

E. The Hatch Act and Post-Government Employment Restrictions

Chapter 14

Political Patronage and the Revolving Door*

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I. INTRODUCTION

§ 14:1 The reemergence of patronage and other political abuses

This chapter's survey of political patronage and conflict of interest laws is timely. The first decade of the 2000s has witnessed an upsurge of congressional, prosecutorial and media attention to improper uses of political power in the operation of government. As this chapter is being written, the Attorney General of the

United States has recently resigned amidst controversy involving the firing of at least seven United States Attorneys, allegedly for not engaging in partisan prosecutions of election crimes.¹ Former Attorney General Gonzales is reportedly under investigation by the Department of Justice Inspector General and the Office of Professional Responsibility for this and other reasons.² About a dozen senior Justice Department officials and aids also have resigned in the wake of the U.S. Attorney firings and allegations of partisan political discrimination in employment decisions with respect to the Voting Rights Section of the Justice Department Civil Rights Division and with respect to Immigration Judges.³ The House Judiciary Committee is scheduled to hold hearings on whether the Department of Justice selectively prosecuted individuals for partisan gain.⁴

Allegations of improper use of influence extend to the White House. The President's former Deputy Chief of Staff, Karl Rove, resigned in August 2007 and currently is under investigation by the Office of Special Counsel ("OSC"), which investigates and prosecutes violations of the Hatch Act, a federal statute with criminal and civil provisions prohibiting partisan political activities by federal employees.⁵ The Rove investigation apparently includes consideration of briefings held with government employees in government offices regarding partisan initiatives and

[Section 14:1]

¹See, e.g., Dan Eggen and Paul Kane, Justice Dept. Probing Whether Gonzales Lied, Wash. Post, Aug. 31, 2007, at A-1; Dan Eggen and Amy Goldstein, Voter-Fraud Complaints by GOP Drove Dismissals, Wash. Post, May 14, 2007, at A-4; Charlie Savage, Missouri attorney a focus in firings, Senate bypassed in appointment of Scholzman, Boston Globe, May 6, 2007, at 1A.

²Dan Eggen and Paul Kane, Justice Dept. Probing Whether Gonzales Lied, Wash. Post, Aug. 31, 2007, at A-1.

³See, e.g., Lara Jakes Jordan, Mukasey Sworn in As Attorney General, Former judge inherits Justice Department struggling to regain credibility, Assoc. Press, www.abcnews.go.com, Nov. 9, 2007; Eric Lipton, Colleagues Cite Partisan Focus by Justice Official, Lawyer is Said to Have Questioned Politics of Applicants, N.Y. Times, May 12, 2007, at A-1; Amy Goldstein and Dan Eggen, Immigration Judges Often Picked Based upon GOP Ties, Wash. Post, June 11, 2007, at A-1.

⁴Adam Cohen, The United States Attorneys Scandal Comes to Mississippi, Another Person in jail, perhaps for political reasons, N.Y. Times, Oct. 10, 2007, at A-26 and The Strange Case of an Imprisoned Alabama Governor, Congress should look at prosecutions that appear to be political, N.Y. Times, Sept. 10, 2007, at A-30.

⁵Tom Hamburger, High-Profile Probe by Low-Key Office, Los Angeles Times, Apr. 24, 2007, at 11; John Solom, Alec MacGillis and Sarah Cohen, How Rove Directed Federal Assets for GOP Gains, Bush Adviser's Effort to Promote

concerns. In June 2007, with respect to one such briefing, the Special Counsel

determined that Administrator Doan [of the General Services Administration] violated the Hatch Act's prohibition against using her official authority and influence for the purpose of interfering with and affecting the result of an election when she solicited the political activity of over thirty subordinate employees and implied that the GSA could be used to help get Republican candidates elected.⁶

Then there is the matter of the long-running investigation of the lead government prosecutor of Hatch Act violations, the Special Counsel, by the Office of Personal Management Inspector General. The Special Counsel is under investigation for retaliating and discriminating against Office of Special Counsel employees and for allowing "political bias to influence enforcement of the Hatch Act."⁷

Meanwhile, the explosion of federal contracting and the bribery and lobbying scandals involving Members of Congress and government lobbyists and contractors in the 2000s have brought unprecedented scrutiny to the ages old revolving door between the government and the private sector. These events culminated most recently in congressional passage of the Honest Leadership and Open Government Act of 2007 ("Honest Leadership Act").⁸ Signed into law September 14, 2007, the Honest Leadership Act, among other things, expands the scope and duration of the post-government employment restrictions on the lobbying-related activities of former executive and legislative employees.⁹

Influence peddling scandals and the legislative reaction to them

the President and His Allies Was Unprecedented in Its Reach, Wash. Post, Aug. 19, 2007, at A-1.

⁶Letter from Scott J. Bloch, Special Counsel, to the President of the United States, June 8, 2007, regarding OSC File No. HA-07-1160, available at <http://www.govexec.com/dailyfed/0607/061107p1.htm>. As of the middle of October 2007, the President had taken no action with respect to the Hatch Act violation by the GSA Administrator as determined by the OSC.

⁷Daniel Pulliam, OPM investigator launches probe of Office of Special Counsel chief, Government Executive.com, available at http://govexec.com/story_page.cfm?articleid=32592; Stephen Barr, That Whistle's Been Blowing for Two Years, Wash. Post, Oct. 12, 2007, at D4; Shawn Zeller, Investigative Drama: Special Counsel's Crusade, CQ Politics.com, Aug. 6, 2007, www.cqpolitics.com/2007/08/investigate_drama_special_co.html.

⁸Pub. L. No. 110-81, 121 Stat. 735.

⁹See 18 U.S.C.A. § 207.

See, e.g., 153 Cong. Rec. S220 (daily ed. Jan. 8, 2007) (statement of Sen. Harry Reid regarding Jack Abramoff, Thomas Skully and the K Street Project)

reflect the enormous growth and financial stakes of modern federal contracting. Today, much of the work of the federal government is done by private contractors and grantees, rather than employees of the federal government. “The true size of the government in 1999 was roughly 17 million employees, about eight times larger than the civil service workforce.”¹⁰ In the past six years, “federal contract spending has [] more than doubled,” from 203 billion dollars in 2000 to \$412 billion in 2006.¹¹ The “federal government now spends over 40 cents of every discretionary dollar on contracts with private companies As a result of the rapid increase in procurement spending, the size of the ‘shadow government’ represented by federal contractors is now at record levels.”¹² With the rapid expansion of government contracting, more government officials and employees seek to do work for private contractors (including those with whom they worked while in government service) or the contractors’ lobbying or law firms.

The burgeoning federal contractor workforce and the recent patronage and influence peddling scandals have brought renewed legislative and enforcement attention to the legal framework governing such conduct. Part II of this chapter discusses briefly First Amendment rights of public employees and contractors to be free from governmental discrimination on the basis of their political views or activities. Part III discusses federal statutory limits on patronage and other partisan activities with respect to federal, state and local employees, federal grantees, government contractors and others in the private sector. Part IV discusses the “revolving door” restrictions imposed on former officials and employees of the executive and legislative branches of the federal government by 18 U.S.C.A. § 207, the principal law addressing

and 153 Cong. Rec. S10703 (daily ed. Aug. 2, 2007) (statement of Sen. John Kerry regarding K Street Project and former Rep. Randy “Duke” Cunningham). So far, two Members of Congress and nine of their associates have been convicted or plead guilty of crimes in connection with the Abramoff and other recent lobbying and contracting scandals. *Unraveling Abramoff: Key Players in the Investigation of Lobbyist Jack Abramoff*, (2007), <http://www.washingtonpost.com>; Charles R. Babcock and Jonathan Weisman, *Congressman Admits Taking Bribes, Resigns*, Wash. Post, A1 (Nov. 29, 2005).

¹⁰Paul C. Light, *Pressure to Grow*, *Government Executive*, Oct. 1, 2000, <http://www.govexec.com/features/1000/1000s1.htm>.

¹¹*More Dollars, Less Sense, Worsening Contracting Trends under the Bush Administration*, June 2007, United States House of Representatives Committee on Oversight and Government Reform Majority Staff, at i.

¹²*More Dollars, Less Sense, Worsening Contracting Trends under the Bush Administration*, June 2007, United States House of Representatives Committee on Oversight and Government Reform Majority Staff, at 3.

this conduct. It also describes the changes in the House and Senate rules imposed by the Honest Leadership Act and the new criminal law provided by that Act, codified at 18 U.S.C.A. § 227, which prohibits congressional influence on private employment decisions based upon “partisan political affiliation.”

II. CONSTITUTIONAL LIMITATIONS ON POLITICAL PATRONAGE

§ 14:2 Overview

The basic framework of the U.S. Constitution protects against tyranny and corruption from domination of the government by one political faction. There is the structural protection of three separate but equal branches of government, each with the means to provide a check on another. For example, Congress has the power to impeach the President or other federal civil officers for bribery or other crimes.¹ The First Amendment in particular also provides core protections against political overreaching on individuals, including government employees and contractors.

§ 14:3 Public employees

The First Amendment protects all public employees from dismissal for political patronage reasons.¹ The First Amendment’s protections bar politically motivated personnel actions against a public employee in dismissals, promotions, transfers, recalls after layoffs or the threats thereof.² Political patronage need only be a “substantial motivating” factor for the adverse employment action to provide a cause of action.³

A politically discriminatory personnel decision may pass muster

[Section 14:2]

¹U.S. Const. art. I, cl. 2, 3.

[Section 14:3]

¹*Elrod v. Burns*, 427 U.S. 347, 350, 96 S. Ct. 2673, 49 L. Ed. 2d 547 (1976) (complaint states legally cognizable claim by employees of sheriff’s office for discharge or threat of discharge solely for being affiliated with a different political party from the sheriff); *Branti v. Finkel*, 445 U.S. 507, 520, 100 S. Ct. 1287, 63 L. Ed. 2d 574 (1980) (affirming injunction against an appointed public official to prevent him from terminating his subordinate public employees due to their political affiliation in violation of their First Amendment rights).

²*Rutan v. Republican Party of Illinois*, 497 U.S. 62, 79, 110 S. Ct. 2729, 111 L. Ed. 2d 52 (1990).

³See, e.g., *Tanner v. McCall*, 625 F.2d 1183, 1192, (5th Cir. 1980); *Gomez v. Rivera Rodriguez*, 344 F.3d 103, 110, 62 Fed. R. Evid. Serv. 879, 56 Fed. R. Serv. 3d 767 (1st Cir. 2003).

under the First Amendment if political affiliation is an appropriate requirement for effective job performance of the government job at issue.⁴ A 2006 district court decision employed the following factors to make this determination: (1) is the employee civil service protected; (2) does he have some technical competence or expertise; (3) does he control others; (4) is he authorized to speak in the name of policymakers; (5) is he perceived as a policymaker by the public; (6) does he influence others; (7) does he have contact with elected officials; and (8) is he responsive to partisan politics and political leaders.⁵ By contrast, high salaries are not indicative of whether a position requires party affiliation.⁶

The government may not violate its workers' First Amendment rights whether they are on or off duty. For example, in 2007, the federal government paid \$80,000 to settle a First Amendment suit brought by a federal employee removed from an Independence Day Celebration speech on the 4th of July 2004 by the President of United States and arrested for her political beliefs.⁷

§ 14:4 Government contractors

The First Amendment also protects the political beliefs and activities of government contractors.¹ In *Board of County Commissioners, Wabaunsee County, Kansas v. Umbehr*, a trash hauler who contracted with the Board of County Commissioners sued to challenge the termination of his contract with the county after he expressed his displeasure with other actions that the Commissioners took in their official capacities. In ruling for the contractor, the Supreme Court applied the test in *Pickering v. Board of Ed. of Tp. High School Dist. 205, Will County, Illinois*,² which protects speech by a public employee on a matter of public concern

⁴*Branti v. Finkel*, 445 U.S. at 515–16.

⁵*Krause v. Buffalo and Erie County Workforce Development Consortium, Inc.*, 425 F. Supp. 2d 352, 388 (W.D. N.Y. 2006) (denying summary judgment on claim by defendants that plaintiff employee's job was a policy-making position and, therefore, exempt from Constitutional protection).

⁶See *Parrish v. Nikolits*, 86 F.3d 1088, 1093 (11th Cir. 1996).

⁷Dahlia Lithwick, *Sic' em With the Rally Squad and Other Tips for Dealing with Demonstrators from the Presidential Advance Manual*, *Slate*, Aug. 20, 2007, <http://www.slate.com/id/2172500/?GT1=10346>, regarding the case *Rank v. Hamm*, No. 2:04-cv-0997, (S.D. W. Va. Aug. 16, 2007).

[Section 14:4]

¹*Board of County Com'rs, Wabaunsee County, Kan. v. Umbehr*, 518 U.S. 668, 673, 116 S. Ct. 2361, 135 L. Ed. 2d 843 (1996).

²*Pickering v. Board of Ed. of Tp. High School Dist. 205, Will County, Illinois*, 391 U.S. 563, 568, 88 S. Ct. 1731, 20 L. Ed. 2d 811 (1968).

if the employee's free speech interest is not outweighed by any injury the speech could have on the interests of the state.³

III. HATCH AND PENDLETON ACT LIMITS ON POLITICAL PATRONAGE

§ 14:5 Overview

Federal statutes dating back to the 19th century provide the bulwark of statutory protections against improper political influences in government. The Pendleton Act and the Hatch Act, as amended, provide for a permanent, non-partisan, merit-based civil service; they prohibit partisan influence on government employees and punish those who engage in prohibited partisan activities. While restrictions on partisan activities within the federal government date back to the Washington Administration, Congress did not enact major laws in this area until after the Civil War.¹ In 1883, Congress passed the Pendleton Civil Service Act in response to rampant abuses of the partisan "spoils" system. The Pendleton Act created the merit-based civil service system, codified anti-partisan prohibitions and criminalized political manipulation of federal employees through employment discrimination, political activity in federal buildings or demands for political contributions.² A half century later, in 1939, Congress passed "An Act to prevent pernicious political activities," commonly known as the Hatch Act for its sponsor Senator Carl Hatch, largely to ban partisan campaigning by executive branch employees and to expand the criminal prohibitions on partisan use of and activities by these employees.³ The Hatch Act quickly became one of the most important and widely administered laws to discourage political activity by federal officers and employees. These laws do not restrict the rights of federal employees to vote

³See also *O'Hare Truck Service, Inc. v. City of Northlake*, 518 U.S. 712, 725–26, 116 S. Ct. 2353, 135 L. Ed. 2d 874 (1996) (city towing contractor of 30 years was improperly removed from a city-approved list of towers after contractor refused to make political contribution to mayor's election campaign) and *Rankin v. McPherson*, 483 U.S. 378, 387, 107 S. Ct. 2891, 97 L. Ed. 2d 315 (1987) (finding discharge of probationary employee improper when speech dealt with matter of public concern).

[Section 14:5]

¹*U. S. Civil Service Commission v. National Ass'n of Letter Carriers, AFL-CIO*, 413 U.S. 548, 557–58, 93 S. Ct. 2880, 37 L. Ed. 2d 796 (1973) (discussing history of partisan political reforms in the United States.)

²22 Stat. 403 (1883).

³53 Stat. 1147 (1939).

as they so choose and to express their personal political opinions regarding political subjects and candidates.

