14 J.L. & Pol. 383

Journal of Law & Politics
Spring 1998

Note

NOTE: THE **REVOLVING DOOR**: AN ANALYSIS OF POST-GOVERNMENT EMPLOYMENT RESTRICTIONS ON FOREIGN REPRESENTATION

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INTRODUCTION

The "revolving door" is the movement of employees into and out of government service. This type of movement can be beneficial to society and should be restricted only after a careful analysis of the costs and benefits that accompany it. Restrictions on the revolving door come at the risk of undermining "one of American government's historical strengths: the cross-pollination brought about by the periodic swapping of roles between bureaucrats and businessmen."[1] But an analysis of the revolving door reveals that when the door opens to allow government employees to leave public service to represent foreign employers, the costs increase significantly to far outweigh any benefits. For this reason, stringent post-employment restrictions should be imposed in the area of foreign representation in order to offset the costs imposed on society by this type of movement.

Part I of this Note focuses on the inevitable transition that confronts government employees and the need those employees have to find adequate employment in the face of change. Part II analyzes the costs imposed by the revolving door, while Part III analyzes its benefits. Part IV explains the increased costs associated with representation of foreign interests by former government employees. Part V focuses on the laws that regulate post-government employment opportunities and evaluates proposed amendments to those laws.

I. Transition in Government

Change is an inevitable part of the American democratic process. Because "statutory terms of

office, the constitutional prerogatives of the President and . . . the election of a new President . . . create an inevitable periodic turnover," government employees need to be able to find new ***384** work after their service is complete.[2] A presidential transition is a period "of incredible turmoil with thousands of appointees looking for jobs while tens of thousands of others jockey for their positions."[3] Similarly, because members of Congress face re-election, times of transition are periods of uncertainty during which they may face defeat at the polls, thus finding themselves out of work.

Although their positions are not as vulnerable to political transition as higher-level appointees or Congressmen, lower-level executive and legislative branch employees often find potential unemployment to be an inevitable reality of government service as well. Typically, the government is not "prepared to guarantee the individual a career in government, and the individual would most often not be willing to commit himself to one."[4] This lack of commitment stems from the fact that temporary, short-term service is mutually beneficial for both the government employee and the government itself. Many employees, though they typically enjoy public service, are unwilling to give up a higher salary in the private sector for more than a few years.[5] Employees who wish to leave government service after only a short time are well-suited for government work; recruiters have long recognized that the constant influx of new workers provides new energy to what can sometimes be an overgrown and unresponsive bureaucracy.[6]

II. Reasons to Restrict the Revolving Door

As a result of the temporary nature of political service and the inevitability of transition, public sector employees typically work in government for only a short. Thus, government appointees, public officials, and lower-level executive and legislative branch staff members need some reassurance that they will be able to find adequate employment upon completion of their careers with the government.[7] At the same time, the types of jobs open to these employees must be restricted for the ***385** following reasons: (1) the employee may use confidential information gained while employed by the government; (2) the employee may have preferred access to government officials; (3) the employee may act improperly while still in office to enhance future employment opportunities in the private sector; or (4) the employee may give the undesirable appearance that she is utilizing public power and influence to enhance private gain.[8]

A. Abuse of Confidential or Insider Information

The first and perhaps most compelling justification for restricting post-government employment is that the employee might use confidential governmental information to gain an unfair advantage in the private sector. A government employee violates the trust the public bestows upon her if she uses information "gained from government employment against the government on behalf of a private client or employer."[9] Utilizing this information not only reveals

information that the government may wish to keep secret, thereby potentially harming government objectives, but it also gives former officials an unfair advantage over other private actors.

The range of relevant information includes what is traditionally considered confidential information--that "pertaining to a given case, contract, criminal investigation, or other matter"--and "insider" knowledge of how a government agency or a congressional office works.[10] For example, a former government attorney clearly abuses her past position if she uses confidential, privileged information obtained in the course of former criminal investigations to aid present clients.[11] The use of insider information that is not confidential can be equally abusive to the public trust. A former government employee's knowledge of "an agency's enforcement policy, [or] the agency personnel who are influential or receptive to private sector concerns," provides the employee with an unfair advantage over other workers in the private sector.[12] Also, former ***386** legislators and their staffers who have better procedural knowledge of the legislative process may have an advantage over other lobbyists in the private sector because they know particular members' predilections and how to influence them to win their votes.[13]

Former government employees' use of confidential or insider information gives them and their new employers an unfair edge over other private competitors, thereby disrupting the equality of competition in America's democratic process.[14] Furthermore, revealing or using this information may conflict with government objectives, either generally or in a particular case. Finally, the abuse of confidential and insider information creates a cynicism among voters and "strike[s] at the heart of our system of representative government."[15] When abuse of confidential or inside information persists, the public is likely to feel that the former employee is cashing in on experience gained while in government, and view her not as the dedicated public servant she appeared to be, "but rather an individual cynically bent on future rewards."[16] This can lead to the loss of public confidence in government and result in a decline in activism among the electorate.[17]

B. Preferred Access to Government Officials

The second reason to restrict the revolving door is to prohibit exploitation of the preferred access to government decision-makers that former government employees enjoy. Their status as former employees gives them priority over other workers in the private sector and enhances their "clout" with government decision-makers.[18] This access often enables "persons leaving government . . . to obtain special favors from former friends and colleagues in the agency that other members of the public would not obtain."[19] This special access may allow former employees to influence the outcome of government action or decisions. Because the former employees now represent particularized private ***387** interests, and not the interests of the public, allowing them to influence government policy may produce results that cater to those

particular private interests rather than the public good.

