Post-Employment Lobbying Restrictions on the Legislative Branch of Government: A Minimalist Approach to Regulating Ethics in Government

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POST-EMPLOYMENT LOBBYING RESTRICTIONS ON THE LEGISLATIVE BRANCH OF GOVERNMENT: A MINIMALIST APPROACH TO REGULATING ETHICS IN GOVERNMENT

Abstract: Federal post-employment lobbying restrictions currently apply only to former executive branch employees. Congress is considering legislation that expands the prohibitions to include the legislative branch. This Comment discusses the proposed legislation in light of first amendment concerns, and concludes that the legislation is constitutional. Moreover, the legislation strikes an optimal balance between the interests of the public, the government, lobbyists, and their clients.

Public opinion has expressed ambivalence about professional lobbyists. On the one hand, lobbying is a vital part of the legislative process. On the other hand, the public sometimes perceives lobbyists as sly political insiders attempting to win congressional votes by lining the wallets and stomachs of Members of Congress. Lobbyists with clout and personal influence are sometimes viewed as the most effective lobbyists. Former elected officials, particularly former Members of Congress, may be in the best position to influence the passage or

* Prior to this Comment's publication, Congress enacted the Post-Employment Restrictions Act of 1989, Pub. L. No. 101-194, 103 Stat. 1716 (codified at 18 U.S.C.A. § 207 (Supp. 1990)). The statute is notably different from the bill addressed in this Comment. First, although the bill and the statute both limit post-employment lobbying by former congressional personnel for one year, the statute is not restricted solely to prohibiting compensated acts. The statute allows former personnel to make or provide statements, based on the individual's own special knowledge, as long as the individual is not compensated for making or providing the statement. Id. § 207(1)(4). The statute does not define "statement" or "compensation," nor does it give examples of compensated acts as discussed in section II.D. of this Comment. Second, the statute restricts former personnel from representing foreign entities for one year. Id. § 207(1). Third, the statute broadens the bill's scope to encompass all offices and agencies of the legislative branch. Id. § 207(e)(5), (e)(7)(G).

1. See generally infra notes 7–11 and accompanying text.

2. See CONGRESSIONAL QUARTERLY INC., THE WASHINGTON LOBBY 1, 3 (4th ed. 1982) [hereinafter THE WASHINGTON LOBBY]; K. SCHRIFTGIESSER, THE LOBBYIST 5 (1951). James Madison recognized a general concern over the influence of lobbyists in the Federalist Papers. THE FEDERALIST No. 10 (J. Madison). Madison warned about the dangers of "factions"—united groups of people organized to accomplish some goal adverse to the interests of others. He was concerned that special-interest groups might be able to wield undue influence over government merely by their persistent behavior and extravagant treatment of legislators. Madison's views were highly contemporary as evidenced by cases where wealthy land owners intercepted and lavishly dined delegates to the First Constitutional Congress even before the delegates reached Pennsylvania. K. SCHRIFTGIESSER, THE LOBBYIST 4 (1951).

3. This Comment refers to Members of Congress as "Members." Persons that work on a Member's staff or a congressional committee staff are "staffers."
defeat of legislation because Congress is a professional fraternity where reciprocity is the norm.  

Congressional ethics scandals have tainted the halls of Congress several times. Two recent examples include the Koreagate scandal during the 1970s and the ethics uproar in the 101st Congress that resulted in resignations by the Speaker of the House and the House Majority Whip. Although these scandals created pressure on Congress to regulate its own members, Congress has failed to adopt a comprehensive congressional ethics act. A new proposal, however, is now before Congress. The Post-Employment Restrictions Act (PERA) seeks to regulate congressional ethics by prohibiting former legislative branch personnel from lobbying Congress for one year following their employment with Congress. PERA properly takes a minimalist approach to regulating ethics in the federal legislature and adequately balances the competing interests of citizens who employ lobbyists, former congressional personnel, and the federal government.

I. LOBBYING, THE CONSTITUTION, AND THE LEGISLATIVE BRANCH

The first amendment protects lobbying because it is a form of petitioning the government. This protection, however, is limited. Congress has in the past placed restrictions on certain forms of lobbying and is presently considering new restrictions.

A. Lobbying and the Right to Petition

Lobbying plays an invaluable role in modern politics. The Supreme Court has held that because lobbying is a means of petitioning the government, any restrictions on lobbying must meet first amendment constitutionality tests. 

4. See THE WASHINGTON LOBBY, supra note 2, at 96.

5. See CONGRESSIONAL QUARTERLY, INC., INSIDE CONGRESS 168 (2d ed. 1979) [hereinafter INSIDE CONGRESS] (in 1977-1978 congressional committees investigated reports that as many as 115 Members took illegal gifts from South Korean officials seeking to bribe the Members with illegal lobbying activity).


