America for Sale: When Well-Connected Former Federal Officials Peddle Their Influence to the Highest Foreign Bidder--A Statutory Analysis and Proposals for Reform of the Foreign Agents Registration Act and the Ethics in Government Act

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INTRODUCTION

In our pluralistic society, individuals and groups routinely make the government aware of their concerns through lobbying efforts. It is only with this information about the concerns of its constituency that government can formulate effective policy and legislation. As Americans, we exercise our democratic rights in stating our case before government officials.

However, not only do Americans lobby the federal government for attention to their concerns, foreign entities increasingly attempt to influence U.S. government action for their own benefit. Through

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hired lobbyists, media consultants, public relations advisers, and other advocates, foreign governments and corporations are trying to get their agenda heard and acted upon.

Foreign influence poses a clear danger to the integrity of federal policy and legislation. The danger is that high-powered lobbyists representing the concerns of foreign parties may crowd out the legitimate concerns of Americans in the governmental decision-making process.

This danger is exacerbated by the increased presence of former high-level federal officials among the ranks of those who are paid to advocate the concerns of foreign governments and corporations. These former officials create much more cause for concern than ordinary lobbyists. Former officials have inside information and contacts that ordinary lobbyists do not have at their disposal. When former officials use inside information and contacts at their former agency to unduly influence agency action for the benefit of their foreign employers, the efficiency and impartiality of the federal government are truly compromised.

One of the most recent and highly-publicized instances of a former official using his inside information and contacts for foreign interests is the scandal that enveloped former White House deputy chief of staff Michael Deaver. After leaving his White House position, Deaver set up Michael Deaver & Associates, a lobbying firm that capitalized on Deaver’s inside knowledge and contacts at the White House. With fees between $100,000 and $1.5 million, his new enterprise was soon billing $4.5 million a year.

What eventually undid Deaver’s career were allegations that he was lobbying White House officials on matters in which he participated as a White House aide, a violation of the Ethics in Government Act of 1978. Deaver represented Rockwell International, which manufactures the B-1 bomber, by discussing future sales with then director of the Office of Management and Budget, James Miller. During his tenure in office, Deaver attended the National Security Council meetings where the B-1 bomber was discussed; Deaver’s fee for representing Rockwell was $250,000.

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1 Martz, Borger, De Frank, McDaniel, & Thomas, Deaver’s Deals, Newsweek, May 5, 1986, at 18 [hereinafter Martz].
2 Id.
4 Martz, supra note 1, at 18-19.
5 Id. at 18.
Deaver was also accused of lobbying on behalf of U.S. businesses operating in Puerto Rico. Those businesses paid Deaver to lobby former administration colleagues to push for retention of tax loopholes that benefited their Puerto Rican activities to the tune of $500 million, which is lost revenue to the federal treasury. Deaver’s fee was undisclosed.

Deaver also was alleged to have lobbied then Transportation Secretary Elizabeth Dole on behalf of Trans World Airlines. Deaver agreed to speak with Dole about getting the Transportation Department to halt Carl Icahn’s takeover of the airline; Deaver’s fee for one phone call was $250,000. Boeing Aircraft was also paying Deaver for his services. Deaver lobbied the White House for a lucrative $200 million contract for a new Air Force One. Boeing got the contract and Deaver received $250,000 for services rendered.

More alarming, however, were Deaver’s lobbying activities on behalf of foreign interests. He represented the South Korean industrial giant, Daewoo Corporation, by meeting with high-level Treasury Department officials on Daewoo’s behalf. Daewoo had been assessed criminal and civil penalties by the Treasury Department for conspiracy and fraud in violation of U.S. trade laws. Deaver met with two Treasury officials in hopes of reducing Daewoo’s final liability, for which he received a $250,000 fee.

Deaver also took a controversial $1.5 million contract with the government of Saudi Arabia, primarily to lobby for the Saudis in anticipated Capitol Hill fights over delivery of AWACS and other military sales. Deaver’s clients also included the governments of Singapore and Mexico ($250,000 each per year) and the South Korean government, through the proxy of the “International Cultural Society of Korea” ($475,000 per year).

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6 Id. at 19.
7 Id.
8 Id.
11 Id.
12 Martz, supra note 1, at 19.
13 Id.
14 Id.
15 Shapiro, De Frank, Borger, and Fineman, Has Mike Deaver Gone Too Far?, NEWSWEEK, April 14, 1986, at 23.
Still, the activity that drew the most public attention was Deaver's representation of the Canadian government on the acid rain issue. While in office, Deaver advocated accommodating Canadian concerns on the issue. His White House colleagues did not suspect any ulterior motive for his position until they learned that Deaver had taken a contract to represent the government of Canada on that very issue when he left office. Deaver's contract was worth $135,000 a year from the Canadian government.

Although Deaver registered himself as an agent for his foreign clients, as required by the Foreign Agents Registration Act, his registration statements may have omitted the detailed descriptions of his activities that the law requires. Deaver's registration statement for his work on behalf of the "International Cultural Society of Korea" is believed by some observers to have been an attempt to hide work that he was doing for the South Korean government.

Deaver's lobbying career came to an abrupt end. Investigations by the General Accounting Office and the Oversight and Investigations Subcommittee of the House Energy and Commerce Committee began turning up the details of Deaver's lobbying activities. As the investigations progressed, the Justice Department received requests from both the Office of Government Ethics and the five Democrats on the House Judiciary Committee for an independent counsel to investigate Deaver's activities.

In May 1986 Attorney General Edwin Meese finally gave in to pressure for an independent counsel and appointed Whitney North Seymour to investigate allegations that Deaver's lobbying activity had violated the Ethics in Government Act. As Seymour's nine month investigation drew to a close, Deaver made a last-ditch effort to stave off an indictment by attempting to have the independent counsel provision of the Ethics in Government Act de-
declared unconstitutional. His challenge was unsuccessful, as in June 1987, the United States Court of Appeals for the District of Columbia Circuit ruled that the independent counsel provision was constitutional.\textsuperscript{25} Deaver's appeal to the Supreme Court was turned down hours before his indictment was issued.\textsuperscript{26}

Despite Seymour's intense investigation and the information it brought to light, the independent counsel elected only to indict Deaver for perjury and not for any violation of the Ethics in Government Act. The eighteen page indictment alleged that Deaver lied three times to a federal grand jury and twice to the congressional subcommittee investigating his activities.\textsuperscript{27} The indictment further alleged that Deaver lied when he denied participating in White House discussions on acid rain on behalf of the Canadian government; that he lied about arranging a meeting between President Reagan and an emissary from the South Korean government; and, finally, that he lied about his lobbying activities on behalf of the Smith Barney brokerage firm and Trans World Airlines.\textsuperscript{28}

Deaver was tried and subsequently convicted of three counts of perjury in December 1987. These convictions carried a maximum of $22,000 in fines and up to fifteen years in prison.\textsuperscript{29} However, U.S. District Court Judge Thomas Jackson gave Deaver a suspended three-year sentence, 1,500 hours of community service, $100,000 in fines, and barred Deaver from lobbying the federal government for profit during his three year probation.\textsuperscript{30} Deaver abandoned the last appeal of his conviction on February 3, 1989.\textsuperscript{31}

Deaver's tale would not be so alarming if he were the only ex-government official lobbying on behalf of foreign interests. He is not. Top Washington lobbying firms with a variety of foreign clients routinely recruit former federal officials. As the Deaver scandal unfolded, the media began to focus on just how many former White House staffers had left to begin lobbying and public relations careers. As one article pointed out, "[f]oreign governments are particularly eager to retain savvy Washington insiders to

\textsuperscript{25} Deaver v. Seymour, 822 F.2d 66 (D.C. Cir. 1987),
\textsuperscript{26} Deaver v. United States, 483 U.S. 1301 (1987) (Court denied Deaver's application to stay his imminent criminal trial pending disposition of his petition for certiorari).
\textsuperscript{27} De Mott & Stanley, The Bill Comes Due for Deaver, Time, March 30, 1987, at 23,
\textsuperscript{28} Id.
\textsuperscript{29} Beckwith, supra note 10, at 23.
\textsuperscript{30} Chicago Trib., September 24, 1988, § 1, at 2.
\textsuperscript{31} Chicago Trib., February 4, 1989, § 1, at 4.
guide them through the bureaucratic and congressional maze and polish their sometimes unsavory images in the U.S.”

In this commentator’s opinion, not enough is being done to prevent these former federal officials from selling their influence on the international market. The danger they pose to the integrity of the U.S. government and the mockery they make of public service must not continue unchecked.

This Article will first explore the provisions of the two main statutes regulating the activities of former officials who lobby for foreign interests: the Foreign Agents Registration Act of 1938 and the Ethics in Government Act of 1978. Second, the shortcomings of the two statutes will be discussed. Lastly, this commentator will outline some proposed reforms of these laws and evaluate those proposals.

I. THE FOREIGN AGENTS REGISTRATION ACT OF 1938 (FARA)

A. Legislative History

The first of the two primary laws affecting the operations of foreign agents in the United States is the Foreign Agents Registration Act of 1938 (FARA). Over the last fifty years, the purposes behind the Act have changed to reflect the different manifestations of activity conducted by foreign agents in this country. What was originally a wartime anti-propaganda measure has evolved into a modern regulatory control over the sophisticated lobbying activities of foreign agents.

In 1934, Congress set up a Special Committee to investigate subversive activities in America. The Committee concluded that “there [were] many persons in the United States representing foreign governments or foreign political groups who [were] supplied by such foreign agencies with funds and other materials to foster un-American activities, and to influence the external and internal policies of this country.” These foreign bodies were attempting to alter U.S. policy through subversive propaganda disseminated

32 Thomas & Beckwith, Peddling Influence, Time, March 3, 1986, at 28. The article also included a list of 14 former Reagan White House officials who left to begin lobbying careers on their own or with large Washington firms. Id. at 36.


in this country by their agents. The two primary disseminators of the propaganda were pro-Nazi and pro-Communist organizations in the United States.\textsuperscript{35}

A prime example of the type of activity about which Congress was concerned is illustrated by the "Silver Ranger" incident. In 1934, it was disclosed in Congress that a pro-Nazi newspaper entitled Silver Ranger was being published in the United States and that its editorial policy advocated reorganization of the United States government to further pro-Nazi goals.\textsuperscript{36} Other examples of pro-Nazi activities disclosed during the 1934 session of Congress include:

1.) evidence of large sums of money set aside for Nazi propaganda in the United States;

2.) German ships and seamen smuggling Nazi propaganda into the United States;

3.) intimidation of German-Americans by a branch of the Nazi secret police in the United States;

4.) linking of organizations and funds in the United States in order to spread racism and social unrest;

5.) active Nazi spying on United States military bases;

6.) use of the United States mail to distribute Nazi propaganda;

7.) efforts to dominate and control the editorial policy of German-American newspapers in the United States; and

8.) use of United States banks to launder and store money to be used for Nazi propaganda.\textsuperscript{37}

In order to counter the effects of subversive propaganda efforts, the Special Committee recommended that Congress enact FARA.\textsuperscript{38}

FARA neither limited nor prohibited the dissemination of foreign propaganda. What FARA required was that the disseminator of the propaganda label its source.\textsuperscript{39} It was felt that if Americans knew the source of foreign propaganda they could make an in-

\textsuperscript{35} The legislative history illustrates that Nazi and Communist propaganda were the main target of FARA. In fact, the words "Foreign Propaganda" in the act originally read "Nazi Propaganda" when the House approved the Special Committee to investigate un-American activities. See H.R. Res. 198, 73d Cong., 2nd Sess., 78 Cong. Rec. 4934, 4949 (1934).

\textsuperscript{36} Id. at 4941.

\textsuperscript{37} Id. at 4946-47

\textsuperscript{38} The Special Committee's report discussed Congressional action to require disseminators of foreign propaganda to register with the Secretary of State. H.R. Rep. No. 1381, supra note 34.

formed decision as to its accuracy.\textsuperscript{40} FARA was designed to limit the effect of foreign propaganda by revealing both the identity of foreign agents and the source of the propaganda they were disseminating.\textsuperscript{41}

FARA in its original enactment\textsuperscript{42} required a person within the statutory definition of "agent of a foreign principal" to register with the Secretary of State.\textsuperscript{43} The act also defined four other terms relevant to the enforcement of FARA. "person";\textsuperscript{44} "United States";\textsuperscript{45} "foreign principal";\textsuperscript{46} and "Secretary".\textsuperscript{47} The Secretary of State was made the administrator of FARA, and was responsible for collecting the registration and supplementary statements of registrants.\textsuperscript{48} The Secretary of State was also given authority to institute criminal charges against persons who failed to comply with the Act, which provided for penalties of a jail term and/or a fine.\textsuperscript{49}

FARA was first amended in 1942 to improve enforcement\textsuperscript{50} and to close up certain loopholes.\textsuperscript{51} With these amendments Congress set

\textsuperscript{40} United States v. Auhagen, 39 F Supp. 590 (D.D.C. 1941). The court noted that if Americans knew the identity of foreign agents, then they could evaluate their statements accordingly. FARA is referred to by the court as the McCormack Act.

\textsuperscript{41} H.R. REP. No. 1381, supra note 34, at 2.

\textsuperscript{42} FARA, supra note 33.

\textsuperscript{43} The term "agent of a foreign principal" means any person who acts or engages or agrees to act as a public relations counsel, publicity agent, or as agent, servants, representative, or attorney for a foreign principal or for any domestic organization subsidized directly or indirectly in whole or in part by a foreign principal. Such term shall not include a duly accredited diplomatic or consular officer of a foreign government who is so recognized by the Department of State of the United States, nor a person, other than a public-relations counsel, or publicity agent, performing only private, non-political financial, mercantile, or other activities in furtherance of the bona fide trade or commerce of such foreign principal.

\textsuperscript{44} "The term 'person' means an individual, partnership, association, or corporation."

