



Office of the  
Assistant Attorney General

Washington, D.C. 20530

October 17, 1990

MEMORANDUM FOR MICHAEL BOUDIN  
Deputy Assistant Attorney General  
Antitrust Division

Re: Application of 18 U.S.C. § 207(a) to Pardon  
Recommendation Made by Former Prosecutor

This memorandum responds to your request for our opinion as to whether 18 U.S.C. § 207(a) applies to a former Antitrust Division attorney who submitted an affidavit to the President in support of a pardon for an individual whom the attorney prosecuted several years ago. Section 207(a) prohibits, among other things, a former employee of the Executive Branch from making any written communication, with the intent to influence, on behalf of any other person (other than the United States) to any department or officer of the United States in connection with certain matters in which the former employee participated personally and substantially while employed by the government. We cannot conclude, on the basis of the information we have been provided, that the affidavit was submitted "on behalf of" the pardon applicant within the meaning of section 207(a), because none of the facts establishes that the former prosecutor was acting as an agent, attorney, or representative of the applicant, as required by this subsection. Accordingly, we conclude that section 207(a) would not apply under the circumstances described.

I.

(b) (6), (b) (7)(C) was indicted in 1982 in connection with an alleged bid-rigging conspiracy. (b) (6), (b) (7)(C), an attorney with the Antitrust Division's field office in Chicago, was in charge of Mr. (b) (6), (b) (7)(C)'s prosecution, and Mr. (b) (6), (b) (7)(C) ultimately pleaded guilty.

Mr. (b) (6), (b) (7)(C) completed his sentence, and thereafter applied for a pardon. On December 19, 1988, Mr. (b) (6), (b) (7)(C), who was by that time in private practice, signed a "character affidavit" in support of Mr. (b) (6), (b) (7)(C)'s application for a pardon. In the affidavit, Mr. (b) (6), (b) (7)(C) states that he has personally known Mr. (b) (6), (b) (7)(C) for seven years, and he recites several facts that he believes support the appropriateness of a presidential pardon:

. . . Mr. (b) (6), (b) (7)(C) was so regretful of his wrongful conduct that he fully cooperated to help us resolve the issue. Thereafter, some of those prosecuted won acquittal on the same facts as those in this applicants [sic] case. Few individuals, as distinguished from their corporate entities, were subsequently prosecuted. The unique combination of this man's personal character, his love of family, community, and country, his volunteered public service from the sentencing that he continues to enjoy rendering long after the completion of probation, and, lastly, fundamental fairness of treatment because [sic] of others that should have or could have been prosecuted and were not -- have caused me to make this affidavit.

Mr. (b) (6), (b) (7)(C)'s application for a pardon is still pending.

You requested our opinion as to whether Mr. (b) (6), (b) (7)(C)'s submission of this affidavit is prohibited by 18 U.S.C. § 207(a).

## II.

Section 207(a) prohibits, among other things, a former employee of the Executive Branch from "knowingly . . . , with the intent to influence, mak[ing] any oral or written communication on behalf of any other person (except the United States)" to any department or officer of the United States in connection with certain "particular matter[s] . . . in which he participated personally and substantially" while employed by the government. 18 U.S.C. § 207(a).<sup>1</sup> Mr. (b) (6), (b) (7)(C)'s submission of the affidavit therefore is prohibited by section 207(a) only if (1) the affidavit was a "written communication" made "with the intent to influence," (2) Mr. (b) (6), (b) (7)(C)'s application for a pardon is the same "particular matter" as his earlier prosecution, and (3) the affidavit was submitted "on behalf of" Mr. (b) (6), (b) (7)(C) within the meaning of section 207(a). We cannot conclude that Mr. (b) (6), (b) (7)(C)'s affidavit was submitted "on behalf of" Mr. (b) (6), (b) (7)(C) within the meaning of section 207(a) and, as a consequence, we conclude that section 207(a) does not apply under the circumstances described.

The term "on behalf of" is not defined in the statute, and in common usage, the phrase is ambiguous. For example, it may refer either to all communications made "in support of" another person or another person's position, or only to those made "as

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<sup>1</sup> Pub. L. No. 101-194, § 101(a), 103 Stat. 1716 (1989), amends section 207(a), effective January 1, 1991. Nothing in the amendments, however, would require a different analysis than that herein, even if the amendments had been effective at the time Mr. (b) (6), (b) (7)(C) submitted the affidavit. Neither the amendments nor their legislative history shed any light on the issues addressed below.

the representative of" another person.<sup>2</sup> The legislative history of section 207, however, reveals that Congress intended the term to reach only communications made as a representative of another, not communications that merely support another or another's position.