The criminal provisions of the Hatch and Pendleton Acts reach government employees who are not subject to the civil Hatch Act, including the President, congressional and judicial employees, and those not employed or funded by the federal government. These criminal laws are enforced by the Public Integrity Section of the Criminal Division of the Department of Justice and United States Attorneys, but appear to have been invoked rarely in recent years. Rather, most enforcement of federal anti-partisanship in government laws has been civil, through enforcement by the OSC before the Merit Systems Protection Board (“MSPB”) or their predecessors, where the civil penalty normally is removal from government employment.⁴ Of course, these civil penalties apply only to those subject to the civil requirements of the Hatch Act.

§ 14:6 The Civil Hatch Act

Congress has extended the civil prohibitions of the Hatch Act to all federal government employees not specifically exempted and to many state and local government employees. The President, Vice President, certain other high-level government employees, and state supported educational, cultural, charitable and religious entities are exempt in full or in part from the Hatch Act.¹

Until 1993, the Hatch Act prohibited essentially all federal employees from taking an active part in political management or political campaigns, notwithstanding that Congress in 1974 relaxed the Hatch Act for state and local employees to allow them to do just that.² In 1993, in response to calls that the Hatch Act could be scaled back for federal employees without adverse effect, Congress amended the Hatch Act to free federal government employees who do not work in agencies with law enforcement, national security or revenue collecting functions to engage in active political campaigning and campaign management. At the same time, Congress added enhanced criminal penalties for Hatch Act abuses and a new criminal prohibition against

⁴5 U.S.C.A. §§ 1506 and 7326.

[Section 14:6]

¹5 U.S.C.A. § 7324(b)(2)(B) (high level employees); 5 U.S.C.A. § 1501(4)(B) (educational, cultural, charitable, or religious).

²Pub. L. No. 93-443, 88 Stat. 1290.

intimidation of federal employees to be (or not) politically active.³ 5 U.S.C.A. § 7323 (freeing most government employees to work on campaigns); 18 U.S.C.A. § 610 (criminal penalties for coercion of federal employees with respect to political activity).

The prohibitions of the Hatch Act for covered federal and state employees have withstood constitutional challenge.⁴ In upholding the Hatch Act, the United States Supreme Court articulated five governmental interests underpinning the Hatch Act prohibitions, which are (1) efficiency; (2) neutrality of a merits-based civil service; (3) shielding government employees from coercion into voting or engaging in political activities against his or her own will; (4) impartiality in law execution and enforcement; and (5) preventing the conversion of public service into “a powerful, invincible, and perhaps corrupt political machine.”⁵ These factors are to be weighed against an employee’s interest in pursuing political activity when evaluating governmental regulation thereof.⁶

³Hatch Act Reform Amendments of 1993, Pub. L. No. 103-94, 107 Stat. 1001 (1993), codified at 5 U.S.C.A. §§ 7321 to 7326 and 18 U.S.C.A. § 610.

⁴See, e.g., *United Public Workers of America (C.I.O.) v. Mitchell*, 330 U.S. 75, 67 S. Ct. 556, 91 L. Ed. 754 (1947) (rejecting challenge to Congressional power to enact Hatch Act and affirming termination of public employee due to his participation as poll watcher and paymaster for other party workers); *U. S. Civil Service Commission v. National Ass’n of Letter Carriers, AFL-CIO*, 413 U.S. 548, 93 S. Ct. 2880, 37 L. Ed. 2d 796 (1973) (Hatch Act prohibitions are not impermissibly vague or overbroad).

⁵*U. S. Civil Service Commission v. National Ass’n of Letter Carriers, AFL-CIO*, 413 U.S. at 564–67.

⁶*U. S. Civil Service Commission v. National Ass’n of Letter Carriers, AFL-CIO*, 413 U.S. at 564–67.

In *United Public Workers of America (C.I.O.) v. Mitchell*, 330 U.S. 75, 94-5, 67 S. Ct. 556, 91 L. Ed. 754 (1947), the Supreme Court rejected First, Fifth, Ninth, and Tenth Amendment challenges to the Hatch Act provision prohibiting federal employees from “taking an active part in political management in political campaigns”, while in *Nat’l Ass’n of Letter Carriers*, it affirmed *Mitchell* in a challenge brought by federal employees who wanted to be politically active. See also *Briggs v. Merit Systems Protection Bd.*, 331 F.3d 1307, 1314, 1318 (Fed. Cir. 2003) (rejecting First Amendment and equal protection claims by D.C. school teacher who was charged with a Hatch Act violation for running for D.C. Council).

§ 14:7 The Civil Hatch Act—Coverage of the Civil Hatch Act—Employees covered by the civil provisions of the Hatch Act

The Hatch Act applies to all federal executive branch and civil service employees, including postal employees,¹ with the exception of the President and Vice President and certain other significant classes of federal workers, who are identified in § 14:8.² Since 1940, Congress has barred covered state and local government executive branch employees involved in federal work from political activity.³ The Hatch Act also reaches certain private not-for-profit organizations that administer federal funds.⁴ VISTA, Service Learning and Older American Volunteer Programs volunteers are also subject to the Hatch Act prohibitions.⁵

§ 14:8 The Civil Hatch Act—Coverage of the Civil Hatch Act—Employees not subject to Hatch Act civil provisions

The Hatch Act exempts the following employees entirely from its coverage:

- The President and Vice President;¹
- Members, officers and employees of Congress, including employees of the General Accountability Office, an agency that reports to Congress;²

[Section 14:7]

¹39 U.S.C.A. § 410(b)(1).

²5 U.S.C.A. §§ 7321 to 7324.

³Act of July 19, 1940, ch. 640, § 12(a), 54 Stat. 767 (codified as amended at 5 U.S.C.A. § 1502); see also 5 U.S.C.A. §§ 1501 to 1508.

⁴See 42 U.S.C.A. § 9851 (deeming “any agency which assumes responsibility for planning, developing, and coordinating Head Start programs and receives assistance under this chapter” a State or local agency for purposes of the Hatch Act); 42 U.S.C.A. § 9918(b) (same for entities involved in Community Services Block Grants).

⁵45 C.F.R. § 1226.6(b).

[Section 14:8]

¹5 U.S.C.A. § 7322(1).

²5 U.S.C.A. § 7322(1).

While congressional personnel are not limited by the civil provisions of the Hatch Act, they are bound by the criminal prohibitions of the Hatch and Pendleton Acts and other federal criminal law. See Senate Ethics Manual, S. Pub. 108-1 (2003 ed.), at 144, 147 and 149 (discussing 18 U.S.C.A. §§ 602, 603, and 607); House of Representatives Ethics Manual (1992 ed.), Chapter 5, XIX,

- Judges, officers and employees of the federal courts;³
- Mayor, recorder of deeds and members of the city council of the District of Columbia;⁴ and
- Employees of the military or other uniformed service;⁵
- State legislative and judicial employees;
- State executive employees who are not “principally” doing work paid for with Federal funds;⁶ and
- State supported educational, cultural, charitable and religious entities.⁷

In addition, two major exceptions to the Hatch Act allow certain federal employees to engage in political activities in certain situations. First, the Act provides that some of its prohibitions (those codified at 5 U.S.C.A. § 7324(a) barring political activity while on duty, in a government building, wearing a government uniform, or using a government vehicle) do not apply to Presidential appointees subject to Senate confirmation or to certain of those who work for the Executive Office of the President, providing that the costs associated with that political activity are not paid for with federal funds.⁸ Second, the Hatch Act prohibitions barring political contributions from some government employees, or a run for partisan political office, do not apply in municipalities where the majority of voters are employed by the federal government and the Office of Personnel Management (“OPM”) determines, that due to special or unusual circumstances, these

Staff Rights and Duties at pages 17–18 (discussing application to congressional personnel of 18 U.S.C.A. §§ 603 and 607, 1341 and 2 U.S.C.A. § 431, among other limitations). Sections 602, 603, and 607 are discussed in §§ 14:14 to 14:18, regarding Hatch and Pendleton Act criminal prohibitions. By their terms, Hatch Act criminal provisions codified at 18 U.S.C.A. §§ 595, 598 and 610, regarding political coercion, would apply to congressional personnel, and anyone else. The GAO regulations prohibit conduct forbidden by the Hatch Act. 4 C.F.R. § 7.

³Code of Conduct for United States Judges, Canon 7, <http://www.uscourts.gov/vol2/ch1.html>; Code of Conduct for Judicial Employees, Canon 5, <http://www.uscourts.gov/guide/vol2/ch2.html>.

⁴5 U.S.C.A. § 7322(1)(C).

⁵5 U.S.C.A. § 7322.

Other laws prohibit partisan activities by the military. 10 U.S.C.A. § 973(b); 18 U.S.C.A. §§ 592 to 593, 596, 608, and 609.

⁶5 U.S.C.A. § 1501(4).

⁷5 U.S.C.A. § 1501(4)(B).

Amtrak is not considered by the OSC to be within the executive branch of the federal government. See Letter from Erica A. Stern, Attorney, Hatch Act, to Amtrak employee (Sept. 5, 2006), available at <http://www.osc.gov>, citing 49 U.S.C.A. § 24301(a)(3).

⁸5 U.S.C.A. § 7324(b); 5 C.F.R. §§ 734.201, 734.401(b), and 734.501.

employees are best served by permitting them to take an active part in political management and political campaigns involving the municipality or other political subdivision in which they reside.⁹

§ 14:9 The Civil Hatch Act—Political activity to which the Civil Hatch Act never applies

The Hatch Act does not abridge the First Amendment rights of public employees.¹ While the Hatch Act restricts many partisan activities, it also makes clear every “employee retains the right to vote as he chooses and to express his opinion on political subjects and candidates.”² In this regard, OPM regulations promulgated under the Hatch Act provide that government employees may register and vote in any election,³ be a member of a political party or other partisan group, attend political gatherings and make a personal partisan political contribution,⁴ be a candidate in a non-partisan election,⁵ “be politically active in connection with a question which is not specifically identified with a political

⁹5 U.S.C.A. § 7325 (regarding prohibitions codified at 5 U.S.C.A. §§ 7323(a) (2) and (3) and 7323(b)).

5 C.F.R. § 733.107(c) lists municipalities or political subdivisions where this political activity is permitted, including mostly listings in Maryland and Virginia, but also some in Alaska, Arizona, California, Georgia, Indiana, Tennessee, and Washington. OPM has proposed to add Fauquier County, Virginia, to this list. 72 Fed. Reg. 39,583 (July 19, 2007).

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¹See *United Public Workers of America (C.I.O.) v. Mitchell*, 330 U.S. 75, 94-5, 67 S. Ct. 556, 91 L. Ed. 754 (1947); *Briggs v. Merit Systems Protection Bd.*, 331 F.3d 1307, 1314 (Fed. Cir. 2003).

²5 U.S.C.A. § 7323(c); 5 U.S.C.A. § 1502(b).

³5 C.F.R. §§ 151.111 and 734.403(a).

⁴5 C.F.R. §§ 734.208(a) and (e); 734.404(b), except that employees of the Federal Election Commission other than a Presidential political appointees are prohibited from giving to, as well as requesting or receiving from, an employee, a Member of Congress, or an officer of a uniformed service a political contribution.” 5 U.S.C.A. § 7323(b)(1); see also 5 C.F.R. § 734.413(b).

⁵5 U.S.C.A. § 7323(a)(3), but note that conduct during the campaign can convert a nonpartisan election into a partisan one for purposes of the Hatch Act. *McEntee v. Merit Systems Protection Bd.*, 404 F.3d 1320, 1325 (Fed. Cir. 2005), cert. denied, 546 U.S. 873, 126 S. Ct. 381, 163 L. Ed. 2d 167 (2005) (“presumption that an election is nonpartisan could be rebutted by evidence showing political partisanship actually entered the campaigns of the candidates.”).

party, such as a constitutional amendment [or] referendum,”⁶ hold office and fundraise on behalf of a non-partisan group provided that the purpose is not for promoting or opposing a political party or candidate in a partisan election.⁷ The Hatch Act prohibitions and their carve-outs have spawned extensive regulations and guidance and some administrative and court decisions.

§ 14:10 The Civil Hatch Act—Hatch Act civil prohibitions applicable to all covered federal and District of Columbia employees

The Hatch Act imposes sweeping prohibitions on partisan political activity by covered employees. Hatch Act prohibitions applicable to all covered employees are as follows. A covered employee may not

- Use his or her official authority or influence with or affecting the result of an election (5 U.S.C.A. § 7323(a)(1));
- Knowingly personally solicit, accept or receive a political contribution¹ from a member of the public and most other government employees, subject to a few exceptions set forth in 5 U.S.C.A. § 7323(a)(2) and interpreted in 5 C.F.R. § 734.208, or solicit, accept or receive uncompensated volunteer services from an individual who is a subordinate (5 U.S.C.A. § 7323(a)(2)(B));
- Run for the nomination or as a candidate for election to

⁶5 C.F.R. § 734.203(b) (for less restricted employees), § 734.403(d) (for further restricted employees).

⁷5 C.F.R. § 734.203 (for less restricted employees) and § 734.404(a)(1) (for further restricted employees).

See generally 5 C.F.R. §§ 734.201 to 734.208 (Permitted Activities for Less Restricted Employees) and 734.402 to 734.405 (Permitted Activities for More Restricted Employees).

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¹A “political contribution” under the Hatch Act “(A) means any gift, subscription, loan, advance, or deposit of money or anything of value, made for any political purpose; (B) includes any contract, promise, or agreement, express or implied, whether or not legally enforceable, to make a contribution for any political purpose; (C) includes any payment by any person, other than a candidate or a political party or affiliated organization, of compensation for the personal services of another person which are rendered to any candidate or political party or affiliated organization without charge for any political purpose; and (D) includes the provision of personal services for any political purpose.” 5 U.S.C.A. § 7322(3).

partisan political office (except as provided by 5 C.F.R. § 734.207);²

- Knowingly solicit or discourage participation in political activity of any person (1) applying for any compensation, grant, contract, ruling, license, permit, or certificate pending before the office of that employee, or (2) participating in or subject to an ongoing audit, investigation or enforcement action before that office (5 U.S.C.A. § 7323(a)(4)); or
- Participate in political activity (1) while on duty, (2) in uniform or official insignia that identifies the office or position of employee, (3) in any room or building occupied in the discharge of official duties by an individual employed or holding office in the federal government (including any agency or instrumentality thereof), or (4) using a federal government owned or leased vehicle or while using a privately-owned vehicle in the discharge of official duties. 5 U.S.C.A. § 7324(a).

“[P]olitical activity” is defined by the OPM Hatch Act regulations to mean “an activity directed towards the success or failure of a political party, candidate for partisan office or partisan political group.”³ For example, government employees clearly may not wear political buttons or display partisan signs, stickers or badges on duty or at work.⁴ E-mailing partisan campaign literature while on duty in a government office to other government employees violates Section 7324(a)(1) to (2).⁵ E-mail Hatch Act violations appear from OSC annual reports to be second in number only to violations arising from government employees running as candidates for partisan office.⁶

²The Hatch Act defines “partisan political office” to mean “any office for which any candidate is nominated or elected as representing a party any of whose candidates for Presidential elector received votes in the last preceding election at which Presidential electors were selected, but shall exclude any office or position within a political party or affiliated organization.” 5 U.S.C.A. § 7322(2); see, e.g., *Special Counsel v. Mahnke*, 54 M.S.P.R. 13, 16, 1992 WL 89144 (M.S.P.B. 1992) (candidate identified by party affiliation on ballot constitutes race for partisan political office).

