AMENDMENT OF THE POST-GOVERNMENT EMPLOYMENT LAWS

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I. INTRODUCTION

A former high-level White House advisor, Michael Deaver, left his government post as White House Deputy Chief of Staff and Assistant to the President of the United States to start a lobbying firm. This lobbying firm later ended up representing such foreign entities as Canada and Puerto Rico.[1] Michael Deaver contacted White House officials on behalf of these clients in violation of post-government employment restriction laws.[2] Deaver, however, was never formally charged with violations of these laws.[3]

Another former political advisor to Reagan, Franklyn Nofziger, was recently acquitted of alleged violations of the post-government employment restriction laws.[4] Nofziger, on three different occasions, contacted White House officials on behalf of clients, within the prohibited time period provided by statute. In overturning the lower court's conviction, the court of appeals held that Nofziger lacked the requisite criminal intent necessary under the statute.[5] These are only two examples of a significant problem: influence peddling by former government employees.

The Department of Housing and Urban Development (HUD) scandal marks another poignant example of ethical misconduct. Developers wanting to profit from lucrative contracts to buy and renovate rental housing for the poor under Section 8 of the Moderate Rehabilitation program enlisted high-priced consultants. The consultants, including former HUD officials and influential Republicans with no prior experience in housing,[6] contacted local housing authorities who promised to cut through the red tape in return for ex-

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1. Deaver v. Seymour, 822 F.2d 66, 67 (D.C. Cir. 1987).

2. *Id.* The Attorney General conducted an investigation into Deaver's possible violations of 18 U.S.C. § 207 (1982).

3. *Id.* Deaver was never charged with violations of the conflict of interest laws because an integral witness, Canadian diplomat Allan Gotlieb, refused to testify regarding Deaver's assistance to the Canadian government in lobbying the White House on the acid rain issue. *See* Beckwith, *The High Price of Friendship*, TIME, Dec. 28, 1987, at 23. Deaver was convicted, however, on two counts of perjury for lying to a grand jury about his post-government employment activities. *Id.*

4. United States v. Nofziger, 878 F.2d 442 (D.C. Cir. 1989).

5. *Id.* at 443. Although the holding in *Nofziger* is technically correct, it illustrates the need for civil sanctions. Had a civil sanction been available under 18 U.S.C. § 207(c) (1982), there would have been no need to find criminal intent.

orbitant consulting fees. The developers paid heavy hitters such as former Secretary of the Interior James Watt, former Senator Edward Brooke of Massachusetts, and former Governor Louis Nunn of Kentucky, excessive consulting fees for using their influence with the Department of Housing and Urban Development.[7] In fact, Watt received approximately $300,000 for making eight telephone calls and meeting with Samuel Pierce, the former HUD Secretary, for half an hour.[8]

These examples illustrate all too clearly the propensity of some public officials to use influence and confidential information gained while in public service to further their careers in the private sector. The existence of such improprieties frustrates several public concerns: maintenance of integrity and public confidence in government, efficient operation of government programs, and equal access to government.[9] The Ethics in Government Act[10] was designed to prohibit executive branch employees from appearing before, and communicating with, agencies with which they formerly worked. The Ethics in Government Act, however, failed to address the larger problem of the misuse of confidential information and influential contacts.

This Note traces the legislative history of federal post-government employment restrictions and presents the competing interests that must be considered in drafting new legislation. Additionally, this Note analyzes the newest federal post-government employment restrictions contained in the Ethics Reform Act of 1989,[11] focusing on aspects of the new legislation and other proposed changes: (1) application of restrictions to Congress and its employees as well as the executive branch; (2) expansion of the system of sanctions to include civil penalties and injunctive relief; and (3) rigorous enforcement of the restrictions, including a cause of action for private parties injured by a former government employee's misuse of confidential information. Finally, this Note analyzes the extent to which the new legislation achieves a proper balance among the competing interests implicated by post-government employment restrictions.

II. LEGISLATIVE HISTORY OF POST-GOVERNMENT EMPLOYMENT RESTRICTIONS

A. Post-Government Employment Restrictions: 1872-1962

The initial post-government employment restrictions were passed in 1872 in order to prevent possible collusion and fraud regarding causes of

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6. Traver, *The Housing Hustle*, TIME, June 26, 1989, at 18. According to this article, since the release of the HUD inspector general's report in April of 1989, the Agency has become the target of two congressional investigations into charges of influence peddling.

7. *Id.* at 19.

8. *Id.*

9. Note, *The Fiduciary Duty of Former Government Employees*, 90 YALE L.J. 189, 190 (1980).

10. 18 U.S.C. § 207 (1988).

11. Pub. L. No. 101-194, § 101(a), 103 Stat. 1716 (codified at 18 U.S.C. § 207 (Supp. I. 1990)).

action against the government.[12] The restriction came in the form of a rider to the post office appropriations bill. It forbade any executive branch appointee from acting as counsel for a party in a claim against the United States during the term of that employee's government service, and for two years after such employment ceased.[13]

This statute created several problems. First, it applied only to prosecuting claims against a government agency,[14] a very narrow interpretation. For instance, the statute did not apply to appearances before an agency for reasons unrelated to claims against the government. This was problematic because it allowed appearances at an agency by former government employees for their influential effect. Second, the law was interpreted to apply only to executive department employees, and not agency personnel,[15] Congress, or Army contracting officers.[16] Moreover, the statute contained no penalties. Consequently, the sanction imposed by courts was often no more than a denial of the employee's fee from the claims collection service.[17]

These problems with the statute led to the adoption of a second section restricting post-government employment.[18] This new section was incorporated into the federal criminal code in 1948 and expanded the application of the restrictions to commissioned officers and provided for criminal penalties of a $10,000 fine, one year imprisonment, or both.[19] This section was an addition to, and not a replacement for, the earlier law. The coverage of this legislation, like the earlier statute, was limited to prosecution of claims involving matters with which the former employee was directly connected.[20]

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12. Post Office Appropriations Act, ch. 256, § 5, 17 Stat. 202 (1872) (codified at 5 U.S.C. § 99 (1958)) (repealed 1962).

13. *Id.* The rider to the post office appropriations bill appeared as follows:

> [I]t shall not be lawful for any person ... appointed an officer, clerk, or employee in any of the executive departments to act as counsel, attorney, or agent for prosecuting any claim against the United States which was pending in said Departments while he was said officer, clerk, or employee, nor in any manner, nor by any means, to aid in the prosecution of any such claim, within two years next after he shall have ceased to be such officer, clerk, or employee.

14. *See* Morgan, *Appropriate Limits on Participation by a Former Agency Official in Matters Before an Agency*, 1980 DUKE L.J. 1, 5 (1980).

15. 25 Op. Att'y Gen. 6 (1903). The distinction between executive level and agency employees is that executive level employees are primarily defined, for the purposes of this law, as all employees who are not agency employees.

16. 31 Op. Att'y Gen. 471 (1919). According to Morgan, Congress tried to reverse this position with the Army Appropriations Act, ch. 8, 41 Stat. 104 (1919) (codified at 18 U.S.C.A. §§ 203-05, 207) (1976 & West Supp. 1979). Morgan, *supra* note 14, at 6.

17. *See, e.g.*, Van Metre v. Nunn, 116 Minn. 444, 133 N.W. 1012 (1912).

18. Crimes and Criminal Procedures Act, ch. 139, § 284, 62 Stat. 698 (1948) (codified at 18 U.S.C. § 284 (1958)) (repealed 1962).

19. *Id.* The amendment, in its entirety, read as follows:

> Whoever, having been employed in an agency of the United States including commissioned officers assigned to duty in such agency, within two years after the time when such employment or service has ceased, prosecutes or acts as counsel, attorney, or agent for prosecuting, any claims against the United States involving any subject matter directly connected with which such person was so employed or performed duty, shall be fined not more than $10,000.00 or imprisoned not more than one year, or both.

20. *Id.*

From 1948 to 1962, the American Bar Association voiced concerns regarding the need for reform of the post-government employment restrictions on attorneys.[21] Finally, in 1957, Congress conducted a study of all federal conflict of interest laws.[22] A committee created by the Association of the Bar of New York studied the problem for two years. The findings contained in its report[23] eventually led to the Ethics In Government Act of 1978.[24]

B. Post-Government Employment Restrictions: 1962-1978

In 1961, John F. Kennedy appointed a three member advisory panel to recommend changes to the existing post-government employment laws.[25] In the closing days of its session the following year, Congress passed legislation largely encompassing the panel's suggestions.[26]

Section 207 of Title 18[27] modified the prior post-government employment restrictions. First, it broadened the application of the statute to include all federal employees in the executive branch, but created an exception for part-time employees and consultants through a "special government employee" category.[28] Second, Congress prohibited only post-government employment activity concerning particular matters and specific parties with whom the former employee dealt.[29] This narrowed the prior application of the statute. Additionally, the new law provided for a one-year ban on post-government involvement regarding matters previously within the former employee's official responsibility.[30] This provision of the statute only prohibited activity when a former employee acted in a representative capacity in an

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21. District Judge Irving R. Kaufman was the most vocal about the need for reform. He perceived a need to clarify existing laws and their application to attorneys. Judge Kaufman felt that the "revolving door" between public and private employment should be encouraged. He was particularly troubled by the status of part-time federal employees, such as consultants and members of boards and commissions, because it was not clear whether their public service disqualified them and their law firms from all cases involving the government. Judge Kaufman asserted that the law's lack of clarity caused many attorneys to turn down cases that they would otherwise be free to take. He encouraged the bar to alleviate the problem. Kaufman, *The Former Government Attorney and the Canons of Professional Ethics*, 70 HARV. L. REV. 657 (1957).

