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Campaign Activities By Congressional Employees

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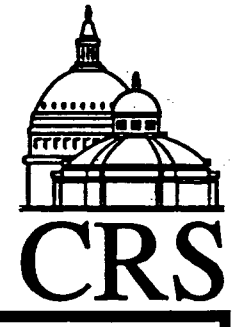

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CAMPAIGN ACTIVITIES BY CONGRESSIONAL EMPLOYEES

SUMMARY

Employees of the House and Senate, not covered by "Hatch Act" restrictions, may engage in general campaigning and partisan political activities during their own free, off-duty time. Since congressional staff may often work irregular hours, it is recognized that a staffer's free or "off-duty" time might occur in what is typically considered the conventional work day.

As for official duties and compensation, however, House and Senate staff are paid from public funds for assisting Members of Congress in their official legislative and representational functions, and such staff may not be compensated from the United States Treasury merely for partisan campaign duties. Although it is understood that in the practical operation of a Member's office there unavoidably may be some minimal "overlap" in the various duties performed for a Member, confining campaign activities to "off-duty" hours away from the office upon completion of one's official duties, or on vacation, annual or other established leave time, will assist in ensuring that public appropriations for official staff, as well as for official supplies, equipment, and facilities, are not being misused for personal, political campaign purposes. It has been suggested that staffers who are to engage in extensive campaign activities on behalf of a Member could remove themselves from the official payroll during that time, or decrease their official compensation to coincide with the decrease in official duties performed during the campaign, and instead, or in addition to reduced official salary, receive compensation from the Member's political committee for those political, campaign duties performed.

Federal criminal law expressly prohibits any federal officer or employee, including congressional staff (and Members of Congress), from knowingly soliciting campaign contributions from other federal employees. 18 U.S.C. §602. Although the enforcement of the statue may be directed towards coerced contributions and political shakedowns (see also 18 U.S.C. §601), a prudent course of conduct would be to avoid any intentional solicitation of contributions from federal employees, particularly if it appears that the solicitation is being made for or on behalf of the Member of Congress, which could in itself present subtle coercive elements. Congressional employees are expressly prohibited by criminal law from making a political contribution to their boss, that is, their "employer or employing authority", and thus may not give contributions to the Member's campaign committee nor purchase tickets to campaign fundraisers of the Member. 18 U.S.C. §603. The solicitation of campaign contributions in a federal building is also expressly prohibited by federal criminal law (18 U.S.C. §607), as well as being a potential violation of other provisions of law if official supplies, equipment, or facilities are used for non-official, campaign purposes. Senate employees are not allowed to handle campaign funds, that is, collect, distribute or be in charge of campaign funds for a federal election, except that three members of a Senator's staff may be expressly designated by the Senator for that purpose. Senate Rule XLI.

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I. *GENERAL CAMPAIGN ACTIVITIES*

There are no federal statutes, regulations, or rules of Congress which specifically prohibit congressional employees from voluntarily engaging in general campaign activity. The broad prohibition against partisan political campaigning, even while on one's own free time, which had been in effect for most executive branch employees in the federal civil service under what was commonly known as the "Hatch Act", had not been applicable in any event to the staff of elected officials such as congressional employees or employees in the Office of the President.[1] Apart from certain restrictions in the area of campaign funds and finances[2], House and Senate staffers may continue to participate in partisan, political campaign activities during their free time.

Although there are no broad prohibitions on campaign activities by congressional staff on their own free time, there do exist general guidelines, ethical standards, and rules in Congress which indicate that official congressional staff, since they are federal employees paid by monies appropriated from the United States Treasury, are considered to be compensated for services rendered for public purposes, that is, for the performance of "official" congressional duties commensurate with the salary they receive from public funds,[3] and not for personal campaigning for a Member. It is a general principle of federal appropriations law that federal monies are to be used only for the purposes for which they were appropriated.[4] These standards and principles have been interpreted in both the House and the Senate to mean that employees may not engage in campaign activities on behalf of a Member to the neglect of their official duties; but that once employees have fulfilled their official congressional duties for which they are compensated from public funds, they may then generally engage in voluntary partisan campaign activities on their own "free time" or "off-duty" hours.[5]

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[1] Restrictions which had prohibited voluntary campaign activities by executive branch employees on their own, personal time, have been substantially removed from the "Hatch Act" for most federal employees. See P.L. 103-94, 107 Stat. 1001, October 6, 1993; 5 U.S.C. §§ 7321 *et seq.*

[2] See 18 U.S.C. §§602 (contributions to one's employer), 603 (soliciting contributions from federal employees), 607 (soliciting contributions in a federal building), and Senate Rule 41 (campaign fund activity by Senate staff).

[3] House Rule 43, clause 8; Committee on House Oversight, *Members' Congressional Handbook*, 104th Congress, at 5 (1995); Legislative Branch Appropriations Act, P.L. 104-53, 109 Stat. 516, appropriations for "official" personnel; see also S. Rpt. 95-500, 95th Cong. 1st Sess. 4 (1977); S. Rpt. 95-241, 95 Cong., 1st Sess. 1 (1977); and Code of Ethics for Government Service, 72 Stat. B12, ¶ 3 (1958).

[4] 31 U.S.C. § 1301(a); see *Principles of Federal Appropriations Law,* United States General Accounting Office 4-2 to 4-5 (1992).

[5] Senate Select Committee on Ethics Interpretative Ruling Nos. 3, 5, 22, 59, 88, 154, 194, 263, 302, 326, 349; House Committee on Standards of Official Conduct Advisory Opinion No. 2, July 11, 1973.

In addition to congressional ethical standards and rulings, there may be potential legal implications if salaries are claimed from public appropriations for individuals merely for their performance of non-official, campaign services on behalf of a Member, or anyone else. Although federal court decisions have shown that there may be questions of justiciability of civil liability claims under the specific provisions of the federal False Claims Act,[6] criminal liability might possibly attach in certain factual circumstances if schemes to compensate individuals from public monies merely for campaign services rendered to a Member, or to another, are considered to constitute a fraud against the government,[7] or a "theft" of government salary or services.[8]

Even though an individual is on a Member's official payroll and receiving salary for official duties, there is no flat prohibition upon an employee of a Member of Congress receiving outside compensation from a campaign committee for campaign related duties during such person's non-congressional and non-official time.[9] In fact, if a staffer is to perform extensive campaign activities for the Member, such person might have his or her official salary reduced commensurate with the decrease in official duties to be performed during this period, or be removed from the official payroll, and be compensated by the campaign committee for the outside political campaign duties performed, to assist in avoiding any implication that official funds are being used for political activities.

Finally, at any time, but particularly during a campaign, the public's *perception* of the conduct of an elected official and his or her staff may have significance beyond mere conformity with the technical requirements of rules or statutes. When official staff are involved in a Member's reelection campaign, such activity may be an easy target for political opponents seeking media attention by charging that official government personnel are being used for private political campaigning, raising appearances of impropriety. Although one can not insulate a Member of Congress/candidate completely from specious and unfair political attacks, sufficiently precise and accurate record keeping and time logs of one's official congressional work and duties, for which one receives a salary from the government, may be useful for documentation during a period when the staffer is also working on the campaign during his or her "free" or "non-official" time.

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[6] 31 U.S.C. §§3729, 3730, see *United States ex rel. Joseph* v. *Cannon*, 642 F.2d 1373 (D.C. Cir. 1981), *cert. denied* 455 U.S 999 (1982).

[7] See *United States* v. *Clark*, Criminal No. 78-207 (W.D. Pa. 1978); note also in other contexts, *United States* v. *Diggs*, 613 F.2d 988 (D.C. Cir. 1979), *cert. denied*, 446 U.S. 982 (1980); and *United States v. Pintar*, 630 F.2d 1270, 1275 (8th Cir. 1980).

[8] 18 U.S.C. § 641. See *United States v. Bresnahan*, Criminal No. 93-0409 (D.D.C. 1993).

[9] Note, for example, Senate Select Committee on Ethics Interpretative Ruling Nos. 357, December 16, 1982, and 402, October 18, 1985.

A. *Campaigning and Official Duties*

1. *Congressional Standards and Rulings*

Congressional standards and rulings on campaign activities by staffers, and on the use of staff appropriations to pay individuals for campaign services, have established a clear ethical principle and rule to be observed in both Houses of Congress: Congressional staff are compensated from public funds for the performance of official congressional duties; that is, to assist a Member with his or her official legislative and representational duties, but not for services rendered to the Member's reelection campaign. In a federal court decision concerning the congressional franking privilege, the United States District Court for the District of Columbia noted Congress' recognition of the principle that public funds are to be used for official congressional, and not for campaign purposes: "It is clear from the record that Congress has recognized the basic principle that government funds should not be spent to help incumbents gain reelection."[10] However, congressional staff may engage in campaign activities on their own "free time" or "off duty" hours as long as they fulfill, and do not neglect those official duties required of them.

