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Opinion No. 05-173

Limits on State Officials

## QUESTIONS

1. Would legislation be constitutional that prohibits an elected official or government employee from lobbying the government for a certain period of time after leaving government service?

2. Would legislation be constitutional that prohibits a citizen who is a lobbyist from running for elected office or entering government employment?

3. Would legislation be constitutional that forces an elected member of the General Assembly who is not otherwise employed by the State of Tennessee to give up his or her job in order to serve in the legislature?

## OPINIONS

1. & 2. A complete answer to these questions would require a review of actual legislation imposing these limits. Any legislation restricting or burdening the right to lobby must be narrowly drawn to further a compelling state interest. In addition, courts will weigh the competing interests in reviewing any legislation that limits the right to run for office or to government employment. The government must show that the interest in free expression is outweighed by that expression's necessary impact on the actual operation of government. Further, the government must demonstrate that the harms the legislation seeks to prevent are real, not merely conjectural, and that the regulation will in fact alleviate these harms in a direct and material way.

3. A complete answer to this question would require a review of actual legislation imposing these limits. The General Assembly may constitutionally restrict the non-legislative activities of state legislators that interfere with their ability to fulfill their official responsibilities. The standard under which any restriction would be reviewed would depend on the interest the legislation furthers and the scope of the restriction. The current ban on paid lobbying by legislators is constitutional because it is narrowly drawn to further a compelling state interest in preventing corruption or the appearance of corruption, ensuring the efficient operation of state government, and ensuring that officials and employees are able to exercise their judgment in the public interest. Further, a court would likely conclude that an individual's interest in engaging in paid lobbying on the state level while serving as a legislator is outweighed by the public interest in avoiding

corruption or the appearance of corruption, ensuring the efficient operation of state government, and ensuring that legislators exercise their judgment in the public interest. We think it can be demonstrated that the harms the ban seeks to prevent are real and that the ban will in fact alleviate them in a real and material way.

## ANALYSIS

1. Restrictions on Lobbying by Public Officials and Employees

This opinion addresses restraints the General Assembly may place on the right to hold public office or public employment. The first question is whether the General Assembly, by statute, may constitutionally prohibit an elected official or government employee from lobbying the government for a certain period of time after leaving government service. A complete answer to this question, of course, would require a review of actual legislation imposing these limits. Discussed below are the standards under which such legislation would be reviewed.

As this Office has noted in the past, the right to lobby is protected by the First Amendment to the United States Constitution. Op. Tenn. Att'y Gen. 05-054 (April 20, 2005); Op. Tenn. Att'y Gen. 05-067 (May 3, 2005). This protection extends to paid lobbying. *Id.* At the same time, the United States Supreme Court has acknowledged that governments have a legitimate interest in regulating lobbyists. *See McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 356 n. 20, 115 S.Ct. 1511, 1523 n. 20, 131 L.Ed.2d 426 (1995) ("The activities of lobbyists who have direct access to elected representatives, if undisclosed, may well present the appearance of corruption."). Thus, courts have upheld laws regulating and monitoring the activities of lobbyists. *See, e.g., United States v. Harriss*, 347 U.S. 612, 74 S.Ct. 808, 98 L.Ed. 989 (1954) (holding that federal lobbying act does not violate lobbyists' constitutional guarantees of freedom of speech and petitioning the government).

However, the United States Supreme Court has also long recognized that "statutes attempting to restrict or burden the exercise of First Amendment rights must be narrowly drawn and represent a considered legislative judgment that a particular mode of expression has to give way to other compelling needs of society." *Broadrick v. Oklahoma*, 413 U.S. 601, 611-612, 93 S.Ct. 2908, 37 L.Ed.2d 830 (1973) (citations omitted). The Tennessee Supreme Court has adopted this standard when reviewing the constitutionality of statutes that may infringe upon First Amendment guarantees:

> The United States Supreme Court has made it clear "that regulation of First Amendment rights is always subject to exacting judicial review." *Citizens Against Rent Control v. City of Berkeley*, 454 U.S. 290, 294, 102 S.Ct. 434, 436, 70 L.Ed.2d 492 (1981). Under this standard of review, the State must demonstrate that the burden placed on free speech rights is justified by a compelling State interest. The least intrusive means must be utilized by the State to achieve its goals and the means chosen must bear a substantial relation to the interest being served by the statute in question.