The increased access that a former government employee is able to command is only important to the extent that the employee can affect the decision-making of government officials. Yet preferential access creates opportunities to influence policy outcomes, due to the familiarity that exists between former colleagues.[20] For example, "[a] former public official or staffer may have an advantage over other lobbyists because a legislator is likely to give more weight to the views of someone known or respected than to someone unknown."[21] As one author stated, "[j]ust as children tend to believe the athletes who endorse cereals, public officials tend to believe their former colleagues."[22] Adults know that these sports figures are paid to promote the cereal, but many government officials may be unable to disassociate the former official from the interest she represents.[23] The concern over this kind of influence becomes greater the higher the position an official has held.[24] For example, a former government official who was senior to colleagues she now deals with in a different capacity will be able to wield influence by trading upon her ex-colleagues' habit of deferring to her advice in the past.[25]

The success of former officials in their post-government careers often rests on their ability to market their access and influence to private employers. As one lobbyist candidly told a reporter, "'I'll tell you what we're selling' . . . 'the returned phone call.'"[26] Thus, private employers consider the skill that a former employee possesses as ancillary to the connections she will be able to utilize to advance their interests. For example, "at the big high-powered firms, the attractions of a former government attorney often have little to do with his ability to write a terrific brief. 'They have to be able to bring in the big clients' . . .. 'That's why these law firms want them.'"[27] Private employers hire these ***388** former government employees precisely because their access to former colleagues gives them the advantage of a "little different hearing," a returned phone call or a preferential meeting that will allow them to effectively lobby for policies favorable to the interests they represent in the private sector.[28]

Accordingly, allowing preferential access creates the opportunity for former government employees to unjustly enrich themselves by trading on their connections to colleagues still in government.[29] At the same time, this access permits the former officials to wield their influence to promote private agendas that may not be in the public interest.

C. Improper Government Action to Enhance Future Employment Opportunities

The third reason to block the revolving door is that, without restrictions on post-government employment opportunities, the employee may be tempted to act improperly while still in government to win the favor of prospective employers or clients.[30] That is, prospective employers might influence the decisions an employee makes while still in government office with the promise of a job after government service.[31] This concern is "consistent with traditional notions of conflicts of interest: it is a fear that decisions made now will be influenced by the

personal interests of the decision maker."[32]

The temptation to grant preferential treatment arises when a government employee in pursuit of future employment uses her influence as a public official to curry favor with potential private sector employers. "For example, if a Department of Defense employee with influence on contract awards has an interest in working for a particular contractor upon leaving government employ, the temptation to give that contractor preferential treatment should be restricted."[33] It is somewhat natural for an employee who is ending service with the government to seek employment with a firm ***389** that deals with the government.[34] Accordingly, there is a high propensity for an employee to make a present decision to benefit an employer with whom she is attempting to win favor.[35] The conflict of interest inherent in the relationship between a government employee and a potential employer should be restricted, for "situations of temptation should not be put in the way of human beings of high authority."[36] Such conflict clouds the employee's thought processes and makes it more difficult for her to make effective decisions.

Also, if a government employee decides to take action to benefit a potential employer, she will unjustly award the employer with a benefit that other members of the public do not receive. As one former administration official admits, "When a guy has got a stack of 25 calls to return and he can't return them all, who does he call back? If I had lunch with someone yesterday (about a job), I'd call him back first."[37] This returned phone call provides the employer with unfair access to the political process and influence over important decisions. Such preferential treatment places a premium on a particular employer's interests and unfairly advantages this employer at the expense of others.

D. Appearance of Impropriety

The fourth, and final reason, to restrict the revolving door is that the employee may create the appearance of impropriety by abusing public power and influence to enhance private gain. This concern exists when a former government employee contacts a current government employee, even if nothing results from the contact.[38] It does not matter whether these former employees actually enjoy greater privileges than other lobbyists;[39] it is the appearance of impropriety that justifies the restraint.[40]

When a former government employee receives an exorbitant salary in the private sector for working on the same issues that the employee dealt with while in government service, it raises a strong suspicion that the ***390** employee is being rewarded for her inside knowledge.[41] There are, however, situations where it is less clear that an employee is actually conflicted, but an appearance of impropriety remains.[42] For example, when a former government employee advises co-workers regarding issues she previously dealt with, or works for a company that has little or nothing to do with her previous work, there may be only an appearance of conflict or no conflict

at all.[43] These appearances still need to be regulated, however, in order to protect the integrity of government service.[44]

A person who holds a position in the government is a fiduciary and must avoid even the appearance of impropriety, which can threaten to "erode[ ] public confidence" in government, creating a cynicism that can potentially "strike at the heart of our system of representative government."[45] In other words, the importance of maintaining the appearance of propriety should not be minimized because the public's belief in the integrity of public officials is essential to effective government.[46] By restricting the revolving door, there is a "distancing" of the former government employee from her prior position that results in a diminished appearance of unfair access and dealing between the employee and her former colleagues.[47]

This section has primarily focused on a "macro" view of government. That is, a view in which the workings of the entire government are the central concern.[48] Such concern is based on the selling of government access and information, the appearance of impropriety and a loss of public confidence in government.[49] The next section, which examines the benefits of the revolving door, focuses on the "micro" view, taking a more sympathetic look at the individual employee's perspective.[50]

*391 III. Benefits of the Revolving Door

As discussed above, the government has significant interests in restricting its employees' post-government employment in order: (1) to prevent the use of confidential information gained while working for the government; (2) to prevent preferred access to government officials; (3) to prohibit an employee from acting improperly while still in office to enhance future private-sector employment opportunities; and (4) to prevent the appearance of impropriety.[51] These interests in restricting the revolving door must be weighed against the benefits that it provides. The free flow of people through the revolving door facilitates the need: (1) to recruit qualified people to work for the government; (2) to allow government employees and potential employers to have the freedom to plan their careers; (3) to encourage independent decision making among federal employees; and (4) to encourage turnover in government.[52]