Since congressional staff may work irregular hours often depending upon the time the House or Senate stays in session, and since a staffer's specific official duties are assigned by the Member within the Member's discretion, it is generally recognized that a staffer's "free time" or "off-duty" hours might occur in what is typically considered the conventional work day. It is also recognized that in the practical operation of a Member's office some minimal campaign related activities might unavoidably be performed by a Member's staff in the course of their official congressional duties for a Member. It has been suggested that although some minimal "overlap" may reasonably exist, it is the Member's responsibility to keep such campaign related activities by staff during duty hours to a "de minimis" amount, and to observe the general principle that staff are compensated from public funds for their assistance in the Member's official legislative and representational duties, rather than for services to the Member's own political campaign.

a. *Senate*

The use of staff on political campaigns was reviewed during the 95th Congress by various committees in the Senate. In recommending changes in the Senate Rules, the Special Committee on Official Conduct of the 95th Congress had proposed a rule which would have specifically required Senate employees who engaged "substantially" in campaign work to be removed from the Senate payroll. The proposal was dropped from the final measure, however, and as a compromise the measure directed the Senate Rules and Administration Committee to study this issue and to report proposals concerning the use of

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[10] *Common Cause* v. *Bolger*, 574 F.Supp. 672, 683 (D.D.C. 1982).

official staff by holders of public office.[11] The Special Committee had been desirous of some specific rule to express the existing general standard with regard to Senate employees since it felt that "the public is entitled to know that those employees in the Senate, receiving government salaries, are doing the public's business and not working directly for the reelection of their employer."[12]

In its report on the rules, standards, and laws governing the use of Senate staff for political campaigns, as directed by S. Res. 110, 95th Congress, the Senate Rules and Administration Committee found that the standard and practice in the Senate was that staffers may engage in political campaign activities on behalf of their employer as long as they fulfill the official congressional duties required of them. That report states, in part, as follows:

> ...[T]he general rule ... which has been relied on to date by Senators and officers and employees of the Senate for guidance [is]: that members of the Senator's staff are permitted to engage in the reelection campaign of a Senator, as long as that staff member does not neglect his or her Senate duties. The nature and scope of a staff member's Senate duties are determined by each Member of the Senate. Such duties necessarily encompass political and representational responsibilities, as well as legislative, administrative, or clerical ones, and are often performed during irregular and unconventional work hours. A similar rule of practice has been followed in the House of Representatives, and would be generally applicable to other Federal employees not covered by the Hatch Act.[13]

The report of the Senate Rules and Administration Committee on a 1977 amendment to the Senate Rule restricting campaign fund activity of Senate staff (now Rule XLI) is further illustrative of the standards in the Senate concerning campaigning by staff. The Committee concluded that Senate employees may participate in campaign activities on behalf of a Senator "so long as they don't neglect their Senate duties"; and may do so during vacation time, annual leave or on a leave of absence:

> The committee is not aware of any laws which prohibit individuals who are part of a Senator's staff from participating in a Senator's reelection campaign as long as they do not neglect their Senate duties, and the committee does not feel there should be such proscriptions. Furthermore, it is neither illegal nor a violation of Senate Rules for a member of a Senator's staff to work full time in political campaigns while on annual leave or vacation time or while on leave of absence

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[11] See 123 *Cong. Rec.* 8041 (1977).

[12] S. Rpt. 95-49, 95th Cong., 1st Sess. 14 (1977).

[13] S. Rpt. 95-500, 95th Cong., 1st Sess. 4 (1977).

from his or her Senate duties, and the committee feels there should not be any proscription of such actions.[14]

Subsequent interpretative rulings by the Senate Select Committee on Ethics have similarly expressed the ethical principle and rule to be observed in the Senate. Although the Senate Rules do not specifically require it, the Senate Select Committee on Ethics has advised Members and staff that to assure that a staffer is performing official duties commensurate with his congressional salary, a staffer who is to engage in political campaign activities on behalf of a Member for any "extended period" should be removed from the public payrolls, or have his salary reduced to reflect his reduction in official duties. Some of these rulings are excerpted below:

Interpretative Ruling No. 3, May 5, 1977:

No provision of the Code of Official Conduct prohibits staff from attending a campaign fundraising event outside office hours or while on recorded vacation leave. The interim position of this Committee is that Senators should encourage staff to remove themselves from the payroll during periods which they expect to be heavily involved in campaign activities. Routine participation after hours or an annual leave time is not now prohibited by the Code of Conduct.

Interpretative Ruling No. 59, September 13, 1977:

... Members can and should remove staff from the Senate payroll when they are to participate for an extended period in substantial campaign activities. One is not removed from the payroll by being placed in a "terminal vacation leave" status.

Interpretative Ruling No. 88, November 16, 1977:

Although the staff member cannot make a direct contribution to a Member of Congress (and thus cannot attend as a paying guest), nothing in the Code of Official Conduct prohibits the staff member from attending the fundraiser on his own time ....

Interpretative Ruling No. 154, June 22, 1978:

As to the possibility of minimal involvement by a staff assistant with campaign-related business, the Select Committee believes that in a Senator's reelection campaign there might be some inadvertent and minimal overlap between the duties of a Senator's staff with respect to the Senator's representational function and his reelection campaign. However, a Senator has the responsibility to insure that such an overlap is of a de minimis nature and that staff duties do not conflict with campaign responsibilities.

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[14] S. Rpt. 95-241, 95th Cong., 1st Sess. 1 (1977).

Interpretative Ruling No. 194, October 8, 1978:

. . . [T]he Select Committee ruled that it is preferable for a Senator to either reduce the salary or remove an employee from the Senate payroll when the employee intends to spend additional time on campaign activities, over and above leave or vacation time. The Committee recognizes that staff members ought to be able to use bona fide vacation time for political campaign activity. As long as an office has an established and reasonable annual leave policy, and as long as an employee takes no more than the amount of time normally allowed for such leave, the Committee believes that an employee may engage in campaign activities during that time.

Interpretative Ruling No. 263, June 12, 1979:

Other than the restrictions on political fund activity in Senate Rule 49 [now Rule 41], no rule expressly prohibits campaign activity by staff during off-duty hours or during established and reasonable annual leave time. In addition, the Committee believes that Senate employees may engage in limited campaign-related activities during Senate hours, provided that the time involved is de minimis and such activity does not interfere with the employee's official Senate duties. However, if an employee intends to spend a substantial amount of time on campaign activities, the Committee has ruled that a Senator should use his or her best judgment in determining whether to remove the staff member from the Senate pay roll or reduce his or her salary commensurately.

Interpretative Ruling No. 302, February 21, 1980:

It is a Member's prerogative in staffing his or her office to prescribe an employee's duties and hours, and to consent to certain outside activities. Other than the restrictions on political fund activity in Senate Rule 41, no rule expressly prohibits political activity by staff during off-duty hours or during established and reasonable annual leave time. However, if an employee intends to spend a substantial amount of time on campaign activities, the Committee has ruled that a Senator should use his or her best judgment in determining whether to remove the staff member from the Senate payroll or reduce his or her Senate salary commensurately.

Interpretative Ruling No. 326, July 1, 1980:

There is no provision of the Code of Official Conduct which prohibits such service [as a political party's National Committee Chairwoman from staffer's home state during off-hours and without compensation] by a member of the personal staff of a Senator. As S. Rep. 95-241 (95th Cong.) indicated, except for prohibitions of Rule 41 with respect to the handling of campaign funds, "it is neither illegal

nor a violation of Senate Rules for a member of a Senator's staff to work full time in political campaigns while on annual leave or vacation time or while on leave of absence from his or her Senate duties . . . ."

If involvement in *any* campaign activity becomes extensive, however, the supervising Member may find it wise to remove the employee from the payroll for the period of extensive campaign involvement. See for example, Interpretative Ruling No. 3 (May 5, 1977); Interpretative Ruling No. 309 (February 21, 1980). This is important for the supervising Senator to recognize, because the position of National Committeeman or Committeewoman for a political party is an important position which could conceivably require a great deal of time on the part of the Senate employee.