³5 C.F.R. § 734.101.

⁴*Burrus v. Vegliante*, 336 F.3d 82, 90 (2d Cir. 2003) (union posters of candidate positions violated Hatch Act).

⁵*Special Counsel v. Wilkinson*, 2006 MSPB 353, 2006 WL 3714712 (M.S.P.B. 2006).

⁶See U.S. Office of Special Counsel Annual Reports since 1993, available at www.osc.gov/library.htm#congress.

§ 14:11 The Civil Hatch Act—Additional Hatch civil prohibitions applicable to more restricted federal employees

Before 1993, the Hatch Act also prohibited all covered employees from taking an active part in political management or political campaigns. The 1993 amendments to the Hatch Act lift this prohibition except for 20 categories of federal employees who work in election, law enforcement, national security or revenue collecting areas.¹ These “more restricted” employees may not take an active part in political management or political campaigns, whereas all other federal employees can.² “More restricted em-

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¹The 20 categories are the Federal Election Commission, Election Assistance Commission, Criminal Division of the Department of Justice, National Security Division of the Department of Justice, Office of Criminal Investigation of the Internal Revenue Service, Federal Bureau of Investigation, Secret Service, Office of the Director of National Intelligence, National Security Council, National Security Agency, Central Intelligence Agency, Defense Intelligence Agency, National Geospatial-Intelligence Agency, Office of Investigative Programs of the United States Customs, Office of Law Enforcement of the Alcohol, Tobacco and Firearms, Merit Systems Protection Board, Office of Special Counsel, Career Senior Executive Service positions described in 5 U.S.C.A. § 3132(a)(4), Administrative Law Judge positions described in 5 U.S.C.A. § 5372, and Contract Appeals Board Member positions described in 5 U.S.C.A. § 5372a or 5372b. For transfers of functions and obligations to the Department of Homeland Security for the Secret Service, the United States Customs Service and the Bureau of Alcohol, Tobacco and Firearms see Sections 203, 381, 531(c), 551(d), 552(d), 557 of Title 6, 28 U.S.C.A. § 599A and the Department of Homeland Security Reorganization Plan of November 25, 2002, as modified, set out as a note under section 542 of Title 6. However, Senate confirmed political appointees of these agencies are not subject to the prohibition against active political campaigning and management. 5 U.S.C.A. § 7323(b)(2)(A) and 7323(b)(3).

²5 U.S.C.A. § 7323(b)(2)(A) and 5 U.S.C.A. § 7323(b)(3) (“No employee of the Criminal Division of the Department of Justice (except one appointed by the President, by and with the advice and consent of the Senate), may take an active part in political management or political campaigns.”). “Active part in political management or in a political campaign” means those acts of political management or political campaigning which were prohibited for employees of the competitive service before July 19, 1940, by determinations of the Civil Service Commission under rules prescribed by the President. 5 U.S.C.A. § 7323(b)(4). Civil Service Commission records are maintained by the National Archives and Record Administration. Other categories of employees can be made subject to these heightened restrictions by their employing agency or instrumentality, as was provided for by President Clinton with respect to the Departments of Justice, State and Defense. See, e.g., Memorandum for the Attorney General, 59 Fed. Reg. 50,809 (Oct. 5, 1994) (authorizing limits on political activities of Justice Department political appointees, including Presiden-

ployees” include, for example, all employees at the Federal Election Commission, but only the criminal enforcement division of the Internal Revenue Service. The Hatch Act regulations promulgated by OPM against active political management or campaigning by the “more restricted” federal employees elaborate that these workers may not

- Serve as an officer of a political party, a member of a national, State, or local committee of a political party, an officer or member of a committee of a partisan group, or be a candidate for any of these positions;
- Organize or reorganize a political party organization or partisan political group;
- Serve as a delegate, alternate, or proxy to a political party convention;
- Address a convention, caucus, rally, or similar gathering of a political party or partisan political group in support of or in opposition to a candidate for partisan political office or political party office, if such address is done in concert with such a candidate, political party, or partisan political group;
- Solicit, accept, or receive political contributions;
- Organize, sell tickets to, promote, or actively participate in a fundraising activity of a candidate for partisan political office or of a political party, or a partisan political group;
- Take an active part in managing the political campaign of a candidate for partisan political office or a candidate for political party office;
- Campaign for partisan political office;
- Canvass voters in support of or in opposition to a candidate for partisan political office or a candidate for political party office, if such canvassing is done in concert with such a candidate, or of a political party, or partisan political group;
- Endorse or oppose a candidate for partisan political office or a candidate for political party office in a political advertisement, broadcast, campaign literature, or similar material if such endorsement or opposition is done in concert with such a candidate, political party, or partisan political group;
- Initiate or circulate a partisan nominating petition;
- Be a candidate for partisan political office;
- Act as a recorder, watcher, challenger, or similar officer at

tial appointees, Presidential appointees with Senate confirmation, non-career SES appointees and Schedule C appointees); Memorandum for the Secretary of State, 59 Fed. Reg. 54,121 (Oct. 27, 1994) (same for State Department political appointees); Memorandum for the Secretary of Defense, 59 Fed. Reg. 54,515 (Nov. 1, 1994) (same for Defense Department political appointees).

polling places in consultation or coordination with a political party, partisan political group, or a candidate for partisan political office; or

- Drive voters to polling places in consultation or coordination with a political party, partisan political group, or a candidate for partisan political office.³

Thus, as was the case for essentially all federal employees before the 1993 amendments to the Hatch Act, the more restricted employees must not engage in any partisan campaign activity whether within a party or for a candidate for office. The prohibition would also appear to apply to political activity on a partisan-driven issue campaign.

By contrast, less restricted employees may “take an active part in political management or in political campaigns.”⁴ Among other things, they can solicit votes, distribute campaign literature, organize and work telephone banks and political meetings, publicly endorse candidates, and urge others to do the same.⁵

§ 14:12 The Civil Hatch Act—Hatch Act civil prohibitions applicable to all covered state and local employees

As previously noted, state and local employees whose work has a nexus to federal funding also fall within the coverage of civil provisions of the Hatch Act and are proscribed by that Act from participating in three types of political activities, which are described below.¹ To be covered, an employee first must work for a “State or local agency,” which is defined by statute to reach “the executive branch of a State, municipality, or other political subdivision of a State, or an agency or department thereof.”² As with the federal government, the legislative and judicial branches of State and local governments are excluded. Whether the agency

³5 C.F.R. §§ 734.409 to 734.413.

⁴5 U.S.C.A. § 7323(a).

⁵See H.R. Rep. No. 103-116, at 15 to 16 (1993); 5 C.F.R. §§ 734.204 and 734.205.

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¹5 U.S.C.A. §§ 1501 to 1508.

²5 U.S.C.A. § 1501(2).

Since “State” is defined by the Hatch Act to mean “a State or territory or possession of the United States,” the reference to “State” in the Hatch Act does not cover employees of Indian nations or tribes or subdivisions thereof. Employees of an entity of an Indian tribe or nation could nevertheless appear to be subject to the Hatch Act were they, for example, to devote their time to a Head Start program or other activity funded by the federal government to which the

is within the executive branch of the State is determined from state law sources.³ Second, only those State or local employees “whose principal employment is in connection with an activity which is financed in whole or in part by loans or grants made by the United States or a Federal agency” may be subject to the Hatch Act.⁴ Federal financing includes administrative, operating, travel and equipment costs associated with the work of State and local workers.⁵ For example, Medicaid funding makes the Hatch Act applicable to many State workers.⁶

State and local employees ordinarily may not avoid the Hatch Act’s prohibition against running for partisan office by changing their employment arrangement. Supervisors may be held to the Hatch Act regardless of quantity of time spent on federally funded programs.⁷ Part-time state or local employees are subject to the Hatch Act.⁸ The Hatch Act even applies if the employee is on leave when covered political activity occurs.⁹ State and local employees with more than one job, supervisors, and part-time employees all may be subject to the Hatch Act depending on various factors, including the respective hours worked on each job, the

Hatch Act applies. See 42 U.S.C.A. § 9851 (Head Start); 42 U.S.C.A. § 9918(b) (Community Services Block Grants).

³Special Counsel v. Bissell, 61 M.S.P.R. 637, 641, 1994 WL 145455 (M.S.P.B. 1994) (case dismissed because the OSC failed to carry its burden to show agency within the state’s executive branch).

⁴5 U.S.C.A. § 1501(4); Special Counsel v. Williams, 56 M.S.P.R. 277, 283, 1993 WL 17710 (M.S.P.B. 1993), subsequently aff’d, 55 F.3d 917 (4th Cir. 1995) (Act covers individual if “as a normal and foreseeable incident to [the individual’s] principal job or position, [the individual] performs duties in connection with an activity financed [at least in part] by federal loans or grants.”).

⁵See, e.g., Special Counsel v. Hayes, 16 M.S.P.R. 166, 172 (M.S.P.B. 1983) (overruled on other grounds by, Special Counsel v. Purnell, 37 M.S.P.R. 184, 1988 WL 70043 (M.S.P.B. 1988)), (signing for federal subsidy triggers application of Hatch Act to executive secretary of housing authority).

⁶Special Counsel v. Alexander, 71 M.S.P.R. 636, 646–47, 1996 WL 587930 (M.S.P.B. 1996), subsequently aff’d, 165 F.3d 474, 1999 FED App. 0020P (6th Cir. 1999).

⁷Palmer v. U.S. Civil Service Commission, 297 F.2d 450, 452 (7th Cir. 1962).

⁸Smyth v. U.S. Civil Service Commission, 291 F. Supp. 568 (E.D. Wis. 1968).

⁹See, e.g., Alexander v. Merit Systems Protection Bd., 165 F.3d 474, 482, 1999 FED App. 0020P (6th Cir. 1999) (leave without pay); State of Minn., Dept. of Jobs and Training v. Merit Systems Protection Bd., 875 F.2d 179, 183–84 (8th Cir. 1989) (same).

respective salaries earned and where the employee at issue works during normal business hours.¹⁰

Expressly excluded from Hatch Act coverage are individuals who exercise no functions associated with a federally financed activity.¹¹ Also not covered by the Act are those employed by either “an educational or research institution, establishment, agency, or system which is supported in whole or in part by the State or political subdivision thereof,” or “a recognized religious, philanthropic, or cultural organization.”¹² The only reported opinion with respect to this exception has held it inapplicable to the circumstances presented.¹³

As with covered federal employees, a State or local officer or employee covered by the civil restrictions of the Hatch Act may not

- “use his official authority or influence for the purpose of interfering with or affecting the result of an election or a nomination for office”; 5 U.S.C.A. § 1502(a)(1) and (3);
- be a candidate for elective office in a partisan election.¹⁴ 5 U.S.C.A. §§ 1502(a)(1) and (3) and 1503; or
- “directly or indirectly coerce, attempt to coerce, command, or advise a State or local officer or employee to pay, lend, or contribute anything of value to a party, committee, organization, agency or person for political purposes,” 5 U.S.C.A. § 1502(a)(2).¹⁵

The Hatch Act prohibitions applicable to State and local government employees are not limited to federal elections or politics.

¹⁰Palmer, 297 F.2d at 452 (applying act to supervisor who spent less than one percent of time on federally funded projects).

¹¹5 U.S.C.A. § 1501(4).

¹²5 U.S.C.A. § 1501(4).

¹³See *Special Counsel v. Suso*, 26 M.S.P.R. 673 (M.S.P.B. 1985) (employee’s and agency’s activity went beyond education and research).

¹⁴Section 1502(a)(3) of Title 5, however, does not apply to State Governors, Lieutenant Governors or anyone authorized by law to act as Governor, a city mayor, “duly elected” executive department heads who are not classified within a civil-service or merit system, or individuals holding elective office. 5 U.S.C.A. § 1502(c). In addition, an election is partisan if candidates are permitted to cross file for the office. *Special Counsel v. Yoho*, 15 M.S.P.R. 409, 411–12 (M.S.P.B. 1983) (overruled on other grounds by, *Special Counsel v. Purnell*, 37 M.S.P.R. 184, 1988 WL 70043 (M.S.P.B. 1988)).

¹⁵See also *Bauers v. Cornett*, 865 F.2d 1517, 1527 (8th Cir. 1989) (Hatch Act prohibits covered employee from soliciting partisan campaign contributions from another covered employee).

§ 14:13 The Civil Hatch Act—Civil enforcement and adjudication under the Hatch Act

With the Civil Service Reform Act of 1978, Congress transferred responsibility for administering the Hatch Act from the Civil Service Commission to three agencies. The MSPB is the independent agency that “adjudicat[es] Hatch Act cases.” The Office of Special Counsel (“OSC”) is the independent agency that “investigate[s] allegations of Hatch Act violations and present[s] them to the MSPB.” The Office of Personnel Management (“OPM”) is the agency “responsible for promulgating Hatch Act regulations.”¹ Typically over 200 Hatch Act complaints are received by the OSC each year, with an average of five disciplinary action complaints brought by the OSC before the MSPB each year.²

Along with its prosecutorial powers, the OSC is authorized to issue advisory opinions concerning potential Hatch Act violations by federal, state and local government employees.³ The OSC usually issues around 3,000 advisory opinions a year, although it issued almost 4,000 in its 2004 fiscal year.⁴ OSC advisory opinions provide particularly useful guidance in areas not covered by Hatch Act regulations or adjudications, such as has been the case with computer applications, including e-mail. However, advisory opinions are not binding on the MSPB.⁵

Hatch Act prosecutions typically begin with a referral from a federal, state or local agency that has identified a possible violation. Government agencies are responsible for reporting pos-

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¹American Federation of Government Employees, *AFL-CIO v. O'Connor*, 747 F.2d 748, 753 (D.C. Cir. 1984); see 5 U.S.C.A. §§ 1103, 1204, 1212, 1214 to 1216, 7326.

The Office of Special Counsel is the successor to Civil Service Commission Office of General Counsel and the Merit Systems Protection Board is the successor to the Civil Service Commission. See Civil Service Reform Act of 1978, Pub. L. No. 95-454, 92 Stat. 1111. The OSC became an independent agency in 1989 and is headed by a Presidential appointee with normally a five-year term of office. 5 U.S.C.A. § 1211(a) and (b). The MSPB also is an independent agency composed of three members, each of whom is a Presidential appointee with a seven-year term of office, and no more than two of whom may be of the same political party. 5 U.S.C.A. §§ 1201 to 1204.

²2006 U.S. Office of Special Counsel Annual Rep. at 30.

The OSC annual reports do not distinguish federal versus state and local Hatch Act matters, nor provide a breakdown of the volume of allegations by type of violation alleged.

³5 U.S.C.A. § 1212(f).

⁴See 2006 U.S. Office of Special Counsel Annual Rep. at 30.

