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Proposed Ban on Contacts with Agents of Foreign Governments

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THE WHITE HOUSE

WASHINGTON

20 July 1995

MEMORANDUM FOR LEON PANETTA
ERSKINE BOWLES

CC: MICHAEL WALDMAN
GEORGE STEPHANOPOULOS

FROM: Harold Ickes HI
Jennifer O'Connor J O'C 7/21/95

SUBJECT: Agency positions on a proposed ban on contacts with agents of foreign governments

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We requested the views of several key agencies and White House staff members regarding a proposal to issue an Executive Order to ban all Executive Branch officials from contact with registered agents of foreign governments when the contact is for the purpose of influencing the U.S. government on behalf of foreign governments. The proposal would ban contacts with corporations that are wholly or majority owned by foreign governments as well. There would be exceptions for lawyers in litigation or administrative proceedings (including informal proceedings). The Domestic Policy Council presented some positive views which are outlined below, beginning on page two. The agencies (State, USTR, DOJ, Treasury, Commerce) and the NSC raised a variety of concerns, which we have also outlined below, see page two. Mickey Kantor does not agree with the proposal and instead offered three different proposals for how to accomplish the same goals; these alternatives are outlined below, beginning on page six, and include a) maintaining a public record of lobbyists who contact USTR on behalf of foreign entities; b) establishing an Administration task force to consider controlling contacts with agents for foreign entities; or c) fully enforce the Foreign Agents Regulation Act.

Attached as an appendix are the memoranda from: USTR
Michael Waldman
NSC
State Department
Commerce Department
Justice Department

Bill Curry was asked for his views but did not submit anything.

The arguments in favor of the ban are that it would:

1) **Fix a serious problem.** The U.S. is the only country in which government officials routinely "switch sides" immediately upon leaving office, using their knowledge and contacts to lobby for our competitors. Japan, in particular, spends significant money to bend our trade policy, and it has had a real impact in previous administrations. (DPC)

2) **Target Republicans.** The Dole campaign will include many foreign lobbyists, and general Republican indifference to this issue may mean that "GOP government for the special interests" will be a winning wedge message next year. The Administration dealt with its own "revolving door" issue through the President's ethics pledge. We could now target GOP ex-officials who continue to act as foreign lobbyists. The President can name names, pick fights such as Dole did with Hollywood, while retaining the support of the press. (DPC)

3) **Appeal to Perot voters.**

Arguments made by the agencies against the proposed ban are that it would:

1) **Produce a devastating reciprocal impact.** In reaction, other countries may very well decide to ban their own employees from meeting with U.S. attorneys and consultants representing the federal government or U.S. companies. State, Commerce, USTR, and other agencies occasionally hire attorneys and consultants abroad to discuss foreign law issues. DOD hires foreign nationals to undertake a variety of tasks in foreign countries to enable it to operate effectively overseas. Examples include facilitation of supply procurement and real estate concerns. State hires foreign nationals for similar purposes, including our counter-drug program and negotiations on technical issues. (USTR, State).

2) **Fail to achieve what it promises.** Such an Executive Order could fail to achieve what it promises, inviting criticism. The overwhelming majority of foreign lobbying is done by representatives of foreign firms, but the Executive Order will only cover representatives of foreign governments and corporations substantially owned by foreign governments. In addition to failing to stop a significant portion of foreign lobbying, exempting foreign firms from the ban could appear inconsistent with our goals; indeed, the press would immediately look at who lobbies for corporations, to see who benefits from our "loophole," and would likely find many of the administration's friends. A proposal for fixing this shortcoming would be to limit the ban to one agency (USTR) and ban contacts by foreign firms as well as governments. Limiting the scope of the ban but closing the loopholes will better safeguard us from criticism.

   In addition, because most contacts are legal in nature, most foreign lobbying will not be eliminated by the ban due to its litigation and administrative proceedings exemption. (Treasury, USTR).

3) **Create enforcement and implementation problems.** The ban would create a burden for Executive Branch employees to identify every person with whom they speak on a policy matter. Each official would have to determine whether the lobbyist is registered and for what policy matter his/her registration applies. Also, it encourages lobbyists not to identify themselves to government officials, because the burden is on the official, not the lobbyist. The ban could also create embarrassment and unnecessary litigation because it might apply to even seemingly casual contact at social functions (DOJ).

4) **Negatively impact litigation involving foreign governments.** Whereas Treasury and USTR believe that the litigation exemption may be so broad as to negate the intent of a "ban," Justice and State believe the exemption may be too narrow. According to State, the exemption extends to attorneys representing foreign principals before "any court of law," but only insofar as they abstain from informal attempts to "influence" or "persuade" agency personnel outside of "established agency proceedings." Attorneys representing foreign governments, sometimes request that the U.S. enter a lawsuit on behalf of a government which is not a party to the suit. Foreign attorneys make such requests because the potential lawsuits may impact their client's foreign policy. State believes such requests are appropriate but they are concerned because they believe these requests may fall outside of the exemption. (State, Treasury).

   Additionally, the proposed litigation exemption, according to State, would create perverse incentives. Foreign governments that wished to employ U.S. counsel to assist in the resolution of disputes involving the U.S government might be encouraged by the proposed restriction to file suit rather than engage in discussions to settle matters amicably. (State, Treasury).

   The Executive Order could probably be drafted to eliminate the uncertainty and to include informal legal proceedings like settlement discussions.

5) **Send the wrong signal.** Such an Executive Order could send the message that the Administration does not have confidence in its appointees to hear arguments put forward by representatives hired by foreign governments. However, the President's speech announcing the proposal can probably eliminate this potential pitfall (Treasury).

6) **Hurt our policy interests.** There are a variety of policy reasons why it would be in our interest to allow foreign governments to use U.S. representatives. Mexico, for example, needed counsel that knew U.S. law and process to work out the Exchange Stabilization Fund agreements. (Treasury).