\textsuperscript{45} Id. at 631.

\textsuperscript{46} "The term 'United States' includes the United States and any place subject to the jurisdiction thereof." Id.

\textsuperscript{47} "The term 'foreign principal' means the government of a foreign country, a political party of a foreign country, a person domiciled abroad, or any foreign business, partnership, association, corporation, or political organization." Id. at 631-32.

\textsuperscript{48} "The term 'Secretary' means the Secretary of State of the United States." Id.

\textsuperscript{49} Ironically, a $75,000 appropriation for the administration of FARA was not included in the Act. H.R. REP. No. 2510, 75th Cong., 3rd Sess. (1938).

\textsuperscript{50} The penalty for willful noncompliance with the Act was a fine of up to $1,000 and a maximum prison sentence of two years. FARA, supra note 33, at 632, 633.

\textsuperscript{51} Rep. Voorhis summarized a report by the Institute of Living Law that was highly
forth a clear enunciation of the policy and purpose of FARA. The amendments included an expansion of the definition of the terms “foreign principal” and “foreign agent.” “Foreign principal” was expanded to include a person or corporation controlled by a foreign principal. Agent of a foreign principal was expanded to include foreign military personnel, while excluding newspapers and magazines that were not controlled by a foreign principal.

The amended Act also created new exceptions to registration for agents of nations declared vital to U.S. interests by the President. In addition, the administration of FARA was transferred from the Secretary of State to the Attorney General’s office.

Additionally, a new and more comprehensive registration form was required from foreign agents. This form required disclosure of activities done on behalf of foreign principals. Furthermore, the foreign agents were required to maintain and preserve records with respect to their activities on behalf of foreign principals. The determination of which records had to be maintained was left to the Attorney General. The penalty for noncompliance was increased from a maximum $1,000 fine and/or two years imprisonment to a maximum $10,000 fine and/or five years imprisonment.

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52 It is hereby declared to be the policy and purpose of [FARA] to protect the national defense, internal security, and foreign relations of the United States by requiring public disclosure by persons engaging in propaganda activities and other activities for or on behalf of foreign governments, foreign political parties, and other foreign principals so that the Government and the people of the United States may be informed of the identity of such persons and may appraise their statements and actions in the light of their associations and activities.


53 Id. at 249, § 1(b). Of course, the rest of the definition remained in place.

54 Id. § 1(c)(4).

55 Id. at 250, § 1(d).

56 President Roosevelt vetoed the bill without this exception. The reason President Roosevelt insisted on the exception is that he did not want to antagonize our allies, and he believed that requiring agents to register would hurt the war effort. See THE REGISTRATION OF FOREIGN AGENTS IN THE UNITED STATES: A PRACTICAL AND LEGAL GUIDE at 21 (J. Pattison & J. Taylors eds. 1981) [hereinafter LEGAL GUIDE].

57 Pub. L. No. 77-532, 56 Stat. 253. The new amendment also empowered the Attorney General to make, amend, and rescind regulations that were necessary for the enforcement of FARA. Id. at 257, § 10.

58 Id. at § 8(a)(2). Corporate officers were personally liable for their corporation’s failure to comply with FARA. Id. at 256, § 7. Aliens convicted under FARA could be deported. Id. at 257, § 8(e).
FARA was next amended in 1950 to prolong and extend liability under the Act by clarifying when the statute of limitations would begin to run. Section 2(a) was amended to make an agent's failure to register under the Act a continuing offense that was relieved when the agent discontinued his or her activities. Section 7 of the Act was amended so that the dissolution of any organization or corporation acting as an agent of a foreign principal would not relieve its officers of responsibility for the organization's compliance with FARA. FARA was also amended in 1950 to require persons who had been trained in espionage, counterespionage, or sabotage by foreign governments to register under the Act.

In 1961, two sections of FARA were amended. First, the commercial exemption to the registration requirement was clarified. Persons were exempt from registration if their activities were either 1) private, nonpolitical, and financial or 2) private, nonpolitical, and mercantile. More significantly, the definition of foreign principal was enlarged to include domestic organizations that were substantially supervised, directed, controlled, or financed by foreign governments or political parties. Thus, an organization receiving significant funding from abroad would be required to register with the Attorney General.

In 1963, FARA was reworked extensively by Congress. Its focus was changed from controlling the dissemination of foreign propaganda to controlling the sophisticated activities of agents acting as paid lobbyists for foreign principals.

The 1963 Hearings on Nondiplomatic Representatives, chaired by Senator Fulbright, were held to examine the need for new legislation to limit the effect that foreign agents could have on
U.S. government legislation and policy. At the outset of the hearings, it was noted that FARA would probably need to be amended because "the circumstances that influenced the passage of the Foreign Agents Registration Act of 1938 had changed and its enforcement had not." As previously stated, the original purpose of FARA was to combat foreign propaganda and subversion. After World War II, the United States emerged as a world economic power. In light of this development, many nations began attempts to influence United States legislation and policy through lawyer-lobbyists, public relations counsel, and domestic "sympathy" groups. Thus, while the circumstances of foreign attempts to influence U.S. policy had changed, FARA had not been amended to cope with this new type of "friendly propaganda."

As a result of these hearings, Senator Fullbright introduced a bill to amend FARA. These amendments were specifically designed to combat the lobbyist-form of propaganda. The proposed amendments consisted of:

1) redefining agent and foreign principal;
2) defining new terms such as political activity and political consultant;
3) authorizing injunctive remedies for the Attorney Gen-

67 Id. at 4.
68 Senator Fullbright stated:
[T]he bill before the Senate primarily reflects the progressively larger role in world affairs that the United States has had to play in the past 20 or so years. Particularly since World War II, American foreign policy has become a central point of reference to the policies and basic interests of virtually every nation in the world. Thus, the efforts to influence American policy have become correspondingly greater and subtler over the same period.
69 One commentator called the switch from subversive propaganda to friendly propaganda a switch from "black" to "white" propaganda to illustrate the different methods being employed by the new breed of foreign agents to influence U.S. policy in a more subtle and sophisticated manner. Note, supra note 39, at 426.
70 110 CONG. REC. 16031.
71 Id. at 16032.
eral;\textsuperscript{72}  
4) prohibiting both campaign contributions for or on behalf of foreign principals and contingent contracts based upon success in political activities undertaken by the agent;\textsuperscript{73}  
5) requiring an agent speaking before a congressional committee to identify his agency relationship, his principal, and file his latest registration statement as part of the Committee hearings;\textsuperscript{74}  
6) broadening the commercial exemption by eliminating confusing terms such as "financial" and "mercantile" and replacing them with the term "bona fide commercial activity";\textsuperscript{75}  
7) requiring filing of political propaganda with the Justice Department when disseminated for or in the interest of the agent's foreign principal;\textsuperscript{76}  
8) authorizing the Attorney General to prescribe by regulation the accounting and other business practices that registrants must follow to meet FARA's disclosure requirements;\textsuperscript{77}  
9) requiring the Attorney General to transmit to the Secretary of State the initial registration along with supplemental and amended registration statements and giving the Secretary of State the authority to make use of the statements in any appropriate manner;\textsuperscript{78} and  
10) exempting a United States corporation with foreign subsidiaries from registering if its activities did not predominantly serve the interests of a foreign principal.

In 1964, the bill passed the Senate, but lapsed in time prior to any other legislative action. A nearly identical bill was introduced in the Senate in 1965.\textsuperscript{79} The bill was in response to public demand

\textsuperscript{72} Id.  
\textsuperscript{73} Id. at 16033.  
\textsuperscript{74} Id. at 16032.  
\textsuperscript{75} Id.  
\textsuperscript{76} Id.  
\textsuperscript{77} Id.  
\textsuperscript{78} Id. Presumably this would give the State Department the power to release such information as is contained in the statements of registration to the press or other agencies of the government when it is in the interests of the United States to reveal a particular registrant's affiliation with a foreign principal.  
The new bill also included what is known as the "attorney exception," which exempts attorneys of foreign principals from registering under FARA. This exemption was added in response to the Supreme Court's ruling in Rabinowitz v. Kennedy, 376 U.S. 605 (1964). The Court held that an attorney who performs legal services for a foreign principal would have to register under FARA because his activities were neither financial nor mercantile. \textit{Id.} at 610. \textit{See generally} Note, \textit{Lawyers and the Foreign Agents Registration Act}, 1 Colum. J.L. & Soc. Probs. 68 (1965) (suggesting several alternatives to the requirement of \textit{Rabinowitz}).
for more detailed information and reporting about the operations and objectives of lobbyists acting on behalf of foreign interests in the United States. This new lobbyist-oriented foreign agent activity was the stated reason for the amendments to FARA. Thus, FARA, as amended, required broader registration in order to effectively control the lobbyist-form of foreign influence on U.S. policy.

B. When Registration is Required Under FARA

The Foreign Agents Registration Act requires persons to register if they are working as an "agent" of a "foreign principal," and their activities as such are not specifically exempted from FARA's registration requirements. The first step in understanding when FARA requires registration is to look at the statutory definitions of "agent" and "foreign principal" as they are codified in the Act and as they have been construed by the Attorney General and the courts.

1. The Foreign Principal

"Foreign principal" is defined broadly in FARA to include four categories: 1) foreign governments and political parties, 2) persons outside the United States, 3) entities organized under the

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80 During the 1963 hearings on nondiplomatic representations, the following letter was submitted as evidence on the need for amending FARA in order to adapt to the changed circumstances of foreign agent activity:

Through channels of personal obligation we have made contact with a powerful law firm in the Senator's home state. The senior member of the firm is the executive officer of the Senator's political machine. The second partner is the son of the Senator's first campaign manager; there are very close family connections between this man and the Senator. The third partner is the private confidential attorney of the Senator; he handles important confidential matters for the Senator's machine. All three propose to call upon the Senator on Monday, January 30, to engage his sympathy for the position of the Dominican Republic with respect to sugar legislation. They will represent themselves as being very interested purely because of their very close ties of friendship and business with my firm. Each of the three will adopt a different approach to arouse the Senator's sympathy. They ask a retainer fee of $2,500.

Nondiplomatic Representatives, supra note 66, at 393-94. See also Paul, Lawyers, Privileged, supra note 68, at 756-57.


laws of, or with a principal place of business in, a foreign country, and 4) indirect foreign principals who are controlled by any actor in categories 1, 2, or 3.  

Two observations should be made at the outset. A foreign principal may be from a country that is either friend or foe of the United States. Moreover, persons may become foreign principals even though they do not pay their "agent[s]."

a. Foreign Governments and Political Parties

FARA's definition of "foreign government" embraces not only lawful (de jure) foreign governments, but also those governments exercising authority without the force of law (i.e., insurgencies). Moreover, U.S. diplomatic recognition is not required to meet the definition of "foreign government" under FARA.  

"Foreign political party," as it is defined in FARA, includes organizations whose activities (at least in part) involve the purpose of controlling a foreign government or influencing its political or public interests. Hence, any political activity may bring a group under FARA's definition of "foreign political party"

b. Persons Outside the United States

The second category of foreign principals, "persons outside the United States," is broadly defined in FARA. It includes any individual, partnership, association, corporation, organization, or any other combination of individuals outside of the U.S. proper, its territories and possessions, and any area subject to U.S. civil or military jurisdiction.

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83 22 U.S.C. § 611(b), (c).
84 As far back as 1943, courts have held that disclosure of the agency relationship was required by friend or foe as long as the requisite agency relationship existed. United States v. Kelly, 51 F. Supp. 362, 363 (D.D.C. 1943).
85 It is not necessary that the relationship meet the definition of "agency" according to the Restatement of Agency. "[Agency comprises] the fiduciary relation which results from the manifestation of consent by one person to another that the other shall act on his behalf and subject to his control, and consent by the other to so act." RESTATEMENT (SECOND) OF AGENCY § 1 (1958). It is only necessary to show that the agent acted at the request of the foreign principal. Attorney Gen. v. Irish N. Aid Comm., 668 F.2d 159, 161 (2d Cir. 1982).
86 22 U.S.C. § 611(e).
87 Id.
89 22 U.S.C. § 611(a), (m).
c. Entities Organized Under the Laws of or With a Principal Place of Business in a Foreign Country

This subsection is a catchall category for foreign corporations, associations, organizations, or other combinations of individuals either organized under the laws of a foreign country or having a principal place of business there. This section would prevent a foreign corporation from incorporating in the United States as a "dummy corporation" for the purpose of not being required to register under FARA—if that corporation has its principal place of business abroad, the registration requirements of FARA would still be triggered.

d. Indirect Foreign Principals

This section provides that if a person's activities are directly or indirectly supervised, controlled, financed, or subsidized by a foreign principal (any of the three aforementioned categories), then the person is a foreign principal. The purpose of this section is to prevent foreign principals from using American intermediaries to supervise their agents in order to hide their activities and avoid registration under FARA. With this broadly defined meaning of "foreign principal," there is usually little question that the agent of any given foreign actor is subject to FARA's registration requirements.

2. Agent of a Foreign Principal

A person becomes the "agent of a foreign principal" when he or she acts at the order, request, or under the direct control of a foreign principal and engages in any of four categories of activities on the principal's behalf. The direction or control need not be direct; control through an intermediary seems to be sufficient. Moreover, the agency relationship need not arise from an express contract or monetary benefit conferred upon the agent; the test is whether the relationship warrants registration by the agent to carry out the informative purposes of FARA.

