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THE TWILIGHT ZONE:
POST-GOVERNMENT EMPLOYMENT RESTRICTIONS
AFFECTING RETIRED/FORMER DEPARTMENT OF DEFENSE PERSONNEL

A Thesis

Presented to

The Judge Advocate General's School, United States Army

The opinions and conclusions expressed herein are those of the author and do not necessarily represent the views of either The Judge Advocate General's School, The United States Army, or any other government agency.

by Major Kathryn Stone, JA

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41ST JUDGE ADVOCATE OFFICER GRADUATE COURSE

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THE TWILIGHT ZONE:
POST-GOVERNMENT EMPLOYMENT RESTRICTIONS
AFFECTING RETIRED/FORMER DEPARTMENT OF DEFENSE PERSONNEL

by Major Kathryn Stone
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ABSTRACT: There are five federal conflict of interest statutes that impose extensive albeit confusing restrictions on the post-government employment, and employment activities, of retired and former Department of Defense (DOD) personnel. An examination of these five statutes reveals that four of them should be repealed as obsolete to the congressional goal of safeguarding the integrity of the DOD procurement process in that they duplicate each other in purpose and unnecessarily complicate the DOD ethics program. This study provides a brief history, the legislative purpose, and the current application for each of the five statutes, and concludes with an analysis outlining why the four duplicative statutes should be repealed.

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THE TWILIGHT ZONE:¹

POST-GOVERNMENT EMPLOYMENT RESTRICTIONS
AFFECTING RETIRED/FORMER DEPARTMENT OF DEFENSE PERSONNEL

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I. INTRODUCTION

The internal effects of a mutable policy are . . . calamitous. . . . It will be of little avail to the people that the laws are made by men of their own choice, if the laws be so voluminous that they cannot be read, or so incoherent that they cannot be understood; if they be . . . revised before they are promulgated, or undergo such incessant changes that no man who knows what the law is today can guess what it will be tomorrow. . . . [H]ow can that be a rule, which is little known and less fixed?²

You are the ethics counselor for your installation.³ One afternoon you are visited by a U.S. Army colonel who wants you to advise him on the ethics laws that will affect him after he retires in a few months. He tells you that for the last two years, he has not served as a contracting officer or representative thereof and did not, in his opinion, serve as a procurement official. He also informs you that he intends to seek post-government employment with several defense contractors

with whom he works as a liaison officer on various Army contracts. Upon questioning him further, you discover that he routinely exercised decisionmaking authority with respect to two major defense systems, and reviewed and approved the statements of work for several procurements. Some of his colleagues told him he needed to talk with you before seeking post-government employment. What do you tell him?

Ethics counselors encounter this type scenario on a daily basis; it is particularly acute at contracting commands/ installations, and at the Pentagon. The author encountered this and other similar type scenarios dozens of times during a three-year assignment in the Office of the Judge Advocate General (OTJAG), Headquarters, Department of the Army (HQDA).⁴ Department of Defense (DOD) regulations require DOD personnel to consult a DOD component legal counsel or, if appropriate, the DOD component's Designated Agency Ethics Official (DAEO) "[i]f the propriety of a proposed action or decision is in question because it may be contrary to law or regulation."⁵ Executive Branch regulations encourage employees to seek the advice of their agency DAEO when they have standards of conduct questions.⁶

There is no easy answer to the question: "What do you tell him?" DOD officials, especially military officers, are subject to complex and confusing post-government employment restrictions. Accordingly, post-government ethics counseling is fraught with

danger. Some of the post-government employment laws apply only to retired military officers (e.g., 18 U.S.C. § 281 and 37 U.S.C. § 801(b) (retired *regular* military officers)); others apply to former procurement personnel (e.g., 41 U.S.C. § 423(f) and 10 U.S.C. § 2397 (which only applies to DOD personnel)); and others apply to former and retired officers and employees government-wide (e.g., 18 U.S.C. § 207).

If you are confused and not quite sure you understand what I wrote in the preceding paragraph, you are experiencing a normal reaction upon entering the twilight zone of post-government employment conflict of interest laws. The above five redundant conflict of interest laws addressed in this thesis are obscure, confusing, overlapping, often unnecessary, and difficult to explain.

Although there are other ethics laws affecting present and former DOD officials, they are beyond the scope of this thesis.⁷ This thesis will examine the five post-government employment laws and propose that Congress repeal four of them because they are no longer necessary to the Congressional goal of safeguarding the integrity of the DOD procurement program. Section II provides a brief overview of these five laws. Section III examines the history and government-wide application of 18 U.S.C. § 207, Restrictions on former officers, employees, and elected officials of the executive and legislative branches, which the author

believes sufficiently protects the DOD procurement program from post-government employment conflicts of interest. Section IV examines the history of the other four post-government employment laws and argues for their repeal. Section V concludes the thesis.

II. Entering the Twilight Zone: Post-Government Employment Restrictions

The first rudiments of morality, broached by skillful politicians, to render men useful to each other as well as tractable, were chiefly contrived that the ambitious might reap the more benefit from and govern vast numbers of them with the greatest ease and security.⁸

A. *Purpose of the Twilight Zone*

Since the American Civil War, Congress has enacted several statutes that address conflicts of interest in federal agency procurements. Some of these laws imposed government-wide, post-government employment restrictions, while others imposed employment restrictions only on DOD personnel. In many cases these "DOD-unique" laws overlapped with restrictions imposed by the government-wide statutes.⁹ Regardless of their application, however, their purpose was to protect the integrity of the government's procurement process. Congress attempted to prohibit

bidders and offerors for a federal agency procurement from gaining an unfair competitive advantage by using improper influence or unauthorized access to procurement-sensitive information.¹⁰

Unfortunately, these individual laws also have contributed a measure of uncertainty and complexity to the post-government employment conflicts of interest laws. This result is not surprising. These statutes were not adopted as a package, but were enacted one at a time in response to existing evils which were also important political issues.¹¹ The executive branch ethics program, and in particular DOD's ethics program, is "encumbered by a complex, multi-tiered system of statutory restrictions" that make effective ethics training and counseling difficult to provide.¹² With this foundation, let us look (briefly for now) at these statutory restrictions. For quick reference by the reader, Appendix A provides a brief summary of the post-government employment statutes addressed in this thesis.

B. Overview of the Five Statutes in the Twilight Zone

1. Government-Wide Post-Government Employment

Restrictions.--Title 18 of United States Code, section 207, applies to former or retired officers or employees of the executive or legislative branches. It sets forth six substantive prohibitions restricting certain post-government employment activities of such persons, with additional restrictions on

certain "senior-level" personnel. Only two of these substantive prohibitions, 207(a) and (c), are relevant to this thesis.

Subsection 207(a)(1) prohibits former officers and employees from communicating with, or appearing before, a United States employee on behalf of someone else, if they intend to influence that United States employee regarding a particular matter in which such former officers or employees participated personally and substantially while employed by the government.¹³ For such representation to be prohibited, the United States must be a party to or have a direct and substantial interest in that same particular matter.¹⁴ This is a lifetime bar.

Subsection 207(a)(2) imposes the same representational restrictions as subsection (a)(1), except that the restriction lasts only for two years after government service terminates. Also, subsection (a)(2) applies only to particular matters that were actually pending under the individual's official responsibility during his or her last year of government service, rather than matters in which he or she participated personally and substantially.¹⁵

Subsection 207(c) prohibits, for one year after leaving government service, certain former senior-level officers and employees from seeking official action by communicating with, or

appearing before, an employee of their former agency on behalf of someone else.¹⁶

The remaining four statutes¹⁷ are directed specifically at the conduct of former or current government personnel involved in procurement-related activities. These four statutes also became unnecessary by the enactment of the Ethics Reform Act of 1989.¹⁸

2. *Procurement Integrity Act Restrictions.*--Title 41 of United States Code, section 423,¹⁹ prohibits a procurement official²⁰ from seeking employment with a competing contractor²¹ during the conduct of a procurement.²² It also prohibits a former procurement official from participating on behalf of a competing contractor in the performance of the contract resulting from such procurement, or from participating in any negotiations leading to the award or modification of any contract for such procurement.²³ This prohibition lasts for two years after the former procurement official's last involvement in a procurement.²⁴

3. *DOD-Unique Post-Government Employment Restrictions.*--Four sections of Title 10, United States Code, are directed at DOD personnel and their potential or actual employment with defense contractors.

Section 2397 requires certain former military officers and DOD civilian employees to file reports with DOD if they are employed by a major defense contractor at an annual pay rate of at least \$25,000 within two years after separating from DOD.²⁵

Section 2397a imposes recusal requirements on certain military officers and DOD civilian employees who performed procurement functions on a defense contract, and who contact, or are contacted regarding post-government employment by, the defense contractor to whom the contract was awarded. Unless the affected individual rejects an initial unsolicited employment overture, he or she must file a written report of the contact and recuse him- or herself from further participation in official matters affecting that defense contractor for any period of time during which the individual has not rejected the employment opportunity.²⁶

Section 2397b prohibits certain former military officers and DOD civilian employees from receiving compensation from a major defense contractor for two years after separating from DOD if, during a majority of their working days during their last two years of government service, they performed a procurement function (a) at a contractor's plant that served as their principal location of work on that procurement, or (b) relating to a major weapons system that involved decisionmaking responsibilities. This prohibition also applies to former

general and flag officers and Senior Executive Service (SES) personnel who served as a primary U.S. representative in negotiating a contract or claim settlement over \$10 million during their last two years of government service.²⁷

Section 2397c requires major defense contractors to submit annual reports to the Secretary of Defense identifying all former or retired DOD officers and employees who received compensation from the contractor within two years after separating from DOD. These contractor reports contain information similar to that which is reported by former officers and employees under section 2397.²⁸

4. *Two-Year Military Selling Statute.*--Title 18 of United States Code, subsection 281(a), imposes a two-year prohibition on retired military officer selling anything, on behalf of someone else, to his or her former military department.²⁹ Subsection 281(b) prohibits such retired officers, for the same two-year period, from prosecuting any claim against the United States that involves his or her former military department or any subject matter with which the retired officer was directly connected while on active duty.³⁰ Section 281 subjects a violator to criminal sanctions.

5. *Three-Year Military Selling Statute.*--Title 37 of United States Code, subsection 801(b), is the civil companion to 18

U.S.C. § 281. Subsection 801(b) provides for the loss of retired pay if, within three years after he or she retires, a retired regular officer of the uniformed services sells goods (but not services), for him- or herself or others, to any of the uniformed services: DOD, Coast Guard, Public Health Service, or National Oceanic and Atmospheric Administration.³¹

One other statute needs mentioning, even though it does not impose restrictions on post-government employment; it restricts instead the activities of government employees who seek post-government employment: 18 U.S.C. § 208(a). Specifically, this statute makes it a crime for an executive branch officer or employee to participate in a matter affecting the financial interests of any person with whom the officer or employee is negotiating for, or has an arrangement concerning, future employment. For example, any officer who participates in an agency procurement must recuse (disqualify) him- or herself from any further participation in that procurement if he or she wants to negotiate for employment with a contractor competing for that procurement.³² Both the Department of Justice and Office of Government Ethics³³ consider "the unilateral submission of a resume to a competing contractor" (conduct short of "negotiating") as conduct that requires the officer to recuse him- or herself from further involvement in a procurement.³⁴

C. The Twilight Zone Itself

Ethics counselors have recognized that the four statutes discussed in preceding subparagraphs B.2. through B.5. are duplicative in purpose of the restrictions imposed by the two general conflict of interest statutes: 18 U.S.C. §§ 207 and 208.³⁵ This overlap is destructive in two respects. First, it creates considerable confusion for former DOD personnel who must abide by the restrictions and who run the risk of criminal, civil, and administrative penalties if they fail to do so. Second, it imposes a mind-numbing administrative burden on the DOD ethics program, which not only must keep track of all the required reports but also must develop programs to train, counsel, and guide a variety of affected officials through five sets of multi-layered and inter-locking restrictions.

The duplicative purpose of these four statutes make them ripe for repeal. They serve no valuable purpose and have succeeded only in imposing complex, unnecessary restrictions on a select group of DOD personnel. The conduct which these four statutes attempt to prohibit is already sufficiently proscribed by 18 U.S.C. §§ 207 and 208.

An additional, more compelling reason to repeal these four statutes stems from the passage of the Ethics Reform Act of 1989.³⁶ This Act, which will be discussed more extensively in paragraph III.F., *infra*, was passed in the wake of the most recent executive and legislative reviews of the conflict of

interest statutes that apply to all three branches of the federal government.³⁷ One result of this review was that Congress amended significantly 18 U.S.C. § 207 in order to make it the "single, comprehensive, post-employment statute applicable to executive and legislative branch personnel who leave Government service."³⁸ A congressional analysis of a subsequent reform bill also acknowledged that section 207's new purpose as the single post-employment statute for the executive branch will remain "thwarted" so long as these four unnecessary statutes, three of which apply exclusively to DOD officials, remain on the books.³⁹

In light of the amendments to 18 U.S.C. § 207 by the Ethics Reform Act of 1989, and this author's argument that the other four statutes should be repealed, it is appropriate to review section 207's evolution to date.

III. The Evolution of Post-Government Employment Restrictions Imposed By 18 U.S.C. § 207

Morality is the best of all devices for leading mankind by the nose.⁴⁰

A. *In The Beginning Darkness was upon the Face of the Deep*

The fact that today's post-government employment laws are confusing and overlapping is nothing new. Soon after taking office, President John F. Kennedy appointed an Advisory Panel on

Ethics and Conflict of Interest in Government to study conflict of interest laws and propose appropriate legislation to ensure high ethical standards in the federal government.⁴¹ Congressional investigations into conflict of interest cases in the executive branch prompted much of President Kennedy's interest in these laws. Public perception that existing conflict of interest laws were confusing, inadequate for the modern business world, and an actual hindrance to the government was also growing.⁴²

On April 27, 1961, President Kennedy transmitted a special message to Congress concerning ethical conduct in government. In his message, President Kennedy noted that some of the conflict of interest laws were enacted before 1873; all were enacted without coordination with any of the others; and no two of them used uniform terminology. President Kennedy complained about the overlap and inconsistency among the statutes, and pointed out that:

The ultimate answer to ethical problems in Government is honest people in a good ethical environment. No web of statute or regulation, however intricately conceived, can hope to deal with the myriad possible challenges to a man's integrity. . . . Nevertheless formal regulation is required -- regulation which can lay down clear guidelines . . .

and set a general ethical tone for the conduct of public business.

. . . .

Criminal statutes and Presidential orders, no matter how carefully conceived or meticulously drafted, cannot hope to deal effectively with every problem of ethical behavior of conflict of interest. Problems arise in infinite variation. . . .

. . . .

Although . . . regulation is essential, it cannot be allowed to dissolve into a welter of conflicting and haphazard rules and principles throughout the Government. Regulation of ethical conduct must be coordinated in order to insure that all employees are held to the same general standards of conduct.⁴³

In his message to Congress, President Kennedy attached a proposed bill to revise the conflict of interest laws. Several similar bills were also introduced in the House of Representatives.⁴⁴ Their purpose was two-fold: simplify and strengthen the conflict laws then in effect, and facilitate the government's recruitment of part-time employees with specialized knowledge and skills without weakening the government's protection against unethical conduct.⁴⁵

On June 1 and 2, 1961, the Antitrust Subcommittee of the House Committee on the Judiciary held hearings on these bills, which resulted in a new bill, H.R. 8140, that passed the House on August 7, 1961.⁴⁶ The Senate Committee on the Judiciary held hearings on this bill on June 21, 1962, and supported its enactment.⁴⁷ It eventually became known as the Bribery, Graft and Conflicts of Interest Act of 1962.⁴⁸

B. Then There was Light, and the Light was Good

The author has chronicled this history in abbreviated form to provide a backdrop and foundation for the reason the Bribery, Graft and Conflicts of Interest Act of 1962 was enacted. This law affected two conflict of interest statutes that applied to government officers and employees⁴⁹ who represented others in transactions with the government during the two-year period after their government employment terminated: 5 U.S.C. § 99, Ex-officers or employees not to prosecute claims in departments, and 18 U.S.C. § 284, Disqualifications of former officers and employees in matters connected with former duties.⁵⁰ The 1962 Act, among other things, covered the subject of post-government employment activities of former government officers and employees in one new section, 18 U.S.C. 207.⁵¹ In creating section 207, the Act repealed both 5 U.S.C. § 99 and 18 U.S.C. § 284.⁵²

This new 18 U.S.C. § 207 contained three subsections.

1. *Subsection (a).*--In addition to replacing the two-

year disqualification (prescribed by the repealed 18 U.S.C. § 284) with a lifetime bar, this subsection also strengthened the law by going beyond claims for money or property to the whole range of matters in which the government had an interest. Basically, subsection (a) permanently barred a former government officer or employee from *acting* (emphasis added) as an attorney or agent for someone else in any matter in which the United States was a party or was interested and in which he or she participated personally and substantially in a governmental capacity.⁵³

2. *Subsection (b).*--This subsection barred a former agency employee, for one year after leaving government employment, from *appearing personally* (emphasis added) before a court, department or agency as an attorney or agent for another person in connection with a matter in which the government had an interest and which came within the employee's area of official responsibility during his or her last year of such responsibility.⁵⁴ Thus, this subsection satisfied Congressional concerns of harm to the government when a supervisory employee terminated his or her connection with the government one day and came back the next day "seeking an advantage for a private interest in the very area where he [or she] had just had supervisory functions."⁵⁵

3. *Subsection (c)*.--Unlike subsections (a) and (b), which addressed the post-government activities of former employees, subsection (c) covered those situations where a person outside the government could benefit from the improper actions of a partner currently employed with the government. It prohibited the partner of a government employee from acting as an attorney or agent for someone else in all matters in which that government employee was currently participating, or had participated, personally and substantially for the government or which came under his or her official responsibility.⁵⁶

A close reading shows that this 1962 version of section 207 did not prohibit former employees from communicating with their former agencies in ways not involving appearances.⁵⁷ Not surprisingly, outside interests frequently hire former government employees because of their special knowledge and skills regarding their former agencies. Congress continued to worry that the information, influence, and access acquired by these former government employees during their government employment would provide an unfair and improper advantage to the outside interests that hired them.⁵⁸ Congress had found that public confidence in Government had been "weakened by a widespread conviction that federal officials [were using] public office for personal gain, particularly after they [left] government service. There is a sense that a 'revolving door' exists between industry and government"⁵⁹ Congress further noted "a deep public

uneasiness with officials who switch sides - who become advocates and advisors to the outside interests they previously supervised as government employees."⁶⁰

C. Let There be a Firmament in the Midst of the Waters and Let it Separate the Waters

Congress was not alone in its concerns about the ethics of former government employees. One of President Jimmy Carter's campaign promises to the American people was to ensure that the federal government remained devoted exclusively to the public interest. President Carter wanted to "strengthen existing restrictions on the revolving door between government and private industry"⁶¹ by "broadening the scope of the existing prohibition [18 U.S.C. § 207(a)-(b)] on appearances by former government officials before their former agency of employment."⁶² He also wanted to revise substantially subsection (c).⁶³

As a result of these Congressional and Presidential concerns, Congress enacted the Ethics in Government Act of 1978.⁶⁴ This Act revised 18 U.S.C. § 207 by further restricting the activities in which a former executive branch official could become involved after terminating his or her government employment. This Act's objectives were to prohibit a former officer or employee from: (1) exercising undue influence over former colleagues still in office with respect to matters pending before his or her former agency; and, (2) using information

gained during his or her government employment for his or her own personal, or a private client's, benefit.⁶⁵ As stated in an informal advisory letter from the Office of Government Ethics (OGE):⁶⁶

The harm to the Government is not simply that a former employee might have been able to assist his or her new employer in a matter before leaving Government. The harm also includes the use or the apparent use of inside information gained about competitors of the new employer who were parties to a matter prior to the new employer's expressed interest. Protection from this harm is necessary to the preservation of the integrity of the Government's contracting process.⁶⁷

Congress intended the 1978 version of section 207 to be the new standard bearer for proper ethical conduct by former government officials by further restricting their post-government employment actions.

1. *Subsection (a)*.--This subsection imposed a *lifetime ban* (emphasis added) on former officers and employees from aiding, assisting or representing anyone other than the United States in matters involving specific parties in which they were personally and substantially involved while employed in the government.⁶⁸

2. *Subsection (b).*--This subsection prohibited former officers and employees, for a period of *two years* (emphasis added) following their government employment, from *appearing before or communicating with* (emphasis added) any agency or court on any matter involving specific parties which came within their official responsibility during their last year of government employment.⁶⁹ ,

3. *Subsection (c).*--This subsection prohibited certain former high-ranking officers and employees, for a period of *one year* (emphasis added) after their government employment terminated, from having any contact with their former agency on any matter then pending before such agency, even if the former employee was not personally involved in the matter as a government employee.⁷⁰

In addition to broadening the scope of the lobbying restrictions in section 207, Congress had discovered another flaw that needed correction: the 1962 version of section 207 contained only criminal sanctions.⁷¹ There had been a noticeable lack of criminal prosecutions under section 207 that Congress believed was due to the Justice Department's reluctance to bring a criminal indictment against a former high level officer or employee.⁷² In Congress' opinion, this reluctance to prosecute essentially rendered the statute unenforceable.

