, it is the pre-

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<sup>1/</sup> Pub. L. No. 104-65, 109 Stat. 691 (1995).

<sup>2/</sup> See 141 Cong. Rec. S10560-61 (daily ed. July 24, 1995).

<sup>3/</sup> Pub. L. No. 102-395, 106 Stat. 1873, codified at 18 U.S.C. § 207(f)(2).

employment disqualification that raises the most serious issues, and it is this provision that most urgently should be repealed. The provision sets a dangerous precedent for limiting the availability of qualified candidates to serve in the U.S. Government. It automatically disqualifies potential nominees solely based on a prior relationship with a particular type of client. Such a rule, which effectively equates an advocate's personal views with those of his or her client, reflects an unwarranted and incorrect view of the lawyer/client relationship, especially in view of the ethical obligations of lawyers and the constitutionally-recognized right to counsel. In addition, such a rule takes no account of the nature, length, significance or contemporaneity of the relationship with the former client. With regard to the new lifetime post-employment restrictions for USTRs and Deputy USTRs, there has been no demonstration that such a ban is needed to address any real problem, and there are compelling reasons not to restrict the post-employment conduct of trade negotiators in such an unusual and severe manner.

In sum, this Report supports the accompanying ABA resolution urging that the Congress: avoid enacting disqualifications for service in the U.S. Government which presume that lawyers and other advisors take on the views of their clients; avoid singling out foreign policy and trade functions for extra-restrictive pre- or post-government employment rules; and promptly repeal the USTR Amendment.

## **II. THE PRE-EMPLOYMENT RESTRICTIONS**

The new pre-employment restriction is unique among provisions in the U.S. Code creating "primary officers" of the U.S. Government (*i.e.*, positions requiring nomination by the President and the advice and consent of the Senate). Of the hundreds of appointees in this category, only USTR and Deputy USTR candidates can be disqualified based solely on the identity of their former clients.

There is a serious constitutional objection to this new pre-employment restriction, in that it infringes on the President's appointments power. The ABA notes, but does not rest its concerns on, that objection. The new pre-employment restriction is also troubling on several policy grounds: (1) it arbitrarily limits the flexibility of the President to choose, and the Senate