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91 22 U.S.C. § 611(c)(1).
93 22 U.S.C. § 611(c).
94 Id.
95 Irish N. Aid, 668 F.2d at 161.
The four categories of activity that bring a person within the definition of "agent of a foreign principal" include 1) political activity, 2) public relations activity, 3) solicitation, collection, and disbursement of funds, and 4) representation before governmental institutions.96

a. Political Activity

Political activity, as defined in FARA, is any attempt to influence the foreign or domestic policy of the United States.97 Political activity not only includes attempts to change United States policy, but also includes attempts to maintain the status quo as well.98 Political activity does not include routine inquiries of government officials concerning current policy or seeking administrative action in a matter where current policy is not in question.99

b. Public Relations Activity

FARA lists four types of public relations activity that bring a person within the definition of agent of a foreign principal when these activities are carried out for a foreign benefactor. These four types of activities are: 1) acting as a public relations counsel,100 2) acting as a publicity agent,101 3) acting as an information service employee,102 and 4) acting as a political consultant.103

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98 S. REP No. 143, 89th Cong., 1st Sess. 8 (1965); H.R. REP No. 1470, 89th Cong., 2nd Sess. 6 (1966); 28 C.F.R. § 5.100(e) (1988).
99 28 C.F.R. § 5.100(e).
100 Public relations counsel is defined as "any person who engaged directly or indirectly in informing, advising, or in any way representing a principal in any public relations matter pertaining to political or public interests, policies, or relations of such principal." 22 U.S.C. § 611(g).
101 Publicity agent is defined as "any person who engages directly or indirectly in the publication or dissemination of oral, visual, graphic, written, or pictorial information or matter of any kind, including publication by means of advertising, books, periodicals, newspapers, lectures, broadcasts, motion pictures, or otherwise." 22 U.S.C. § 611(h).
102 Information service employee is defined as:
[A]ny person who is engaged in furnishing, disseminating, or publishing accounts, descriptions, information, or data with respect to the political, industrial, employment, economic, social, cultural, or other benefits, advantages, facts, or conditions of any country other than the United States, or of any government of a foreign country or of a foreign political party or of a partnership, association, corporation, organization, or other combination of individuals organized under the laws of, or having its principal place of
c. Solicitation, Collection, and Disbursement of Funds

A person is required to register as an agent of a foreign principal when he or she solicits, collects, disburses, or dispenses contributions, loans, money, or anything of value on behalf of that foreign principal.\(^\text{104}\) This section serves to inform the public where their money is going when they make contributions to a person collecting funds for a foreign cause.\(^\text{105}\)

d. Representation Before Government Institutions

Most relevant to our analysis of the problem of insider lobbying by former federal officials is FARA's fourth category of activity that brings a person under the definition of "agent of a foreign principal"—representing the interests of a foreign principal before any agency\(^\text{106}\) or official\(^\text{107}\) of the United States government.

3. Exemptions Under FARA

FARA provides that certain occupations and certain activities shall be exempted from its registration requirements. Despite the existence of an agency relationship with a foreign principal, some persons can claim legitimate exemptions under the Act.

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\(^\text{103}\) Political consultant is defined as "any person who engages in informing or advising any other person with reference to the domestic or foreign policies of the United States or the political or public interests, policies, or relations of a foreign country or of a foreign political party.") 22 U.S.C. § 611(p).

\(^\text{104}\) 22 U.S.C. § 611(o)(ii).

\(^\text{105}\) This was the issue in Attorney Gen. v. Irish N. Aid Comm., 530 F Supp. 241 (S.D.N.Y. 1981), aff'd, 668 F.2d 159 (2nd Cir. 1982). In this case, the Attorney General was successful in getting a ruling that the Irish Northern Aid Committee had to register as a foreign agent.

The Committee argued that it was merely a relief organization for human suffering in Northern Ireland and thus exempt from registration under FARA as merely a private and nonpolitical actor as provided for in §613(d). The Attorney General prevailed in his argument that in reality the Committee was a front to raise money for the Irish Republican Army and thus the Committee would not be able to claim exemption from FARA as a nonpolitical actor.

\(^\text{106}\) Agency is defined in federal regulations as "every unit in the Executive and Legislative branches of Government of the United States, including committees of both Houses of Congress." 28 C.F.R. § 5.100(c).

\(^\text{107}\) Official is defined in federal regulations as "[m]embers and officers of both Houses of Congress as well as officials in the Executive branch of Government in the United States." 28 C.F.R. § 5.100(d).
FARA provides for four exempted occupations and three exempted activities. The four exempted occupations are:

a. accredited diplomatic or consular officers of a foreign country; 

b. foreign government officials;

c. staff members of diplomatic or consular officers; and 

d. attorneys who represent foreign interests.

The three exempted activities are:

a. religious, scholastic, or scientific pursuits; 

b. private and nonpolitical activities; and 

c. private and nonpolitical activities.

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106 22 U.S.C. § 613(a). The diplomatic or consular official must be accredited by the State Department to qualify for the exemption. Accreditation occurs when the official is formally recognized by the Secretary of State. 28 C.F.R. § 5.301(a). The recognition is personal only and does not extend to an office, a bureau, or any other entity. 28 C.F.R. § 5.301(b) (1988). The scope of the exemption is limited to the individual’s official functions as a diplomatic or consular officer. 22 U.S.C. § 613(a) (1982).
107 22 U.S.C. § 613(b) (1982). The same restrictions as those for diplomatic or consular officials apply. To qualify for the exemption, the status and character of duties of a foreign government official must be on public record with the State Department. The exemption does not apply if the official is also a public relations counsel, publicity agent, or U.S. citizen.
108 22 U.S.C. § 613(c). The same restrictions for officials of foreign governments apply.
109 22 U.S.C. § 613(g). The attorney exemption does not apply to activity aimed at influencing government policy.

Attorneys placed considerable pressure on Congress to enact the attorney exemption in the wake of the Supreme Court's decision in Rabinowitz v. Kennedy, 376 U.S. 605 (1964). See supra note 79. The Court held that an attorney representing Cuban interests would have to register under FARA since his activities were "political in nature." The attorney exemption essentially nullifies the Rabinowitz decision. The attorney exemption applies when an attorney represents a disclosed foreign principal before the courts or administrative agencies in both formal and informal proceedings. 22 U.S.C. § 613(g).

In Attorney Gen. v. Covington and Burling, 411 F Supp. 371 (D.D.C. 1976), inj. denied, 430 F Supp. 1117 (D.D.C. 1977), the court held that the law firm of Covington and Burling, which was a registered agent of the Republic of Guinea, could claim the attorney-client privilege to withhold certain documents from its FARA registration statements. Id. at 377. The court, however, reserved for itself the decision as to which documents the privilege would affect. Id. at 377. See Paul, Lawyers, Privileged, supra note 68, at 758.
110 22 U.S.C. § 613(e). The Attorney General has restricted the scope of this exemption by making it unavailable to persons who engage in political activity for or on behalf of a foreign principal. 28 C.F.R. § 5.304(d). This restriction serves to prevent foreign actors from cloaking their activities through the guise of a scholastic, scientific, or religious "front." Id.
111 22 U.S.C. § 613(d). There are three categories for this exemption:
1. Activities that are private, nonpolitical, and in furtherance of bona fide trade or commerce. 22 U.S.C. § 613(d)(1) (1982). This exemption most often applies to businessmen carrying out commercial activity that does not involve foreign governmental interests. Note, The Foreign Agents Registration Act: When is Registration Required, 34 S.C.L. Rev 687, 697-98 (1983). The exemption may also apply where a business executive is doing business
c. acts of agents of foreign governments vital to the defense of the United States.\textsuperscript{115}

4. \textit{FARA}'s Registration Requirements

Every agent of a foreign principal must (1) file a registration statement with the Attorney General;\textsuperscript{116} (2) file two copies of all with a foreign government, as long as the business executive does not directly promote the public or political interests of the foreign government. 28 C.F.R. § 5.304(b). Congress was aware that many foreign business enterprises are owned by foreign governments. Congress did not want to require U.S. businesses to register under FARA in order to be able to do business with these enterprises. See S. Rep. No. 143, \textit{supra} note 98, at 11; H.R. Rep. No. 1470, \textit{supra} note 98, at 10. Where an enterprise is so closely related to the interest of a foreign government (i.e., that enterprise accounts for ninety percent of the nation's exports), the exemption may not apply. \textit{Id.}

Trade or commerce is usually defined to include the “exchange, transfer, purchase, or sale of commodities, service, or property of any kind.” 28 C.F.R. § 5.304(a).

2. Activities not serving predominantly a foreign interest. 22 U.S.C. § 613(d)(2). This provision was designed to exclude from registration both U.S. companies with foreign subsidiaries and foreign companies with U.S. subsidiaries. Paul, \textit{The Foreign Agents Registration Act: The New Amendments}, 22 Bus. Law 601, 608-11 (1967); O'Hara, \textit{The Foreign Agents Registration Act—“The Spotlight of Pitiless Publicity}, 10 Vill. L. Rev. 435, 452 (1965); Note, \textit{supra}, at 699-700. The complexities of what types of activity are covered by this section are beyond the scope of this article.

3. The activity of groups who solicit and collect funds within the United States for medical aid and assistance or for food and clothing to relieve human suffering is exempt from registration under FARA. 22 U.S.C. § 613(d)(3).

\textsuperscript{116} 22 U.S.C. § 613(f). Agents whose principals are nations whose defense is vital to the defense of the United States are exempt from registration if they meet the three requirements for the exemption:

1. The agent must engage in activities which mutually promote the defense of the United States and the foreign government;
2. The agent must disseminate only accurate and truthful information; and
3. The foreign government must notify the Secretary of State of the agent's identity and activity.

For the exemption to apply, the President must have designated the foreign nation as one vital to the defense of the United States. 28 C.F.R. § 5.305. Currently, there is no such designation in force for any nation. \textit{LEGAL GUIDE}, \textit{supra} note 56, at 96. The exemption is revocable by the Attorney General at the request or with the approval of the Secretary of State. \textit{Id.}

\textsuperscript{116} 22 U.S.C. § 612. The registration statement must include the following information:
1. The registrant's name and personal and business address.
2. A complete list of the agent's employees and a description of the nature of their work.
3. Copies of all written agreements between the principal and the agent.
4. Terms of all oral agreements between the principal and the agent.
5. Methods employed or to be employed to perform the agent's duties.
6. Any political activities.
7. Other persons for whom the agent is acting.
8. Money paid to the agent from the principal within 60 days of the agency and money
political propaganda that was transmitted through the United States mails or through other means of interstate commerce with the Attorney General;¹¹⁷ and (3) keep books of account and other

disbursed on behalf of the agent in the 60 days prior to the agency.

9. Any other information that the Attorney General deems necessary (for reasons of national security and the public interest) to be disclosed.


After the initial registration statement, the agent is required to file supplemental statements every six months. 22 U.S.C. § 612(b). The agent must give the Attorney General notice within ten days if the nature of his work changes. Id.

The Attorney General has the power to:

1. Review the registration statements and supplements to see if they are complete and accurate.

2. Return registration statements to agents and order any deficiencies to be corrected.

3. Seek injunctive and/or criminal relief against any registrant refusing to complete a deficient statement. Injunctive relief would bar agents from performing their agency duties until they comply with the request to correct deficiencies. Criminal penalties for noncompliance include fines of $10,000 maximum and/or five years maximum imprisonment. 22 U.S.C. § 618 (1982). The Attorney General's office has not pushed for imprisonment in cases it has prosecuted. Defendants tend to plea bargain and receive suspended fines if they comply with the Act. See Attorney Gen. v. Arab Information Center, Ca. No. 76-279 (D.D.C. 1976) (A consent decree was entered into with the Attorney General not to violate the Act. The consent decree neither denied nor admitted the allegations made.). See also Attorney Gen. v. United States Japan Council, Inc., Ca. No. 76-1290 (1976).

¹¹⁷ 22 U.S.C. § 614 (1976). The agent has up to 48 hours after the beginning of the transmittal to file, with the Attorney General, two copies of the propaganda and a statement describing to whom and where it was disseminated. 22 U.S.C. § 614(a) (1982). FARA defines political propaganda as

any oral, visual, graphic, written, pictorial, or other communication or expression by any person, (1) which is reasonably adapted to, or which the person disseminating the same believes will, or which he intends to, prevail upon, indoctrinate, convert, induce, or in any other way influence a recipient or any section of the public within the United States with reference to the political or public interests, policies, or relations of a foreign country or a foreign political party or with reference to the foreign policies of the United States or promote in the United States racial, religious, or social dissensions, or (2) which advocates, advises, instigates, or promotes any racial, social, political, or religious disorder, civil not, or other conflict involving the use of force or violence in any other American republic or the overthrow of any government or political subdivision of any other American republic by any means involving the use of force or violence. 22 U.S.C. § 611(j) (1982).

If an agent does transmit propaganda or cause it to be transmitted, the propaganda must be conspicuously marked at its beginning with (or prefaced with or accompanied by) an accurate statement of the relationship between the transmitter of the propaganda and the propaganda itself. 22 U.S.C. § 614(b) (1976). The propaganda must also inform its recipient that the disseminator is a foreign agent and that the United States does not condone his or her statements. Id. The propaganda must also inform the recipient that a copy of all political propaganda disseminated by the foreign agent is available for public inspection. 22 U.S.C. § 614(c) (1976).