7. See infra notes 85-95 and accompanying text (analyzing PERA's constitutionality).
1. **Modern Lobbying**

Lobbying is generally defined as the attempt to influence the passage or defeat of legislation. It may also involve other forms of persuasion such as drafting model legislation, suggesting to legislative staff that a legislator sponsor or initiate legislation, writing letters to legislators on behalf of clients, making phone calls to legislative offices, advising clients on effective lobbying strategies, and generating grass-roots involvement at the community level. Citizens can locate and hire professional lobbyists from a number of sources. In addition to boutique lobbying firms that specialize solely in state or federal lobbying activity, many law firms provide lobbying practice groups to complement their litigation and corporate departments.

Lobbyists’ principal function is communicating their clients’ will to the legislature. They perform this communicative function by serving as a link between congressional policy makers and citizens, and by helping groups and individuals voice their concerns to Congress in an organized and effective manner.

2. **Constitutional Implications**

Although the Supreme Court has held that lobbying is a protected first amendment activity, the Court has decided very few recent cases based on the right to petition. The Court has considered, however, legislation that restricts government employees from engaging in partisan political activities. The Court’s decision provides insight into how the Court might view legislation that restricts former government employees from actively lobbying the government.

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8. See BLACK'S LAW DICTIONARY 845 (5th ed. 1979). See generally THE WASHINGTON LOBBY, supra note 2, at 3–10. Lobbying may also include attempts to influence executive branch decisions. This type of lobbying is addressed in the current Ethics Act and is beyond the scope of this Comment.

9. See THE WASHINGTON LOBBY, supra note 2, at 8–10 (providing examples of grass-roots lobbying).


12. "Lobbyists communicate to their clients what is happening or is likely to happen in government. They communicate to government what is happening or is likely to happen to their clients. They advocate policies and points of view before both Congress and the executive agencies. They stimulate others to communicate with government." L. MILBRATH, THE WASHINGTON LOBBYISTS 162–64 (1963).

13. See THE WASHINGTON LOBBY, supra note 2, at 8.

a. First Amendment Petitioning Rights

The first amendment of the United States Constitution protects the right to petition. Although neither the Constitution nor the Supreme Court have defined the right to petition, the Supreme Court has protected some acts as petitioning activity: paying individuals to distribute petitions for public signature, and lobbying the legislature to pass laws of an anti-competitive nature. Lobbying, therefore, has been identified as part of the right to petition.

Petitioning is a fundamental right, inseparable from other first amendment rights, protected from infringement by the states through the fourteenth amendment. Although fundamental, the right to petition is not absolute. Government may limit first amendment rights to satisfy a compelling governmental interest. When a statute attempts to restrict first amendment rights, the courts apply strict scrutiny review to judge the statute's constitutionality. Under this test, the statute must be narrowly drawn and further a compelling governmental interest.

b. The Hatch Act's Limitations on Political Activity

The Supreme Court has held that a statute prohibiting government employees from engaging in partisan political activities does not violate the employees' first amendment rights. In United States Civil Service Commission v. National Association of Letter Carriers, the Court

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15. "Congress shall make no law ... abridging ... the right of the people ... to petition the Government for a redress of grievances." U.S. CONST. amend. I.
19. The first amendment protects the rights of speech, press, religion, assembly, and petition. U.S. CONST. amend. I.
21. Id. at 483. One author argues that only the core petitioning acts of preparing, signing, and transmitting a written petition to the government are absolute. See Smith, "Shall Make No Law Abridging ...": An Analysis of the Neglected, but Nearly Absolute, Right of Petition, 54 U. CIN. L. REV. 1153, 1190–91, 1196 (1986). Petitioning that goes beyond these core acts is subject to governmental limitation. Id.
examined the constitutionality of the Hatch Political Activities Act\textsuperscript{26} (Hatch Act). The Hatch Act is sweeping: it prohibits countless executive branch employees from taking an active part in partisan politics, including participating in political campaigns and holding local party offices.\textsuperscript{27} Regardless of the Hatch Act's seeming breadth, the Court held that the Hatch Act is narrowly tailored to meet the government's interest.\textsuperscript{28} The government's interest in preventing its employees from participating in partisan politics and in preventing the coercion of its public servants is compelling.\textsuperscript{29} The Court implicitly reasoned that the Hatch Act is narrowly tailored because it does not restrict all political activity.\textsuperscript{30} Government employees can still vote and express personal views.\textsuperscript{31} The Court stated that to avoid erosion of the public's confidence in government, government employees should avoid biased political activities.\textsuperscript{32}

Dissenting in \textit{Letter Carriers}, Justice Douglas argued that the Hatch Act is not narrowly tailored. First, the Hatch Act is too broad because it applies to civil service positions that do not threaten the appearance of integrity.\textsuperscript{33} Second, the Act unnecessarily restricts government employees' political activities during personal, non-work hours.\textsuperscript{34} Justice Douglas feared that overly broad statutes risk deterring the exercise of first amendment freedoms, the foundation of American society.\textsuperscript{35}

\textbf{B. Current Lobbying Regulations}

Congress and the state legislatures have regulated certain types of lobbying for some time. In 1978, Congress enacted the Ethics in Government Act (Ethics Act),\textsuperscript{36} which directly restricts lobbying by certain former executive branch personnel. The states have restricted the post-employment lobbying of both legislative and executive branch personnel. Congress now is considering extending the Ethics Act to ex-congressional personnel.