*Bemis Pentecostal Church v. State*, 731 S.W.2d 897, 903 (Tenn. 1987), *appeal dismissed*, 485 U.S. 930, 108 S.Ct. 1102, 99 L.Ed.2d 264 (1988), *rehearing denied*, 485 U.S. 1029, 108 S.Ct. 1587, 99 L.Ed.2d 902 (1988).

In order to survive constitutional scrutiny, therefore, any law prohibiting an elected official or a government employee from lobbying after leaving office or employment must be narrowly tailored to further a compelling state interest. Preventing corruption or the appearance of corruption, ensuring the efficient operation of state government, and ensuring that officials and employees are able to exercise their judgment in the public interest are all valid compelling state interests. But the ban should be narrowly drawn to promote those interests without infringing on protected activity that does not undermine the interest. Clearly, for example, any "revolving door" legislation should be confined to ban lobbying for pay or other consideration. The ban should also target officials most likely to be able to exert undue influence, as well as areas where paid lobbying by the particular official or employee may be most effective.

The New York Court of Appeals upheld a law permanently banning former executive officials and employees from appearing before their agency on a matter in which they were directly involved during their employment, and banning them from appearing before their agency on any matter for two years after employment. *Forti v. New York State Ethics Commission*, 75 N.Y.2d 596, 554 N.E.2d 876, 555 N.Y.S.2d 235 (1990); s*ee also*, *State v. Nipps*, 66 Ohio App.2d 17, 419 N.E.2d 1128 (Ohio Ct. App. 1979) (law banning public official or employee from representing a client before the public agency by which the official has been employed on any matter in which the official had directly participated for twelve months after leaving employment was not overly broad, vague, or unconstitutional on its face). On the other hand, the Office of the Iowa Attorney General has concluded that a two-year ban on lobbying by all former officials and employees would probably be ruled unconstitutional because it was not closely drawn in furtherance of a compelling state interest. Op. Iowa Att'y Gen. 93-1-4 (January 19, 1993). The opinion noted that federal law limitations at 18 U.S.C. § 207 on lobbying by former employees and officials were more narrowly drawn to target matters in which the employee was personally involved, or more general matters that a more highly placed official might be in a position to influence.

Any proposed restriction can also be analyzed as a limit on the right to hold public office or employment. The United States Supreme Court has recognized that there is no fundamental right to run for or hold public office. *Bullock v. Carter*, 405 U.S. 134, 92 S.Ct. 849, 31 L.Ed.2d 92 (1972). Courts have found that governments may limit the political activities of current government employees to ensure impartial execution of the laws and maintain public confidence in governmental fairness. *United States Civil Service Commission v. National Association of Letter Carriers AFL-CIO*, 413 U.S. 548, 93 S.Ct. 2880, 37 L.Ed.2d 796 (1973). But, in determining the validity of a restraint on job-related speech of public employees, a court must arrive at a balance between the interests of the employee as a citizen in commenting upon matters of public concern and the interest of the government, as an employer, in promoting the efficiency of the public services it performs through its employees. *United States v. National Treasury Employees Union*, 513 U.S. 454, 115 S.Ct. 1003, 130 L.Ed.2d 964 (1995), *citing Pickering v. Board of Education of Township High School District 205, Will County*, 391 US. 563, 88 S.Ct. 1731, 20 L.Ed.2d 811 (1968). The

government must show that the interests of both potential audiences and present and future employees are outweighed by that expression's necessary impact on the actual operation of government. 513 U.S. at 468, 115 S.Ct. 1003 at 1013. Where the government defends a regulation on speech as a means to redress past harms or prevent anticipated harms, it must do more than simply posit the existence of the disease sought to be cured; it must demonstrate that the recited harms are real, not merely conjectural, and that the regulation will in fact alleviate these harms in a direct and material way. 513 U.S. at 475, 115 S.Ct. at 1017 (quoting *Turner Broadcasting System v. Federal Communications Commission*, 512 U.S. 622, 664, 114 S.C. 2445, 129 L.Ed.2d 497 (1994)).