A. Recruitment of Qualified Employees

The first reason to allow freedom of movement in and out of government service is that it serves the government's need to recruit qualified people. Freedom of movement "enhances the government's ability to recruit people to come in because it assures them that they will not substantially injure their future career prospects and life choices by accepting" government employment.[53] The revolving door enables a government employee both to earn a decent living and to utilize the skill and expertise she has developed when she returns to or begins a career in

the private sector.[54] Because the government is unable to provide sufficient salary incentives to compete with the private sector, stringent restrictions on post-government employment significantly limit the government's ability to recruit qualified people. The revolving door encourages qualified individuals to work for the government because it allows them to either return to or start a career in the private sector after they leave public service.[55]

Restrictions on the revolving door also force former government employees to either temporarily or permanently forfeit their area of ***392** expertise after leaving government service.[56] Yet it is the experience and understanding employees gain while working in government that makes them attractive to private employers and clients.[57] Restricting an individual's use of this expertise in subsequent employment will therefore limit the government's ability to attract highly qualified applicants for relatively low paying jobs.[58] Without this incentive, many potential applicants will choose not to work for the government because they will be making less money with no guarantee of future opportunities for employment after their service is complete. The expertise an employee gains while in public service should be thought of as compensation for the position, somewhat of an equalizer for the lower salary she receives.[59]

Because turnover in government service is inevitable, without the revolving door, individuals will fear giving up their current work and salary for the uncertainty which they will confront as government employees. As one former Pentagon employee stated, "Having spent a career developing some competence in defense matters, I wonder what the GAO and its sponsors would have me do should I decide to leave government. Bake bread? Drive a taxicab?"[60]

B. Freedom of Career Planning

The second benefit of the revolving door is the freedom of individuals to plan their careers. Many people only wish to work for the government temporarily, and restrictions on the revolving door will limit their subsequent career opportunities in the private sector.[61] These individuals are often unwilling to devote their entire career to public service, knowing they will have to give up a higher salary or more varied work in the private sector, as well as the expertise they have already acquired as a result of their job.[62] For example, such restrictions may actually "prevent the use of personal knowledge and skills that a public employee acquired on his own, not as a unique result of government service."[63]

***393** Thus, these restrictions may deter employees "from fulfilling their desire for government service and represent a significant cost affecting the freedom of those individuals to plan their careers."[64] Therefore, restrictions on the revolving door shut out those individuals who are unable to work for government permanently and represent a significant loss not only for the employee, but for the government as well. Government recruiters will face a smaller pool of attractive applicants and will be forced to hire fewer qualified individuals for public service.

Such restrictions also interfere with potential employers' freedom to hire whomever they wish. Restrictions on the revolving door may prevent employers who wish to hire or rehire government employees from doing so. For example, "[a] company that cannot rehire its vice-president because he or she worked as a presidential appointee has lost a major investment in that man or woman."[65] Thus, private sector employers are unable to hire otherwise desirable employees to work in their businesses.

C. Independent Decision Making

The third reason to maintain the revolving door is to encourage government employees to engage in independent and honest decision-making. When restrictions affect the right of an individual to leave a government job to enter the private sector, the personal autonomy and independence of that individual will be inhibited.[66] The lack of post-government job opportunities will cause an employee to react in one of two ways: (1) the employee may be extremely cautious, and strictly follow directions in order to remain employed and retain a salary, or (2) because the employee knows she will reap no reward later outside of government, she may act selfishly while in government in order to benefit herself.

With the first reaction, because an employee feels that she has no opportunity in the job market except for the position she now occupies, she will be more apt to accept existing government policy and refuse to advocate innovative changes for fear that she may be fired.[67] Limitations on the revolving door will make her much more dependent on the evaluation of her performance by superiors and may make her feel "locked ***394** in" to her job.[68] Thus, persons who were recruited for government service for their expertise, education, or accomplishment in the private sector may not express their views, resulting in a lack of innovation in government. As one commentator noted, "What worries me is that we're going to wind up with a government of wimps-- people who've never done anything controversial, never tried a new idea, never taken risks."[69]

The second reaction, to act selfishly while in government, demonstrates that stringent restrictions on post-government employment may not only affect the independence of an employee's decision-making, but may also induce an employee to act selfishly while in public service out of resentment over the lack of post-government employment opportunities. "Imposition of a substantial personal sacrifice . . . could . . . mak[e] it that much easier to rationalize an action the principal purpose for which is to confer some private benefit on the official taking it."[70] Thus, employees will act selfishly in order to reap rewards while in government by promoting policies and programs that benefit themselves, often to the detriment of other citizens or the public good. If government employees know there are opportunities for private sector employment in the future, they will be more apt to put the public good before their private concerns. Restrictions take this incentive away and increase the likelihood that

individuals will act self-interestedly because they know they will not be taken care of later.

D. Turnover In Government

The revolving door is beneficial to society because it allows the free interchange of ideas between the private and public sectors. The revolving door encourages innovative and expert decision-making in government. If there are stringent restrictions on the revolving door, fewer people with valuable expertise will apply for positions and the government will be denied the skill and information these workers can provide.[71] Turnover allows "government policies to be established with the advice of those who have in the past felt the effects of those policies or who have special insights into the sector of society to which government action is to be ***395** directed."[72] This kind of insight is invaluable to the development of policy that is responsive to the needs of society. It discourages stagnancy and promotes active and thoughtful employee participation in government.

While the insight that private sector employees provide to government is important, the information that former officials take away from government service and impart to the private sector is equally valuable. "Government alumni often help communicate policies and attitudes of their agencies better than books or speeches."[73] Not only can they educate the public about how the agency works, but they also will be more apt to give honest and constructive criticisms about the functioning of government after they have left.[74] Such open communication will be beneficial for both the public and private sectors and will help each to function more effectively. Thus, the revolving door promotes the recruitment of highly qualified people, the freedom of individual career planning, more effective government action and more meaningful public education.