   In addition, the Executive Order would shut down legitimate trade and export promotion activities that currently provide jobs and improve the economies of the U.S.

and other countries. (Commerce).

Moreover, negotiations on commercial satellites, fisheries and the use of national and international waters would be severely restricted by the ban. Export and import licensing and enforcement would be extremely difficult. Telecommunications discussions with other countries would be diminished and advisory councils could be effectively eliminated or become purposeless. (Commerce).

7) **Hurt U.S. firms.** Because the entire firm of any registered agent would be covered by the Executive Order, entire law and public relations firms may be precluded from broad scale representation. (Commerce, USTR).

8) **Hurt small countries.** The Executive Order would create a strong bias against smaller countries which cannot afford maintenance of large U.S. embassy operations, yet who need to monitor U.S. Executive Branch and legislative activity. They would have to hire more embassy staff just to be able to collect public information. (Commerce, DOJ).

9) **Rob us of the ability to impart and receive valuable information.** The Executive Branch could lose basic sources of commercial information from corporate, legal and trade representatives of all countries. Relying upon diplomatic channels solely for commercial intelligence would strain current State Department resources and embassy staff, and isn't a practical source of the broad range of information required for intelligent commercial policy formulation. (State).

For example, the Antitrust Division at the Department of Justice regularly makes policy determinations based upon communications with U.S. representatives of foreign governments. For instance, in recent negotiations over international uranium sales, representatives of foreign governments met with Justice officials to provide information, unavailable from other sources, about the international market and the role in the market of various governments and governmental entities. Similarly, representatives of foreign governments frequently play pivotal roles in negotiations over trade regulation; the governments whom they represent often prefer for strategic reasons to proceed through American representatives. (DOJ).

Moreover, U.S. government officials sometimes encourage foreign governments to include in delegations private individuals who possess special or expert knowledge. Such agents are often in the best position to articulate the views and concerns of their foreign government principals in complex, technical and quasi-commercial matters and to present, in turn, the U.S. response in an informed coherent matter. Examples include discussions: of various matters with agents representing Haiti; of loan guarantees and trade issues with Israel; of debt restructuring with debtor countries; of visa issues with Nigeria; of telecommunications issues with Central American countries; and resolution of claims with Nicaragua. The proposed bar would place

U.S. government officials in the awkward and untenable position of being permitted to communicate with certain members of foreign government delegations but not with others. (State, Treasury).

Some foreign governments use private individuals in the exploration of extremely sensitive foreign policy issues. For example, private intermediaries have been used in connection with Middle East negotiations and in connection with discussions about the establishment of diplomatic relations with Angola and the Angolan peace process. Private individuals have also been used by the IRA and have been instrumental in our negotiations over Northern Ireland. (Treasury, Commerce, USTR, State, DOJ).

10) **Create problems regarding inquiries from the Hill.** The proposed bar would undermine agencies' ability to respond to inquiries from the Hill. If foreign government agents succeed in prompting members of Congress to pressure any agency to take a particular stance on an issue, the agency would be unable to meet with such agents. (State, DOJ).

11) **Cut off dialogue with foreign associations and think tanks.** Many foreign governments, e.g. Brazil, China, and Korea, have U.S. based commercial and financial associations that receive government funding. The U.S. government addresses these groups and has them report to us on policy developments. Dialogue with these groups would be dramatically reduced by the proposed ban. The ban could also disrupt communications with well-connected foreign nationals and U.S. citizens in think-tanks, academe, government-connected institutions or corporations, and other private entities. (Treasury, State).

While the Departments raised this concern, it seems that we would neutralize it so long as the Executive Order referred only to <u>registered</u> foreign agents. Few of these entities or individuals register under FARA, so these concerns may actually be misplaced.

12) **Call attention to foreign lobbyists now employed by or associated with the Clinton administration.** Unilateral action on foreign lobbying would call attention to individuals who were foreign lobbyists before entering government service with our administration (Ron Brown, Sandy Berger, Pat Griffin, Charlene Barshevsky, etc.) or who are close to the administration (DNC Treasurer Scott Pasterick, Vernon Jordan, etc.). It would also raise questions about why -- if foreign lobbying is so bad per se that it must be banned -- we are willing to accept campaign contributions from those same foreign lobbyists. (DPC)

13) **Make us look silly.** In light of the Presidents' agreement with Speaker Gingrich to set up a "base-closing" style commission on lobbying reform, this proposal could look silly. Also, if we do not play the press correctly, the proposal could be interpreted as xenophobic by the elite press, and that message could ruin the positive message we

want to get out on this issue. (DPC)

Alternatives to the proposed ban would be to:

1) **Maintain a public record of lobbyists who contact USTR on behalf of foreign entities.** Under this proposal, USTR employees would be required to keep a record of lobbyists who contact USTR on behalf of foreign governments and foreign companies. This option could cover just oral contracts or oral and written contracts. USTR employees would be required to record the name and affiliation of the agent, the foreign entity represented, and the subject matter of the each contact. USTR would make this information available to the public.

   This option would increase transparency and provide the public with additional information on the activities of foreign agents. Given the public's interest in the extent of lobbying by foreign agents on behalf of foreign entities, the Administration may want to consider expanding this policy to cover all agencies that are contacted by foreign agents. (USTR)

2) **Create an Administration task force to consider controlling contacts with agents for foreign governments.** Under this proposal, the Administration would create a task force to consider ways to control contacts between Executive Branch officials and agents for foreign governments and entities substantially controlled by foreign governments.