The agent's entire registration statement is open to the public and available for inspection in Washington; alternatively, a copy may be sent by mail from the Foreign
written records of all activities required to be disclosed by the Act.\textsuperscript{118}

III. THE ETHICS IN GOVERNMENT ACT OF 1978

The other statute that would affect lobbying activities of ex-government officials on behalf of foreign principals is the Ethics in Government Act of 1978;\textsuperscript{119} specifically, the provisions of Title V of the act that restrict post-employment activity of ex-government officials.\textsuperscript{120}

A. Legislative History

Although the Ethics in Government Act has only been law since 1978, the roots of federal ethics legislation go back to the mid-nineteenth century.\textsuperscript{121} In the wake of numerous scandals involving the corruption of federal government officials, the first criminal statutes were enacted to deal with several categories of official misconduct. Those categories were:

1. Activities of current or former federal employees on behalf of others with respect to claims before the courts or federal agencies.
2. Dealing in official transactions with businesses in which the employee has a financial interest.
3. Accepting pay from nongovernment sources “in connection with” official duties.
4. Assisting another, for pay, in receiving a government contract.\textsuperscript{122}

Impetus for change in the old statutes came in the early 1960’s due to the efforts of the Association of the Bar of the City of

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\textsuperscript{\textsuperscript{118} 22 U.S.C. § 614(e) (1982). The Attorney General also publishes an annual synopsis of registration statements filed during the past year. U.S. Department of Justice, Report of the Attorney General to the Congress of the United States on the Administration of the Foreign Agents Registration Act of 1938, as amended for (the current) calendar year.}
\textsuperscript{\textsuperscript{120} 18 U.S.C. § 207 (1982).}
\textsuperscript{\textsuperscript{121} R. VAUGHN, CONFLICT-OF-INTEREST REGULATION IN THE FEDERAL EXECUTIVE BRANCH 11 (1979).}
\textsuperscript{\textsuperscript{122} ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK, CONFLICT OF INTEREST AND THE FEDERAL SERVICE 28 (1960) [hereinafter BAR STUDY].}
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New York and the Kennedy administration. New York's Bar Study concluded that the old statutes were in need of revision because they were poorly drafted and lacked coordination, focused on areas of government activity where the risk of corruption had become insignificant, and finally did not contemplate large modern government structures and complex bureaucratic procedures and regulations. Thus, the existing statutes were overhauled to deal with the realities of present-day government.

With the 1962 statutes came the first broad provisions restricting the post-employment activities of former government employees. The sentiment in Congress at that time was that the individual federal agencies' ethical rules on post-employment activity were inadequate protection against the "revolving door" effect of high officials leaving government to take lucrative positions with the industries they once regulated.

The House passed a bill in August 1961 that included two post-employment restrictions. The first was a permanent ban on employees representing private parties on matters in which their participation was "personal and substantial."

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124 BAR STUDY, supra note 122, at 180-82.

125 The revised conflict of interest statutes are codified today as Title 18 U.S.C. §§ 201-219, 24 (1982), Chapter 11, Bribery, Graft, and Conflict of Interest.

126 Act of Oct. 23, 1962, P.L. 87-849, § 1(a), 76 Stat. 1126, 18 U.S.C. §§ 201-218 (1962). Former § 284 of Title 18 provided a narrow post-employment restriction that only prevented a former employee from representing a party involving a specific contract or claim against the United States that the employee had worked on while in office. The narrow scope of § 284 was underscored by the decision of a federal district judge in United States v. Bergson, 119 F Supp. 459 (D.D.C. 1954). In that case, the court held that "claims against the United States" were limited to demands for money or property. Id. at 468. The court held that this language did not encompass defendant's action of applying to the antitrust division of the Justice Department (a division he used to head) to obtain a clearance letter for a merger for a firm on whose cases he had worked during his tenure in office. Id. at 468. 18 U.S.C. § 284 was repealed by the 1962 Act.

127 During the hearings on revision of federal ethics rules, the Chairman of the House Committee on the Judiciary, Congressman Emmanuel Celler, compared agency enforcement of ethics rules to putting the fox in charge of the chicken coop. He further remarked to a colleague on the committee that, "the longer you remain here, the more you will realize that you cannot expect the agency to enforce conflict of interest statutes through administrative sanctions you just will not get anywhere." Federal Conflict of Interest Legislation: Hearings on H.R. 2157, H.R. 1900, H.R. 7556 & H.R. 10575 Before the Comm. on the Judiciary, 86th Cong., 2d Sess. 392 (1960).

128 H.R. 8140.

129 Id.
substantial participation could take the form of an approval, disapproval, recommendation, decision, or rendering of advice. The second was a two year bar on a former employee representing anyone on a matter that was within the employee’s “official responsibility”

After passage of the House bill, federal agencies began to protest that the new post-employment restrictions would cause a mass exodus from federal service and hamper personnel recruitment for federal agencies. The opposition of the federal agencies slowed Senate action on the bill during the remainder of 1961. The eventual Senate version of the bill cut the two year disqualification period on matters under a former employee’s “official responsibility” to one year, and added a number of exemptions for intermittent employees such as consultants and advisers.

The House accepted the Senate version of the bill without change. President Kennedy signed the bill into law on October 23, 1962, and it took effect on January 21, 1963.

The 1962 Act set forth two post-employment restrictions. First, a former federal employee could never act as agent or attorney in any “particular matter involving a specific party or parties” that involves the United States and in which the person participated “personally and substantially” as a federal employee. For example, suppose A was an official of the Federal Trade Commission. During A’s tenure in office, suppose that A participated both personally and substantially in an administrative adjudication involving the XYZ Corporation. Thus after A leaves the FTC, he would be barred from acting as attorney or agent for the XYZ Corporation in connection with the specific subject matter of that administrative adjudication. While on its face this seemed like a broad restriction, its scope was somewhat limited because it only applied to adversarial proceedings and not to general rule-mak-

130 R. Roberts, supra note 123, at 97.
131 Id.
132 Id. at 98.
133 Id.
134 Id. at 99. The Kennedy administration pressured for these exemptions, saying that consultants and advisers would be held to the same high standard that the administration had already set for other federal employees under the already existing conflict of interest rules, laws, and regulations.
135 Id.
136 Id.
The permanent bar did not apply to giving advice or assistance on a matter the former employee had dealt with personally, so long as that advice or assistance was not in the capacity of agent or attorney.

The second post-employment restriction under the 1962 Act was a one year ban on appearing personally, as agent or attorney, in a particular matter involving specific parties in which the United States is involved that was actually pending during the former employee's tenure in office, and that was under the former employee's "official responsibility." "Official responsibility" was defined as direct administrative or operating authority to approve, disapprove, or direct government action. The authority could be either intermediate or final, lone or joint, and either personal or through subordinates; the definition had the bureaucratic chain of command in mind. The effect of the one year bar was limited since it only applied to matters actually pending during the former employee's tenure; if any new matter arose, the former employee was free to appear as agent or attorney even though the matter was of a type that was once under his or her official responsibility.

A third restriction under the 1962 Act applied to partners of present employees. Partners of present federal employees were barred from acting as attorney or agent in any particular matter involving specific parties that involve the United States, and in which the employee was currently participating or in which the employee had personally and substantially participated.

The last major revision of the federal criminal conflict of interest statutes came during the Carter administration through the vehicle of the Ethics in Government Act of 1978. During the presidential election campaign of 1976, candidate Jimmy Carter stressed the restoration of public confidence in the integrity of government as a primary goal. In the wake of the Watergate

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139 R. VAUGHN, supra note 121, at 15.
140 18 U.S.C. § 207(b).
142 Id., R. VAUGHN, supra note 121, at 15.
143 R. VAUGHN, supra note 121, at 15.
144 18 U.S.C. § 207(c) (1962).
145 Id. The criminal liability of partners was expressly limited to the language of 18 U.S.C. § 207(c).
146 R. ROBERTS, supra note 123, at 147.
scandals of the early 1970's, the public's trust in the federal government and its officials had been severely shaken. In a speech to the American Bar Association, Carter outlined his support for new laws to limit the movement of persons employed by federal regulatory agencies into the industries they once regulated.\(^{147}\)

In January 1977, after his election victory, President-elect Carter announced new ethical guidelines for senior political nominees, which included a requirement that his nominees agree to make no formal or informal appearance before their former agency after leaving office.\(^{148}\) Under the 1962 conflict of interest statutes, the permanent bar only applied to formal proceedings.\(^{149}\) The Carter guidelines were a precursor to new ethics legislation being prepared for introduction in Congress.

On May 3, 1977, the White House introduced the Ethics in Government Act.\(^{150}\) While Congress had tried to enact ethics reform legislation in the aftermath of Watergate, nothing of substance had been achieved.\(^{151}\) The Ethics in Government Act proposed the creation of an Office of Government Ethics, located within the Civil Service Administration, along with new restrictions on post-employment activities of government officials.\(^{152}\) The ethics office was to have four responsibilities:

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\(^{147}\) N.Y. Times, August 10, 1976, at 15, col. 1.

\(^{148}\) N.Y. Times, January 5, 1977, at 1, 17.

\(^{149}\) See 18 U.S.C. § 207(a)(2) (1962). Formal proceedings included judicial or other proceedings, applications, requests for a ruling or other determination, contracts, claims, controversies, charges, accusations, arrests, or other particular matters involving a specific party or parties in which the United States is a party or has a direct and substantial interest.


\(^{152}\) Message to Congress, supra note 150.
(1) issuing general conflict of interest guidelines;
(2) making recommendations to the President on proposed changes in ethics rules;
(3) monitoring individual and agency compliance with ethics rules; and
(4) directing the government-wide ethics program.\footnote{153}

The office was not, however, vested with full jurisdiction over criminal and civil conflicts of interest.\footnote{154} The Ethics Office would have the power only to administer the ethics program and order corrective action by agencies or individuals; the Justice Department would retain final authority over criminal investigations.\footnote{155} The White House and the Justice Department did not want to centralize ethics responsibility in the new office; its function was to coordinate, while day-to-day management was left to agencies and investigations were left to Justice.\footnote{156}

With respect to the new post-employment restrictions in Carter's proposed Act, his recommendations were 1) the extension of the one year ban on appearing before an agency on a particular matter that was under the former employee's "official responsibility" to two years; and (2) a ban on former high officials contacting their former agency in any representative capacity on any matter for one year.\footnote{157} A final significant provision of the proposed Act was the establishment of a special prosecutor to investigate charges of misconduct by high officials.\footnote{158}

Senate hearings on the Ethics in Government Act along with the Public Officials Integrity Act (S. 555) began in May 1977.\footnote{159} Supporters of the Carter proposals testified that there was a need for stronger post-employment restrictions, but there was a danger in over-regulating and thus eliminating the necessary regulatory flexibility to deal with complex conflict of interest issues.\footnote{160}

\footnote{153} R. Roberts, \textit{supra} note 123, at 153.
\footnote{154} \textit{Id.}
\footnote{155} H.R. 6954.
\footnote{156} R. Roberts, \textit{supra} note 123, at 153. It was also unclear how the director of the Ethics Office would administer any sanctions for ethics violations; presumably, he or she would have to ask the President to punish or dismiss the transgressor.
\footnote{157} \textit{Id.} at 154. The Carter proposals were weaker than anticipated; many observers had expected an across the board prohibition on former officials taking jobs with employers with whom they had substantial dealings during their official tenure.
\footnote{158} \textit{Id.}
\footnote{159} \textit{Id.}
\footnote{160} \textit{Id.}
The Senate passed the Public Officials Integrity Act of 1977 on July 27th. It mandated the creation of an Ethics Office of the ‘Civil Service Administration, the appointment of special prosecutors to investigate ethics charges against high officials, and revisions of the post-employment provisions that went beyond the Carter proposals.161

The Senate bill expanded the disqualification period for matters under a former employee’s “official responsibility” from one to two years.162 The bill also created a new ban that prohibited high officials from contacting their former agency on any matter for one year.163 Additionally, the bill authorized both criminal penalties as well as administrative authority for agencies to disbar a former employee for violations of post-employment restrictions for up to five years.164 The sharpest conflict between the Senate and the Carter administration was over defining activity that would be covered by the lifetime ban.

The Senate post-employment revisions changed the lifetime ban on acting as attorney or agent on matters where the former employee participated personally and substantially.165 The revision expanded the ban to include informal as well as formal proceedings.166 Carter had not wanted the ban to apply to all forms of aiding and assisting outside of informal and formal proceedings, i.e., to so-called “behind the scenes assistance.”167 The language that the Senate adopted, however, reflected its intent to include exactly that sort of behind the scenes help given to private interests on matters with which the former employee had worked on while in office.168 The Carter administration was hoping that the House would water down the behind the scenes provisions.169

When the bill arrived in the House, widespread disagreement arose, partly due to the fact that parts of the bill fell under the

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161 Id. at 156.
162 Id., 18 U.S.C. § 207(b). The aiding and assistance prohibition was limited to aid and assistance rendered at government proceedings.
166 R. ROBERTS, supra note 123, at 156.
167 Public Officials Integrity Act of 1977, Blind Trusts and Other Conflict of Interest Matters: Hearings on S. 535 Before the Senate Comm. on Governmental Affairs, 95th Cong., 1st Sess. 7-8 (1977) (message to Congress from President Carter indicating his support for the strengthening of government ethical standards).
168 R. ROBERTS, supra note 123, at 156.
169 Id.
With respect to the post-employment provisions of the bill, Carter successfully persuaded the House Judiciary Committee to delete the lifetime bar on behind the scenes assistance and replace it with a two year bar with respect to matters in which the former employee’s participation was personal and substantial.\textsuperscript{171}

The scope of the post-employment restrictions also troubled the Judiciary Committee.\textsuperscript{172} Under the Carter proposals, the restrictions would apply to executive-level positions, political appointees classified at GS-16 or above, military officers in grade 0-6 or above, and others designated as having significant decision-making or rule-making authority by the director of the Ethics Office.\textsuperscript{173} The White House and the Justice Department were able to convince the House Judiciary committee that allowing the director of the Ethics Office to designate who would be subject to post-employment rules would not be an unconstitutional delegation of legislative authority.\textsuperscript{174}

A further point of debate over the post-employment restrictions was the threshold issue of whether they were warranted at all. Several members of the Judiciary Committee criticized the Carter administration’s “naive attempt to deal with what it perceives as the problem of the ‘revolving door’ in Government service.”\textsuperscript{175} These critics described the one year disqualification period as particularly punitive and argued that the Carter reforms would “hamper the ability of federal Government to attract bright, young people, as well as experienced professionals, for high-level positions.”\textsuperscript{176} This dissension over the content of the Act, jurisdictional battles between committees, and federal agency pressure on the White House to moderate its reform package combined to prevent passage of the Act during the rest of 1977.\textsuperscript{177}

\textsuperscript{170} \textit{Id.} The bill fell under the jurisdiction of the Select Committee on Ethics, the Post Office and Civil Service Committee, the Armed Services Committee, and the House Judiciary Committee.