Interpretative Ruling No. 402, October 18, 1985

In light of the Senator's apparent determination that his secretary's services for his campaign committees do not conflict with her Senate duties, her receipt of compensation is not prohibited by Senate Rules.

b. *House of Representatives*

Rulings in the House of Representatives have focused on various standards, rules and regulations applicable to Members and employees. Rules of the House specifically provide that a Member "shall retain no one under his payroll authority who does not perform official duties commensurate with the compensation he received in the offices of the employing authority".[15] Clerk hire expenses for official staff are payable from the "Members' Representational Allowance", which is available to support "official and representational duties", and which may not be used to pay for "any personal, political, [or] campaign ... expenses."[16] The House Committee on Standards of Official Conduct has thus found that an employee may engage in campaign activity only "during the periods he is free" once he or she has fulfilled the official congressional duties assigned to him or her. The Committee noted that since there are no specific times or hours under statute or rule which an employee is required to work, and since a congressional staffer's hours may be irregular, that a staffer's "free time" may occur during what might be considered the conventional work day:

As to the allegation regarding campaign activities by an individual on the clerk hire rolls of the House it should be noted that due to the irregular time frame in which the Congress operates, it is unrealistic to impose conventional work hours and rules on Congressional employees. At sometimes these employees may work more than double the usual work week -- at others, some less. These employees are

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[15] House Rule XLIII, clause 8.

[16] Committee on House Oversight, *Members' Congressional Handbook, supra* at 1,5.

> expected to fulfill the clerical work the Member requires during the hours he requires and generally are free at other periods. If, during the periods he is free, he voluntarily engages in campaign activity, there is no bar to this. There will, of course, be differing views as to whether the spirit of this principle is violated but this Committee expects Members of the House to abide by the general proposition.[17]

In addition to the standards cited above it is significant to note that House regulations specifically direct that disbursements from the Members' Representational Allowance "require specific documentation and Member certification as to accuracy and compliance with applicable Federal laws, House Rules, and Committee Regulations."[18] Noting such requirements and rules, the *Ethics Manual for Members and Employees of the House of Representatives*, House Committee on Standards of Official Conduct (1992), similarly noted that staff employees in the House are thus considered to receive payment from public funds for the "regular performance of official duties commensurate with the compensation they receive," rather than merely for "non-official political campaign activities on behalf of a Member," and thus a staffer may only engage in political activities "on his own free time" once the employee has "completed the official duties assigned to him...."[19]

c. *Official Duties Versus Campaign Activities*

Although the ethical standards, guidelines and rules of the House and Senate discussed above generally permit "campaign" activities on behalf of a Member once staffers have fulfilled their "official" duties, there are generally no specific job descriptions for committee or Member staff in the House or the Senate which are comparable to the job descriptions currently in force in the civil service. There is therefore no detailing of what a staffer's "official" duties may entail, or precisely what activities are involved in or excluded from assisting a Member with his "official and representative" or "representational" duties. Traditionally, the specific duties of a Member's staff are within the discretion of the employing Member to best meet the Member's needs and those of his or

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[17] Advisory Opinion No. 2, July 11, 1973, House Committee on Standards of Official Conduct.

[18] Committee on House Oversight, *Members' Congressional Handbook, supra* at 2, 53.

[19] *Ethics Manual, supra,* at Chapter 8. Professional staff of the committees of the House are subject to provisions which restrict them from engaging in any work other than committee business during congressional working hours, and which provide that other duties may not be assigned to them other than committee business (House Rule XI). The legislative history of this provision, originating in the Legislative Reorganization Act of 1946 (60 Stat. 812), indicates that the prohibition was intended to insure that professional staff of committees would work exclusively on committee business during their congressional working hours, as opposed to performing "other congressional office duties". S. Rpt. No. 1011, 79th Cong., 2d Sess. 10. This was apparently to insure a continuing full time professional staff of experts for the standing committees of Congress (see 92 *Cong. Rec.* 6442 (1946)). The restrictions would work to prohibit such staffers from performing duties other than committee work for Members during normal working hours, but would not bar off-hours political campaign activities.

her constituents. As to the exercise of this discretion, however, the United States Court of Appeals for the District of Columbia, in upholding a conviction of a Member of Congress for using clerk hire appropriations to compensate individuals who performed mostly non-congressional duties, agreed with expert testimony that it is "within a congressman's discretion to define the parameters of an employee's responsibilities as long as those responsibilities relate to the congressman's 'official and representative' duties".[20]

The general distinction between "official" legislative and representational duties on the one hand, and "campaign" activities on the other, is a traditional distinction of long-standing in Congress. For example, in the use of the Member's franking (free mailing) privilege, Members may frank "official" mail matter but may not send political campaign material under the frank.[21] This distinction between campaign activities and official duties is also recognized and inherent in congressional rules and regulations such as the respective House and Senate Rules on unofficial office accounts, the rule on the use of computer facilities, and in other statutory provisions such as the Federal Election Campaign Act, and the provision of the franking law on "mass mailings" of newsletters and similar material.[22]

Although the distinction between "official" duties and "campaign" activities is a common one in congressional matters, because of the various public, political and official roles which a Member may assume in connection with his or her position in Congress, there may be instances where this distinction is less clear than in others, or where one area may intrude into the other. As noted by

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[20] *United States* v. *Diggs,* 613 F.2d 988 at 997 (D.C. Cir. 1979), *cert. denied* 446 U.S. 982 (1980).

[21] Franking law provides that it is permissible to frank materials relating to "the conduct of the official business, activities, and duties of the Congress" ... covering "all matters which directly or indirectly pertain to the legislative process or to any congressional representative functions generally, or to the functioning, working or operating of the Congress and the performance of official duties in connection therewith ...." (39 U.S.C. § 3210(a)(1) and (2)); but that the frank is not available for sending material complimentary or laudatory of a Member on a purely "political basis rather than on the basis or performance of official duties" nor material "which specifically solicits political support for the sender or any other person or any political party, or a vote or financial assistance for any candidate for any public office" (39 U.S.C. § 3210(a)(5)(A) and (C)). In upholding the franking statute against a constitutional challenge, a three judge panel of the District Court for the District of Columbia noted that Congress had drawn a statutory distinction between "official mailings, those related directly to the legislative and representative functions of Congress," and "unofficial" mailings such as political material. *Common Cause* v. *Bolger*, 574 F.Supp. 672, 683 (D.D.C. 1982). The Court stated: "It is clear from the record that Congress has recognized the basic principle that government funds should not be spent to help incumbents gain reelection. The details of the franking scheme, including its distinction between official and unofficial mailings, appear to be rationally designed to work for that end." *Id.*

[22] See the provisions of House Rule XLV (note H.R. Doc. 95-73, 95th Cong. 1st Sess. 16-17 (1977), discussing proposal of this Rule); Senate Rule 38 and S. Rpt. 95-49, 95th Cong., 1st Sess. 11, 46; 2 U.S.C. § 59e(d), and Senate Select Committee on Ethics Interpretative Ruling No. 442 (1992); Senate Rule XL(5); 2 U.S.C. § 439a; and 39 U.S.C. §3210(f); see discussion in H.R. Rpt. 96-281, 96th Cong. 1st Sess. 5.

the United States District Court in the franking case: "To state the obvious, it is simply impossible to draw and enforce a perfect line between the official and political business of Members of Congress".[23]

Some confusion may initially be caused by the labelling of some of the official representational duties of a Member of Congress as "political" in nature. The Supreme Court in a case concerning the immunity of Members from prosecution under the constitutional "Speech or Debate Clause," noted that in addition to the "purely legislative activities protected by the Speech or Debate Clause", there are representational duties of a Member of Congress which, although "appropriate" and "legitimate," might be characterized as "political in nature ... because they are a means of developing continuing support for future elections," and which do not have "the protection afforded by the Speech or Debate Clause".[24] These "appropriate" representational duties of Members of Congress may include "legitimate errands performed for constituents, the making of appointments with Government agencies, assistance in securing Government contracts, preparing so-called 'newsletters' to constituents, news releases, and speeches delivered outside of Congress."[25] This distinction made by the Supreme Court, it should be noted, was for purposes only of coverage of the Speech or Debate Clause immunity, which the Court said went only to the official *legislative* duties of a Member, but not necessarily to the official representative functions of the Member.

Even though these constituent services and communications to constituents, which are part of the Member's legitimate representative duties, might arguably be characterized as "political in nature," they are generally distinguishable, as far as the congressional ethical principle involved, from those activities typically understood by congressional rule, statute, and practice to be political "campaign" activities, such as the solicitation of political contributions, canvassing votes for a candidate in a primary or general election, organizing a political fundraiser, coordinating campaign volunteer lists, etc. The Supreme Court in *Buckley v. Valeo*,[26] noted that a particular statute in the federal campaign laws was specifically directed at Congress' accommodating this distinction "between the legitimate and necessary efforts of legislators to communicate with their constituents" on the one hand, and "activities designed to win elections by legislators in their other role as politicians," on the other.[27]

There is some practical concern, however, expressed over the potential and arguably unavoidable, "overlap" or intrusion of some minimal campaign related

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[23] *Common Cause* v. *Bolger, supra* at 683.

[24] *United States* v. *Brewster*, 408 U.S. 501, 512 (1972).

[25] *Id.* at 512.

[26] 424 U.S. 1 (1976).

