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February 11, 1997

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

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

Dear

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

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

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

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

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

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

Respectfully yours,

Lucinda A. Low
Chair

cc: Robert Evans

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

RECOMMENDATION

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

I. Congress should avoid statutory provisions that disqualify senior executive or judicial appointees on the basis of clients they have previously represented.

II. Congress and the Administration should continue to utilize traditional mechanisms (including the Senate's power of confirmation), rather than special pre- or post-employment rules, to ensure that senior executive and judicial positions are filled only by highly qualified persons who will fulfill the responsibilities of their positions with complete integrity.

III. Ethics-in-government rules, whether addressed to pre- or post-government employment activities, should not single out foreign policy or trade functions for special, restrictive treatment. Congress should repeal the 1995 amendments to 18 U.S.C. §207 and 19 U.S.C. §2171(b), whose effect is to restrict the pre- and post-employment activities of U.S. Trade Representatives ("USTRs") and Deputy USTRs on behalf of foreign interests, and should not extend those provisions to cover other senior government positions.

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

I. INTRODUCTION

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

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

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

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

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

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

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

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

II. THE PRE-EMPLOYMENT RESTRICTIONS

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

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

to confirm, the best possible person for a particular government position; (2) it presumes, without justification, that a person advising a foreign government personally embraces and retains views antithetical to those of the U.S. Government; (3) it creates perverse anomalies unconnected to any legitimate interest in ensuring the loyalty of senior appointees; and (4) comparable disqualifications could easily be enacted, based on the same flawed rationale, for other government positions.

A. The New Disqualification Is of Doubtful Constitutionality

As mentioned above, there is virtually no legislative history accompanying the USTR Amendment and thus, unlike the debate surrounding provisions restricting post-government employment activities, no discussion by the Congress of the legality of the new pre-employment restriction. As also noted above, before the USTR Amendment there were no statutory provisions disqualifying any class of persons from service as USTR or Deputy USTR.

It is well accepted that the Congress has the constitutional responsibility for creating the various government offices not specifically enumerated in the Constitution.[4/] Further, it is well accepted that the Congress can attach qualifications to those government offices:

> While Congress may not appoint those who execute the laws, it may lay down qualifications of age, experience, and so on. Sometimes these qualifications significantly narrow the field of choice. However, any Congressionally imposed qualifications must have a reasonable relation to the office. Otherwise, Congress would be, in effect, creating the appointing power in Congress, rather than in the President.
>
> Congress may, in short, create the office but may not appoint the officer. To distinguish between these two powers, the Court has developed a *germaneness* test.[5/]

4/ *See generally* LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 244 (2d ed. 1988) (analyzing the wording of Art. II, § 2, cl. 2).

5/ JOHN E. NOWAK & RONALD D. ROTUNDA, CONSTITUTIONAL LAW 265 (5th ed. 1995) (footnotes omitted).

The Department of Justice articulated just such serious constitutional concerns with the USTR Amendment as it relates to the President's appointments power:

> The Department of Justice has long opposed broad restrictions on the President's constitutional prerogative to nominate persons of his choosing to senior executive branch positions. The restriction in the bill is particularly problematic because it operates in an area in which the Constitution commits special responsibility to the President, who "is the constitutional representative of the United States in its dealings with foreign nations." See, e.g., United States v. Louisiana, 363 U.S. 1, 35 (1960). The officers in question perform diplomatic functions as the direct representative of the President, a fact that Congress itself has recognized by providing that they should enjoy the rank of ambassador. 19 U.S.C. § 2171(b). Regardless of whether the President would, as a policy matter, be willing to accept this particular restriction, Congress would exceed its constitutionally assigned role by setting such a broad disqualification. See, e.g., Civil Service Commission, 13 Op. Att'y Gen. 516, 520-21 (1871).[6/]

After passage of the Lobbying Disclosure Act by both the Senate and the House, Justice continued to express serious concerns about the new pre-employment provision, but did not recommend that the President veto the Act on this basis.[7/] The President in signing the bill noted the constitutional issue.[8/]