   This option is designed to address public concerns about the relatively unfettered access that foreign lobbyists for foreign governments have to Executive Branch officials. In addition to considering ways to control contacts between Administration officials and foreign agents, the task force could examine campaign contributions made by foreign agents. Although U.S. law prohibits foreign entities from contributing to U.S. campaigns, lawyers and lobbyists for foreign entities are not restricted from raising and distributing funds to candidates. (USTR)

3) **Fully enforce the Foreign Agents Registration Act (FARA).** Although FARA requires individuals who represent "foreign principles" to register with the Justice Department when they engage in certain lobbying activities, FARA is not viewed as an effective statute for regulating foreign agents. In general, many foreign lobbyists do not register, and this law is not enforced.

   Under this proposal, the President would direct the Justice Department to devote additional resources to ensure that FARA filings are completed in full accord with FARA requirements. Periodic audits, with the possible aid of the FBI, would send an immediate message that neither partial nor total non-compliance would be permitted. A major problem with those applications which do get filled out is the cursory way in which information is submitted. One recent registrant, asked to identify his activities and services, answered "met with United States Government policy-makers (both Legislative and Executive)" without specifying which officials he met with or the nature of those meetings. This type of answer in not unusual.

Consequently, the Administration, consistent with its authority under FARA, should immediately insist that all registrants provide full information on each contact with federal officials. Finally, the Administration should make all FARA filings available to the public over the Internet, an easy step given that FARA filings are already computerized. (USTR)

ORIGINAL MEMOS

THE UNITED STATES TRADE REPRESENTATIVE
Executive Office of the President
Washington, D.C. 20506

19 July 1995

MEMORANDUM FOR HAROLD ICKES

FROM: MICHAEL KANTOR

SUBJECT: Foreign Lobbyists -- Options

This memorandum presents options for regulating the activities of foreign agents who lobby the executive branch on behalf of foreign governments and foreign companies. These options are designed to support the President's strong commitment to ensuring that his administration maintains the highest ethical standards and increases the public's confidence in government activities. There is no doubt that public anger about the revolving door and the influence of foreign agents is close to the surface and easily ignited. Americans are justifiably angry when they read that one-third of all former principal trade officials at USTR later became registered foreign agents, that one-half of all USTRs later lobbied on behalf of foreign businesses, and that four USTRs subsequently were hired to work for Japanese corporations.

One attempt to address these concerns is the Foreign Agents Registration Act (FARA) (22 U.S.C. §§ 611-621). FARA was enacted in 1938 largely as a result of the recommendations of a special Congressional committee that had investigated un-American activities and discovered that the Nazis had established an extensive underground propaganda apparatus in the United States using American firms and citizens. FARA has been amended several times, most significantly in 1966 as a result of Senator J. William Fulbright's study of "Non-Diplomatic Activities of Representatives of Foreign Governments." Senator Fulbright determined that many foreign governments had retained U.S. lawyers and public relations consultants to influence executive and legislative branch decision-making outside normal diplomatic channels. The 1966 amendments, which still form the core of the present Act, shifted the focus of the Act by placing primary emphasis on the protection of the integrity of the U.S. Government's decision-making process and the identification of the sources of foreign political propaganda.

Although the FARA requires individuals who represent "foreign principals" to register with the Justice Department when they engage in certain lobbying activities, FARA is not viewed as a particularly effective statute for regulating the activities of foreign agents. Critics contend that the registration and disclosure process is not adequately enforced nor adequately accessible to the public.

Consequently, I encourage you to consider the following options designed to deal more effectively with the revolving door and the influence of foreign agents:

<u>OPTION 1:</u> Maintain a Public Record of Lobbyists Who Contact USTR on Behalf of Foreign Entities.

Under this option, USTR employees would be required to keep a record of lobbyists who contact USTR on behalf of foreign governments <u>and</u> foreign companies. (This option could cover just oral contacts or both oral and written contacts.) USTR employees would be required to record the name and affiliation of the agent, the foreign entity represented, and the subject matter of each contact. (See attached draft USTR Foreign Agent Contact Form.) USTR would make this information available to the public in our public reading room.

This option would increase transparency and provide the public with additional information on the activities of foreign agents. Given the public's interest in the extent of lobbying by foreign agents on behalf of foreign entities, I encourage you to consider whether the Administration should expand this policy to cover all agencies that are contacted by foreign agents.

<u>OPTION 2:</u> Create an Administration Task Force to Consider Controlling Contacts with Foreign Agents for Foreign Governments.

Under this option, the Administration would create a task force to consider ways to control contacts between executive branch officials and agents for foreign governments and entities substantially controlled by foreign governments. This option is designed to address public concerns about the relatively unfettered access that foreign lobbyists for foreign governments have to executive branch officials.

The President has the power to control contacts between executive branch officials and foreign agents. Not only does Article II of the Constitution expressly grant the President general administrative control of those executing the laws, but Congress has expressly granted the President broad statutory authority to oversee and direct the operations of the executive branch. Most significantly in this case, Congress has authorized the President "to prescribe regulations for the conduct of employees in the executive branch." 5 U.S.C. § 7301.

In addition to considering ways to control contacts between Administration officials and foreign agents, the task force could examine campaign contributions made by foreign agents. Although U.S. law prohibits foreign entities from contributing to U.S.

campaigns, lawyers and lobbyists for foreign entities are not restricted from raising and distributing funds to candidates.

<u>OPTION 3:</u> Fully Enforce the Foreign Agents Registration Act.

Under this option, the President would direct DOJ to devote additional resources to ensure that FARA filings are completed in full accordance with FARA's requirements. Periodic audits, perhaps with the assistance of agents detailed from the FBI, would send an immediate message that partial compliance will not be tolerated. Currently, foreign agents often provide only cursory information to detailed questions under FARA. For example, FARA requires foreign agents to identify each foreign principal represented and to "describe in full detail your activities and services." One recent registrant, however, stated merely that it had "met with United States Government policy-makers (both legislative and executive)" without specifying which officials were contacted or the nature of the contacts. This registrant's incomplete submission is not unusual. Consequently, in accordance with FARA, the Administration should immediately insist that all registrants provide <u>full</u> information on <u>each</u> contact with federal officials. In addition, the Administration should make all FARA filings available on the INTERNET to give the public more access to the activities of foreign agents. This would be a relatively easy step, given that FARA filings already are computerized.