Regulations governing former government attorneys are beyond the scope of this Note because their own Canons of Ethics regulates their professional conduct. Nevertheless, it is important to note the concerns that led to the reform of the post-government employment restrictions.

22. This study resulted in a report. *See* STAFF OF HOUSE COMM. ON THE JUDICIARY, 85TH CONG., 2D SESS., REPORT ON THE FEDERAL CONFLICT OF INTEREST LEGISLATION (Comm. Print 1958).

23. *See* Morgan, *supra* note 14, at 9.

24. 18 U.S.C. § 207 (1978) (amended 1979), *amended by* Ethics Reform Act of 1989, Pub. L. No. 101-194, 103 Stat. 1716 (1989) (codified at 18 U.S.C. § 207 (Supp. I 1990)).

25. Morgan, *supra* note 14, at 9.

26. *See* Bribery, Graft and Conflicts of Interest Act, Pub. L. No. 87-849, 76 Stat. 1123 (1962) (codified at 18 U.S.C. §§ 201-18 (1976)) (amended 1977, 1978 & 1979).

27. 18 U.S.C. § 207 (1976) (amended 1978, 1979).

28. The term "special government employee" is defined in section 202(a) as any person "employed ..., with or without compensation, for not to exceed one hundred and thirty days during any period of 365 consecutive days." 18 U.S.C. § 202(a) (1976) (amended 1978, 1987).

29. 18 U.S.C. § 207(a), (b) (1976) (amended 1978, 1979).

appearance before a government agency. The statute did not prohibit office counseling in preparation for such an appearance. Finally, the new legislation upgraded the misdemeanor sanctions of the prior statute to felony level, but failed to create any civil or administrative remedies.[31]

The issue of post-government employment restrictions was not intensely debated in the mid-1960's. In fact, when President Johnson issued an Executive Order regarding Ethics in Government Service he did not even mention such restrictions.[32] Nonetheless, post-government employment restriction laws did not enjoy a long respite from scrutiny.

In the late 1960's and early 1970's, the Ralph Nader organizations conducted studies that helped popularize the view that these regulations were not accomplishing their legislative intent. This view did not claim that regulation was wrong, but that it was not achieving its purpose because the process had allegedly been captured by the regulated firms.[33] One explanation for this alleged capture is the incestuous relationship between the employees working for the regulatory agencies and the firms for which they ultimately expected to work.[34] Government employees were making decisions regarding private corporations for which they later expected to work upon leaving government employ.

Various courts interpreting section 207 also found it to be inadequate. Most notable was the Second Circuit Court of Appeals opinion in *General Motors Corp. v. City of New York*.[35] In *General Motors*, a private lawyer previously employed by the Antitrust Division at the Department of Justice was asked to represent New York City in a lawsuit against General Motors. This attorney had worked on this same issue while with the Department of Justice, although he had not been actively in charge of the case.[36] The Justice Department formally advised the attorney that section 207 was inapplicable to his activity.[37] This narrow interpretation of section 207 made the post-government employment laws in effect at the time inapplicable to "side-switching," exactly the type of activity the post-government employment laws were designed to curb.

The early 1970's brought into focus ethical problems in the political arena as well as the legal field. As the events of Watergate unravelled, concern about morality and ethics was paramount. These concerns were not

30. 18 U.S.C. § 207(b) (1976) (amended 1978, 1979). The term "official responsibility" is defined in section 202(b) as "the direct administrative or operating authority ... to approve, disapprove, or otherwise direct Government action."

31. 18 U.S.C. § 207 (1976) (amended 1978, 1979).

32. Exec. Order No. 11,222, 30 Fed. Reg. 6469 (1965), *reprinted in* 18 U.S.C. § 201 (1970), *revoked by* Exec. Order No. 12,731, 3 C.F.R. 306 (1990).

33. *See* M. GREEN, THE CLOSED ENTERPRISE SYSTEM (1971 ed.); E. COX, R. FELLMETH & J. SCHULZ, THE NADER REPORT ON THE FEDERAL TRADE COMMISSION (1969); R. FELLMETH, THE INTERSTATE COMMERCE OMISSION (1970).

34. *See* Morgan, *supra* note 14, at 12.

35. 501 F.2d 639 (2d Cir. 1974).

36. *Id.* at 642.

37. The attorney, however, was disqualified because his representation of the city violated Disciplinary Rule 9-101(B). Rule 9-101(B) states that "A lawyer shall not accept private employment in a matter in which he had substantial responsibility while he was a public employee." MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 9-101(B) (1969).

confined to the Executive Branch, but also extended to Congress.[38] In addition, in 1976 Common Cause presented the results of a study[39] indicating that many executive level employees were leaving government service to work for companies that they had directly dealt with while in government employment.[40] The study expressed concern over the conflicts presented when a government employee deals with a potential future employer or, conversely, the special access that former employees have to the agency or department with which they once worked.[41] Common Cause suggested that federal employees entering the private sector be required to sign a two-year contract agreeing not to accept employment with a company affected by a "specific agency or proceeding" or "affected by a policy proceeding" in which the employee had participated.[42] Common Cause further recommended a lifetime ban on former employees representing private companies before the agency for which they once worked.[43]

C. The Effect of the 1978 Ethics in Government Act on Post-Government Employment Restrictions

President Carter entered office at a time of great public concern about ethics in government.[44] Consequently, it is not surprising that the first bill introduced in Congress that year dealt with ethics.[45] The Government Operations Committee laid the groundwork for the bill the previous year, conducting a study of government regulation.[46] The study carefully reviewed the

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38. Although the memories of former Vice President Spiro Agnew's resignation after allegations of income tax evasion had all but faded, Congress had its fair share of problems in the late 1970's. For example, Congressman Wilbur Mills' affair with Fanne Foxe, a stripper, created an ethical stir. Soon thereafter, Ohio Congressman Wayne Hays was caught with his mistress, Elizabeth Ray, on his office payroll. Ray proudly announced to the press that she could not type or even answer the phone. The crowning blow, however, was the exposure of President Nixon's participation in the Watergate affair, making it clear that some type of ethical reform was necessary. Martz, *Congress Gropes to Reform*, NEWSWEEK, June 12, 1989, at 20.

39. *See* A. KNEIER, SERVING TWO MASTERS: A COMMON CAUSE STUDY OF CONFLICTS OF INTEREST IN THE EXECUTIVE BRANCH (1976).

40. *Id.* at i.

41. *Id.* at ii, iii.

42. *Id.* at 64, 71-72.

43. *Id.*

44. Morgan, *supra* note 14, at 18.

45. *See* H.R. 1, 95th Cong., 1st Sess. (1977), *reprinted in Hearings on H.R. 1, H.R. 9, H.R. 6954 and Companion Bills, Financial Disclosure Act, Before the Subcomm. on Administrative Law and Government Relations of the House Comm. on the Judiciary*, 95th Cong., 1st Sess. 3 (1977) [hereinafter *Hearings on H.R. 1*]. In the Senate, the primary ethics bill was Senator Ribicoff's Public Officials Integrity Act, S. 555, 95th Cong., 1st Sess. (1977). The bill included financial disclosure provisions, appointed a congressional legal counsel and a special prosecutor to monitor executive branch misbehavior, and established an Office of Government Ethics. *Id. See also* Morgan *supra* note 14, at 18 n.98.

46. Morgan, *supra* note 14, at 18.

existing conflict of interest laws.[47] The resulting Senate Bill, S. 555,[48] easily passed by a vote of 74-5.[49]

Opposition to the bill came from the House Armed Services Committee. The Committee expressed concern that the post-government employment restrictions, when imposed on Department of Defense employees, would significantly inhibit the hiring of consultants and other part-time employees.[50] The Securities and Exchange Commission (SEC) expressed similar fears over the legislation's adverse effect on recruiting.[51] According to the SEC, many lawyers worked for the SEC to gain initial experience in the securities law area. If these attorneys later wanted to practice securities law in the private sector, they would necessarily have to practice before the Commission, an activity prohibited by the statute.[52]

Despite opposition from these sources, an amended version of S. 555 passed both houses by a large margin.[53] The new legislation made significant changes in post-government employment restrictions. First, the law extended the prohibition to "aiding and assisting" as well as direct representation before a former agency.[54] The prohibition lasted two years and applied only to employees at the GS-17 level or above and comparable military ranks.[55] Second, the new legislation provided for a one-year "cooling off" period[56] for employees at the GS-17 level or above.[57] The legislation did, however, provide for expanding the "cooling off" period to employees at the GS-16 level or below, if deemed necessary by the Office of Government Ethics.[58] Third, the

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47. The major focus of H.R. 1, *see supra* note 45, was financial disclosure. Concern about post-government employment restrictions was minimal. Morgan, *supra* note 14, at 18-19.

48. 95th Cong., 1st Sess. (1977).

49. 123 CONG. REC. S10,774 (daily ed. June 27, 1977).

50. *See* HOUSE COMM. ON ARMED SERVICES, ETHICS IN GOVERNMENT ACT OF 1977, H.R. REP. NO. 642, 95th Cong., 1st Sess., pt. 2, at 15-18 (1977).

51. *See Hearings on H.R. 1, supra* note 45 (letter from Chairman Harold M. Williams of the SEC to Chairman Peter W. Rodino of the House Judiciary Committee (Sept. 8, 1977)).