Congress accordingly included in the Ethics in Government Act of 1978 an "administrative mechanism" that permitted agencies to determine violations of section 207 and impose a meaningful penalty on the violator.⁷³ Basically, Title V of the Act permitted agencies to bar a violator from practice or contact before his or her former agency for up to 5 years.⁷⁴

D. Let the Waters be Gathered Together and Let the Dry Land Appear

A more detailed history of the Ethics in Government Act of 1978 is beyond the scope of this paper and has been covered previously elsewhere.⁷⁵ Nevertheless, it is important to note that in passing the 1978 Act, Congress stated that it had found "too much ambiguity, confusion, inconsistency, and obscurity" in the existing conflict of interest laws. Congress, therefore, was "especially conscious of the matter of clarity of language and terminology" in passing the statutory revisions comprising the Act.⁷⁶ Unfortunately, the language Congress used in certain parts of the 1978 version of section 207 was not as clear and unambiguous as it intended, as will be seen next.

In its entirety, section 207 attempts to prevent even the appearance of the use of public office for private or personal gain. As noted previously, Congress used the 1978 Act to revise subsection (c) based on President Carter's recommendation to strengthen then existing revolving door restrictions. The

revised subsection (c) made it unlawful for certain high-ranking government officials, within one year after their government employment ceased, to "knowingly" appear before the government agency in which they were previously employed, or to communicate with such agency "with the intent to influence" former colleagues, on behalf of someone other than the United States in connection with any particular matter pending before the agency or in which such agency had a "direct and substantial interest."⁷⁷

On July 16, 1987, a grand jury indicted Franklyn C. Nofziger on four counts alleging lobbying activities in violation of subsection 207(c).⁷⁸ Mr. Nofziger had served as Assistant to the President for Political Affairs for President Ronald Reagan from January 1981 to January 1982. Trial began on January 11, 1988, and on February 11 the jury found Mr. Nofziger guilty on three of the counts.⁷⁹

The first count involved a letter from Mr. Nofziger to Edwin Meese III, then Counselor to the President, urging White House support of one of Mr. Nofziger's clients in its efforts to secure a contract from the Army to manufacture small engines. Mr. Nofziger's letter informed Mr. Meese that his client was "having some problems with the Army" and advised Mr. Meese that awarding the contract to his client, who was located in the Bronx, would promote President Reagan's well-publicized commitment to

revitalizing the South Bronx.⁸⁰ The second count involved Mr. Nofziger's use of his influence in urging James E. Jenkins, then Deputy Counselor to the President, to support another Nofziger client in its efforts to secure the use of civilian crews on noncombat Navy vessels. Mr. Nofziger knew President Reagan had promised during his 1988 presidential election campaign to implement such a program.⁸¹ The third count involved Mr. Nofziger's attempts on behalf of another client to influence the White House to support funding for the purchase of his client's military aircraft. Congress had not authorized funding for such purchases, but Mr. Nofziger knew of President Reagan's interest in the matter due to a memorandum the President had sent to the Secretary of Defense, urging him to encourage export sales of that same aircraft.⁸²

On April 8, 1988, Mr. Nofziger was sentenced to \$30,000 in fines and consecutive terms of imprisonment of two to eight months on each of the three counts. The district court stayed execution of Mr. Nofziger's sentence pending his appeal.⁸³

E. Let There be Lights in the Heavens to Give Light upon the Earth

On June 27, 1989, by a divided panel, the District of Columbia Circuit overturned Mr. Nofziger's conviction. The majority found that 18 U.S.C. § 207(c) was ambiguous as to its mens rea requirements.⁸⁴ Indeed, Judge Thomas A. Flannery, the

presiding judge in Mr. Nofziger's trial, recognized this ambiguity and stated: "[T]he big problem with this case is that we are dealing with a statute that is hardly a model of clarity."⁸⁵

On appeal, the Circuit Court found it necessary to determine which parts of subsection (c) were modified by the adverb "knowingly:" the appearance clause alone ("knowingly acts as agent or attorney for, or otherwise represents . . . in any appearance before"), and the communication clause ("or, with the intent to influence, makes any . . . communication . . . to").⁸⁶ The government argued that it did not prove the knowledge element at trial because "knowingly" applied only to the appearance clause and Mr. Nofziger was charged with violating the communication clause. Mr. Nofziger naturally argued that "knowingly" modified the entire sentence, both the appearance and communication clauses. This would require the government to prove, before Mr. Nofziger could be found guilty, that he knew at the time he communicated with the White House that the subjects of his communications were then pending before, or of "direct and substantial interest" to, the White House.⁸⁷ This the government failed to prove. The appellate court, for its part, noted that the 1978 revisions had stranded the mens rea "knowingly" in a "grammatical no man's land in which it is uncertain whether it applies to both" the appearance and communication offenses, "or just the appearance offense."⁸⁸

Unfortunately, 18 U.S.C. 207 has no common law predecessor.⁸⁹ Accordingly, the courts, and agencies charged with developing regulations implementing the law, were left to interpret and apply section 207 as written by Congress according to the "plain and ordinary meaning of its words."⁹⁰ After analyzing the legislative history of subsection (c) and finding the congressional intent unclear, the D.C. Circuit, in a two-to-one decision, adopted Mr. Nofziger's narrow interpretation of subsection (c) and overturned his three convictions.⁹¹ The majority found that the statute's mens rea required knowledge of each element denominated in the offense, not just the appearance clause. The majority's reasoning followed the well-established rule that presumes a statute's mens rea requirement should apply to every element of the offense in the absence of a clear legislative intent to the contrary.⁹² The majority further noted that "[i]f the government's interpretation . . . were correct, a prudent man would avoid even permissible lobbying of his former agency within one year of his departure because the existence of an unsuspected direct and substantial agency interest could convert what he believed to be a permissible communication into a felony."⁹³

This summary of Mr. Nofziger's case is intentionally brief in that the Nofziger district and circuit court opinions have

already been superbly analyzed in great depth by other authors.⁹⁴

F. Let the Waters Bring Forth Creatures and Great Sea Monsters

Subsection 207(c)'s ambiguous mens rea requirement was not a new phenomenon to Congress. The Senate Judiciary Committee recognized in 1980⁹⁵ that different courts could require "different states of mind for the same elements of the same offenses" because Title 18 gave no "explicit direction to judges, jurors, lawyers, or citizens on how to determine the mens rea requirements, if any, for each element of offenses defined in it."⁹⁶

Congress reacted to the D.C. Circuit's decision in *Nofziger* with unusual speed. In November of 1989, Congress amended subsection 207(c) when it enacted the Ethics Reform Act of 1989.⁹⁷ This Reform Act, which affected more than subsection 207(c), became "the first comprehensive reform of ethics laws in more than a decade."⁹⁸ Of interest here, though, are only the changes the Reform Act made to subsection 207(c).

This new subsection (c), which remains in effect today, focuses less on the role of the agency being lobbied by the former government employee and more on the goal or purpose of the person lobbying.⁹⁹ Effective January 1, 1991, subsection (c) eliminated the requirement for the prohibited contact (i.e., appearance or communication) to be in connection with a matter

"pending before such department or agency or in which such department or agency has a direct and substantial interest."¹⁰⁰ Subsection (c) now requires only that the prohibited contact be "in connection with any matter on which [the former employee] seeks official action."¹⁰¹

Subsection (c)(1)--which revised former subsections (c)(1) - (3)--currently reads, in pertinent part:

[A]ny person who is an officer or employee . . . of the executive branch . . . who is referred to in paragraph (2) [referring to certain former senior personnel], and who, within 1 year after the termination of his or her service or employment . . . *knowingly makes, with the intent to influence, any communication to or appearance before* (emphasis added) any officer or employee of the department or agency in which such person served within 1 year before such termination, on behalf of any other person (except the United States), in connection with any matter on which such person seeks official action by any officer or employee of such department or agency, shall be punished as provided in section 216 of this title.¹⁰²

In addition to changing the focus of the lobbying restriction, subsection (c) reduced the burden of proof imposed

by the D.C. Circuit court on the government by revising the mens rea requirement that caused the appellate court so much trouble in *United States v. Nofziger*. Congress sought to ensure that its intent could not be misinterpreted again. Therefore, Congress incorporated clarifying language in subsection 207(c)(1) to make two things clear: (1) that the terms "knowingly" and "with intent to influence" apply to both the appearance offense and the communication offense¹⁰³, and (2) that there is no requirement that the former senior employee know that the particular matter for which he or she is now lobbying is pending before, or is a matter of direct and substantial interest to, his or her former agency.¹⁰⁴ Senator Carl M. Levin (D-Mich), a co-sponsor of the bill resulting in the Ethics Reform Act of 1989, specifically noted that the D.C. Circuit court's reversal of Mr. Nofziger's convictions did not reflect congressional intent.¹⁰⁵ Although there is very little legislative history explaining the Reform Act's specific changes to subsection 207(c),¹⁰⁶ Senator Levin's comments regarding the Reform Act make congressional intent on this matter quite clear:

One matter we have addressed . . . has to do with the knowing standard. In the recently decided case involving former Presidential aide Lyn Nofziger, the court of appeals held that under the current law the word "knowing" modified all the elements of the offense including the provision that the particular matter was

pending before the subject department or agency or that the agency had a direct and substantial interest in the particular matter. That judicial interpretation does not reflect congressional intent. We correct that misinterpretation in this bill by including a knowing standard only for the act of making the communication with the intent to influence and state that the offense is committed if the former employee seeks official action by an agency or department employee. There is no requirement, here, that the former employee know that the particular matter on which he or she is lobbying was a matter of interest or was pending before the subject agency or department. Thus, we are able to set the record straight on this matter.¹⁰⁷

G. Let the Earth Bring Forth Creeping Things and Beasts

An intriguing point is that subsection 207(c)'s mens rea requirement still may be ambiguous. Two authors have postulated that Congress, "[i]n its attempt to 'set the record straight,' [has] instead succeeded in enacting a statute that is as ambiguous as the one it replaced."¹⁰⁸ They argue that subsection (c) is both syntactically and semantically ambiguous.¹⁰⁹ According to their analysis, subsection (c) is syntactically ambiguous because the reader is uncertain how far down the sentence "knowingly" travels; in other words, "[a]n interpretive problem arises because the language of the statute does not

specify if the prosecution must prove that the former employee knew that the subject of the communication involved official action."¹¹⁰ They argue further that the statute is semantically ambiguous due to the punishment provisions found in 18 U.S.C. § 216. Section 216 establishes misdemeanor penalties for "engag[ing] in the conduct constituting the offense," and felony penalties for "willfully engag[ing] in the conduct constituting the offense."¹¹¹ These authors point out that "[t]he state of mind term 'willfully' is semantically ambiguous because courts have interpreted it as meaning either a purpose to break the law or simply knowledge of one's conduct."¹¹² They conclude with a detailed step-by-step analysis of how to resolve this "gordian knot" of ambiguities.¹¹³

Whether the mens rea requirement for subsection 207(c) remains ambiguous has yet to be tested in court, as there have been no prosecutions under subsection (c) since it was revised by the Ethics Reform Act of 1989.¹¹⁴

H. Be Fruitful and Multiply, and Fill the Earth and Subdue It

Subsections 207(a)-(b) of the Ethics in Government Act of 1978 were also amended by the Ethics Reform Act of 1989. They became subsections 207(a)(1)-(2); however, unlike revised subsection (c), they retained the "direct and substantial interest" language that troubled the appellate court in *United States v. Nofziger*. More specifically:

1. *Subsection (a)(1).*--The 1978 version of subsection (a) was amended and became subsection (a)(1). It continued the lifetime ban on former officers and employees communicating with, or appearing before, a United States employee, on behalf of someone else, regarding particular matters in which the individual participated as a government employee and in which the United States is a party or has a direct and substantial interest.¹¹⁵

2. *Subsection (a)(2).*--The 1978 version of subsection (b) was amended and became subsection (a)(2). It continued the two-year representational ban regarding particular matters that were pending under the former officer's or employee's official responsibility during his or her last year of government employment, and in which the United States is a party or has a direct and substantial interest.¹¹⁶

Undoubtedly with a desire for both consistency and clarity, Congress chose to clothe amended subsections (a)(1)-(2) with mens rea language mirroring amended subsection (c), thereby making it clear that the terms "knowingly" and "with intent to influence" clearly apply to both the appearance and the communication offense.¹¹⁷ Subsection (c), however, does not require that the former senior employee know that the particular matter for which

he or she is now lobbying is pending before, or is a matter of direct and substantial interest to, his or her former agency.

The knowledge requirement under subsection (a) should be crystal clear for two additional reasons. First, because subsection (a)(1) applies to matters "in which the person participated personally and substantially" as a government employee, the former employee's knowledge in this situation can easily be inferred from his or her close association with the subject.¹¹⁸ Second, because subsection (a)(2) applies to matters in "which [a] person knows or reasonably should know [were] actually pending under his or her official responsibility" during his or her last year of government employment, the former employee's knowledge in this situation is not only direct but also personal.¹¹⁹

Also noteworthy is that subsection (a), as amended, continues to apply, as did the 1978 version of subsections (a)-(b), to all former executive branch employees, whereas subsection (c) is limited in application to certain former senior officials.¹²⁰

I. But the Work Was not Finished and There Was No Rest

President Bill Clinton entered the post-government revolving door arena immediately after assuming the presidency on January 20, 1993. Like Presidents Kennedy and Carter, President Clinton

made post-government lobbying an important issue in the presidential campaign. Indeed, his first Executive Order, issued on January 20, 1993, imposed new ethics rules on "senior appointees" in the White House.¹²¹

The new rules extend to five years the existing one-year ban on lobbying one's own former agency.¹²² It also extends the scope by prohibiting former senior appointees in the Executive Office of the President (EOP), also for five years after their government employment terminates, from lobbying any officer or employee of any other executive agency "with respect to which [he or she] had personal and substantial responsibility as a senior appointee in the EOP."¹²³ The new rules ban the same senior officials for life from representing foreign governments, but not foreign corporations.¹²⁴

To date, President Clinton has not indicated that he will propose codifying these new rules, or expand their application to all executive branch officers and employees. To the contrary, transition officials noted when these new rules were initially proposed for senior White House appointees that President Clinton would exempt career civil service personnel, foreign service officers, and uniformed military personnel largely because they are career government employees for which "there is no justification for going beyond the existing law."¹²⁵ According to these officials, the new rules affect high-ranking appointees who

"could leave government and return to throw their weight around their former agencies," but not lower-level staff personnel "who would have considerable knowledge, but much less influence, to peddle."¹²⁶

J. The Forbidden Fruit - 18 U.S.C. § 207 Today

1. *Generally.*--For DOD officials, as well as all executive branch officers and employees, Section 207 now provides a comprehensive series of restrictions on post-government employment representational activities that relate directly to both the level and nature of the former DOD official's government service, and to the particular matters on which he or she worked as a DOD official. These representational restrictions are triggered only if the former DOD official participated personally and substantially in a particular matter involving specific parties, or if he or she had official responsibility for the matter while employed by the government.

Furthermore, the restrictions in section 207 do not bar any former government officer or employee from *employment* with any defense contractor or other private or public employer after his or her government employment terminates, regardless of the official's previous government rank.¹²⁷ These restrictions also do not bar post-government *employment* that is connected with a particular matter in which the former government officer or employee was personally and substantially involved while employed

by the government, or which came under the employee's official responsibility during his or her last year of government employment.¹²⁸ These restrictions only bar certain representational activities, not employment itself, even if the employer does business, or is seeking to do business, with the government.¹²⁹

This makes sense when one considers that section 207's purpose is to prevent the favoritism and undue influence that can result when a former officer or employee contacts the government on the same matters with which he or she was connected as a government employee. Consequently, the section 207 restrictions do not apply to a former DOD official who is employed in a technical or management (i.e., non-representational) position that relates to a particular matter in which he or she participated personally and substantially as a government official, or which came under his or her official responsibility during his or her last year of government service.¹³⁰ Ethics counselors commonly refer to these types of positions as "in-house" positions since they do not involve contact by the former official with the government.¹³¹

2. *Today's Restrictions.*--The statutory language for section 207 restrictions was covered briefly in preceding paragraph II.B.1. Let us now examine what this complex language actually means to former DOD officials.

Section 207 establishes rules for government officers and employees regarding those situations that "as a matter of law create conflicts of interest and should operate as a deterrent to those who seek to take advantage of their previous relationship" with a government agency.¹³² The purpose of this section never has been to prevent all communication between a former government employee and his or her former government agency; it was designed to prevent only those types of communication made by the former government employee that seek to improperly influence his or her former agency. For example, exchanging holiday and sympathy cards would not be prohibited "communication," nor would social functions such as cocktail parties so long as these types of communication do not relate to a pending matter of business.¹³³ The restrictions in section 207 also do not bar self-representation.¹³⁴

a. *Subsection 207(a)(1).*¹³⁵ --This subsection is targeted at the former executive branch officer or employee who participates in a matter while employed by the government and then "switches sides" after leaving government service by representing another person on the same matter before the United States. This lifetime restriction begins on the date the individual terminates his or her government service. The restriction does not apply unless the individual, on behalf of someone else, communicates with, or makes an appearance before,

an employee of any United States department, agency, court or court-martial. Further, the restriction does not prohibit communications with or appearances before Members of Congress or their legislative staffs.¹³⁶

This subsection also does not prohibit former officers or employees from providing "behind-the-scenes" assistance relating to the representation of others. For example, even though a former DOD official cannot telephone, sign his or her name to a letter addressed to, or attend a meeting with a government procurement official, it is legally permissible for the former DOD official to tell his or her employer the name of the DOD employee whom he should call, or to whom to write the letter, or with whom to attend the meeting.¹³⁷

The restrictions in this subsection prohibit only those appearances and communications that have the "intent to influence." An "appearance" occurs when the DOD official is physically present before the United States in either a formal or informal setting, and when the circumstances make it clear that the official's attendance is intended to influence the United States.¹³⁸ A "communication" is broader than an appearance and includes correspondence (in writing or through electronic transmission) and telephone calls.¹³⁹ An "intent to influence" the United States occurs when the purpose of the official's appearance or communication is to seek a discretionary government

ruling, benefit, approval, or other action, or to influence the government's action in connection with a matter that the former DOD official "knows involves an appreciable element of dispute concerning the particular government action to be taken."¹⁴⁰

In order for the appearance or communication to be prohibited by subsection (a)(1), it must involve the same particular matter involving a specific party(ies) in which the former officer or employee participated personally and substantially while employed by the government. "Personally" means directly, and includes merely directing a subordinate to participate.¹⁴¹ "Substantially" means that the individual's involvement must be of significance to the matter, or form the basis for a reasonable appearance of significance.¹⁴² "Substantiality" should be based on the importance of the effort, not just on the amount of effort devoted to the matter. While participating in a series of peripheral involvements may be insubstantial, participation in a single critical step may be substantial.¹⁴³ Although the terms "personally" and "substantially" were challenged as unconstitutionally vague in *Nofziger*,¹⁴⁴ the trial court disagreed and found these terms to have a well understood common meaning that was supplemented by the Office of Government Ethics in the Code of Federal Regulations.¹⁴⁵

This subsection's requirement that the prohibition involve a "particular matter involving a specific party" applies both at the time the officer or employee acted in his or her official governmental capacity, and at the time he or she is representing someone else after terminating government service. Whether something constitutes the same particular matter depends on the extent to which the matter involves the same basic facts, the time elapsed, the same or related parties, the same confidential or sensitive information, and the continued existence of an important federal interest.¹⁴⁶ A "particular matter" may continue in whole in another form, or in part, and includes any "judicial or other proceeding, application, request for a ruling or other determination, contract, claim, controversy, investigation, charge, accusation, [or] arrest."¹⁴⁷ Stated another way, it covers "the whole range of matters in which the government has an interest."¹⁴⁸ For the representation on the same particular matter to be prohibited, however, the United States must be a party to or have a direct and substantial interest in that same matter at the time the former officer or employee makes the post-government communication or appearance.¹⁴⁹

The term "involving a specific party or parties" modifies the term "particular matter" and "narrows it to more discrete and isolatable transactions between specific parties."¹⁵⁰ For example, a draft Request for Proposal (RFP) becomes a "particular matter involving a specific party or parties" when potential

contractors for the project are identified.¹⁵¹ "Specific party" is not limited to those entities who were parties or potential parties at the time the former officer or employee participated in the matter as a government employee; nor is it limited to those parties now desiring representation by the former officer or employee. All that is required for this prohibition to apply is that a party (or parties) was identified with the particular matter at the time of the individual's participation as a government employee.¹⁵² Whereas contracts are always particular matters involving specific parties, general rulemakings, legislation, and the formulation of general policy do not normally involve specific parties, even though they may qualify as particular matters.¹⁵³ Therefore, a former Army officer who was personally and substantially involved in making rules for the Army's environmental program could quite possibly--depending on all other facts--appear before or communicate with the Army on behalf of his or her post-government employer regarding the rule's impact on such employer.¹⁵⁴

*b. Subsection 207(a)(2).*¹⁵⁵--The restriction in this subsection is identical to the representational restriction in subsection (a)(1), with two exceptions. First, the prohibition lasts for only two years after the former officer or employee terminates government employment, rather than for life; and, second, the prohibition requires only that he or she have had "official responsibility" for a matter during his or her last

year of government service, rather than personal and substantial participation in the matter.¹⁵⁶ Just as with subsection (a)(1), this subsection prohibits communications to or appearances before an employee of any United States department, agency, court, or court-martial if they are made with the intent to influence. This two-year representation restriction applies to any particular matter involving specific parties that was "actually pending" under the former employee's "official responsibility" at any time within his or her last year of government service.¹⁵⁷

The term "actually pending" means that the matter was in fact referred to or under consideration by persons within the former officer's or employee's area of responsibility, not that it could have been.¹⁵⁸ This two-year restriction applies only if the former officer or employee knows or reasonably should know at the time of his or her representation that the matter was under his or her responsibility during his or her last year of government service.¹⁵⁹ Section 202 of title 18, United States Code, defines "official responsibility" as "the direct administrative or operating authority, whether intermediate or final, and either exercisable alone or with others, and either personally or through subordinates, to approve, disapprove, or otherwise direct Government action."¹⁶⁰ Determining the scope of "official responsibility" involves looking at the employee's job description or delegation of authority, and those areas assigned to him or her by statute, regulation, or executive order.¹⁶¹ For

example, all particular matters that are under consideration in an agency fall within the agency head's official responsibility. If a subordinate employee actually participates in a matter in his or her official capacity, then that particular matter falls within the official responsibility of the intermediate supervisor responsible for the subordinate employee.¹⁶² Even if an employee is able to disqualify him-or herself from further participation in the matter, the matter continues to remain under his or her official responsibility.¹⁶³

c. *Subsection 207(c)*.¹⁶⁴--This subsection applies only to "senior" employees; generally, those personnel whose pay grades fall within the Executive Schedule, Senior Executive Service, or general or flag officer rank in the active duty military.¹⁶⁵ It is a one-year restriction that begins when the employee ceases to be a "senior" employee, not when the employee leaves government service, unless the two conditions occur simultaneously.¹⁶⁶ Like the lifetime restriction in subsection (a)(1), this subsection prohibits appearances before and communications with the United States but does not prohibit "behind-the-scenes" or "in-house" assistance. It is designed to serve as a "cooling off" period in order to prevent any appearance that the former senior employee is able to improperly influence government decisions because of his or her former senior position.¹⁶⁷

On the one hand, subsection (c) is broader than the lifetime restriction in subsection (a)(1) in that there is no requirement that the former senior employee have participated personally and substantially in the matter that is the subject of the post-government appearance or communication. On the other hand, subsection (c) is narrower than the lifetime restriction because it prohibits "only appearances before or communications with employees of a government agency in which the former senior employee served during his or her last year in a senior position, rather than all executive branch agencies.¹⁶⁸ This representational bar applies to any matter, whether or not involving a specific party, in which the former senior employee seeks official action by a current government employee on behalf of someone else.¹⁶⁹

The restrictions in subsections (a) and (c) do not apply to communications made solely for the purpose of furnishing scientific or technological information.¹⁷⁰ This exemption allows the free exchange of such information in order to keep the government informed of the significance of scientific and technological alternatives.