Let's discuss these options at your convenience.

June 1995

OFFICE OF THE UNITED STATES TRADE REPRESENTATIVE

Foreign Agent Contact Form

1. Name of USTR Employee:

2. Date of Contact:

3. Method of Contact:
Telephone Call __________
Meeting ________________

4. Name and address of the foreign agent AND his/her firm or organization.

5. Government or company the agent represents:

6. Subject matter of contact:

****

Instructions to USTR Employees:
Obtain from the individual the information listed above. Complete the form and send it to the "Foreign Agent" mail bin in Room 122 on the same day as the contact. The forms will then be delivered to the Reading Room on the same day.

THE WHITE HOUSE

WASHINGTON

July 18, 1995

MEMORANDUM FOR HAROLD ICKES

FROM: MICHAEL WALDMAN MW

SUBJECT: FOREIGN LOBBYING

Here are my thoughts. I'm of mixed minds about this. Political reform is a strong concern for Perot voters and independents, and we need to take some actions to break through to them. However, I am ambivalent about the specific proposal of "banning contacts with foreign lobbyists."

The undue influence of lobbyists and money, and the influence of foreign lobbying in particular, are legitimate issues that are important to us politically. The Dole campaign will be thick with foreign lobbyists, and the general Republican tone-deafedness on these issues may mean that "GOP government for the special interests" will be a winning wedge next year. We are, in fact, the only country I know of in which government officials routinely "switch sides" immediately upon leaving office, using their knowledge and contacts to lobby for our competitors. Japan, in particular, truly does spend a lot of money to bend our trade policy, and it has had a real impact (in previous administrations!). We have largely taken care of this problem for our own officials through the President's executive order.

We should take no action on foreign lobbying until we have reached clearer resolution on the Clinton-Gingrich political reform commission. We will look very silly if we take a unilateral step on this issue (or other political reform issues) without moving forward to implement our public agreement to set up a "base-closing" style commission on reform. In addition, we should give a speech or radio address on lobby reform before Bob Dole gets credit for it at the end of next week. This caveat is particularly true when it comes to foreign lobbying. Elites (editorialists, journalists etc.) support political reform, but think that attacks on foreign lobbyists are xenophobic. This is not an elite message in any event, but we won't get our message heard at all if we do not at least soften up the elites and press who will translate our actions.

Then, if we want to act unilaterally on foreign lobbying, we must be serious about our own house. This issue could easily blow up in our faces. As you know, we have many former and current foreign lobbyists in our administration and political family. If we go as far as banning contacts with foreign lobbyists -- which says, in effect, that being a foreign agent is per se a bad thing to be -- then we certainly can't take their campaign contributions, or give them leadership roles in our campaign.

If we conclude that a sharp unilateral action is necessary, we should limit it and make it real. Rather than banning lobbying by foreign governments -- which leaves only 90% of foreign lobbyists free to contact us -- we should limit it to one agency (USTR) and ban contacts by foreign firms as well as governments. In other words, limit the scope, but avoid the loopholes. If we cannot do this, it may just be that this is an issue that is not susceptible to a clean, sharp unilateral action.

If we do want to take on the foreign lobbying issue, we should take on the <u>real</u> foreign lobbying problem. I actually <u>do</u> think this is a legitimate issue and a genuine concern. We dealt with this revolving door issue for our own administration through the President's ethics pledge. Now we should target GOP ex-officials, who continue to act as foreign lobbyists, by proposing that former officials be banned from lobbying Congress or the White House on behalf of foreign firms and governments. (This would, in effect, codify our executive order.) The President can name names, pick fights *a la* Dole and Hollywood. And we'd have the support of the press.

* * *

A comment on the arguments made against taking action on foreign lobbying. Most of the arguments made are fallacious, in my view. I don't buy the idea that there is vital information we cannot get other than through U.S. lobbyists, that there's no more distinction between U.S. firms and foreign firms any more (*really?* I don't think that's our policy!), and other internationalist arguments that have been made. I think that reciprocity concerns are potentially legitimate, but frankly I have not seem them made all that compellingly.

NOTE: Bruce Reed is out on paternity leave, but he and I discussed this, and I believe we are in agreement. I would say that Bruce believes more strongly than I do that this is at least an issue with real appeal to Perot voters, and that we should find a way to do <u>something</u>.

THE WHITE HOUSE

WASHINGTON

July 6, 1995

INFORMATION

MEMORANDUM FOR HAROLD ICKES

FROM: ANTHONY LAKE

SUBJECT: Foreign Lobbying

You asked what impact there would be on the NSC's equities if the President were to prohibit Executive Branch employees from meeting with "foreign agents" of foreign governments. We are commenting only on the foreign policy implications, not administrative or enforcement issues presented by the proposal.

We have consulted with the State and Defense Departments, each of which believes that such a prohibition would have serious negative implications for the performance of their functions.

1. The prohibition could interfere with our ability to impart and receive information in the most efficient manner. It would disproportionately disadvantage small governments.

-- Such agents are often in the best position to articulate the views and concerns of their foreign government principals in complex, technical and quasi-commercial matters and to present, in turn, the U.S. response in an informed coherent matter. This is particularly the case when dealing with smaller countries. Some examples provided by the State Department include the discussion of various matters with agents representing Haiti; of loan guarantees and trade issues with Israel; of debt restructuring with debtor countries; of visa issues with Nigeria; of telecommunications issues with Central American countries; and resolution of claims issues with Nicaragua. The State Department sometimes encourages foreign governments to include private individuals on their delegations when specialized knowledge is required (e.g., bankers, for example, in a financial negotiation.)