IV. Costs of the Revolving Door Increase with Foreign Representation

To preserve these significant benefits, post-government employment restrictions should be limited to situations in which there is a real threat of abuse of the public trust.[75] If the restrictions apply to situations in which there is little potential for unethical behavior, the restrictions will only produce a deadweight loss.[76] Because society's potential gains from the revolving door compete with the risk of conflicts of interest that may occur when employees move to the private sector, the competing factors must be weighed in order to determine the appropriate restrictions in a particular set of circumstances.[77]

When the circumstances involve a former government employee's use of influence to lobby on behalf of foreign principals, foreign governments, foreign political parties or corporations with their principal place of ***396** business in a foreign country, there is a greater need to regulate post-government employment activities because the risk of conflicts of interest increases.[78] Each

of the factors that create a need to restrict the revolving door[79] is heightened when a lobbyist acts on behalf of foreign interests. Since government recruitment efforts, career planning, independent decision-making and turnover in government remain the same, the greatly increased costs that accompany lobbying on behalf of foreign interests produce a need for tighter regulation of this post-government employment activity.

A. Confidential or Insider Information Available to Foreign Principals

The revolving door should be restricted to prevent former government employees from using or revealing confidential information. The former officials may draw upon confidential or insider information either in the course of working for a foreign principal, or while still in government in order to enhance their future employment opportunities. In fact, the number of former government employees willing to offer confidential or insider information to obtain jobs is large enough that some foreign recruiters have come to routinely expect that this information be offered as a condition for obtaining employment.[80] As one former embassy official stated, "When former U.S. officials come to [the embassy] looking for a job, they are often expected to prove their worth by bringing 'golden nuggets'--inside information that may be of use to the Japanese."[81]

This exportation of confidential information is more harmful than its domestic counterpart because foreign interests, in many respects, inherently conflict with American national interests. Thus, when former government employees become "insider traders" and use their privileged knowledge of domestic matters to benefit foreign competitors, the revolving door potentially puts the United States at an economic disadvantage and may even threaten its national security.[82] Abuse of insider knowledge by foreign employers will have a more harmful effect ***397** on the United States than its abuse by domestic employers because it threatens not only competition within the nation, but the nation's ability to compete abroad.

Furthermore, there is a greater likelihood of abuse to the public trust when former employees use confidential or insider information to further foreign interests.[83] While the perception that the employee is "cashing in" on her service to the government to go into private sector employment often leads to disenchantment and apathy in the electorate, this problem is only intensified when that transfer is to a foreign principal. When the revolving door swings open to allow public servants to move into foreign employment, the public may perceive its governors as not only opportunistic, but disloyal to the interests of the nation as well.

The costs imposed by the flow of confidential information through the revolving door increase in cases of foreign representation because the interests of foreign principals are often inherently in conflict with those of the United States government and domestic interests. This threatens not only internal competition but the interest of the United States relative to other nations.

B. Foreign Principals Obtain Preferred Access to the American Political Process

The second concern, preferred access to government officials, is also exacerbated when the access is for the benefit of foreign rather than domestic employers. As previously noted, special access, such as the returned phone call or a preferential meeting, is only meaningful if the former government official is able to affect policy decisions. Preferred access for a former government employee creates this opportunity because the concerns she represents will be listened to and respected by government officials who have worked with her in the past.[84] The concern here is that if lobbyists who represent the interests of foreign parties are able to garner increased access, they may actually "crowd out legitimate concerns of Americans in the governmental decision-making process."[85] The United States government would not only be forsaking the public ***398** interest for the sake of the lobbyist's particular agenda, but for the sake of a foreign concern.

For example, in the trade arena, current officials' acceptance and reliance on their former colleagues' representation of foreign business interests allows these lobbyists to "befog an issue, raise doubts, and delay or even prevent changes in American trade policy---including those that are clearly in America's national interest."[86] Inequality of access between former government employees and other citizens is more objectionable when these employees represent the interests of foreign principals because there is a greater likelihood that these interests will negatively affect domestic concerns.

Foreign employers are eager to hire former officials who can provide them with the benefits of preferred access. As one author notes, "foreign governments are particularly eager to retain savvy Washington insiders to guide them through the bureaucratic and congressional maze and polish their sometimes unsavory images in the United States."[87] In addition to providing access for foreign principals, these lobbyists also provide legitimacy for foreign interests. While domestic interests are typically accorded legitimacy regardless of whether or not they are agreed with, foreign principals make significant gains by having their concerns incorporated as legitimate interests on the American agenda.

For foreign principals, legitimacy is an invaluable part of preferred access because it assures them that their concerns will be listened to and acted upon by American officials. Because current and former government officials have great familiarity with each other and respect each other's opinions, it is unlikely that the fact that a former official now represents a foreign employer will alter the credence that former colleagues will give to her position.[88] In fact, current officials may be eager to help former colleagues who may be able to assist them obtain a job with foreign employers in the future.[89]

Because the revolving door affords foreign principals greater legitimacy and influence, they are better able to affect government policy. This represents an increased cost of the revolving door, because the foreign principal's interests often run counter to domestic concerns or the public

interest.

*399 C. Improper Government Action to Enhance Future Employment Opportunities with Foreign Principals

The third concern, that individuals will act improperly while in government to benefit future employers, is also heightened when these future employers are foreign principals. The temptation for government workers to curry favor for these foreign employers can be reduced with adequate restriction of the revolving door.