[27] *Id.* at 84, n. 112; see also *Common Cause* v. *Bolger, supra.*

activities into the official operation of a Member's office. In responding to official inquiries from the press or inquiries from constituents, congressional staffers may need to respond to questions dealing with issues or matters which relate to or bear upon a Member's political campaign as well as his or her official legislative and representative duties.[28] Similarly, scheduling assistance and information from the Member's official staff may be requested by the campaign staff to assure that the Member's campaign schedule does not conflict with his or her official agenda. Both ethics committees in Congress realize that some of this minimal overlapping may exist in the practical operation of a Member's office, and thus the Senate Select Committee on Ethics has noted that "there might be some inadvertent and minimal overlap" between the staff's official duties and activities related to a Member's campaign but that "a Senator has the responsibility to insure that such an overlap is of a de minimis nature and that staff duties do not conflict with campaign responsibilities."[29] Similarly, the House Committee on Standards of Official Conduct has recognized that in a practical sense it may not be possible to have an absolute separation of duties during the work day but that the "Committee expects Members of the House to abide by the general proposition" that staffers are to work on campaign related matters during their "free time" after the completion of their official duties.[30]

To avoid some of the more serious problems which may arise by the performance of regular campaign responsibilities by a staff employee on the public payroll, the Senate Select Committee on Ethics has recommended on various occasions that, when a staffer is to engage in campaign activities on behalf of the Member for any "extended" period or to any "substantial" degree, the Member either remove the staffer from the Senate payroll for that period and compensate the staffer with campaign funds, or reduce the staffer's compensation from public funds commensurately with the reduction in official duties of the staffer during his time of increased campaign activities.[31] Congressional employees may also campaign on behalf of a Member of Congress while on established annual leave or other vacation time.[32] There is no general prohibition in the House or the Senate on a congressional staffer receiving reimbursement or compensation from a campaign committee for campaign work performed on off-duty, non-official time, even while still on the congressional

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[28] "Answering questions about one's voting record is clearly part of a Senator's official responsibilities. The fact that he explains his voting record in response to a political attack does not turn such explanations into campaign activities." Senate Select Committee on Ethics, Interpretative Ruling No. 419, September 22, 1987.

[29] Interpretative Ruling No. 154, June 22, 1978.

[30] Advisory Opinion No. 2, July 11, 1973.

[31] Interpretative Ruling Nos. 3, 5, 59, 194, and 263.

[32] See, for example, Senate Select Committee on Ethics, Interpretative Ruling Nos. 194, 263.

payroll and being compensated from official funds for the performance of official congressional duties.[33]

2. *False Claims, Fraud and Theft: Federal Criminal Law*

In addition to the congressional ethical standards and guidelines discussed, it is possible that legal implications may arise for Members and staff if individuals, compensated from public funds, perform no congressional duties or only a nominal percentage of official duties for such compensation, but mainly provide campaign services to the Member. It has been argued that since a Member makes a claim to the United States Government for the staffer's salary, and that since such salary is intended as compensation for assisting the Member in his or her "official" legislative and representational duties, then using that individual for other than the official purposes contemplated might involve a false claim, a false statement, or a fraud upon the government. This may be particularly relevant where the employing Member must certify in writing that such expenses were for "official" purposes.

There have been several *civil* suits initiated by private citizens under the False Claims Act (31 U.S.C. §§ 3729, 3730) against Members of Congress for compensating individuals from the clerk-hire or other staff allowances when those individuals allegedly did not perform any, or did not mainly perform, official congressional duties for such compensation. These civil suits, however, have generally been dismissed on jurisdictional or procedural grounds without a trial on the merits of the facts alleged.[34]

In *United States ex rel. Joseph* v. *Cannon*,[35] a three judge panel of the United States Court of Appeals for the District of Columbia dismissed as a non-justiciable "political question" a civil suit under the False Claims Act initiated by a private citizen against a Member of Congress for making claims for a staffer's official salary when that staffer allegedly worked extensively and exclusively on the Member's reelection campaign for a period of time while continuing to receive a salary from appropriated funds. The Court of Appeals noted that "political questions are denied judicial scrutiny" because the courts are "underequipped to formulate national policies or develop standards of conduct for matters not legal in nature".[36] The courts might thus find a non-justiciable political question where there is a "lack of judicially discoverable

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[33] Note, for example, Senate Select Committee on Ethics, Interpretative Ruling Nos. 357, 402.

[34] *United States ex rel. Thompson* v. *Hays*, Civil Action Nos. 76-1068, 1132 and 1140; *United States ex rel. Martin-Trigona* v. *Daley*, Civil Action No. 1164 (D.D.C. 1976); *United States ex rel. Joseph* v. *Cannon* 642 F.2d 1373 (D.C. Cir. 1981), *cert. denied,* 455 U.S. 999 (1982); but see *United States ex rel. Hollander* v. *Clay*, 420 Supp. 853 (D.D.C. 1976), concerning appropriations for transportation.

[35] 642 F.2d 1373 (D.C. Cir. 1981), *cert. denied,* 455 U.S. 999 (1982).

[36] *Id.* at 1379.

and manageable standards" for resolving an issue. As to the use of senatorial staff on a Member's reelection campaign, the court found that the lack of specificity in the ethical guidelines existing in 1976 concerning "official" duties of Senate staff, and the failure of the Senate to promulgate a specific rule on campaigning by staffers at that time "reveals the lack of firm standard during that period relevant to this case, and vividly portrays the keen difficulties with which courts would be faced were they to attempt to design guidelines on their own".[37] Thus, the Court found that "in the absence of any discernible legal standard ... we are loathe to give the False Claims Act an interpretation that would require the judiciary to develop rules of behavior for the Legislative Branch".[38] In dismissing the action, the Court of Appeals warned that "[i]n doing so, we do not, of course, say that Members of Congress or their aides may defraud the Government without subjecting themselves to statutory liabilities."[39]

The Court of Appeals' warning concerning statutory liability for fraud is well taken considering past *criminal* actions against former Members or employees of the House of Representatives for false statements, theft, and fraud involving the compensation of individuals from clerk-hire appropriations when such individuals performed few or no official congressional duties in return for that compensation. In *United States* v. *Diggs*,[40] the United States Court of Appeals for the District of Columbia upheld the conviction of a Member of the House for false statements (18 U.S.C. § 1001) and mail fraud (18 U.S.C. § 1341) for a scheme whereby individuals were being compensated from public funds, that is, clerk hire appropriations, but were performing only nominal official congressional duties. The Court of Appeals found that although the "employees" involved may have performed some official congressional services for the Member, "only a nominal percentage of [the employees'] responsibilities were congressionally related," and thus there was sufficient evidence for a jury to conclude that the employees were paid from the clerk hire allowance "with the intention of compensating them for services rendered to the [defendant's private business concern] or the defendant."[41] Although it might be argued that "it was a matter of [the Member's] discretion to fix their duties and salaries as congressional employees," the "defendant's representations to the House Office

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[37] *Id.* at 1380.

[38] *Id.* at 1385.

[39] *Id.*

[40] 613 F.2d 988 (D.C. Cir. 1979), *cert. denied* 446 U.S. 982, (1980).

[41] *Id.* at 1002.

of Finance that [the employees] were *bona fide* congressional employees were fraudulent and material in violation of 18 U.S.C. § 1001."[42]

United States v. Pintar,[43] did not involve Members of Congress and congressional employees, but did involve a fact situation where federal monies in a federal program were being used to pay persons for political campaign activities. In that case the court upheld a charge of a conspiracy to defraud the United States (18 U.S.C. §371) where there was "strong evidence that the Pintars used [their authority] to direct employees whose salaries were funded by federal grants to perform political work during office hours", and that such concerted activities constituted a "scheme to impair, obstruct, defeat or interfere with lawful governmental functions".[44]

In a criminal action specifically involving campaign activities by persons compensated from clerk-hire funds, the Department of Justice in 1978 obtained a criminal indictment against a former Member of the House of Representatives, charging that the former Member while in Congress had defrauded the United States by placing 11 persons on his congressional payroll to pay them for operating and staffing various campaign headquarters in the former Member's reelection campaign.[45] The indictment specifically charged violations of the mail fraud statute (18 U.S.C. § 1341), among other violations, for using the mails to send payroll checks in executing "a scheme and artifice to defraud the United States of America, and to obtain money and property by means of false and fraudulent pretenses, representations and promises ...."[46] The "scheme", as charged in the indictment, was that the defendant "would prepare and submit ... clerk-hire allowance and payroll authorization forms to the Office of Finance of the House of Representatives which falsely represented that [certain named individuals] were bona fide employees of the defendant's congressional staff and that they were performing the type of services which entitled them to salaries stated in the clerk-hire forms," while willfully concealing that those named individuals were in fact placed on the House payroll "in order to pay them for their work in maintaining, staffing, and operating various campaign headquarters opened for the purpose of reelecting the defendant to Congress".[47]

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[42] *Id.* A recent Supreme Court case, *Hubbard v. United States,* 115 S.Ct. 1754 (1995), has called into question the applicability of 18 U.S.C. § 1001 to submissions or statements made to the Congress, although the question of the statute's application to vouchers submitted to an *administrative* unit of Congress, such as a payroll office, may not be fully resolved as of this writing. See *United States v. Rostenkowski,* 68 F.3d 489 (D.C.Cir. 1995).

