

November 17, 2000
DO-00-044

MEMORANDUM

TO: Designated Agency Ethics Officials

FROM: Amy L. Comstock
Director

SUBJECT: Recent Office of Legal Counsel Opinions Concerning
18 U.S.C. § 207

The Office of Legal Counsel (OLC) recently issued two opinions concerning 18 U.S.C. § 207. One addresses the question of when a person is no longer a candidate for purposes of the exemption at section 207(j)(7) for representations made by former senior and very senior executive branch employees solely on behalf of a candidate. The other addresses who is covered by the one-year restriction on certain communications or appearances by very senior employees back to the Government, at 18 U.S.C. § 207(d).

I. Opinion Concerning the Scope of the Exemption at
18 U.S.C. § 207(j)(7)

Section 207(j)(7) exempts certain individuals who communicate or appear solely on behalf of a candidate or certain political organizations from the restrictions on former senior and very senior employees imposed by 18 U.S.C. §§ 207(c) and 207(d).¹ A candidate is a person who seeks (or who has authorized others to explore on his or her behalf) election to Federal or State office.

¹ The exemption does not apply if the person making the communication is employed by anyone other than a candidate, one of the specified political organizations, or a person or entity who represents or advises only such candidates or political organizations; nor does the statute apply to former employees of the Federal Election Commission with respect to communications to or appearances before the Federal Election Commission.

Section 207(j)(7) does not explain when a candidate for the Office of President or Vice President ceases to be a candidate. In order to permit an orderly and effective transition, the Office of Government Ethics (OGE) asked OLC, on October 6, 2000, whether, under section 207(j)(7), a President-elect and Vice President-elect are deemed "candidates" up until the point of inauguration.

OLC, in an opinion issued November 6, 2000, concluded that a candidate for the Office of President of the United States is seeking office as a candidate until he or she actually assumes that office. Accordingly, notwithstanding the post-employment restrictions at 18 U.S.C. §§ 207(c) and (d), a person who otherwise meets the conditions of the exemption at section 207(j)(7) may communicate on behalf of a person who is a "candidate" until that person assumes the office to which he or she was elected.

II. Opinion Addressing the Scope of 18 U.S.C. § 207(d)

Among the persons subject to the restriction at 18 U.S.C. § 207(d) are those "employed in a position . . . at a rate of pay payable for level I of the Executive Schedule" See section 207(d)(1)(B). Positions at level I of the Executive Schedule are listed in 5 U.S.C. § 5312 and include members of the cabinet, the Director of the Office of Management and Budget, and the Commissioner of Social Security. OLC was asked whether section 207(d) applies to other persons who are paid, pursuant to various pay authorities, amounts in excess of the amount paid persons at level I of the Executive Schedule.

In an opinion issued November 3, 2000, OLC concluded that section 207(d) applies only to employees whose pay is exactly the same as that set for level I positions. OLC, as a basis for its conclusion, cited the express language of section 207(d). Persons paid above that level would be covered by the one-year bar of 18 U.S.C. § 207(c) for senior employees rather than the more restrictive one-year bar at section 207(d) for very senior employees. If an employee's salary is set administratively at the level I rate, OLC concluded that the decision to so set the employee's pay would presumably reflect an agency determination that the more stringent restrictions of section 207(d) should apply.

Copies of the two OLC opinions may be obtained from OGE's Website at www.usoge.gov.