52. *Id.*

53. *See* Pub. L. No. 95-521, 92 Stat. 1824 (1978) (codified in scattered sections of 2, 5, 18, 20 & 28 U.S.C.). The measure passed the Senate by a voice vote on October 7, 1978, 124 CONG. REC. S17,497 (daily ed. Oct. 7, 1978), and the House by a 370 to 23 vote on October 12, 1978. 124 CONG. REC. H12,591 (daily ed. Oct. 12, 1978).

54. 18 U.S.C. § 207(b) (1978) (amended 1979, 1989).

55. *Id.* GS-17 refers to the General Schedule which delineates pay rates for federal civilian employees. 5 U.S.C. § 5332 (1988). The Ethics in Government Act actually created four categories to which the two-year prohibition applied: (1) persons paid a sum equal to or greater than that provided for in the Federal Executive Salary Schedule, 5 U.S.C. §§ 5311-17; (2) persons paid at or above the basic rate of GS-17, *id.* § 5332; (3) active duty commissioned officers paid at level O-7 or above as prescribed by 37 U.S.C. § 201 (1988); and (4) persons with "substantial decisionmaking authority" as defined by the Director of the Office of Government Ethics, a positions created by Title IV of the ethics legislation. 18 U.S.C. § 207(d) (1978) (amended 1979, 1989).

56. A "cooling off" period is a one-year restriction on any contact with the employees of the agency with which the former federal employee worked. This one year period is based on the assumption that most confidential information and influence gained while employed by the government will, for the most part, dissipate one year after the employee's departure. Morgan, *supra* note 14, at 20.

57. 18 U.S.C. § 207(c), (d) (1978) (amended 1979, 1989).

58. *Id.* § 207(d)(1)(C).

bill carved out two exceptions to its coverage. Exceptions were made for communications to the government involving scientific or technical information[59] and for uncompensated appearances.[60] Finally, the bill created an administrative remedy, providing authority for the head of a department or agency, after proper hearing and notice, to ban a former employee from any further contact with the agency upon finding a violation of the post-government employment restrictions.[61] This was included because the Senate committee believed that too few prosecutions resulted under the requirement of a "knowing" state of mind.[62]

Federal employees reacted negatively to this new legislation. In fact, many high-level officials in the Department of Housing and Urban Development, and other agencies, threatened to resign after it passed.[63] In response, Congress back-pedalled in an attempt to soften the effect of the legislation. First, the Chairman and ranking minority members of both the House and Senate committees responsible for the new law wrote letters to the Director of the Office of Government Ethics indicating that 18 U.S.C. § 207(b)(ii) of the new law was to be narrowly interpreted.[64] In addition, the Office of Government Ethics published a set of regulations narrowly interpreting the "aiding and assisting" provision of the law, applying it only to representational activity.[65] Congressman Danielson also proposed a bill delaying the effective date of the legislation[66] and Congressman Moorehead offered legislation deleting the "aiding and assisting" language altogether.[67]

Finally, Congress amended the Ethics in Government Act two weeks before the law's effective date.[68] The new legislation modified the "aiding and assisting" language by prohibiting only assistance by "personal presence at" the appearance before the agency.[69] The legislation also specified that the prohibitions only extended to cases where the employee had official responsibility or was personally and substantially involved.[70] The amendments also excluded one and two star generals and former officials working for colleges, universities, and nonprofit agencies.[71] This legislation remained unchanged until Congress passed the Ethics Reform Act of 1989.

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59. *Id.* § 207(f).
60. *Id.* § 207(i).
61. *Id.* § 207(j).
62. *See* SENATE COMM. ON GOVERNMENTAL AFFAIRS, REPORT TO ACCOMPANY S. 555, THE PUBLIC OFFICIALS INTEGRITY ACT OF 1977, H.R. REP. NO. 170, 95th Cong., 1st Sess. (1977).
63. *See* Beck, *A Federal Brain Drain*, NEWSWEEK, Mar. 5, 1979, at 51.
64. Letter from Hon. Abe Ribicoff, Charles N. Percy, George E. Danielson and Carlos J. Moorehead to Bernhardt K. Wruble, Director, Office of Government Ethics (Feb. 16, 1979), *reprinted in* 125 CONG. REC. S1613 (daily ed. Feb. 21, 1979).
65. Amendments to 5 C.F.R. §§ 737.1-.29 (1979), 44 Fed. Reg. 19,974 (1979).
66. *See* H.R. 2843, 96th Cong., 1st Sess. (1979).
67. *See* H.R. 2119, 96th Cong., 1st Sess. (1979).
68. *See* Amendments to the Ethics in Government Act of 1978, Pub. L. No. 96-28, 93 Stat. 76 (1979) (codified at 18 U.S.C. § 207(b), (d)(1)-(2) (1988)).
69. *Id.*
70. *Id.*
71. *Id.*

D. The 1980's Post-Government Employment Restriction Bills

In order to understand the current federal post-government employment restrictions embodied in the Ethics Reform Act of 1989, an analysis of preceding bills is imperative. This body of legislation, although never enacted, provides insight into the alterations that Congress deemed necessary.

In 1987, a new bill was introduced aimed directly at creating longer post-government employment restrictions for former government employees working for foreign interests.[72] This new legislation was drafted in response to the growing federal trade deficit and to a 1986 GAO study reporting that approximately seventy-six federal officials were currently representing foreign interests from fifty-two countries after leaving government office between 1980 and 1985.[73] Representative Kaptur, one of the bill's sponsors, succinctly expressed the problem. While on a trade mission to Japan with the Department of Commerce, a businessman from her district mentioned that the previous year he had been on a similar trip and shared proprietary information about his business with members of the Federal Trade Commission. He was disturbed to learn that only one year later those same people were working for his foreign competitors.[74]

The new legislation, H.R. 1231, would have essentially replaced Section 207 of Title 18 with a new law putting a four-year ban on representing or advising a foreign entity for compensation. The ban also extended to any government or foreign political party or any person outside the United States, unless they were a citizen or domiciled in the United States, or a company organized or created under United States laws.[75] A business organized, or with its principal place of business, in the United States was also exempt from coverage.[76]

This proposed legislation is notable for two reasons. First, its restrictions applied both to Congress and high ranking executive branch employees.[77] Second, the legislation permitted the Attorney General, upon a finding of violations, to petition the appropriate court for injunctive relief.[78] Although this bill never became law, the abuse it sought to combat was widely publicized.

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72. *See* Foreign Agents Compulsory Ethics in Trade Act of 1987, H.R. 1231, 100th Cong., 1st Sess. (1987).

73. *See Foreign Agents Compulsory Ethics in Trade Act of 1987: Hearings on H.R. 1231 Before the Subcomm. on Administrative Law and Government Relations of the House Comm. on the Judiciary*, 100th Cong., 1st Sess. 21 (1987) [hereinafter *Hearings on H.R. 1231*]. The GAO study indicated that the 76 officials representing foreign interests included five Assistants to the President of the United States, one White House Chief of Staff, one major general and three lieutenant generals, six senators, nine representatives, eight special assistants to the President, two deputy assistants to the President, and twenty-two level 1-4 agency officials. *Id.* at 11.

74. *Id.* at 20.

75. *Id.* at 3.

76. *Id.* at 4.

77. H.R. 1231 applied post-government employment restrictions to the following federal employees: the President and Vice-President of the United States and their appointees, the heads of each department, Members of Congress, any employee in the executive branch serving at level I-V, and members of the uniformed service in a pay grade 0-7 or higher. *Id.* at 5.

78. *Id.* at 7.

For example, at about the same time H.R. 1231 was introduced, Michael Deaver's post-government improprieties were coming to light.[79] Also in 1986, former Senator John Tower left government service and immediately lined up more than $750,000 in consulting work with six leading defense contractors.[80] Tower claimed that the advice for which he was compensated was not superior to any information the defense contractors could have received from a daily newspaper.[81] The recent case of Franklyn Nofziger also focused public attention on the propensity of some former federal employees to misuse contacts and confidential information.[82]

H.R. 1231, in combination with the preceding events, focused the attention of Congress on the need to address the existing gaps in federal post-government employment laws.[83] Introducing H.R. 5043[84] was Congress' most valiant effort in that regard. This Act merits extensive review because it greatly influenced the current legislative changes in the federal post-government employment restriction area. The Act proposed post-government employment restrictions on five levels of federal personnel and extended the restrictions on executive branch personnel. These restrictions applied to members of Congress and certain congressional employees.[85] The bill also

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79. *See supra* notes 1-3 and accompanying text.

80. *See* Shapiro, *Drawing The Line*, TIME, Mar. 13, 1989, at 19.

81. *Id.*

82. *See* United States v. Nofziger, 878 F.2d 442 (D.C. Cir. 1989). *See also supra* notes 4-5 and accompanying text, and case analysis *infra* notes 164-69 and accompanying text.

83. *See Hearings on H.R. 1231, supra* note 73, at 14-16.

84. The Post-Employment Restrictions Act of 1988, H.R. 5043, 100th Cong., 2d Sess. (1988).

85. *See* H.R. REP. NO. 1068, 100th Cong., 2d Sess. 4 (1988) [hereinafter H.R. REP. 1068]. The first category of restrictions applied to all executive level employees paid at or above Level V (GS-17). The Bill created three levels of bans for these personnel: 1) a lifetime prohibition on representing, aiding or advising anyone with whom the federal employee had substantial and personal dealings while working with the government; 2) a two-year ban on representation of a party regarding a matter that was under that employee's "official responsibility"; and 3) a one-year ban on representing, aiding or advising anyone with regard to trade negotiations not already prohibited by the lifetime or two-year bans. *Id.* at 1-3.