-- Some foreign governments use private individuals in the exploration of extremely sensitive foreign policy issues. The State Department has provided as examples the use of private intermediaries in connection with the Middle East negotiations and in connection with discussions about the establishment of diplomatic relations with Angola and the Angolan peace process. Private individuals have also been used by the IRA.

-- The FARA exemptions would not, in State's view, protect the range of interaction it has with lawyers here or abroad on cases in litigation.

2. Both State and Defense also believe such a ban would have adverse impacts on U.S. interests overseas, if applied reciprocally. (We have not canvassed other agencies, like Commerce and AID, which State suggests also use agents overseas.)

-- Defense points out that the military hires foreign nationals to undertake a variety of tasks in foreign countries/ports to enable DOD to operate effectively overseas. Examples include facilitation of supply procurements and real estate matters.

-- State points out that there is no guarantee that reciprocal action, if taken, will be entirely symmetrical. (State General Counsel was aware of no country that currently restricts such activities, although State did not do a comprehensive review.) Depending upon what use of agents was prohibited by a foreign government, State indicates it could interfere with our counter-drug program, which uses contractors to deal directly with foreign government officials. State also indicates it frequently includes private experts in our negotiating teams to address technical issues.

Attachment
Tab A State Department Views

THE LEGAL ADVISER
DEPARTMENT OF STATE
WASHINGTON

June 30, 1995

VIA FAX

MEMORANDUM

TO: Mr. Alan J. Kreczko
Special Assistant to the President and
Legal Adviser to the National Security Council

FROM: Conrad K. Harper CKH

SUBJECT: Proposed Bar on Executive Branch Communications with Foreign Government Agents

You have asked for our comments on a proposal to prohibit representatives of the USG from communicating with agents of foreign governments (designated as such in accordance with the Foreign Agents Registration Act (FARA)). In our view, the proposed Executive Order raises a number of significant questions and concerns, and, if promulgated, would likely substantially impair the ability of the USG to receive and impart information in pursuance of its foreign policy objectives. We believe that these concerns are of sufficient magnitude as to counsel extreme caution and much more careful study before any action is taken on the proposal.

1. U.S. Litigation Involving Foreign Governments. State Department lawyers frequently interact with attorneys representing foreign governments with regard to a variety of litigation matters in the U.S. courts. We are concerned that FARA's section 3(g) exemption may not be broad enough to permit some of these communications should the proposed bar be implemented. The exemption extends to attorneys representing foreign principals before "any court of law," but only insofar as they abstain from informal attempts to "influence" or "persuade" agency personnel outside of "established agency proceedings." 22 U.S.C. § 613(g). Applicable regulations specifically designate attempts to influence the formulation of foreign policy as prohibited activities outside the course of agency proceedings. See 28 C.F.R. § 5.306.

The nature and scope of this exemption (which, we presume, would be incorporated into the proposed bar) raise two concerns. First, attorneys representing foreign governments have, in the past, communicated with the Department regarding lawsuits to which their foreign government principals are not parties. Such consultations might be intended, for example, to persuade the USG to exercise its policy discretion to enter a lawsuit in support of the foreign government's interest. Representations of this sort are not uncommon, are entirely appropriate in our view, and are beneficial to the formulation of U.S. foreign policy, yet they may fall outside the scope of the FARA exemption -- and could trigger the proposed bar -- because they may not relate to a proceeding before "any court of law" involving the foreign principal. The consequence of the proposed bar could thus be Draconian: Foreign governments would be restricted from employing U.S. counsel to present to the Department their views concerning U.S. litigation to which they are not formally a party. Foreign government officials not trained in U.S. law are obviously in a disadvantageous position to assume such responsibilities.

Second, we note that the litigation in which the Department is involved occasions communications that touch not only on the specific legal content of the matters at hand, but upon the foreign policy context in which legal proceedings are situated. The manner in which legal and foreign policy considerations are intertwined calls into question the ability of attorneys representing foreign governments in such situations to obtain a waiver. This, in turn, raises the question of how foreign governments could obtain legal representation in matters of a "mixed" nature if the proposed ban were in effect. (We note, generally, that the FARA Registration Unit at the Department of Justice has informed us that its practice is to read FARA exemptions narrowly; therefore, U.S. counsel may not be given the benefit of the doubt in the interpretation of the section 3(g) exemption.)

No matter the nature of the legal issue, the proposed bar constitutes a significant obstacle to foreign governments which seek the counsel of attorneys with whom they have established relationships. The proposed restriction would preclude all attorneys and law firms registered as foreign government agents for any reason from acting as counsel in any litigation matter. As we understand the proposal, any single communication giving rise to a registration obligation under FARA would prohibit registered parties from engaging in conduct that would otherwise be exempted under section 3(g). (One need only page through the Justice Department's published compilation of FARA filings to appreciate these consequences. DOJ's 1988-1991 FARA registration compilation spans more than 1,100 pages and 180 countries.) We note, in this regard, one of the flaws of the proposed bar: it operates to prevent communications with the Executive Branch even where there is no relationship between the communication in question and the activity giving rise to FARA registration. Thus, an agent may be registered under FARA for reasons entirely unrelated to the otherwise permissible nature of the communications he wishes to have with the Department, but the agent's status as a FARA registrant would nevertheless prevent such discussions from taking place.

FARA's litigation exemption would also create perverse incentives if the bar on foreign agent communications were implemented. Foreign governments that wished to employ U.S. counsel to assist in the resolution of disputes involving the USG might be encouraged by the proposed restriction to file suit rather than engage in discussions to settle matters amicably. For the bar would prohibit the USG from communicating with such representatives _unless_ such communications were in connection with a formal legal proceeding.

