

Note: Executive Order 12834, referenced in this Informal Advisory Letter, has been revoked.

Office of Government Ethics

96 x 19--10/18/96

Letter to the Chairman and Vice Chairman of a U.S. Senate Committee dated October 18, 1996

We have received your letter of October 7, 1996, in which you requested that this Office review and investigate allegations of potential conflict of interest on the part of [a Federal employee], who you indicated in your letter was the outgoing Special Assistant to the Chairman of [a] Commission. In your letter you indicate that during a hearing your Committee conducted [in] 1996, it was alleged that [the employee] had been integrally involved in the deliberations of the Commission which resulted in the Commission's approval of a controversial management contract submitted by [a] Tribe and that he now is leaving the Commission to work for the Tribe.

The Office of Government Ethics (OGE) is not an investigatory agency. Rather it serves in an advisory and policy-making role for the executive branch. Investigations of possible misconduct by employees of the executive branch are carried out by the Inspector General of the agency in which the employee serves and/or the Department of Justice. We note that you have already sent a letter to each of those offices. Consequently, rather than referring your letter to them, we will provide them with a copy of this letter with an offer of assistance with any questions regarding the interpretations of those conflicts of interest statutes and ethics regulations that might be applicable.

Without pursuing any information other than that provided in your letter, we can provide you with some general information about the potential conflicts' restrictions that are applicable when an individual determines to seek employment outside the Government. We will also provide information about the post-employment restrictions that might be applicable. In this instance, as you are probably aware, there are some special statutory exemptions for present and former Government officials who represent the interests of Indian tribes, and we will make some reference to them.

The primary statute applicable to negotiating for future employment by an executive branch official is 18 U.S.C. § 208. In general, that statute prohibits the employee from participating personally and substantially in any particular matter in which an organization with whom the employee is negotiating or has an arrangement for future employment has a financial

interest. Even if the employee has not yet begun "negotiating," if the employee knows he or she has a personal interest in the outcome of a matter, then the statute also prohibits the employee from acting officially on the matter. An example of the latter might arise where the organization has told the individual that if the outcome of a matter goes one way, they will be hiring a person to fill a particular position and they would be very interested in his seeking that position. The employee indicates he is interested. There may be an issue of whether this exchange is yet "negotiating," but the employee interested in the job now personally has a financial interest in the outcome.

Subsection (b) of section 208, title 18 does contain various authorities for providing an individual with a waiver of or exemption from the restrictions of section 208. In part, subsection (b)(4) contains an exemption for financial interests arising solely out of birthrights in an Indian tribe. We know of no instance where employment with an Indian tribe would be a birthright and consequently do not think this exemption authority would be applicable. Therefore, an executive branch employee would have had to utilize or qualify under one of the other authorities in subsection (b) prior to the time he or she took official action otherwise prohibited by section 208(a).

Section 208 is a criminal statute and the various penalties are set forth in 18 U.S.C. § 216. Government actions in which a conflict of interest occurred on the part of a Government official participating in the matter are also subject to challenge under various statutes, depending upon the nature of the particular matter involved.

The executive branch also has administrative rules with regard to "seeking" employment (as opposed to the more narrow term "negotiating" for employment), and those rules are found in subpart F of 5 C.F.R. part 2635. The penalty for violating those rules is an administrative sanction which effectively becomes unavailable when the individual no longer is in Government service.

With regard to the criminal post-employment restrictions of 18 U.S.C. § 207 (and even the restriction on current Government employees making representations to the Federal Government on behalf of private parties, 18 U.S.C. § 205) there is an exemption from the application of these restrictions for representations made on behalf of Indian tribes. That exemption is found in 25 U.S.C. § 450i(j). Therefore, for purposes of the general post-employment restrictions, once any individual leaves the executive branch and is retained to represent the interests of an Indian tribe before the Federal Government, the only statutory Federal post-employment restrictions he or she might suffer are those for

individuals who had engaged in certain procurement activities. ¹ The individuals may also be subject to restrictions imposed by State licensing authorities through codes of professional responsibility, such as State bar rules for attorneys.

If you or your staffs have any questions about this letter or OGE's role, please do not hesitate to contact my Office.

Sincerely,

Stephen D. Potts
Director

¹ High-level noncareer appointees in the executive branch are required by Executive Order 12834 to sign a contractual pledge not to engage in certain post-employment activities.