[43] 630 F.2d 1270 (8th Cir. 1980).

[44] *Id.* at 1276, 1278.

[45] *United States* v. *Clark,* Criminal No. 78-207 (W.D. Pa. 1978).

[46] Grand Jury indictment, 2.

[47] Grand Jury indictment, 2-3.

On February 13, 1979, the defendant/former Member of Congress pleaded guilty to the mail fraud and income tax evasion charges in this indictment in connection with those activities charged, and on June 12, 1979, was sentenced to two years in prison and fined $11,000.

A congressional staff employee has also pleaded guilty in United States District Court to a criminal information in *United States v. Bresnahan*,[48] concerning the receipt of a government salary and expenses for performing campaign duties in a congressional campaign. The criminal information charged that the defendant, an Administrative Assistant to a Member of Congress, "traveled and caused other employees" of the Congressman "to travel from Washington D.C., to Long Beach California to work on the primary and general election campaign of a Congressional candidate. The defendant, at the direction of another, made it appear and directed the other employees to make it appear, that they were conducting official business. In fact, they worked on a Congressional campaign." During the time they worked on the congressional campaign, the employees "claimed to be performing official business, [and] the United States House of Representatives reimbursed the defendant and the other employees for diem expenses ...[and they] also received money in the form of salary paid for the time that they campaigned." The congressional staffer pleaded guilty to 18 U.S.C. § 641, theft of government property, that is, the "salary and expenses paid to them by the United States House of Representatives...."

The substantial conformance by Members and staff to the general ethical guidelines and principles established by the rulings and opinions of the House and Senate ethics committees regarding the limitation of regular campaigning by congressional staff to their own "free time" or "off-duty" hours may thus work to assist a Member in assuring that public appropriations are not being utilized to finance one's own political campaign, and that persons compensated from staff appropriations are in fact "bona fide" congressional employees, performing the official congressional duties contemplated in the appropriation of their salaries, to which the Member may have certified in writing. This would apparently prevent the types of abuses and misrepresentations concerning the misuse of staff appropriations and public funds which have led to criminal fraud and theft charges against Members and staff in the past.

B. *Campaigning and Running For Elective Office*

As noted above, congressional employees do not come within the restrictions of the amended "Hatch Act". Thus, unlike executive branch employees who are still barred from running for partisan elective office,[49] the permissible campaign activities by staff employees of Members of Congress include running as a candidate for partisan elective office. A congressional staff employee is thus

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[48] Criminal No. 93-0409 (D.D.C. 1993).

[49] See now 5 U.S.C. §7323(a)(3), as amended by P.L. 103-94.

not prohibited by statute, or by congressional rule from running for such positions as delegate to party conventions, or for elective state, local or federal office. The considerations discussed above concerning electioneering or campaigning during "free time", as opposed to "working hours" for which compensation is derived from the United States Treasury, would, of course, apply to running and campaigning for elective office in one's own campaign, as well as to campaign activity for another. Furthermore, any specific rules or guidelines of a particular Member's or employing authority's office should be examined and considered before undertaking any such outside endeavors.

Although congressional employees are not expressly prohibited from *running* for elective office, they may effectively be barred from simultaneously *holding* a full-time elective office and retaining their congressional employment. Federal statutes such as those dealing with dual pay and dual employment, and precedents and constitutional provisions with regard to "incompatible offices" appear to eliminate the possibility of holding two, full-time paid positions or offices with the federal government. As far as State, local, or other outside positions, various Senate and House Rules concerning outside employment, official duties, place of employment, and conflicts of interest, may severely restrict, and effectively prohibit, a congressional employee from holding an outside, full-time position. When a state or local elective position, however, is intended merely to be a part-time position, entailing only evening and weekend hours or intermittent duties, the potential "time" conflict with one's congressional employment may be eliminated. In such an instance, when there is no apparent incompatibility or "subject matter" conflict of interest between the state or local office and one's congressional employment, a congressional employee might be able to hold such a position when approval is received from his or her employing congressional office.

Interpretative Rulings by the Senate Select Committee on Ethics have, for example, expressly permitted a full-time employee of a Member (the Member's press relations coordinator) to serve as a city council member at a salary of less than $200 a month.[50] Similarly, the Committee ruled in 1978 that if adjustments were made in the official congressional salary of an employee to reflect the decrease in the congressional work performed by the staffer because of a new position held, and if a restriction of Senate duties were imposed if necessary to avoid conflicts of interest, the staffer could run for and hold a compensated elected office in the state legislature and still remain a Senate employee in the district office of the Member.[51]

While *federal* laws and rules might not prohibit all dual officeholding, *State* and local statutes or ordinances of the jurisdiction should be examined, as those provisions often expressly prohibit an elected or appointed officer of the jurisdiction from simultaneously holding federal office or employment.

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[50] Interpretative Ruling No. 55, September 7, 1977.

[51] Interpretative Ruling No. 109, March 23, 1978; see also Interpretative Ruling No. 155, June 28, 1978.

II. *CAMPAIGN FUNDS AND FINANCES*

A. *Political Contributions*

There are specific restrictions within current federal law upon congressional employees (as well as all other federal employees) in the area of soliciting or making political contributions. Federal criminal statutes *prohibit* a congressional employee from: (a) *soliciting* a political contribution for a federal campaign from any other federal officer, employee, or person receiving a salary or compensation for services from the United States Treasury (18 U.S.C. § 602); and (b) *making* any political contribution to a federal officer, employee, person receiving a salary from the United States Treasury, or Member of Congress who is the employer or employing authority of the congressional staffer (18 U.S.C. § 603).

The relevant statutory language of these provisions reads as follows:

§ 602. Solicitation of Political Contributions

> It shall be unlawful for -
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> (1) a candidate for the Congress;
> (2) an individual elected to or serving in the office of Senator or Representative in, or Delegate or Resident Commissioner to, the Congress;
> (3) an officer or employee of the United States or any Department or agency thereof; or
> (4) a person receiving any salary or compensation for services from money derived from the Treasury of the United States to knowingly solicit, any contributions within the meaning of section 301(8) of the Federal Election Campaign Act of 1971 from any other such officer, employee, or person. Any person who violates this section shall be fined under this title or imprisoned not more than 3 years, or both.

§ 603. Making Political Contributions

> (a) It shall be unlawful for an officer or employee of the United States or any department or agency thereof, or a person receiving any salary or compensation for services from money derived from the Treasury of the United States, to make any contribution within the meaning of section 301(8) of the Federal Election Campaign Act of 1971 to any other such officer, employee or person or to any Senator or Representative in, or Delegate or Resident Commissioner to, the Congress, if the person receiving such contribution is the employer or employing authority of the person making the contribution. Any person who violates this section shall be

> fined under this title or imprisoned not more than three years, or both.
>
> (b) For purposes of this section, a contribution to an authorized committee as defined in section 302(e)(1) of the Federal Election Campaign Act of 1971 shall be considered a contribution to the individual who has authorized such committee.

1. *Soliciting Political Contributions from Federal Employees*

The statute at 18 U.S.C. § 602 prohibits congressional employees from "knowingly" soliciting political contributions from any other federal employee, officer, or person receiving salary for services from the United States Treasury.[52] Inadvertent solicitations of federal employees, therefore, such as when part of a general fund raising campaign aimed at the general public, was not intended to be a violation of this provision nor its predecessor.[53] As stated in the House Report on the Federal Election Campaign Act Amendments of 1979, amending § 602:

> In order for a solicitation to be a violation of this section, it must be actually known that the person who is being solicited is a federal employee. Merely mailing to a list will no doubt contain names of federal employees [and] is not a violation of this section.[54]

Unlike the statute prior to the amendments contained in 1979 (P.L. 96-187) the current § 602 prohibits only the "solicitation" of political contributions from other federal employees and does not prohibit the "receipt" of such contributions. The House Report on the changes to § 602 noted: "The provision prohibiting receipt of contributions by federal employees has been eliminated."[55] It would not appear to violate the criminal statute, therefore, for congressional employees to receive *unsolicited* political contributions from other federal employees (although Senate employees if not political fund designees are prohibited from such activity under Senate Rule 41, discussed below).