For all these reasons, we find the proposed restriction troubling. The Office of the Legal Adviser depends upon full, free, and robust communication with the legal representatives of foreign governments to carry out its functions and properly advise Department principals. The proposed bar threatens to restrict crucial lines of communication between the USG and foreign governments, as well as the discretion and ability of foreign governments to employ competent counsel well versed in their activities.

2. _Other Legal and Technical Communications with Foreign Government Agents_. Not infrequently, State Department officials (both within the Legal Adviser's Office and policymaking bureaus) also meet with counsel and other representatives of foreign governments in matters _unrelated_ to pending litigation. By way of example, the Department has met or negotiated with agents of:

- the Aristide government-in-exile to discuss a wide of range of issues including President Aristide's return to Haiti (since President Aristide's return, the

Department has had discussions with foreign agents regarding the status of forces in Haiti);

- the Government of Israel to discuss USG loan guarantees and trade issues relating to ethanol and textile imports;

- the Government of Kuwait to discuss a range of issues arising from the Iraqi invasion and the Gulf War including compensation issues and border questions being considered by the Iraq-Kuwait Border Commission;

- a number of debtor countries to discuss bilateral and Paris Club debt restructuring issues;

- the Philippines and a consortium of Central American governments to discuss telecommunications issues;

- the Government of Nicaragua to discuss resolution of U.S. expropriation claims;

- Antigua and Barbuda and Panama to discuss refugee transfers and safe havens;

- the Government of Chile to discuss extradition requests;

- Nigeria to discuss visa issues;

- the Governments of Jamaica and the Bahamas to consult regarding drug interdiction;

- the El Salvadoran government to discuss military assistance and other issues;

- Panama to engage in negotiations over the status of Panama Canal;

- the Angolan government to discuss the establishment of diplomatic relations and the Angolan peace process.

The proposal in question would bar these communications, thereby preventing the USG from consulting with representatives who are often in the best position to articulate the views and concerns of their foreign government principals in complex, technical, and quasi-commercial matters, and from presenting, in turn, the U.S response in an informed, coherent fashion.

Smaller governments with less sophisticated diplomatic or consular operations are especially prone to rely on agents in matters requiring special and expert knowledge. Indeed, prohibiting communications between U.S. officials and foreign government agents would likely disproportionately disadvantage small or unsophisticated governments. More than that, a bar on agent communications in cases where foreign government officials lack the necessary competence would substantially impair the Department's ability to obtain the information it needs to make accurate assessments and formulate policy effectively.

More developed and less developed countries alike may well perceive the proposed bar as an inappropriate and unjustified limitation on their prerogative to select interlocutors. Foreign governments would not be the only parties to object to the bar. If its vocal opposition to legislative proposals to strengthen FARA in recent years is any indication, the U.S. Bar would undoubtedly object strenuously to the contemplated restriction.

3. Other Foreign Policy Communications

The ban in question would likely disrupt the Department's communications with well-connected foreign nationals and U.S. citizens in think-tanks, academe, government-connected institutes or corporations, and other private entities. Such discussions frequently constitute an important "back door" channel for sensitive foreign policy matters. The United States may itself send private individuals as Special Envoys to convey particular messages or perform special missions, such as was done through Jimmy Carter in Haiti and South Korea. Such individuals, whether foreign nationals or U.S. citizens, are by no means "lobbyists" in the traditional sense; yet, because of their close links to a foreign government or the nature of their mission, they would very often fall within the registration requirements of the FARA. Consequently, USG officials would be prohibited from communicating with them.

4. Communications with Foreign Government Delegations. In both bilateral and multilateral settings, USG officials have, in the past, interacted with foreign government delegations which include private individuals who would likely fall within FARA's definition of "foreign agent." Indeed, USG officials sometimes encourage foreign governments to include in delegations private individuals who possess special or expert

knowledge (bankers, for example, in the context of negotiations concerning financial matters). The proposed bar would place USG officials in the awkward and untenable position of being permitted to communicate with certain members of foreign government delegations but not with others.

5. Responding to Foreign Agent Advocacy in the Congress. The proposed bar would undermine the Department's ability to respond to inquiries from Capitol Hill. That is, if foreign government agents succeed in prompting members of Congress to pressure the Department to take a particular decision or action, we would be unable to meet with such agents, whether for informational purposes or for possible resolution of the matter in question.

6. The Threat of Reciprocal Restrictions. We are concerned that the proposed ban may prompt foreign governments to adopt reciprocal restrictions on USG agents. There is no guarantee that the reciprocal action taken will be entirely symmetrical; prohibitions imposed by foreign governments might well be broader and more disruptive than the bar currently being contemplated. Reciprocal action could affect the Department's foreign policy functions and USG activities in a number of ways:

a. More than 1,500 lawsuits against the USG are currently pending around the world. The Departments of State and Justice work closely with local counsel in defending against these lawsuits. A reciprocal restriction on the activities of foreign government agents could hinder the activities of our local counsel and thereby impair the defense of these lawsuits. It would also potentially obstruct the activities of local counsel hired by the USG in a range of matters unrelated to litigation (e.g., the negotiation of contracts, and commercial and real estate matters.)

b. Reciprocal restrictions would also impair the Department's ability to utilize contractors abroad in a variety of functions. Our counter-drug program, for example, (which operates in Andean countries and other locations) makes considerable use of contractors who deal directly with foreign government officials. These counter-drug efforts would be directly threatened by reciprocal restrictions on the activities of USG agents.

c. USG delegations to multilateral conferences and other international fora often include private sector experts and even NGO representatives; such individuals bring to our delegations special and expert knowledge. (Private sector experts comprise, in fact, the large part of our delegations to conferences and negotiations dealing with the development of private international law). Reciprocal restrictions on foreign government agents might well prohibit the participation of these private individuals in such meetings.

d. It is our understanding that AID and DOD employ contractors in foreign countries on a regular basis. A reciprocal restriction on foreign agents could undermine the functions and activities of these contractors. It might be advisable to inquire if AID, DOD, Commerce, DOE, DOJ and other agencies have views on the potential consequences of restrictions on USG contractors and other agents and representatives operating abroad.