\textsuperscript{26} 5 U.S.C.A. § 7324(a) (West 1980).
\textsuperscript{27} See id.
\textsuperscript{28} \textit{Letter Carriers}, 413 U.S. at 580.
\textsuperscript{29} Id. at 566-57.
\textsuperscript{30} Id. at 556.
\textsuperscript{31} Id.
\textsuperscript{32} Id. at 565.
\textsuperscript{33} Id. at 597-98 (Douglas, J., dissenting); see also \textit{Broadrick v. Oklahoma}, 413 U.S. 601, 620 (1973) (Douglas, J., dissenting) (janitors, messengers, nurses, and elevator operators are employees that pose no threat to the appearance of integrity).
\textsuperscript{34} Id. at 598.
\textsuperscript{35} Id.
I. The Federal Ethics in Government Act

Federal law restricts the post-employment conduct of only executive branch employees. The Ethics Act imposes three different degrees of post-employment restrictions, depending upon an employee's level of involvement in particular matters while employed with the government. First, high-ranking former executive branch employees are banned for life from representing any person before an agency or department on a matter in which the employees substantially and materially participated. Second, ex-employees may not lobby, for two years, on matters that were pending before the agency for which they worked. Finally, the Ethics Act bans for only one year lobbying on all other matters, regardless of whether the employees actually worked on the issue when employed with the government.

The Ethics Act's revolving door bans were enacted to avoid the appearance that government employees use public office for personal or private gain and to prevent instances of actual misconduct. The government prosecuted several former officials under the Ethics Act, demonstrating that the government's concern about post-employment misconduct is justified.

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39. Id. § 207(b).

40. Id. § 207(c). Federal courts have upheld the Ethics Act's constitutionality on due process grounds. See, e.g., United States v. Nasser, 476 F.2d 1111, 1115 (7th Cir. 1973). The Supreme Court, however, has not decided the Ethics Act's constitutionality on first amendment grounds.

41. "Revolving door" is the analogy commonly used to describe the use of public service as a mere stepping stone for lucrative jobs in the private sector. See Thomas, Peddling Influence, TIME, March 3, 1986, at 27. See generally Post-Employment Conflicts of Interest: Hearings on H.R. 5097 Before the Subcomm. on Admin. Law and Governmental Relations of the House Comm. on the Judiciary, 99th Cong., 2d Sess. 91 (1986) (statement of David H. Martin, Director of the Office of Government Ethics). Similarly, the related idea of "influence peddling" connotes using the special privileges and favors a Member or staffer acquires as a result of public service to obtain access to current Members and their staffs after leaving employment with the legislative branch. See Thomas, Peddling Influence, TIME, March 3, 1986, at 27.


43. See, e.g., United States v. Coleman, 805 F.2d 474, 477 (3d Cir. 1986) (ex-IRS agent attended meetings between clients and IRS officer to whom some of his cases had been transferred); United States v. Nasser, 476 F.2d 1111 (7th Cir. 1973) (former IRS employee represented clients before his former agency).
2. Existing Post-Employment Lobbying Bans on Legislative Branch Personnel

Although no federal post-employment lobbying statute regulates congressional personnel, other post-employment regulations exist. Congressional codes of ethics govern the behavior of federal legislative employees and contain post-employment provisions. Likewise, many state statutes regulate the post-employment activity of ex-legislative branch personnel.

a. Congressional Codes of Ethics

In 1977, the House and Senate adopted new ethics codes to govern the behavior of Members and congressional employees. The Senate rules prohibit a former Member who later becomes a registered lobbyist under the Federal Registration of Lobbying Act (FRLA) from lobbying Members or employees of the Senate for one year after leaving office. Similarly, Senate staff may not lobby either the senators for whom they worked or the staff of their former bosses for one year. Senate code violations may result in reprimand, censure, expulsion, or loss of seniority, penalties traditionally used to discipline violators of any provision in the Senate's code.

The House takes a different approach to regulating post-employment activity. Rather than restricting ex-Members and staff from lobbying their former colleagues for a specific period of time, the House rules merely bar ex-Members from the Hall of the House if their purpose in being there is to lobby.

b. State Post-Employment Statutes

The state legislatures have led the way in imposing post-employment bans on legislative branch personnel. State statutes impose post-employment lobbying bans of varying degrees on former legislative

44. INSIDE CONGRESS, supra note 5, at 153–63.
45. See supra note 37 and accompanying text.
47. Id. at Rule XXXVII(9).
48. INSIDE CONGRESS, supra note 5, at 160. Although these penalty provisions may deter any unethical conduct by current legislators, it is questionable how they impact former Members who lose seniority upon leaving Congress and cannot be expelled from an institution to which they no longer belong.
49. RULES OF THE HOUSE OF REPRESENTATIVES Rule XXXII(2), (3) (1989) (ex-staffers are not granted floor privileges).
personnel. States that have such statutes generally limit post-employment lobbying for the first one or two years after employees leave public service. Some states impose longer post-employment restrictions on former legislators than on former legislative staff.