3. *Congressional Intent.*--Today's section 207 (as amended by the Ethics Reform Act of 1989),¹⁷¹ received extensive consideration in two consecutive Congresses. According to Senator Levin, the primary sponsor of the 1989 Reform Act,

section 207 now "constitutes Congress' carefully considered judgment as to the appropriate limitation on contacts between former government officials and their old offices."¹⁷²

In recognition of section 207's government-wide application and its restrictions on post-government employment activities, several Members of Congress listened to and deemed legitimate the complaints of contractors and federal officials that other statutes restricting post-government employment and employment activities unnecessarily duplicated the purpose of section 207. Throughout 1990 and 1991, Congress considered several bills intended to reform procurement integrity laws and streamline the various overlapping statutes affecting the post-government activities of DOD personnel.¹⁷³ A tentative House-Senate compromise bill proposed repealing the DOD-unique selling statutes but expanding the application of post-government employment restrictions to contract administration personnel while eliminating the "majority of working days"¹⁷⁴ language in 10 U.S.C. § 2397b. The DOD General Counsel's office found the latter provisions, introduced late in the negotiations by Rep. Nicholas Mavroules (D-Mass), chairman of the House Armed Services Investigations Subcommittee, unacceptable and voiced its opposition to the bill, which then died.¹⁷⁵

Accordingly, despite two years of extensive efforts by Congress and Executive Branch officials, the post-government

employment provisions of 41 U.S.C. § 423, and the DOD-unique restrictions in 10 U.S.C. § 2397, 18 U.S.C. § 281, and 37 U.S.C. § 801(b), remain in effect.

IV. Reforming the Twilight Zone

..
What thou avoidest suffering thyself seek not to impose on others.¹⁷⁶

A. *Rubik's Cube*

Congress should repeal the three conflict of interest statutes that specifically target DOD officials and their post-government employment with DOD contractors.¹⁷⁷ It also should repeal the executive branch-wide, post-government employment restrictions in 41 U.S.C. § 423(f). Such action would reduce not only the multiple, and oftentimes unintelligible, layers of overlapping restrictions that burden the DOD ethics program, but would eliminate the unfairness of burdening retired DOD officials, and in particular retired military officers, with additional layers of restrictions that do not apply to other executive branch officers and employees.

Currently, a retired regular military officer must steer his or her post-government employment conduct through at least three conflict of interest statutes.¹⁷⁸ This increases to four

statutes¹⁷⁹ if he or she served as a procurement official within the two years prior to retirement. It increases to five statutes¹⁸⁰ if he or she held a certain rank and was involved in any procurement-related activities within the two years prior to retirement.

Former, rather than retired, military officers need only worry about one statute in general.¹⁸¹ This increases to two statutes if they served as a procurement official during their last two years of government service.¹⁸² This again increases to three statutes¹⁸³ if they held a certain rank and were involved in procurement-related activities during their last two years of government service.

Former and retired DOD civilian officers and employees need to steer their post-government employment conduct through at least one statute,¹⁸⁴ which increases to two statutes¹⁸⁵ if they served as a procurement official during their last two years of government service. This increases to three statutes¹⁸⁶ if they held a certain rank and were involved in procurement-related activities during their last two years of government service.

This is somewhat overwhelming to the average DOD official. Post-government employment restrictions should be part of a "fair and understandable system" for both the former DOD official "whose activity must be fairly restricted, and for the public who

rightfully demands tough enforcement of laws."¹⁸⁷ Yet presently, former DOD officials, through the far-reaching restrictions in these laws, are branded as scofflaws or scofflaws-in-waiting before they have even begun to seek post-government employment. The best example of this point is the onerous two-year criminal selling statute, 18 U.S.C. § 281, which prohibits a retired military officer from selling anything to the department from which he or she retired for two years after retiring, regardless of the officer's rank or potential for improper influence, or whether there is any nexus whatsoever between his or her former military duties and what he or she now wishes to sell. This is patently unfair and discriminatory, especially since there is no parallel statute for executive branch officials in the non-uniformed services. Congress needs to rethink the value of this overlapping "deterrence" where there is no nexus to any true conflict of interest. Mr. Joe D. Whitley, Deputy Assistant Attorney General, Department of Justice, addressed this "deterrence" in testimony before a Senate subcommittee on 18 U.S.C. § 207:

[T]his deterrence . . . should be weighed against the best interests of society to encourage its citizens to work in Government and to consider such service an honor and a privilege, and at the same time not to punish them with unreasonable penalties unrelated to

any genuine conflict of interest on their leaving Government for other employment.¹⁸⁸

This author proposes that the philosophy behind section 207, deterrence with fairness, illustrates why the DOD-unique post-government employment statutes should be repealed, and why the post-government employment restrictions in 41 U.S.C. § 423(f) are no longer necessary. Perpetuating the prohibitions in these statutes, which cover similar conduct but apply different restrictions to limited classes of former DOD officials, is at odds with the comprehensive purpose and structure of the Ethics Reform Act of 1989.¹⁸⁹ A quote from the subcommittee hearings previously mentioned exemplifies the quandry in which a former DOD official finds him- or herself upon leaving government service. Although the senators speaking were referring to 18 U.S.C. § 207(c) before it was amended by the Ethics Reform Act of 1989, their comments are apropos to the four statutes at issue:

Sen. Levin. I will be putting this in the record now [referring to a subcommittee flowchart that helps determine who 207(c) applies to].

Sen. Stevens. I read that.

Sen. Levin. Did you? Just to show how complicated this is.

Sen. Stevens. At first I thought they had lost their minds, but then I understood it. [Laughter.]

Sen. Levin. This could almost be right out of Dickens. This is a chart of questions you have to ask yourself when you leave the government as to whether you are covered or not. First of all . . . you've got to ask a question, and if the answer is 'Yes', then you've got to ask another question. If the answer is 'Yes', you've got to ask another question. I mean, that is a Rubik's Cube, and it is not solvable by an awful lot of people.¹⁹⁰

B. Procurement Integrity Post-Government Employment Restrictions

1. *Generally.*--What is commonly referred to as the Procurement Integrity Act, codified at 41 U.S.C. § 423, began as the "procurement integrity" section of the Office of Federal Procurement Policy Reauthorization bill. This bill created Section 27 of the Office of Federal Procurement Policy Act Amendments of 1988.¹⁹¹ Congress passed the Procurement Integrity Act on November 17, 1988. Interestingly, the new restrictions it imposed on post-government employment activities caused many senior and essential federal officials to resign in order to escape the Act's far-reaching grasp. Congress was forced, therefore, to delay its effective date in order to study it at greater length.¹⁹² The Procurement Integrity Act finally became

effective 240 days later¹⁹³, but was suspended within six months of its effective date for a period of one year by the same law that also amended it: the Ethics Reform Act of 1989.¹⁹⁴ Despite its rocky start, the Procurement Integrity Act survived and is currently in effect, even though there have been several administration and congressional efforts to repeal portions of it, including its post-government employment provisions.

The Procurement Integrity Act's purpose, among other things, is to restrict the post-government employment activities of certain former executive branch personnel in order to protect against favoritism in the government's procurement process.¹⁹⁵ Its legislative purpose was to "break the back of the old-boy network" where government personnel gave "information and favors" to contractors in exchange for "promises for future employment opportunities."¹⁹⁶ The Act also provides for contractual, administrative, civil, and criminal penalties for violating its various provisions.¹⁹⁷

Ever since the Procurement Integrity Act's enactment, however, many parties have questioned its necessity.¹⁹⁸ Members of the private sector criticized it as "unnecessary, redundant, and counterproductive, due to the tremendous amount of legislation already in effect governing ethical conduct."¹⁹⁹ A General Accounting Office survey of industry and government acquisition officials opined that Congress "should concentrate on

making the law less complicated and easier to understand rather than . . . adding to the patchwork of existing procurement laws."²⁰⁰ Notwithstanding these criticisms and the argument that Congress should examine the inadequacies of existing laws before passing more laws, Congress enacted the Procurement Integrity Act as a "noble cause."²⁰¹ This occurred despite the findings in 1986 by the President's Blue Ribbon Commission on Defense Management (the Packard Commission) that: "The nation's defense programs lose far more to inefficient procedures than to fraud and dishonesty. The truly costly problems are . . . overcomplicated organization and rigid procedure, not avarice or connivance."²⁰²

2. *Prohibitions.*--Subsection 423(f) of title 41, United States Code, delineates the Act's restrictions on post-government employment. This subsection was the first government-wide²⁰³ revolving door provision targeted specifically at procurement conduct.²⁰⁴ It imposes two basic restrictions on employees who leave Federal service. First, a former procurement official²⁰⁵ may not participate in any manner on behalf of a competing contractor in any negotiations leading to the award or modification of a contract for such procurement. Second, a former procurement official also may not participate personally and substantially on behalf of the competing contractor in the performance of such contract.²⁰⁶ Both restrictions apply for two years²⁰⁷ from the date of the individual's last personal and substantial participation²⁰⁸ in the procurement on behalf of the

government. Subsection 423(f) does not statutorily preclude an individual from being employed by the successful competing contractor; it only excludes employment activities relating to the particular procurement in which the individual participated.²⁰⁹

These two restrictions also apply to an individual's post-government employment activities on behalf of some subcontractors. They generally do not apply if the subcontract amount is less than \$100,000 or if the participation is on behalf of a subcontractor below the second tier.²¹⁰ The restrictions do apply, however, regardless of dollar value and at any tier, if the subcontractor on whose behalf the individual is now participating significantly assisted the prime contractor in negotiating the prime contract. They also apply if the individual, while serving as a government employee, recommended the particular subcontractor to the prime contractor as a source.²¹¹

Although they do not regulate post-government employment conduct, subsections 423(a)(1) and (b)(1) are important to this discussion because they both regulate the conduct of procurement officials who seek post-government employment with competing contractors. Subsection (a)(1)²¹² prohibits competing contractors from discussing, offering or promising future employment to government procurement officials during the conduct of a

procurement. Subsection (b)(1)²¹³ is a mirror image in reverse, in that it prohibits government procurement officials from soliciting or accepting future employment discussions or promises from competing contractors during the conduct of a procurement, absent a proper recusal under subsection (c).²¹⁴ The Procurement Integrity Act does not prohibit employment negotiations between a procurement official and competing contractor once the "conduct of the procurement" has ended; i.e., once the contract has been awarded, modified²¹⁵ or extended.

Interestingly, subsections (a)(1) and (b)(1) can be violated even though there is no evidence of a "nexus to an official act" or intent to influence.²¹⁶ This is because these elements of nexus or intent are not needed for the imposition of administrative or civil remedies as provided for in the statute.

3. *Reform.*--The type of conduct proscribed by subsection 423(f) is also prohibited by criminal statute 18 U.S.C. § 207. As stated previously, the Ethics Reform Act of 1989²¹⁷ amended section 207 in order to establish a "single, comprehensive, post-employment statute applicable to former executive and legislative branch personnel."²¹⁸ As described in detail in preceding paragraph II.B.1., the restriction in subsection 207(a)(1) is a permanent, lifetime bar that prohibits former officers and employees who participated personally and substantially in a "procurement"²¹⁹ (i.e., a particular matter²²⁰) from representing

any other person before a department or agency of the United States in connection with that same procurement or contract.

In March 1989, President George Bush recognized this overlap in proscribed conduct and proposed repealing the post-government employment restrictions in subsection 423(f). A Federal Advisory Commission that he had appointed previously to study a wide-range of ethics issues also recommended that the post-government employment restrictions in the Procurement Integrity Act be repealed.²²¹ The need for such repeal was further illustrated by the announcements of several administration officials that they were leaving government service in order to avoid the Act's post-government employment restrictions. This prompted *Wall Street Journal* editorial writers to note, with respect to the Act: "The problem is clear. Congress amended the Federal Procurement Policy Act to create a huge new list of forbidden activities," which the *Journal* further labeled as the "typically vague products of today's sloppy legislative drafting."²²²

Given that 18 U.S.C. § 207 is a government-wide, post-government employment statute recently fine-tuned in the areas of improper use of influence, there is no need to statutorily impose other post-government employment restrictions on procurement personnel that are more onerous than those imposed on other government employees whose actions may have an equally significant or even greater impact on potential employers.²²³ For

example, the restriction in subsection 423(f) against performing work under a contract unnecessarily prohibits conduct that poses no "potential for abuse of former position."²²⁴ The proscribed conduct does not involve contacts with former government associates, and source selection and bid proposal information lose their importance with respect to a procurement once the contract has been awarded to a particular company. Furthermore, section 207 would prohibit the situation where a former government procurement official, after contract award and during contract performance, contacted his or her former government colleagues in an attempt to persuade them to overlook a contract requirement or to provide/approve an advance payment before completion of the required work. This is because the individual's contacts would constitute prohibited representation on a particular matter in which he or she participated personally and substantially. If such individual had not personally and substantially participated in the procurement (i.e., particular matter), and is not a senior official under subsection 207(c), then the opportunity for improper influence is unlikely.

It also makes no sense to proscribe work under a contract since, after a contract has been awarded, both the contractor and the government have a "shared interest" in the contract's successful performance.²²⁵ The efforts of former government employees devoted to such an endeavor is to the government's best interest.

Although the second restriction in subsection 423(f) against participating in negotiations helps to ensure that the government's procurement-sensitive information remains protected, it is unnecessary since such unauthorized disclosure is already prohibited by subsections 423(b)(3),²²⁶ (d),²²⁷ and (e)(4).²²⁸ Furthermore, administrative,²²⁹ civil²³⁰, criminal²³¹ and contractual²³² penalties are available for violations of such subsections. For example, if a procurement official properly recuses him- or herself from an agency procurement in accordance with subsection 423(c), negotiates for employment with a contractor competing for such procurement, begins employment with that competing contractor, and improperly discloses proprietary or source selection information while the conduct of the procurement remains ongoing, such individual will have violated subsections 423(d) and (e)(4), which authorize administrative remedies and civil penalties.

Accordingly, the two-year restrictions in subsection 423(f) overlap with 18 U.S.C. § 207 and unnecessarily add a second, third, and possibly fourth layer of post-government employment restrictions on former government procurement officials. As stated previously, other 423 subsections remedy the unauthorized disclosure of proprietary or source selection information during the conduct of an agency procurement by former government employees who become employed by competing contractors.

Additionally, proprietary and source selection information lose their importance with respect to a procurement once a contract has been awarded; and it is in the government's interest for the contract to be performed successfully by former government employees who are familiar with the procurement and the government's needs. The multiple restrictions in subsection 423(f) are counterproductive and add unnecessary complexity to an already crowded matrix of restrictions. Moreover, these multiple restrictions come at a high cost to executive branch efforts to administer a meaningful, intelligible, and workable ethics program.²³³

Even Congress was forced to recognize, albeit belatedly, the complexity of the post-government employment restrictions in subsection 423(f). In 1989, Congress amended section 27 by adding a new subsection (k).²³⁴ This new subsection, entitled "Ethics Advice," requires agency ethics officials, upon request, to provide a procurement official with a written "safe harbor" opinion as to whether section 423 precludes such official from engaging in certain activities, such as negotiating for employment, or accepting post-government employment, with a competing contractor.²³⁵

Subsection 423(k) is a patent indictment of congressional failure in the ethics arena. As a matter of principle, ethics, or "safe harbor" opinions, which supposedly serve to protect

requesting officials from sanctions, if they fully disclose their situation and then follow the ethics advice they receive, should be unnecessary. Ethics laws, to include those imposing post-government employment and employment activity restrictions, should be straightforward and clear, thereby enabling employees of reasonable intelligence and experience to understand and comply with them without having to obtain a written legal opinion to "protect" them.²³⁶ These "safe harbor" opinions will be discussed at greater length in paragraph IV.C.3.b., *infra*.

Although the Procurement Integrity Act was prompted in part by the 1988 criminal scandal concerning DOD contracting practices known as Operation Ill-Wind,²³⁷ none of the individuals and companies involved in the Ill-Wind indictments, pleas, and prosecutions had engaged in conduct that would have violated the restrictions in subsection 423(f). This fact is significant. Senator Levin even recognized that "there is no indication that, after leaving Government service, any individual performed work under a contract or assisted a competing contractor in negotiations leading to the award of a contract on which he had participated during Government service."²³⁸

Congress should repeal 41 U.S.C. § 423(f) as an unnecessary and duplicative prohibition on conduct already proscribed by 18 U.S.C. § 207. The fact that section 423(f) currently applies to enlisted members of the uniformed services, while section 207

does not, is not sufficient reason--in and of itself--to retain section 423(f) and all of its baggage. Congress should simply amend section 207 to make it apply to those enlisted members who serve as procurement officials for the government.

*C. Reporting Requirements and Post-Government Employment Bars
Under 10 U.S.C. §§ 2397 - 2397c*

As outlined in preceding paragraph II.B.3., 10 U.S.C. §§ 2397 - 2397c are revolving door statutes targeted specifically at certain DOD officials and their post-government employment with defense contractors. The restrictions on seeking employment imposed by section 2397a, and the post-government employment prohibitions contained in section 2397b, should be repealed because their purposes duplicate the revolving door restrictions that already apply to all executive branch officers and employees under 18 U.S.C. §§ 207 and 208(a). The post-government employment reporting requirements contained in sections 2397 and 2397c should also be repealed because they impose unnecessary and administratively difficult procedural requirements on the DOD ethics program that do not contribute positively to enforcing the post-government employment prohibitions in section 2397b.²³⁹

1. Reporting Requirements in Sections 2397 and 2397c

a. Generally.--Experience seems to indicate that the public has always been concerned about the potential for DOD officials to use improperly their official positions to curry

favor with defense contractors in order to secure potential future employment. DOD officials, especially career military officers, often leave government service well prepared for business. They "know how to work in the close quarters of a corporate environment and talk in terms of either strategy or tactics against the 'enemy,' their former employer, or their customers as the case may be."²⁴⁰ Accordingly, Congress imposed reporting requirements on certain former DOD officials (section 2397) and major defense contractors (section 2397c).

The reporting requirements imposed on former DOD officials began in 1969 and were initially codified at 50 U.S.C. § 1436.²⁴¹ These reporting requirements were later amended and became 10 U.S.C. § 2397.²⁴² Today, section 2397 requires former DOD officials (O-4 and GS-13 and above) to file reports if they are employed by a major defense contractor at an annual pay rate of at least \$25,000 within two years after leaving the DOD.²⁴³ These reports must include information: (1) describing the person's current duties; (2) describing his or her former duties while employed by DOD; (3) concerning the extent to which his or her former official DOD duties required him or her to perform work for that particular defense contractor; and, (4) regarding the nature of any disqualification actions taken during his or her last two years of government service.²⁴⁴

The reporting requirements imposed on major defense contractors (here, those awarded one or more DOD contracts aggregating at least \$ 10 million in the preceding fiscal year²⁴⁵) began with the Defense Acquisition Improvement Act of 1986, which added a new section 2397c.²⁴⁶ Section 2397c, a corollary to section 2397, requires major defense contractors to submit annual reports to DOD identifying former DOD officials who received compensation from the contractor within two years after leaving the DOD.²⁴⁷

b. Reform.--These two statutes serve only to encumber the DOD ethics program by singling out certain DOD officials and defense contractors with requirements to file reports that are not imposed on officials and contractors of other executive branch agencies. Such "differential treatment is at odds with Congressional and Administration efforts to provide uniformity in ethical standards that apply throughout the executive branch."²⁴⁸ Even though the reports from both the former DOD officials and contractors are filed with DOD, they have "not proved to be of value" in enforcing any conflict of interest restrictions.²⁴⁹ Interestingly, the only basis for initiating action under either of these two sections has been for failure to file the reports themselves, rather than for violating any other restriction.²⁵⁰

Additionally, the volume of reports that DOD--and the headquarters of each military department--receives, analyzes, and

seeks clarification on because of faulty or unclear information creates an unnecessary administrative burden that is time- and resource-intensive without any sort of positive payoff. In 1990, the General Accounting Office estimated that compliance by former DOD officials with the filing requirements imposed by section 2397 was as low as 30%.²⁵¹ This low compliance rate required DOD and military department ethics counselors to set aside their primary duties while they attempted to contact thousands of non-filers.²⁵² Thus, the official duty time and personnel efforts spent on managing these reports is a major commitment of resources. Ethics counselors could employ these resources more productively by using this time and effort to provide ethics advice and training. The justification to repeal this reporting requirement becomes more persuasive in light of the fact that the reports have not proven themselves to be of any value in the administration of DOD's ethics program.²⁵³

Recently, Congress has questioned the continuing need for these reports. A staff analysis prepared for the House Armed Services Subcommittee on Investigations, chaired by Rep. Nicholas Mavroules (D-Mass), recognized that the "purpose of the reporting requirement is not clear;" and that since those not complying with the requirements are not likely to file accurate reports or to file reports at all, "the reports are really of no value" without a costly administrative system for follow-up.²⁵⁴

The reporting requirements imposed by sections 2397 and 2397c provide no benefit and serve only to administratively burden the DOD ethics program. Consequently, Congress should repeal them.