In *National Treasury Employees Union*, the United States Supreme Court invalidated a law prohibiting federal employees from accepting compensation for making speeches or writing articles, regardless of whether the subject of the speech, or the person or group paying for it, had any connection with the employee's official duties. The Court ruled on the law only as it applied to the lower-level employees who had brought the lawsuit and expressly refused to rule on the ban as applied to senior employees in the executive branch. The Court indicated that analyzing a ban on honoraria, as applied to senior executives, might involve weighing different governmental interests. The Court, therefore, suggested that a legislature may constitutionally place restrictions on the outside activities of higher-ranking officials even though the same restrictions, applied to employees in general, were unconstitutional.

Restrictions on the activities of employees and officials after leaving government would probably be subject to review under the same standards. Thus, a court would weigh the interest of the official or employee in lobbying after leaving office against the public interest in promoting the integrity of state government. The government must show that the interest in free expression is outweighed by that expression's necessary impact on the actual operation of government. Further, the government must demonstrate that the harms the legislation seeks to prevent are real, not merely conjectural, and that the regulation will in fact alleviate these harms in a direct and material way.

2. Prohibiting Lobbyists from Public Office or Employment

The second question is whether legislation would be constitutional that prohibits a citizen who is a lobbyist from running for elected office or entering government employment. We think any such legislation would be subject to the same standards of review as those applicable to restrictions on lobbying after officials or employees leave office. Thus, any burden on the right to lobby must be narrowly tailored to further a compelling state interest. Further, a court will weigh the interest of an individual to engage in lobbying while running for public office or serving as a government employee against the public interest in preventing corruption or the appearance of corruption, ensuring the efficient operation of state government, and ensuring that officials and employees are able to exercise their judgment in the public interest. The government must show that the interest in free expression is outweighed by that expression's necessary impact on the actual operation of government. Further, the government must demonstrate that the harms the legislation seeks to prevent are real, not merely conjectural, and that the regulation will in fact alleviate these harms in a direct and material way.

This Office has concluded that the General Assembly may not constitutionally ban any person required to register as a lobbyist from serving as the appointed member of any state or local board, commission, committee, or other entity having authority to formulate, implement, enforce, or recommend public policy. Op. Tenn. Att'y Gen. 05-067 (May 3, 2005). We concluded that this ban was not narrowly tailored because it applied regardless of the issues or agencies on which a particular lobbyist's activities were focused. Further, the legislation made no attempt to delineate those situations where a real conflict of interest exists. At the same time, this Office also noted that the interest in preventing corruption or the appearance of corruption has been found sufficiently compelling to justify a ban on some political activities by lobbyists. *Maryland Right to Life State Political Action Committee v. Weathersbee*, 975 F.Supp. 791 (Md. 1997). In that case, the United States District Court for the District of Maryland upheld a state law banning regulated lobbyists from serving as an officer or treasurer of a political committee that contributes to candidates for the General Assembly. The Court found that the ban was narrowly tailored to prevent political corruption and the appearance of corruption. The Court cited the defendants' articulation of this interest as follows:

> A lobbyist who also holds the purse strings of a political committee which donates money to a legislative candidate has the potential to exert tremendous influence over that legislator. Permitting a person to wear the hats of both lobbyist and political committee officer or treasurer increases markedly the likelihood that money will be traded for political favors.