Since the term "contribution" is defined for purposes of this restriction as that term is defined in § 301(8) of the Federal Election Campaign Act of 1971, the prohibition on soliciting contributions from fellow federal employees will apparently not reach political contributions to support only state or local

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[52] Federal executive branch employees covered by the "Hatch Act" are generally prohibited from all political contribution solicitations except from fellow memebrs of a labor organzation under certain circumstances. See 18 U.S.C. § 602(c); 5 U.S.C. § 7323(a)(2).

[53] See 113 *Cong. Rec.* 25703 (1973).

[54] H.R. Rpt. 96-422, 96th Cong. 1st Sess. 25 (1979).

[55] *Id.*

candidates. Section 301(8) of the FECA of 1971 is now codified at 2 U.S.C. § 431(8) and defines "contribution" to mean "any gift, subscription, loan, advance, or deposit or money or anything of value made by any person for the purpose of influencing any election for Federal office." (Similarly, since Senate Rule 41 restricts political fund activity relating only to federal elections, Senate staffers would not be barred from soliciting and receiving voluntary contributions strictly for state or local candidates from fellow staffers or from other federal employees).

In addition to prohibiting congressional employees from soliciting political contributions for federal elections from other federal employees, the statute likewise prohibits Members of and candidates for Congress from soliciting such contributions from federal employees. Members of Congress may therefore not "solicit," but may now apparently accept *unsolicited*, voluntary contributions from federal employees. However, it should be noted that congressional staffers who are the Member's employees or under the employing authority of that Member are specifically *prohibited* from *making* even unsolicited, voluntary contributions to that Member of Congress under 18 U.S.C. § 603. As a practical matter, then, Members of Congress should not accept such contributions from their own employees.[56]

The intent of the prohibition on solicitations, as discussed by its sponsors, was to prevent federal employees from being "subject to any form of political assessment".[57] Since the statute is directed at protecting employees who, because of their employment and positions may be subject to coercion, the prohibition of § 602, as noted in the discussion prior to the adoption of the 1979 amendments, "does not apply to solicitation of Members of Congress."[58] This interpretation is consistent with the interpretation of the predecessor statute to 18 U.S.C. § 602 which, as noted in a resolution adopted by the House in the 63rd Congress, 2d Session (1913), "should not be construed to prohibit one Senator or Member of Congress from soliciting campaign contributions from another Senator or Member of Congress".[59]

The Department of Justice has also indicated in the past that in the exercise of prosecutorial discretion the application of the statute in a criminal

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[56] Under the former statute, Members of Congress were also prohibited from *receiving* contributions from federal employees, including their staff, even where no solicitation of the contribution was shown. See *Brehm* v. *United States*, 196 F.2d 769 (D.C. Cir.), *cert. denied.*, 344 U.S. 838 (1952), upholding conviction of Member of Congress for receiving campaign contribution from staff even without specific finding of solicitation. *Id.* at 770. This provision was amended to its present form in 1979.

[57] 125 *Cong. Rec.* 36754, December 18, 1979.

[58] *Id.*

[59] See VI *Cannon's Precedents of the House of Representatives*, § 401, at 571-573; see also H.R. Rpt. 99-277, 99th Cong., 1st Sess., 13-14 (1985), House Committee on Standards of Official Conduct.

context would focus on "coercive" contributions, and indications of political "shakedowns."[60] It should be emphasized, however, that the plain language of the statutory prohibition does not expressly require this element of the offense, that is, does not expressly require coercion, and no judicial interpretation of the law has as yet expressly added such an element as being required in the indictment or proof to establish a violation, although the cases have indicated that the underlying intent and ultimate objective of the statute, similar to the former Hatch Act restrictions on voluntary political activity, was to protect employees from less-than-voluntary political conduct.[61] Finally, in this regard, it should be noted that an employer-employee, or supervisor-supervisee relationship, might in itself arguably provide an initial presumption or indication of a coerced political solicitation.[62] In light of these factors, and the express language of the criminal statute prohibiting such activity, the more cautious course of conduct for congressional employees would be to avoid knowing and intentional solicitation of political contributions for a federal election from other federal employees.

2. *Making Political Contributions*

Congressional employees are prohibited from making political contributions to their "boss", that is, their employer or employing authority under the current statutory provision now codified at 18 U.S.C. § 603.[63] As explained in the

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[60] See, for example, U.S. Department of Justice, *Federal Prosecution of Election Offenses* 64-65 (January 1995); see also H.R. Rpt. 99-277, *supra* at 4, 13-14.

[61] In *Ex Parte Curtis,* 106 U.S. 371, 374 (1882), the Supreme Court found that an earlier version on the ban on contributing to and soliciting from federal employees extended even to non-coercive activities since "what begins as a request may end as a demand...." In *Brehm v. United States,* 196 F.2d 769 (D.C.Cir. 1952), *cert. denied,* 344 U.S. 838, a Member of Congress was found in violation of statute for receiving contributions from staff even where grand jury was presented testimony that staffer voluntarily initiated offer of contributions. 196 F.2d at 770-771. See also *United States v. Wurzbach,* 280 U.S. 396 (1930), where "coercion" was not specifically alleged or proven in Member's receipt of contributions from federal employees, and where court found the law "clearly embraces the acts charged."

[62] Note *Federal Prosecution of Election Offenses, supra* at 65. Even where solicitations are made by non-supervisory co-workers, if made during working time, fellow employees might conclude that the solicitation represented the interests of those higher in the organization and thus the element of coercion could be present. See as an analogy "Hatch Act" cases on coerced contributions from federal and state employees, for example, *In the Matter of Hawkins* (CSC No. S-7-42), and *Wolfstein* (CSC No. S-11-42), 2 P.A.R. 23, 26 (1942); *In the Matter of Mulhair* (CSC No. F-1349-52), 1 P.A.R. 607, 609 (1952). The threat of depriving any federal job or any federal benefit or appropriation to coerce political contributions is a specific violation of 18 U.S.C. §601.

[63] Prior to 1980, congressional employees were prohibited from making political contributions to any other federal officer, employee, or Member of Congress, regardless of whether such individual was the contributor's employer or employing authority. Although in practice there was no strict enforcement of the statute, such a restriction on employees had been on the statute books in some form since 1883. Similar restrictions on some federal employees have been upheld against constitutional challenges alleging interference with employees' political rights (*Ex Parte Curtis, supra,* and *United States* v.*Wurzbach, supra*), as have those restrictions on general

legislative history of the amendments to § 603, political contributions would be barred from a Member's staff to that Member, and from committee staff to the chairman of that committee. Persons employed by the minority of a committee are also barred from contributing to the ranking minority member of the committee, as well as to the chairman:

> Section 603 has been amended to allow voluntary contributions from federal employees to other federal employees. If, however, the individual is employed by a Senator, Representative, or Delegate or Resident Commissioner to Congress that employee cannot contribute to his or her employer although voluntary contributions to other Members of Congress would be allowed. An individual employed by a congressional committee cannot contribute to the chairman of that particular committee. If the individual is employed by the minority that individual cannot contribute to the ranking minority member of the committee or the chairman of the committee.[64]

In addition to permissible contributions by congressional staff to a candidate, including a Member of Congress, who is *not* the employer or employing authority of the staffer, congressional employees may contribute to a committee or an organization which is not an "authorized committee" of the staffer's employer or employing authority. An "authorized committee" of a candidate is one which is designated in writing by the candidate to accept contributions and make expenditure on his or her behalf,[65] and includes the candidate's principal campaign committee. Generally, under federal campaign law, a multicandidate committee, that is, one which supports more than one federal candidate, may not be designated as an "authorized committee" of a candidate.[66] Therefore, congressional staffers may generally make political contributions to multi-candidate political committees, such as the Democratic or Republican Congressional Campaign Committees or the Republican or Democratic National Committee, even though some of the proceeds received by such committees may eventually be expended for the benefit of the contributor's employer. In making such contributions to multi-candidate committees, however, the staffer should not specifically "earmark" the contribution for use only in the campaign of his or her employer, since such "earmarking" of a contribution may be considered as a contribution from the staffer/contributor

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campaign activities by executive branch employees who come within the "Hatch Act". *United Public Workers* v. *Mitchell*, 330 U.S. 75 (1946); *United States Civil Service Commission* v. *National Association of Letter Carriers, AFL-CIO* 413 U.S. 458 (1973).

[64] H.R. Rpt. 96-422, 96th Cong., 1st Sess. 26 (1979).

[65] See 18 U.S.C. § 603(b), 2 U.S.C. § 432(e)(1), as amended by P.L. 96-187.

[66] 2 U.S.C. § 432(e)(3).

to that Member/candidate,[67] and thus a potential violation of the criminal prohibition on contributions to one's employer or employing authority.