2. *Requirements Relating to Contacts Under Section 2397a*

a. *Generally.*--Section 2397a²⁵⁵ applies to certain DOD officials (O-4 and GS-11 and above²⁵⁶) who have participated in a procurement function²⁵⁷ in connection with a contract awarded by DOD. These officials must report any contacts they make-- regarding future employment opportunities--to the defense contractor who was awarded the contract.²⁵⁸ These DOD officials must also report any contacts such defense contractor makes with them regarding future employment opportunities.²⁵⁹ The report, which must be made to the official's supervisor and designated agency ethics official, must include the date of each contact and a brief discussion of the contact's substance.²⁶⁰ A one-time contact that the DOD official terminates immediately requires neither disqualification²⁶¹ nor a report.²⁶²

If the DOD official fails to report other such contacts promptly or to disqualify him- or herself, if appropriate, he or she is subject to administrative penalties and, after leaving government service, a ten-year ban on employment with the defense contractor involved in the contact.²⁶³

b. *Reform.*--The restrictions on seeking employment imposed by section 2397a are similar in their application to the restrictions on seeking employment that apply to all executive branch personnel under 18 U.S.C. § 208, Acts Affecting a Personal Financial Interest.²⁶⁴ As such, section 2397a is duplicative and subjects a selected class of executive branch officers and employees to unnecessary procedural requirements that are intended to ensure, as does section 208, that these very officials do not improperly use their government positions to further the interests of a potential employer.²⁶⁵

Section 208 of title 18, United States Code, already requires such DOD officials to disqualify themselves under what are essentially the same conditions. In other words, a DOD official is prohibited from participating in his or her official capacity in any matter that involves an entity with which he or she is negotiating, discussing, or has an arrangement regarding future employment.²⁶⁶ The practicalities of this prohibition mean that the official must notify his or her supervisor of the situation and request disqualification if the official's duties require him or her to take actions affecting his or her potential employer, but the official desires to negotiate for prospective employment. The supervisor must either ensure the official disqualifies him- or herself and ceases all participation in such matters, or make a determination that the official's "interest" in his or her prospective employer is not so substantial as to be

deemed likely to affect the integrity of the official's duties.²⁶⁷ Furthermore, Congress intended for the 1989 amendments to 18 U.S.C. § 208 to make that statute the government-wide standard for negotiating for employment.²⁶⁸

Given the elaborated restrictions and procedures in 18 U.S.C. § 208, section 2397a of title 10 merely adds the procedural requirement that the official give written notice of the contact and file a written disqualification statement, if appropriate. The official must comply with these section 2397a procedures even if he or she no longer performs official duties that could affect a prospective employer. In essence, section 2397a requires affirmative action by a DOD official who already is recused, *de facto*, from the performance of procurement functions relating to the contracts of that particular defense contractor.²⁶⁹ Accordingly, the bureaucratic procedural requirements in section 2397a constitute an example of egregious overkill for no valid purpose and impose a labyrinthine network of confusing and overlapping administrative requirements on an already over-burdened DOD ethics program.

For the sake of uniformity and because it is discriminatory to subject only DOD procurement personnel to an additional layer of overlapping procedural requirements and penalties that differ from those that apply to other executive branch officers and employees, section 2397a should be repealed.

3. *Prohibitions on Employment by Defense Contractors Under Section 2397b*

a. *Generally.*--None of the revolving door and conflict of interest statutes enacted prior to or after Section 2397b prohibit a former government official from accepting employment with a defense contractor. Instead, these statutes restrict former government officials from performing certain representation or selling activities for their employer. Section 2397b, however, was the first, and so far the only, statute to prohibit certain DOD officials from accepting compensation from (i.e., accepting employment with) certain defense contractors.

Section 2397b came about through a somewhat circuitous route. First, the Defense Authorization Act for 1986 prohibited presidential appointees from accepting, for a two-year period, post-government employment with any defense contractor with whom they acted as a primary government representative in the negotiation or settlement of a government contract.²⁷⁰ There was considerable confusion as to whether the term "presidential appointees" covered all officers in the military as well as civilian appointees, by virtue of the fact that military officers are also appointed by the President with the advice and consent of the Senate.²⁷¹ Because this issue remained unresolved, and because of congressional uncertainty regarding the impact of that two-year ban on the ability of DOD to attract and retain

qualified officials to serve in key acquisition assignments, Congress repealed this provision.²⁷²

In 1986, Congress created a new section 2397b in chapter 141 of title 10, United States Code.²⁷³ This new section resulted from four revolving-door bills introduced in the 99th Congress.²⁷⁴ All of the bills would have applied to procurement personnel government-wide, not just to DOD personnel. Unfortunately, Senator Levin narrowed his bill²⁷⁵ to apply to DOD personnel only.²⁷⁶ Senator Levin chaired the Senate Armed Services Committee, which agreed to his bill's language regarding the revolving door between DOD procurement officials and private industry.²⁷⁷ This occurred despite then Deputy Defense Secretary William H. Taft's testimony in a hearing before the Senate Armed Services Defense Acquisition Policy Subcommittee in 1985. Secretary Taft testified that there was no need to tighten current statutory restrictions on post-government employment of contracting personnel, and that the conflict of interest problem was more apparent than real. He further noted that:

We have not seen evidence . . . that DOD officers or employees relax contractor requirements in order to curry favor and gain future employment. We doubt that this is a common practice or a substantial problem. On the contrary, I believe a contractor is more likely to hire a departing DOD official who has aggressively

represented the government's interests. . . . [T]he current law works well to address actual conflicts of interest.²⁷⁸

Secretary Taft also opined that current post-government employment restrictions caused problems for DOD in its efforts to recruit persons from industry to fill certain positions, even though he acknowledged that the "appearance" of a conflict of interest in the minds of some might undermine public confidence in DOD's program.²⁷⁹ He requested that Congress--if it insisted on tightening the law to address concerns about improper appearances--do so with a "narrowly crafted" limitation rather than one that would severely impose on employment opportunities for former government employees.²⁸⁰

Then-subcommittee Chairman Dan Quayle (R-Ind) agreed with Secretary Taft that sweeping legislation on this issue would be "counterproductive," and noted that he was searching for a compromise that would ensure against abuse but still remain reasonable.²⁸¹ Subcommittee member Alan Dixon (D-Ill) also agreed that it would be unwise to "make appearance a crime."²⁸²

Several months later the House Judiciary subcommittee held hearings on another similar bill that had been introduced the previous year by Representative Charles Bennett (D-Fla).²⁸³ The bill prohibited DOD employees who had "significant

responsibilities for a procurement function" with respect to a contractor--during the two-year period prior to their leaving their agency--from working for that contractor for two years after leaving DOD.²⁸⁴ The bill drew heavy criticism from most of the witnesses who testified at the two-day hearing. Basically, their testimony questioned the need for the bill since there was, first, a lack of any documentation showing such a need and, second, a lack of precision in the bill's language as to whom the two-year post-government employment ban would apply.²⁸⁵ Nevertheless, after several more changes to its language, the bill eventually was enacted as 10 U.S.C. § 2397b.²⁸⁶

Today, section 2397b imposes an additional layer of post-government prohibitions on a select class of DOD officers and employees (personnel at or above military O-4 rank or civilian GS-13 level). Basically, it is targeted at contracting officers, program managers, claims settlement officials, and contract administrators or auditors in a contractor's facility.²⁸⁷ These DOD officials are prohibited from accepting compensation valued above \$250 from a company with more than \$10 million in defense contracts if the official, during the two years prior to leaving government, met at least one of two conditions. First, the official must have spent a majority of his or her working days²⁸⁸ performing a procurement function at a site or plant owned by that contractor;²⁸⁹ or, second, such official must have participated personally and substantially, in a manner involving

decisionmaking responsibilities²⁹⁰ through contact with the contractor, regarding procurement functions relating to a major defense system.²⁹¹

b. *Reform.*--As enacted by Congress, section 2397b is intended to prevent the possibility of, as opposed to actual, conflicts of interest in post-government employment. In its application it slays only imaginary or ghost dragons that are not yet real and may not ever materialize. A staff analysis prepared for the House Armed Services Subcommittee on Investigations reported that the two-year ban on employment in section 2397b "is clearly intended to preclude even the appearance that an individual may have acted differently while in the government in the hopes or based on a promise of future employment with" a contractor.²⁹² The analysis recommends that section 2397b be repealed.²⁹³

In its execution, section 2397b overreaches by creating a "conclusive presumption"²⁹⁴ that employment with a defense contractor within two years of leaving government service is a conflict of interest, even if one's work for the defense contractor has no connection whatsoever with one's former government duties or even DOD itself. It is a remedy for a potential, rather than actual, "problem" that is based solely on congressional speculation that the public *might* perceive that

procurement officials *might* curry favor with defense contractors with whom they work in order to secure future employment.

Section 2397b's "remedy" against "appearance" problems is sufficiently addressed in Federal Acquisition Regulation (FAR) 1.602-2, Contracting Officers' Responsibilities.²⁹⁵ This FAR provision requires contracting officers to take actions to preserve the integrity of the procurement process. These responsibilities, therefore, are sufficient authority for procurement officials to disaffirm contracts tainted by actual or apparent conflicts of interest.²⁹⁶ For example, the appearance of an unfair competitive advantage will justify a contracting officer's action to exclude a bidder from receiving the award of a contract.²⁹⁷ Similarly, conduct that compromises the integrity of the competitive process is sufficient to sustain a contract's termination.²⁹⁸ Accordingly, the FAR provides more than adequate protection against "appearance" problems in the procurement process.

Two witnesses at the hearings for what eventually became section 2397b strongly criticized its overreaching nature. Mr. Hugh Witt, representing the Aerospace Industries Association, opposed the measure outright and commented that "[t]his two-year disqualification, without regard to how remote the job may be from DOD's business, is too broad and unfairly stigmatizes DOD personnel."²⁹⁹ Mr. Witt also opined that "[n]o specific

legislation . . . will ever solve" the problem of a handful of people who will always take advantage of a situation to improve their personal reputation or fortune.³⁰⁰ Mr. Witt further objected to the bill's confusing and complex language, noting that it would be difficult to define those DOD officials who would be covered by the measure's language regarding those personnel who had "significant responsibilities for a procurement function."³⁰¹ Mr. David Martin, then Director of the Office of Government Ethics, testified that the bill was "ill-advised" because there was no indication that post-government employment conflicts of interest were a problem.³⁰² Even the subcommittee chairman, Dan Glickman (D-Kan), repeatedly expressed concern about the lack of "hard evidence" to indicate that DOD had a problem with post-government employment conflicts of interest.³⁰³ Representative Glickman was also concerned about the vagueness of the term "significant responsibilities."³⁰⁴

There is another compelling reason to repeal section 2397b. The concepts and definitions it employs are of such complexity that Congress believed it would be wrong to leave government employees and contractors to their own resources to determine whether a particular employment relationship would be statutorily precluded.³⁰⁵ Accordingly, Congress provided a mechanism within the statute that permits DOD officials to request an opinion from their designated agency ethics official as to whether the requesting official may accept post-government employment (i.e.,

accept compensation) from a particular defense contractor.³⁰⁶ The designated agency ethics official is required by law to provide the requesting official with a written opinion within 30 days of receiving the request.³⁰⁷ If the official is told he or she may accept such employment, there is a conclusive presumption (i.e., "safe harbor") that the official will not violate the statute by accepting such employment.³⁰⁸

Although DOD experience has been that section 2397b applies to very few people in actuality,³⁰⁹ the written "safe harbor" opinions it generates impose a significant administrative burden on DOD ethics officials. Defense contractors are naturally aware of the availability of these "safe harbor" opinions and as a matter of practice refuse to hire former DOD officials who have not obtained a written opinion stating that their employment with the defense contractor will not violate the law.³¹⁰ Some defense contractors require the official--before he or she can become an employee of the contractor--to have a written opinion even if the official was never involved in procurement or procurement-related activities. Other defense contractors will not negotiate with a DOD official unless he or she has a written opinion declaring it permissible for him or her to seek employment with, and be employed by, the defense contractor.³¹¹

These opinions are not pro forma. Each must be written by a lawyer and tailored to address the propriety of a specific DOD

official's employment with a specific defense contractor based on the particular procurement duties the DOD official performed for the government.³¹² From April 6, 1987, when section 2397b became effective, through December 1, 1989, when the Ethics Reform Act of 1989 suspended the section,³¹³ DOD prepared approximately 4,400 "safe harbor" opinions under section 2397b³¹⁴ (this figure does not include opinions issued under the "safe harbor" provisions of the Procurement Integrity Act, 41 U.S.C. 423(k)). In only about four percent of the cases were the DOD officials' prospective post-government employment prohibited by the statute.³¹⁵ Unless section 2397b is repealed, therefore, DOD ethics officials--especially those in procurement commands or on major procurement installations--should expect to continue being inundated with requests for written opinions regarding the propriety of post-government employment and employment activities.

DOD ethics counselors are frustrated by the substantial effort, time, and resources expended on these opinions, especially since the vast majority of DOD officials requesting the opinions do not need them because they do not fall within the statute's coverage.³¹⁶ As mentioned in preceding paragraph IV.B.3., it is most unfortunate that the statute is so complex and hard to understand that a written opinion from an ethics counselor is needed to protect a DOD official from unwittingly violating the law. Ethics laws should be straightforward enough to be readily understandable to most employees.

Some Members of Congress have conceded that the overwhelming administrative burden on DOD created by requests for these "safe harbor" opinions was probably "not envisioned" and "would appear to be disproportionate to the purpose it serves."³¹⁷ Congress also recognized that the requirement to provide these written opinions to so many DOD officials has diverted thousands of manhours from ethics training and counseling.³¹⁸

This requirement for written "safe harbor" opinions--when layered on top of all the other DOD-unique and government-wide post-government employment restrictions that DOD personnel must learn and abide by--contributes significantly to DOD's difficulty in providing meaningful and understandable ethics training. Even Congress has recognized that the best that DOD's ethics training can hope to accomplish is to "give employees the impression that employment after Government service has so many pitfalls that they must seek individualized counseling before leaving government."³¹⁹

By attempting to prevent conflicts of interest, section 2397b mirrors in purpose--though certainly not in scope and coverage--the restrictions imposed by 18 U.S.C. § 207. This duplication in purpose, however, is unnecessary, and section 2397b should be repealed. As Congress intended, the Ethics Reform Act of 1989³²⁰ amended 18 U.S.C. § 207 in order to make it

the single, comprehensive, government-wide post-government employment statute. The restrictions section 207 imposes on post-government conduct are sufficient to protect against conflicts of interest while satisfying the public's need for assurances of integrity in the government's procurement programs.

D. Two-Year Selling Restriction Imposed By 18 U.S.C. § 281

1. *Generally.*--The selling and claim prosecution restrictions in 18 U.S.C. § 281 have been in existence for years. In 1948, three title 18 sections imposed selling and claim prosecution restrictions on active and retired officers.³²¹ The first section, 18 U.S.C. § 281, imposed an indefinite selling restriction in a sort of backward way. Section 282 exempted retired military officers from the proscription against officers receiving compensation for services rendered before a United States officer or department if the United States was a party to or interested in the matter. Nevertheless, the section went on to say: "Nothing herein shall be construed to allow any retired officer to represent any person in the sale of anything to the Government through the department³²² in whose service he holds a retired status."³²³ The second section, 18 U.S.C. § 283, prohibited officers from acting as an agent or attorney for prosecuting, or aiding or assisting in the prosecution of, any claim against the United States.³²⁴ The third section, 18 U.S.C. § 284(a), prohibited former officers, for two years after leaving government service, from prosecuting or acting as counsel,

attorney, or agent for prosecuting any claims against the United States involving any subject matter in which the officer was directly connected while employed by the government.³²⁵

In 1962, Congress repealed sections 281 and 283, except as they applied to retired military officers.³²⁶ Congress also repealed section 284(a), but continued its restrictions regarding the post-government employment activities of former officers and employees in a single new section, 18 U.S.C. § 207.³²⁷

Several years later Congress repealed the limited applicability of sections 281 and 283 to retired military officers, and substituted a new section 281.³²⁸ This new section 281 contained the same selling restriction as before, except that it clarified the language by specifically prohibiting a retired military officer from receiving compensation for representing any person in the sale of anything (i.e., goods or services) to the United States through the military department in which the officer was retired. Furthermore, this new section 281 changed the selling prohibition from a permanent ban to a two-year ban, beginning on the date the military officer retired.³²⁹ Section 281 also prohibited--with some changes--the prosecution of claims. Specifically, section 281 prohibited a retired military officer, for two years after release from active duty, from acting as agent or attorney for prosecuting or assisting in the prosecution of any claim against the United States involving (1)

the military department in which the officer was retired, or (2) any subject matter with which the officer was directly connected while on active duty.

At the time this new section 281 was enacted, the Senate and House Judiciary Committees were considering a request from DOD to repeal the previous versions of 18 U.S.C. §§ 281 and 283 in their entirety.³³⁰ DOD's request was based on a desire to treat retired regular officers on the same basis as former civilian employees, retired reserve officers, enlisted military members, and former military personnel (who had not retired) for purposes of applying conflict of interest laws.³³¹ The congressional conferees for the new section 281 conceded that its enactment did not obviate the need for the Judiciary Committees to continue with a comprehensive review of DOD's request.³³²

Today's version of 18 U.S.C. § 281 differs by one word from when it was revised and supplanted by Congress in 1987.³³³ Two points regarding section 281, however, need highlighting. First, the Department of Justice has opined that the restrictions in section 281 do not apply to situations where the retired military officer represents only him- or herself and no other person in selling activities.³³⁴

This distinction is often difficult to make, and each case depends on its facts as to whether the retired military officer

is truly only representing him- or herself and not others as well. For example, a retired military officer would be wise to avoid selling on behalf of an entity in which the retired officer is a co-owner or shareholder.³³⁵ Second, section 281 only restricts sales to the military department from which the military officer is retired. For example, a retired Army officer is not prohibited by section 281 from representing a company in the sale of anything to the Navy or Air Force; he or she is only prohibited from selling to the Army. The reader should note, however, that this retired officer, who is not prohibited by section 281 from selling to the Navy, may run afoul of 37 U.S.C. § 801(b) if he or she sells goods to the Navy. This prohibition is discussed further in paragraph IV.E., *infra*.

2. *Reform.*--Section 281 should be repealed because it has been superseded in purpose by the government-wide, post-government employment restrictions in 18 U.S.C. § 207. Like section 207, section 281 is directed at the improper use of influence by former government officials and, thus, prohibits certain representational selling activities. Section 207, however, establishes a more appropriate scheme of restriction because it relates the bans on post-government representational activities directly to both the level and nature of a former government official's duties while in the government, and to the particular matters on which he or she worked as a government official.³³⁶

As the reader will recall, the prohibitions on representational activities in subsections 207(a)(1) and (2) are triggered only if the former government official participated personally and substantially in a particular matter involving specific parties, or if that matter fell under the individual's official responsibility during his or her last year of government service. The former official's representational activities are limited only with respect to that same particular matter. The sort of nexus that makes this type of representational restriction appropriate and meaningful is lacking in section 281.³³⁷

At a time when most DOD procurement work is conducted by civilians, there is no rational basis for singling out a subclass of retired military officers for more restrictive post-government employment rules regarding sales to the government. No demonstrative purpose is served in prohibiting a retired Army officer with a career in operational line assignments--and no involvement with procurement--from representing a company in the sale of boots to the Army. What fire-breathing dragon does this selling restriction slay? From what demonstrated harm is the government being protected? If, prior to retirement, the Army officer was personally and substantially involved in the Army's procurement of boots, or if that matter came under the officer's official responsibility during his or her last year of service,

the representation restrictions in section 207 will protect the Army against any improper influence. If the same retired officer had nothing whatsoever to do with boots while in the Army other than to wear them, there is no improper influence from which to shield the Army should that retired officer represent someone else in selling boots to the Army.

The only retired military officers who might have any clout based solely on their status as a retired officer, rather than their former involvement in a particular matter, would be general or flag officers. The possibility that these officers might wield such clout through improper influence, however, is preempted by subsection 207(c).³³⁸ This subsection prohibits retired general and flag officers, among others, from attempting to influence the official actions of their former departments for one year after they leave government service.