975 F.Supp. 791 at 797 (quoting defendants' brief). The Court also noted that the law was passed in response to an actual influence peddling scandal involving a lobbyist and donations from several political committees the lobbyist controlled. Any restriction on the right of paid lobbyists to run for elective office or hold a government job, therefore, should be narrowly tailored to promote a compelling state interest; further, the public interest promoted by the restriction should outweigh the individual's interest in engaging in the particular type of lobbying. The government must show that the interest in free expression is outweighed by that expression's necessary impact on the actual operation of government. Further, the government must demonstrate that the harms the legislation seeks to prevent are real, not merely conjectural, and that the regulation will in fact alleviate these harms in a direct and material way.

3. Limits on Legislators

The last question is whether the General Assembly may pass legislation that would force an elected member of the General Assembly who is not otherwise employed by the State of Tennessee to give up his or her job in order to serve in the legislature. The constitutionality of this legislation depends on the activity it bans and the interest the ban serves. Where the legislation burdens the right to engage in paid lobbying, the restriction must be narrowly tailored to promote a compelling state interest. Further, the public interest in preventing the appearance of corruption, ensuring the efficient operation of state government, and in ensuring that legislators exercise their judgment in the public interest must outweigh an individual's interest in acting as a legislator and as a paid lobbyist. Further, the government must demonstrate that the harms the legislation seeks to prevent are real, not merely conjectural, and that the regulation will in fact alleviate these harms in a direct and material way. The restrictions on legislators imposed under 2005 Tenn. Pub. Acts Ch. 102 (the "Ethics Act"), for example, meet these standards. Under Tenn. Code Ann. § 2-10-123(a), legislators may not receive compensation from any entity other than the State, a county, or municipality for providing consulting services. Consulting services with regard to legislators includes services to advise or assist a person or entity in influencing state legislative or administrative action, including services to advise or assist a person in doing business with the State. Tenn. Code Ann. § 2-10-122(1). Prohibited compensation does not include anything of value that may be accepted under § 2-10-116 or identified in § 3-6-114(b) or (c). Tenn. Code Ann. § 2-10-122(3). Under Tenn. Code Ann. § 2-10-116(a):

> The acceptance of an honorarium by a public official in such person's capacity as a public official is prohibited. "Honorarium" means a payment of money or any thing of value for an appearance, speech or article, but does not include actual and necessary travel expenses, meals and lodging associated with such appearance, speech or article.

Under Tenn. Code Ann. § 3-6-114(b) and (c), state officials may accept certain gifts from a lobbyist or the employer of a lobbyist such as informational materials, sample merchandise, and food provided in connection with an event to which invitations are extended to the entire membership of the General Assembly, a committee of either or both houses of the General Assembly, or a delegation in the General Assembly from two or more senatorial districts. Tenn. Code Ann. § 3-6-114(c) provides:

> Nothing herein shall prohibit a city, county or chamber of commerce from hosting and/or funding an activity where the entire general assembly is invited as a group to a special activity within that governmental entity's jurisdiction. County and municipal groups, and state colleges and universities are exempted from the prohibitions in this section when access to facilities or events which they sponsor is permitted to all members of the general assembly, a standing or statutory committee of either or both houses of the general assembly,

or all members whose districts are located within the county of such group, college or university.

We think this ban is narrowly tailored to further the compelling state interests of avoiding the appearance of corruption, ensuring the efficient operation of state government, and ensuring that legislators exercise their judgment in the public interest. Legislators are in a unique position to influence state government action in both the executive and legislative branches, regardless of the subject matter or department at issue. Legislators hold the purse strings of state government. Their influence, therefore, extends beyond their power simply to vote for legislation. For this reason, the ban may constitutionally extend beyond lobbying before the General Assembly and include lobbying state executive agencies. We think the ban is narrowly tailored because it extends only to lobbying state government and excludes items like personal gifts and meals and travel expenses for giving a speech. Further, a court would conclude that an individual's interest in engaging in paid lobbying on the state level while serving as a legislator is outweighed by the public interest in avoiding corruption or the appearance of corruption, ensuring the efficient operation of state government, and ensuring that legislators exercise their judgment in the public interest. We also think it can be demonstrated that the harms the ban seeks to prevent are real, and that the ban will in fact alleviate them in a real and material way.

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