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#93006

NO. STATE OF NEBRASKA
OFFICIAL
FEB 9 1993
DEPT. OF JUSTICE

DATE: February 8, 1993

SUBJECT: Constitutionality of LB 601 - Restricting Former Senators from Lobbying Activity

REQUESTED BY: Senator Curt Bromm, Nebraska Legislature

WRITTEN BY: Don Stenberg, Attorney General
Steve Grasz, Deputy Attorney General

You have requested an Attorney General's Opinion concerning the constitutionality of LB 601, your bill which prohibits past state senators and certain past staff members from engaging in lobbyist activities for a period of time.

Under the terms of LB 601, as introduced,

> No state senator shall engage in lobbying activities as a registered lobbyist for four years from the date he or she ceases to be a state senator, except that any person who was a state senator within such time and was registered with the Clerk of the Legislature as a lobbyist on January 11, 1993, shall be exempt from this subsection.
>
> No permanent staff member of the Legislature or of a state senator shall engage in lobbying activities as a registered lobbyist for two years from the termination of the most recent employment with the Legislature or state senator. . . .

The bill also exempts those staff members who were registered lobbyists on January 11, 1993.

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In *Eastern R.R. Presidents Conference v. Nocra Motor Freight*, 365 U.S. 127, 138 (1961), the Supreme Court recognized lobbying as a part of the right to petition. Lobbying therefore falls under the umbrella of protection provided by the First Amendment.[1] If LB 601 is subjected to a strict scrutiny test, it must be narrowly drawn and further a compelling governmental interest to pass constitutional muster.

Over twenty states have enacted legislation similar to LB 601. *See* Schmitz, A Survey of State Post-Employment Restrictions, in "The Revolving Door:" Ethics In Government Service 30, 58-63 (1980). The United States Congress has also restricted lobbying activities of its past members and certain members of their staff. *See* 18 U.S.C.A. § 207 (Supp. 1990). The compelling governmental interest usually identified to support lobbying restrictions on former legislators is the avoidance of the appearance of, and actual impropriety. Specifically, conflicts of interest are avoided by restricting for a time the use of any special influence or knowledge that a former legislator or staff member may have acquired while still in governmental service.

LB 601 is not drafted as narrowly as many similar statutes restricting lobbying activities of former legislators. LB 601 is broader in some respects, the first being that LB 601's restrictions are longer and appear to encompass a greater range of activity.

The length of time other states restrict past legislators lobbying activity range from "the months following voluntary termination" in Montana, Mo.Ann.Stat. §2-2-105(3) (Vernon Supp. 1989) to three years in Alabama, Ala.Code §36-25-13 (1990). LB 601's proposed four year restriction on former state senators is the longest such restriction of which we are aware. However, on the federal level, 18 U.S.C.A. §207 (the Ethics Act) provides for different degrees of restriction on executive branch employees depending on their level of involvement in particular matters while employed with the government. These restrictions begin with high-ranking former executive branch employees being banned for life from representing any person before an agency or department on a matter in which the employees substantially and materially participated, 18 U.S.C.A. §207(A). In contrast, the Ethics Act restricts the legislative branch from post-employment lobbying for

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[1]Likewise, restrictions on lobbying implicate Article I, section 5 of the Constitution of the State of Nebraska which states, "Every person may freely speak, write and publish on all subjects. . . ." For purposes of this opinion, the constitutional analysis of the state and federal provisions is the same.

only one year. This disparity may be due to the fact that Congress, as a bicameral system becomes more cumbersome and dilutes the influence of former members more quickly than the executive branch. For similar reasons that the Ethics Act poses greater restrictions on the executive branch than on the bicameral legislative branch, it is arguable that Nebraska's unicameral system demands the longer restriction of four years in order to achieve the same results that bicameral states can in two years.

LB 601 also appears to encompass a greater range of activity than similar laws in other states. Many other states restrict lobbying activity only in regard to matters in which the lobbyist was directly concerned and personally participated during his/her time as a legislator. *See e.g.*, Iowa Code Ann. §68B.7. However, it is again arguable that Nebraska's unique unicameral system may require LB 601's broader scope in order to effectuate its purpose. In a unicameral system, senators are directly concerned with and personally participate in nearly all matters. Therefore, read in the context of Nebraska's unique unicameral system, LB 601 may not actually restrict any more activity than similar statutes in other states.

The final respect in which LB 601 is broader than many other post-employment restriction statutes is that LB 601 is in no way linked to the pecuniary interests of the former legislators. As a result of this, former legislators may be in violation of this bill for attempting to further a purely personal interest. This application of the bill could be found overbroad and thus a violation of the constitutional right to petition granted by the First Amendment. To remedy this problem, it is suggested that paragraph five be amended to read:

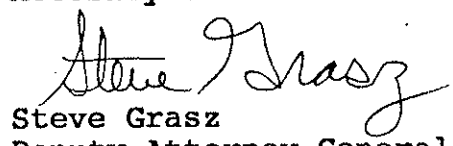
> No state senator shall engage in lobbying activities as a registered lobbyist <u>for compensation</u> for four years from the date he or she ceases to be a state senator. . . .

In conclusion, LB 601 promotes the compelling state interest of avoiding the appearance of, and actual, impropriety in lobbying activity. Although LB 601 is broader in its restrictions than many similar state and federal statutes, Nebraska's unique unicameral system may require broader restrictions to achieve the same ends.

Therefore, if amended as suggested, we believe that LB 601 is sufficiently narrow in its scope to pass constitutional muster.

Sincerely yours,

DON STENBERG
Attorney General



Steve Grasz
Deputy Attorney General

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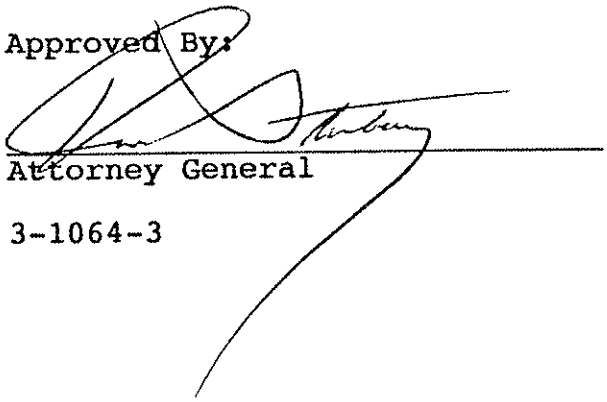

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