Out of all the retired officers and employees in the executive branch, it is unfair to burden retired military officers with an absolute criminal selling prohibition that has no nexus to the officers' prior military duties. Section 281 was once suspended for eighteen months while Congress debated bills that attempted to streamline the revolving door ethics laws.³³⁹ Although those bills failed for various reasons,³⁴⁰ Congress should repeal section 281 permanently.

E. *Three-Year Selling Restriction Imposed By 37 U.S.C. § 801(b)*³⁴¹

1. *Generally.*--In 1951, Congress enacted what became 37 U.S.C. § 323, which prohibited payments from any appropriations to any officer on the retired lists of the Regular uniformed services³⁴² if such officer, within two years of retirement, sold, contracted, or negotiated for the sale of supplies or war materials to any agency of the Department of Defense, Coast Guard, Coast and Geodetic Survey (today's National Oceanic and Atmospheric Administration) or Public Health Service.³⁴³ This law was an outgrowth of a similar law found at 10 U.S.C. § 6112. Section 6112 provided for the withholding of retired pay during the period in which a retired officer of the Regular Navy or Regular Marine Corps was engaged, for himself or others, in selling, or contracting or negotiating to sell, naval supplies or war materials to the Department of the Navy.³⁴⁴ In 1953, Congress enacted 5 U.S.C. § 59c, which mirrored, with no language change, 37 U.S.C. § 323.³⁴⁵ Interestingly, Congress left the same restriction in 37 U.S.C. § 323, and the 1958 edition of the United States Code contains the same restriction in titles 5 (section 59c) and 37 (section 323).

In 1962, Congress repealed 5 U.S.C. § 59c but enacted the same selling restriction, with slight language changes, in 37 U.S.C. § 801(c).³⁴⁶ This action was part of a congressional purpose to restate--in comprehensive form without substantive

change--the laws applicable to the pay and allowances of members of the uniformed services, and to eliminate the overlaps and inconsistencies in previously enacted laws in this area.³⁴⁷ That same year, Congress also extended the time period on the selling restriction in section 801(b) from two to three years.³⁴⁸

Various amendments in recent years repealed other subsections of 801, to where subsection (b) now contains the three-year selling restriction.³⁴⁹ Although the language in today's section 801(b) has been changed slightly over the years, the selling restrictions originally imposed have remained the same, except for the change from two to three years.³⁵⁰

Basically, as outlined in preceding paragraph II.B.5., section 801(b) provides for the loss of retired pay to a retired regular officer of the uniformed services if, within three years after the officer's name is placed on the retired list, he or she engages in activities, for him- or herself or others, involving the sale of supplies or war materials to the Army, Navy, Marine Corps, Air Force, Coast Guard, Public Health Service, or National Oceanic and Atmospheric Administration.³⁵¹

No exceptions or qualifications are made in the law. "Selling" is construed very broadly by the Comptroller General to include any phase of the procurement process. Basically, any activity that has as its goal the ultimate consummation of a sale is prohibited selling under the statute.³⁵² Knowledge, intent, or

even lack of good faith are not necessary in order to require withholding of retired pay.³⁵³ Purely social contacts, and contacts that involve no sales activity whatsoever, are both outside the purview of the statute, as are contacts with noncontracting technical specialists if the retired officer occupies a non-sales, executive, or administrative position.³⁵⁴ The phrase "supplies or war materials" is construed to include any article of tangible property purchased by the military departments.³⁵⁵ Selling activities to provide services (e.g., consulting services), therefore, do not fall within the purview of the section 801(b) prohibition against selling supplies or war materials.³⁵⁶

In the event a retired regular officer violates section 801(b), the officer will forfeit his or her retired pay during the period of the prohibited selling activity, and during any ensuing contract, but not longer than three years from the date the officer's name was placed on the retired list.³⁵⁷

In order to determine whether retired regular military officers are engaging in sales activities that should result in the forfeiture of retired pay, DOD requires such officers to file a report with the DOD Finance and Accounting Service within 60 days after his or her name is placed on the retired list.³⁵⁸ This report must be filed regardless of the type of employment, if any, in which such officer is engaged.

2. *Reform.*--At a minimum, the section 801(b) selling restrictions imposed on retired regular DOD officers should be repealed, for the same reasons the author proposed for repealing 18 U.S.C. § 281. Section 801(b) is obsolete, particularly in the military, because it has been superseded in purpose by the government-wide, post-government employment restrictions in 18 U.S.C. § 207. Whereas 18 U.S.C. § 207 is directed at the improper use of influence by former government officials and, thus, prohibits certain representational activities, section 801(b) is directed not only at the improper use of influence and favoritism but also at conduct that tempts such improprieties.³⁵⁹ Section 801(b)'s purpose--the elimination of any danger of favoritism or use of personal influence in the procurement process³⁶⁰--resulted from congressional concerns that contacts by retired regular officers would result in the award of contracts, even if such officers did not participate in the contract negotiations.³⁶¹

Unlike section 801(b), 18 U.S.C. § 207(a) prohibits only those post-government representational activities that directly relate to a particular matter in which the former government official participated, or for which he or she had responsibility, as a government official.³⁶² The former official's post-government representation activities are limited only with

respect to that same particular matter. Section 801(b) has no such nexus requirement.

Section 801(b) goes one step further than 18 U.S.C. § 281, however, in that it is targeted only at retired *regular* officers, rather than all retired officers. The author proposes that there is no longer any rational basis for this distinction in the Department of Defense. In today's military environment, where career paths and promotion and assignment opportunities are similar for active duty reserve and regular officers, there is no justification for concluding that retired regular military officers possess more influence, or are more prone to use and/or seek favoritism, than retired reserve officers. Consequently, there is no longer any need to impose an extra set of restrictions on the post-government selling activities of retired regular military officers.

On the other hand, section 801(b) falls one step short of 18 U.S.C. § 281. Whereas section 281 prohibits the sale of anything (e.g., goods and services), section 801(b) prohibits only the sale of goods but not the sale of services (e.g., consulting services). The author proposes that there is no rational basis for this distinction. If the purpose of section 801(b) is to protect the government's procurement program from improper influence and favoritism, why is it improper for a retired regular officer to use his or her influence to sell boots but not

to sell consulting services? Section 281 avoids this anomaly by prohibiting the sale of anything.

To parallel the example used in preceding paragraph IV.D.2., where is the actual or potential conflict of interest if a retired Regular Army officer--with a career in operational line assignments and no involvement with procurement--desires to sell, for him- or herself or others, boots to the Air Force? Is it fair, much less reasonable, to "punish" by loss of retired pay certain selling activities by a retired regular officer but not the same selling activities by a retired reserve officer? If the retired Regular Army officer was personally and substantially involved in procuring boots for the Air Force while on active duty, or if the matter of procuring boots for the Air Force came under the officer's official responsibility during his or her last year of service, the representation restrictions in section 207 will sufficiently protect the Air Force against improper influence if the officer retires one day and the next day attempts to sell boots to the Air Force.

One might argue that section 801(b) should not be repealed because it prohibits selling for oneself as well as others, whereas 18 U.S.C. § 207 prohibits only the representation of others, not oneself. The author counters with the argument that if Congress believed it proper for retired officers to sell to their former military departments for themselves (i.e., 18 U.S.C.

§ 281, which prohibits only sales on behalf of others, and not oneself), what rational basis is there for prohibiting retired officers from selling to *other* military departments for themselves? Again, these inconsistencies in the post-government selling statutes illustrate the need for their repeal.

The author proposes that, if Congress believes a retired regular Army officer selling boots to the Air Force for him- or herself (regardless of the officer's retired rank or the fact that the officer is selling to a department other than the one from which he or she retired) constitutes an actual, or too great of a potential, conflict of interest, then Congress should expand the application of 18 U.S.C. § 207(c) to include all ranks of retired officers. In testimony before a Senate subcommittee, the former Chief Domestic Policy Advisor to President Jimmy Carter exchanged the following comments with Senator Stevens:

Senator Stevens. I just finished having a conversation this last week with a former member of the Joint Chiefs of Staff, and I was told that the members of the Joint Chiefs of Staff really aren't involved in making decisions on procurement. I don't think the public believes that. . . . I think we ought to have a fairness curtain, one year, I don't care whether you're a typist or you're the President, you should not have

anything to do with the Federal Government if you served in the Federal Government.

Mr. Eizenstat. You mean even below the senior level? . . . [I]f it's outside your own compartment, I really question whether there is going to be undue influence.³⁶³

An additional argument for the proposition that the distinction between retired reserve and retired regular officers for selling purposes is obsolete derives from the Defense Officer Personnel Management Act of 1980 (DOPMA).³⁶⁴ Until DOPMA was enacted, an anomaly had developed in which large numbers of reserve officers could serve 20 years on active duty and qualify for active-duty retirement. The law which permitted this,³⁶⁵ however, provided for different treatment of regulars and reservists, which often resulted in perceived inequities by reserve officers.³⁶⁶ DOPMA was passed in order to eliminate these inequities by permitting an all-regular career military force. Now, officers who become eligible for integration into the regular component of their military department must accept such integration. Those who decline an appointment into their department's regular component upon selection for promotion to O-4 rank are released from active duty.³⁶⁷ As a result of DOPMA, the overwhelming majority of active duty officers above O-4 rank are regular officers.

The repeal of 37 U.S.C. § 801(b) and 18 U.S.C. § 281 would eliminate the unfairness of burdening retired military officers with two additional layers of overlapping post-government selling restrictions--totally unrelated to the officers' prior government duties--that do not apply to other executive branch officers or employees.

V. Conclusion

One man's justice is another's injustice.³⁶⁸

In recent years, defense contractors and DOD officials have criticized the multiplicity of DOD ethics laws as a labyrinthine network of confusing and overlapping requirements. Former DOD officials are subject to upwards of five different post-government employment conflict of interest laws, each of which applies to different subclasses of persons, restricts different activities, and imposes different administrative procedures.

No reason exists to have different standards for executive branch officers and employees as a whole, DOD procurement officials (who differ depending on the particular statute at issue), retired military officers, and retired regular military officers. The net result of the accretion of these five statutes subjects DOD officials to a complex, multi-tiered system of

incomprehensible and seemingly inconsistent statutory restrictions that are counterproductive to an effective and meaningful ethics training and counseling program. It would appear that Congress passed many of these laws without having read or understood their substance and relationship to one another, and it is not clear why, due to the many overlapping restrictions and coverage, Congress did not instead amend 18 U.S.C. § 207. Nevertheless, at the time of their enactment, most of these statutes served as supplements to existing government-wide remedies by creating civil remedies for conduct similar to that prohibited by the criminal conflict of interest statutes.³⁶⁹ With the enactment of the Ethics Reform Act of 1989, however, Congress clarified the conflict of interest provisions in 18 U.S.C. §§ 207 and 208, and created a new class of misdemeanor violations and added civil penalties and injunctive relief for violations of most of the conflict of interest statutes in Chapter 11 of title 18, United States Code.³⁷⁰ This action effectively voided the necessity for the three DOD-unique statutes, as well as the Procurement Integrity Act.

Repeal of these statutes will make the post-government employment conflict of interest restrictions simpler and easier to understand and comply with, without in any way undermining the integrity of the DOD procurement process. Such repeal would also reduce the overdeterrence practiced by many former DOD officials who, despite their best efforts, do not fully understand the

restrictions imposed on them by these laws and, therefore, refrain from permissible lobbying because of their fear of running afoul of the law.

In summary, there are two ways in which DOD officials can attempt to abuse the trust of their public office. First, before leaving government service, they might seek to curry favor with a potential employer by acting in a procurement with less than the impartiality required of government servants. The disqualification requirements imposed by 18 U.S.C. § 208 are an effective check on this type of conduct. Second, after leaving government service, former DOD officials may attempt to take unfair advantage of their former positions to benefit a new employer either by using their influence with former associates, or by revealing or using non-public information acquired as part of their official duties. Section 207 of title 18, United States Code, more than adequately addresses the potential for improper use of influence by banning contacts with their former associates on matters in which former DOD officials were involved.

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1. *The Twilight Zone* was a popular television show in the 1960s. The author of many of the stories in the show, Rod Serling, defined the "twilight zone" as "[a] middle ground between light and shadow, . . . a place between the pit of man's fears and the summit of his knowledge." A typical story would highlight ordinary people who found themselves in another dimension of sight, mind, and sound involving "extraordinary circumstances dealing with problems of their own or fate's making." Carol Serling, *Introduction: Breaching the Barriers*, in *JOURNEYS TO THE TWILIGHT ZONE 7* (Carol Serling ed., 1993).
2. THE FEDERALIST NO. 62, at 317 (James Madison) (Bantam Classic ed., 1982). The author gratefully acknowledges Sharon A. Donaldson for the idea for this quotation; See Sharon A. Donaldson, *Section Six of the Office of Federal Procurement Policy Act Amendments of 1988: A New Ethical Standard in Government Contracting?*, 20 *Cumb. L. Rev.* 421, n. 120 (1989/1990).
3. "All [Army Staff] agencies, field operating agencies, separate activities, installations, and commands authorized a commander in the pay grade of O-7 or above must designate, in writing, one or more officers or civilian employees . . . to be Ethics Counselors for their organization." DEP'T OF ARMY, REG. 600-50, STANDARDS OF CONDUCT FOR DEPARTMENT OF THE ARMY PERSONNEL, para. 2-9a (28 Jan. 1988) [hereinafter AR 600-50]. Parts of AR 600-50

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have been superseded by Standards of Ethical Conduct for Employees of the Executive Branch, 5 C.F.R. § 2635 (1992), which became effective on February 3, 1993. AR 600-50, para. 2-9a, and several other paragraphs as well, will remain in effect at least until the publication of the Department of Defense Joint Ethics Regulation (JER), DOD 5500.7-R. See HQDA (DAJA-SC) Message 291600Z JAN 93, SUBJECT: New Rules Governing the Standards of Ethical Conduct for Army Personnel [hereinafter DA Message].

4. Until July 1991, standards of conduct (ethics) and post-government employment issues pertaining to Army personnel that rose to the Headquarters, Department of the Army (HQDA) level were handled in the Administrative Law Division, Office of The Judge Advocate General (OTJAG), HQDA. Pursuant to Secretary of the Army approval, a new legal office was created to work these issues. It became operational in July 1991 under the name: Standards of Conduct Office, Department of the Army (DA SOCO). SOCO attorneys provide ethics advice, counseling, and training to the HQDA Staff and its field operating agencies, and assist Army ethics counselors world-wide in their counseling and training efforts.

5. Standards of Conduct, 32 C.F.R. § 40.4(a)(3) (1992).

6. 5 C.F.R. § 2635.107(b). These regulations further state that disciplinary action for violating these regulations will not be taken against an employee who "has engaged in conduct in good faith reliance upon the advice of an agency ethics official."

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Id. Although reliance on an ethics counselor's advice will not protect a DOD official from prosecution for violating a criminal statute, these regulations point out that such reliance "is a factor that may be taken into account by the Department of Justice." *Id.*

7. For the sake of completeness in this area, ethics counselors should be alert to these other laws because many of them subject the violator to substantial penalties. These other ethics laws include: 18 U.S.C. § 209, Receiving compensation from a private source for government work; 18 U.S.C. §§ 203 and 205, Acting for an outside interest in certain dealings with the government; 18 U.S.C. § 285, Unauthorized use of documents relating to claims from or by the government; 50 U.S.C. § 783, Unauthorized disclosure of classified information; 18 U.S.C. § 1905, Unauthorized disclosure of confidential information; and U.S. CONST. art. I, § 9, Unauthorized acceptance, by any person holding any office of profit or trust in the federal government, of any present, emolument, office or title, from any king, prince, or foreign state, including all retired military personnel. For an excellent article on the duties of ethics counselors and the dangers inherent in counseling prospective retirees, see Alan K. Hahn, *United States v. Hedges: Pitfalls in Counseling Prospective Retirees Regarding Negotiating for Employment*, ARMY LAW., May 1991, at 16.

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8. BERNARD DE MANDEVILLE, AN INQUIRY INTO THE ORIGIN OF MORAL VIRTUE (1723).
9. STAFF OF SUBCOMM. NO. 5, HOUSE COMM. ON THE JUDICIARY, 85TH CONG., 2D SESS., REPORT ON CONFLICT OF INTEREST LEGISLATION, pts. I and II, at 2 (Comm. Print 1958).
10. 136 CONG. REC. S8522-03, S8544 (daily ed. June 21, 1990).
11. H.R. REP. NO. 748, 87th Cong., 1st Sess. 2 (1961). See also President's Message to Congress Relative to Ethical Conduct in the Government, H.R. DOC. NO. 145, 87th Cong., 1st Sess. (Apr. 27, 1961), reprinted in 1961 U.S.C.C.A.N 1141, 1143.
12. 136 CONG. REC. at S8544.
13. The pertinent part of subsection 207(a)(1) provides:

Any person who is an officer or employee . . . of the executive branch . . . , and who, after the termination of his or her service or employment . . . , knowingly makes, with the intent to influence, any communication to or appearance before (emphasis added) any officer or employee of any department, agency, court, or court-martial . . . , on behalf of any other person (except the United States . . .) in connection with a particular matter -

(A) in which the United States . . . is a party or has a direct and substantial interest,

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(B) in which the person participated personally and substantially as such officer or employee, and

(C) which involved a specific party or specific parties at the time of such participation,

shall be punished as provided in section 216 of this title.

18 U.S.C. § 207(a)(1) (1992).

14. *Id.*

15. The pertinent part of subsection 207(a)(2) provides:

Any person subject to the restrictions contained in paragraph (1) who, within 2 years after the termination of his or her service or employment with the United States . . . , *knowingly makes, with the intent to influence, any communication to or appearance before* (emphasis added) any officer or employee of any department, agency, court, or court-martial . . . , on behalf of any other person (except the United States . . .), in connection with a particular matter -

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(A) in which the United States . . . is a party or has a direct and substantial interest,

(B) which such person knows or reasonably should know was actually pending under his or her official responsibility as such officer or employee within a period of 1 year before the termination of his or her service or employment . . . , and

(C) which involved a specific party or specific parties at the time it was so pending,

shall be punished as provided in section 216 of this title.

18 U.S.C. § 207(a)(2) (1992).

16. The pertinent part of subsection 207(c) provides:

(1) In addition to the restrictions set forth in subsections (a) and (b), any person who is an officer or employee . . . of the executive branch of the United States . . . , who is referred to in paragraph (2), and who, within 1 year after the termination of his or her service or employment as such officer or employee, *knowingly makes, with the intent to influence, any*

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communication to or appearance before (emphasis added) any officer or employee of the department or agency in which such person served within 1 year before such termination, on behalf of any other person (except the United States), in connection with any matter on which such person seeks official action by any officer or employee of such department or agency shall be punished as provided in section 216 of this title.

(2)(A) Paragraph (1) shall apply to a person (other than a person subject to the restrictions of subsection (d))-

(i) employed at a rate of pay specified in or fixed according to subchapter II of chapter 53 of title 5,

(ii) employed in a position which is not referred to in clause (i) and for which the basic rate of pay . . . , is equal to or greater than the rate of basic pay payable for level V of the Executive Schedule,

(iii) appointed by the President to a position under section 105(a)(2)(B) of title 3 or by

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the Vice President to a position under section 106(a)(1)(B) of title 3, or

(iv) employed in a position which is held by an active duty commissioned officer of the uniformed services who is serving in a grade or rank for which the pay grade . . . is pay grade O-7 or above.

18 U.S.C. § 207(c) (1992).

17. 10 U.S.C. § 2397-2397c; 18 U.S.C. § 281; 37 U.S.C. § 801(b); and 41 U.S.C. § 423(f).

18. Ethics Reform Act of 1989, Pub. L. No. 101-194, §§ 101(a), 102, 103 Stat. 1716, 1717-18, 1724 (1989) (codified as amended at 18 U.S.C. § 207(c) (West Supp. 1990) (effective Jan. 1, 1991).

19. The pertinent part of subsection 423(b) provides:

During the conduct of any Federal agency procurement of property or services, no procurement official of such agency shall knowingly --

(1) solicit or accept, directly or indirectly, any promise of future employment or business opportunity from, or engage, directly or indirectly, in any discussion of future employment or business with, any officer, employee, representative, agent, or

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consultant of a competing contractor, except as provided in subsection (c) (author's note: subsection (c) covers recusals; see *infra*, note 214).

41 U.S.C. § 423(b)(1) (1992).

20. A procurement official is one who participates personally and substantially in the conduct of a procurement prior to award. The pertinent part of subsection 423(p)(3)(A) provides:

The term "procurement official" means, with respect to any procurement (including the modification or extension of a contract), any civilian or military official or employee of an agency who has participated personally and substantially in any of the following, as defined in implementing regulations:

(i) The drafting of a specification developed for that procurement.

(ii) The review and approval of a specification developed for that procurement.

(iii) The preparation or issuance of a procurement solicitation in that procurement.

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(iv) The evaluation of bids or proposals for that procurement.

(v) The selection of sources for that procurement.

(vi) The conduct of negotiations in the procurement.

(vii) The review and approval of the award, modification, or extension of a contract in that procurement.

(viii) Such other specific procurement actions as may be specified in implementing regulations.

41 U.S.C. § 423(p)(3)(A) (1992).

21. Subsection 423(p)(2) defines a "competing contractor" as follows:

The term "competing contractor", with respect to any procurement (including any procurement using procedures other than competitive procedures) of property or services, means any entity that is, or is reasonably likely to become, a competitor for or recipient of a

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contract or subcontract under such procurement, and includes any other person acting on behalf of such an entity.