C. Attempts to Extend Post-Employment Lobbying Bans to Congress

Congress has attempted to enact post-employment lobbying bans on congressional personnel several times. The most recent attempt, The Post-Employment Restrictions Act, is now before Congress.

1. Failed Attempts to Include Congress in Lobbying Bans

Since 1986, two bills introduced in Congress have attempted to expand the Ethics Act by imposing post-employment restrictions on legislative branch personnel. A post-employment lobbying bill was introduced in the 99th Congress. Despite the Senate Judiciary Com-


A few state ethics statutes that limit the post-employment conduct of executive branch employees specifically exclude legislative branch personnel from their coverage. See, e.g., ARIZ. REV. STAT. ANN. §§ 38-502(8), 38-504 (1985); MD. ANN. CODE art. 40A, § 3-103(b) (1986); WASH. REV. CODE ANN. §§ 42.18.130, 42.18.221 (Supp. 1989).

51. See generally Schmitz, A Survey of State Post-Employment Restrictions, in "The Revolving Door": Ethics in Government Service 30, 58-63 (1980) (available from the St. Louis University School of Law). States that limit executive branch employees, on the other hand, impose bans on post-employment conduct ranging from one year to a lifetime. See, e.g., ARK. STAT. ANN. § 19-11-709 (1987) (one-year ban); IOWA CODE ANN. § 68B.7 (West 1973) (two-year ban); NEV. REV. STAT. § 281.491 (1987) (lifetime ban on any issue that was before the agency during the employment period).

52. See, e.g., N.Y. PUB. OFF. LAW § 73(8) (McKinney 1988).


mittee's approval of the legislation, the bill failed to earn Senate approval and was, therefore, never considered by the House.

The 100th Congress finally took decisive action. The Post-Employment Restrictions Act of 1988 (1988 Bill) was the first statute passed by Congress imposing a post-employment lobbying ban on congressional personnel. The 1988 Bill would have prohibited former congressional personnel from lobbying Congress for one year after leaving the legislature. Congress' vision was never realized, however, because former President Reagan pocket-vetoed the bill. Reagan claimed that the 1988 Bill unreasonably favored the legislative branch by setting less severe bans on Congress than on executive branch personnel.

2. The Post-Employment Restrictions Act of 1989

The 101st Congress again is considering bills that would restrict post-employment lobbying by former congressional personnel. The Post-Employment Restrictions Act (PERA) is quite similar to the 1988 Bill and incorporates many of the 1988 Bill's major provisions. Ex-Members may not lobby current Members and staff for one year after leaving public service. Most high-paid staff likewise may not lobby their former bosses for one year. PERA would exclude public

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55. See generally id. at 1–29.
60. A federal pocket veto occurs when the President fails to sign a bill within 10 days of presentment and Congress adjourns. Presidential assent is necessary when Congress cannot reconvene to act on the bill. U.S. CONST. art. I, § 7. See BLACK'S LAW DICTIONARY 1403 (5th ed. 1979).
62. Id. at 1562.
63. The bills before each body are presently designated as H.R. 2267, 101st Cong., 1st Sess. (1989) (The Post-Employment Restrictions Act of 1989) [hereinafter PERA], and S. 1, 101st Cong., 1st Sess. (1989). This Comment refers to both the House and Senate bills as "the proposed legislation" and PERA. Citation is to H.R. 2267 alone.
speeches and public appearances from its coverage. Only compensated lobbying may be the basis of an offense.

Advocates of PERA have articulated several supporting rationales. Chief among these rationales is the desire to bolster the public's confidence in Congress by shutting the revolving door between public service and the private sector. Advocates believe the revolving door creates an appearance of impropriety. Moreover, PERA would help prevent actual impropriety.

Some Members have pointed out potential problems with the legislation. For example, PERA might impair the government's ability to recruit new employees and retain current ones. Limiting contact between former and present legislative branch personnel also may deprive Congress of valuable sources of information. Finally, Members argue that there is no evidence of corruption in the legislative branch that justifies expanding present law.

II. THE CASE FOR A ONE-YEAR BAN ON POST-EMPLOYMENT LOBBYING BY FORMER LEGISLATIVE BRANCH PERSONNEL

Although PERA would affect many important interests, the one-year post-employment ban is short enough to minimize most adverse effects. PERA is constitutional because it promotes compelling governmental interests and it is narrowly tailored. Moreover, PERA strikes an optimal balance between competing interests, a balance that is well supported in public policy.

67. Id. § 2(f). The bill imposes both civil and criminal penalties for violations. Id. §§ 2(g), (m).
70. See id.
74. Id. at 49 (additional views of Rep. Edwards). Discussing ethical violations of post-employment lobbying standards presents a semantics problem. There is no evidence of actual post-employment lobbying misconduct in Congress because no statutory standard exists to judge the conduct of former personnel. Although it may look bad for an ex-Member to turn lobbyist one day after leaving Congress, is it inherently unethical?
A. Competing Interests Affected by a One-Year Restriction on Post-Employment Lobbying

Post-employment lobbying bans on the legislative branch of government affect several interests. The federal government and Congress must maintain an appearance of propriety to ensure that the public has faith in government. Although lobbying bans may address successfully any appearance of impropriety, they also risk infringing important petition rights of former legislative branch personnel and risk adversely affecting their ability to earn a living. Citizens who employ lobbyists have an interest in being able to hire former legislative branch employees. To these citizens, restrictions on choosing a lobbyist limit a means by which they may exercise their personal petition rights.