For purposes of the current restrictions on contributions by congressional staffers, the term "contribution" is defined as in 2 U.S.C. § 431(8) (§ 301(8) of the Federal Election Campaign Act, as amended). Specifically excluded from the term "contribution" is the value of voluntary services by an individual provided a candidate or committee.[68] A congressional staffer may, therefore, voluntarily provide his or her services, his or her own free time, and his or her assistance to a Member's campaign, even to an employing Member's campaign, without violating the prohibition on making campaign "contributions" to one's employer.

The definition of the term "contribution" under federal campaign law also demonstrates that the prohibition goes only to the contribution of things of value in connection with a federal election campaign (2 U.S.C. § 431, § 301(8)(A)(i) of the FECA as amended). A congressional staffer may, therefore, make a political contribution to an officer or employee of the federal government for purposes of influencing the election or defeat of a candidate to state or local office.

B. *Fundraising Dinners and Testimonials*

Fundraising dinners and testimonials are common methods for candidates to raise money for an upcoming political campaign, or to pay off previous campaign debts. The money paid for a ticket to such an event is generally considered under federal law as a campaign contribution from the purchaser of the ticket to the candidate on whose behalf the event is being held.[69]

Since the purchase of a ticket to a fundraiser or testimonial would generally be considered a political contribution to the candidate involved, a congressional employee should not under the provisions of 18 U.S.C. § 603, as amended, purchase such a ticket or contribute money to a fundraiser or testimonial given for the Member who is the staffer's employer or employing authority.

Although a congressional employee should not attend such a fundraiser or testimonial as a paying guest, the employee could apparently attend as a nonpaying guest without violating provisions against making political contributions to one's employer. Furthermore, a congressional employee may also volunteer his or her own free time to work on the fundraiser or testimonial for the Member's campaign since voluntary services are not considered

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[67] See Regulations of Federal Election Commission, 11 C.F.R. § 110.6.

[68] See § 301(8)(i) of the FECA, as amended.

[69] See 2 U.S.C. § 434, as amended, note explanation in H.R. Rpt. 96-422, 96th Cong., 1st Sess. 16, to accompany FECA Amendments of 1979; see Internal Revenue Service, Revenue Ruling 72-412 (TIR 1191), 1972-2 CB-5; see also House Rule XLIII, paragraph 7.

"contributions" under federal campaign law.[70] Senate employees, however, are prohibited from being involved in the solicitation, receipt, disbursement, or in being the custodian of any campaign funds for use in a federal election unless such employee is one of three persons specifically designated by a Senator to handle campaign funds. Unless so designated, a Senate employee should not be involved in that part of a fundraiser, but may be involved in the planning, arrangement making, etc., of the event.[71]

Finally, although a congressional employee could not contribute to a fundraiser or testimonial on behalf of his or her boss, or purchase a ticket to it, the employee might arguably be permitted to "host" such a fundraiser or dinner at his or her residence without violating the federal campaign laws. The definition of the term "contribution" within the campaign laws exempts certain costs in connection with a fundraising event on behalf of a candidate held on an individual's residential premises, up to an amount of $1,000 per any election. Expenses included in the $1,000 exemption are the cost of invitations, food, and beverages.[72]

C. *Campaign Fund Activity by Senate Employees*

As discussed briefly above, Senate Rules restrict campaign fund activity by Senate officers and employees. Senate Rule XLI prohibits most Senate officers and employees from "handling" any campaign funds for a federal election. An employee or officer of the Senate may therefore not receive, solicit, be the custodian of, or distribute campaign funds of any federal candidate, except that three assistants may be designated by the Senator to perform such activities on behalf of that Senator, or for a committee or organization established and controlled by a Senator or a group of Senators. The Select Committee on Ethics has found under the Rule that Senate employees may not "solicit others to solicit funds or otherwise become involved to any substantial degree in political fund activity."[73]

The relevant portion of Rule XLI states as follows:

RULE XLI

Political Fund Activity; Definitions

1. No officer or employee of the Senate may receive, solicit, be a custodian of, or distribute any funds in connection with any campaign for the nomination for election, or the election, of any individual to be

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[70] § 301(8)(B)(i) of the FECA, as amended.

[71] Senate Select Committee on Ethics, Interpretative Ruling Nos. 3, 5, 22, and 88.

[72] See 2 U.S.C. § 431(8)(B)(ii); sec. 301(8)(B)(ii) of the FECA.

[73] Interpretative Ruling Nos. 326, July 1, 1980; and 25, June 2, 1977.

> a Member of the Senate or to any other Federal office. This prohibition does not apply to three assistants to a Senator, at least one of whom is in Washington, District of Columbia, who have been designated by that Senator to perform any of the functions described in the first sentence of this paragraph and who are compensated at an annual rate in excess of $10,000 if such designation has been made in writing and filed with the Secretary of the Senate and if each such assistant files a financial statement in the form provided under rule XXXIV for each year during which he is designated under this rule. The Secretary of the Senate shall make the designation available for public inspection.

The Senate Rule on campaign fund activities by Senate employees had originally been interpreted to permit the designated employees of the Senator to handle campaign funds for a federal campaign *only* on behalf of the Senator designating them.[74] However, the rule is now interpreted to permit the three designated employees of the Senator to handle campaign funds on behalf of a committee for any individual for elective federal office, as long as the committee is controlled by a Senator or a group or Senators, and the employing Senator gives his permission.[75] The three designated employees, with the permission of their employing Senator, could therefore be involved in the solicitation, receipt, distribution, or in being the custodian of campaign funds on behalf of a Senator's principal campaign committee, or for multi-candidate political committees or political action committees which are involved in the federal campaigns of persons other than their employing Senator, as long as the committees are established and controlled by a Senator or group of Senators. Employees may not handle funds for committees set up by trade associations, interest groups, corporations or labor organizations.

A Senate employee, even a political fund designee, could not hold a position of chief executive officer of a state political party committee, since the duties of the position would entail in the normal course of business "the acceptance, solicitation, retention or expenditures of funds in connection with federal elections" and for federal candidates other than the employee's supervising Senator (Interpretative Ruling No. 291, November 26, 1979), and such committee is not established and controlled by a Senator. However, the Senate Select Ethics Committee found that a campaign fund designee could hold a position as a national party chairperson for one's state when the duties concerning political funds were not of a similar nature to those described above.[76]

The restriction on employees of the Senate in Rule 41 does not extend to fundraising activity or campaign finance activity in relation to strictly state or

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[74] Senate Select Committee on Ethics, Interpretative Ruling Nos. 32, 45, 222, and 223.

[75] Interpretative Ruling No. 387, September 17, 1987.

[76] Interpretative Ruling No. 326, July 1, 1980.

local political contests.[77] The Senate Select Committee on Ethics has made it clear, however, that "the State and local political fund activity must be clearly separate and distinct from any activities in connection with a Federal election in order to be permitted under the Rule."[78]

D. *Campaign Activity In a Federal Building*

When congressional employees become involved in campaign financing activities, an important consideration is a federal criminal provision now codified at 18 U.S.C. § 607, which restricts the solicitation or receipt of political contributions in federal buildings or other federal facilities. The amended and renumbered version of the prohibition states as follows:

Section 607. Place of Solicitation

> (a) It shall be unlawful for any person to solicit or receive any contribution within the meaning of section 301(8) of the Federal Election Campaign Act of 1971 in any room or building occupied in the discharge of official duties by any person mentioned in section 603, or in any navy yard, fort, or arsenal. Any person who violates this section shall be fined under this title or imprisoned not more than three years, or both.

Although prohibiting the receipt or solicitation of campaign contributions in a federal building, the amended statute recognizes that it is often unavoidable that unsolicited campaign contributions will be received through the mail or a contribution by a supporter will be tendered in person, within a congressional office. When this situation occurs the statute specifically provides that a staff employee of a Member of Congress may accept the contribution as a transmittal for subsequent forwarding, within seven days of receipt, to an appropriate campaign organization outside of the congressional office. This provision of 18 U.S.C. § 607 states as follows:

Section 607.

> (b) The prohibition in subsection (a) shall not apply to the receipt of contributions by persons on the staff of a Senator or Representative in, or Delegate or Resident Commissioner to, the Congress, provided that such contributions have not been solicited in any manner which directs the contributor to mail or deliver a contribution to any room, building, or other facility referred to in subsection (a), and provided that such contributions are transferred within seven days of receipt to a political committee within the meaning of section 302(e) of the Federal Election Campaign Act of 1971.

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[77] Interpretative Ruling No. 204, December 5, 1978; and No. 182, September 29, 1978.

[78] Interpretative Ruling No. 291, November 26, 1979; see also Interpretative Ruling No. 326, July 1, 1980.