41 U.S.C. § 423(p)(2) (1992).

22. Subsection 423(p)(1) defines the term "during the conduct of a procurement" as follows:

The term "during the conduct of any Federal agency procurement of property or services" means the period beginning on the earliest specific date, as determined under implementing regulations, on which an authorized official orders or requests an action described in clauses (i)-(viii) of paragraph (3)(A) (*see supra*, note 20), and concluding with the award, modification, or extension of a contract, and includes the evaluation of bids or proposals, selection of sources, and conduct of negotiations.

41 U.S.C. § 423(p)(1) (1992).

23. The pertinent part of subsection 423(f)(1) provides:

No individual who, while serving as an officer or employee of the Government or member of the Armed

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Forces, was a procurement official with respect to a particular procurement may knowingly --

(A) participate in any manner, as an officer, employee, agent, or representative of a competing contractor, in any negotiations leading to the award, modification, or extension of a contract for such procurement. . . .

41 U.S.C. § 423(f) (1992). Note that under this statute, an enlisted member or noncommissioned officer of the Armed Forces may be a procurement official, since the statute uses the word "member" rather than "officer or employee" of the Armed Forces.

24. *Id.*

25. The pertinent part of section 2397(b)(2) provides:

(A) If a person to whom this subsection applies (i) (author's note: military officers at pay grade O-4 or above, and civilian employees at pay grade level GS-13 or above) was employed by, or served as a consultant or otherwise to, a defense contractor at any time during a year at an annual pay rate of at least \$25,000 and the defense contractor was awarded contracts by the Department of Defense during the preceding year that totaled at least \$10,000,000, and

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(ii) within the two-year period ending on the day before the person began the employment or consulting relationship, the person served on active duty or was a civilian employee for the Department, the person shall file a report with the Secretary of Defense in such manner and form as the Secretary may prescribe. The person shall file the report not later than 90 days after the date on which the person began the employment or consulting relationship.

(B) The person shall file an additional report each time, during the two-year period beginning on the date the active duty or civilian employment with the Department terminated, that the person's job with the defense contractor significantly changes or the person commences an employment or consulting relationship with another defense contractor under the conditions described in the first sentence. A person required to file an additional report under this subparagraph shall file the report within 30 days after the date of the change or the date the employment or consulting relationship commences, as the case may be.

10 U.S.C. 2397(b)(2) (1992). *See also* 10 U.S.C. 2397(c)(2) (1992).

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26. The pertinent part of the subsection 2397a(b) provides:

(1) If a covered defense official (author's note: military officers at pay grade level O-4 or above, civilian employees at pay grade level GS-11 or above) who has participated in the performance of a procurement function in connection with a contract awarded by the Department of Defense contracts, or is contacted by, the defense contractor to whom the contract was awarded (or an agent of such contractor) regarding future employment opportunities for the official with the defense contractor, the official (except as provided in paragraph (2)) shall--

(A) promptly report the contact to the official's supervisor and to the designated agency ethics official (or his designee) of the agency in which the covered defense official is employed; and

(B) for any period for which future employment opportunities for the covered defense official have not been rejected by either the covered defense official or the defense contractor, disqualify himself from all participation in the performance of

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procurement functions relating to contracts of the defense contractor.

(2) A covered defense official is not required to report the first contact with a defense contractor under paragraph (1)(A) or to disqualify himself under paragraph (1)(B) if the defense official terminates the contact immediately. However, if an additional contact of the same or a similar nature is made by or with the defense contractor, the covered defense official shall report (as provided in paragraph (1)) the contact and all contacts of the same or a similar nature made by or with the defense contractor during the 90-day period ending on the date the additional contact is made.

10 U.S.C. § 2397a(b) (1992).

27. The pertinent part of subsection 2397b(a)(1) provides:

[A] person who is a former officer or employee of the Department of Defense or a former or retired member of the armed forces (author's note: these persons are defined in subsection (c)(1) as former military officers at pay grade level O-4 or above, and former civilian employees at pay grade level GS-13 or above) may not accept compensation from a contractor during

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the two-year period beginning on the date of such person's separation from service in the Department of Defense if --

(A) on a majority of the person's working days during the two-year period ending on the date of such person's separation from service in the Department of Defense, the person performed a procurement function (relating to a contract of the Department of Defense) at a site or plant that is owned or operated by the contractor and that was the principal location of such person's performance of that procurement function;

(B) the person performed, on a majority of the person's working days during such two-year period, procurement functions relating to a major defense system and, in the performance of such functions, participated personally and substantially, and in a manner involving decisionmaking responsibilities, with respect to a contract for that system through contact with the contractor; or

(C) during such two-year period the person (author's note: this person is defined in subsection (c)(2) as a military officer at pay grade level O-7 or

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above, and a DOD civilian employee at the pay grade level for Senior Executive Service or above) acted as one of the primary representatives of the United States

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.. (i) in the negotiation of a Department of Defense contract in an amount in excess of \$10,000,000 with the contractor; or

(ii) in the negotiation of a settlement of an unresolved claim of the contractor in an amount in excess of \$10,000,000 under a Department of Defense contract.

10 U.S.C. § 2397b(a)(1) (1992).

28. 10 U.S.C. § 2397c(b)(1)(A)-(B) (1992).

29. The pertinent part of section 281 provides:

(a)(1) A retired officer of the Armed Forces who, while not on active duty and within two years after release from active duty, directly or indirectly receives (or agrees to receive) any compensation for representation of any person in the sale of anything to the United States through the military department in which the officer is retired (in the case of an officer

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of the Army, Navy, Air Force, or Marine Corps) or through the Department of Transportation (in the case of an officer of the Coast Guard) shall be fined under this title or imprisoned not more than two years, or both.

. . . . ,

(b) A retired officer of the Armed Forces who, while not on active duty and within two years after release from active duty, acts as agent or attorney for prosecuting or assisting in the prosecution of any claim against the United States --

(1) involving the military department in which the officer is retired . . . ; or

(2) involving any subject matter with which the officer was directly connected while in an active-duty status;

shall be fined under this title or imprisoned not more than one year, or both.

18 U.S.C. § 281(a)-(b) (1992).

30. *Id.*

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31. The statute provides:

Payment may not be made from any appropriation, for a period of three years after his name is placed on that list, to an officer on a retired list of the Regular Army, the Regular Navy, the Regular Air Force, the Regular Marine Corps, the Regular Coast Guard, the National Oceanic and Atmospheric Administration, the Public Health Service, who is engaged for himself or others in selling, or contracting or negotiating to sell, supplies or war materials to an agency of the Department of Defense, the Coast Guard, the National Oceanic and Atmospheric Administration, or the Public Health Service.

37 U.S.C. 801(b) (1992).

32. The pertinent part of subsection 208(a) provides:

Except as permitted by subsection (b) hereof, whoever, being an officer or employee of the executive branch of the United States Government . . . , participates personally and substantially as a Government officer or employee, through decision, approval, disapproval, recommendation, the rendering of advice, investigation, or otherwise, in a judicial or other proceeding,

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application, request for a ruling or other determination, contract, claim, controversy, charge, accusation, arrest, or other particular matter in which, to his knowledge, he, his spouse, minor child, general partner, organization in which he is serving as an officer, director, trustee, general partner or employee, or any person or organization with whom he is negotiating or has any arrangement concerning prospective employment, has a financial interest - Shall be subject to the penalties set forth in section 216 of this title.

18 U.S.C. § 208(a) (1992).

33. The Ethics in Government Act of 1978, Pub. L. No. 95-521, 92 Stat. 1824, established the Office of Government Ethics (OGE) within the Office of Personnel Management (OPM). OGE gained separate agency status on October 1, 1989, when Congress enacted the Office of Government Ethics Reauthorization Act, Pub. L. No. 100-598, 1988 U.S.C.C.A.N. (102 Stat.) 3031. OGE is charged by the Ethics in Government Act with providing overall direction for executive branch policies designed to prevent conflicts of interest and help ensure high ethical standards on the part of agency officers and employees. Pursuant to the Ethics Reform Act of 1989 (*see supra*, note 18), as revised by the technical amendments of May 4, 1990, Pub. L. No. 101-280, OGE is the

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supervising ethics office for the executive branch. 5 C.F.R. § 2600.101 (1992).

34. 136 CONG. REC. at S8546.

35. This statement is based on the author's experience in working with other DOD ethics counselors.

36. *See supra*, note 18.

37. 136 CONG. REC. at S8545.

38. *Id.*

39. *Id.*

40. F.W. NIETZSCHE, THE ANTICHRIST, XLIV.

41. S. REP. NO. 2213, 87th Cong., 2d Sess. 2 (1962), *reprinted in* 1962 U.S.C.C.A.N. 3852.

42. H.R. REP. NO. 748, 87th Cong., 1st Sess. (1961). *See also* Brief of Lawrence H. Crandon at Appendix B, United States v. Boeing Co., 845 F.2d 476 (4th Cir.) (No. 88-931), *rev'd*, 494 U.S. 152 (1990) (providing more detail on the history of Congressional and public concern in this area).

43. President's Message to Congress Relative to Ethical Conduct in the Government, H.R. DOC. NO. 145, 87th Cong., 1st Sess. (Apr. 27, 1961), *reprinted in* 1961 U.S.C.C.A.N. 1141.

44. S. REP. NO. 2213. The Senate Report discusses the legislative history of the House bills.

45. *Id.*

46. *Id.*

47. *Id.*

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48. Bribery, Graft and Conflicts of Interest Act, Pub. L. No. 87-849, 1962 U.S.C.C.A.N. 3852, 76 Stat. 1119. A detailed history of these various House and Senate bills can be found in the House and Senate Reports and United States Code Congressional and Administrative News.

49. Memorandum Regarding Conflict of Interest Provisions of Pub. L. No. 87-849, Jan. 28, 1963, *reprinted in* 28 Fed. Reg. 985 (1963) [hereinafter Conflict of Interest Memorandum].

50. The legislative history to the Bribery, Graft and Conflicts of Interest Act (*see supra*, note 48), which contains a section-by-section analysis of the conflict of interest laws affected by the Act, is found at 1962 U.S.C.C.A.N. 3852.

51. Conflict of Interest Memorandum, *supra* note 49.

52. Congress considered 5 U.S.C. § 99 to be an overly protective civil statute that was no longer needed due to the growth in number and size of the federal government's departments. Section 99 prohibited a former executive branch officer or employee, for two years following the termination of his or her government employment, from representing anyone in the prosecution of a claim against the United States if the claim was pending before any executive branch department while the officer was an employee, even if he or she had been totally unaware of the claim during that period. See 1962 U.S.C.C.A.N. 3853.

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Title 18, United States Code, Section 284, was a criminal statute similar to 5 U.S.C. § 99 albeit narrower in scope: It prohibited a former government employee, for the same two-year period, from prosecuting in a representative capacity any claim against the United States involving any subject matter directly connected with his or her former government job. *Id.* at 3861.

53. 18 U.S.C. § 207(a) (1969). *See also* S. REP. NO. 2213, *supra*, note 41.

54. 18 U.S.C. § 207(b) (1969). *See also* S. REP. NO. 2213, *supra*, note 41.

55. S. REP. NO. 2213, *supra* note 41.

56. 18 U.S.C. § 207(c) (1969). *See also* S. REP. NO. 2213, *supra*, note 41.

57. *See supra*, note 48, at § 207(a)-(b), 76 Stat. 1119, 1123.

58. S. REP. NO. 170, 95th Cong., 2d Sess. 31-33, *reprinted in* 1978 U.S.C.C.A.N. 4247-249.

59. *Id.* at 32, *reprinted in* 1978 U.S.C.C.A.N. 4216, 4248.

60. *Id.*

61. President's Message to Congress Transmitting Proposed Ethics in Government Act of 1977, 1 PUB. PAPERS 786 (May 1, 1977) [hereinafter President Carter's Message].

62. Beth Frensilli, *Ethics in Government Act, Statutory Interpretation of Ambiguous Criminal Statutes: An Analysis of Title 18, Section 207(c) of the United States Code*, 58 GEO. WASH. L. REV. 972, 973. (1990).

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63. President Carter's Message, *supra* note 61.
64. The Ethics in Government Act of 1978, Pub. L. No. 95-521, 92 Stat. 1824 (1978).
65. S. REP. NO. 170, *see supra*, note 58, at 1978 U.S.C.C.A.N. 4216, 4247.
66. *See supra*, note 33.
67. OGE Letter 84 x 15, 1984 WL 50153 (O.G.E. Nov. 19, 1984).
68. 18 U.S.C. § 207(a) (1982). *See also* S. REP. NO. 170, *supra* note 58, at 1978 U.S.C.C.A.N. 4216, 4250.
69. 18 U.S.C. § 207(b) (1982). *See also* S. REP. NO. 170, *supra* note 58, at 1978 U.S.C.C.A.N. 4216, 4250.
70. 18 U.S.C. § 207(c) (1982). *See also* S. REP. NO. 170, *supra* note 58, at 1978 U.S.C.C.A.N. 4216, 4250.
71. S. REP. NO. 170, *supra* note 58.
72. *Id.*
73. *Id.*
74. *Id.*
75. For the historical development of the Ethics in Government Act of 1978, Pub. L. No. 95-521, 92 Stat. 1824, *see* Mundheim, *Conflict of Interest and the Former Government Employee: Rethinking the Revolving Door*, 14 CREIGHTON L. REV. 707 (1981).
76. S. REP. NO. 170, *supra* note 58.
77. The pertinent parts of subsection 207(c) provide:

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Whoever (meaning certain high-ranking officials identified in subsection (d)), within one year after such employment has ceased, *knowingly* (emphasis added) acts as agent or attorney for, or otherwise represents, anyone other than the United States in any formal or informal appearance before, or, with the intent to influence, makes any oral or written communication on behalf of anyone other than the United States, to -

(1) the department or agency in which he served as an officer or employee, or any officer or employee thereof, and

(2) in connection with any judicial, rulemaking, or other proceeding, application, request for a ruling or other determination, contract, claim, controversy, investigation, charge, accusation, arrest, or other particular matter, and

(3) which is pending before such department or agency or in which such department or agency has a direct and substantial interest -

shall be fined not more than \$10,000 or imprisoned for

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not more than two years, or both.

18 U.S.C. 207(c) (1982) (amended 1989).

78. *United States v. Nofziger*, 878 F.2d 442, 444 (D.C.Cir. 1989), *cert. denied*, 493 U.S. 1003 (1989). The government later sought and obtained the dismissal of two counts alleging violations of subsection 207(a).

79. *Id.*

80. *Id.* at 445.

81. See Frensilli, *supra* note 62, at n.28.

82. *Nofziger*, 878 F.2d 442, 445.

83. *Id.*

84. *Id.* at 452.

85. Record at 3416, *United States v. Nofziger*, No. 87-0309 (D.D.C. 1988), cited in *Nofziger*, 878 F.2d 442, 445.

86. *Nofziger*, 878 F.2d at 444.

87. *Id.*

88. *Id.* at 450.

89. *Nofziger*, No. 87-0309, 1987 U.S. Dist. LEXIS 14134, at *27 (D.D.C. Nov. 10, 1987).

90. *Id.*

91. *Nofziger*, 878 F.2d 442, 454. A rehearing was denied, although four of the nine members of the circuit believed the decision was "clearly wrong." In a concurrence written by Circuit Judge Edwards, in which Judges Wald, Mikva, and Ginsburg,

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Ruth B. joined, Judge Edwards wrote: "I think that the majority opinion in this case is clearly wrong; however, this is not a basis for an en banc consideration by the court. Therefore, I concur in the denial of . . . [a] rehearing en banc." *Id.* at 460.

92. "The second applicable rule states that absent evidence of a contrary legislative intent, courts should presume mens rea is required." *Nofziger*, 878 F.2d at 452 (citing *United States v. Liparota*, 471 U.S. 419, 426 (1985)). The author credits Matthew T. Fricker and Kelly Gilchrist for the idea for using this quote, which is found in footnote 26 of their law review article, see *infra* note 94.

93. *Nofziger*, 878 F.2d at 454.

94. See Frensilli, *supra* note 62; and Matthew T. Fricker & Kelly Gilchrist, *United States v. Nofziger and the Revision of 18 U.S.C. § 207: The Need for a New Approach to the Mens Rea Requirements of Federal Criminal Law*, 65 NOTRE DAME L. REV. 803 (1990).

103. The Senate Judiciary Committee reported:

No Federal statute attempts a comprehensive and precise definition of the terms used to describe the requisite state of mind. Nor are the terms defined in the statutes in which they are used. Instead the task of giving substance to the "mental element" used in a

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particular statute, or to be inferred from a particular statute, has been left to the courts.

S. REP. NO. 553, 96th Cong., 2d Sess. 59 (1980).

96. Fricker & Gilchrist, *supra* note 94, at 805.

97. *See supra*, note 18. The Ethics Reform Act of 1989 inadvertently excluded military officers (and members of the civilian uniformed services, such as the Public Health Service) from the criminal conflict of interest laws by defining "officers" and "employees" to include only civilian personnel. Consequently, Congress enacted technical amendments to the Act to remedy this situation, among others. The amendment makes clear that "officers" and "employees" include officers of the uniformed services on active duty. Ethics Reform Act of 1989: Technical Amendments, Pub. L. No. 101-280, 1990 U.S.C.C.A.N. (104 Stat.) 169, 173.

98. 162 CONG. REC. S15,953 (daily ed. Nov. 17, 1989) (statement of Sen. Levin). Senator Levin further noted that the ethics part of the bill "strengthens existing laws that apply to all three branches . . . ranging from postemployment lobbying restrictions . . . [F]or the first time . . . we would bring Members of Congress and top congressional staff under the postemployment lobbying restrictions of 18 United States Code section 207." *Id.* at S15,953-4.

99. Fricker & Gilchrist, *supra* note 94, at 846.

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100. 18 U.S.C. § 207(c)(3) (1988).
101. 18 U.S.C. § 207(c)(1) (1992).
102. *Id.*
103. Ethics Reform Act of 1989, *see supra*, note 18. *See also* Frensilli, *supra* note 62, at 982.
104. Ethics Reform Act of 1989, *see supra* note 18, at § 101(a), 103 Stat. 1716, 1717-18.
105. 162 CONG. REC. S15,954 (statement of Sen. Levin).
106. "The Act was moved through Congress in a couple of weeks, and no committee or conference reports were prepared." Murdock, *Finally, Government Ethics as if People Mattered: Some Thoughts on the Ethics Reform Act of 1989*, 58 GEO. WASH. L. REV. 502, 503 (1990). *See also* Fricker & Gilchrist, *supra* note 94, at 846-47.
107. 162 CONG. REC. S15,954 (statement of Sen. Levin).
108. Fricker & Gilchrist, *see supra* note 94, at 847.
109. *Id.*
110. *Id.* For illustration, Fricker and Gilchrist offer an interesting factual scenario in which a former employee contacts his former agency to gain information on the specifics of a contract on which that agency is taking bids. The former government employee's firm has not yet made a bid and he does not know if they will. Thus, the former employee, prosecuted under the revised subsection 207(c), could argue that, when he communicated with his former agency, he did not know if his firm

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would seek official action on the subject of the communication.

Id. at 847, n.211.

111. 18 U.S.C. § 216(a)(1)-(2) (West Supp. 1990).

112. Fricker & Gilchrist, *see supra* note 94, at 848, n.215.

113. *Id.* at 848-851.

114. Memorandum from Stephen D. Potts, Director, Office of Government Ethics to Designated Agency Ethics Officials (Nov. 4, 1992) (summarizing conflict of interest prosecutions from Jan. 1, 1990 to Dec. 31, 1991).

115. *See supra* note 13.

116. *See supra* note 15.

117. The pertinent part of revised subsection 207(a) provides:

(1) Any person who is an officer or employee . . . of the executive branch . . . , and who, after the termination of his or her service or employment . . . , *knowingly makes, with the intent to influence, any communication to or appearance before* (emphasis added) any officer or employee of any department, agency, court, or court-martial . . . , on behalf of any other person (except the United States . . .) in connection with a particular matter -

(A) in which the United States . . . is a party or has a direct and substantial interest,

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(B) in which the person participated personally and substantially as such officer or employee, and

(C) which involved a specific party or specific parties at the time of such participation, shall be punished as provided in section 216 of this title.

(2) Any person subject to the restrictions contained in paragraph (1) who, within 2 years after the termination of his or her service or employment with the United States . . . , *knowingly makes, with the intent to influence, any communication to or appearance before* (emphasis added) any officer or employee of any department, agency, court, or court-martial . . . , on behalf of any other person (except the United States . . .), in connection with a particular matter -

(A) in which the United States . . . is a party or has a direct and substantial interest,

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(B) which such person knows or reasonably should know was actually pending under his or her official responsibility as such officer or employee within a period of 1 year before the termination of his or her service or employment . . . , and

(C) which involved a specific party or specific parties at the time it was so pending, shall be punished as provided in section 216 of this title.

18 U.S.C. § 207(a) (1992).

118. Ethics Reform Act of 1989, *see supra* note 18, at § 101(a). *See also* Frensilli, *supra* note 62, at 997, n.148.

119. Ethics Reform Act of 1989, *see supra* note 18, at § 101(a). *See also* Frensilli, *supra* note 62, at 997, n.148.

120. Ethics Reform Act of 1989, *see supra* note 18. *See also* main text, paragraph III.J.2.c.

121. Exec. Order No. 12834, 58 Fed. Reg. 5911 (1993). Section 2(a) of this order defines "senior appointee" as every full-time, non-career Presidential, Vice-Presidential or agency head appointee in an executive agency whose rate of basic pay is not less than the rate for Level V of the Executive Schedule (5 U.S.C. § 5316). It does not include any person appointed as a member of the senior foreign service or solely as a uniformed

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service commissioned officer. Presidential aides originally thought these new rules would apply to the top 100 or so "senior appointees" in the White House. These aides now believe the rules will apply only to about twenty very senior people. The reason is that the executive order defines the affected individuals in terms of pay grade rather than by title or duties. When President Clinton imposed salary cuts on White House personnel, many "senior appointees" fell below the Level V cutoff in the Executive Schedule (currently, about \$105,000 per year). See *Salary Cuts Crimp Clinton Ethics Rules*, WASH. POST, Feb. 22, 1993, at A13.