1. The Interests of the Federal Government and the General Public

The federal government is interested in ensuring that the general public has faith in its elected officials. Likewise, the public is interested in ensuring that its government officials and elected representatives behave ethically. PERA addresses these concerns by imposing cooling-off periods on ex-congressional personnel, thereby limiting their immediate access to Congress.

Some legislators, however, have argued that no post-employment lobbying legislation is necessary because Congress can control such activity with existing regulations.75 The congressional rules, however, are ineffective. The Senate rules, for example, are unenforceable against non-Members,76 and Congress is reluctant to police itself adequately,77 thus compounding the appearance of impropriety PERA seeks to remedy.

Members and staff may be tempted to commit two types of ethical violations: selling privileged or otherwise non-public information to a private party for personal gain, and misusing power acquired as a

76. See supra notes 46–47 and accompanying text (discussing the Senate's internal rules).
77. See supra notes 5–6 (discussing major ethical cases in Congress). Although Congress initiated many investigations during Koreagate and Speaker Jim Wright's ethics scandal, Congress fell short of actually punishing its current or former Members. Instead, it called off the investigations once the alleged offender resigned or made a public apology. See generally INSIDE CONGRESS, supra note 5, at 167 (no action taken by Congress against Members who admitted they engaged in illegal or unethical activity); Cohen, Ethics Codes and Political Timing, NAT'L J., Feb. 24, 1990, at 469 (neither House Speaker Jim Wright nor House Majority Whip Tony Coelho were questioned in public session about ethics charges; because Coelho resigned before the House Ethics Committee began a formal inquiry into his conduct, he was never investigated by the House).
result of public service to establish lucrative employment in the private sector.\textsuperscript{78} For example, former congressional personnel who had access to secret NASA files in the course of their tenure with the Armed Services Committee could potentially share such secrets with foreign entities in exchange for the entities’ promises to retain the former congressional personnel as lobbyists. In that case, a clear conflict of interest arises between the former employees’ ethical duty to protect national secrets and personal ambitions to advance their career opportunities. Although such conflicts are contrary to the public interest, there are few examples of such activity occurring in the legislative branch.

Although few would disagree that selling sensitive information constitutes actual misconduct, identifying the misuse of power is more difficult. For example, do former Members necessarily misuse power when they lobby former colleagues, even if they obtain no special favors for their clients? Congress has avoided the problem of identifying actual misuse of power by instead focusing on the “appearance of impropriety.” The problem of “appearance” occurs whenever lobbyists’ prior employment gives them power that they could abuse in a particular situation, regardless of whether the lobbyists actually abuse their power. Because the mere potential for abuse could undermine public confidence, PERA would limit all lobbying between former congressional personnel and current Members and staff for one year.

2. Interests of Former Congressional Personnel

Post-employment lobbying restrictions potentially affect two primary interests of former congressional personnel. Restrictions may affect their interest in pursuing careers as lobbyists. Restrictions also may affect adversely their individual rights to petition the government.

PERA’s lobbying bans would prevent ex-congressional personnel who become professional lobbyists from practicing their vocation for one year.\textsuperscript{79} The bans would not, however, prohibit all lobbying: PERA bans only compensated lobbying directed toward Congress.\textsuperscript{80} Former congressional personnel are free to lobby the executive branch


\textsuperscript{79} See supra notes 64–65 and accompanying text (describing PERA’s one-year ban).

\textsuperscript{80} See supra note 67 and accompanying text.
without waiting a year, and are able to lobby Congress for compensation after one year.\(^1\)

Post-employment lobbying restrictions may infringe personal petition rights when lobbyists' interests coincide with clients' interests. For example, former Members who personally are interested in liberalizing American banking laws cannot lobby Congress on this issue if they are paid to lobby by a bank with identical interests. By limiting the compensated lobbying activity of former congressional personnel, PERA would restrict their ability to lobby Congress on issues of personal concern.

3. **Interests of Citizens Who Employ Lobbyists**

Some individuals exercise their personal petition rights by employing lobbyists. Because professional lobbyists are often better able to influence the passage or defeat of a piece of legislation than most non-lobbyists,\(^2\) hiring a professional lobbyist is the most effective means some people have of communicating with their elected representatives. Former legislative branch employees have high levels of expertise regarding the legislative process and with specific subject matters that congressional committees address.\(^3\)

In addition to their well-recognized communicative function,\(^4\) lobbyists also serve an educative function. If former legislative branch employees share their expertise with people who use lobbyists, groups and individuals may be able to communicate more effectively with their elected representatives. In this capacity, former Members and staff teach citizens how to lobby better for themselves.