The second set of restrictions applied to executive branch personnel at Executive Level V, or paid at or above GS-17 (the bill provided some leeway in allowing the Director of the Office of Government Ethics to decide if 0-7 branch positions would be included). *Id.* at 20. In addition, the Bill provided for a one year "cooling off" period as required by § 207(c) of the Ethics in Government Act. *Id.* Apparently, only 3,500 positions out of the possible 11,000 have been designated by the Director of OGE as falling within the coverage of this provision. *Id.*

The third set of restrictions covered Executive Levels III through V, typically the assistant secretary levels and the second-level White House staff. These personnel were prohibited from contacting their former agency in an attempt to influence any matter. *Id.* This ban applied to all former employees who had been appointed by the President, even if the department was compartmentalized.

The fourth category covered the President, Vice-President, cabinet members, under-secretaries, senior White House staff, and 0-9's through 0-10's in the uniformed service. These personnel were prohibited from contacting their entire former department or agency, and *all* presidential appointees in the executive branch for one year. The President and Vice-President were prohibited from contacting any employee in the executive branch. *Id.* at 20-21. The committee felt these restrictions on senior level officials were necessary because such officials are so politically well-connected across departmental lines. The committee further noted that

imposed a new set of criminal penalties and allowed for civil and equitable remedies for knowing and willful violations.[86] Moreover, H.R. 5043 provided exceptions to the general prohibitions on certain federal post-government employment restrictions.[87]

H.R. 5043 received wide-scale support and passed in both the House and the Senate by a large margin.[88] Nonetheless, the bill was pocket vetoed by President Reagan on November 25, 1988.[89] Reagan indicated in a letter of disapproval[90] that he vetoed the bill because he was certain that it would adversely affect the government's ability to attract qualified people.[91] Reagan viewed the legislation as a rushed effort and deserving of more time and consideration.[92]

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these restrictions would not stop most employees from earning a living because most would remain free to deal with agencies for which they had not previously worked. *Id.* at 21.

The fifth group of people covered by this bill consisted of Congress and its employees. Members were prohibited from contacting, for one year, any personnel of the House in which they served. *Id.* Congressional staff were prohibited from contacting only the Member with whom they worked or any of that Member's current staff. *Id.*

Committee staff had a one-year restriction on contacting the current staff of the employing committee. *Id.* Leadership staff were prohibited from contacting any member of the leadership of the House in which they worked, as well as any of the current leadership staff. *Id.* These bans applied to personnel at the GS-17 level or above. *Id.*

In addition, H.R. 5043 covered only acts for compensation. *Id.* Limiting the restrictions to compensated acts was designed to remove any potential for unconstitutional vagueness as to the statute's prohibitions. The committee reasoned that post-employment restriction on communications made for compensation did not have a chilling effect on first amendment rights because an individual "knows when he is being compensated." *Id.*

86. The bill imposed a one-year prison sentence and/or a $100,000 fine for a "knowing" violation, making this a misdemeanor. H.R. REP. 1068, *supra* note 85, at 21. Additionally, the new law made a "knowing and willful" violation a felony with a possible two-year prison sentence and/or a fine of $250,000. *Id.* The statute also authorized civil penalties including a civil suit, brought by the Attorney General and not a private party, for which the penalty was $50,000 or the amount of compensation, whichever was greater. *Id.* These civil penalties afforded the government much needed flexibility in the statute's enforcement, which otherwise was exceedingly difficult, according to John C. Keeney, Deputy Assistant Attorney General. According to Keeney, in a recent study done by the GAO, only two of the five prosecutions taking place between 1980 and 1985 resulted in convictions. Additionally, the Attorney General could seek injunctive relief for violations of this section. *Id.* at 22.

87. First, none of the bans applied to former federal government personnel who were elected officials of a state or local government. H.R. REP. 1068, *supra* note 85, at 22. Second, the one-year "no contact" bans were inapplicable to former federal employees who were: 1) carrying out business as an employee of a state or local government; 2) working for an institution of higher learning; or 3) working for a hospital or medical research facility. There was also an exemption from all bans on former federal employees employed by an international organization of which the United States was a member. This exception limited the lifetime ban to areas controlled personally and substantially by the individual while in the employ of the federal government. *Id.*

88. The bill passed in the Senate by a voice vote on October 18, 1988, 134 CONG. REC. S16,697 (daily ed. Oct. 18, 1988), and passed in the House by a vote of 347 to 19. 134 CONG. REC. H10,122 (daily ed. Oct.12, 1988).

89. 44 CONG. Q. ALMANAC 6 (100th Cong., 2d Sess. (1988)).

90. 1 Ethics in Gov't Rep. (Washington Service Bureau) ¶ 1-012.4.

91. *Id.*

92. *Id.* at ¶ 1-012.6. Reagan expressly disapproved of four items. First, the President disapproved of the bill's provision prohibiting the highest level executive branch employees from contacting any employee with another federal agency for one year. This ban resulted from

Congress, however, did not relax its attempt to pass new post-government employment restrictions. Members introduced many new bills,[93] aspects of which were integrated into the Ethics Reform Act passed in 1989.[94]

III. COMPETING INTERESTS IN THE DRAFTING OF NEW POST-GOVERNMENT EMPLOYMENT REGULATIONS

As the legislative history suggests, concerns about post-government employment restrictions are not new. It is important to determine why, or if, such regulations are needed and the possible costs of such new regulations.

A. The Benefits of Post-Government Employment Restrictions

One aim of post-government employment regulations is preventing misuse of confidential information held by former government employees.[95] This prohibition's only concern is curbing "side switching" and applies only to matters in which the former employee was personally and substantially involved.[96]

Restrictions are also directed at reducing the amount of influence peddling.[97] This goal explains the incorporation of the one-year "cooling off"

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the fear that senior level employees' influence usually cut across departmental lines. It was, therefore, ineffective to merely prohibit them from contacting their former employing agencies. *See* H.R. REP. 1068, *supra* note 85, at 19. Second, the President disapproved of the bill's prohibition on all representation before senior level executive officials regardless of whether the matter related in any way to the employees' former duties. This criticism was aimed at the one-year cooling off period. Third, the President felt that the bill's provision strengthening existing criminal sanctions was excessive. Fourth, Reagan expressly disagreed with the limitation that only acts done for compensation be prohibited by section 207. In addition, the President felt that H.R. 5043 favored Congress while being unnecessarily harsh with the executive branch. This criticism referred to the fact that Congress was only subject to a one-year cooling off period while some executive employees were subject to both the cooling off period and the lifetime and two-year bans for matters they were personally involved in and matters that were under their official responsibility. 1 Ethics in Gov't Rep. (Washington Service Bureau) ¶ 1-012.6.

Reagan did not think the effort was a total failure and commended the committee on the following provisions: 1) the power to seek civil remedies; 2) the distinction between misdemeanor and felony violations; 3) the elimination of the compartmentalization of the Executive Office of the President; and 4) the adjustment of the one year ban on contacts with the former employing agency to include all matters in which the United States had a direct interest, even though the agency did not have a direct interest. *Id.* at ¶ 1-012.8.

93. H.R. 5043, H.R. 1231, and the Ethics Reform Act of 1989 do not cover the wide spectrum of legislation introduced in this area. A more comprehensive, although not exhaustive, list of bills introduced since the Ethics in Government Act of 1978 and the Reform Act of 1989 includes: H.R. 9, 101st Cong., 2d Sess. (1990) (died in committee); H.R. Doc. No. 101-45, 101st Cong., 1st Sess. (1989) (died on the floor); H.R. 2143, 101st Cong., 1st Sess. (1989) (died in committee); H.R. 4917, 100th Cong., 2d Sess. (1988) (died in committee); S. 237, 100th Cong., 1st Sess. (1987) (passed by Senate, died in the House); H.R. 5426, 99th Cong., 2d Sess. (1986) (died in committee); H.R. 5097, 99th Cong., 2d Sess. (1986) (died in committee); H.R. 4863, 99th Cong., 2d Sess. (1986) (died in committee); H.R. 4857, 99th Cong., 2d Sess. (1986) (died in committee); H.R. 4819, 99th Cong., 2d Sess. (1986) (died in committee); H.R. 3733, 99th Cong., 1st Sess. (1985) (died in committee).

94. Ethics Reform Act of 1989, Pub. L. No. 101-194, 103 Stat. 1716 (1989) (codified at 18 U.S.C. § 207 (Supp. I 1990).

95. *See* H.R. REP. 1068, *supra* note 85, at 15.

96. *Id.*

97. *See* 18 U.S.C. § 207(c) (Supp. I 1990). This section developed a one-year cooling-off period to help curb post-government employment abuses.

period into the current post-government employment restriction laws.[98] Although not all influence peddling can be curbed,[99] the purpose behind limiting such activity — promoting equal access to government — is a reasonable goal.[100]

These restrictions are also aimed at preventing prospective employers from clouding the employee's decision-making ability while he or she is still employed by the federal government.[101] For example, if a Department of Defense employee with influence on contract awards has an interest in working for a particular contractor upon leaving government employ, the temptation to give that contractor preferential treatment should be restricted.