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CKA for

USTR

BANNING CONTACTS WITH FOREIGN AGENTS -- POTENTIAL PROBLEMS

o Scope. Does the policy cover just agents for foreign governments or agents for foreign companies as well? If the policy is limited to agents for foreign governments, does it include agents for foreign companies that are substantially controlled by foreign governments? If the policy is limited to agents for foreign governments, some observers will question why the policy does not apply to agents for foreign companies as well.

o What activities are covered by the policy? For example, would the policy extend to formal and informal agency proceedings, such as dumping and countervailing duty investigations and debt restructuring? Would the policy cover oral and written communications? What about requests by foreign agents for public information?

o Reciprocity. Prohibiting USG employees from meeting with lobbyists for foreign governments and foreign companies could lead some foreign governments to prohibit their employees from meeting with agents representing the USG and U.S. companies. State, Commerce, USTR, and other agencies occasionally hire attorneys and consultants abroad to discuss foreign law issues with foreign governments and U.S. companies regularly retain foreign counsel to represent their interests before foreign governments.

o The USG would lose some of its ability to collect valuable information and influence foreign government and foreign company decision-making if USG employees cannot meet with foreign agents. Experienced U.S. attorneys and consultants acting as foreign agents sometimes prove useful to the USG in cases where the foreign government or the foreign company does not understand USG procedures.

o What are the Constitutional/free speech ramifications?

o Many friends and supporters of the Administration are foreign agents.

UNITED STATES DEPARTMENT OF COMMERCE
Office of the Secretary
Washington, D.C. 20230

July 6, 1995

MEMORANDUM FOR Harold Ickes

FROM: William W. Ginsberg
Chief of Staff

SUBJECT: Proposed Executive Order

With respect to the proposed executive order discussed with Jennifer O'Connor this morning, the Commerce Department vigorously opposes such a proposal. It would cripple all United States trade policy, and would effectively shut down the overwhelming amount of legitimate trade and export promotion activities that currently provide jobs and improve the economies of the U.S. and other countries.

Additionally, this order would create a strong bias against small countries of the world who can't afford maintenance of large U.S. operations. It would affect negatively countries who have representatives here in the United States monitoring legislation and government actions.

The proposed executive order would affect issues other than trade. Negotiations on commercial satellites, fisheries and use of national and international waters would be severely restricted. Export and import licensing and enforcement would become extremely difficult. Telecommunications discussions with other countries would be diminished. Advisory councils could be effectively eliminated or become purposeless.

While the Foreign Agents Registration Act requires individuals to register, certain ethics regulations attribute an individual's registration to apply to the firm with whom the individual is associated. In these cases, entire law firms or public relations firms may find themselves precluded from broad scale representation.

Finally, such an order would cause the executive branch to lose a basic source of commercial information from corporate, legal and trade representatives of all countries. Relying upon diplomatic channels solely for commercial intelligence would strain current State Department resources and embassy staff, and isn't a practical source of the broad range of information required for intelligent commercial policy formulation.

Please call me if you would like to discuss this further - 482-4246.

Treasury

Treasury's Concerns Regarding Issuing Executive Order:

-- Contacts with US lawyers representing countries' commercial bank debt restructurings would be prohibited - cutting off Treasury from crucial technical information.

-- Many think tanks have foreign gov't support -- access to them would be cut.

-- Various gov'ts have US based commercial and financial associations -- Brazil, Republic of China, Korea etc.. -- all with gov't funding. We speak to these groups at annual meetings, receive visits, have them report to us on developments. All this would be cut. ?

Other Concerns:

o It would send a negative signal.

-- In essence, it says the President does not have sufficient confidence in his appointees to permit them to hear arguments put forward by representatives hired by foreign governments.

-- More graphically, it says Amb. Kantor is qualified to run trade policy but not capable of being unduly influenced by a foreign government representative.

o It would not do what it says, inviting criticism.

-- The necessary exceptions -- such as representing a government in a countervail case against government subsidies -- will cover the great majority of current contacts.

-- It will not cover contacts with representatives of foreign firms (other than majority-owned). Most foreign lobbying is done by the representatives of foreign firms. ?

o If the necessary exceptions are not made, damage will be done. For example, Mexico needed counsel that knew US law and process to work out the Exchange Stabilization Fund agreements.

U.S. Department of Justice

Office of the Deputy Attorney General

Associate Deputy Attorney General

Washington, D.C. 20530

MEMORANDUM

TO: HAROLD M. ICKES
Assistant to the President

FROM: SETH P. WAXMAN SPW
Associate Deputy Attorney General

RE: Proposed Ban on Contacts with Lobbyists for Foreign Governments

DATE: July 6, 1995

CC: HON. ABNER J. MIKVA

I understand the Administration is considering a proposal to issue an Executive Order banning executive branch officials from contact with lobbyists for foreign governments. As you know, the Office of Legal Counsel is currently appraising the constitutionality of such an Executive Order.

