



Office of the
Deputy Assistant Attorney General

Washington, D.C. 20530

DEC 3 1986

Memorandum for David H. Martin
Director, Office of Government Ethics

Re: USIA Director's Service on the Board of the
United States Telecommunications Training Institute

This responds to your request of October 30, 1986, for an opinion on section 1307 of the Omnibus Diplomatic Security and Antiterrorism Act of 1986, Pub. L. No. 99-399, 100 Stat. 899. Specifically, you wish to know whether in our view this provision authorizes the Director of the United States Information Agency (USIA) to serve on the Board of Directors of the United States Telecommunications Training Institute (USTTI), and whether this provision also obviates any requirement imposed by 18 U.S.C. 208 that he disqualify himself from participating in governmental decisions affecting the financial interest of USTTI.¹

Section 208 prohibits, *inter alia*, an executive branch official from personally and substantially participating in any governmental matter that affects the financial interest of an entity in which he or she is serving as an "officer, director, or trustee." Ordinarily, section 208 would require that a government official be disqualified from taking any part in decisions affecting the financial interests of a private entity on whose board of directors he or she sits.²

¹ We understand that the only potential statutory obstacle to the Director's service on the USTTI Board with which you are concerned is 18 U.S.C. 208. Consequently, this memorandum does not address any other possible issues that might arise under other laws should the Director decide to serve on the USTTI Board.

² Section 208 also provides, as an alternative to disqualification, that an official may obtain a waiver to permit him to participate in cases in which the private financial interest involved is not so substantial that is likely to affect the integrity of the services which the Government may expect from the official. See 18 U.S.C. 208(b)(1).

This Office has on several occasions taken the position that a federal official serving on the board of an essentially private entity by virtue of a federal statutory mandate is not an "officer, director,³ or trustee" of that entity within the meaning of section 208. Our reasoning has been that section 208 is premised on a concern to avoid any conflict between a federal official's public and private obligations and interests; thus, where a government official is authorized by statute to serve on the board of a private group as part of his or her official governmental duties, in what is essentially an ex officio capacity, the reasonable inference to be drawn is that the official is to serve the interests of the government in the event of any conflict between those interests and the interests of the private organization. Accordingly, we have concluded that the disqualification requirement in section 208 does not apply at all in situations in which an official's responsibilities and activities in connection with a private entity derive solely from his or her office of public trust.

Section 1307 seems to us to contemplate federal officials' serving on the USTTI board in precisely this fashion. The section provides in full as follows:

Sec. 1307 - Expression of Support of Activities of the United States Telecommunications Training Institute

Nothing in this Act, the Communications Act of 1934, or any other Act, shall be construed to preclude the Department of State, the United States Agency for International Development, or the United States Information Agency from participation in support of any activities of the United States Telecommunications Training Institute (including use of staff, other appropriate resources and service on the board of the Institute).

The text of this provision expressly permits official support by the named federal agencies for the activities of USTTI, and there is no apparent reason why this support may not

³ See Memorandum for the Assistant Attorney General, Land and Natural Resources Division, from Larry L. Simms, Deputy Assistant Attorney General, July 14, 1982 (conflict of interest and fiduciary duty questions raised by Attorney General's supervision of litigation-against the National Trust for Historic Preservation, in light of his ex officio membership on its board); Memorandum for the Assistant Attorney General, Antitrust Division, from Mary C. Lawton, Deputy Assistant Attorney General, May 21, 1976 (conflict of interest questions raised by participation of Attorney General and Deputy Attorney General in a decision whether to file an antitrust action against the American Bar Association, in light of their ex officio membership in the ABA House of Delegates).

take the form of designating their officials to serve on the USTTI board. The legislative history of the provision supports this interpretation, and indicates further that Congress did not expect that such official service by government officials on the USTTI board would give rise to a conflict of interest. See 130 Cong. Rec. S8435 (June 25, 1986)(remarks of Sen. Mathias)("This amendment simply clarifies that this cooperation between Government and corporate leaders does not present a 'conflict of interest' on the part of the USTTI's Government board members.")

There is nothing in the text or legislative history of section 1307 that gives the named federal agencies any guidance as to which of their officials should be selected to represent the agency's interests on the USTTI board. Accordingly, we believe that this is essentially a matter within each agency's discretion. Presumably, in exercising its discretion, each agency will take into account a variety of considerations, including the extent to which a particular individual's other official responsibilities will predictably give rise to problems of divided loyalty if he or she is asked to serve on the USTTI Board.⁴ Similarly, the agency may decide to take steps to minimize such problems by requiring the official to disqualify himself from particular matters in which the problem of divided loyalties might appear particularly acute. We emphasize, however, that such disqualification would not be required by section 208.

In sum, we believe that section 1307 authorizes officials of USIA, including the Director, to serve on the board of USTTI. While any officials so serving may decide on a case-by-case basis not to participate in governmental actions that would have a direct and predictable effect on the financial interests of USTTI, they would not be required to disqualify themselves by virtue of 18 U.S.C. 208.

Samuel A. Alito, Jr.

Samuel A. Alito, Jr.
Deputy Assistant Attorney General
Office of Legal Counsel

cc: C. Normand Poirier
Acting General Counsel, USIA

⁴ For example, an agency might reasonably conclude that its official representative on the USTTI Board should not be an official responsible for deciding whether to award federal grant monies to USTTI or another private entity.