The prohibition of this statute and the exception to it were discussed on the floor of the Senate prior to the adoption of this provision as part of the Federal Election Campaign Act Amendments of 1979:

> Solicitation or receipt of contributions in any room or building occupied by a Federal employee in the course of official duties is prohibited. The sole exception is for contributions received by an individual on the staff of a Member of Congress, provided the contributions are transferred to the Member's political committee within 7 days. This exception is intended to cover situations in which a contributor, although not requested to, mails or delivers a contribution to a Federal office. The exception does not authorize solicitations from a Federal office, nor does it permit receipt of contributions in a Federal office where such contributions have been solicited in any manner which directs the contributor to return contributions to a Federal office.[79]

As for the act of soliciting contributions from a congressional office, it should be noted that while this criminal prohibition has thus far not specifically been construed by the courts to prohibit the solicitation of campaign contributions from a federal building by letter or telephone to persons who are not located in a federal building, such activities would be barred by other provisions of law and regulation relating to appropriations and official allowances. The criminal prohibition at section 607 was originally intended and was historically construed to prohibit anyone from soliciting contributions from federal clerks or employees while such persons were in a federal building.[80] In interpretations of this provision, the focus of the prohibition has been directed to the location of the individual from whom a contribution was requested, rather than the location from which the solicitation had originated. In 1908 the Supreme Court had occasion to interpret the statute which was the predecessor of the current § 607. The Court in *United States* v. *Thayer*, stated that the act of "solicitation" is completed, and therefore, arises, at the location where the request for a contribution is received by the person to whom the request is made. The Court stated: "... [T]he solicitation was in the place where the letter was received."[81] The Department of Justice has noted that the statute was intended to fill a gap in protecting federal employees from assessment by prohibiting all persons from soliciting such employees while they are in a federal building. [82]

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[79] 125 *Cong. Rec.* S19099-19100 (daily ed. Dec. 18, 1979) remarks of Sen. Hatfield.

[80] See Pendleton Act, 22 Stat. 403, 407, 14 *Cong. Rec.* 640, 865; note specifically 62 Stat. 722, 18 U.S.C. § 603 (1948); see H.R. Rpt. No. 305, 89th Cong. 1st Sess. A51.

[81] 209 U.S. 39, 44 (1908).

[82] Although questions could theoretically be raised as to the criminal provision's technical coverage of solicitations from a congressional office directed to persons not *in* a federal building, the House Committee on Standards has stated clearly that regardless of the target of the

Separate from the issue of criminal liability under 18 U.S.C. § 607, the use of federal office space, including congressional office space, or the use of official government equipment and supplies, paid for from federal tax dollars, for purposes of soliciting campaign contributions or for other clearly political campaign activities, could involve violations of other federal laws, congressional regulations and standards. Provisions of the United States Code, congressional regulations governing allowances, and appropriations provisions generally specify that amounts provided a Member of Congress from appropriated funds for such items as telephone, mail, office space, stationery, etc., are for the use of such items only for "official" or "strictly official" purposes.[83] These provisions would thus apparently work to bar the use or conversion of such supplies, equipment, or facilities for "campaign" purposes, rather than for "official" congressional business. As discussed earlier in this report with respect to the official allowances for congressional staff, the use of official allowances or supplies, services, or goods secured by such allowances, for other than the official purposes for which the appropriations were made, or for other purposes than those which the Member had certified or documented in vouchers, might possibly subject a Member to a number of legal liabilities concerning false claims, fraud or possibly even "conversion" or theft.

The ethics committees in both the House and the Senate have thus found that general campaign or campaign fund activities should be conducted outside of the official office space provided Members of Congress, and should generally be conducted with equipment, supplies or other facilities which are secured by private funds or contributions and not official congressional allowances or appropriations.[84]

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solicitation or its coercive nature, "no activities of a political solicitation nature should occur with the support of any federal resources (staff or space) in order to avoid any question that a violation of 18 U.S.C. § 607 has occurred." "Dear Colleague" letter from House Committee on Standards of Official Conduct, November 21, 1985, at 2.

[83] See for example 2 U.S.C. §§ 42a, 42c, 46g, 46g-1, 56, 57, 58, 58a-2, 59, among others, as well as regulations issued by the Committee on House Oversight and the Senate Committee on Rules and Administration governing use of official allowances.

[84] See, for example, the disciplinary report from the House Committee on Standards of Official Conduct, H.R. Rpt. 101-293, 101st Cong., 1st Sess., *In the Matter of Representative Jim Bates*, at 8, 10-11 (1989). In that report the Committee concluded: "Moreover, use of House resources (including employees on official time) to solicit political contributions is improper." *Id.* at 12.

III. *QUICK REFERENCE LIST OF SPECIFIC CAMPAIGN PROHIBITIONS*

A. *General*

An employee *may not*:

(1) Deprive, attempt to deprive, or threaten to deprive anyone of employment or any other benefit, provided for or made possible by an Act of Congress appropriating relief funds because of that person's political affiliation. 18 U.S.C. § 246.

(2) Make or offer to make an expenditure to any person either to vote or withhold one's vote or to vote for or against any candidate in a federal election. 18 U.S.C. § 597.

(3) Solicit, accept, or receive an expenditure in consideration of one's vote or the withholding of one's vote in a federal election. 18 U.S.C. § 597.

(4) Use any appropriation by Congress for work relief, relief, or for increasing employment, or exercise any authority conferred by an appropriations act for the purpose of interfering with, restraining, or coercing any individual in the exercise of his right to vote. 18 U.S.C. § 598.

(5) If a candidate, directly or indirectly promise or pledge the appointment of any person to any public or private position or employment, for the purpose of procuring support of one's candidacy. 18 U.S.C. § 599.

(6) Promise employment or any other benefit provided for or made possible by an act of Congress as reward for political activity or support. 18 U.S.C. § 600.

(7) Furnish, disclose, or receive for political purposes the names of persons receiving relief payments under any act of Congress. 18 U.S.C. § 605.

(8) Make any expenditure for any general public political advertising which anonymously advocates the election or defeat of a clearly identified candidate. 2 U.S.C. § 441d.

(9) Fraudulently misrepresent oneself as speaking or acting on behalf of a candidate. 2 U.S.C. § 441h.

B. *Soliciting or Receiving Campaign Contributions*

An employee *may not*:

(1) Promise to use support or influence to obtain federal employment for anyone in return for a political contribution. 18 U.S.C. § 211.

(2) Cause or attempt to cause anyone to make a political contribution by means of denying or threatening to deny any governmental employment or benefit provided for or made possible, in whole or in part, by any act of Congress. 18 U.S.C. § 601.

(3) Solicit political contributions from any other federal employee or any "person receiving any salary or compensation or services from money derived from the Treasury of the United States." 18 U.S.C. § 602.

(4) Solicit or receive political contributions from persons known to be entitled to or to be receiving relief payments under any act of Congress. 18 U.S.C. § 604.

(5) Intimidate any federal officer or employee to secure political contributions. 18 U.S.C. § 606.

(6) Solicit or receive political contributions in a federal building, other than unsolicited contributions transferred to a political committee within seven days. 18 U.S.C. § 607.

(7) Knowingly accept a contribution in excess of limitations under federal law of $1,000 to a candidate from any person, and $5,000 to a candidate from multi-candidate committees. 2 U.S.C. § 441a(a).

(8) Accept or receive any political contributions from the organizational or treasury funds of a national bank, corporation, or labor organization. 2 U.S.C. § 441(b) (contributions from separate segregated funds of these organizations may be received).

(9) Knowingly solicit contributions from federal government contractors. 2 U.S.C. §441(c).

(10) Solicit, accept, or receive a contribution from a foreign national. 2 U.S.C. § 441e.

(11) Knowingly accept a contribution made by one person in the name of another person. 2 U.S.C. § 441f.

(12) If a Senate employee, receive, solicit, be custodian of, or distribute any campaign funds for federal elections *unless* the employee is one of three assistants whom the Senator has designated to perform such functions, the employee is compensated at a rate in excess of $10,000 per annum, the

Senator's designation has been made in writing and filed with the Secretary of the Senate, and the employee files an annual financial disclosure statement. Rule XLI, Standing Rules of the Senate.

C. *Making Political Contributions*

An employee *may not*:

(1) Make a political contribution to any Member of Congress or federal official who is the employer or employing authority of the congressional staffer. 18 U.S.C. § 603.

(2) Make a cash contribution in excess of $100. 2 U.S.C. § 441g.

(3) Make contributions in excess of $1,000 per election to any candidate, $5,000 per calendar year to a political committee, and $20,000 to a national party committee per year, or make contributions aggregating over $25,000 per calendar year. 2 U.S.C. § 441a(a).

(4) Make a contribution in the name of another. 2 U.S.C. § 441f.

(5) Make contributions or expenditures in excess of $100 other than by contribution to a committee or candidate, without filing a report with the Federal Election Commission. 2 U.S.C. § 434(e).