The post-employment bans on lobbying would impair only minimally the interests of citizens who employ lobbyists. Although the communicative function would be impaired, the limitation would be neither permanent nor absolute. Former legislative branch employees acting as paid lobbyists are not the only individuals who can communicate the public will to Congress. Citizens can use a variety of other professional lobbyists or volunteer services.

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81. The restrictions could be more severe. Congress could have placed lifetime bans on congressional lobbying in PERA. See 18 U.S.C.A. § 207(a) (West Supp. 1989) (lifetime ban on lobbying by some former executive branch personnel).

82. Professional lobbyists can devote their time and resources to following a bill through the legislative process, whereas most citizens do not have access to such resources or support staff and are not always close to Capitol Hill.

83. E. Beard & S. Horn, Congressional Ethics: The View From the House 41 (1975).

84. See supra notes 12–13 and accompanying text.
The post-employment lobbying bans would not at all impair the educative function a lobbyist may perform for clients. Beginning with their first day as private sector employees, former congressional personnel would be free, under the proposed legislation, to teach clients how to lobby effectively.

B. Striking a Constitutional Balance

When the Supreme Court upheld the constitutionality of the Hatch Act in *Letter Carriers*, it weighed the same interests affected by PERA. As such, the holding in *Letter Carriers* provides insight into the constitutionality of PERA’s post-employment lobbying restrictions. To pass constitutional muster, PERA must support a compelling governmental interest and must be narrowly tailored to meet the interest.

The broad governmental interests that PERA and the Hatch Act promote are identical: avoiding both the appearance of impropriety and actual impropriety. In *Letter Carriers*, the Supreme Court held that these interests were compelling with respect to current governmental employees. PERA raises the issue, however, of whether these interests are compelling when the government restricts former, rather than current, employees. Two considerations lead to the conclusion that PERA’s interests are compelling. First, the language of *Letter Carriers* did not limit the Court’s rationales to restricting only present employees from engaging in constitutionally protected activity. Moreover, the Court has upheld other lobbying restrictions that affect only non-government employees.

The more important issue is whether PERA is narrowly tailored. The majority in *Letter Carriers* held that the Hatch Act, which affects thousands of government employees during work and non-work hours, is not unconstitutionally broad. The Hatch Act places strict, direct prohibitions on a large number of political activities, whereas PERA infringes only indirectly the petitioning rights of lobbyists and citizens. Furthermore, PERA’s ban is neither absolute nor perma-

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86. *See, e.g., Letter Carriers*, 413 U.S. at 565.
87. *See supra* notes 15–24 and accompanying text (discussing first amendment jurisprudence).
89. *See supra* note 37 (the FRLA is constitutional).
90. *See supra* text accompanying notes 27–32 (discussing the Hatch Act’s scope).
91. *See supra* note 67 and accompanying text (only compensated lobbying is prohibited).
Post-Employment Lobbying Restrictions

whereas the Hatch Act absolutely prohibits certain political activity over the duration of an employee's tenure with the government. Although PERA would infringe lobbyists' right to practice a certain profession, the Court has never held that such a right is constitutionally protected. Moreover, although PERA would apply to all former Members, PERA's post-employment lobbying restriction would affect only a small portion of staff in the Congress. On balance, the Hatch Act's infringement of first amendment rights is more severe than is PERA's. Because the Court has held that the Hatch Act is not unconstitutionally broad, the Court probably would hold that PERA is similarly constitutional.

C. PERA Strikes a Proper Public Policy Balance

In addition to satisfying the Supreme Court's constitutional test, PERA would strike a proper public policy balance. By imposing minimal cooling-off periods on former employees, PERA would prevent former congressional personnel from using the most sensitive, non-public information for personal gain. At the same time, PERA recognizes that checks inherent to the legislative branch reduce the need for more restrictive legislation.

I. A One-Year Lobbying Ban is the Minimum Restriction Congress Should Impose

Members of Congress have recommended post-employment lobbying prohibitions ranging from twelve months to four years. A one-year ban is justified because one year is the minimum time Congress can limit post-employment lobbying and still achieve its primary goal of reducing the appearance of impropriety.

A one-year restriction prevents former congressional personnel from using to their advantage the most dangerous information—fresh information. This information is dangerous because it enables new lobbyists potentially to wield a great amount of influence in Congress. Congressional personnel who leave Congress during mid-session and

92. See supra note 66 and accompanying text (discussing activity exempt from PERA's scope).
94. The Ethics Act implicates only employees who earned at least $76,990 per year when employed with the government. See supra note 65.
95. Even Justice Douglas probably would have found PERA sufficiently narrow because it affects employees who directly affect the government's interests. See supra notes 33-35 and accompanying text (Douglas' dissent in Letter Carriers).
become lobbyists within the same session know who is vulnerable to pressure or wavering on specific issues. They know the intricacies of bargaining sessions between Members. The entire process of drafting, introducing, amending, and adopting a piece of legislation creates incalculable amounts of information, all of which would be valuable to partisan lobbying interests. When congressional personnel move into the private sector in mid-session with such fresh information, they possess tools that are neither available to other lobbyists nor to the general public.