Without such restrictions, the decisions made by government employees will be influenced by their personal interests, which are congruous with the interests of foreign employers. For example, in an attempt to win Japanese clients, former Commerce Department officials offered to help companies in Japan circumvent the same regulations they wrote while in office.[90] The implication that follows is that these officials may have deliberately written loopholes into the law in order to benefit future foreign employers while they were still employed by the government.[91] Similarly, as an advocate for Canadian concerns regarding acid rain, former deputy chief of staff and United States presidential assistant Michael Deaver used his position to benefit both himself and the Canadian government.[92] After government service, he entered into a contract to represent the Canadian government on the same issue he advocated for them while in government.[93]

Actions such as these are clear examples of the abuse of a public office for private gain. In fact, these actions are even more offensive because they create the opportunity for foreign principals to influence government decision-making at the expense of United States citizens. The additional cost incurred when employees work to benefit foreign interests while in government requires toughened restrictions on the revolving door in this area.

D. Appearance of Impropriety

The fourth concern, the appearance of impropriety, is also much greater when the revolving door facilitates employment with foreign principals. Appearances of impropriety, whether or not there is an actual abuse of government office, threaten to erode the public's confidence in ***400** government.[94] When such appearances involve foreign interests, there is an even greater loss of confidence among the electorate because it appears that the government is not working in the interest of Americans but in the interest of foreign citizens. The cost of such appearances are great for the American psyche because they create the fear that the government is no longer adequately representing the needs or interests of its citizens.

V. Current Restriction: 18 U.S.C. § 207

Congress enacted 18 U.S.C. § 207 to restrict the post-government employment of former employees, officers, and elected officials of the executive and legislative branches. Currently, § 207(f) of the statute addresses the heightened need for regulation of these former employees with regard to representing, aiding or advising foreign entities, the government of a foreign country and political parties.[95] The statute also restricts these former employees from using information concerning trade or treaty negotiations to aid or advise anyone other than the United States.[96] Despite these safeguards, Congress must go further to protect against the increased costs that flow from the representation of foreign principals.

A one-year restriction currently prohibits former senior and very senior-level employees of the executive branch, and all employees of the legislative branch, from knowingly representing, aiding or advising a foreign entity with the intent to influence the decision of any employee of any agency or department of the United States.[97] Also, there is a special rule for the United States Trade Representative and the Deputy United States Trade Representative, who, after termination of their services, are permanently banned from knowingly representing, aiding or advising a foreign entity with the intent to influence government decisions.[98] Additionally, if any employees of the executive or legislative branches personally or substantially participated in trade or treaty negotiations, they ***401** are prohibited from using this information to aid or advise any other person (except the United States) concerning ongoing trade or treaty negotiations for one year after the termination of their government service.[99]

There are other provisions that regulate the post-government employment opportunities of legislative and executive branch employees without reference to foreign representation. In the legislative branch, there is a one-year restriction on former members and employees communicating with or appearing before their former colleagues.[100] In the executive branch, there is a similar restriction that prohibits senior and very senior personnel from contacting or appearing before their former agency for one year.[101] Additionally, there is a permanent ban on a former employee of the executive branch communicating with or appearing before any agency regarding a particular matter in which the employee participated personally during government service.[102] Lastly, there is a two-year restriction on a former employee of the executive branch communicating with or appearing before any agency regarding a particular matter that was under the employee's official responsibility.[103]

*402 VI. Proposals for Change

The relevant provisions of the statute § 207(b) and (f) must be amended to reflect the increased costs that accompany representation of foreign interests in post-government employment. Any amendments must be clear and understandable to potential government employees because oftentimes the concern over regulation of the revolving door deals not with the existence of

restrictions, but the ambiguity with which they are drafted. As one potential employee stated, "I've concluded that there's no way I can serve in government . . . the conflict of interest laws are sufficiently vague and subject to ex post facto interpretation. They've got criminal sanctions. No one wants to be the test case ten years down the road. I certainly don't."[104]

A. Substitute "Foreign Principals" for "Foreign Entity" in § 207(f)(1)

Representation by former insiders on behalf of a foreign company is equally harmful to American interests as action on behalf of a foreign government or political party. However, current law does not treat these concerns in a similar fashion. Rather, it contains a loophole that precludes former government employees from lobbying on behalf of foreign governments and political parties for one year, but does not restrict lobbying on behalf of foreign companies.

The heightened costs of the revolving door exist regardless of whether the former employee lobbies for a foreign government or a foreign company. It is illogical to differentiate between these forms of representation and impose restrictions on one activity but not the other. Increased problems with the abuse of confidential or insider information, preferential access to the political process and agenda, and the appearance of impropriety exist whether the employee represents an employer who is involved in foreign politics or in private sector work.

Accordingly, the first proposal addresses this loophole and would substitute "foreign principals" for "foreign entity" in § 207(f)(1). Foreign principals are defined by 22 U.S.C. § 611(b) to include: 1) a government of a foreign country and a foreign political party, 2) a person outside the United States, and 3) a partnership, association, corporation, organization, or other combination of persons organized under the laws of or having its principal place of business in a foreign country.[105] This definition will ***403** lessen the potential costs of foreign representation that occur as a result of the revolving door.

Further, by expanding the restriction to cover foreign principals as well as foreign entities, employees will find it more difficult to circumvent the existing restriction provided by the statute. Often former government employees are able to disregard the restriction on representation of foreign entities by lobbying for issues that are of interest to both foreign companies and foreign governments. For example, in Executive Order No. 12834, President Clinton bars top appointees from representing foreign governments for life but allows them to lobby for foreign corporations without regulation.[106] As one commentator noted, "[t]here are situations where the interests of foreign governments are identical to that of foreign companies. A lifetime ban . . . can be gotten around that way."[107] To avoid the loophole in this Executive Order and in § 207(f)(1), this section needs to apply more broadly to cover foreign principals. This definition prevents former government employees from lobbying during the restricted time period by asserting that they represent foreign companies rather than foreign governments.