\textsuperscript{171} \textit{Id.}

\textsuperscript{172} \textit{Id.} at 158.


\textsuperscript{175} \textit{See supra} note 173, at 102.

\textsuperscript{176} \textit{Id.} at 104. \textit{See} R. Roberts, \textit{supra} note 123, at 159.

\textsuperscript{177} R. Roberts, \textit{supra} note 123, at 159. To mollify critics who accused the Congress of foot-dragging on the ethics issue, the House passed a number of rules that (1) required
In September 1978, the debate over ethics legislation resumed in the House. The eventual House bill was similar to the Senate's and gave the White House most of what it wanted, but there were some important changes made in the House.

The Defense Department had voiced concerns that post-employment restrictions would hamper the flow of scientific and technical information between former officials working for contractors and the government. Thus, a compromise was struck that would allow former officials to obtain exemptions from the post-employment restrictions on a case-by-case basis. Congressman Samuel Stratton, however, argued that, even with the case-by-case exemption scientists would still leave government service in droves because they would not know if they would get an exemption until after leaving government employment. Stratton succeeded in getting an amendment to the Act that exempted "the making of communications solely for the purpose of furnishing scientific or technological information" from the mandates of the Act.

A further point of controversy was over proposed amendments to the one year ban on contact with the former agency by a high official. House opponents of the ban succeeded in passing an amendment that created an exemption allowing agencies to waive the ban for some former officials who were members of a licensed profession in good standing. The effect of this amendment was to effectively gut the anti-contact provision of the Act.

The House eventually passed its version of the Act on September 30, 1978, after lengthy debate. It took nearly one month for its members to disclose their financial holdings, (2) attempted to curb abuses of perks and privileges of office, and (3) proposed a cap on outside income. Ironically, these measures designed to placate the public have today set the stage for an ethics scandal with a life of its own. The recent ethics charges and subsequent resignation of House Speaker Jim Wright have shifted the focus on ethics from the executive branch to the Congress.

Id. at 160.
Id.
Id.
Id.
Id.
Id., The Stratton amendment became codified as 18 U.S.C. § 207(f).
R. ROBERTS, supra note 123, at 160.
R. ROBERTS, supra note 123, at 161.
Id.
the House and Senate to iron out their differences in conference.\textsuperscript{188} On the issue of post-employment restrictions, the conference agreed to delete the House exception to the one year no contact rule; they inserted instead a limit on the rule so that it would only apply to executive level officials and others designated by the director of the Ethics Office as having significant decision-making or supervisory responsibility.\textsuperscript{189} President Carter signed the Ethics in Government Act on October 28, 1978.\textsuperscript{190}

With passage of the Act came a fire-storm of protest from the federal agencies, particularly with respect to the new section 207(b)(ii) of Title 18, which provided for a two year disqualification period on “aiding, assisting, counseling, or representing” anyone on a matter in which they participated personally and substantially.\textsuperscript{191} Momentum in Congress began to build to amend or repeal the post-employment portions of the Act, while steadfast supporters of the Act dug in their heels for a fight.\textsuperscript{192}

\textsuperscript{188} Id.
\textsuperscript{189} Id. at 162.
\textsuperscript{190} 37 CONG. Q. WKLY. 3121-24 (1978).
\textsuperscript{191} R. ROBERTS, supra note 123, at 163-64. The Washington Post reported that hundreds of government officials were planning to quit before the Act became effective to avoid the post-employment restrictions of the Act. Washington Post, January 31, 1979, at A3, col. 1. Members of the Carter administration, notably then Secretary of Health, Education, and Welfare Joseph Califano, asked the President to postpone the effective date of the law and give Congress time to clarify or amend the post-employment restrictions. N.Y. Times, March 8, 1979, at A1, col. 1. The Defense Department was most vocal in its criticism of the Act as “a disaster,” “blatantly unfair,” and a “slap in the face” to officials who had expected to be employed by defense contractors upon leaving the government service. The Disastrous Ethics in Government Law, Air Force Magazine (Feb. 1979). The DOD further argued that the post-employment restrictions would burden the defense industry with a loss of valuable expertise. Id.
\textsuperscript{192} R. ROBERTS, supra note 123, at 164, 165. Senator Patrick Moynihan was quoted as saying:

I simply wish to state that I think we passed a law that had much more in it than we originally realized, and that in the name of ethics in Government we are making service to Government impossible for ethical people. I think we had better pay attention to it before we look up and suddenly find that we have not only lost so many absolutely indispensable people, but that we cannot replace them.

125 CONG. REC. S1400 (daily ed. Jan. 31, 1979). On the other hand, Senator Abraham Ribicoff defended the post-employment restrictions, saying that Congress had no intention to “prevent a Federal employee from taking any position with any firm or organization which he chooses when he leaves the government.” Congress only intended to apply the two year aiding and assisting bar to “those matters in which a former high ranking official had been personally and substantially involved” and not matters that may have merely been under the former employee’s official responsibility. 125 CONG. REC. S2898 (daily ed. Feb. 21, 1979) (statements contained in the cover letter of the Memorandum on the “Aiding and Assisting in Representing” Provision of 18 U.S.C. § 207(b)).
In April 1979, the White House proposed a series of technical amendments to section 207(b) to clarify the application of the aiding and assisting rule. The most significant of these amendments was to narrow the scope of the "aiding and assisting" prohibition to exempt any behind the scenes activity not part of a formal or informal proceeding. In hearings on the amendment before the Senate Judiciary Committee on Administrative Law and Government Relations, administration representatives testified that including behind the scenes assistance would leave former officials wide open to scurrilous charges of what they said behind closed doors. The Senate passed the administration's technical amendments on April 9, 1979.

The amendment package then went to the House, where the White House added additional amendments to win swift approval. These additional amendments included (1) an exemption for high officials leaving the federal service for positions in higher education, medical research and treatment facilities, or state and local governments and (2) further limitations on the number of persons automatically covered by the one year no contact ban. The House passed the amendment package and President Carter signed the amendments into law on June 15, 1979.

B. The Ethics in Government Act of 1978

Title V of the Ethics in Government Act deals with the post-employment restrictions whose legislative history has been discussed above. Title V had the objectives of: (1) insuring government efficiency; (2) eliminating official corruption; (3) promoting even-handed exercise of administrative discretion; (4) preventing the exercise of undue influence of former officials with their former

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194 R. ROBERTS, supra note 123, at 165.
195 125 CONG. REC. S7141-42 (daily ed. April 4, 1979) (testimony of Alan Campbell, Director of the Office of Personnel Management, previously given at a hearing before the House Judiciary Subcommittee on Administrative Law and Government Relations and later introduced to the Senate).
197 R. ROBERTS, supra note 123, at 166.
199 R. ROBERTS, supra note 123, at 166.
agency colleagues; (5) creating a realistic mechanism to punish official corruption; (6) providing a standard of ethical conduct for former officials; and (7) avoiding even the appearance of impropriety of public office being used for personal or private gain.201

The post-employment restrictions of Title V of the Ethics in Government Act are often perceived as a radical revision of conflict of interest law. They are actually a modification of the pre-existing criminal conflict of interest statutes dating back to the Kennedy administration. To understand what Title V of the Ethics in Government Act entailed, it is helpful to explain it in terms of how it changed the previous statutory scheme.

With respect to the lifetime ban, the Ethics in Government Act provided that no one could act as attorney or agent or otherwise represent any other person, in any particular matter, concerning specific parties, that involves the United States as a party, and in which the former employee’s participation was both personal and substantial.202 The Act broadened the pre-existing lifetime ban by including informal as well as formal proceedings.203 The Act further expanded the lifetime ban by including appearances in any professional capacity, and not just appearances as attorney or agent.204

The two year disqualification provision of the Ethics in Government Act also substantially broadened the pre-existing conflict of interest provisions of Title 18.205 The two year ban is divided into two categories of prohibited activity. The first prohibited category is acting as attorney, agent, or otherwise representing a person on a matter that fell within the former employee’s “official

201 P.L. 95-21, at 31-32.
202 18 U.S.C. § 207(a) (1978). A recent study by the President’s Commission on Federal Ethics Law Reform recommended that § 207(a) be amended to add a two year ban on the use or disclosure of certain nonpublic information by a former official for purposes of aiding or advising a party in a representation that is subject to § 207(a). To Serve With Honor: Report of the President’s Commission on Federal Ethics Law Reform 61 (1989) [hereinafter Serve With Honor].
203 18 U.S.C. § 207(a). The previous § 207(a) was limited to adversarial proceedings that included “any judicial or other proceeding, application, request for a ruling or other determination, contract, claim, controversy, charge, accusation, or arrest,” thus excluding informal non-adversarial proceedings. See R. VAUGHN, supra note 121, at 16 (discussing the scope and impact of the Ethics in Government Act of 1978).
204 18 U.S.C. § 207(a). The legislative history shows that Congress intended to include representation “in any professional capacity, whether as attorney, consultant, expert witness, or otherwise,” Joint Explanation of the Committee on Conference, 124 CONG. REC. 12,303, 12,306 (daily ed., Oct. 11, 1978). Making a written or oral representation with the intent to influence is also prohibited under this provision.
205 18 U.S.C. § 207(b).
This category was an extension of the previous "official responsibility" ban from one to two years.\footnote{18 U.S.C. § 207(b)(i).}

The second prohibited category of activity under the two year disqualification period is the provision against individuals knowingly representing or aiding, counseling, advising, consulting, or assisting in the representation of any person by their presence at any formal or informal proceeding on a matter in which their participation as a government employee was both substantial and personal.\footnote{18 U.S.C. § 207(b)(ii) (1978).} This provision was an entirely new category of prohibited activity under the criminal conflict of interest statutes. The ban on aiding or assisting in representation, as opposed to actual representation, amounts to a ban on lobbying activity. Before 1978, lobbying was never a federal crime, no matter how closely related the lobbying issue was to the employee's activities while in office. Thus, the new Ethics in Government Act expanded the purview of the federal conflict of interest statutes.

Significantly, the aiding and assisting ban does not apply to all former government employees, but to high officials only. High officials include secretaries of departments, heads of agencies, deputy, under, and assistant secretaries, associate administrators, and others paid at the executive scale.\footnote{R. VAUGHN, supra note 121, at 16. This description is a bit of an oversimplification. The technical breakdown of which employees are and are not covered by subsection c is covered in exhaustive detail in 18 U.S.C. § 207(d).} Also subject to the aiding and assisting ban provisions are higher level military officers assigned to pay grades 0-9 or above, as well as any other person that the Ethics Office director deems as having significant enough decision-making or supervisory responsibility to warrant being subject to the restriction.\footnote{18 U.S.C. § 207(d)(1)(B)(C) (1982).}

The Ethics in Government Act further provides for a one year ban on representing any party or making an oral or written com-
munication on that party's behalf to the former agency concerning any matter that is either pending before the agency or in which the agency has a direct and substantial interest. This provision, like the aiding and assisting provision, only applies to that same group of high level government officials. Congress' intent in passing this provision was to limit contact with the agency by its former high officials for one year in order to avoid even the "appearance of impropriety." Title V also provided a number of significant exemptions to its provisions. None of the three post-employment restrictions applies to the making of communications solely for purposes of furnishing scientific or technological information. Similarly, nothing in Title V prevents a former employee from giving statements under oath.

Most of Title V's exemptions concern the one year ban on high officials contacting their former agency. The one year ban does not apply to former employees who are currently working in state or local government, institutions of higher education, or hospitals and medical research facilities. The ban does not apply to appearances or communications concerning personal and individual

311 18 U.S.C. § 207(c).
312 Id. One of the proposals of the President's Commission on Ethics Reform would be to extend the one year no contact ban to include senior employees of the legislative and judicial branches and their senior staff. Serve With Honor, supra note 202, at 55.

With respect to the White House offices, each of the nine separate offices is compartmentalized under a 1983 ruling by the Office of Government Ethics. The nine offices are: the Office of Management and Budget; the Council of Economic Advisers; the National Security Council; the United States Trade Representative; the Council for Environmental Quality; the Office of Science and Technology Policy; the Office of Administration; the White House Office; the Office of Policy Development; and the Office of the Vice President. In terms of subsection c, this compartmentalization means that the one year no contact ban only prevents former employees from contacting the specific office in which they were employed. The President's Commission further recommended that this ruling be overturned through administrative action or legislation. Id. at 75-76.

Subsection c is unique among the post-employment restrictions of the Ethics in Government Act in that it excludes so-called "special employees" who only temporarily worked for the government; the details of who is a "special employee" are explained in 18 U.S.C. § 202(a) (1982).

314 18 U.S.C. § 207(f) (1978). Individuals may also be granted an exemption under this provision if they are highly qualified in a given scientific field and their action is deemed in furtherance of the national interest by the director of the Ethics Office and the head of the agency concerned. The individual's exemption is then certified and published in the Federal Register.

315 18 U.S.C. § 207(h).
316 18 U.S.C. § 207(d)(2). The exemption only applies to appearances, representations, or communications on behalf of their current employer.
matters. The ban does not apply to statements made as a witness provided that the statements are based on the former employee’s special knowledge of a particular area and that no compensation is received other than compensation fixed by law or regulation for witnesses.

The penalties that accompany violations of any of the post-employment restrictions are both criminal and administrative in nature. The criminal penalties include a maximum fine of $10,000 and/or a maximum prison term of two years. The administrative penalty authorizes the head of the employee’s former agency to prohibit the employee from making any appearance before or any communication to the agency on behalf of another for up to five years and to take other additional disciplinary action. The former employee is entitled to notice, opportunity for a hearing, and review by a federal district court of any disciplinary action taken.