Yesterday afternoon, we were asked by White House Counsel to provide you with a tentative analysis of the potential <u>policy</u> implications of such a ban, particularly with regard to the interests of the Department of Justice. Because of the short time we have had to prepare this memorandum -- and indeed to consider the policy implications of a ban on contacts with lobbyists for foreign governments[1] -- the analysis in this memorandum is only preliminary. Moreover, because neither this memorandum nor its conclusions have been reviewed by the Attorney General or the Deputy Attorney General, nor have they otherwise been formally vetted within the Department, the views expressed herein do not reflect a formal Department position. Nonetheless, I think it is fair to state that the Department would likely conclude that the proposed Order presents several serious drawbacks and few advantages. It would unwisely shield Department and other executive branch officials from access to

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[1] Prior to this time, we have been concerned only with the legal and constitutional implications of such an Order.

valuable information, and it likely would raise a host of practical problems in implementation and enforcement.

I. The proposal

The proposed Executive Order would ban all executive branch officials from contact with registered agents of foreign governments when the contact is for the purpose of influencing the U.S. government on behalf of foreign governments. The order would include corporations that are either wholly-owned or majority-owned by foreign governments. All direct contacts (meetings, calls, letters, chance encounters) would be prohibited, but reading newspaper advertisements or hearing public lectures would presumably be excluded. The definition of registered agents of foreign governments would largely track the definition of agency in the Foreign Agents Registration Act (FARA), although it would be limited to foreign governments, while FARA covers agents of all foreign "principals." There would be exceptions for lawyers engaged in litigation or administrative proceedings.

Add

II. Discussion

The proposal appears to be designed to guard against overreaching and undue influence -- or the perception thereof -- by paid lobbyists for foreign governments. But on even cursory reflection, the proposal seems to have serious drawbacks. The proposed Order almost certainly would pose myriad problems of implementation and enforcement. And even assuming that the Order could be clearly implemented and enforced, it would deprive the Department of Justice contacts that are important to its orderly and effective operation -- particularly the Antitrust Division. We outline these inherent problems first, and then discuss some of the enforcement and implementation problems posed by the proposed Order.

A. <u>The Proposed Order Would Prevent Access to Potentially Valuable Sources of Information</u>.

In banning contacts with representatives of foreign governments on policy matters affecting those governments, the proposed Order would eliminate a regular source of valuable information for Department policymakers -- particularly in the Antitrust Division. That division regularly makes policy determinations based upon communications with U.S. representatives of foreign governments. For example, in recent negotiations over international uranium sales, representatives of foreign governments met with Department officials to provide information, unavailable from other sources, about the international market and the role in the market of various governments and governmental entities. Similarly, representatives of foreign governments frequently play pivotal roles in negotiations over trade regulation; indeed, the governments whom they represent often prefer for strategic reasons to proceed through American representatives. For these reasons, the Antitrust Division in particular voices serious concerns about the proposed Executive Order.

Other components in the Department, such as the Criminal and Civil Divisions, share those concerns, although they would be less affected by the proposed order, so long as the litigation exception was carefully written to exclude attorneys engaged in litigation with those Divisions. However, the Criminal Division's Registration Unit in charge of the Foreign Agents Registration Act has constant contacts with the foreign agents it registers, and those contacts often touch upon policy matters -- from changes in legislation to whether a particular agent must register and pay its fees. Divisions that work with foreign governments on international treaties or joint policing operations also have some contacts with agents of those governments. Of course, such contacts are widespread in other departments such as State, Commerce, Defense, Energy, and the USTR.

Preventing foreign governments and their corporations from using lobbyists, when the same lobbyists may be hired by domestic firms and interest groups, also raises an issue in its differential treatment of domestic and foreign competitors. It is not clear why government officials should listen to foreign governments and their corporations less than to domestic interests. What is more, foreign lobbyists will still be able to lobby Congress. Small countries who cannot afford to maintain large diplomatic missions, but rely instead on hiring lobbyists to advocate their interests on particular issues, will be especially affected.

In general, the prohibition on all contacts seems an unduly broad response to a concern about misleading or improper lobbying of government officials by foreign agents. FARA currently requires lobbyists representing foreign governments to identify themselves as such when they speak to government officials. Those officials are no less able to identify potential bias in the views of lobbyists for foreign governments than in the views of other representatives.

B. The Order Would Likely Create a Wealth of Enforcement and Implementation Problems.

The proposal also raises major difficulties of enforcement and implementation.

First, the proposed Order would regulate the conduct of executive branch officials, not lobbyists. It thus would impose a burden on officials to determine the identity of every person with whom they speak on a policy matter. The official must determine both whether the lobbyist is registered, and for what policy matter his registration applies. Failure to comply presumably would be sanctionable in some as-yet undetermined fashion.

Second, the proposed Order would be a continual source of potential embarrassment and, perhaps, litigation. Since the Order is not limited to contacts on official premises or while an official is "on duty," it would apply even to seemingly casual interaction at social functions. Allegations of improper contacts could be easily levelled. Whatever short-term advantages would be gained by announcing the new Executive Order would likely be more than outweighed by repeated charges of violation.[2]

Third, because the Executive Order puts the burden of identification squarely on the government official, it may encourage lobbyists not to identify themselves as such to government officials, since the officials will not be able to speak with them once they are identified. Such a result cuts against the sunshine spirit of FARA, which encourages disclosure of lobbyists' identities and purposes, and against the goal of enabling government officials to know who lobbyists are.

Fourth, the proposal's distinction between agents of private foreign corporations (permitted) and foreign governments (prohibited) will be nearly impossible to enforce. In many countries, close ties between industry and government make the distinction nearly meaningless for the purposes of the proposal. Indeed, governments may get around the proposal by using private corporations' agents as their unofficial, unpaid surrogates.

Fifth, the "lawyers' exemption" in the proposed Order in fact may be less broad than is being assumed. Specifically, we are uncertain whether the exception for "formal or informal" agency proceedings in fact would be sufficiently broad to cover "anti-dumping or countervailing duty proceeding; debt restructuring; and other similar

[2] At a minimum, the order should clearly specify that it creates no private right of action, although even that proviso would likely be insufficient to prevent claims premised on violation of the order.