B. Increase the Length of Time for the Restrictions in § 207(f)(1)&(b)

The second proposal is to lengthen the amount of time for which the § 207(f)(1) restrictions apply for representing, aiding or advising foreign principals, and for using information from trade or treaty negotiations, under § 207(b). In both statutory sections, the amount of time should be increased from one year to five years in order to adequately protect against the potential abuse the revolving door may allow in this area. Five years is the appropriate amount of time for the restriction because it takes into account political transition: at least one cycle of the presidency and two congressional cycles. Also, this proposal significantly lessens all of the costs that accompany the revolving door.

For example, the confidential information an employee possesses will be less current after five years have passed and thus less relevant to a foreign principal's transactions. If the "golden nugget" of information is less valuable to potential foreign employers, there will be less enticement for an employee to attempt to offer it as leverage to obtain a job. Also, with a new administration and two congressional cycles of turnover, ***404** former government officials will have fewer contacts, and fewer former colleagues currently holding office who will grant them preferential treatment. Thus, there will be less opportunity for foreign principals to influence decision-making in the United States through "insider" channels.

Further, former government employees will be less apt to act improperly while in public office or during trade or treaty negotiations to curry favor with potential foreign employers. The favors that a public employee grants while in office may not even be remembered by prospective employers five years later and thus, there is little temptation to make a strategic move to advantage a foreign principal. There will also be a diminished appearance of impropriety because there will be fewer individuals who represent, aid or advise foreign principals immediately after government service. Often it is the immediacy of the change which appears the most self-aggrandizing and offensive to American citizens.

C. Broaden § 207(f)(1) to Apply to Lower-Level Employees in the Executive Branch

The third proposal is to change the application of § 207 (f)(1) to include lower-level appointees of the executive branch. One of the major loopholes in the statute, as well as in President Clinton's Executive Order No. 12834, is that lower-level personnel in the Executive Branch have no restriction on representing, aiding or advising foreign principals after government service.[108] As one commentator noted with regard to the President's Executive Order:

> the biggest loophole may be the fact that only 1,100 or so top appointees have to follow the new rules. Most political operatives, who reside well below that level, can carry on business as usual. Although their posts aren't as prestigious . . . 2,200 to 3,000 [of these] political appointees also have access to information and special relationships. Therefore they get a windfall.[109]

These appointees may be less skilled, may have less access to confidential information or prominent decision-makers, or may be less able than top-level officials to influence governmental policies where they work, but they still have considerable influence over decisions. Also, even if these employees wield no tangible influence, the appearance of impropriety still justifies some restraint on their post-government employment opportunities. Further, as restrictions on very senior and senior personnel increase, these lower-level appointees may become more ***405** attractive to potential foreign employers, and there will be a greater potential for abuse.

Thus, although their influence is limited, these lower-level appointees still possess enough qualities that make them attractive to foreign principals such that their conduct should be regulated. However, restriction should be minimal to reflect the limited influence these employees possess and the heightened difficulty of recruiting qualified individuals to serve in less senior executive branch positions. As one former recruiter stated, "Low salaries are corroding government at many levels. Recruiting for specialized but less visible jobs has become particularly hard."[110] Taking these factors into account, the restriction should be for one year. This will adequately guard against the potential for abuse that these lower-level appointees may present, while simultaneously preserving the ability of government to adequately recruit for these positions.

D. Extend the Permanent Ban in § 207(f)(2) to Other Highly Sensitive Positions

The fourth proposal is to extend the permanent ban in § 207 (f)(2) to apply not only to the United States Trade Representative and Deputy Trade Representative, but to other individuals who hold highly sensitive positions as well. The permanent ban on aiding, advising or representing foreign entities should apply to individuals who have served as the Secretary of Commerce, Commissioners of the International Trade Commission, the Secretary of State, and the Secretary Defense. Because these officials hold tremendous power and influence over trade, foreign policy and defense matters, a permanent ban on their post-government employment conduct is justified. But, the permanent ban, due to its severity, should remain only with regard to representing, aiding or advising a foreign government or political party.

The Secretary of Commerce and the International Trade Commission "play a seminal role in overseeing and administering trade policy in America."[111] The Secretary of Commerce leads key trade missions, is familiar with the trade objectives of prominent American companies, develops trade policy, and plays a significant role in the enforcement of trade laws.[112] Officials at the International Trade Commission provide ***406** guidance regarding trade negotiation, assess the economic injury to American workers from imports, and advise the President on the domestic implications of trade policies.[113] The Secretary of State is the President's principal adviser on

foreign policy, and maintains primary responsibility for representing the United States abroad. The Defense Secretary is responsible for national security matters and has a direct interest in America's weapons systems.[114]

Due to the prominence and nature of these positions, these individuals have access to highly confidential information and "insider" knowledge that must not be traded to foreign entities after their service is completed. These officials also have the heightened ability to unduly influence former colleagues in order to obtain desired policy outcomes to benefit the interests of foreign entities. The higher a position an individual has held, the greater the concern over undue influence becomes.[115] Thus, if the official becomes a lobbyist for a foreign entity, she will be able to "trade" upon habits of deference which many colleagues accorded her with in the past.

Also, as the appointed official's tenure approaches completion she will likely be flooded with job offers to represent foreign entities regarding many of the same issues she dealt with while in government. The temptation will be great for an official to curry favor for a potential employer while still in government in order to obtain the ideal job. Such temptation must be diminished or it will harm the official's leadership ability and give foreign entities the opportunity to exert tremendous influence over the agency's policy decisions. Lastly, a very damaging perception is created if prominent officials such as these individuals foster an appearance of impropriety by capitalizing on their influence to aid the advancement of foreign governments or political parties. Public support for government programs will be undermined and the morale of other employees who remain at the agency will be decreased.[116]

These amendments strengthen existing law and reflect the heightened need to regulate former government employees' lobbying efforts on behalf of foreign employers. Without these amendments, the statute does not ***407** protect against many of the blatant abuses which may occur when former insiders use their influence to benefit foreign interests.