The phrase "on behalf of any other person" originated in the amendments to section 207(a) that were enacted as part of the Ethics in Government Act of 1978, Pub. L. No. 95-521, § 501(a), 92 Stat. 1824, 1864. Originally, section 207(a) prohibited former employees from "act[ing] as agent or attorney for anyone other than the United States in connection with any [matter]" on which the former employee had worked while in government. 18 U.S.C. § 207(a) (1976) (emphasis added). There was little question that this provision prohibited only representational activity by a former employee. As amended, the subsection prohibits former employees from (1) "act[ing] as agent or attorney for, or otherwise represent[ing], any other person (except the United States), in any formal or informal appearance" before an agency or officer in connection with certain matters or (2) making, "with the intent to influence, . . . any oral or written communication on behalf of any other person (except the United States)" to an officer or agency in connection with certain matters. 18 U.S.C. § 207(a) (1988) (emphasis added). The amended section thus clarifies that all forms of representation before an agency or department are covered by the section, and details the actual representational contacts that are prohibited. The appearance clause makes certain that not only formal but informal appearances in connection with the defined matters are prohibited, and the communications clause ensures that all forms of communications are covered, not only actual appearances.

The primary, if not sole, purpose for these amendments was simply to ensure that all forms of representational contact with an agency, whether by appearance or other communication, and whether formal or informal, would be covered by the provision. See H.R. Rep. No. 800, 95th Cong., 1st Sess. 28 (1978) ("This revision makes it clear that subsection[] (a) . . . prohibit[s] representational activity including any contacts with intent to influence in any matter in which the former employee participated

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<sup>2</sup> See Webster's Third New International Dictionary 198 (1986) ("on behalf of" means "in the interest of: as the representative of: for the benefit of"); Random House Dictionary of the English Language 188 (2d ed. 1987) ("on behalf of" means "as a representative of or a proxy for" or "in the interest or aid of"); cf. Dixson v. United States, 465 U.S. 482, 490-91 (1984) (phrase "person acting for or on behalf of the United States" in federal bribery statute, 18 U.S.C. § 201(a), was facially ambiguous as to scope).

personally and substantially as a government employee . . . .") (emphasis added). As the House Report on the Ethics in Government Act explains, the revised section 207(a) was intended to prohibit essentially the same representational contacts as the original provision, and the amendments were made in large part just to provide more detailed guidance on the contacts that are covered:

As is the case in the current law, subsection (a) of section 207 as restated in amended H.R. 1 provides a lifetime ban against a former government official or employee after his government employment has ceased, from acting as an agent or attorney or otherwise representing any person in connection with any matter in which he participated personally and substantially while in government. In other words, the government employee cannot "shift sides." The revised language of section 207(a) bars any formal or informal appearance before the former agency with respect to the matter with which he was so included in government and also includes new language which bars such a former employee from making any written or oral communication in [sic] behalf of any person to any agency with the intent to influence governmental action with respect to that matter.

H.R. Rep. No. 800, 95th Cong., 1st Sess. 32-33 (1978) (emphasis added). There is no suggestion that Congress intended by the amendments to extend potential liability beyond representational contacts to all communications made in support of another. Its only concern was with preventing government employees from so-called "revolving door" representation of private parties before the government. S. Rep. No. 170, 95th Cong., 1st Sess. 32, reprinted in 1978 U.S. Code Cong. & Admin. News 4216, 4248.

That the subsection extends only to representational communications or appearances is reinforced by an exchange on the House floor between Congressmen Wiggins and Danielson. Representative Wiggins introduced an amendment that would have deleted the communications clause, leaving only the appearance clause. Representative Wiggins argued that the communications clause represented an unwise extension of existing law, which in his view did "not prohibit incidental contacts with agencies by former employees, [but rather only] prohibit[ed] direct representation of a client in any proceeding in which that individual had personally participated." 124 Cong. Rec. 32,008 (1978) (emphasis added). Representative Danielson opposed the amendment, explaining that, while the appearance and communication clauses reached different types of conduct (the former, appearances before an agency, and the latter, oral or written communications to the agency), both clauses reached only representational activity:

[T]he language of the currently existing section 207 of title 18 in effect has this same provision there. I say, in effect, because it prohibits the knowingly acting as agent or attorney for anyone other than the United States. That is what is prohibited in existing law.

When this bill was drafted, we had described, first of all, formal or informal appearances before agencies. The other language that the gentleman seeks to strike is the other side of the coin, representation by an agent or attorney, namely, making a written or oral communication on behalf of another with the intent to influence.