Finally, concern exists regarding appearances when a former federal employee contacts a current federal employee about government issues, even when no action by the current employee results from the contact.[102] The issue is how far the regulations should go in prohibiting the "appearance of impropriety."[103]

B. The Costs of Post-Government Employment Restrictions

There is no recorded opposition to "appropriate" restrictions on federal post-government employment activities. There is, however, much debate over the appropriate period to which employment restrictions should apply, to whom they should apply, and how to prevent the consequences of overly restrictive regulations.[104]

One of the most obvious costs of post-government employment restrictions is the potential adverse effect on the government's ability to attract quality people to serve their country.[105] This is particularly true of certain pro-

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98. *Id.*

99. *See, e.g.*, Morgan, *supra* note 14, at 42-43. Morgan suggests that some influence peddling cannot be curbed, even by a one-year "cooling off" period. Limiting such activity can easily be "taken too far", especially when what appears to be the employee's influence may merely be the power or authority of his job. Morgan also suggests that influence based on fame, as in the case of an easily identifiable public official such as Henry Kissinger, is not readily amenable to rules. In other words, it would be difficult to prohibit someone from returning a call from Henry Kissinger, or Raquel Welch for that matter, long before they would return a call from the average American citizen.

100. *See* Note, *supra* note 9, at 191.

101. *See* H.R. REP. 1068, *supra* note 85, at 16. 18 U.S.C. § 208 (Supp. I 1990) prohibits a current federal employee from participating in decision-making regarding any party with whom he is negotiating employment. This concern is beyond the scope of this Note because it derives from activities *during* the course of government employment as opposed to after it.

102. *See* H.R. REP. 1068, *supra* note 85, at 16.

103. District Judge Irving Kaufman suggests the need to guard against even the appearance of such impropriety. *See* General Motors Corp. v. City of New York, 501 F.2d 639 (2d Cir. 1974). This was a switch from Kaufman's earlier stance that what appeared to be unethical was largely based on the political mores of the day. *See generally* Kaufman, *supra* note 21.

104. *See, e.g.*, H.R. REP. 1068, *supra* note 85, at 16-17.

105. *See id.* at 17; Morgan, *supra* note 14, at 51; 1 Ethics in Gov't Rep. (Washington Service Bureau) ¶ 1-012.4 (Letter of Disapproval of H.R. 5043, From Ronald Reagan to United States Congress). Morgan defines this recruiting problem in terms of "human capital," the wealth of experience and skill built up during a person's lifetime. From an economic standpoint, human capital should should be expended in the most effective way. Severe post-government employment restrictions, however, depreciate the value of government employees' human capital by limiting their entrance into government employment. Morgan, *supra* note 14, at 52.

fessions such as tax law, export-import trade, and securities law, where such restrictions make it very difficult for individuals to practice their profession in the private sector because of the constant need to appear before government agencies.[106]

Another problem with overly restrictive post-government employment laws is their potential for impinging on the independent decision-making ability of federal employees.[107] If the post-government employment opportunities of federal employees are severely restricted, employees will be less likely to challenge government decisions or advocate changes in governmental policy for fear of being fired with little hope of alternate employment.[108] Consequently, senior level employees, who suffer greater restriction upon leaving government employ, are "locked in" to their jobs and are more dependent on the ratings of their superiors. Such a system makes it difficult to leave a government job and enter the private sector, and thus affects the personal autonomy of the government employees involved.[109]

Third, the general public is deprived of former federal employees' expertise gained while in government jobs.[110] For example, a university that cannot hire an experienced government research scientist must hire someone less experienced.[111] A client who cannot hire a lawyer experienced in commodities law must, in effect, pay to educate a less experienced attorney.[112] A company that cannot rehire the company's former vice-president, because she temporarily worked for the government, loses a major investment in that person.[113]

Finally, overly rigorous sanctions may drastically change the face of the federal government. By making it too difficult for employees to leave government employment, a class of civil servants may result.[114] In fact, the mix of

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Even though government employees do not enter government service solely to have a marketable commodity upon leaving government service, the experience to be gained from a position is certainly a draw, as it is with any job. Government jobs, unlike jobs in the private sector, do not pay very well, and consequently, the experience gained may be the only real selling point left for such positions. This is especially true when trying to attract people from the outside, with already established careers, to government service. *See generally* Norton, *Who Wants To Work in Washington?*, FORTUNE, Aug. 14, 1989, at 77.

106. *See* H.R. REP. 1068, *supra* note 85, at 17. These professions are particularly affected because the nature of their post-government employment will require that they practice before a federal agency. For example, an attorney who has worked for the Securities and Exchange Commission will necessarily be required to appear before the SEC when practicing securities law in the private sector. Consequently, post-government employment restrictions for these employees must be carefully constructed so they are not overly restrictive.

107. *See* H.R. REP. 1068, *supra* note 85, at 17; Morgan, *supra* note 14, at 53.

108. *See* H.R. REP. 1068, *supra* note 85, at 17.

109. *See* Morgan, *supra* note 14, at 54.

110. *Id.* at 55. The Judiciary Committee posed the following as examples: a former Secretary of Education might be prohibited from helping underdeveloped countries to establish a stronger education system; an under-secretary of Agriculture might be prohibited from advising a third world country, such as Ethiopia, on famine assistance; a former expert at the National Institute of Health may be prevented from doing cooperative work with another nation on medical advancements. H.R. REP. 1068, *supra* note 85, at 17-18.

111. Morgan, *supra* note 14, at 55.

112. *Id.*

113. *Id.*

114. *See* H.R. REP. 1068, *supra* note 85, at 18; Morgan, *supra* note 14, at 55.

career and non-career federal employees at virtually every level has always been perceived as one of the strengths of the American system.[115]

Keeping these issues in mind when drafting or evaluating new post-government employment legislation, it may be possible to strike a balance between enabling the government to recruit quality people and enabling those employees to work for the government without the fear that such employment will foreclose later opportunities in the private sector.

IV. PROPOSED CHANGES TO THE POST-GOVERNMENT EMPLOYMENT LAWS AND ANALYSIS OF THE ETHICS REFORM ACT OF 1989

The Ethics Reform Act of 1989 ("Reform Act") drastically changed the face of post-government employment restrictions.[116] The Reform Act revised the Ethics in Government Act,[117] while adding certain measures to pre-existing legislation.

The following discussion addresses proposed changes to the post-government employment laws, and then considers whether the Reform Act adopts those changes. The Reform Act's amendments to the post-government employment restrictions are extensive and will be analyzed as follows: 1) the Reform Act's application of restrictions to Congress and its employees; 2) the Reform Act's civil and injunctive remedies; and 3) the Reform Act's exclusion of a private cause of action.[118]

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115. *See* H.R. REP. 1068, *supra* note 85, at 18.

116. Ethics Reform Act of 1989, Pub. L. No. 101-194, § 101(a), 103 Stat. 1716 (codified at 18 U.S.C. § 207 (Supp. I 1990)) [hereinafter Reform Act].

117. The Reform Act not only revised the post-government employment sections of the Ethics in Government Act of 1978, it also revised the following subject areas regarding ethics: the financial disclosure requirements of federal personnel (amending 2 U.S.C. §§ 701-09 and repealing Titles II and III of the Ethics in Government Act of 1978); acceptance of gifts and travel by federal employees (amending 5 U.S.C. § 7351 and adding subchapter III at the end of 31 U.S.C. ch. 13); and available penalties and injunctions (amending 18 U.S.C. §§ 202-05, 208-09 & 216). The Reform Act not only changed existing legislation, it created new legislation pertaining to ethics: eradicating honoraria and limiting outside employment while giving elected officials a pay raise, 5 U.S.C. App. 7 §§ 501-02; creating a Citizens' Commission on Public Service and Compensation to review cost of living adjustments for government officials, 2 U.S.C. §§ 351-64; and amending the rules of the House and Senate relating to acceptance of gifts and travel reimbursements, 2 U.S.C. § 31-2.

118. The Reform Act created new and more rigorous restrictions for the executive branch. The legislation created permanent restrictions on the exertion of any knowing and intentional influence by appearance before, or communication with, any department or agency on behalf of any person (other than the United States) regarding a particular matter with which the former employee participated. *See* 18 U.S.C. § 207(a)(1) (Supp. I 1990). The term "intent to influence" is defined by the statute as the intent to affect any official action by a government entity of the United States through any officer or employee of the United States, including members of Congress. *Id.* § 207(i)(1). "Particular matter" is later defined to include any investigation, application, request for a ruling, or determination, rule making, contract, controversy, claim, charge, accusation, arrest, or judicial or other proceeding. *Id.* § 207(i)(3). "Participated" is defined by the Reform Act as an action taken as an officer or employee through decision, approval, disapproval, recommendation, rendering of advice, investigation, or other such action. *Id.* § 207(i)(2). In order for an item to be considered a "particular matter" it must meet the following requirements: 1) the United States must have a direct and substantial interest; 2) the former employee must have participated personally and substantially as an officer or employee of

A. Post-Government Employment Restrictions Applying to Congress

The idea of placing post-government employment restrictions on the members of Congress is relatively new.[119] Various studies indicate that such

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the government; and 3) said item must involve a specific party or parties at the time of such participation. *Id.* § 207(a)(1)(A)-(C). These lifetime bans apply to all officers and employees of the executive branch. *Id.* In addition, the new legislation places a two year restriction on any communications and/or appearances regarding any matter that was under the federal employee's official responsibility. *Id.* § 207(a)(2). As with the lifetime restriction, the intent to influence must be present. In addition, the "particular matter" must meet the following requirements: 1) the United States must have a direct and substantial interest; 2) the person must know or must have reasonably known that the matter was under his official responsibility; and 3) a specific party or parties must have been involved at the time it was pending. *Id.* § 207(a)(2)(A)-(C). These three restrictions do not add anything new to existing law, but merely parrot provisions of the Ethics in Government Act. *See id.* § 207(a) & (b).