VII. Conclusion

While change is often an inevitable part of the democratic process in the United States, the transition of government employees into the private sector must be regulated where there is great likelihood of abuse. The costs of the revolving door significantly increase when former government employees accept work representing, aiding or advising foreign employers. In order maintain the integrity of national interests at home and abroad, stricter regulation of post-government employment opportunities in this area is justified.

Footnotes

d1 B.A, Colgate University, 1994; J.D., University of Virginia School of Law, 1998.

1 John Norton, Who Wants to Work in Washington?, Fortune, Aug. 14, 1989, at 77.

2 Proceedings of the National Conference on Federal Regulation: Roads to Reform, 32 Admin. L. Rev. 383, 395 (1980) (panel on the 'revolving door ') [hereinafter National Conference].

3 Judith Havemann, Ex-Officials Find Mixed Bag of Job Prospects; For Low-Level Appointees, Revolving Door Can Spin Slowly, Wash. Post, Feb. 15, 1989, at A10.

4 Id. at 396.

5 See id.

6 See id.

7 See id. at 396-97.

8 See Testimony Before Subcomm. on Oversight of Government Management of the Senate Governmental Affairs Comm. (Apr. 12, 1988) (statement by Archibald Cox, Chairman of Common Cause) in Ann McBride, Ethics in Congress: Agenda and Action, 58 Geo. Wash. L. Rev. 451, 470 (1990). See also Thomas D. Morgan, Appropriate Limits on Participation by a Former Agency Official in Matters Before an Agency, 1980 Duke L.J. 1, 42-44 (1980); National Conference, supra note 2, at 397-398.

9 National Conference, supra note 2, at 397.

10 Id.

11 United States v. Ostrer, 597 F.2d. 337 (2d Cir. 1979).

12 National Conference, supra note 2, at 397.

13 See Michael H. Chang, Protecting the Appearance of Propriety: The Policies Underlying the One-Year Ban on Post-Congressional Lobbying Employment, 5-Wtr Kan. J.L. & Pub. Pol'y 121, 122-23 (1996).

14 See Note, The Fiduciary Duty of Former Government Employees, 90 Yale L.J. 189, 191-92 (1980).

15 McBride, supra note 8, at 486.

16 National Conference, supra note 2, at 397.

17 See McBride, supra note 8, at 486.

18 See Morgan, supra note 8, at 42-44

19 National Conference, supra note 2, at 398.

20 See Chang, supra note 13, at 122.

21 Id.

22 Pat Choate, Agents of Influence 49 (1990).

23 See id.

24 See McBride, supra note 8, at 470.

25 See id.

26 Evan Thomas, Peddling Influence; Lobbyists Swarm Over Capitol Hill, Time, Mar. 3, 1986, at 26.

27 Howard Kurtz, A Government Official's Job Hunt Through the Revolving Door to $500,000 a Year, Wash. Post, May 6, 1984, at F5.

28 McBride, supra note 8, at 470.

29 See Bill McAllister & Ann Devroy, Full Circle Through the Revolving Door; Ex-Reagan Official Who Left to Help Deaver Now Works for Bush, Wash. Post, July 25, 1989, at A21.

30 Id.

31 See Wendy L. Gerlach, Amendment of the Post-Government Employment Laws, 33 Ariz. L. Rev. 401, 413 (1991).

32 Morgan, supra note 8, at 45.

33 Gerlach, supra note 31, at 413.

34 See Morgan, supra note 8, at 45.

35 Id.

36 Rauh, Conflict of Interest in Congress, in Conference on Conflict of Interest, University of Chicago Law School, 4 (1961).

37 Kurtz, supra note 27, at F5.

38 See Gerlach, supra note 31, at 413.

39 See Chang, supra note 13, at 123.

40 See id.

41 See Kurtz, supra note 27, at F5.

42 See Revolving Door Sunshine Act of 1993: To Amend the Government in the Sunshine Act to Require the Disclosure of Certain Activities: Hearing on H.R. 1593 Before the Legislation and Nat'l Sec. Subcomm. of the Comm. on Government Operations, House of Representatives, 103d Cong., 1st Sess. 61 (1993) [hereinafter Hearings on H.R. 1593]

43 See id.

44 National Conference, supra note 2, at 398.

45 Chang, supra note 13, at 122 (quoting McBride, supra note 8, at 486).

46 See National Conference, supra note 2, at 398.

47 Chang, supra note 13, at 123.

48 Stephen J. Curran, Regulating the Revolving Door: A Study of Proposed Federal Restrictions on Post-Government Employment Activities, 2 Geo. J. Legal Ethics 943, 955 (1989).

49 See id.

50 See id.

51 See supra note 8.

52 See National Conference, supra note 2, at 396-97; see also Morgan, supra note 8, at 50-56.

53 National Conference, supra note 2, at 396-97.

54 See Curran, supra note 48, at 955.

55 See id.

56 See id.

57 See Morgan, supra note 8, at 51-52.

58 See United States v. Medico Indus., Inc., 784 F.2d. 840, 843 (7th Cir. 1986).

59 See id.

60 That Revolving Door, Wash. Post, May 17, 1987, at C6. (GAO is an acronym for the Government Accounting Office.)

61 See National Conference, supra note 2, at 396-97.

62 See id. at 396.

63 Note, supra note 14, at 193 (citing Ethics and Financial Disclosure: Hearings on H.R. 3829 Before the Subcomm. on Employee Ethics and Utilization of the House Comm. on Post Office and Civil Service, 95th Cong., 1st Sess. 72-75 (1977)).