Id. Congressman Danielson's comments confirm that the amended section 207(a) was intended to prohibit only representational contacts -- as had the original provision -- and that Congress' purpose in amending the provision was simply to define more clearly the types of representational contacts that would be covered by the section.<sup>3</sup>

If the legislative history of section 207(a) had not resolved the ambiguity inherent in the phrase "on behalf of," the rule of lenity would require that the phrase be construed narrowly in this case. That rule "demand[s] resolution of ambiguities in criminal statutes in favor of the defendant." Hughey v. United States, 110 S. Ct. 1979, 1985 (1990); see also Liparota v. United States, 471 U.S. 419, 427 (1985) ("[A]mbiguity concerning the ambit of criminal statutes should be resolved in favor of lenity.") (quoting Rewis v. United States, 401 U.S. 808, 812 (1971)). As noted above, the phrase "on behalf of" may mean either "in support of" or, more narrowly, "as representative of." Thus, in the absence of a clear resolution of the ambiguity in the legislative history, the rule of lenity would require that the phrase "on behalf of" be construed so as to favor Mr. [REDACTED], i.e., to mean "as representative of."

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<sup>3</sup> The appearance clause is cast explicitly in terms of "represent[ational]" contacts, while the communications clause refers to communications "on behalf of" another. But there is no evidence in the legislative history or elsewhere that Congress intended the phrase "on behalf of" in the latter clause to have a meaning any broader -- indeed, any different -- than the term "represents" in the appearance clause. In fact, there is affirmative evidence to the contrary in the passages quoted above from both the House Report on the Ethics in Government Act of 1978 and the colloquy between Congressmen Wiggins and Danielson.

Accordingly, we conclude that, for purposes of section 207(a), communications made "on behalf of" a person include only communications that are made by one who is acting as an agent or attorney, or in some other representational capacity for another.<sup>4</sup> This is not to say that section 207(a) extends only to communications arising from or prompted by the attorney-client relationship. The appearance clause clearly states that the statute applies to anyone who "acts as agent or attorney for, or otherwise represents, any other person." 18 U.S.C. § 207(a) (emphasis added). Congress plainly intended to cover a range of representational relationships beyond that of attorney and client. See S. Rep. No. 170, 95th Cong., 1st Sess. 152 (1977), reprinted in 1978 U.S. Code Cong. & Admin. News 4216, 4368 ("In addition to subsequent practice by a lawyer on behalf of clients, subsection (a) is intended to include consultants and expert witnesses . . .").

An agency or representational relationship entails at least some degree of control by the principal over the agent who acts on his or her behalf. See, e.g., Restatement (Second) of Agency § 1(1) (1958) ("Agency is 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 so to act.") (emphasis added). Therefore, in order for communications to be made "on behalf of" another person within the meaning of section 207(a), they must be not merely supportive of that person's position; they must be made by someone who is to some degree subject to the control or direction of that person. There need not be a formal contract of representation, nor need there be an expectation of monetary gain. One may act as the agent, attorney, or representative of another without a formal contract or without expectation of payment. See, e.g., Office of Government Ethics Informal Op. 81x9 (Feb. 25, 1981), reprinted in Ethics in Gov't Rep. (WSB) (1988) ("One clearly may violate Section 207(c) without receiving compensation.")<sup>5</sup>

On the limited information we have been provided, we cannot conclude that Mr. [REDACTED] was acting as the attorney, agent, or representative of Mr. [REDACTED]. The information provided does not suggest, much less establish, that there was a professional,

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<sup>4</sup> The Office of Government Ethics advised this Office that it agrees with this conclusion as to the scope of section 207(a). Telephone conversation between F. Gary Davis, General Counsel, Office of Government Ethics, and J. Michael Luttig, Acting Assistant Attorney General, Office of Legal Counsel (Oct. 11, 1990).

<sup>5</sup> The relevant language of section 207(c) is virtually identical to that of section 207(a).

contractual, monetary, or any other agency relationship between Mr. (b) (6), (b) (7)(C) and Mr. (b) (6), (b) (7)(C). Although the submission of the affidavit was clearly in support of Mr. (b) (6), (b) (7)(C)'s application, nothing in the facts suggests that Mr. (b) (6), (b) (7)(C) was in any way subject to the control or direction of Mr. (b) (6), (b) (7)(C). In the absence of such evidence, we do not believe section 207(a) applies.

#### CONCLUSION

We cannot conclude on the facts as you have described them that Mr. (b) (6), (b) (7)(C)'s affidavit was submitted "on behalf of" Mr. (b) (6), (b) (7)(C) within the meaning of section 207(a). As a consequence, we conclude that section 207(a) does not apply to Mr. (b) (6), (b) (7)(C)'s submission of his affidavit in connection with Mr. (b) (6), (b) (7)(C)'s application for pardon.

Please let us know if we can be of further assistance.

  
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