⁵*Am. Fed. Gov't Employees v. O'Connor*, 747 F.2d at 753–54.

sible Hatch Act violations to the OSC.⁶ Any party may also file a Hatch Act complaint with the OSC.⁷ When the OSC pursues a Hatch Act civil violation, it sometimes issues a warning letter or negotiates a settlement with the accused, which settlement must employ only Hatch Act penalties and otherwise be lawful on its face.⁸ In this regard, a voluntary resignation by the offending employee normally moots the matter as removal from government employment is the ultimate relief that the OSC could obtain under the civil Hatch Act.⁹

The OSC may also present the case to the MSPB, unless the case involves a Presidential appointee, in which case the OSC complaint is directed to the President for appropriate action.¹⁰ The OSC initiates a Hatch Act prosecution with the MSPB by filing a complaint with the Clerk of the MSPB,¹¹ and its complaint must be plead with “particularity.”¹² An answer is due within 35 days of the date of service of the complaint.¹³ Failure to timely answer or to specifically deny the allegations in the complaint may permit the allegations to be considered admitted and used to form the basis of a decision.¹⁴ The answer may be accompanied by affidavits or documentary evidence.¹⁵

Proceedings before the MSPB on an alleged Hatch Act violation are administrative actions with significant due process protections for the accused. A defendant in a disciplinary proceeding before the MSPB has the right to notice of the charges, to contest the charges, to an evidentiary hearing on the record before an Administrative Law Judge (“ALJ”), to a reasoned, written decision by the ALJ (issued at the earliest practicable date), to a copy of that decision and any subsequent final decision by

⁶See 5 U.S.C.A. § 1504.

⁷See 5 U.S.C.A. § 1212; OSC-13, Complaint of Possible Prohibited Political Activity (Violation of the Hatch Act); How to File a Complaint Alleging a Violation of the Hatch Act, available at http://www.osc.gov/ha_role.htm.

⁸See, e.g., *Special Counsel v. Malone*, 84 M.S.P.R. 342, 348–49, 1999 WL 1051939 (M.S.P.B. 1999) (debarment is not a penalty for a Hatch Act violation).

⁹5 U.S.C.A. § 7326.

¹⁰5 U.S.C.A. § 1215(b).

¹¹5 C.F.R. § 1201.122(a)(1).

¹²5 C.F.R. § 1201.123(a)(2).

¹³5 C.F.R. § 1201.124.

¹⁴5 C.F.R. § 1201.124(d).

¹⁵5 C.F.R. § 1201.124(d).

the MSPB, and to be represented in the proceedings by counsel.¹⁶ The accused has the right to petition the MSPB for review of an adverse ALJ decision within 35 days of receipt of service of the decision,¹⁷ or, in the case of an ALJ recommendation of no action, to reply to the recommended decision of the ALJ within 35 days after the date of service of the recommended decision.¹⁸ The accused also has the right thereafter to judicial review of an adverse MSPB decision, as is discussed further below.¹⁹

The burden of proof in MSPB proceedings is on the OSC, and the OSC must prove its case by a preponderance of the evidence.²⁰ The accused employee has the burden of proof for affirmative defenses, such as a defense that his agency or his job is not covered by the Hatch Act.²¹ Defenses that the accused made a mistake or misapprehended the law, or that a superior ordered or knew of and acquiesced in the alleged misconduct have not found success.²²

Discovery is available in Hatch Act proceedings, and the Federal Rules of Civil Procedure are instructive rather than controlling.²³ The OSC and other parties to the proceeding may subpoena the attendance and testimony of witnesses and the production of documentary evidence from anywhere in the United States for deposition and hearing.²⁴ The MSPB may invoke

¹⁶5 U.S.C.A. §§ 1215(a)(2) to (3) and 1504; 5 C.F.R. § 1201.124(b).

¹⁷See 5 C.F.R. § 1201.114(d) to (f).

¹⁸5 C.F.R. § 1201.125(c)(2) and (3); see also 5 U.S.C.A. §§ 1215(a) and 1216(a)(1).

¹⁹The Hatch Act complainant also has rights to notice of what is going on with the OSC investigation of his or her allegations of a Hatch Act violation, and to comment thereon. See 5 U.S.C.A. § 1214.

²⁰5 C.F.R. § 1201.56(a)(1)(ii); see also 5 C.F.R. § 1201.56(c)(2) (defining “preponderance of the evidence”); *Special Counsel v. Perkins*, 2006 MSPB 344, 2006 WL 3613437 (M.S.P.B. 2006).

²¹*Special Counsel v. Eisinger*, 103 M.S.P.R. 252, 2006 WL 2571163 (M.S.P.B. 2006), decision *aff’d*, 236 Fed. Appx. 628 (Fed. Cir. 2007).

²²See, e.g., *O’Connor*, 747 F.2d at 753–54; *In re Higginbotham*, 221 F. Supp. 839, 840–41 (W.D. Pa. 1963), judgment *aff’d*, 340 F.2d 165 (3d Cir. 1965) (federal government may not be estopped by action of agent not within scope of his actual authority); *Briggs*, 331 F.3d at 1318 (Fed. Cir. 2003).

²³5 C.F.R. §§ 1201.71 to 1201.75.

²⁴5 U.S.C.A. §§ 1204, 1507; 5 C.F.R. §§ 1201.81 to 1201.85, and 5 C.F.R. § 1810.1 (regarding OSC).

judicial proceedings to effectuate its subpoenas and orders.²⁵ The Federal Rules of Evidence are not strictly followed.²⁶

Where the testimony of the accused would incriminate him, he should be able to invoke his 5th Amendment right not to do so.²⁷ Otherwise the accused is not excused from testifying or producing documentary evidence to avoid removal from government employment.²⁸

Civil penalties for Hatch Act violations may only be imposed by the MSPB and usually result in removal from government employment. If, upon adjudication of the case, the MSPB adopts the ALJ's recommended decision that the accused government employee has violated a prohibition in Section 7323 or Section 7324 of Title 5 of the United States Code, the government employee is subject to removal from employment.²⁹

In the case of a federal or District of Columbia employee, however, should the MSPB find by unanimous vote that the violation does not warrant removal, then the MSPB must impose a penalty of not less than a 30-day suspension without pay.³⁰ A decision to impose a suspension rather than removal from government employment requires an evaluation of the following factors first articulated in *Special Counsel v. Purnell*:³¹ (1) the nature of the offense and the extent of the employee's participation, (2) the employee's motive and intent, (3) the political coloring of the employee's activities, (4) whether the employee had received advice of counsel regarding the activities, (5) whether the em-

²⁵5 C.F.R. § 1201.85(a).

²⁶See 5 C.F.R. §§ 1201.61 to 1201.75.

²⁷*Kastigar v. U.S.*, 406 U.S. 441, 444, 92 S. Ct. 1653, 32 L. Ed. 2d 212 (1972) (The 5th Amendment privilege against self-incrimination "can be asserted in any proceeding, civil or criminal, administrative or judicial, investigatory or adjudicatory.").

²⁸See 5 U.S.C.A. § 1507(c); see, e.g., *Wages v. U.S. Civil Service Com'n*, 170 F.2d 182, 183 (6th Cir. 1948) (Defendants could not invoke their Fifth Amendment rights when they were asked questions which could not implicate them in a crime.).

²⁹5 U.S.C.A. § 7326.

³⁰5 U.S.C.A. § 7326.

³¹*Special Counsel v. Purnell*, 37 M.S.P.R. 184, 200, 1988 WL 70043 (M.S.P.B. 1988), decision aff'd, 730 F. Supp. 779 (N.D. Ohio 1989).

ployee had ceased the activities and (6) the employee's past employment record.³²

The MSPB is not authorized to require a State or local agency to remove any of its employees, nor is there a statutory basis to suspend rather than remove such employees from government service. Instead, under the Hatch Act, a State or local agency stands to forfeit federal funding equivalent to two years of an employee's salary if the agency refuses to remove an employee pursuant to a MSPB order, or the employee removed from his job in compliance with a MSPB decision is rehired by another State or local agency within that State within 18 months.³³ The MSPB has held that federal and District of Columbia employees need not be removed from government service for 18 months upon removal from office for a Hatch Act violation.³⁴ This decision highlights an anomaly between the penalties for Hatch Act violations depending upon whether the accused is employed by the federal or District of Columbia government or by a State or local government.

Judicial review of an adverse MSPB decision is available under 5 U.S.C.A. §§ 1215(a)(4), 1508, and 7703(a)(1), before the United States Court of Appeals for the Federal Circuit.³⁵ A petition for review of a MSPB decision must be filed within 60 days after petitioner received notice of the decision under review.³⁶ The standard of review of a MSPB decision is set forth in 5 U.S.C.A. § 7703(c), which requires the court to affirm the Board's decision unless it is "(1) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; (2) obtained without procedures required by law, rule, or regulation having been followed; or (3) unsupported by substantial evidence." The body of law being developed by the Federal Circuit is modest, due in part to the relatively brief time that Hatch Act cases have been

³²See also *Eisinger v. Merit Systems Protection Bd.*, 236 Fed. Appx. 628 (Fed. Cir. 2007) (affirming Board decision to remove employee of United States Small Business Administration for Hatch Act violation) (citations omitted).

³³5 U.S.C.A. § 1506(a); *Oklahoma v. U.S. Civil Service Com'n*, 330 U.S. 127, 143, 67 S. Ct. 544, 91 L. Ed. 794 (1947) (Hatch Act's penalty provision regarding State employees does not violate 10th Amendment).

³⁴*Special Counsel v. District of Columbia Public Schools*, 99 M.S.P.R. 614, 617, 2005 WL 2320034 (M.S.P.B. 2005) (rehiring of DCPS teacher two months after removal not inconsistent with removal order).

³⁵5 U.S.C.A. § 7703(b)(1).

³⁶5 U.S.C.A. § 7703(b)(1).

directed exclusively to the Federal Circuit and to the few number of Hatch Act cases prosecuted before the MSPB by the OSC.³⁷

§ 14:14 Criminal prohibitions of the Pendleton and Hatch Acts and other federal law

The civil prohibitions of the Hatch Act are buttressed by the anti-political patronage criminal provisions of the Hatch and Pendleton Acts. The Justice Department's manual on prosecution of patronage crimes has observed that

[i]n many cases, the Hatch Act's civil provisions, as amended in 1993, may provide sufficient sanctions for violations of the politicking restrictions applicable to federal employees. Criminal prosecution may be appropriate, however, in cases of aggravated abuses, such as political inducements or threats of retaliation directed at public servants, and attempts to subvert federal laws and programs for political ends.¹

Thus, while the civil remedies for violating the Hatch or Pendleton Act are more frequently used, the criminal provisions in these acts (numbering almost a dozen) are augmented by other anti-patronage laws, and deprivation of rights and anti-intimidation criminal laws, and the traditional prosecutorial bulwarks of federal prosecution such as false statements (18 U.S.C.A. § 1001), conspiracy (18 U.S.C.A. § 371), mail or wire fraud (18 U.S.C.A. §§ 1341 and 1343), RICO (18 U.S.C.A. §§ 1961 to 1968), The Travel Act (18 U.S.C.A. § 1952) and bribery (18

³⁷Each year a handful of Hatch Act complaints are resolved by an employee voluntarily leaving government employment. This leaves the issue of to what extent the OSC is declining to prosecute cases where it either has not investigated fully the allegations or has found reasonable cause to believe the Hatch Act was violated. Those aggrieved by Hatch Act violations may consider bringing an action for violation of their federal civil rights. See, e.g., § 14:2; 42 U.S.C.A. § 1983; *Roldan-Plumey v. Cerezo-Suarez*, 115 F.3d 58 (1st Cir. 1997) (42 U.S.C.A. § 1983 claim based on firing for political beliefs allowed to proceed). Such an action would be subject to the four-year statute of limitations provided by 28 U.S.C.A. § 1658(a).

[Section 14:14]

¹Craig C. Donsanto and Nancy L. Simmons, *Federal Prosecution of Election Offenses* 73 (6th ed. 1995).

See also Craig C. Donsanto and Nancy L. Simmons, *Federal Prosecution of Election Offenses* (unpublished 7th ed. 2005), as made public by federal court order in 2005 in *Leadership Conference on Civil Rights v. Gonzales*, 404 F. Supp. 2d 246 (D.D.C. 2005), appeal dismissed, 2006 WL 1214937 (D.C. Cir. 2006).

U.S.C.A. § 666), all of which provide felony sanctions of up to five years or more in prison.²

Moreover, the criminal laws often cover more offenders and a wider array of conduct than do the civil provisions of the Hatch Act. For example, the civil Hatch Act prohibits covered employees from using their official authority or influence for the purposes of interfering with or affecting the result of an election, while the criminal law captures anyone doing so, not just covered employees using their official authority or influence.³

Many of the anti-patronage crimes are misdemeanors. However, the Pendleton criminal political contribution provisions, 18 U.S.C.A. §§ 602, 603, 606 and 607, and the 1993 Hatch criminal intimidation provision, 18 U.S.C.A. § 610, provide for a felony sentence that includes imprisonment for up to three years. The relatively softer criminal penalties of the Hatch and Pendleton criminal laws provide opportunities for favorable plea agreements. Prosecutors can secure a criminal conviction while defendants can avoid the risk of still harsher criminal charges and penalties found in other more widely applicable federal criminal laws.

The Department of Justice exercises significant oversight over politically sensitive prosecutions. A prosecutor who is considering bringing a criminal prosecution for partisan misconduct must consult in advance with the Public Integrity Section before instituting grand jury proceedings, filing an information, or seek-

²The maximum period of incarceration under the federal funds bribery statute, 18 U.S.C.A. § 666, and RICO, 18 U.S.C.A. §§ 1961 to 1968 is 10 and 20 years in prison, respectively. Prosecutors have successfully employed these and other non-patronage specific federal statutes to punish partisan misconduct. See, e.g., *U.S. v. Moeller*, 80 F.3d 1053, 1059, 44 Fed. R. Evid. Serv. 284 (5th Cir. 1996) (upholding Section 666 bribery conviction of state official for scheme to exchange sham contracts for political fundraising); *U.S. v. Grubb*, 11 F.3d 426, 440 (4th Cir. 1993) (upholding conviction of state judge for RICO, conspiracy, mail fraud and bribery arising from campaign fraud scheme). Former Congressman Randy “Duke” Cunningham is serving a 100-month sentence for Section 371 conspiracies to commit crimes against the United States including bribery, mail and wire fraud. Plea Agreement, *United States v. Cunningham*, No. 05-cr-2137 (S.D. Cal. Nov. 28, 2005); Crooked congressman going to prison, *cnn.com*, Mar. 3, 2006, <http://www.cnn.com/2006/law/03/03/cunningham.sentenced/index.html>.

³Compare 5 U.S.C.A. §§ 7323(a)(1) and 1502(a)(1) with, among others, 18 U.S.C.A. §§ 594 and 610 (criminal provisions of the Hatch Act), which are discussed later in this chapter, or 18 U.S.C.A. §§ 241 (conspiracy to deprive another of a federal right), 242 (deprivation of rights under color of law), or 595 (use of official authority by any engaged in federally funded activity for purpose of interfering with federal election), which are discussed in ch. 18 (The Criminal Enforcement of Federal Campaign Finance and Election Laws).

ing an indictment that charges patronage crimes.⁴ The applicable statute of limitation for crimes of political patronage is five years.⁵ Fines applicable to the Hatch and Pendleton criminal provisions are provided by 18 U.S.C.A. § 3571. Typically, for patronage crimes, sentencing guidelines research starts with U.S.S.G. §§ 2C1.8 (base offense level 8) or 2H2.1 (base offense level range of 6–18) depending upon the criminal statute involved. For strategic considerations in defending a criminal charge see Chapter 18 of this Treatise, entitled “The Criminal Enforcement of Federal Campaign Finance and Election Laws.”