A one-year lobbying restriction protects against such dangers. One year, while not a complete cycle for Congress, is an adequate cooling-off period for former legislative branch personnel. A one-year ban stops ex-congressional employees from working as lobbyists during any session in which they worked in Congress. While a congressional session lasts one calendar year, a congressional term lasts two years and consists of two successive sessions. Although Congress may consider a particular bill over the entire two-year term, it generally attempts to dispose of legislation in the same year in which it is reported out of committee. Shorter prohibitions would permit former congressional employees who have become new lobbyists to interject themselves into congressional debates on matters with which they directly participated. This activity creates a strong appearance of impropriety. A shorter ban would also weaken the public’s confidence in Congress by spawning cynicism over the cosmetic approach of such legislation.

2. Is a One-Year Ban Long Enough?

Just as Congress should resist attempts to shorten PERA’s one-year ban, Congress should also resist the temptation to lengthen it. A one-year lobbying ban is long enough to deal adequately with the appearance of impropriety. Institutional differences between the executive and legislative branches provide additional controls against actual misconduct. Congress should reject prohibitions longer than one year.

98. For example, congressional personnel who immediately become lobbyists may know who traded which provision in a bill for another.
99. This is not always true. There have been many cases—especially involving highly controversial legislation—in which Congress wrangled over essentially the same legislation for years. In fact, the post-employment lobbying restriction is a contemporary illustration.
100. The New York ethics statute seems to follow this logic. New York’s law, which restricts ex-staff from lobbying during the remainder of the term in which they worked, prohibits staff from interjecting themselves into debate in which they participated as legislative employees. See N.Y. PUB. OFF. LAW § 73(8) (McKinney 1988); see also supra notes 50–52 and accompanying text (discussing state post-employment statutes).
Post-Employment Lobbying Restrictions

because they too greatly infringe upon important countervailing interests.

The appearance of impropriety is the major concern that Congress is attempting to address by restricting post-employment lobbying. Because a mere appearance of impropriety is the primary issue, the statute need only go far enough to address the public's perception of impropriety. The one-year lobbying ban adequately addresses the appearance problem because it puts Congress and the executive branch in approximate parity: both branches face a statutory restriction. As long as Congress applies a double standard by statutorily limiting the post-employment activity of executive branch personnel without similarly restricting its own personnel, the public inevitably will perceive Congress as unfair and perhaps even unethical.

The structure of the legislative branch prevents much actual misconduct from occurring. Two major differences between the executive branch and the legislative branch support placing less restrictive prohibitions on the legislative branch. First, Congress' bicameral process protects against any one entity exerting undue influence in the legislative process. Second, special personnel and recruiting considerations in the legislature require less restrictive post-employment bans.

In the legislative branch, the bicameral system\textsuperscript{101} dilutes the influence former Members or staff might wield. No analogous limitation exists in the executive branch. Compared to the executive agency rule-making process, the legislative process is extremely cumbersome because legislation must pass through many bodies before it becomes law.\textsuperscript{102} In addition, the public and media tend to give the legislative process greater scrutiny.\textsuperscript{103} Executive branch employees, on the other hand, sometimes exercise quasi-legislative rule-making power, but are not subject to bicameral controls.\textsuperscript{104} Often, important decisions affecting many entities lie in the hands of a single executive branch employee.\textsuperscript{105} Thus, Congress may justifiably place greater restrictions on executive branch personnel.

\textsuperscript{101} See U.S. Const. art. I, § 7.

\textsuperscript{102} Before becoming law, a bill must pass each House of Congress, gain the approval of a joint House and Senate conference committee, pass each House again as amended by the conference committee, and then obtain the President's signature. See generally U.S. Const. art. I.

\textsuperscript{103} See generally R. Baker, House and Senate 149–51 (1989).


\textsuperscript{105} See, e.g., Forti v. New York, 147 A.D.2d 269, 542 N.Y.S.2d 992, 996 (1989). Executive branch personnel award specific contracts and litigate lawsuits for the government, whereas
The legislative and executive branches face different recruiting problems. Congressional personnel, unlike their executive branch counterparts, lack civil service job protections and can lose their positions through the retirement, death, or defeat of a single person—the Member for whom they work. Imposing severe post-employment lobbying bans on congressional personnel may deter people from coming to work for Congress because they will fear that they will have less ability to capitalize on their legislative work experience later in private sector jobs. Congress may likewise lose current employees who would rather leave Congress now than face a greater than one-year lobbying ban when PERA is finally enacted. These recruiting concerns evidence a need to impose less prohibitive post-employment lobbying bans on ex-congressional personnel.

D. Recommendations for Improving PERA and the Internal Rules of Congress

Congress should enact PERA. But Congress should first make a few important changes to the bill. Initially, Congress should amend PERA to prohibit current Members and staff from engaging in lobbying activities with ex-congressional personnel. If current congressional personnel faced penalties for engaging in improper contact with former Members and staff, they would be encouraged to screen lobbyists closely. This change would enable PERA to better achieve its twin goals of removing the appearance of misconduct and actual misconduct.