122. Exec. Order No. 12834, Section 1.1, 58 Fed. Reg. 5911 (1993).

123. *Id.* at Section 1.2.

124. *Id.* at Section 1.3.

125. *Presidential Transition, Clinton to Require Appointees to Honor Five-Year Lobbying Ban*, BNA, Dec. 10, 1992, at 238, available in LEXIS, Nexis Library, BNA File. See also *supra*, note 121.

126. Al Kamen & David Von Drehle, *Ethics Policy Toughened; Top Appointees to Face 5-Year Lobbying Curb*, WASH. POST, Dec. 10, 1992, at A1.

127. Regulations Concerning Post Employment Conflict of Interest, 5 C.F.R. § 2637.101(c)(5) (1992).

128. *Id.*

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129. *Id.*
130. *Id.*
131. *Id.* at § 2637.201(b)(6).
132. *Post-Employment Lobbying Restrictions: Hearings Before the Subcomm. on Oversight of Government Management of the Senate Comm. on Governmental Affairs*, 100th Cong., 1st Sess. 43-44 (1987) [hereinafter *Lobbying Hearings*] (testimony of Joe Whitley, Deputy Assistant Attorney General, Department of Justice).
133. 5 C.F.R. § 2637.201(b)(5) (1992).
134. Memorandum from Stephen D. Potts, Director, Office of Government Ethics to Designated Agency Ethics Officials 2 (Nov. 5, 1992) [hereinafter *Potts Memorandum*] (providing written materials to facilitate advice and training under 18 U.S.C. § 207) (on file with author).
135. *See supra*, note 13.
136. *Potts Memorandum* at 3, *see supra*, note 134.
137. 5 C.F.R. § 2637.201(b)(6) (1992).
138. *Id.* at § 2637.201(b)(3).
139. *Id.*
140. *Potts Memorandum* at 3, *see supra*, note 134.
141. 5 C.F.R. § 2637.201(d)(1) (1992).
142. *Id.*
143. *Id.* *See also* *Potts Memorandum* at 4, *supra*, note 134.
144. *Nofziger*, 878 F.2d at 442.

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145. *Nofziger*, No. 87-0309, 1987 U.S. Dist. LEXIS 14134, at *39 (D.D.C. Nov. 10, 1987).
146. 5 C.F.R. § 2637.201(c)(4) (1992).
147. *Id.* at § 2637.201(c)(1).
148. S. REP. NO. 2213, *supra*, note 41.
149. Potts Memorandum at 4, *see supra*, note 134.
150. *See supra*, note 67.
151. *Id.*
152. *Id.*
153. *CACI, Inc. v. United States*, 1 Cl. Ct. 352 (1983), *rev'd*, 719 F.2d 1567 (Fed. Cir. 1983) (subsection 207(a) not violated by submission to former agency of contract proposal that did not involve same particular matter in which former government employee had personally and substantially participated).
154. Potts Memorandum at 4, *see supra*, note 134.
155. *See supra*, note 15.
156. 18 U.S.C. § 207(a)(2) (1962).
157. *Id.*
158. 5 C.F.R. § 2637.202(c) (1992).
159. Potts Memorandum at 5-6, *see supra*, note 134.
160. 18 U.S.C. 202 (1992). *See also* 5 C.F.R. § 2637.202(b)(1) (1992).
161. 5 C.F.R. § 2637.202(b)(2) (1962).
162. *Id.*
163. Potts Memorandum at 5, *see supra*, note 134.

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164. See *supra*, note 16.
165. Post-Employment Conflict of Interest Restrictions, 5 C.F.R. § 2641.101 (1992).
166. Potts Memorandum at 8, see *supra*, note 134.
167. *Id.*
168. 18 U.S.C. § 207(c) (1992).
169. Potts Memorandum at 8, see *supra*, note 134.
170. 18 U.S.C. § 207(j)(5) (1992). See also 5 C.F.R. § 2637.206(a)-(c) (1992).
171. See *supra*, note 18.
172. *Government Contracts, Senate Approves Comprehensive Rewrite of Procurement Ethics Laws*, BNA, Aug. 6, 1991, at A-2, available in LEXIS, Nexis Library, BNA File [hereinafter *Procurement Rewrite*].
173. See *Contract Policy, Roth Reintroduces Procurement Integrity Reform Bill, Senate Hearings Scheduled*, BNA, Feb. 25, 1991, at A-17, available in LEXIS, Nexis Library, BNA File [hereinafter *Procurement Reform Bill*]; *Defense, Mavroules to Offer Revolving Door Amendment to DOD Bill*, BNA, May 13, 1991, at A-8, available in LEXIS, Nexis Library, BNA File [hereinafter *Revolving Door Amendment*]; *Procurement Rewrite*, *supra*, note 181.
174. "Majority of working days" is a term used in determining whether the restrictions in 10 U.S.C. § 2397b will apply to a former officer or employee involved in procurement-related

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activities for the government. See *infra*, main text paragraph IV.C.3.a., and note 288.

175. *Government Contracts, Pentagon Forces Negotiators to Drop Procurement Integrity Terms from DOD Bill*, BNA, Nov. 8, 1991, at A-16, available in LEXIS, Nexis Library, BNA File [hereinafter *Pentagon Forces*].

176. EPICTETUS, ENCHEIRIDION (c.100).

177. 10 U.S.C. §§ 2397, 2397a, 2397b, and 2397c; 18 U.S.C. § 281; and 37 U.S.C. § 801(b).

178. 18 U.S.C. §§ 207 and 281; and 37 U.S.C. 801(b).

179. The fourth statute is 41 U.S.C. § 423(f).

180. The fifth statute is 10 U.S.C. § 2397b.

181. 18 U.S.C. § 207.

182. The second statute is 41 U.S.C. § 423(f).

183. The third statute is 10 U.S.C. § 2397b.

184. 18 U.S.C. § 207.

185. The second statute is 41 U.S.C. § 423(f).

186. The third statute is 10 U.S.C. § 2397b.

187. *Lobbying Hearings* at 4, see *supra*, note 132 (statement of Sen. Levin).

188. *Id.* at 44 (statement of Joe D. Whitley).

189. 136 CONG. REC. S8546.

190. *Lobbying Hearings* at 16, see *supra*, note 132.

191. Office of Federal Procurement Policy Act Amendments of

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1988, Pub. L. No. 100-679, § 6, 102 Stat. 4063, 41 U.S.C. § 402 (1988).

192. Brief of Lawrence H. Crandon at n.20, *United States v. Boeing*, 845 F.2d 476 (4th Cir.) (No. 88-931), *rev'd*, 494 U.S. 152 (1990); *see also* H.R. REP. NO. 748, 87th Cong., 1st Sess. (1961). When President Ronald Reagan vetoed the "Post-Employment Restrictions Act of 1988", H.R. 5043, 100th Cong., 2d Sess., he noted: "It is already difficult to recruit talented people into the senior ranks of Government" and, regarding the proliferation of new ethics laws, "[m]any of the most talented might never sign up to serve their country, and the country would be the worse for it". President's Memorandum of Disapproval, 24 WEEKLY COMP. PRES. DOC. 1561 (Nov. 23, 1988).

193. Originally, the "Procurement Integrity Act" was to take effect 30 days after its passage; *see* H.R. REP. NO. 911, 100th Cong., 2d Sess. (1988). The effective date was extended, however, to take effect 180 days after the date of the act's enactment; furthermore, the Act was to apply only to conduct that occurred on or after May 16, 1989. The effective date was extended again, for 60 more days, to accommodate complaints from various executive branch agencies (e.g., Office of Management and Budget, and DOD) and defense contractors), who complained that they needed more time to digest and implement the Act's numerous administrative requirements; *see* 135 CONG. REC. H1876 (daily ed. May 15, 1989).

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Interestingly, the Act was only in effect for approximately six months when it was suspended by the Ethics Reform Act of 1989, § 506(d), *see supra*, note 18. This suspension, which lasted for one year following the date the Reform Act was enacted (i.e., until 1 December 1990), resulted from President George Bush's dislike of the Procurement Integrity Act and the worries of several Congressmen that the Procurement Integrity Act conflicted with existing conflict of interest laws; *see* 134 CONG. REC. S15,962 (1988) (daily ed. Nov. 17, 1989). *See also* Donaldson at n.7, *supra* note 2.

194. *See supra*, note 18.

195. Because the Procurement Integrity Act was passed hurriedly before Congress' imminent adjournment, no joint House-Senate legislative history was drafted in time to accompany the Act. Only comments from certain Members of Congress are available. For example, Sen. John Glenn (D-OH) attached to his statement in the Congressional Record for Oct. 20, 1988, a section-by-section analysis of Section 6 of the Act. However, Rep. Jack Brooks (D-TX), Chairman of the House of Representatives Government Operations Committee and a sponsor of the Act, stated that Sen. Glenn's analysis, which was the only joint analysis produced by the Senate with respect to section 6, was "extraneous" to the words of the bill. 134 CONG. REC. H10611 (Oct. 20, 1989). *See also* a paper presented by Stephen M. Ryan, an attorney with Brand

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& Lowell, P.C. Washington, D.C., entitled *The History of the Troubled "Procurement Integrity" Statute* (1990), at V-11, and n. 16, at a seminar held at The Judge Advocate General's School's 1993 Government Contract Law Symposium, on Jan. 12, 1993, at Charlottesville, VA [hereinafter Ryan Paper].

196. 134 CONG. REC. S17,071 (daily ed. Oct. 20, 1988) (statement of Sen. Glenn).

197. 41 U.S.C. § 423 (g)-(j) (1992).

198. *To Extend the Authorization of Appropriations for the Office of Federal Procurement Policy: Hearings on H.R. 3345 Before the Legislation and National Security Subcomm. of the House Comm. on Government Operations, 100th Cong., 1st Sess. 199-200* (1987) (letter from Albert D. Bourland, Vice-Pres. of Congressional Relations, U.S. Chamber of Commerce, to Rep. Jack Brooks, Chairman of the House Committee on Government Operations).

199. Donaldson at 424, *see supra*, note 2.

200. *Id.* at 428, and n.29.

201. *Id.*

202. *Id.* **See also** PRESIDENT'S BLUE RIBBON COMMISSION ON DEFENSE MANAGEMENT, A QUEST FOR EXCELLENCE: FINAL REPORT TO THE PRESIDENT xxiii-iv, 44 (June 1986) (Summary) (chaired by David Packard, Hewlett-Packard Co. founder); and *The Acquisition Findings in the Report of the President's Blue Ribbon Commission on Defense Management: Hearings on S. 3082, S. 2151 Before the*

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Subcomm. on Defense Acquisition Policy of the Comm. on Armed Services, 99th Cong., 2d Sess. 30-40 (1986) (statements of Packard Commission members David Packard, Dr. William Perry, Jaques S. Gansler).

203. Unlike 41 U.S.C. § 423(f), which applies government-wide, 10 U.S.C. § 2397b is targeted only at the procurement-related activities of DOD personnel.

204. Ryan Paper at V-13, *see supra*, note 195.

205. The Procurement Integrity Act applies to DOD officers, employees, and enlisted members if they served as procurement officials, as defined in the statute. *See supra*, note 20.

206. Memorandum, Army Standards of Conduct Office, OTJAG, DAJA-SC, subject: Ethics Under the Procurement Integrity Act (1 Oct. 1992) [hereinafter Army Ethics Memorandum].

207. The original House bill provided for a three-year, rather than two-year, bar. *See* H.R. 3345, 100th Cong., 2d Sess., 134 CONG. REC. H7426 (1988).

208. The term "personal and substantial participation" is defined under the Procurement Integrity Act as it is defined under 18 U.S.C. § 207. *See supra*, main text paragraph III.J.2.a., and note 141.

209. Ryan Paper at V-13, *see supra*, note 195.

210. Army Ethics Memorandum, *see supra*, note 206.

211. *Id.*

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212. The pertinent part of subsection 423(a) provides:

During the conduct of any Federal agency procurement of property or services, no competing contractor or any officer, employee, representative, agent or consultant of any competing contractor shall knowingly-

(1) make, directly or indirectly, any offer or promise of future employment or business opportunity to, or engage, directly or indirectly, in any discussion of future employment or business opportunity with, any procurement official of such agency, except as provided in subsection (c).

41 U.S.C. § 423(a)(1) (1992).

213. See *supra*, note 19.

214. The pertinent part of subsection 423(c) provides:

(1) A procurement official may engage in a discussion with a competing contractor that is otherwise prohibited by subsection (b)(1) if, before engaging in such discussion-

(A) the procurement official proposes in writing to disqualify himself from the conduct of any

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procurement relating to the competing contractor (i) for any period during which future employment or business opportunities for such procurement official with such competing contractor have not been rejected by either the procurement official or the competing contractor, and (ii) if determined to be necessary by the head of such procuring official's procuring activity . . . ; and

(B) the head of that procuring activity of such procurement official . . . , after consultation with the appropriate designated agency ethics official, approves in writing the recusal of the procurement official.

(2) A procurement official who, during the period beginning with the issuance of a procurement solicitation and ending with the award of a contract, has participated personally and substantially in the evaluation of bids or proposals, selection of sources, or conduct of negotiations in connection with such solicitation and contract may not be approved for a recusal under paragraph (1) during such period with respect to such procurement.

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(3) A procurement official who, during the period beginning with the negotiation of a modification or extension of a contract and ending with-

(A) an agreement to modify or extend the contract, or

(B) a decision not to modify or extend the contract,

has participated personally and substantially in the evaluation of a proposed modification or extension or the conduct of negotiations may not be approved for a recusal under paragraph (1) during such period with respect to such procurement.

41 U.S.C. 21 423(c)(1)-(3) (1992).

215. A "modification" means the addition of new work to a contract, or the extension of a contract, which requires a justification and approval. It does not include an option where all the terms of the option, including option prices, are set forth in the contract and all requirements for option exercise have been satisfied, change orders, administrative changes, or any other contract changes that are within the scope of the

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contract. GENERAL SERVS. ADMIN. ET AL., FEDERAL ACQUISITION REG. 3.104-4(e) (1 Apr. 1984) [hereinafter FAR].

216. Donaldson at 425 and n.47, *see supra*, note 2.

217. *See supra*, note 18.

218. 136 CONG. REC. S8547.

219. *Id.*

220. 18 U.S.C. § 207(a)(1) (1992).

221. The report was titled: "*To Serve With Honor; [The] Report of the President's Commission on Ethics Law Reform; Report and Recommendations to the President* 66. *See also* Ryan Paper at V-15, *supra*, note 203.

222. Ryan Paper at V22, *see supra*, note 195.

223. 136 CONG. REC. S8647.

224. *Id.*

225. *Id.*

226. The pertinent part of subsection 423(b) provides:

During the conduct of any Federal agency procurement of property or services, no procurement official of such agency shall knowingly-

. . . .

(3) disclose any proprietary or source selection information regarding such procurement directly or indirectly to any person other than a person authorized

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by the head of such agency or the contracting officer to receive such information.

41 U.S.C. § 423(b)(3) (1992).

227. Subsection 423(d) provides:

During the conduct of any Federal agency procurement of property or services, no person who is given authorized or unauthorized access to proprietary or source selection information regarding such procurement, shall knowingly disclose such information, directly or indirectly, to any person other than a person authorized by the head of such agency or the contracting officer to receive such information.

41 U.S.C. § 423(d) (1992).

228. The pertinent part of subsection 423(e)(4) provides: "If a procurement official leaves the Government during the conduct of such a procurement, such official shall certify that he or she understands the continuing obligation not to disclose proprietary or source selection information." 41 U.S.C. § 423(e)(4) (1992).

229. 41 U.S.C. § 423(h) provides for administrative penalties for violations of subsections 423(b), (d), or (e).

230. 41 U.S.C. § 423(i) provides for civil penalties for violations of subsections 423(a), (b), (d), or (f).

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231. 41 U.S.C. § 423(j) provides for criminal penalties for, among other things, knowingly and willfully disclosing proprietary or source selection information during the conduct of a procurement.

232. 41 U.S.C. § 423(g) provides for contractual penalties for conduct by a competing contractor that violates subsection 423(a).

233. 136 CONG. REC. S8547 (Jun. 21, 1990).

234. Defense Authorization Act for 1990 & 1991, Pub. L. No. 101-189, § 814(a)(3), 1989 U.S.C.C.A.N. (103 Stat.) 1496.

235. 41 U.S.C. § 423(k) (1992). See also 136 CONG. REC. S8547.

236. 136 CONG. REC. S8548.

237. "Operation Ill-Wind" was the Federal Bureau of Investigation's (FBI) code-name for the criminal investigation of the DOD contracting program. Front-page newspaper reports in June, 1988 led the public and members of the Congress to believe that the DOD procurement program was replete with corruption. Public opinion polls taken soon after the investigation became public knowledge demonstrated that Americans were angered by and disgusted with the government's contracting system. Such public opinion is a powerful stimulus for "reform." See Ryan Paper at V-4, *supra*, note 195.

238. 136 CONG. REC. S8547.

239. *Id.* at S8546.

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240. GOVERNMENT CONTRACTS UNDER THE FEDERAL ACQUISITION REGULATION, CHAPTER 3: IMPROPER BUSINESS PRACTICES AND PERSONAL CONFLICTS OF INTEREST, SECTION 3.1, ETHICS IN CONTRACTING (1986).

241. Act of November 19, 1969, Pub. L. No. 91-121, 1969 U.S.C.C.A.N. (83 Stat.) 237 (codified at 50 U.S.C. § 1436).

242. Technical Amendments Act of October 12, 1982, Pub. L. No. 97-925, 1982 U.S.C.C.A.N. (96 Stat.) 1291 (codified at 10 U.S.C. 2397).

243. These reporting requirements are accomplished through the completion and filing with DOD of DD Form 1787, Report of DOD and Defense Related Employment. DD Form 1787 is discussed, and a copy can be seen, in AR 600-50, para. 5-8 and Fig. 1-5. Although parts of AR 600-50 have already been superseded by Standards of Ethical Conduct for Employees of the Executive Branch, 5 C.F.R. § 2635, which became effective on Feb. 3, 1993, para. 5-8 of AR 600-50, regarding the filing of DD Form 1787, remains in effect. See DA Message, *supra*, note 3.

244. 10 U.S.C. § 2397(b)(3) (1992).

245. 10 U.S.C. § 2397c(b)(1)(A) (1992).

246. Defense Acquisition Improvement Act of 1986, Pub. L. No. 99-951, 1986 U.S.C.C.A.N. (100 Stat.) 5627. The reporting requirement for defense contractors began in a package of procurement-related provisions offered during the defense acquisition policy subcommittee (of the Senate Armed Services Committee) markup of the 1986 defense authorization measure (S.

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674). The package was offered by the subcommittee chairman, then-Senator Dan Quayle (R-Ind). Sen. Quayle's provision required defense contractors to report to DOD regarding any employee who, within the past two years, was employed by DOD and who had substantial responsibility for contracts with that contractor. See *Revolving Door Provision Included in Senate Panel's Markup of Defense Bill*, BNA, Apr. 4, 1985, at A-19, available in LEXIS, Nexis Library, BNA File [hereinafter *Revolving Door Provision*].

247. 10 U.S.C. § 2397c(b)(1)(A)-(B) (1992).

248. 136 CONG. REC. S8549.

249. *Id.*

250. *Id.*

251. *Id.*

252. *Id.*

253. *Id.*

254. *Mavroules to Offer Revolving Door Amendment to DOD Bill*, BNA, May 13, 1991, at A-8, available in LEXIS, Nexis Library, BNA File [hereinafter *Mavroules Amendment*].

255. Defense Authorization Act for 1986, Pub. L. No. 99-145, § 923, 99 Stat. 583 (codified at 10 U.S.C. § 2397a). The Senate Armed Services Committee, during its three-day markup of the Senate bill (S. 674), included language requiring certain DOD employees (O-4 or GS-11 and above) to report contacts with a contractor regarding future employment opportunities and

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disqualify themselves from any official actions relating to that contractor. The Senate bill also strengthened the reporting requirement for DOD personnel who left government and went to work for a defense contractor. See *Revolving Door Provision*, *supra* note 246. See also 1985 U.S.C.C.A.N. (99 Stat.) 611-12.

256. 10 U.S.C. § 2397a(a)(2) (1992).

257. Subsection 2397a(a)(6) defines the term "procurement function" to include any function, with respect to a contract, relating to

"(A) the negotiation, award, administration, or approval of the contract;

(B) the selection of a contractor;

(C) the approval of changes in the contract;

(D) quality assurance, operation and developmental testing, the approval of payment, or auditing under the contract; or

(E) the management of the procurement program." 10 U.S.C. § 2397a(a)(6) (1992).

Based on the statute, it appears that almost any activity that is performed and which relates to a contract is considered to be a "procurement function" for the reporting requirements in section 2397a.

258. 10 U.S.C. § 2397a(b)(1)(A) (1992).

259. *Id.*

260. 10 U.S.C. § 2397a(b)(1)(A) and (c) (1992).

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261. For any period during which neither a defense contractor, nor a DOD official subject to this statute, has rejected future employment opportunities with each other after an initial contact by either party, the official must disqualify him- or herself from all participation in the performance of procurement functions relating to the contracts of that defense contractor.