Section 207(a) of the Reform Act replaces the former section 207(b). The new section 207(b) restricts, for one year, any advice or aid by a former government employee to an entity other than the United States. This restriction only applies to an employee who personally and substantially helped with treaty or trade negotiations within one year prior to the termination of his government employ. *Id.* The Reform Act defines trade negotiation as any negotiation that the President enters into pursuant to the Omnibus Trade and Competitiveness Act of 1988, and does not include any action taken before that determination is made. *Id.* § 207(b)(2). "Treaty negotiation" is defined as any agreement made by the President and requiring the advice and consent of the Senate. These trade and treaty aiding and advising bans are imposed on all executive branch employees, officers, Congressional members and their staffs. *Id.* § 207(b)(1).

The Reform Act places additional restrictions on senior level executive and agency personnel. These restrictions apply to executive level employees employed at a fixed rate of pay according to 5 U.S.C. §§ 5311-18 (1988) or a comparable or greater pay. In addition, these restrictions also cover employees not referred to in the above provision who are compensated at a rate of GS-17. This classification includes persons employed in the Senior Executive Service. All employees appointed by the President to a position under 3 U.S.C. § 105(a)(2)(B) (1988), or by the Vice-President to a position under 3 U.S.C. § 106(a)(1)(B) (1988), are also included. Finally, all those employed in an active duty position of the uniformed service at a pay grade 0-7 or above as specified in 37 U.S.C. § 201 (1988) are also covered by the Reform Act. 18 U.S.C. § 207(c)(2) (Supp. I 1990). In addition, the Director of the Office of Government Ethics may, at any time, waive the restrictions on the uniformed service employees and the GS-17 employees listed above. *Id.* § 207(c)(2)(D). The one year restriction in section 207(c) prohibits certain senior level personnel from communicating with or appearing before any department, agency or employee in connection with any matter on which such employee seeks some administrative action. *Id.* § 207(c)(1). As with the previous provisions, this amendment requires that the employee manifest some intent to influence. *Id.* This prohibition on influence peddling is a new addition to the post-government employment restrictions.

The last set of restrictions specifically tailored to the executive branch are imposed on the most senior personnel. These restrictions apply to: the Vice-President of the United States; any executive branch employee paid at a rate of schedule I of the Executive Schedule or employed in a position in the Executive Office of the President at a rate of II of the Executive Schedule; and employees appointed by the President to a position under 3 U.S.C. § 105(a)(2)(A) (1988) or by the Vice-President under 3 U.S.C. § 106(a)(1)(A) (1988). This restriction prohibits any listed employee from contacting any employee at the agency with which he worked the year prior to the termination of his government employment and any other employee who is listed in 5 U.S.C §§ 5312-16 (Supp. I 1990). 18 U.S.C. § 207(d)(2)(A)-(B) (Supp. I 1990). This restriction prohibits any communication with, or appearance before, such agency, or employees at the agency, regarding any matter for which the former employee seeks administrative action. *Id.* § 207(d)(1). This provision parallels the preceding restriction amending section 207(c) in attempting to address the issue of influence peddling and has no counterpart in the prior post-government employment restrictions.

119. The idea of applying post-government employment restrictions to Congress was recently proposed by Senator Strom Thurmond in S. 237, 100th Cong., 1st Sess. (1987). This

restrictions are needed.[120] A recently conducted GAO study indicates that between 1980 and 1985, nine senators worked for foreign interests in positions that might implicate confidential information or involve some influence peddling.[121] In addition, in 1988, University of Michigan National Election Studies showed that sixty-three percent of Americans polled believed "our government was 'run by a few big interests'; only thirty-one percent thought it was run for the greater public interest."[122] Another poll, conducted by USA Today, showed that "54% of the public believe that at least one of every three Members of Congress is corrupt."[123] As Ann McBride discusses in her article on congressional ethics, at least eighty former Members of Congress are registered as lobbyists[124] and at least thirty-seven former House and Senate aides have jobs with defense contractors.[125] Consequently, the problem is not whether there should be such restrictions, but rather how far they should go. Should they apply only to congressional members or should they be extended to their staff members, legislative committee staff and even leadership staff?

Ensuring a more evenhanded application of such restrictions is the primary purpose behind the popular support for applying post-government employment restrictions to Congress.[126] The premise is that Members of Congress, like their counterparts in the executive branch, are susceptible to misusing their influence and contacts upon leaving government service.

The primary opposition to congressional restrictions relies on the premise that legislative personnel are different in that they, unlike their counterparts in the executive branch, have very little job security.[127] Essentially, most legislative jobs depend on arbitrary factors such as whether the Representative or Senator to whom it is tied is reelected, retires, or passes away.

Restrictions imposed on Members of Congress and their staffs must be carefully tailored to each level of employment. Restrictions should vary between members and staff because members will undoubtedly have more influence and clout on a wider scale than a staff person. Additionally, restric-

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bill was later incorporated into the Post-Employment Restrictions Act of 1988, H.R. 5043, 100th Cong., 2d Sess. (1988), which both the Senate and House passed, but which President Reagan pocket vetoed in the Fall of 1988. *See supra* notes 89-92 and accompanying text. This idea was also expressed by Representative Craig James in his recent bill, the Integrity in Post-Employment Act of 1989. *See* 3 Ethics in Gov't Rep. (Washington Service Bureau) ¶ 8-015. *See also* Fein & Branford Reynolds, *Designing an Equitable Ethics Code*, LEGAL TIMES, Jan. 30, 1989, at 20.

120. *See, e.g.*, McBride, *Ethics in Congress: Agenda and Action*, 58 GEO. WASH. L. REV. 451, 453-54 (1990). Additionally, recent scandals suggest that the legislative branch is not above reproach. *See generally* Shapiro, *Drawing the Line*, TIME, Mar. 13, 1989, at 18; Traver, *The Housing Hustle*, TIME, June 26, 1989, at 18.

121. *See Hearings on H.R. 1231*, *supra* note 73, at 21.

122. Yang, *Congress Gets Ethical, Shuns Any Hint It is in Debt to Big Givers*, Wall St. J., Aug. 4, 1989, at A1, col. 1.

123. Minzesheimer, *Poll: Many Say Congress "Corrupt,"* USA Today, June 2, 1989, at A1.

124. McBride, *supra* note 120, at 472.

125. *Id.*

126. *See* H.R. REP. 1068, *supra* note 85, at 19.

127. *Id.* at 18.

tions should be limited to matters in which the former member was personally involved. Restrictions should not extend to all matters before Congress because this will impede effective leadership by preventing the exchange of advice when leadership changes.

1. The Reform Act's Application of Post-Government Employment Restrictions to Congress and Its Employees

The Reform Act not only revamps the current post-government employment restrictions as applied to the executive branch,[128] but also broadens the scope of such laws and applies them to Members of Congress and their respective staffs.[129] The restrictions are based on classifying congressional employees into five categories: 1) Members of Congress;[130] 2) personal staff of members;[131] 3) joint, standing and select committee staffs;[132] 4) leadership staff of Congress;[133] and 5) all other employees of any other legislative office of Congress.[134] The legislative restrictions apply to employees, with the exception of congressional members, who are paid at a level of GS-17 or higher.[135]

Former members of Congress are restricted for one year from knowingly making, with the intent to influence, any communication with or appearance before: a current Member of Congress, a current officer of Congress, or any employee of either house of Congress.[136] This prohibition applies only to

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128. *See supra* note 118 for analysis of the Reform Act's post-government employment restrictions on the executive branch.

129. Reform Act, 18 U.S.C. § 207(e) (Supp. I 1990).

130. *Id.* § 207(e)(1). The term Member of Congress is later defined as a Senator or Representative. *Id.* § 207(e)(7)(J). The term Representative is further defined to include a Delegate and Resident Commissioner to the House of Representatives. *Id.* § 207(e)(7)(K).

131. *Id.* § 207(e)(2). Employees of the House of Representatives and Senate are further defined as employees of members, joint and standing committees, and leadership staff of the House and Senate. *Id.* § 207(e)(7)(C)-(D).

132. *Id.* § 207(e)(3) (the staff definition is at § 207(e)(7)(A)).

133. *Id.* § 207(e)(4). Leadership staff are further defined as employees in the House of Representatives who work for the following members: the Speaker, majority leader, minority leader, majority and minority whip, chief deputy majority and minority whips, chairman of the Democratic Steering Committee, chairman and vice chairman of the Democratic Caucus; chairman, vice chairman and secretary of the Republican Conference, chairman of the Republican Research Committee, and chairman of the Republican Policy Committee or any other leadership position created after the effective date set forth in sections 1-2(a) of the Reform Act. *Id.* § 207(e)(7)(L).

The Leadership staff of the Senate is further defined as including the employees who work for the following members of the Senate: Vice-President; the President pro tempore; Deputy President pro tempore; majority and minority leader; majority and minority whip; chairmen and secretary of the Conference of the majority and minority, chairman and co-chairman of the Majority Policy Committee; and chairman of the Minority Policy Committee. *Id.* § 207(e)(7)(M).

134. *Id.* § 207(e)(5). The term "employee of any other legislative office of the Congress" is defined as any employee or officer for the following: Architect of the Capitol, United States Botanic Garden, General Accounting Office, Government Printing Office, Library of Congress, Office of Technology Assessment, Congressional Budget Office, Copyright Royalty Tribunal, United States Capitol Police, and any other legislative branch agency, entity, or office not listed. *Id.* § 207(e)(7)(G).

135. *Id.* § 207(e)(6).