The new disqualification raises serious separation of powers questions. When such provisions are enacted without hearings, with virtually no floor debate or legislative history, and despite constitutional objections noted by the Department of Justice, the justifications underlying them should be carefully

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6/ Letter from Andrew Fois, Assistant Attorney General, Office of Legislative Affairs, U.S. Department of Justice to the Hon. Henry Hyde, Chairman, House Committee on the Judiciary, concerning S. 1060 [the Senate bill pending before the House] 2-3 (Nov. 7, 1995).

7/ Letter from Andrew Fois, Assistant Attorney General, Office of Legislative Affairs, U.S. Department of Justice to the Hon. Alice M. Rivlin, Director, Office of Management and Budget concerning S. 1060 2 (Dec. 18, 1995).

8/ *See* 51 Weekly Compilation of Presidential Documents 2205-06 (December 25, 1995).

examined. Where such provisions are not only constitutionally suspect but also premised on a mistaken and troublesome view of the lawyer-client relationship, they should be removed.

B. It Is In The Public Interest for the President to Be Free to Appoint the Most Highly Qualified Nominees, Regardless of Past Clients

The new disqualification rules out many qualified individuals who could otherwise serve the nation effectively as senior trade negotiators. The best qualified candidate for a particular USTR or Deputy USTR appointment may be someone who has some experience advising foreign clients. (We note, in this regard, the adage that it is useful for a prosecutor to have experience serving as defense counsel.) Yet, the USTR Amendment would prevent such a person from serving.

While it is wrong to presume a link between advocacy and personal belief, it is even more wrong to freeze such a presumption into a statute. Categorical and difficult-to-amend statutory disqualifications cannot take into account the nuances of a particular candidate's history. These are precisely the factors that the President should weigh in choosing a nominee and the Senate should review in the confirmation process.

The new disqualification does not only restrict the President's appointments power. It also represents a failure to respect the Senate's constitutional role to consider, and where appropriate disapprove, the President's nominees. The Senate should preserve its prerogative to consider a particular nominee's record of advocacy for foreign clients, or foreign government clients, in the confirmation process and to determine whether anything in that record is sufficiently troubling to justify withholding confirmation.[9/]

9/ The unwarranted breadth of the new disqualification is demonstrated by the more narrowly drawn alternatives that Congress did not select. Even assuming *arguendo* that assertive use of the Senate's confirmation authority is insufficient, narrower solutions are available. One is mandatory recusal with penalties for failure to do so, combined with strict reporting of prior activities. *See, e.g.,* 28 U.S.C. § 528 (Justice Department employees). Recent USTR and Deputy USTR nominees have disclosed prior representations, including foreign representations, and have voluntarily recused themselves (temporarily or permanently, as appropriate) with respect to issues involving those particular clients. *Hearing to consider nomination of Michael Kantor Before Senate Comm. on Finance*, 103rd Cong., 1st Sess. (1993); *Nomina-*

(continued...)

C. The Unstated Premise of the New Disqualification -- That An Advocate is Either Tainted By or Continuously Captive to the Interests of a Former Client -- Is Inconsistent with U.S. Traditions and Values

During the 1974 Senate consideration of legislation to establish the office of special prosecutor and to depoliticize the position of Attorney General, former Supreme Court Justice Arthur Goldberg described the attorney-client relationship in the following manner:[10/]

> One of the traditional concepts applicable to the bar at large is too often overlooked in senatorial confirmation hearings involving nominees for Attorney General, Assistant Attorney General, Deputy, and U.S. Attorneys. That concept -- which I fear, Mr. Chairman, in the day of the organization man and big interests which lawyers are called upon to serve, is too often overlooked -- is that *the bar is independent, that it is not a servant of a client, but services a client; and that the men and women of the bar are independent and give counsel and advise independently.* The principal law enforcement officers of the Government should be lawyers in that sense, ... Any nominee of a different mind or character should not be confirmed by the Senate.