10 U.S.C. § 2397a(b)(1)(B) (1992).

262. 10 U.S.C. § 2397a(b)(2) (1992).

263. 10 U.S.C. § 2397a(d)(1)(A) (1992). See also Defense Authorization Act for 1987, Pub. L. No. 99-661, § 932, 1986 U.S.C.C.A.N. (99 Stat.) 6456.

264. See *supra*, note 32.

265. 136 CONG. REC. S8548.

266. See *supra*, note 32.

267. 18 U.S.C. § 208(b)(1) (1992).

268. The 1989 amendments to 18 U.S.C. § 208 made more definitive the restrictions and procedures on negotiating for employment while still in government service. See 136 CONG. REC. S8546. See also Ethics Reform Act of 1989, *supra*, note 18.

269. 136 CONG. REC. S8546.

270. See *supra*, note 255, Defense Authorization Act for 1986, § 921 at 99 Stat. 583, 698. Both the House and Senate bills contained provisions limiting the activities of DOD employees with respect to post-government employment. The House bill placed an absolute two-year prohibition on employment by a

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defense contractor of any government employee who had significant responsibilities for a procurement function regarding that contractor or any of its subsidiaries or affiliates. However, the House receded with an amendment which added a new provision to the Senate bill prohibiting Presidential appointees who acted as a primary government representative in negotiating or settling a government contract from accepting employment with that contractor within two years after the termination of such activities. See 1985 U.S.C.C.A.N. 611-12. See also Defense Authorization Act for 1987, Pub. L. No. 99-661, 1986 U.S.C.C.A.N. (99 Stat.) 6455.

271. Defense Authorization Act for 1987, Pub. L. No. 99-661, 1986 U.S.C.C.A.N. (99 Stat.) 6455.

272. Section 921 of the Defense Procurement Improvement Act of 1985 (Title IX of the Defense Authorization Act for 1986, Pub. L. No. 99-145, *supra*, note 255) was repealed by the Act of Oct. 30, 1986, Pub. L. No. 99-591, 100 Stat. 3341.

273. Continuing Appropriations Act for 1987, Pub. L. No. 99-591, § 931, 1986 U.S.C.C.A.N. (100 Stat.) 3341-156.

274. *Levin to Offer Bill to Close "Revolving Door"; DOD Official Defends Status Quo*, BNA, Mar. 26, 1985, at A-3, available in LEXIS, Nexis Library, BNA File [hereinafter *Levin Bill*]. Sen. David Pryor (D-Ark) and Sen. Charles Grassley (R-Iowa) sponsored S. 490, and Rep. Barbara Boxer (D-Calif) sponsored a companion measure, H.R. 1201, which would have prohibited a firm from

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hiring a former federal employee (at or above O-3 or GS-8 rank) who had played a significant role in the award or administration of the firm's government contracts within five years after the termination of the contract. Sen. William Proxmire (D-Wis) sponsored S. 385, which would have imposed a two-year waiting period before former federal contracting personnel at the GS-13 level or above could accept employment with a firm over which they had personal and substantial involvement in contracting authority within the three-year period prior to leaving government service. Sen. Proxmire's bill also would have required the former employee and contractor considering hiring him to file a joint request with the Office of Personnel Management for an advisory opinion on whether the employment would constitute a conflict of interest. Sen. Carl Levin (D-Mich) then offered S. 674, which would have barred former government employees who, within the three-year period prior to leaving government service, had participated personally and substantially in a government procurement function relating to a contract, from accepting employment with that contractor for a period of two years after leaving government service. Sen. Levin's bill would have applied to former officials at or above pay grade O-3 or GS-9.

275. S. 674. *Id.*

276. *Levin Bill*, see *supra*, note 274.

277. *Revolving Door Provision*, see *supra*, note 246.

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278. Deputy Defense Secretary William H. Taft testified on March 19, 1985. See *Levin Bill, supra*, note 274.

279. *Id.*

280. *Id.*

281. *Id.*

282. *Id.*

283. H.R. 2554 was referred to the House Armed Services Committee, which reported out the bill after making changes. The measure was referred to the Judiciary, and Post Office and Civil Service Committees on Nov. 21, 1985. The committees were given until March 15, 1986, to make any changes to the measure, after which date the bill became eligible for House floor action. See *Conflict of Interest Measure Aimed at Defense Procurement Criticized at House Hearing*, BNA, Feb. 4, 1986, available in LEXIS, Nexis Library, BNA File [hereinafter *Procurement Measure Criticized*].

284. *Id.*

285. *Id.*

286. See *supra*, note 273. Interestingly, some of the statutory language that is the most difficult to understand and apply, and which still survives today, originated in the testimony of the DOD Deputy Inspector General, Derek Vander Schaaf. Mr. Vander Schaaf testified that, even though he supported H.R. 2554 (see *supra*, note 283), the bill's definition of "significant responsibilities" needed clarification. He recommended that the

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bill's coverage be limited to "individuals whose procurement-related duties are substantial or continuing with respect to a particular contractor and who exercise *decisionmaking responsibilities* (emphasis added), either directly or as an adviser to the decision maker." Mr. Vander Schaaf also recommended that DOD policymakers, whose decisions are directed toward contractors across the board rather than particular contractors, be exempt from the measure. See *Procurement Measure Criticized, supra*, note 283.

287. See *Mavroules Amendment, supra*, note 254.

288. A portion of any working day which is spent performing a procurement function qualifies as one "work day". For example, if an official states that he or she spent only 20 percent of his or her time performing procurement functions, that 20 percent might still fall within the restrictions because the functions need only have involved any portion of a work day, not the whole work day. See Memorandum, Department of Defense Office of General Counsel, to Members of the Ethics Oversight Committee, subject: "Revolving Door" Update (10 U.S.C. § 2397b) (Apr. 20, 1987).

Further, "majority of working days" refers to the "major defense system" involved, not to each individual contract under that system. Thus, one who has worked a majority of his or her days on a major defense system will be restricted as to every one

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of that system's prime contractors with whom he or she has had the requisite contact. See Memorandum, Department of Defense Office of General Counsel, to Members of the Ethics Oversight Committee, subject: Ethics Update Letter #6, 10 U.S.C. § 2397b (8 Mar. 1989).

289. If the building involved is leased from a third party and occupied by both contractor and DOD employees, any DOD official who is working in that building and who is covered by section 2397b--if he or she works with that contractor's employees on a common contract or project--is considered to be working at a contractor's "site" for purposes of the statute. See Memorandum, Department of Defense Office of General Counsel, to Members of the Ethics Oversight Committee, subject: "Revolving Door" Update Letter #3 (22 May 1987).

290. *Id.* "Decisionmaking responsibilities" include personal and substantial participation in a matter through decision, approval, disapproval, recommendation, advice, investigation or otherwise. The Office of Government Ethics uses this terminology to describe an "official act".

291. 10 U.S.C. § 2397b(a)(1)(A) and (B) (1992).

292. See *Mavroules Amendment*, *supra*, note 254.

293. *Id.* The analysis also recommended, in the alternative, that 10 U.S.C. § 2397b be applied government-wide if Congress would not support the total repeal of 10 U.S.C. § 2397b. The analysis noted that "[i]f the behavior it is intended to prevent

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is such that a restriction on employment in any capacity is desirable, that rationale should apply to all government procurement officials in similar situations."

294. The term "conclusive presumption" came from the hearing testimony of Hugh Witt, representing the Aerospace Industries Association. Mr. Witt commented that the bill "creates a conclusive presumption that employment within two years [after leaving DOD] is a conflict". See *Procurement Measure Criticized*, *supra*, note 283.

295. FAR 1.602-2.

296. Naddaf Int'l Trading Co., B-238768.2, Oct. 19, 1990, 90-2 CPD ¶ 316. See also United Telephone Co. of the Northwest, GSBGA Nos. 10031-P, 10067-P, 89-3 BCA ¶ 22,108.

297. Compliance Corp., 22 Cl. Ct. 193 (1990) (party disqualified from the competitive process for having attempted to obtain the incumbent's proprietary information by bribing one of the incumbent's employees). See also Holmes and Narver Servs., Inc., B-235906, Oct. 26, 1989, 89-2 CPD ¶ 379; and CACI, Inc. - Federal v. United States, 719 F.2d 1567 (Fed. Cir. 1983).

298. Huynh Servs. Co., B-242297-2, June 12, 1991, 91-1 CPD ¶ 562 (termination for convenience was reasonable to protect the integrity of the competitive bidding process given the evidence that the employee of the second low bidder, who had reviewed and supervised the bidding for that bidder, was married to the owner of the company that received the contract as the low bidder).

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299. See *Procurement Measure Criticized*, *supra* note 283.
300. *Id.*
301. *Id.*
302. *Id.*
303. *Id.*
304. *Id.*
305. 136 CONG. REC. S8549.
306. 10 U.S.C. § 2397b(e)(1) (1992).
307. 10 U.S.C. § 2397b(e)(3) (1992).
308. 10 U.S.C. § 2397b(e)(4) (1992).
309. 136 CONG. REC. S8548.
310. 136 CONG. REC. S8547.
311. This knowledge is based on the author's five years experience as an ethics counselor.
312. 136 CONG. REC. S8547.
313. See *supra*, note 18. Pursuant to the Ethics Reform Act of 1989, section 2397b, among other statutes, was suspended and had no force or effect during the period beginning Dec. 1, 1989 and ending Dec. 1, 1990.
314. 136 CONG. REC. S8548-9.
315. *Id.* at S8549.
316. *Id.* at S8548.
317. *Id.*
318. *Id.* at S8549.
319. *Id.*

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320. *See supra*, note 18.

321. 18 U.S.C. § 281, Compensation to Members of Congress, officers, and others in matters affecting the Government; 18 U.S.C. § 283, Officers or employees interested in claims against the Government; and 18 U.S.C. § 284(a), Disqualification of former officers and employees in matters connected with former duties.

322. The term "department" here refers to the military departments; i.e., Department of the Army, Department of the Navy, etc.

323. Act of June 25, 1948, Pub. L. No. 772, § 281, 62 Stat. 697.

324. *Id.*

325. *Id.*

326. *See supra*, note 48, at § 2.

327. *See supra*, note 48, at 76 Stat. 1126. *See also* main text paragraph III.B.

328. Defense Authorization Act for 1988 and 1989, Pub. L. No. 100-180, § 822, 1987 U.S.C.C.A.N. (101 Stat.) 1132.

329. *Id.* Specifically, the selling restriction was included in subsection 281(a)(1) of title 18, United States Code..

330. *Id.* at 1987 U.S.C.C.A.N. 1777.

331. *Id.*

332. *Id.*

333. *Id.* at 1987 U.S.C.C.A.N. 1132. The word "excepted" was superseded by the word "exempted" in 18 U.S.C. § 281(c)(2).

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334. Letter from Theodore B. Oleson, Assistant Attorney General, Office of Legal Counsel, to Colonel Arnold I. Melnick, Chief, Litigation Division, Department of the Army (Nov. 30, 1981). See also *United States v. Gillilan*, 288 F.2d 796, 797 (2d Cir. 1961).
335. Letter from Mr. Oleson to Colonel Melnick, *supra*, note 334.
336. 136 CONG. REC. S8549.
337. *Id.*
338. See *supra*, note 16.
339. The Ethics Reform Act of 1989, *supra* note 18, suspended 18 U.S.C. § 281, as well as 41 U.S.C. § 423 and 10 U.S.C. §§ 2397a and 2397b, for one year beginning on Dec. 1, 1989, and ending on Dec. 1, 1990. See also 1989 U.S.C.C.A.N. 1759. The one-year suspension (for 18 U.S.C. § 281, 10 U.S.C. §§ 2397a and 2397b, and 41 U.S.C. § 423(f) (the remainder of the Procurement Integrity Act in section 423 went back into effect on Dec. 1, 1990) was extended to May 31, 1991, pursuant to the Defense Authorization Act for 1991, Pub. L. No. 101-510, Div. A, Title VIII, § 815(a)(3), 1990 U.S.C.C.A.N. (104 Stat.) 1597.
340. See *Pentagon Forces*, *supra*, note 175.
341. The Defense Authorization Act for 1991, Pub. L. No. 101-510, Div. A, Title XIV, § 1484(c)(2), 104 Stat. 1716, provided for section 801 to be amended by striking out the "(b)" before the words "Payment may not be made." This made sense because section 801(a) was repealed by the Ethics Reform Act of 1989, see *supra*, note 18. The 1992 annual pocket part (West Publishing Co.) to

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title 37, United States Code, however, retains the "(b)" before the words "Payment may not be made."

342. The uniformed services are not the same as the armed services. In peacetime, the *armed* services consist of the military departments that constitute the Department of Defense-- the Departments of the Army, Navy (including the Marine Corps), and the Air Force. The *uniformed* services include not only the military departments in the Department of Defense, but also the Coast Guard, Public Health Service, and National Oceanic and Atmospheric Administration (in 1953 this was called the Coast and Geodetic Survey).

343. Supplemental Appropriation Act for 1952, Pub. L. No. 253, ch. 664, ch. XIII, § 1309, 1951 U.S.C.C.A.N. 766, 65 Stat. 757.

344. See To the Secretary of the Navy, B-144947, 40 Comp. Gen. 511 (1961).

345. Supplemental Appropriations Act for 1954, Pub. L. No. 207, ch. 340, ch. XIII, title I, § 1309, 1953 U.S.C.C.A.N. 483, 67 Stat. 437.

346. Act of Sep. 7, 1962, Pub. L. No. 87-649, § 14b, 1962 U.S.C.C.A.N. 527, 76 Stat. 451, 485.

347. S. REP. NO. 1874, 87th Cong., 2d Sess. 2 (1962). See also 1962 U.S.C.C.A.N. 2390.

348. Act of Oct. 9, 1962, Pub. L. No. 87-777, § 2, 1962 U.S.C.C.A.N. 907, 76 Stat. 777.

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349. Ethics Reform Act of 1989, Title V, § 505(a), *see supra*, note 18; Defense Authorization Act for 1991, *see supra*, note 341.

350. *See supra*, note 31, for the current language of 37 U.S.C. § 801(b).

351. *Id.*

352. Lieutenant Commander Fred M. Cloonan, B-175116, 58 Comp. Gen. 3 (1972); Lieutenant Commander Ronald Anthony, B-137231, 38 Comp. Gen. 470 (1959).

353. Lieutenant Colonel Theodore W. Hammet, USA, Retired, B-198751, Jan. 8, 1982, 1982 U.S. Comp. Gen. LEXIS 1599.

354. Theodore W. Hammet, B-198751, Feb. 19, 1981, 1981 U.S. Comp. Gen. LEXIS 232.

355. To the Secretary of Defense, B-148130, 41 Comp. Gen. 677 (1962); Lieutenant Commander Ronald Anthony, B-137231, 38 Comp. Gen. 470 (1959).

356. Dikewood Services Co., 56 Comp. Gen. 188 (1976).

357. *See supra*, note 352.

358. This report must be filed also within 30 days after the information in the previously filed report ceases to be accurate. The reports should continue to be filed--when there are changes--for three years after retirement, at which point in time the filing requirement ends (i.e., the selling restriction ends). This reporting requirement is accomplished through the completion and filing of DD Form 1357, Statement of Employment. DD Form 1357 is discussed, and a copy can be seen, in AR 600-50, para. 5-

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5b and Fig. 1-2. Although parts of AR 600-50 have already been superseded by Standards of Ethical Conduct for Employees of the Executive Branch, 5 C.F.R. § 2635, which became effective on Feb. 3, 1993, para. 5-5b of AR 600-50, regarding the filing of DD Form 1357 remains in effect. See DA Message, *supra* 3.

359. See *supra*, note 344.

360. See *supra*, note 354.

361. See *supra*, note 359.

362. See *Supra*, note 117. See also 136 CONG. REC. S8549.

363. See *Lobbying Hearings* at 14, *supra*, note 132 (testimony of Stuart E. Eizenstat, partner in Powell, Goldstein, Frazer & Murphy and former Chief Domestic Policy Adviser to President Jimmy Carter).

364. Defense Officer Personnel Management Act, Pub. L. No. 96-513, 1980 U.S.C.C.A.N. 6333, 94 Stat. 2835.

365. The Officer Personnel Act of 1947, which is discussed in 1980 U.S.C.C.A.N. 6339.

366. *Id.* at 6343. One of the inequitable situations involved the uncertain career expectations of reserve officers on active duty since they had no expectation of minimum time in grade prior to retirement or separation, and could be released at any time subject to the needs of the service. On the other hand, retired reserve officers at that time were not subject to the dual compensation laws, which restrict the amount of retired pay that career officers may receive if they work for the federal

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government in a civilian capacity. That is no longer the case. See Civil Service Reform Act of 1978, Pub. L. No. 95-454, § 308, 1978 U.S.C.C.A.N. (92 Stat.) 1149.

367. See discussion in 1980 U.S.C.C.A.N. 6355-6. See also DEP'T OF ARMY, REG. 601-100, APPOINTMENT OF COMMISSIONED AND WARRANT OFFICERS IN THE REGULAR ARMY, Interim Change 102, para. 2-39 and 2-39.1 (10 Nov. 1982).

368. R.W. EMERSON, *Circles* (1841).

369. 136 CONG. REC. S8544.

370. 18 U.S.C. § 216 (1992).

APPENDIX A

SUMMARY OF POST-EMPLOYMENT RESTRICTIONS
(Effective 1 January 1992)

1. Applicable to all officers and civilian employees.

IF you were a Government officer or employee (including a special Government employee), THEN you may not—

ever—	make, on behalf of anyone else, with the intent to influence, any communication to or appearance before—	any Government officer or employee regarding—	any particular matter involving specific parties in which you ever participated personally and substantially for the Government (18 USC 207 (a)(1)).
within 2 years after termination of your Government service—	make, on behalf of anyone else, with the intent to influence, any communication to or appearance before—	any Government officer or employee regarding—	any particular matter involving specific parties that you know was pending under your official responsibility in the last year of Government employment (18 USC 207 (a)(2)).

2. Applicable only to officers and civilian employees who participated in treaty or trade negotiations.

IF you participated personally and substantially in any treaty or trade negotiations and had access to nonreleasable information, THEN you may not —

within 1 year after termination of your Government service—	represent, aid, or advise—	anyone else concerning—	an ongoing trade or treaty negotiation in which during your last year of Government service you participated personally and substantially (18 USC 207 (b)).
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3. Applicable only to "senior employees".

IF you held an Executive Level position, a military grade O-7 or above, or an SES position at ES-5 or above, THEN you may not—

within 1 year after termination of service in a "senior employee" position—	make, on behalf of anyone else, with the intent to influence, any communication to or appearance before—	any officer or employee of a department or agency in which you served during your last year as a "senior employee" regarding—	any matter on which you seek official action (18 USC 207 (c)).
within 1 year after termination of service in a "senior employee" position—	aid or advise a foreign entity, or represent a foreign entity before the Government, with the intent to influence—	any Government entity, officer, or employee regarding—	any official decision (18 USC 207 (f)).

4. Applicable only to officers and civilian employees who participated in the conduct of a procurement.

IF, during the period from 16 July 1989 through 30 November 1989, you participated personally and substantially in the conduct of a particular Army procurement, or personally reviewed and approved the award, modification, or extension of any contract for that procurement, THEN you may not, after 31 May 1991 but—

within 2 years after the date of your last participation in that procurement—	participate on behalf of any competing contractor— (i.e., any entity likely to be a competitor for or recipient of a Government contract or subcontract)	in any manner whatsoever in—	any negotiations leading to the award, modification, or extension of any contract for that procurement (41 USC 423(e)(1)).
within 2 years after the date of your last participation in that procurement—	participate on behalf of any competing contractor—	personally and substantially in—	the performance of that contract (41 USC 423(e)(2)).

5. Applicable to certain other procurement officials.

a. Officers and Civilian Employees in Grades Above 0-3 or GS-12:

IF during the 2 years prior to separation you performed a procurement function on a majority of your working days, either:

- (1) At a site owned or operated by a particular DOD contractor, or
- (2) Relating to a major defense system supplied by a particular DOD contractor with regard to which you participated personally and substantially in decision-making responsibilities through personal contact with that contractor, Then you may not--

for 2 years after separation from DOD--	accept compensation from that particular contractor--	for any service whatsoever--	regardless of whether it involves any DOD matter (10 USC 2397b).
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b. Officers and Civilian Employees in Grades Above 0-6 and GS-15:

IF, at any time during the 2 years prior to separation, you ever acted as one of the primary representatives of the United States in the negotiation of any DOD contract over \$10 million, or in the settlement of a contract claim for over \$10 million, THEN you may not--

for 2 years after separation from DOD--	accept compensation from that particular contractor--	for any service whatsoever--	regardless of whether it involves any DOD matter (10 USC 2397b).
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6. Applicable only to retired Army officers.

IF you are a Retired Army Officer, THEN you may not--

within 2 years after retirement--	prosecute or assist in prosecuting any claim against the U.S. Government before--	any Government entity, officer, or employee regarding--	any matter with which you were directly connected while on active duty (18 USC 281(b)(2)).
within 2 years after retirement--	prosecute or assist in prosecuting any claim against the U.S. Government before--	any Government entity, officer, or employee regarding--	any matter involving the Army (18 USC 281(b)(1)).
within 2 years after retirement--	represent another, for compensation, in connection with selling to--	the Army or an Army non- appropriated fund activity--	anything, either goods or services (18 USC 281(a)(1)).
within 3 years after retirement as a Regular Army officer--	engage in selling, or contracting or negotiating in connection with a sale, to--	any Department of Defense agency, including the military departments and all DoD non- appropriated fund activities--	any tangible property (but not personal or professional services) (37 USC 801(b)).