64 Morgan, supra note 8, at 55.

65 Id.

66 See id. at 54.

67 See Gerlach, supra note 31, at 414.

68 Id.

69 Norton, supra note 1, at 77.

70 Eric J. Murdock, Finally, Government Ethics as if People Mattered: Some Thoughts on the Ethics Reform Act of 1989, 58 Geo. Wash. L. Rev. 502, 515 (1990).

71 See Morgan, supra note 8, at 55.

72 National Conference, supra note 2, at 396.

73 Morgan, supra note 8, at 56.

74 See National Conference, supra note 2, at 397.

75 See Morgan, supra note 8, at 56.

76 See Murdock, supra note 70, at 514.

77 See James S. Roberts, The 'Revolving Door': Issues Related to the Hiring of Former Federal Government Employees, 43 Ala. L. Rev. 343, 344 (1992).

78 See 22 U.S.C.A. § 611(b) (1990).

79 See supra note 8 and accompanying text. In brief, those factors are: (1) potential misuse of confidential information; (2) preferential access to government officials; (3) the temptation to take improper actions while still in office to enhance future employment opportunities in the private sector; and (4) the creation of an appearance of impropriety.

80 See Choate, supra note 22, at 59.

81 Id.

82 Gary Lee, Trade, National Security and the Revolving Door Lawmakers Seek Creation of Professional Corps With Restrictions on Post-Government Work, Wash. Post, Apr. 13, 1992, at A19.

83 See Hobart Rowen, Government's Revolving Door Needs Slowing, Wash. Post, Dec. 24, 1989, at H1.

84 See Chang, supra note 13, at 122.

85 Michael I. Spak, America for Sale: When Well-Connected Former Federal Officials Peddle Their Influence to the Highest Foreign Bidder, 78 K.Y.L.J. 237, 274 (1989-90).

86 Choate, supra note 22, at 50.

87 Thomas, supra note 26, at 28.

88 See Spak, supra note 85, at 274,

89 See id.

90 See Choate supra note 22, at 59.

91 See id. (noting it "can never be known" whether loopholes were deliberately inserted in expectation of future earnings, but arguing that an incident of this kind nonetheless 'undermines American confidence in the integrity of U.S. trade policymaking.').

92 See Spak, supra note 85, at 240.

93 See id.

94 See National Conference, supra note 2, at 398.

95 18 U.S.C.A. § 207(f)(3) (West Supp. 1997). A "foreign entity" and a "foreign political party" are defined in 22 U.S.C.A. § 611(e), (f) (1990).

96 See 18 U.S.C.A. § 207 (b) (West Supp. 1997).

97 Id. at § 207(f)(1)(A), (B). The statute prohibits such conduct when its intent is to influence a decision of any officer or employee of any department or agency of the United States in carrying out her official duty.

98 Id. at § 207(f)(2). Again, the intent of the conduct must be to influence the decision of an officer or employee in carrying out her official duty.

99 Id. at § 207(b).

100 Id. at § 207(e)(1). Former members are restricted for one year from knowingly making, with the intent to influence, any communication with or appearance before current Members, officers or employees of either house of Congress. Id. Personal staff members are restricted for one year from contacting the member for whom they worked or any employee of that member. Id. at § 207(e)(2). Committee staff members are prohibited, for one year, from contacting any employee, member or former member of the committee who was a committee member Id. at § 207(e)(3). There is also a one year restriction on members of the leadership staff from contacting the leadership or employees of the leadership in the House in which they served in the year immediately prior to the former staff member's termination. Id. at § 207(e)(4). Lastly, employees in other legislative offices are restricted from communicating with or appearing before the office in which they formerly worked for one year. Id. at § 207(e)(5). In each of these instances the one year prohibition begins at the termination of government employment and applies to any matter on which the former employee seeks official action. Id. at § 207 (e).

101 Id. at § 207(c),(d). For senior and very senior personnel of the executive branch there is also a one year restriction on knowingly making, with the intent to influence, any communication to or appearance before any officer or employee of the department or agency in which the former employee served within one year before termination.

102 Id. at § 207(a)(1). After termination of service with the government there is a permanent ban on executive branch employees or officers knowingly making, with the intent to influence, any appearance before, or communication with, any department or agency on behalf of any person (other than the United States) regarding a particular matter with which the former employee participated. Id. "Particular matter" includes any investigation, application, request for a ruling, or determination, rulemaking, contract, controversy, claim, charge, accusation, arrest, or judicial or other proceeding. Id. at § 207(i)(3). The particular matter must meet the following requirements: 1) the United States must have a direct and substantial interest; 2) the former employee must have participated personally and substantially as an officer or employee of the government; 3) the matter must involve a specific party or specific parties at the time of such participation. Id. at § 207 (a)(1)(A)(B)(C).

103 Id. at § 207(a)(2). This restriction applies to a particular matter that was under the employee's official responsibility within one year before termination of employment.

104 Norton, supra note 1.

105 22 U.S.C.A. § 611(b) (1990).

106 See Exec. Order No. 12834, 58 Fed. Reg. 5911 (1993).

107 Sheila Kaplan, The Revolving Door Still Spins The Cash-Filled Holes in Clinton's Ethics Policy, Wash. Post, Jan. 31, 1993, at C5.

108 See Exec. Order, supra note 106. See also 18 U.S.C.A. § 207(f)(1).

109 Lee, supra note 82, at A19.

110 Norton, supra note 1.

111 141 CONG. REC. H13126 (1995) (statement by Rep. English).

112 See id.

113 See id.

114 See Revolving Door Issues and Post-Employment Restrictions: Hearing Before the Investigations Subcomm. of the Comm. on Armed Services, House of Rep., 102d Cong. 3 (1991).

115 See McBride, supra note 8, at 470.

116 See Armed Services, supra note 115.