Today, the Ethics in Government Act is one of the primary means by which the federal government regulates the post-employment activities of its former employees on behalf of private and foreign interests. However, the statute does not address ade-

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218 Id. The President’s Commission on Federal Ethics Law Reform has proposed that compensation be removed as an element for violation of the one year no contact rule of section c. The Commission instead proposes that representational activity on another party’s behalf should be prohibited without regard to whether compensation was received. 

219 18 U.S.C. § 207(c).
221 Id.
222 In addition to the post-employment restrictions of the Ethics in Government Act, many of the federal regulatory agencies have their own sets of rules that similarly restrict the activities of former employees. Agencies were given the responsibility to develop their own ethical guidelines under Executive Order 11222, issued by President Johnson on May 8, 1965. This order was issued in the wake of the same hearings on ethics that led to the 1962 conflict of interest statutes. 

Hearings on H.R. 814 Before the House Committee on the Judiciary, 87th Cong., 2d Sess., 8, 33, 55, 92 (1962). These hearings stressed that many conflict of interest problems could only be dealt with on the agency level.

These agency restrictions are typically enforceable not through criminal statutes but rather through the vehicle of civil relief in the courts. R. Vaughn, supra note 121, at 47. For an illustrative example of agency post-employment restrictions, see 16 C.F.R. § 1030.1201-18, which discusses post-employment restrictions of the Consumer Products Safety Administration.

The drawback of the agency ethics programs is that they vary widely from agency to agency. A recent example of an agency ethics program that failed to prevent abuse of power by its current employees is the ethics program at the Department of Housing and Urban Development. A growing scandal at HUD implicates past and present officers in a pattern of getting HUD approval for financial assistance to politically well-connected real estate
quately the difficulties that are created when former government officials answer to foreign principals.\textsuperscript{223}

IV Proposed Reforms of the Foreign Agents Registration Act and the Ethics in Government Act

The Foreign Agents Registration Act and the Ethics in Government Act are the two statutes that have the most direct impact on the issue of former government officials working on behalf of foreign interests.\textsuperscript{224} The Foreign Agents Registration Act would require those former officials working for foreign governments to register their agency relationships and to disclose the nature of their activity on behalf of those foreign interests. The restrictions of FARA apply regardless of whether the former employee is engaged in activity related to his or her former duties in government service.

The Ethics in Government Act is triggered when former employees' activities on behalf of their benefactors (foreign or not) are sufficiently related to their former duties as government officials. Depending on how closely related their agency duties are to their former official duties, former employees face certain restrictions on what they can legally do on behalf of their foreign principals. With respect to some activities that were part of their developers. A three year old report on the HUD ethics program by the Office of Government Ethics cites HUD's ethics program as "one of the most ill-managed this team has ever seen in a major department." Chicago Trib., August 1, 1989, at A1, col. 1. If HUD could not effectively monitor the activities of its current employees, one can only presume that the activities of its former employees are similarly not scrutinized.

Even absent an applicable criminal statute or agency rule, it has been proposed that the federal government may also take action against a former employee through civil action for breach of fiduciary duty. For an in-depth analysis of the advantages of such a proposal, see Note, The Fiduciary Duty of Former Government Employees, 90 Yale L.J. 189 (1980).

Former attorneys for the government are also restricted in their post-employment activities by the American Bar Association's Code of Professional Responsibility. Disciplinary Rule 9-101(B) provides that a "lawyer shall not accept private employment in a matter in which he has substantial responsibility as a public employee." This rule not only affects former employees, it may also disqualify their future partners and associates from dealing with the matter as well. The ABA rules are enforced through state bar associations. The state bar associations may grant waivers of some of the post-employment ethical rules, but the circumstances under which waivers may be granted differ from state to state. See R. Vaughn, supra note 121, at 87-90, for a fuller discussion of the application of the Code of Professional Responsibility to issues of post-employment activity.

\textsuperscript{223} See infra notes 255-328 and accompanying text.

\textsuperscript{224} For a thorough discussion of the legislative history and the requirements of FARA, see supra notes 33-118 and accompanying text. For a similar discussion of the Ethics in Government Act, see supra notes 118-222 and accompanying text.
official responsibility, they may be barred for a certain period of time. With respect to other activities in which their participation was personal and substantial, former employees face a permanent bar. Depending upon how high a position they occupied, former officials may also be barred from contacting their former agency on their own behalf or on anyone else's for a full year.

Ideally, these two statutes should be a sufficient check on the activities of former government officials employed by foreign interests. The relatively benign restrictions of FARA, which only require registration and disclosure, should serve the function of informing the agencies before whom these individuals appear of the foreign agency relationship. The individual’s statements can then be assessed in light of that relationship. The more stringent mandates of the Ethics in Government Act theoretically should provide a deterrent to activity for a foreign benefactor that is so closely related to the former official’s duties as to raise legitimate issues of conflict of interest.

In reality, both statutes are inadequate to effectively manage the problems posed by former government officials in the employ of foreigners. Thus, the following section will explore the relative shortcomings of both Acts.

A. The Foreign Agents Registration Act: Problems and Proposals for Change

1. Disclosure Does Not Greatly Affect the Former Official’s Power to Influence

With respect to the Foreign Agents Registration Act, the threshold issue is whether its internal logic applies to the problems presented by ex-government officials. Congress’ rationale in enacting FARA was that if individuals were paid to speak on behalf of foreign principals, they should have to disclose their agency relationship so that the recipients of their speeches can make informed decisions regarding their credibility. The type of person contem-

225 The introduction of the Act reads:
It is hereby declared to be the policy and purpose of this Act to protect the national defense, internal security, and foreign relations of the United States by requiring public disclosure by persons engaging in propaganda activities and other activities for or on behalf of foreign governments, foreign political parties, and other foreign principals so that the Government and the people
plated by the original Act was the subversive propagandist, who would be subjected to "the spotlight of pitiless publicity" regarding his or her agency relationship.\textsuperscript{226} Thus, the foreign agent would be unable to make statements under a cloak of anonymity.

When ex-government officials go to work for foreign governments, entirely opposite problems arise. Foreign propagandists, before 1938, were able to gain an advantage due to the fact that they were often strangers to their audience. Thus, they could appear to be merely concerned ordinary citizens when making statements on behalf of foreign benefactors. FARA took away this advantage from foreign propagandists by making them known to their audience as foreign agents.

Former officials working for foreign interests gain advantage not from anonymity but rather from familiarity. The familiarity that former officials have with ex-colleagues in the federal service is their greatest asset. Former officials can navigate through bureaucratic channels far easier than others who routinely deal with federal agencies. Former officials have a great deal of confidential information that is most valuable to their new employers. They have substantial contacts within the agency, understand its procedures, and know how to shape arguments for presentation based on the informal practices and standards of the agency.\textsuperscript{227}

Since former officials benefit from being known in agency circles, the disclosure mandates of FARA do not take any advantage away from them by making their agency affiliation a matter of public record. Former officials still know a great deal of valuable information that can be put to use through surrogates.\textsuperscript{228} Moreover, the fact that they are working on behalf of foreign interests would not necessarily result in their ex-colleagues appraising their statements in the light of their new agency relationship. Many of their ex-colleagues are looking forward to one day working in the private sector themselves. The fact that their former co-workers are now working in the private sector would not tend to change their assessment of them or their statements. Michael Deaver was reg-

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\textsuperscript{227} R. VAUGHN, supra note 121, at 84.

\textsuperscript{228} Id.
istered as a foreign agent with FARA, yet this did not seem to deter those whom he contacted during his lobbying career.

Moreover, this disclosure requirement does not change the image of former officials for many of their ex-colleagues because they are likely already aware of those activities. Those ex-colleagues may not know the exact nature of the lobbying activity, but they are informed nonetheless that this or that large lobbying firm does a good deal of business with foreign clients. The fact that their former co-workers are registered under FARA adds nothing to what they already know about them.

It is this commentator's contention that the disclosure mandates of FARA do not take away any advantage from ex-government officials and, thus, FARA does not prevent these ex-officials from exercising undue influence with their former agency colleagues. The logic behind FARA was to limit the influence of foreign agents by making their activities public, but publicity does not neutralize effectively the potential of former officials to influence their former colleagues.

2. Noncompliance with the Act is a Continuing Problem

Yet even if registration under FARA could undercut the influence of former officials working for foreign principals, there is still the practical difficulty of widespread noncompliance with FARA's registration requirements. In 1989, the Justice Department had registered 832 agents working for 2,039 foreign principals. With nearly every foreign government and countless foreign private interests all lobbying the U.S. government, it does not take a vivid imagination to surmise that many foreign agents are not registering their activities as required under FARA.

One reason for the low rate of compliance is that the Foreign Agents Registration Office is not adequately staffed to monitor compliance and seek corrective action against those who either fail to register or fail to give accurate disclosure on their registration statement. Historically, the FARA office has had between six and seventeen persons working for it, including attorneys, paralegals,

and clerical personnel.\textsuperscript{230} Seventeen people does not seem to be enough to accomplish the mission of FARA.\textsuperscript{231} Over twenty-five years ago, a Congressional committee criticized the staffing of the FARA office as inadequate to handle the thorough processing of all registration statements. FBI checks of the registration statements turned up a number of discrepancies, omissions, and inconsistencies that the FARA staff had overlooked.\textsuperscript{232} Today, there are roughly the same number of attorneys in the FARA office. This understaffing begs the question of how seriously the federal government has considered the potential problems of foreign agents operating anonymously in this country.

Noncompliance with the mandates of FARA has been uncovered repeatedly whenever Congress investigates legislative lobbying efforts.\textsuperscript{233} In 1962, when the Senate Foreign Relations Committee looked into lobbying efforts by nations seeking higher import quotas under the Sugar Act, scores of agents suddenly appeared for registration with FARA.\textsuperscript{234}

The actual rates of noncompliance are dramatized in two recent studies of FARA disclosure statements by the Congressional Research Service\textsuperscript{235} and the General Accounting Office.\textsuperscript{236} According to the GAO survey of forty-five random registration files, (1) sixty-seven percent (261/392) of the required statements and exhibits were not received within the prescribed time limits; (2) thirty-three percent (157/476) of the dissemination of information reports were not received on time; and (3) seventy percent (154/22) of the supplemental statements were not received on time.\textsuperscript{237} Although the

\begin{itemize}
\item \textsuperscript{230} Telephone interview with Brian Ahern, Attorney for the Foreign Agents Registration Office (July 25, 1984).
\item \textsuperscript{231} Activities of Nondiplomatic Representatives of Foreign Principals in the United States: Hearings Before the Committee on Foreign Relations, 88th Cong., 1st Sess. 54 (1963).
\item \textsuperscript{232} Id. at 13.
\item \textsuperscript{233} Note, supra note 114, at 703. See also Berman & Heiman, Lobbying by Foreign Governments on the Sugar Act Amendments of 1962, 28 LAW & CONTEMP. PROBS. 416 (1963); Note, supra note 39, at 422.
\item \textsuperscript{234} Note, supra note 114, at 703.
\item \textsuperscript{235} Congressional Research Service, The Foreign Agents Registration Act, prepared for the Senate Committee on Foreign Relations, 95th Cong., 1st Sess. (1977) [hereinafter CRS].
\item \textsuperscript{236} United States General Accounting Office, Improvements Needed in the Administration of Foreign Agents Registration (1974 and 1980) [hereinafter GAO].
\end{itemize}
1980 follow up study by the GAO found an improved compliance rate of fifty-one percent, that is still an inadequate level.\textsuperscript{238}

A further factor in the continued noncompliance with FARA is the awkward process that the FARA office must resort to in order to compel full disclosure from registrants. Currently, if an individual refuses to comply with the Act, the FARA office must ask the Attorney General to obtain an injunction against the individual in federal district court.\textsuperscript{239} Despite the efforts of the district courts to expedite matters, the appeals process could result in protracted litigation before an individual is ultimately compelled to fully disclose all pertinent registration information. Litigation between the Attorney General and the Irish Northern Aid Committee lasted eleven years from the time that enforcement action was threatened by the Justice Department until the Second Circuit finally ruled that the committee had to register as a foreign agent.\textsuperscript{240}

Clearly, FARA has not fully realized the expectations of Congress regarding compliance.\textsuperscript{241} A number of proposals have been advanced to improve compliance with FARA. One obvious necessary change would be to stiffen the penalties for noncompliance.\textsuperscript{242} With a maximum fine of $10,000 for violations of the Act, FARA does not seem to sufficiently deter individuals who regularly receive several times that amount for routine lobbying services. If the

\begin{footnotes}
\item[238] 1980 GAO Report, \textit{supra} note 236, at 133, Enclosure I at 3.
\item[239] The Act provides:
Whenever in the judgment of the Attorney General any person is engaged in or about to engage in any acts which constitute or will constitute a violation of any provision of the Act, or regulations issued thereunder, the Attorney General may make application to the appropriate United States district court for an order enjoining such person from continuing to act as an agent of such foreign principal, or for an order requiring compliance with any appropriate provision of the Act or regulation thereunder. The district court shall have jurisdiction and authority to issue a temporary or permanent injunction, restraining order or such other order which it may deem proper.
\item[242] CRS, \textit{supra} note 235, at 1. The Introductory Statement to this Committee clearly expresses Congressional disappointment with the effectiveness of FARA.
\item[243] In increasing the penalties for noncompliance, the deterrent effect can only be taken seriously by potential offenders if the Attorney General's Office ends its practice of readily agreeing to consent decrees to enjoin violators from further noncompliance instead of punishing past noncompliance. Offenders are quite often sophisticated lobbyists who are well aware of the restrictions of FARA. Their noncompliance constitutes a continuing violation of the Act (22 U.S.C. § 618(e)) and should not be excused. See Attorney Gen. v. United States-Japan Trade Council, Inc., No. 76-1290 (D.D.C. 1976); Attorney Gen. v. DGA Int'l, Nos. 75-2040, 75-2041, and 75-2042 (D.D.C. 1975); Attorney General v. Arab Info. Cent., No. 76-279 (D.D.C. 1976).
\end{footnotes}
maximum fine were to be raised to a significant level or left to a court's discretion, there would be a genuine deterrent effect upon high-powered Washington lobbyists.