The criminal provisions of the Pendleton and Hatch Acts can be divided generally into prohibitions with respect to political contributions, intimidation or other interference with federal elections or voting rights, and corruption with respect to employment and benefits.⁶

§ 14:15 Criminal prohibitions of the Pendleton and Hatch Acts and other federal law—Prohibitions on solicitation or receipt of political contributions (18 U.S.C.A. §§ 602 to 603, and 606 to 607)

All four of the criminal provisions of the Pendleton Act place restrictions on political contributions. They are codified at 18 U.S.C.A. §§ 602 (outlawing solicitations of political contributions by federal employees from another federal employee), 603 (outlawing making of political contributions by a federal employee to his or her “employer or employing authority”), 606 (outlawing intimidation by federal employee to secure political contribution from another employee) and 607 (outlawing political solicitations in federal rooms or buildings).

§ 14:16 Criminal prohibitions of the Pendleton and Hatch Acts and other federal law—Prohibitions on solicitation or receipt of political contributions (18 U.S.C.A. §§ 602 to 603, and 606 to 607)—Prohibitions against soliciting or making political contributions (18 U.S.C.A. §§ 602 and 603)

Sections 602 and 603 respectively prohibit federal government employees and others who receive federally funded compensation

⁴U.S.A.M. 9-85.210.

⁵18 U.S.C.A. § 3282.

⁶The legislative history of the criminal provisions of the Hatch and Pendleton Acts is set forth in App. J-3.

from soliciting or making political contributions from another federal employee. In the past quarter-century Congress and federal prosecutors have narrowed the scope of these statutes by amendment and interpretation.

Section 602 makes criminal to “knowingly solicit” any election-related contribution from “(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,” if the solicitor is “any other such officer, employee, or person.”¹ The Supreme Court has declared that Section 602 prohibits public officers and employees from exercising or being subjected to “pressure for money for political purposes.”² On its face, the ambit of Section 602 reaches federal executive, legislative and judicial employees, as well as state and local government employees compensated with federal funds, federal grantees and federal government contractors.

Until its amendment in 1980, Section 602 prohibited the solicitation *and* receipt of a political contribution, and it was not limited to federal elections.³ Before then, Section 602 also did not require the person making the solicitation to know that the person solicited was a federal employee, congressional candidate or person compensated with federal funds. This also is when the definition of “contribution” under Section 602 became the same as that in the Federal Election Campaign Act of 1971, codified at 2 U.S.C.A. § 431(8).

With the 1993 Hatch Act amendments, Congress excepted from 18 U.S.C.A. § 602 solicitations authorized by those amendments, which are codified at 5 U.S.C.A. §§ 7323 and 7324.⁴ The Criminal Division further has interpreted Section 602 not to cover a federal

[Section 14:16]

¹For purposes of Section 602, a contribution is defined by the meaning of contribution provided in 2 U.S.C.A. § 431(8), which is “(i) any gift, subscription, loan, advance, or deposit of money, or anything of value made by any person for the purpose of influencing an election for federal office; or (ii) the payment by any person of compensation for the personal services of another person which are rendered to a political committee without charge for any purpose.”

²*U.S. v. Wurzbach*, 280 U.S. 396, 398, 50 S. Ct. 167, 74 L. Ed. 508 (1930).

³*Pub. L. No. 96-187* (1980); *Brehm v. U.S.*, 196 F.2d 769, 770 (D.C. Cir. 1952) (upholding Section 602 conviction of Member of Congress based simply upon the fact that he received a campaign contribution from staff).

⁴18 U.S.C.A. § 602(b); *Pub. L. No. 103-94*, § 4(a), 107 Stat. 1004 (1993).

employee's solicitation of "voluntary political contributions from other non-subordinate federal employees," or "state and local government employees and those who have received federal grants."⁵

For almost a century after Congress enacted the Pendleton Act in 1883, the federal law that came to be codified in Section 603 of Title 18 of the United States Code prohibited the making of political contributions to a federal officer, employee or Member of Congress by another, regardless of the employment relationship. The Supreme Court upheld Section 603 as so written in its seminal decision in *Ex parte Curtis*.⁶ In 1980, Congress drastically narrowed Section 603 so that it now only prohibits a subordinate federal employee or recipient of federal compensation from making a political contribution to his or her "employer or employing authority" or that employer or employing authority's campaign committee.⁷ Congressional ethics manuals interpret the 1980 amendment to Section 603 to permit congressional staff contributions to any candidate, including congressional candidates, so long as the candidate is not the staffer's boss.⁸

In 1993, as with Section 602, Congress further restricted the scope of Section 603 by making it inapplicable "to any activity of an employee (as defined in Section 7322(1) of Title 5 [the civil Hatch Act]) or any individual employed in or under the United States Postal Service or the Postal Regulatory Commission, unless that activity is prohibited by Section 7323 or 7324 of such title [the civil Hatch Act]."⁹ A May 5, 1995 opinion by the Department of Justice Office of Legal Counsel interpreted Section 603 not to apply to voluntary contributions made by rank-and-file executive branch officers or employees to the President's authorized re-election campaign committees in conformance with the civil provisions of the Hatch Act (i.e., contribution is made voluntarily, while the donor is off duty, out of uniform, and away from federal office space or vehicle).¹⁰

⁵Craig C. Donsanto and Nancy Simmons, *Federal Prosecution of Election Offenses* 110 (7th ed. 2007).

⁶*Ex parte Curtis*, 106 U.S. 371, 386, 1 S. Ct. 381, 27 L. Ed. 232 (1882).

⁷18 U.S.C.A. § 603(a) and (b).

⁸See Senate Ethics Manual, S. Pub. 108-1 (2003 ed.), at 148, House of Representatives Ethics Manual, ch. 5 (1992 ed.).

⁹18 U.S.C.A. § 603(c).

¹⁰Memorandum Opinion from Dawn Johnsen, Deputy Assistant Attorney General, Office of Legal Counsel, to the Counsel to the President on Whether 18 U.S.C. § 603 Bars Civilian Executive Branch Employees and Officers from Mak-

§ 14:17 Criminal prohibitions of the Pendleton and Hatch Acts and other federal law—Prohibitions on solicitation or receipt of political contributions (18 U.S.C.A. §§ 602 to 603, and 606 to 607)—Prohibition against intimidating another for making or failing to make a political contribution (18 U.S.C.A. § 606)

Pursuant to Section 606, a federal officer or employee is prohibited from discharging, demoting, or promoting another, or threatening or promising to do so, for making or failing to make “any contribution of money or other valuable thing for any political purpose.” Section 606 applies to political activities at the federal, state or local level and includes donated services. “In the Criminal Division’s view, Section 606 was not intended to prohibit the consideration of political factors (such as ideology) in the hiring, firing, or assignment of the small category of federal employees who perform policymaking or confidential duties for the President or Members of Congress.”¹

§ 14:18 Criminal prohibitions of the Pendleton and Hatch Acts and other federal law—Prohibitions on solicitation or receipt of political contributions (18 U.S.C.A. §§ 602 to 603, and 606 to 607)—Political contributions barred from federal rooms and buildings (18 U.S.C.A. § 607)

No one may solicit or receive a contribution in any room or building where any federal officer or employee is conducting any official duty.¹ By its terms, Section 607 applies to the anyone, federal employees or not, regardless of whether they are soliciting or receiving a political contribution, and expressly including the President of the United States and Members of Congress. In 2002, Congress amended Section 607 to make it inapplicable to political contributions which are received by staff of the President or Senators or Congressmen that were not solicited to be received in a federal room, building or other facility covered by Section 607(a) and which are transferred within seven days of

ing Contributions to a President’s Authorized Re-election Campaign Committee (May 5, 1995).

[Section 14:17]

¹Craig C. Donsanto and Nancy L. Simmons, *Federal Prosecution of Election Offenses* 112 (7th ed. 2007).

[Section 14:18]

¹18 U.S.C.A. § 607.

receipt to a political committee permitted by “section 302(e) of the Federal Election Campaign Act of 1971.”² Congressional rules also interpret Section 607 not to cover solicitation of Members of Congress, or solicitations “aimed at the public at large” that may “inadvertently” reach federal employees.³ To avoid suggestion of a violation of Section 607, the House Committee on Standards of Official Conduct states that “no activities of a political solicitation nature should occur with the support of any federal resources (staff or space).”⁴ According to the Criminal Division, Section 607 applies to funds for any election or other political purpose and bars political solicitations on federal military reservations, but does not apply to U.S. Postal Service post office boxes, nor to federal space leased or rented such that no official duty is conducted there.⁵

§ 14:19 Criminal prohibitions of the Pendleton and Hatch Acts and other federal law—Political intimidation or coercion (18 U.S.C.A. §§ 594, 598 and 610)

Several criminal provisions of the Hatch Act bar political intimidation of or by government employees or with use of federal funds. The most recent of these is Section 610 of Title 18, which Congress enacted in 1993 and which makes it unlawful “for any person to intimidate, threaten, command, or coerce, or attempt to intimidate, threaten, command, or coerce, any employee of the Federal Government to engage in, or not to engage in, any political activity.”¹ Political activity expressly includes voting and political contributions or campaigning and prohibition against intimidation easily covers, for example partisan employment decisions or practices and other conduct inconsistent with the First Amendment.² The anti-partisan intimidation prohibition of Section 610 was added in 1993 to counter increased risk of political manipulation of federal employees from the 1993 Hatch reforms

²18 U.S.C.A. § 607(b).

³Senate Ethics Manual, S. Pub. 108-1 (2003 ed.), at 149; House of Representatives Campaign Activity Booklet.

⁴See Senate Ethics Manual, S. Pub. 108-1 (2003 ed.), at 145 n. 377; see also 31 U.S.C.A. § 1301(a) (regarding misappropriation of staff or supplies).

⁵18 U.S.C.A. § 607; Craig C. Donsanto and Nancy L. Simmons, *Federal Prosecution of Election Offenses* 115 (7th ed. 2007).

[Section 14:19]

¹“[E]mployee of the Federal Government” as defined by the Hatch Act is codified at 5 U.S.C.A. § 7322(1).

²See §§ 14:2 to 14:4.

allowing greater politicking by federal employees.³ Yet, to the extent that Section 610 is read to require explicit intimidation or attempted intimidation, Section 610 would not stem institutional patronage where the partisan climate is so thick that nothing need be said or done for the intimidation to be effective. Moreover, Section 610 applies only to executive branch employees and thus in this respect is more limited than Section 600 and 601, discussed in § 14:20.

Other anti-partisan intimidation criminal provisions of the Hatch Act date back to the original Hatch Act. Section 594 prohibits interference with the right of a person to vote and vote as he or she may choose in a federal election.⁴ The Criminal Division has recognized that Section 594 applies to non-violent voter intimidation.⁵ A violation of Section 594 is a misdemeanor.

Section 598 of Title 18 forbids the use of federal funds or authority under an Appropriation Act “for the purpose of interfering with, restraining, or coercing any individual in the exercise of his right to vote at any election.” With respect to the use of federal funds or authority, Section 598 applies to (1) “any appropriation made by Congress for work relief purposes, or for increasing employment by providing loans and grants for public-works projects” or, in the alternative, (2) the “exercise[] or administ[r]ation of] any authority conferred by any Appropriation Act.” Section 598 reaches any person regardless of whether he or she is a public employee so long as federal funds or authority conferred by an Appropriation Act is involved.

§ 14:20 Criminal prohibitions of the Pendleton and Hatch Acts and other federal law—Partisan corruption of federal employment, contracts, benefits or appointment (18 U.S.C.A. §§ 600–601 and 604–605)

Criminal provisions of the Hatch Act forbid partisan corruption of federal employment, contracts and benefits.¹

Section 600 applies to

[w]hoever, directly or indirectly, promises any employment, posi-

³139 Cong. Rec. H6817 (daily ed. Sept. 21, 1993).

⁴18 U.S.C.A. § 594.

⁵Craig C. Donsanto, *Federal Prosecution of Election Offenses* 29 (5th ed. 1988).

[Section 14:20]

¹18 U.S.C.A. §§ 600, 601, 604 and 605.

tion, compensation, contract, appointment, or other benefit, provided for or made possible in whole or in part by any Act of Congress, or any special consideration in obtaining any such benefit, to any person as consideration, favor, or reward for any political activity or for the support of or opposition to any candidate or any political party in connection with any general or special election to any political office or in connection with any primary election or political convention or caucus held to select candidates for any political office.²

Meanwhile, Section 601 likewise reaches

[w]hoever, directly or indirectly, knowingly causes or attempts to cause any person to make a contribution of a thing of value (including services) for the benefit of any candidate or any political party, by means of the denial or deprivation, or the threat of the denial or deprivation, of—

(1) any employment, position, or work in or for any agency or other entity of the Government of the United States, a State, or a political subdivision of a State, or any compensation or benefit of such employment, position or work; or

(2) any payment or benefit of a program of the United States, a State or a political subdivision of a State;

If such employment, position, work, compensation, payment, or benefit is provided for or made possible in whole or in part by an Act of Congress.³

Prosecutors are encouraged to use Sections 600 and 601 to address “situations when corrupt public officials use government-funded jobs or programs to advance a partisan political agenda rather than to serve the public interest.”⁴ Accordingly, for example, these sections might be employed to address the use by a public official of no-bid contracts as patronage. Sections 600 and 601, however, are not by their terms limited to public officials. For instance, Section 601 would appear to cover a promise or other special consideration for a job with a government contractor or other recipient of federal funds in exchange for any political activity regarding one or more elections. In any event, Section 371 of Title 18 could reach party officials or employees, candidates, their agents and anyone else who conspire with another to cause violation of either of these statutes.

That said, at least one federal court of appeals has held that

²18 U.S.C.A. § 600.

³18 U.S.C.A. § 601.

⁴Craig C. Donsanto and Nancy L. Simmons, *Federal Prosecution of Election Offenses* 116 (7th ed. 2007); see, e.g., *U.S. v. Pintar*, 630 F.2d 1270, 1283, 6 Fed. R. Evid. Serv. 1132 (8th Cir. 1980) (secretary hired with federal funds in exchange for performance of political work).

Section 601 requires evidence of an explicit promise of employment or other benefit in return for campaign services.⁵ That same appellate court also has held that Section 601 does not extend to protect against public officials requiring lessors of equipment to make political contributions as a condition to their equipment being used on state jobs.⁶

Finally, Section 604 prohibits anyone from soliciting or receiving a contribution, assessment or subscription “for any political purpose from any person known by him to be entitled to or receiving compensation, employment, or other benefit provided for or made possible by any Act of Congress appropriating funds for work relief or relief purposes.”⁷ Section 605 prohibits the furnishing or disclosure for any political purpose to a political candidate, committee, campaign manager, or to any person for delivery to same, of any list or names of persons receiving relief-related government compensation, employment or benefits made possible by a congressional act appropriating or authorizing the appropriation of funds for work relief or relief purposes. Violations of Sections 604 and 605 are misdemeanors.

IV. LIMITS ON THE REVOLVING DOOR BETWEEN PUBLIC AND PRIVATE EMPLOYMENT

§ 14:21 Overview of Section 207—Legislative History prior to 2007

While efforts to regulate the influence of former government employees date back to 1872, the major body of law in this area began with the passage of an ethics Act in 1962, which included the provision subsequently codified as 18 U.S.C.A. § 207.¹ Section 207 has since been amended with some frequency, including ma-

⁵U.S. v. Cicco, 10 F.3d 980, 986 (3d Cir. 1993) (vacating Section 601 conviction of mayor and town counsel members for attempting to coerce municipal employees into performing services for political party as condition of employment).