136. *Id.* § 207(e)(1)(A)-(B).

matters on which the former member desires some type of action by the aforementioned authorities and employees.[137]

Congressional members' personal staffs are restricted, for one year after leaving their government employ, only from contacting the member for whom they worked or any employee of that member.[138] Consequently, employees can contact members for whom they did not work. This provision could be a problem because a staff member who was paid at a level as high as GS-17 probably worked for the member for a significant amount of time and forged many ties with other members of Congress or committee employees. Therefore, this prohibition may be inadequate. The requirement that the communication or appearance with the employee or member be intentional and with regard to a matter on which the former employee desires some action also applies here.[139]

A similar one-year restriction applies to employees of the joint, standing and select committees of Congress.[140] The only variation involves who the former employee cannot contact. The former committee employee is prohibited from contacting any employee, member or former member of the committee who was a committee member in the year immediately prior to the former employee's termination.[141]

The Act also imposes a similar one-year restriction on the leadership staff of Congress. Former leadership staff are prohibited from any of the proscribed contact with the leadership or employees of the leadership in the House in which they served.[142] This provision is problematic because it does not take into consideration the widespread contact that leadership employees have with all members of that particular congressional branch.

The last group of restrictions dealing with the legislative branch concern other legislative office employees.[143] The same one year restriction on communications with, or appearances before, the office with which they formerly worked applies to these employees.[144]

The Reform Act also prohibits, for one year, Congressional members, personal staff, committee staff, leadership staff and other legislative staff from aiding or advising entities, other than the United States, regarding ongoing trade or treaty negotiations.[145]

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137. *Id.* § 207(e)(1)(A). The restrictions also apply to officers of Congress, the only difference being that the officer can, within the one year period, contact members, officials, and employees from the House in which he did not serve. *Id.* § 207(e)(1)(C).

138. *Id.* § 207(e)(2)(A)-(B).

139. *Id.* § 207(e)(2).

140. *Id.* § 207(e)(3).

141. *Id.*

142. *Id.* § 207(e)(4)(B)(i)-(ii).

143. For a listing of other legislative office employees, *see supra* note 134.

144. Reform Act, 18 U.S.C. § 207(e)(5) (Supp. I 1990).

145. *Id.* § 207(b). The restriction only applies to treaties with which the employee was personally and substantially involved during the year preceding the termination of his federal employ. *Id.*

The Reform Act also imposes additional restrictions on all employees of the legislative branch,[146] senior level employees of the executive branch[147] and very senior level employees of the executive branch.[148] These restrictions prohibit any of the above named employees from knowingly representing a foreign entity[149] for one year after their government employment ceases.[150] The Act prohibits representation, aid or advice given with the intent to influence an officer or employee of the United States Government in carrying out his official duty.[151]

In addition, one welcome exception concerns communications regarding personal matters and special knowledge.[152] A former employee can give, in statement form, advice to a current employee so long as no compensation is received.[153] This exception was presumably devised to allow the free exchange of information between incoming and outgoing employees.[154]

2. *The Possible Ramifications of the Reform Act's Application to Congress and Its Employees*

The post-government employment restrictions imposed on former congressional employees are very carefully tailored.[155] Congress has remedied one possible problem that existed under earlier draft legislation by narrowing

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146. *See supra* notes 129-34 for a discussion of all the employees to whom this legislation applies.

147. Senior level employees of the executive branch are defined by the Reform Act at 18 U.S.C. § 207(c)(2) (Supp. I 1990). *See supra* note 119.

148. Very senior level employees are defined by the Reform Act at § 207(d)(1)(A)-(C). *See supra* note 119.

149. A "foreign entity" is the government of any foreign country as defined in the Foreign Agents Registration Act of 1938, 22 U.S.C. § 611(e) (1988). *See* Reform Act, 18 U.S.C. § 207(f)(2) (Supp. I 1990).

150. Reform Act, 18 U.S.C. § 207(f)(1) (Supp. I 1990).

151. *Id.* § 207(f)(1)(A)-(B). The Reform Act also notes that detailees, employees who are detailed from one department or agency to another, are deemed to be employees of both departments or agencies. *Id.* § 207(g). In addition, the Reform Act provides for redesignation of government departments and agencies that have distinct and separate functions. *Id.* § 207(h). It should be noted, however, that redesignation cannot be made regarding the Executive Office of the President. This part of the legislation, which differs from the current legislation on post-government employment restrictions, was probably in response to the problem the Executive Office of the President has had with the post-employment adventures of Michael Deaver and Franklyn Nofziger. *See supra* notes 1-5 and accompanying text regarding the ethical discrepancies of Michael Deaver and Franklyn Nofziger. *See also supra* note 73 regarding the GAO study indicating that the majority of post-government employment problems occur in the executive branch.

152. Reform Act, 18 U.S.C. § 207(j)(4) (Supp. I 1990).

153. *Id.*

154. The Reform Act provides for several other exceptions to the post-government employment restrictions that are beyond the scope of this Note. The restrictions, for example, do not apply to employees who are carrying out official duties for the federal, state or local governments, an accredited institution, or a non-profit hospital or research organization. *Id.* § 207(j)(1)-(2). The Act also exempts appearances, communication on behalf of, or aid and advice to an international organization of which the United States is a member. *Id.* § 207(j)(3). Exceptions are made for the free exchange of scientific and technological information. *Id.* § 207(j)(5). Finally, the statute stipulates that nothing in it is meant to prevent former employees from testifying in a court of law. However, such employees may not, subject to the preceding restrictions, testify as expert witnesses except in compliance with a court order. *Id.* § 207(j)(6).

155. *See supra* notes 128-54 and accompanying text.

the restrictions to allow for the free exchange of information between incoming and outgoing employees.[156] In addition, such restrictions treat government employees in both the executive and legislative branches of government evenhandedly.

The Reform Act's restrictions are not without problems. The restrictions forbid personal staff, committee staff, leadership staff, and other legislative employees only from contacting members or employees of the office, committee, or leadership group for which they worked.[157] This limitation is underinclusive because it assumes that a congressional employee's sphere of influence is limited to the office in which he worked. In reality, employees at the GS-17 pay rate probably have a much wider circle of influence. Consequently, a one year restriction should be added prohibiting business contacts with congressional employees, members or offices with which the former employee had personal and substantial dealings. This restriction would more effectively limit a former congressional employee's ability to influence congressional members and employees with whom he did not work, but had substantial dealings.

In addition, Members of Congress are prohibited for one year from making any appearances before any member or employee of either house of Congress.[158] This restriction does not take into account the possible influence members may have with the executive branch of government. Consequently, the permanent restrictions on executive branch employees' representation of particular matters with which they were personally and substantially involved should also apply to Members of Congress.[159] The two year restrictions concerning matters under the executive employee's official responsibility should also apply to congressional members.[160] This would help achieve a more evenhanded application of post-government employment restrictions for the executive and legislative branches.

B. Civil Remedies

The Ethics in Government Act provided only for criminal sanctions for violations.[161] A government employee found guilty under 18 U.S.C. § 207 faced a fine of $10,000, imprisonment for two years, or both.[162] The sanction system did not include civil penalties. In fact, the sanction system in the Ethics in Government Act has been cited as a possible reason for the low enforcement and subsequent conviction rate under section 207.[163]

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156. *See supra* notes 152-54 and accompanying text.
157. Reform Act, 18 U.S.C. § 207(e)(2)-(5) (Supp. I 1990).
158. *Id.* § 207(e)(1)(A)-(B).
159. These restrictions appear at § 207(a)(1).
160. These restrictions appear at § 207(a)(2).
161. 18 U.S.C. § 207(b)-(c) (1988).
162. 18 U.S.C. § 207 (1988) (amended by Reform Act, 18 U.S.C. § 216 (Supp. I 1990)).
163. *See Hearings on H.R. 5097 and Related Bills Before the Subcomm. on Administrative Law and Government Relations of the House Comm. on the Judiciary*, 99th Cong., 2d Sess. 76 (1986) (statement of Deputy Attorney General John C. Keeney) [hereinafter *Hearings on H.R. 5097*]. Keeney indicates that since 1980, the effective date of the current restrictions, only five cases were brought under section 207 and of those only two resulted in

Enforcement of section 207 is hampered by the difficulty of proving criminal intent. A recent case, *United States v. Nofziger*,[164] plainly illustrates this obstacle. Nofziger was tried and convicted under section 207(c) for violating the one-year ban on contact with a department or agency with which he served, but his conviction was subsequently overturned on appeal.[165]

Nofziger worked as the Assistant to the President for Political Affairs under the Reagan Administration for exactly one year. After resigning his position, he and an associate formed a government relations and political consulting firm. Nofziger was charged with, and convicted of, three lobbying violations prohibited by 18 U.S.C. § 207(c).[166]

In overturning Nofziger's conviction, the appellate court held that the government had not adequately proved criminal intent.[167] More specifically, the government failed to show that Nofziger knew that the matter for which he was lobbying was then before the Department with which he was consorting. In essence, the government failed to prove beyond a reasonable doubt that, during the one-year "cooling off" period, Nofziger had "knowingly" tried to influence a department or agency on a matter currently being considered.[168] As this case illustrates, the government has a difficult burden of proof for a successful prosecution under section 207 since the state of mind requirement must be proven beyond a reasonable doubt.[169]

Permitting a civil sanction under 18 U.S.C. § 207 may counterbalance the difficulty of obtaining a conviction. Civil sanctions would strengthen the remedial effect of the Ethics in Government Act because the burden of proving guilt is less stringent.[170] Members of the Department of Justice have indicated their support for such civil sanctions.[171]

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convictions. Keeney predicts that enforcement and convictions would be easier if civil penalties were included in the statute because then the government would not have the burden of proving a knowing and intentional violation beyond a reasonable doubt.

164. 878 F.2d 442 (D.C. Cir. 1989).