Increased penalties alone will not bring about the desired level of compliance. It will also be necessary to increase the enforcement powers of the FARA office.\textsuperscript{243} Currently, the FARA office must often resort to a grand jury investigation to achieve compliance.\textsuperscript{244} Granting the FARA office the power to summon individuals to appear before it, testify and/or produce records, and to assess civil penalties for minor violations of the Act would do much to expedite the process.\textsuperscript{245}

FARA's staff would have to increase substantially if these broader powers were granted. In the current climate of budget deficits and federal spending curbs, this may seem an impractical suggestion. However, the increased cost of additional staff could be more than offset by the increased amount of fines that a larger staff could collect from violators of the Act.

Another proposal for change in the Act is to change its name in order to remove the subversive and criminal connotations of registration as a "foreign agent."\textsuperscript{246} Advocates of this proposal stress the need for a new name for the Act to complement its modern focus on lobbyists as opposed to subversive propagandists. Removing the stigma attached to the Act, it is argued, would lead to higher rates of compliance. People would not be as hesitant to register as an "international information aide" as opposed to a "foreign agent."\textsuperscript{247}

This commentator has some reservations about the proposal. While a name change may cause some individuals to register their affiliation, the main objection to the Act is its extensive and complex registration requirements and not the Act itself. Those who do not wish to register their activities will continue not to do so regardless of how the Act happens to be named.

\textsuperscript{243} This was one of the proposals mentioned in the CRS study. CRS, \textit{supra} note 235, at 15.

\textsuperscript{244} \textit{Id.}

\textsuperscript{245} \textit{Id.} at 16. The power to assess civil penalties for minor violations is important because the FARA office would hesitate to pursue criminal sanctions for minor violations of the Act. The power to assess smaller civil penalties of $500 would be a more appropriate means of correcting minor deficiencies in registration. An amendment to FARA granting the FARA office the power to assess civil penalties was proposed by Senator George McGovern in 1977, but was not enacted. S. 2045, 95th Cong., 1st Sess. (1977).

\textsuperscript{246} CRS, \textit{supra} note 235, at 2.

\textsuperscript{247} \textit{Id.}
3. FARA's Language is Often Unclear

Aside from the issues of FARA's dubious effectiveness on former government officials and its chronic pattern of noncompliance, FARA has also been criticized as a byzantine scheme of broad restrictions and numerous exemptions in which it is difficult to know whether one is obliged to register. Several possible solutions have been advanced to deal with this issue: (1) to constrict the broad sweeping language of the act; (2) to make potential registrants apply for an exemption;\textsuperscript{248} (3) to allow potential registrants to send a letter stating that they intend to rely on one of FARA's exemptions;\textsuperscript{249} and (4) to clarify existing exemptions.\textsuperscript{250}

Constricting the scope of the Act does not seem to be a viable solution. Foreign interests lobby the U.S. government on countless issues: trade restrictions, fishing rights, foreign aid, communication regulations, international finance, environmental concerns, immigration policy, technology transfers, and the list goes on. Lobbying also takes many forms; appearances before Congress, applying for agency rulings, personal and informal interaction with government officials, letter writing campaigns, etc. It would not seem practical to narrow the scope of the Act to cover only certain issues and activities given the wide range of lobbying by foreign interests that should be subject to the Act.

Making all potential registrants apply for an exemption before they engage in their proposed activity has some appeal. Under the current scheme, individuals unilaterally claim exemptions and rely on them and the legitimacy of the exemption is rarely scrutinized.\textsuperscript{251}

Potential pitfalls for this proposal include increased paper work and staffing demands\textsuperscript{252} as well as confusion over who would be considered a "potential registrant." Theoretically, every U.S. business that contemplated any foreign dealings would have to apply and wait for a commercial exemption under FARA.\textsuperscript{253} Such a result would seem to be an undue burden upon international commerce by putting U.S. businesses at a distinct competitive disadvantage. Such an outcome would be inconsistent with the original intent of FARA.

\textsuperscript{248} Id. at 18.
\textsuperscript{249} GAO, supra note 236, Enclosure I, at 10.
\textsuperscript{250} CRS, supra note 235, at 2.
\textsuperscript{251} Id. at 17.
\textsuperscript{252} Id. at 18. The CRS report recognized this problem but argued that the benefits would outweigh the costs.
\textsuperscript{253} 22 U.S.C. § 613(d) (1982).
The third proposal, viz., letting potential registrants send written notification of their intention to rely on one of FARA’s exemptions, may solve part of the problem with respect to international business. This proposal would let individuals and businesses, so long as they are claiming their exemption in good faith, to proceed with international transactions without a go-ahead from FARA. If evaluation of the exemption by the FARA office reveals an invalid exemption, which would be rare for a purely commercial transaction, the FARA office would then inform the individual accordingly. This seems a fair compromise between the concerns of limiting restrictions on commerce and promoting better compliance with FARA.

The final proposal (clarifying the existing exemptions) seems most directly geared toward the problem. The confusion over exemptions plays a substantial role in persistent noncompliance with the Act because individuals are unable to tell if they can qualify for an exemption. Clarifying the exemptions would eliminate the need for either obtaining advance clearance or sending a letter of reliance on an exemption since individuals would usually be able to readily tell if their activity is within the scope of the exemption.

The problem with clarifying the exemptions is the same as the problem of restricting the scope of the Act. There is a wide variety of international contact that logically should be exempt from the mandates of FARA. It might be extremely difficult to draft exemptions to cover all of this activity without further complicating the exemption issues.254

FARA is undoubtedly in need of reform to increase compliance with and understanding of its mandates. However, with respect to issues of ex-government officials working for foreign concerns, the problem remains that public disclosure of their activity does not have the desired inhibiting effect on their ability to influence their former colleagues. It is only when the disclosure mandates of FARA are combined with the post-employment restrictions of the Ethics in Government Act that the influence of former officials can be limited.

B. The Ethics in Government Act: Problems and Proposals for Change

The Ethics in Government Act goes beyond the relatively benign registration requirements of FARA. Title V of the Act makes

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254 Congress has a history of muddying the waters of an area of the law in the name of "simplicity" (e.g., the Tax Reform Act of 1986).
it a criminal offense for ex-government officials to engage in certain activities closely related to their former official duties. The restrictions placed upon individuals will vary according to the degree of relation between their former duties and the current activity and also upon their level of government service. The Act applies to former officials working for both foreign and domestic interests.

As argued above, the Foreign Agents Registration Act does not by itself effectively neutralize the capacity of ex-government officials to influence their former agencies. The Ethics in Government Act, ideally, should achieve this goal by barring certain activities where former officials have their greatest capacity to use undue influence. This capacity is greatest with the individual’s former agency and especially on matters that were part of his or her “official responsibility” or in which he or she participated “personally and substantially.”

The Ethics in Government Act, however, is as problematic a statute as FARA. The succeeding section outlines some of the major problems with the Act as well as some proposed solutions.

1. United States v Nofziger and the Future of Title V

A major hurdle for the Act is a recent ruling by the Court of Appeals for the District of Columbia Circuit. The case involved the conviction under the Ethics in Government Act of Lyn Nofziger, formerly President Reagan’s Assistant for Political Affairs. Nofziger was originally convicted of violating subsection c of Title 18, section 207 because he communicated with his former agency with intent to influence its action.

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255 See supra notes 201-22 and accompanying text.
256 See supra notes 119-222 and accompanying text.
258 18 U.S.C. § 207(b).
261 The statute provides:
Whoever, other than a special Government employee having been so employed as specified in subsection (d) of this section, within one year after such employment has ceased, knowingly acts as agent or attorney for, or otherwise represents, anyone other than the United States in any formal or informal appearance before, or with the intent to influence, makes any oral or written communication on behalf of anyone other than the United States to-
(1) the department or agency in which he served as an officer or employee, or any officer or employee thereof, and
(2) in connection with any judicial, rulemaking, or other proceeding,
Nofziger was found to have committed three violations of the Act by contacting former colleagues still at the White House during the one year ban period on contact with the former agency by a high official. Nofziger was found to have lobbied on behalf of the Welbilt Electronic Die Corporation, a defense contractor; the National Marine Engineers Beneficial Association, a labor union representing licensed maritime officers; and the Fairchild Republic Corporation, a division of Fairchild Industries, another defense contractor.

Nofziger appealed his conviction largely on the ground that for a conviction the statute requires that he be shown to have had knowledge of all the facts that made his conduct illegal. Focusing on the word "knowingly" in subsection c, Nofziger argued that he had to know that the White House had a "direct and substantial interest" in the matters on which he lobbied, as well as all of the other circumstances that made his conduct illegal under subsection c.

The government countered that the word "knowingly" only applies to one who "acts as agent or attorney for, or otherwise represents" a party and not to one who "with the intent to influence, makes any written or oral communication." In short, the government argued that, under subsection c, a conviction for acting as attorney or agent requires knowledge of all the facts that make the conduct illegal, but conviction for making oral or written communication to the agency does not require knowledge of all

application, request for a ruling, or other determination, contract, claim, controversy, investigation, charge, accusation, arrest, or other particular matter, and

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

shall be fined not more than $10,000 or imprisoned for not more than two years, or both.

18 U.S.C. § 207(c) (emphasis added).

262 The group of high officials subject to the one year no contact ban is explained in subsection d of § 207. 18 U.S.C. § 207(d).

263 Nofziger was found guilty of contacting then Attorney General Edwin Meese, James E. Jenkins, then deputy-counselor to the President, and with members of the National Security staff. The Wedtech scandal eventually expanded to include allegations of undue influence against Meese. Mr. Meese eventually resigned from office in the face of serious charges regarding his conduct, some of which originated from within his own Justice Department. Nofziger, 878 F.2d at 444.

264 Id. at 445.

265 Id. at 446.

266 Id. at 447.
the operative facts. The issue boiled down to what level of *mens rea* was required under subsection c; whether a conviction for making written or oral communication was a strict liability offense or whether it required knowledge of all pertinent facts that made the communication illegal.\(^{267}\)

The court, after an exhaustive analysis of both the wording of the Act and the legislative history, concluded that the statute was ambiguous on the issue of the requisite *mens rea* for subsection c.\(^{268}\) In light of this ambiguity, the court reasoned that it could not impose strict liability for the communication offense under subsection c, i.e., the government had to have shown that Nofziger had operative knowledge of all the facts that made his communication illegal.\(^{269}\) The court held that the government had not met that burden in its indictment.\(^{270}\) Accordingly, the court then reversed and remanded Noffiger’s conviction.\(^{271}\)

The court’s decision bodes ill for further use of the current statutes to deal with the “revolving door” problem. Due to the similar wording used in subsections a and b of section 207, this decision could mean that the whole range of communication offenses under Title V of the Ethics in Government Act could not be prosecuted effectively. The court’s decision, by analogy, could require a showing by the government that the offender had full knowledge of all the facts that made his or her communication illegal. Considering the behind-the-scenes nature of much of the communication between former officials and their former agencies, it may be an impossible burden of proof for the government to meet in most cases.

The Nofziger decision thus puts the continuing viability of Title V into question as a means to curb the abuses of former officials selling their influence to interests both foreign and domestic. How many of the former official’s colleagues would be willing to talk to investigators and thus jeopardize their future job prospects in private industry? Moreover, how many of them would withhold information to avoid an investigation into their own conduct?

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\(^{267}\) *Id.* at 450.

\(^{268}\) The court remarked that “we are dealing with a statute that is hardly a model of clarity.” *Id.* at 452. Circuit Judge Edwards vehemently dissented, stating that the majority was fabricating ambiguity where none existed. *Id.* at 455.

\(^{269}\) *Id.* at 454.

\(^{270}\) *Id.*

\(^{271}\) *Id.*
2. Inefficiency in Enforcement

The Ethics in Government Act provides that an independent counsel is to be appointed by the Attorney General to investigate any "specific information" that high government officials have engaged in conduct violating any federal criminal law not amounting to a petty offense.²⁷²

The Attorney General must ask the division of the federal court that is set up to appoint independent counsels²⁷³ to do so in two instances. First, if after a preliminary investigation the Attorney General finds "reasonable grounds to believe that further investigation or prosecution is warranted," the Attorney General must seek the appointment of an independent counsel.²⁷⁴ Alternatively, if after ninety days from the beginning of the preliminary investigation (and after the lapse of any extension of time to that period)²⁷⁵ the Attorney General has not notified the division of the court that there are no reasonable grounds for further investigation, the Attorney General must ask for an independent counsel to be appointed.²⁷⁶

It is crucial to note that the Attorney General's determination of whether further investigation by an independent counsel is warranted is not reviewable by any court.²⁷⁷ What this effectively does is to make the Attorney General "the gate that either opens or closes" the independent counsel mechanism.²⁷⁸

This commentator asserts that the current version of the independent counsel provisions of the Act place far too much discretion

²⁷² 28 U.S.C. § 591-598 (1988). In making the determination of whether to authorize an investigation, the Attorney General "shall consider only (A) the specificity of the information received; and (B) the credibility of the source of the information." 28 U.S.C. § 591(d)(1)(A), (B).


²⁷⁵ The Attorney General may apply for an extension of time in addition to the 90 day period from the beginning of the preliminary investigation. 28 U.S.C. § 592(a)(3) (1988).


in the hands of the Attorney General. With respect to potential investigations of criminal post-employment activity by former high officials, the danger exists that the Attorney General may be politically motivated to reach a finding that no reasonable ground exists for further investigation. An independent counsel investigation may unearth damaging information that could harm the current administration and perhaps even the Attorney General. Former Attorney General Meese requested an independent counsel to investigate Lyn Nofziger only to later be implicated personally in the Wedtech scandal in the wake of the evidence uncovered by the investigation.279

As the independent counsel law stands now, one individual is entrusted with the final irreversible decision of whether an investigation of alleged criminal impropriety by a current or former high government official will take place. This commentator maintains that the potential for abuse of discretion by the Attorney General is a cause for concern.280

3. Proposals for Change

Answers to the infirmities of the Ethics in Government Act are not easy given the behind the scenes nature of the activity. What goes on behind closed doors in Washington is difficult to monitor and regulate in comparison to open and public activities carried on by federal agencies. However, reasonable and rational reforms are needed if the Act is to do more than give statutory lip service to the goal of governmental integrity.