⁶U.S. v. Cerilli, 603 F.2d 415, 421 (3d Cir. 1979). Section 599 of Title 18, which has its origins from before the Hatch Act of 1939, makes it illegal for political candidates to, directly or indirectly, promise to appoint or to support the appointment of another person to any job “for the purpose of procuring support in his candidacy.” 18 U.S.C.A. § 599. Violation of Section 599 is a misdemeanor absent willfulness, in which case it is a felony for which the candidate may be imprisoned for up to two years. Section 599 was originally enacted as part of the Federal Corrupt Practices Act of 1925.

⁷18 U.S.C.A. § 604.

[Section 14:21]

¹Pub. L. No. 87-849, 76 Stat. 1119 (1962).

for amendments in 1978, 1989 and 2007. Section 207 restricts lobbying of the federal government by former executive and legislative branch officials and employees, including Members of Congress. Violations of Section 207 are subject to criminal and civil sanctions and the Attorney General may seek injunctive relief to prohibit conduct that would violate Section 207.

The goal of Section 207 and its amendments is to discourage attempts by former government officers and employees to use knowledge gained in public service for private gain. Section 207 implements the principle that a “public servant owes undivided loyalty to the [G]overnment.”² The Senate Report to the 1978 Ethics in Government Act declared that 18 U.S.C.A. § 207

seeks to avoid *even the appearance of* public office being used for personal or private gain. In striving for public confidence in the integrity of government, it is imperative to remember that what appears to be true is often as important as what is true. Thus government in its dealings must make every reasonable effort to avoid even the appearance of conflict of interest and favoritism.”³

Section 207 is a complex statutory scheme consisting of multifaceted categories of covered former employees, exceptions and waivers. Section 207 primarily restricts direct communications to or appearances before the government by former government officials and employees on behalf of someone else. The dura-

The 1962 legislation augmented Section 207 with other statutory provisions addressing conflicts of interest by current federal employees, which provisions are codified as 18 U.S.C.A.

- § 203 (barring federal employees from requesting or accepting compensation by third-parties or the offer or giving of same by third parties);
- § 205 (barring federal employees from acting as an agent or attorney in a claim against the United States or for anyone in a executive branch proceeding in which the United States is a party or has a direct and substantial interest);
- § 208 (barring taking action as government official or employee in matter in which he or she has a personal financial interest); and
- § 209 (United States exclusive salary provider for federal officials and employees). Pub. L. No. 87-849.

Subsequently, in 1988, Congress enacted the law codified now as 41 U.S.C.A. § 423, which prohibits conflicts of interest by current and former government personnel in procurement. 41 U.S.C.A. § 423(c) and (d); Pub. L. No. 100-679, 102; Stat. 406.3. All of these laws have criminal sanctions that are set forth in 18 U.S.C.A. § 216, and Sections 203, 205, 208 and 209 are discussed more thoroughly elsewhere in the Treatise. Office of Gov’t Ethics, Rep. to the President and to Congressional Committee on the Conflict of Interest Laws Relating to Executive Branch Employment, 11–12 (2006).

²H.R. Rep. No. 748, 87th Cong. 1st Sess. (1961).

³S. Rep. No. 170 at 32, as reprinted in 1978 U.S.C.C.A.N. 4216, 4248 (emphasis in original).

tion of the prohibitions may be as short as one or two years or as long as one's lifetime, and the duration is generally inversely related to the scope of the prohibition. That is, the more of the government that is off-limits to the former employee, the shorter the period of Section 207's prohibition. In certain isolated situations, Section 207 prohibits "behind the scenes" assistance in addition to representational contacts with the government. Originally applicable only to executive branch employees, in 1989, Congress extended the prohibitions of Section 207 to Members of Congress and other officers and employees of the legislative branch.⁴ Section 207 also has spawned a patchwork of regulations, including a major rule-making still in progress and likely to be re-proposed in light of the 2007 amendments.

§ 14:21.10 Overview of Section 207—The Honest Leadership and Open Government Act of 2007

The most prominent change in Section 207 imposed by the new law was to lengthen the lobbying bar for Senators and very senior executives from one to two years. The new two year "cooling off" period applies to those Senators and very senior executives who leave their office "on or after the date of adjournment of the first session of the 100th Congress sine die or December 31, 2007, whichever date is earlier."¹

The Honest Leadership Act also has heightened criminal sanctions applicable to Congress. Congress created a maximum 15-year felony for Members of Congress who use their official position to influence a private entity's employment decisions or practice solely on the basis of partisan political affiliation,² and provided for Members of Congress to lose their congressional pensions for conviction under Section 207, among other crimes.³

§ 14:21.20 Overview of Section 207—The role of the Office of Government Ethics and the designated agency ethics officials

The Office of Government Ethics ("OGE") and designated ethics officials in each agency are responsible for administering Section

⁴Ethics Reform Act of 1989, Pub. L. No. 101-194, 103 Stat. 1716.

[Section 14:21.10]

¹Pub. L. No. 110-81, 121 Stat. 735 § 105(a) (2007).

²Pub. L. No. 110-81, 121 Stat. 735, § 102 (2007), codified at 18 U.S.C.A. § 227.

³Pub. L. No. 110-81, 121 Stat. 735, § 401 (2007), codified at 5 U.S.C.A. §§ 8332 and 8411.

207.¹ The OGE promulgates regulations under Section 207, issues advisory letters and other guidance, and counsels current and former employees regarding their conflict of interest obligations.² The designated agency ethics officials are typically the first line of support for current and former government employees on ethics matters and can provide specific guidance to an employee based upon the facts relevant to that agency. Agency heads also play a role in that they are required by 28 U.S.C.A. § 535(b) to report to the Attorney General possible violations of Section 207. Prosecutions of alleged Section 207 violations are handled by the Public Integrity Section of the Criminal Division of the Department of Justice or by a United States Attorney's Office.³

Final comprehensive regulations under Section 207 were proposed by OGE in 2003 but have not been made final, leaving in place a patchwork of regulations the reach of which depends upon when the affected individual left government service.⁴ The conduct of officials and employees who terminated their Government service prior to January 1, 1991, is governed, by regulations at 5 C.F.R. §§ 2637.101 to 2637.216, which predate the substantial revisions to Section 207 made by the Ethics Reform Act of 1989, effective January 1, 1991. The conduct of senior officers and employees who left or will leave government service after January 1, 1991, but before the effective date of the 2007 amendments, is governed, by the regulations regarding Section 207(c) set forth in 5 C.F.R. §§ 2641.101 to 2641.201. The comprehensive regulations the OGE proposed in 2003, offer guidance from OGE into its interpretation of then-Section 207.⁵

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¹Ethics in Government Act of 1978, 5 U.S.C.A. § 403.

²The OGE regulations are set forth in 5 C.F.R. §§ 2600 to 2610 and the guidance is available from the OGE website at <http://www.usoge.gov>.

³2006 Rep. to Congress on the Activities and Operations of the Public Integrity Section 8.

⁴See Post-Employment Conflict of Interest Restrictions, 68 Fed. Reg. 7844 to 7892 (Feb. 18, 2003) and Post-Employment Conflict of Interest Restrictions—Correction, 68 Fed. Reg. 15,385 (March 31, 2003) (regarding Proposed 5 U.S.C.A. § 2641).

⁵Memorandum from Amy L. Comstock, Director, to Designated Agency Ethics Officials and Inspectors General on Proposed Post-Employment Rule (Feb. 19, 2003), available at <http://www.usoge.gov>.

§ 14:21.30 Overview of Section 207—Section 207 criminal penalties and the requirements of “willfully,” “knowingly” and “with intent to influence”

Criminal offenses under the federal conflict of interest laws, including Section 207, now carry substantial penalties. Prior to amendments in 1989, Section 207 provided a single felony offense with a prison term of up to two years.¹ In the Ethics Reform Act of 1989, Congress increased the array of penalties for violations of Section 207 when it created Section 216, a new penalty provision for violations of the criminal conflict of interest laws codified as Sections 203 to 205 and 207 to 209 of Title 18. Under Section 216, violation of Section 207 may result in civil penalties, a misdemeanor or a felony of up to five years in prison.² Section 216 felonies require proof that the accused “willfully” violated Section 207.³ Given the difficulty of proving that a former government employee knew that his or her conduct would violate Section 207 and engaged in that conduct anyway, prosecutors may utilize the general federal criminal statutes prohibiting false statements and conspiracy, which provide for five-year prison terms without

[Section 14:21.30]

¹Pub. L. No. 95-521, 92 Stat. 1824 (1978).

²18 U.S.C.A. § 216. As a separate matter, conduct giving rise to a violation of Section 207 also provides a basis for suspension or debarment from government contracting of the former government employee or his or her private contractor employer. See, e.g., 48 C.F.R. §§ 9.400 to 9.409 (government-wide debarment and suspension procedures) and 290.402 to 290.407-3 (Department of Defense specific supplemental procedures), and 3.101.1 (“Transactions relating to the expenditure of public funds require the highest degree of public trust and an impeccable standard of conduct”). Causes for debarment include commission of an “offense indicating a lack of business integrity or business honesty that seriously and directly affects the present responsibility of a Government contractor” or “any other cause so serious or compelling in nature that it affects the present responsibility of the contractor.” 48 C.F.R. § 9.406-2. Suspension or debarment actions often are, but need not be, initiated upon awareness by the contracting agency of an indictment, conviction or civil judgment. Debarment and Suspension, Am. Bar. Ass’n, *The Practitioner’s Guide to Suspension and Debarment* 63 (3d ed. 2002). Debarment may not be imposed as a punishment, but, if imposed, may be fatal to some careers and businesses. Section 2408 of Title 10 is relevant to defense contractors as it prohibits a contractor from employing in a management position with respect to a government contract valued at \$100,000 or more, any individual convicted of any fraud or defense contract-related felony, for a five-year period from the date of conviction.

³18 U.S.C.A. § 216(a)(2).

requiring any proof as to willfulness, to prosecute revolving door conflicts of interest.⁴

Several of the Section 207 prohibitions require a prosecutor to prove the defendant acted “knowingly,” and “with the intent to influence.”⁵ “Knowingly” means the defendant knows that he or she is engaging in the conduct that the law forbids.⁶ “Knowingly” as used in Section 207 does not require proof that the defendant committed the conduct despite knowing that the conduct was unlawful; this additional proof is required, however, to demonstrate that the defendant acted “willfully” for purposes of any Section 207 felony conviction.⁷

The OGE has proposed defining “with intent to influence” to refer to communications or appearances “(i) [s]eeking a Government ruling, benefit, approval, or other discretionary Government action; or (ii) [a]ffecting Government action in connection with an issue or aspect of a matter which involves an appreciable element of actual or potential dispute.”⁸ This definition includes silent appearances that are made with intent to influence, which courts have concluded already are covered by Section 207.⁹ This proposed regulation excludes from Section 207 coverage such

⁴See, e.g., Plea Agreement, *United States v. Ney*, No. 1:06-cr-00272 (D.D.C. Sept. 13, 2006) (defendant pleaded guilty to one count of conspiracy under 18 U.S.C.A. § 371 and one count of false statements under 18 U.S.C.A. § 1001 in connection with former staffer’s violation of the one-year cooling off bar imposed by Section 207).

Civil penalties under Section 207 of Title 18 may range up to \$50,000 per violation, 18 U.S.C.A. § 216(b), while criminal fines under Section 207 are provided by Section 3571 of Title 18. The sentencing guidelines, while not mandatory, remain influential and research under them related to a Section 207 offense typically will begin with U.S.S.G. 2C1.3 for which the base offense level begins with 6. The statute of limitations applicable to a prosecution brought under Section 207 is five years. 18 U.S.C.A. § 3282.

For a detailed discussion of the requirements of proof for “knowing and willful” see Chapter 18, “The Criminal Enforcement of Federal Campaign Finance and Election Laws.”

⁵18 U.S.C.A. § 207(a)(1), (a)(2), (c)(1) and (d)(1).

⁶*U.S. v. Nofziger*, 878 F.2d 442, 443 (D.C. Cir. 1989) (holding that, for conviction under 18 U.S.C.A. § 207, “the . . . government [must] prove that [the defendant] had knowledge of all the facts making his conduct criminal”).

⁷18 U.S.C.A. § 216; cf. *Bryan v. U.S.*, 524 U.S. 184, 193, 118 S. Ct. 1939, 141 L. Ed. 2d 197 (1998) (to be convicted of the sale of firearm without a license, prosecution must prove defendant knew that his conduct was unlawful).

⁸Proposed 2641.201(e)(1)(i) and (ii), 68 Fed. Reg. 7873 (Feb. 18, 2003).

⁹Proposed 2641.201(e)(4), 68 Fed. Reg. 7873; see, e.g., *U.S. v. Coleman*, 805 F.2d 474, 480 (3d Cir. 1986) (“intended to include *appearances in any* professional capacity” with or without speaking for the client) (emphasis added).

contacts as requests for publicly available documents, status inquiries, filing of tax returns, non-controversial factual statements or questions, and filing a Form 10-K.¹⁰

§ 14:21.40 Overview of Section 207—Behind-the-scenes assistance

Most Section 207 restrictions do not restrict behind-the-scenes activities, such as providing advice and assistance to another with respect to how to lobby the executive branch, providing that such advice and assistance is not for attribution to the former employee. Both the OGE and the Office of Legal Counsel have opined on impermissible behind-the-scenes activities.¹

§ 14:21.50 Overview of Section 207—Exceptions and waivers

None of the Section 207 restrictions apply to self-representation, to official representation on behalf of the United States (including Congress) or the District of Columbia or, to conduct by the former government officer or employee as an elected official of a State or local government.¹ In all, Section 207 contains a half dozen exceptions from its prohibitions. In a few instances, a person may obtain a waiver from the application of a Section 207 restriction to him or her.

Section 207 prohibitions and the exceptions thereto for the executive and legislative branches of the federal government are addressed below. Some of the prohibitions of Section 207 also apply to former officers and employees of the executive branch of

¹⁰Proposed 2641.201(e)(2), 68 Fed. Reg. 7873. The House Committee on Standards of Official Conduct, the committee which enforces the House ethics rules and which is informally known as the House Ethics Committee, differs and cautions that Section 207 “is broad enough that it precludes a former Member even from, for example, requesting or scheduling, for or on behalf of any other person, a meeting with any current Member, officer or employee on official business.” Memorandum from the Committee on Standards of Official Conduct to All Members and Officers, Post-Employment and Related Restrictions for Members and Officers 4 (Sept. 29, 2006) see also Memorandum from the Committee on Standards of Official Conduct to All Employees, Post-Employment and Related Restrictions for Staff 5 (Sept. 29, 2006).

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¹See 5 C.F.R. § 2637.201(b)(3), (6); “Communications” under 18 U.S.C.A. § 207 at 3 (Jan. 19, 2001) (available at the OLC website, http://www.usdoj.gov/v/olc_follow_memoranda/opinions_hyperlink).

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¹18 U.S.C.A. §§ 207(a) to (d), (f) and (l) and 207(j)(1).

the District of Columbia, and these District of Columbia prohibitions will be noted.