Congress also should define more clearly the term “compensation.” The present definition of compensation in PERA creates two problems. First, PERA fails to address the issue of delayed compensation. Delayed compensation occurs when lobbyists are compensated for their lobbying services after the one-year ban elapses. Congress can avoid some of the ambiguity created by the vague definition of congressional personnel primarily generate broad policies that affect many entities. Therefore, there is less opportunity for post-employment conflicts of interest among ex-congressional personnel because they do not work with individual parties or contracts. See H.R. Rep. No. 1068, 100th Cong., 2d Sess. 46, 47 (1988).

"compensation" by defining through example what a compensated act is. 110 Second, PERA fails to address instances when the interests of ex-congressional personnel and their lobbying clients coincide. 111 Congress could resolve this dilemma by requiring ex-Members and staff to temporarily disaffiliate themselves from their employer, thereby removing the compensation element while preserving the lobbyists' right to lobby on personal issues. 112

Although PERA's minimalist approach adequately addresses the appearance of impropriety in post-employment lobbying, more could be done. Congress should amend the internal rules of both Houses to better address post-employment concerns. The House and Senate rules should place uniform lobbying restrictions on ex-congressional personnel, thereby removing the unequal bans each House currently places on former personnel. Congress also should require all registered lobbyists to identify themselves as professional lobbyists before engaging in conversations with Members or staff. Thus, current congressional personnel will recognize which of their former colleagues are lobbying and which are merely making social calls. Finally, the House and Senate should amend their respective rules to eliminate former Members' access to restricted areas such as the Congressional gymnasium and dining room—areas that are already unavailable to other lobbyists. 113 By eliminating the special treatment afforded former Members, Congress reduces further the appearance of impropriety.

Enforcement is the area that carries the greatest potential for improvement. If Congress enforced its existing rules more aggressively, there might not be a need to enact a post-employment statute at all. Congress has too often prematurely called off congressional

110. An example of compensation should include receiving a client's promise to hire a lobbyist for future jobs if the lobbyist agrees to lobby pro bono for one year after leaving employment with the legislature. The promise of future employment is a thing of value.

111. For example, an ex-Member who opposes American arms sales to Jordan for personal reasons may also work for a pro-Israel lobby organization that lobbies to maintain strong American military and economic aid for Israel. At what point can it be said that former Members lobby as agents of their employers versus lobbying on their own behalf?

112. Acts of initially innocent volunteer lobbying might retroactively be made illegal by a single subsequent instance of compensated lobbying during the one-year period. For example, suppose a former staffer performs pro bono lobbying for a politically active entity during the first ten months after resigning a congressional position. However, during the eleventh month after resignation, the staffer charges an expensive dinner with a current Member on the organization's charge card. Although this last act may be compensated lobbying under PERA's definition of "compensation," the proposed legislation does not indicate whether the illegal act has the effect of tainting all of the previous lobbying activity. If the last act infects all previous acts, the former staffer might be liable for committing several offenses.

113. See THE WASHINGTON LOBBY, supra note 2, at 96.
investigations into the ethics of one of its Members or ex-Members.\textsuperscript{114} Incomplete probes into allegations of misconduct generate public distrust regarding Congress' ability to control the ethical conduct of its own members and employees. By actively enforcing its existing rules, Congress will send a strong message to present and former personnel that it will not tolerate lobbying misconduct and, if Congress discovers actual misconduct, it will punish such misconduct severely.

### III. CONCLUSION

As Congress examines PERA and its one-year ban on lobbying, Congress must recognize that lobbying benefits individual citizens and the legislative process. Lobbying can disclose instances of need, waste, corruption, and misconduct to an institution that is frequently too busy to detect such concerns without prompting.\textsuperscript{115} Lobbying also maintains the free flow of ideas between the public and its elected officials.\textsuperscript{116} Former congressional personnel-turned-lobbyists can play a vital role in the exchange of ideas between the public and Congress. PERA recognizes the importance of lobbying and the role of former congressional personnel by taking a measured approach to post-employment restrictions. PERA's one-year ban strikes an appropriate balance between the need to assure public confidence and the desire to promote full access to Congress.

PERA is the appropriate means by which Congress can cure the appearance of impropriety. Before enacting PERA, however, Congress should fine-tune the legislation. By placing responsibility on current congressional personnel to refrain from improper contact with former personnel, PERA will more effectively achieve its goals. Congress should also clarify the definition of compensation by placing specific examples of compensated lobbying in the bill's legislative record. In addition, Congress should supplement PERA with revised congressional codes of ethics that restrain post-employment misconduct with effective enforcement provisions. These efforts will improve public perception of Congress and safeguard against future misconduct.

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\textsuperscript{114} See supra note 77 (citing this data); see Cohen, \textit{Ethics Codes and Political Timing}, \textit{Nat'l J.}, Feb. 24, 1990, at 469.

\textsuperscript{115} See Smith, supra note 21, at 1178.