9/(...continued)

tion of Carla Anderson Hills: Before Senate Comm. on Finance, 101st Cong., 1st Sess. (1989). *Nominations of Rufus Hawkins Yerxa, Charlene Barshefsky, Walter Broadnex, Avis Lavelle, Jerry Klegner, David Ellwood, Kenneth Apfel, Bruce Vladeck, Hariet Rabb and Jean Hanson: Before Senate Comm. on Finance*, 103rd Cong., 1st Sess. (1993). Other trade officials have done likewise. *See, e.g.*, Rick Jenkins, "Trade Nomination Raises 'Revolving Door' Issue," *Christian Science Monitor* at 8 (Jan. 14, 1994). Another alternative is more extensive mandatory reporting of pre-employment activities over a set period before Senate confirmation, enhancing the Senate's ability to reject a nominee based on prior activities if it wishes. *See, e.g., Hearings on S. 555 (Public Officials Integrity Act of 1977, Blind Trusts and Other Conflict of Interest Matters) Before the Senate Comm. on Governmental Affairs*, 95th Cong., 1st Sess. 108-09 (1977) (testimony of Fred Wertheimer, Vice President for Operations, Common Cause). Requiring disclosure of clients is not without its problems. As noted by the ABA in 1977, such a regime could place a professional person in the position of having to violate the confidentiality of a privileged relationship. *See Financial Disclosure Act: Hearings on H.R. 1, H.R. 9, H.R. 6954, and Companion Bills Before the Subcommittee on Administrative Law and Governmental Relations of the House Comm. on the Judiciary*, 95th Cong., 1st Sess. 487, 490 (1977) (testimony of Prof. Livingston Hall and Prof. Herbert S. Miller on behalf of the American Bar Association).

10/ *Removing Politics from the Administration of Justice: Hearings on S. 2803, S. 2978 Before the Subcommittee on Separation of Powers of the Senate Comm. on the Judiciary*, 93rd Cong., 2d Sess. 62 (1974) (emphasis added).

For just such reasons, it is widely accepted that a lawyer should not be ineligible for nomination as a judge solely because of past representation of, for example, criminal defendants.

The USTR Amendment, and the proposals to extend the disqualification so that it applies to other government positions, adopts a different and inaccurate view of the relationship between advocates and their clients. It is wrong to assume that an outside advisor, such as a lawyer, necessarily concurs with the views or actions of his or her client, or will apply those views in carrying out the duties of a public office. Certainly, if someone represents more than one group of clients -- for example, foreign governments in some matters and U.S. corporations in others -- it cannot fairly be presumed that the foreign government representation determines or more accurately represents the person's own beliefs.

When an individual leaves the private sector and becomes a government official, he or she takes on totally new responsibilities and must move beyond *all* prior client interests -- those of domestic and foreign clients alike. Other than preserving their confidences, an appointee has no continuing obligation to prior clients. The USTR Amendment wrongly ignores this aspect of public service.

Reflecting its inconsistency with U.S. traditions and values, the new disqualification is utterly without precedent in the U.S. Code. Appendix 2 to this Report identifies 126 statutory provisions, relating to U.S. Government civilian offices, that impose qualifications in addition to Senate confirmation.[11/] As shown there, those 126 provisions fall into seven groupings:

- 3 provisions requiring that appointees be U.S. citizens;
- 19 provisions requiring that appointees be civilians at the time of their appointment;

11/ These are all the provisions that could be identified through review of the U.S. Code, 1994 Edition, and Supplement I to that Edition. Some of these positions are also subject to statutory requirements designed to ensure a balance of political affiliation on Boards and Commissions, *e.g.*, an equal number of Democrats and Republicans on the U.S. International Trade Commission. Additionally, in some cases an office is required by statute to be filled by an existing federal, state or local government official. Appendix II largely ignores such requirements.