§ 14:22 Executive branch revolving door limits

Section 207 restricts communications and appearances by a former officer or employee of the executive branch of the United States or District of Columbia government to or before the executive branch. Some of these restrictions apply to employees of independent agencies that are not part of the legislative or judicial branches of the federal government, as well as to special government employees, as defined by 18 U.S.C.A. § 202(a).¹ A former official or employee may be subject to more than one Section 207 prohibition.²

§ 14:23 Executive branch revolving door limits—Lifetime bar

Section 207(a)(1) prohibits a former executive branch officer or employee from switching sides in a “particular matter” in which the U.S. was a party and on which he or she “personally and substantially” worked while in the government.¹

Section 207 defines “particular matter” to include “any investigation, application, request for a ruling or determination, rulemaking, contract, controversy, claim, charge, accusation, arrest, or judicial or other proceeding.”² Although this language may appear broad, the focus of the ban is on adjudicative type proceedings involving individual parties, not broad policy issues. Thus, for example, while a former government employee who was responsible for determining whether a particular company was awarded a government contract or received approval for the sale of a particular drug could not in the private sector represent the

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¹See 18 U.S.C.A. § 207(a)(1), (b), (d) and (f) (independent agencies) and 207(c) and (f) (special government employees).

²As between the “cooling off” periods of Section 207(c) (for senior employees) and (d) (for very senior employees), Section 207(d) controls. 18 U.S.C.A. § 207(c)(2).

See App. J-4 for a chart showing the relevant time period for the various lobbying restrictions of Section 207.

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¹18 U.S.C.A. § 207(a)(1). The restriction of Section 207(a)(1) similarly applies to a former officer or employee of the executive branch of the District of Columbia. 18 U.S.C.A. § 207(a)(1) and (3)(B).

²18 U.S.C.A. § 207(i)(3).

company before the government with respect to the same contractor drug, Section 207 does not impose a lifetime ban on employees who may have been responsible for formulating government policy on classes of drugs or delivered speeches to Congress on such matters. Indeed, Section 207(a)(1) has been held not to reach supervisory actions that apply to a type or class of investigation or to investigatory methods that reflect a policy matter of general applicability.³ “Ministerial duties” also have been found to not constitute personal and substantial involvement.⁴ Section 207 defines the activity in which the person “participated” as a government employee to mean “an action taken as an officer or employee through decision, approval, disapproval, recommendation, the rendering of advice, investigation, or other such action.”⁵ “[T]he term ‘officer or employee,’ when used to describe the person to whom a communication is made or before whom an appearance is made, [extends all the way to] the President and the Vice President.”⁶ A “communication” need not be direct. The Justice Department Office of Legal Counsel has concluded that use by a former employee of an intermediary to convey information to the government with the intent that it be attributed to him or her would violate Section 207’s representational bar.⁷

For a person to participate “personally” in a matter as a government employee means “directly.”⁸ “[S]ubstantially” with respect to a person’s participation means

the employee’s involvement must be of significance to the matter, or form a basis for a reasonable appearance of such significance. It requires more than official responsibility, knowledge, perfunctory involvement, or involvement on an administrative or peripheral issue. A finding of substantiality should be based not only on the effort devoted to the matter, but on the importance of the effort. While a series of peripheral involvements may be insubstantial, the

³See *Shakeproof Indus. Prods. Div. of Ill. Tool Works, Inc. v. United States*, 104 F.3d 1309, 1313-14 (Fed. Cir. 1997) (exercise of general delegated authority to approve investigations did not constitute personal and substantial involvement).

⁴*Kelly v. Brown*, 9 Vet. App. 37, 39 (1996).

⁵18 U.S.C.A. § 207(i)(2).

⁶18 U.S.C.A. 207(i)(1)(A).

⁷See Memorandum for Amy L. Comstock, Director, OGE, from Joseph R. Guerra, Deputy Assistant Attorney General, OLC, (Jan. 19, 2001).

⁸5 C.F.R. § 2637.201(d).

single act of approving or participation in a critical step may be substantial.⁹

Several federal courts have interpreted the lifetime ban and rendered fact-specific decisions consistent with the statute and rules. A “direct and substantial interest” of the United States or District of Columbia, not surprisingly, includes government contract negotiations.¹⁰

Federal courts have held that the ban requires that there be “the same specific parties, subject matter, and ‘substantially’ overlapping facts.”¹¹ Applying this standard, courts have disqualified former United States Attorneys and District Attorneys from representing defendants in prosecutions for which they were involved at the investigative stage as federal government attorneys.¹² Prosecutors have secured guilty pleas from government officials and employees who “switch sides” in violation of Section 207(a)(1) in other scenarios as well.¹³

The recent scandal involving convicted U.S. Representative

⁹5 C.F.R. § 2637.201(d).

¹⁰*U.S. v. Medico Industries, Inc.*, 784 F.2d 840, 845–46 (7th Cir. 1986) (army procurement officer negotiated army contract for new private employer).

With respect to government contracts, 41 U.S.C.A. § 423(d) of the United States Code provides a procurement-specific one-year post-employment compensation restriction applicable to key decision-making and administrative government personnel involved with contract matters over \$10,000,000. This restriction bars an affected former employee from receiving compensation from a contractor for service as a director, officer, employee or consultant, unless the former employee goes to work for a division or affiliate of the contractor that does not produce the same or similar product or service as the division of the contractor responsible for the contract with which the employee was involved while working for the government. 41 U.S.C.A. § 423(d). The restriction of Section 423(d) is in addition to the Section 207(a)(1) lifetime restriction, the scope of which is much broader than the compensation ban of Section 423. There is no dollar amount threshold under Section 207(a)(1) and the former employee may have participated personally and substantially under Section 207(a)(1) without having served in any of the contracting roles or performed any of the specific functions or decisions enumerated by Section 423.

¹¹*E.E.O.C. v. Exxon Corp.*, 202 F.3d 755, 758 (5th Cir. 2000), citing *United States v. Medico Indus., Inc.*, 784 F.2d at 843; see also *C.A.C.I., Inc.-Federal v. U.S.*, 719 F.2d 1567, 1575–76, 71 A.L.R. Fed. 338 (Fed. Cir. 1983).

¹²See, e.g., *U.S. v. Clark*, 333 F. Supp. 2d 789, 795 (E.D. Wis. 2004); *U.S. v. Martin*, 39 F. Supp. 2d 1333, 1335 (D. Utah 1999); *U.S. v. Dorfman*, 542 F. Supp. 402, 410–11 (N.D. Ill. 1982).

¹³See, e.g., *United States v. Bryan*, No. 1:04-cr-00043 (E.D. Va. July 23, 2004) (former Government Services Administration contract specialist pleaded guilty to representing contractor on same contract that she was responsible for administering and modifying on behalf of GSA in violation of Section 207(a)(1)); *United States v. Spino*, No. 3:02-cr-00259 (D. Conn. Dec. 4, 2002) (former IRS

Randy “Duke” Cunningham also included a criminal conviction under Section 207(a)(1)’s lifetime ban related to a former program manager at the Department of the Army’s National Ground Intelligence Center, Robert Fromm, who pleaded guilty to a misdemeanor violation of the lifetime ban of Section 207(a)(1). The program manager admitted to knowingly, with the intent to influence, communicating with Department of Defense employees on behalf of his then-current employer, MZM, Inc., a defense contractor, about the program he had managed for the government, which depended, before and after he left government service, upon a multi-million dollar multi-year contract with that defense contractor.¹⁴ This plea follows the guilty plea of an owner and founder of MZM, Inc., to bribing former U.S. Representative Randy “Duke” Cunningham.¹⁵

In addition to the lifetime bar of Section 207(a)(1), former United States Trade Representative and their deputies are forever restricted by Section 207(f)(2) from aiding behind-the-scenes or lobbying on behalf of a foreign entity.¹⁶

§ 14:24 Executive branch revolving door limits—Two-year bars—Particular matter under government supervisor/manager’s official responsibility

Section 207 also imposes time-limited bans on former federal employees. Among the most important is the two-year restriction on government supervisors and managers concerning particular matters previously under his or her official responsibility. Section 207(a)(2) tracks the requirements of Section 207(a)(1), except that, instead of a matter on which the person “personally and substantially” participated as a government employee, the excludable matter was one that “such person knows or reasonably should know was actually pending under his or her official responsibility as such officer or employee within a period of 1 year before the termination of his or her [government] service or

tax collector pleaded guilty to representing entities against which he had previously sought to collect taxes in violation of Section 207(a)(1)); *United States v. Nearen*, No. 1:96-cr-00874 (E.D.N.Y. May 6, 1997) (former SEC enforcement attorney pleaded guilty to communicating with the SEC on behalf of those he had earlier investigated as a SEC attorney in violation of Section 207(a)(1)).

¹⁴Plea Agreement and Statement of Offense, *United States v. Fromm*, No. 1:07-cr-00230 (D.D.C. Oct. 9, 2007).

¹⁵Jayson Whitehead, NIGC employee pleads guilty, Charlottesville’s News Weekly, Oct. 10, 2007, available at <http://www.c-ville.com>.

¹⁶See § 14:29 for a discussion on Section 207(f). 18 U.S.C.A. § 207(f)(2).

employment. . . .”¹ “Official responsibility” means “the direct administrative or operating authority, whether intermediate or final, and either exercisable alone or with others, and either personally or through subordinates, to approve, disapprove, or otherwise direct Government action.”² The President and Vice President are among those with whom a person subject to Section 207(a)(2) may not have contact.³ Thus, for example, Section 207(a)(2) prohibits lobbying a prior government office by a former employee for whom a government contract matter was in his chain of supervision in the year *before* he left government service.

Federal prosecutors have secured guilty pleas and civil penalties under Section 207(a)(2) from former government managers and their private employers for trying to persuade the former government manager’s former government office to take a position contrary to the position held by the government office when the manager had responsibility for it.⁴ In *U.S. v. Arnpriester*,⁵ the court concluded, in reliance upon Section 207(a)(2), that a judge should have recused himself from presiding over a prosecution resulting from an investigation for which he had been responsible in his last year of service as the United States Attorney.⁶

§ 14:25 Executive branch revolving door limits—Two-year bars—Very senior government employees

As amended in 2007, Section 207(d) prohibits the Vice President, cabinet members and other very senior government personnel for the first two years after they leave government service from “knowingly mak[ing], with the intent to influence [official action on a matter], any communication to or appearance” before

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¹18 U.S.C.A. § 207(a)(2)(B).

²18 U.S.C.A. § 202(b).

³18 U.S.C.A. § 207(i)(1)(A).

⁴See, e.g., *United States v. Hews*, No. 1:93-mj-00576 (D.D.C. Nov. 2, 1993) (guilty plea); *United States v. Vander Schaaf*, No. 1:99-CV-00811 (E.D. Va. June 11, 1999) (civil settlement with fine); *United States v. Morrison & Foerster LLP*, No. 1:98-cv-02135 (Sept. 4, 1998) (law firm charged with aiding and abetting civil violation of Section 207(a)(2) and for helping private contractors bid for contracts that they previously had helped the government to develop).

⁵*U.S. v. Arnpriester*, 37 F.3d 466, 467 (9th Cir. 1994).

⁶Former government employees who are lawyers also should refer to applicable state bar rules regarding limits on their participation in matters in which they previously participated personally and substantially on behalf of the government, and to Section 203 of Title 18, which proscribes compensation to a government employee for any representational services.

“any officer or employee [including the President and Vice President] of any department or agency in which such person [worked] in such position within a period of 1 year before [his government service terminated], and any person appointed to a position in the executive branch which is listed in section 5312, 5313, 5315, or 5316 of title 5.”¹ Section 207(d) defines very senior employees to mean employees listed under Levels I or II of the Executive Schedule, who are among the highest paid government employees.²

§ 14:26 Executive branch revolving door limits—One-year bars

As amended in 2007, Section 207 has four separate one-year restrictions that broadly restrict work on certain subjects by narrow categories of former federal employees. These one-year restrictions are for (a) federal workers involved with treaty negotiations and who had access to government information exempt from public disclosure under the Freedom of Information Act;¹ (b) the “cooling off” period for senior employees; (c) anyone representing or aiding foreign entities in their new non-government employment; and (d) information technology contractors. These last two restrictions are broader than other Section 207 restrictions in that they prohibit not only representational contacts but also any aid of any kind.

§ 14:27 Executive branch revolving door limits—One-year bars—Access to information regarding treaty negotiations

Section 207(b) applies to executive branch employees who are subject to the lifetime ban of § 207(a) and who, within the one-year period before leaving government employment, “personally and substantially participated in any ongoing trade or treaty negotiation on behalf of the United States” and who had access to information properly withholdable by the government from the

[Section 14:25]

¹18 U.S.C.A. § 207(d).

²18 U.S.C.A. § 207(d)(1)(B).

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¹5 U.S.C.A. § 552.

public under the Freedom of Information Act.¹ These employees “shall not, on the basis of that information, knowingly represent, aid, or advise any other person (except the United States) concerning such ongoing trade or treaty negotiation for a period of 1 year after” termination from government employment.² This provision reaches legislative personnel, including Members of Congress.³ It no longer applies to trade negotiations because Congress allowed to expire the fast track negotiating authority this provision referenced.⁴

§ 14:28 Executive branch revolving door limits—One-year bars—Senior government employees

Section 207(c) prohibits Presidential appointees, higher paid employees, various special Government employees, such as cabinet secretaries and deputies, and persons assigned from the private sector to a government job from “seek[ing] official action” by any officer or employee [including the President and Vice President] of the department or agency in which such person served within one year before termination from government service.¹ The Section 207(c) ban, however, does not apply to special employees who work less than 60 days in the year prior to leaving the government.²

In some circumstances, Section 207(c) is waivable by the Direc-

[Section 14:27]

¹5 U.S.C.A. § 552.

²18 U.S.C.A. § 207(b)(1).

³See § 14:33.

⁴Section 207(b)(2)(A) defines the term “trade negotiation” with reference only to section 1102 of the Omnibus Trade and Competitiveness Act of 1988 (codified at 19 U.S.C.A. § 2902), which concerns fast track trade agreement authority, and which expired in 1993 and has not been renewed. See Office of Gov’t Ethics, Rep. to the President and to Congressional Committees on the Conflict of Interest Laws Relating to Executive Branch Employment, 26 (2006). In 2002, when Congress provided similar fast track authority it did so in a new provision, 19 U.S.C.A. § 3803, and, while Congress has amended Section 207 since then, Congress has not amended Section 207 to conform to Section 3803 and thus revive this exception.

[Section 14:28]

¹18 U.S.C.A. § 207(c)(2).

²18 U.S.C.A. § 207(c)(2)(B) and (i)(1)(A); see also 17 C.F.R. § 140.735-6(c) (restrictions on former senior CFTC employees); 5 C.F.R. 1304.4605(1) (restrictions applicable only to former senior employees).

The OGE has issued guidance regarding the Section 207 and other ethical requirements for special government employees. See Memorandum from Stephen D. Potts, Director to Designated Agency Ethics Officials, General

tor of the Office of Government Ethics at the request of the affected department or agency.³ These waivers are not individual specific but, instead, apply to positions or categories of positions to which clauses (ii) or (iv) of Section 207(c)(2)(A) refer.⁴ By contrast, waivers issued to individual employees by designated agency ethics officers under Section 208 are not published.⁵

The scope of Section 207(c) may be narrowed by a department or agency that is able to separate itself into distinct components so that a former employee is limited by Section 207(c) only with respect to the component for which he worked.⁶ A former employee, under some circumstances, may also be able to lobby the parent department. Section 207(h) designations narrowing the one-year ban by agency components require a determination by the Director of the Office of Government Ethics that “there exists no potential for use of undue influence or unfair advantage based upon past Government service.” Agencies and bureaus so designated by the OGE are set forth in 5 C.F.R. § 2641, App. B, and these designations are reviewed by the OGE annually. No

Counsel and Inspectors General Regarding Summary of Ethical Requirements for Special Government Employees, 2000 WL 33407342 (Feb. 15, 2000); Office of Gov’t Ethics, Summary of Post-Employment Restrictions of 18 U.S.C. § 207, Re-issuance of Post-Employment Summary (July 29, 2004).