The answers proposed by this commentator are not blanket prohibitions against former high government officials working for foreign interests. Proposals such as the Post Employment Integrity Act of 1986,281 which, if enacted, would have barred former Cabinet and White House officials from ever lobbying for foreign governments or corporations, go too far in dealing with the issue.282 Such a restrictive approach would severely hamper the govern-

279 Chicago Trib., May 12, 1987, § 1, at 1.
282 Church, Acid Rainwomen Deaver’s Parade, 127 TIME, May 5, 1986, at 20. The Act was proposed by Sen. Strom Thurmond and hearings were held but no further action was taken on the measure. Most observers agreed that the legislation was aimed directly at Michael Deaver since it was introduced during the height of public attention on the Deaver affair. The bill would have applied retroactively to Deaver.
ment’s ability to recruit qualified people for top policy positions, especially for foreign policy matters. Effective reforms should work within the existing restrictions set up by Title V

a. Clarifying the Requisite Mens Rea for Offenses

The answer, in this commentator’s opinion, lies with clarification and better enforcement of existing law. The first clarification that needs to be made is the issue of what mental state is required for conviction under the post-employment restrictions. The Nofziger court found the statute to be ambiguous on whether it imposed strict liability, culpability based on knowledge of the operative facts making the contact illegal, or some other altogether different standard. A clarification is required unless the Supreme Court overrules the decision.

The most natural reading of the statute, to this commentator’s mind, is that voiced by the dissent of Judge Edwards in the Nofziger decision. Judge Edwards argued that the plain reading of the statute provides for two mens rea standards for the two offenses of subsection c of section 207. For the offense of acting as agent or attorney, the mens rea requirement is that former officials must act knowingly—they must have operative knowledge of all the facts that make acting as agent or attorney illegal.

For the communication offense, the requisite mens rea is simply as it is stated in the statute, to wit, that the actor made oral or written communication with the intent to influence. It seems absurd to think that anything else would be required for intent here. What other reason could former officials have to write or contact their former agencies, with the intent to influence action, unless the agency has a substantial and direct interest in the matter? Contact with the former agency would not have any purpose to an ex-official turned lobbyist unless that agency had a substantial and direct interest in the matter.

Congress should amend the Act to make it clear that the mens rea requirement for the appearance offenses in section 207 is to “knowingly act as agent or attorney or otherwise represent” while the mens rea requirement for the communication offenses is

283 Nofziger, 878 F.2d at 454 (Edwards, J., dissenting).
284 Id. at 455.
285 Id.
286 Id. (emphasis added).
to "make written or oral communication with the intent to influence."\textsuperscript{287}

b. \textit{Removing the Potential for Abuse of Discretion by the Attorney General}

Regarding the problem of the potential for abuse of discretion by the Attorney General, there is little that can be done to force the Attorney General's hand.\textsuperscript{288} Currently, there are only three ways to challenge the Attorney General's refusal to ask for an independent counsel. First, the Judiciary committee of either House or a majority of the members of either party on those committees may request that the Attorney General apply for independent counsel appointment.\textsuperscript{289} The Attorney General must reply to the request in writing, stating the reasons for his or her decision.\textsuperscript{290} Second, the committee making the request may make public the information received regarding the matter.\textsuperscript{291} This could be done in order to put public pressure on the Attorney General to apply for a special prosecutor.\textsuperscript{292} Finally, the Congress could use its ultimate power of impeachment of the Attorney General.\textsuperscript{293}

None of these current options is a satisfactory remedy for abuse of discretion by the Attorney General. Congress may request an independent counsel and demand a reason why the Attorney General will not comply, but Congress is powerless to enforce its request.\textsuperscript{294} Publication of information by the committee would only be effective if public outcry were sufficient to spur the Attorney General to act.\textsuperscript{295} Moreover, the propriety of making such infor-

\textsuperscript{287} 18 U.S.C. § 207(c) (1982).
\textsuperscript{288} Note, supra note 280, at 507-11. This Note details three instances where abuse of discretion by the Attorney General has been alleged in declining to ask for a special prosecutor to investigate violations of the Ethics in Government Act. The author further explains several proposed solutions to the potential problem of abuse of discretion by the Attorney General.
\textsuperscript{290} 28 U.S.C. § 592(g)(2)(3).
\textsuperscript{291} 28 U.S.C. § 592(g)(4).
\textsuperscript{292} Note, supra note 280, at 509.
\textsuperscript{293} U.S. Const. art. II, § 4.
\textsuperscript{294} Note, supra note 280, at 508. See H.R. Rep. No. 1307, 95th Cong., 2d Sess. 23 (1978) (dissenting views of Reps. Wiggins, McClory, Butler, Moorehead, and Kindness) ("Although the House or Senate Judiciary Committees, in whole or in part, may request the Attorney General to appoint a special prosecutor, H.R. 9705 [Special Prosecutor Act of 1978] creates no more power to enforce that request than now exists.").
\textsuperscript{295} Note, supra note 280, at 509. See 124 Cong. Rec. 31,976 (1978) (statement of Rep. Hyde) ("[P]ublic opinion is not always easy to mobilize and it is foolish to wait until a grave crisis has developed before establishing workable procedures to meet that crisis.").
mation public is questionable given its unsubstantiated character. Impeachment is "far too unwieldy and time consuming to act as an effective mechanism to control abuses of discretion." One proposed solution to the potential problems of abuse of discretion would be to confer standing upon private citizens to challenge the Attorney General's refusal to apply for the appointment of an independent counsel. Such a provision was considered in the first drafts of two predecessor bills to the Ethics in Government Act, but was not included in the final Act. This type of provision would allow a court to assess the conduct of the Attorney General in reaching his or her decision.

This proposal, however, is fraught with problems. First, unless one court were designated as the forum for challenging these decisions, confusion would arise over what the proper standard for review of Attorney General decisions should be. This proposal would also make the reviewability of ethics decisions depend upon the legal resources of plaintiffs; if they are without funds for litigating the issue, the Attorney General's decision would not be reviewed. Lastly, there is also the danger that this proposal would allow even baseless allegations of criminal conduct against a current or former official to be part of the public record in open court.

A second proposal would be to give Congress the power through the Judiciary committees to enforce its request for appointment of an independent counsel by seeking writs of mandamus to force the Attorney General to apply for the appointment. One purported

296 Note, supra note 280, at 509. See S. REP. No. 170, 95th Cong., 1st Sess. 58 (1977), reprinted in 1978 U.S. CODE CONG. & ADMIN. NEWS 4216 ("Just because a person holds a high-level position does not justify making unsubstantiated allegations of criminal conduct public, nor does it justify publicly announcing the initiation of a criminal investigation at the very early stage of the investigation.").


299 Id. at 511.

300 Note, supra note 280, at 512.

301 Id.

advantage of this approach over conferring standing upon private citizens is that it would not necessarily result in disclosure of baseless allegations of criminal conduct in open court.\textsuperscript{304}

The disadvantages of the writ of mandamus scheme include the potential that it could be used by the members of one party to challenge the integrity of the Attorney General of the other party and thus cause the other party political embarrassment.\textsuperscript{305} It is also questionable whether the Judiciary committees would be able to take the time to sort through all the available facts in order to make a reasoned decision on whether to seek a writ.\textsuperscript{306}

A third proposal to correct abuses of discretion by the Attorney General would be to allow the division of the court responsible for appointing independent counsel to review the decisions of the Attorney General.\textsuperscript{307} Any abuse of discretion could be remedied by review of the Court. The advantages of this proposal as compared to the writ of mandamus proposal are its low risk of leaks of unsubstantiated allegations and a decreased risk of partisan abuse of the process.\textsuperscript{308} On the down-side, allowing judicial review by the division of the court "would greatly increase the workload of the panel."\textsuperscript{309} Also problematic are issues of what information would constitute the record for review and what the correct legal standard of review would be.\textsuperscript{310}

A final proposal would be to create an independent federal agency to administer the Ethics in Government Act.\textsuperscript{311} The idea of an independent agency originated some thirty years ago with Professor Abraham Chayes, then an advisor to President Kennedy.\textsuperscript{312} The original proposal was for an appointed commission to review the financial affairs of high level appointees and nominees to screen

\begin{footnotes}
\footnotetext[305]{Note, supra note 280, at 514. Using ethics charges to bash the other party is not unheard of in Congress. The Jim Wright scandal was spurred, in part, by the desire of Republicans to loosen the Democrat’s stranglehold over the House of Representatives.}
\footnotetext[306]{Id.}
\footnotetext[307]{Id. at 515.}
\footnotetext[308]{Id.}
\footnotetext[309]{Id. at 515.}
\footnotetext[310]{Id. at 516-17.}
\footnotetext[311]{Id. at 517.}
\footnotetext[312]{R. Roberts, supra note 123, at 198.}
\end{footnotes}
for conflict of interest problems. That idea has been broadened by later advocates into a proposal for a commission with sole authority over conflict of interest screening as well as investigations of ethics charges against high level officials. This commission would be given the authority that the Attorney General now has to conduct a preliminary investigation and then to ask for a special prosecutor. The commission might also be empowered to assess penalties against violators of the Act in the form of fines or restitution.

One advantage of such a scheme would be to remove the decisions over special prosecutors from potential partisan influence at the Justice Department. Commissioners could be evenly distributed between the two parties to avoid use of the commission as a political weapon. This proposal would also reduce the danger of public disclosures of mere allegations because the commission could conduct in camera proceedings.

There are also a number of pitfalls to consider with respect to the independent agency proposal. The commission may not receive enough complaints to keep it busy. The result might be Congressional impetus to scrap the committee as a waste of money. The committee in turn might be tempted to ask for a special prosecutor more often in order to justify its existence. However, if a new independent agency were created to deal with allegations of ethics violations, more individuals may come forward who were reluctant to approach the Justice Department with their information.

There is also the danger that, even without partisan wrangling, the commission could take on the character of a McCarthy style witch-hunt. The spectre of an all powerful ethics police with an army of lawyers and accountants at its disposal raises concerns of fairness to the accused. As several observers during the recent

313 Id.
314 Id.
315 Id. at 198, 199.
316 Id. at 199.
317 Note, supra note 280, at 518.
318 Id. at 519.
319 Id.
320 Id. at 520.
321 Id.
322 Similar reservations were expressed in Congress, during the hearings on the Ethics in Government Act, over proposals to have the Office of Ethics appoint and direct the ethics officers in the various federal agencies. Rep. Danielson, then chairman of the House
ethics hearings on former House Speaker Jim Wright noted, a team of expert legal and financial investigators could find skeletons in just about anyone's closet.

c. The Need for a Greater Variety of Enforcement Tools

Currently, the only sanctions that may be applied against violators of the post-employment restrictions of the Ethics in Government Act are the two years imprisonment and the $10,000 fine. Many advocates of alternative forms of sanction argue that prosecutors may decline to prosecute some lesser violations of these provisions given the choice between no prosecution and a harsh criminal punishment for a minor infraction.323

The President's Commission on Federal Ethics Reform has proposed a number of alternative sanction schemes.324 First, they propose that the Attorney General be allowed to pursue new civil and misdemeanor penalties for mere knowing violations of the Act, while retaining the criminal penalties for willful violations of the Act.325 The Commission further advocated that the Attorney General be empowered to seek injunctive relief for violations of the Act.326 This power could be used to halt impending or ongoing violations of the Act's provisions.327 These proposals would provide the Attorney General with the power to seek swifter and surer sanctions against violators of the Act since the standard of proof required would be a "preponderance of the evidence" as opposed to the more onerous criminal standard of "reasonable doubt."328

The Ethics in Government Act is in need of substantive amendment to make it the effective tool that is needed to check the influence of former government officials working for both foreign and domestic interests. With the renewed emphasis that the Bush

Judiciary Committee, remarked that the proposal would create "an absolute bureaucratic monster, a band of roving commissars, who will be sprinkled throughout the various government agencies willy-nilly on a rotating basis to look under every leaf and twig." 124 Cong. Rec. 31996 (daily ed. Sept. 27, 1978). His colleague, Rep. Ryan, opposed the proposal to create the office of ethics because it would "create a priesthood of ethics counselors [and] mullahs of the U.S. Government" who would dictate to the agencies "what ought to be." 12 Id. at 31997-98. See R. Roberts, supra note 123, at 161.

323 Serve With Honor, supra note 202, at 104-05.
324 Id. at 104.
325 Id.
326 Id. at 107.
327 Id.
328 Id. at 105.
administration is placing on governmental ethics, the outlook is hopeful for meaningful change.

CONCLUSION

In our pluralistic society, individuals and groups exercise their democratic rights by lobbying the government on issues of concern to them. However, when influential former government officials sell their lobbying skills to foreign interests, the integrity of the federal service and the legitimacy of the government's policy decisions are threatened. The actions of these individuals demean the federal service in the public mind as simply another tool for private gain. Worse yet, their actions threaten the policy outcomes of the government by crowding out the legitimate interests of U.S. citizens in favor of extrinsic foreign interests.

The Foreign Agents Registration Act and the Ethics in Government Act are the two main statutory curbs on the activities of former officials working as agents for foreign principals. Ideally, they should work in tandem to prevent these individuals from exercising undue influence over the federal government. In reality, the problem is all too apparent from the headlines of influence peddling for both foreign and domestic concerns by current and former bureaucrats. Both Acts are in need of substantive change in order to adequately address the problems that these former officials present.