165. *Id.*

166. The three counts were based on the following actions:

1. Nofziger sent a letter to "Edwin Meese III, then counselor to the President, urging the White House to support the Welbilt Electronic Die Corporation in its efforts to secure a contract from the Army for the manufacture of ... small engines";
2. Nofziger forwarded a copy of a letter previously sent to the President of the National Marine Engineers Beneficial Ass'n (MEBA) to James E. Jenkins, Deputy Counselor to the President. A note was appended to this letter advising Jenkins to help MEBA's endeavors by securing civilian manning of noncombat Navy vessels;
3. Nofziger met with members of the National Security Counsel staff to encourage them to purchase A-10 aircraft from Fairchild Republic Corporation.

Id. at 444-45.

167. *Id.* at 443.

168. *Id.* at 454.

169. *See Hearings on H.R. 5097*, supra note 163, at 78-83 (statement of John C. Keeney).

170. In a civil case the burden of proof is usually by a preponderance of the evidence, whereas in a criminal case the government must prove guilt beyond a reasonable doubt.

171. *See Hearings on H.R. 5097, supra* note 163, at 76-83 (statement of John C. Keeney).

1. The Reform Act's Inclusion of Civil and Injunctive Remedies

In addition to the revision of post-government restrictions in the Reform Act, the penalties for such activities have also been expanded. The Ethics in Government Act allowed only for criminal penalties.[172] The new law changes the prior two year penalty for criminal violations of the post-government employment restrictions, and replaces it with a one year prison sentence or a fine[173] for any violation, and a five year prison sentence or a fine for any *knowing* violation of the restrictions.[174]

In addition, the law affords a civil remedy and an injunctive remedy not provided for under the old law.[175] The civil remedy enables the Attorney General to bring a civil action requiring only proof of a violation by a preponderance of the evidence,[176] a lower standard than required in a criminal action. It is still unclear whether it will be easier to get convictions for violations under the Reform Act. The civil penalty is a fine of $50,000 or the amount of compensation the former government employee earns, whichever is higher.[177]

Finally, the Reform Act also provides for an injunctive remedy. The Attorney General may petition a court for an order enjoining the former employee from engaging in the prohibited conduct.[178]

2. The Possible Effects of the Reform Act's Civil Remedies

Including civil sanctions in the new post-government employment restriction laws may result in a higher conviction rate. John Keeney, Assistant Attorney General for the Department of Justice, indicates that the low conviction rate under 18 U.S.C. § 207 is directly tied to the requirement of proof beyond a reasonable doubt.[179] The *Nofziger* case[180] illustrates this problem.

It is not entirely clear that lowering the burden of proof will result in a higher conviction rate. The government must still prove an intentional or knowing violation in order to impose a civil sanction.[181] Successful prosecution and subsequent conviction may remain a problem, despite the lower burden of proof, because of the difficulty of meeting the "intentional and knowing" state of mind requirement.

Given the scant legislative history on this particular section of the Reform Act,[182] it is difficult to determine the congressional intent. Perhaps,

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172. *See* 18 U.S.C. § 207(a)-(b) (1988) (amended by Reform Act, 18 U.S.C. § 216 (Supp. I 1990)).
173. The fine is $50,000 or the amount of compensation, whichever is greater. Reform Act, 18 U.S.C. § 216(b) (Supp. I 1990).
174. *Id.* § 216(a).
175. *Id.*
176. *Id.* § 216(b).
177. *Id.*
178. *Id.* § 216(c).
179. *See Hearings on H.R. 5097, supra* note 163, at 78-83 (statement of John C. Keeney).
180. *See supra* notes 164-68 and accompanying text for an analysis of the *Nofziger* case.
181. Reform Act, 18 U.S.C. § 207(a), (c)-(e) (Supp. I 1990).
182. *Id.*

Congress, in seeking a higher conviction rate under this section, wished to avoid ensnaring the unwary. Accordingly, Congress coupled the highest state of mind requirement with a lower burden of proof. The consequence is that the government can prosecute only knowing violators. This language recognizes that there is no deterrent value in prosecuting and convicting an unknowing offender. Because the statute is new, it remains to be seen what the exact effect of this legislation will be on the conviction rate. It is difficult to believe that this new legislation will result in substantially more convictions, given the higher state of mind requirement.

C. Private Cause of Action

The last recommendation regarding the post-government employment laws is that they should provide for a private cause of action.[183] Such a cause of action should be limited to interested parties who are economically injured by a former government employee's misuse of confidential information or influence. For example, a former government employee is employed by Company "A" in its attempt to secure a government contract. In competition for such a contract are Company "B" and Company "C." Due to the employee's misconduct, the contract is awarded to Company "A." The hypothetical companies "B" and "C" have a cause of action against Company "A" or the employee if the government does not file some type of action on its own within six months.[184]

Increased enforcement is the primary benefit offered by a private cause of action for misuse of information by a government employee. According to the Department of Justice, very few cases are prosecuted under section 207 because resources are limited and convictions unlikely.[185] Private industry has more resources available and, consequently, prosecution may be more rigorous. In addition, apportioning damages among the employee and the guilty private employer satisfies notions of fairness because the employer benefits from his employee's abuse of post-government employment restrictions, and thus should pay the price.

In addition, allowing a private cause of action may be more efficient than a lawsuit instigated by the government. A private party who is harmed will necessarily be better informed regarding the particular facts of the case than will the government. Also, the private party would bear the cost of such a lawsuit, unless attorney's fees were awarded to the prevailing party to compensate it for any harm. Obviously, the private cause of action would not be

183. The idea of a private cause of action is not new. *See, e.g.*, Note, *supra* note 9, at 206; Kalo, *Deterring Misuse of Confidential Government Information: A Proposed Citizens' Action*, 72 MICH. L. REV. 1577 (1974) (urging that private citizens be allowed to sue former and present public employees on the government's behalf to recover profits gained by the use of confidential information).

184. Citizens' suits have been implemented in other areas of the law, such as with security law violations and defense contractor fraud. Securities law allows a private cause of action for interested parties under 15 U.S.C § 78t(a) (1982). In addition, defense contractors can be sued by private citizens for fraud. *See, e.g.*, Rushford, *Staking Their Claims*, LEGAL TIMES, July 10, 1989, at 1.

185. *Hearings on H.R. 5097*, *supra* note 163, at 77 (statement of John C. Keeney).

necessary if only the government were harmed. If both the government and a private entity are harmed then the costs of litigation could be shared.

There are possible problems that a private cause of action engenders. First, a private cause of action may be used to harass competitors.[186] This problem, however, can be overcome by forcing plaintiffs to pay attorney's fees and court costs in frivolous cases.[187]

Second, such a cause of action may also be used to abuse the discovery process.[188] For example, a party might seek confidential information being used by the company employing the former government employee.[189] This problem, however, can be overcome by a protective order issued by the court.

Therefore, the current post-government employment restrictions, which do not include a private cause of action, should be amended to allow a private cause of action for misuse of confidential information and influence attained while a federal employee.

V. CONCLUSION

In conclusion, it is important to consider the costs and benefits of post-government employment restrictions in determining if an equilibrium has been achieved by the latest legislation.

The Reform Act's application of post-government employment restrictions to Congress attempts to balance a curb on the misuse of confidential information and influence with the need to attract quality people into government service without fear that they will be left unemployable upon their reentry into the private sector. This balance is partially accomplished by the new restrictions on Congress because they vary according to the level of congressional employment and thus the level of perceived "clout." Consequently, a member has more rigorous restrictions on his post-government employment activity than does a staff employee.

Problems do exist with this provision because in some aspects it is underinclusive, creating the possibility of undesirable post-government activity.[190] The legislation, therefore, should be more carefully drafted to eliminate such problems.

Although the Reform Act includes civil sanctions in order to supposedly remedy the low conviction rate under a criminal statute, it is unclear whether

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186. *See* Note, *supra* note 9, at 213. Although this source identifies the problem in relation to the concept of imposing a fiduciary duty on ex-government employees, the problem also exists for the statutory lawsuit advocated here.

187. *Id.* at 214. Even though the American rule requires that each party pay his own expenses, a losing party who acts in bad faith may be liable to his opponent for fees and expenses. Alyeska Pipeline Serv. Co. v. Wilderness Soc'y, 421 U.S. 240, 247-50 (1975) (harassment, delay, or other litigation abuses constitute bad faith, supporting an award for fees and expenses); Nemeroff v. Abelson, 469 F. Supp. 630, 639-40 (S.D.N.Y. 1979), *rev'd on other grounds*, 620 F.2d 339 (2d Cir. 1980) (granting award in suit brought to damage reputation and credibility of writer and publisher). In addition, FED. R. CIV. P. 11, which prohibits frivolous claims, may act as a deterrent.

188. *Alyeska*, 421 U.S. at 247-50; *Nemeroff*, 469 F. Supp. at 639-40.

189. *Alyeska*, 421 U.S. at 247-50; *Nemeroff*, 469 F. Supp. at 639-40.

190. *See supra* notes 157-60 and accompanying text.

this will be the result. Given that the state of mind requirement remains at the highest level, intent or knowledge, the conviction rate may not significantly increase. Again this affects the balance, making abuse of the statute more likely and enforcement of the statute more problematic. If the government truly desires more rigorous enforcement of the post-government employment restrictions, Congress must lower the existing requirement of a knowing and intentional state of mind.

Finally, denying a private cause of action undermines the efficacy of the Act. A private cause of action would plainly cultivate more rigorous enforcement of the Act because of the financial motivation and resources available to private parties. Such an addition to current law would help limit post-government employment abuses.