³18 U.S.C.A. § 207(c)(2)(C).

⁴See 18 U.S.C.A. 207(c)(2)(A)(ii) and (iv).

Section 207(c)(2) waivers are published in 5 C.F.R. § 2641 App. A.

⁵The conflicts of interest controversy in 2003 involving former Centers for Medicare and Medicaid Services Administrator Thomas A. Scully highlights the problems arising from the lack of visibility of agency issued conflict of interest waivers. In the summer of 2003, unbeknownst to Congress and the public, Mr. Scully sought private employment from employers in the health field, which stood to benefit from Medicare reform, at the same time that he negotiated as a government employee a major legislative overhaul of Medicare. Only after the President signed the Medicare legislation was it learned that Mr. Scully had secured from his agency a 208(b)(1) waiver to engage in conflicts of interest. See, e.g., Amy Goldstein, Medicare Chief Scully Says He’s ‘Checking out of Dodge,’ Wash. Post, Dec. 3, 2003, at A27. Thereafter, the President’s Chief of Staff directed that senior Administrative appointees who intend to negotiate for outside employment consult with the Office of the Counsel to the President, but he did not direct agencies to affirmatively make public their decisions to waive conflicts of interest prohibitions for individual employees as required by the Freedom of Information Act, 5 U.S.C.A. § 552(a)(2)(B). Memorandum from Andrew H. Card, Jr., to the Heads of Executive Departments and Agencies Establishing New Ethics Procedures (Jan. 6, 2004) available at <http://www.citizen.org>. The Office of Government Ethics is not a central repository of agency issued conflict of interest waivers under Section 208, nor does it maintain any statistics about them.

⁶18 U.S.C.A. § 207(h).

Executive Office of the President agency or bureau may be designated under Section 207(h). Section 207(h) does not apply to persons covered by the Executive Schedule that sets pay rates for executive positions other than those for the Senior Executive Service, nor to Presidential or Vice Presidential appointees.⁷ In 2007, the Office of Government Ethics approved a request from the Department of Homeland Security (“DHS”) to eliminate compartmentalization in favor of a “a single, undifferentiated organization for purposes of 18 U.S.C. § 207(c).”⁸ Now, a former DHS official or employee must refrain from lobbying anyone at DHS for a year after leaving DHS employment.

The OGE has reported on a small number of civil settlements under Section 207(c) since the 1989 amendment that eased prosecutions under this Section. In *United States v. Glassman*, the government obtained a \$10,000 civil settlement from a former Deputy for International Coordination of the Task Force for Military Stabilization for allegedly lobbying the Department of State on behalf of Northrup Grumman to help secure contracts with the Bosnian government.⁹ In another case, *United States v. Boster*, the government recovered \$30,000 from a former Deputy Assistant Attorney General for Information Technology for allegedly lobbying the then current Deputy Assistant Attorney General for Information Technology on behalf of his private employer, Science Applications International Corp.¹⁰

§ 14:29 Executive branch revolving door limits—One-year bars—Aid or representation of foreign entities

Section 207(f) prohibits for one year former senior or very senior government employees already subject to Section 207(c) or (d), including the Vice President, from “knowingly” aiding or advising any “foreign entity” and from “knowingly represent[ing]

⁷18 U.S.C.A. §§ 207(h) and 207(c)(2)(A)(i) and (iii).

⁸This revocation of DHS agency compartmental designations went into effect on June 6, 2007 and is codified at 5 C.F.R. 2641 App. B, 72 Fed. Reg. 10339 to 10342 (Mar. 8, 2007).

⁹See Memorandum from Amy L. Comstock, Director, to Designated Agency Ethics Officials and Inspectors General, 2001 Conflicts of Interest Prosecution Survey (Oct. 17, 2002), available at <http://www.usoge.gov> (“Laws and Regulations”).

¹⁰Memorandum from Amy L. Comstock, Director, to Designated Agency Ethics Officials and Inspector Generals, 2000 Conflict of Interest Prosecution Survey (Feb. 12, 2002), available at <http://www.usoge.gov> (“Laws and Regulations”).

a foreign entity” before any Member of Congress, the President, the Vice President, or any officer or employee of any Department or agency,¹ “with the intent to influence a decision of such officer or employee in carrying out his or her official duties.”² This one-year restriction begins to run once the employee leaves his or her government job covered by Section 207(c) or (d). “Foreign entity” for purposes of Section 207(f) includes both the definition of “foreign entity” and “foreign political party” as defined in sections 1(e) and 1(f) respectively of the Foreign Agents Registration Act of 1938, as amended.³ This definition encompasses any foreign commercial corporation that “exercises the functions of a sovereign.”⁴ The United States Trade Representative and his or her deputy are permanently barred from representing, aiding or advising foreign entities following their government service as U.S. Trade Representative or Deputy Trade Representative.

§ 14:30 Executive branch revolving door limits—One-year bars—Contract aid or representation by former private sector details to agencies

In a limited category of cases, the one year ban reaches individuals not formally employed by federal government. Section 207(l) restricts employees of private sector organizations assigned to an agency under the Information Technology Exchange Program from “knowingly” representing or aiding, counseling or assisting in representing another in connection with any contract with that agency. Accordingly, this restriction bars persons assigned to an agency under this program both from lobbying that agency on behalf of another and from helping another “behind-the-scenes” with any contract with that agency. The one-year bar begins on the date that employee’s assignment under the Program terminates.

[Section 14:29]

¹See 18 U.S.C.A. 207(i)(1)(B) and Office of Legal Counsel Memorandum from Renee Lettow Lerner, Deputy Assistant Attorney General, for Marilyn L. Glynn, Acting Director, Office of Government Ethics, on Application of 18 U.S.C. § 207(f) (June 22, 2004).

²18 U.S.C.A. § 207(f) and (i)(1)(A).

³22 U.S.C.A. §§ 611(e) and (f) to 621.

⁴Memorandum from the Office of Government Ethics to Designated Ethics Officials, Summary of Post-Employment Restrictions of 18 U.S.C.A. § 207 (July 29, 2004) (available at <http://www.usoge.gov>, follow DAEOgrams hyperlink).

**§ 14:31 Executive branch revolving door limits—
Exceptions**

There are seven statutory exceptions to the “revolving door” restrictions of Section 207 that allow lobbying or other representational contacts that would otherwise be barred by Section 207.¹ These Section 207 exceptions are divided below into three categories: (a) global exceptions, which apply to all Section 207 prohibitions, (b) exceptions for senior and very senior employees, and (c) a scientific advice exception. In addition, Congress has by separate statute created a further exception from the prohibitions of Section 207 for federal officers and employees of the United States Enrichment Corporation who become directors, officers or employees of the Corporation when it converts to a private entity.²

**§ 14:32 Executive branch revolving door limits—
Exceptions—Global exceptions**

The Section 207 “revolving door” restrictions do not apply to former government officers and employees who perform official government duties, represent or aid international organizations or offer testimony, 18 U.S.C.A. § 207(j)(1), (3) and (6), respectively.

**§ 14:33 Executive branch revolving door limits—
Exceptions—Global exceptions—Official
government duties**

“[O]fficial duties” on behalf of the United States or the District of Columbia, or as an elected official of a State or local government, are not subject to Section 207 prohibitions.¹ Accordingly, former government employees who are elected state officials may immediately engage in work such as transacting business with their former agency concerning new matters on behalf of the state.² In addition to Section 207(j)(1), Sections 207(a) to (e) and (l) all contain an exception for actions on behalf of the United States. Section 207(b) to (d) further define the United States to

[Section 14:31]

¹18 U.S.C.A. 207(j).

²42 U.S.C.A. § 2297h-3.

See App. J-5 for a chart showing the statutory exceptions and waivers available under Section 207 by subsection.

[Section 14:33]

¹18 U.S.C.A. § 207(j)(1).

²5 C.F.R. § 2637.204(b)(2) Ex. 1.

include “independent agencies.”³ The OGE has repeatedly rejected the argument that an activity is on behalf of the United States if it benefits the United States.⁴

The Honest Leadership Act amended Section 207 to expand the exception under Section 207(j)(1) to allow certain lobbying by former government officers and employees that go to work for Indian tribes and nations under certain circumstances.⁵ As amended in 2007, the Section 207 revolving door restrictions “shall not apply to acts authorized by section 104(j) of the Indian Self-Determination and Education Assistance Act (25 U.S.C. § 450(j)).”⁶

**§ 14:34 Executive branch revolving door limits—
Exceptions—Global exceptions—International
organizations**

Former federal employees may appear, communicate, advise or aid with respect to “an international organization in which the United States participates,” providing that “the Secretary of State certifies in advance that such activity is in the interests of the United States.”¹

**§ 14:35 Executive branch revolving door limits—
Exceptions—Global exceptions—Testimony**

Section 207 does not prevent a former employee “from giving testimony under oath, or from making statements required to be

³Section 207(f), which bars representing or aiding foreign entities for one year, contains within it no categorical exception for former government officers or employees who are acting on behalf of the United States. It is unclear when, if ever, Section 207(j)(1) would apply to Section 207(f).

⁴See, e.g., Office of Gov’t Ethics, Summary of Reissuance of Post Employment Summary, available at <http://www.usoge.gov>. (“A former employee does not act on behalf of the United States, however, merely because the United States may share the same objective as the person whom the former employee is representing.”).

⁵The 2007 amendment to Section 207(j)(1) takes effect upon enactment of the Honest Leadership Act, except that the conforming amendment to section 104(j)(2) of the Indian Self-Determination and Education Assistance Act shall apply to individuals who leave Federal office or employment to which such amendments apply on or after the 60th day after the date of the Act’s enactment, November 13, 2007. Section 105(d) of Pub. L. No. 110-81, 121 Stat. 735 (2007).

⁶See § 104(a), Pub. L. No. 110-81, 121 Stat. 735 (2007).

The 2007 amendment to Section 450i(j) of Title 25 is set forth in App. J-6.

[Section 14:34]

¹18 U.S.C.A. § 207(j)(3).

made under penalty of perjury.”¹ Those subject to the lifetime bar of Section 207(a)(1), however, must have a court order to serve as an expert witness for any person other than the United States or the District of Columbia.²

**§ 14:36 Executive branch revolving door limits—
Exceptions—Exceptions for senior and very
senior employees**

Former senior and very senior employees are excepted from their “revolving door” restrictions with respect to (1) certain representations on behalf of State and local governments and certain educational institutions, not-for-profit hospitals and organizations, (2) uncompensated transfer of special knowledge, and (3) certain types of communications on behalf of political candidates, campaigns or party committees.¹

**§ 14:37 Executive branch revolving door limits—
Exceptions—Exceptions for senior and very
senior employees—State and local governments
and institutions, hospitals and organizations**

Section 207(j)(2) makes the “revolving door” bars that are specific to former senior and very senior government employees inapplicable “to acts done in carrying out official duties as an employee acting on behalf of (1) an agency or instrumentality of a State or local government, or (2) an accredited, degree-granting institution of higher education, or a hospital or medical research organization, as defined by Section 101 of the Higher Education Act of 1965, 20 U.S.C.A. § 1001, and Section 501(c)(3) of the Internal Revenue Code of 1986, 26 U.S.C.A. § 501(c)(3),

[Section 14:35]

¹18 U.S.C.A. § 207(j)(6); U.S. ex rel. Watson v. Connecticut General Life Ins. Co., 2003 WL 203568 (E.D. Pa. 2003) (allowing testimony based on former government employee’s “personal knowledge of certain contracts while employed by the government”).

²See also Exxon Corp., 202 F.3d at 758 (noting same and holding that former government attorneys may testify factually and as experts for oil company regarding settlement that they helped negotiate as government attorneys with that company).

[Section 14:36]

¹18 U.S.C.A. §§ 207(j)(2), (4) and (7), respectively.

respectively.¹ To qualify for this exception, the former senior or very senior employee must be an “employee” of the State or local government or other specified entity; it is not sufficient for him or her to be a consultant or independent contractor.²

**§ 14:38 Executive branch revolving door limits—
Exceptions—Exceptions for senior and very
senior employees—Special knowledge**

Section 207(j)(4) states that a former senior or very senior employee may, without regard to Section 207(c) or (d) restrictions, make or provide a statement for which “no compensation is thereby received” based on his or her own “special knowledge in the particular” subject area.¹

**§ 14:39 Executive branch revolving door limits—
Exceptions—Exceptions for senior and very
senior employees—Political parties and campaign
committees**

Notwithstanding Sections 207(c) and (d), former senior and very senior employees may appear or communicate on behalf of “a candidate in his or her capacity as a candidate, an authorized committee, a national committee, a national Federal campaign committee, a State committee, or a political party.” This political exception allowing activity before an agency does not apply if the appearance or communication (1) is before or to the Federal Election Commission by a former officer or employee thereof, (2) at a time when the former employee is employed by a person or entity other than (a) those identified in the above quote, or (b) “a person or entity who represents, aids, or advises only persons or entities” so identified.¹ This political exception thus narrowly allows former high level government employees to engage in certain political lobbying. This lobbying must conform, as much other types

[Section 14:37]

¹18 U.S.C.A. § 207(j)(2).

²OGE Informal Advisory Letter 87 x1, 1987 WL 109906 (Feb. 3, 1987); see also Commentary to Proposed Regulation 2641.301(c), 68 Fed. Reg. 7844, 7862 (Feb. 18, 2003).

[Section 14:38]

¹18 U.S.C.A. § 207(j)(4). 5 C.F.R. § 2637.204(i) (providing examples of when former employees may use their special knowledge.).

[Section 14:39]

¹18 U.S.C.A. § 207(j)(7).

of lobbying, to applicable anti-patronage and coercive politicking criminal prohibitions and other limitations of federal law.²

**§ 14:40 Executive branch revolving door limits—
Exceptions—Scientific or technological exception
to permanent bar**

This exception, rarely used, allows former government scientists and others to provide the government with scientific and technological information. Under Section 207(j)(5), the lifetime bar of Section 207(a)(1) does not apply to communication with the government “solely for the purpose of furnishing scientific or technological information [providing that one of the two following conditions is met].” Section 207(j)(5) applies if the communication is (1) “made under procedures acceptable to the department or agency concerned,” or (2) “the head of the department or agency concerned with the particular matter . . . makes a certification, published in the Federal Register, that the former officer or employee has outstanding qualifications in a . . . technical discipline, and is acting with respect to a particular matter which requires such qualifications, and that the national interest would be served by [his or her] participation. . . .”¹ The Vice President of the United States may qualify for this exception after he leaves office.² This exception provision applies to Section 207(a), (c) and (d) prohibitions, but not to Section 207(b), (f) and (l) prohibitions. There appear to have been less than a half dozen waivers issued under this provision since its enactment.³

**§ 14:41 Executive branch revolving door limits—
Exceptions—Exception to Section 207 found in
another statute**

Congress created an additional exception from the prohibitions of Section 207 when it enacted a law to privatize the United States Enrichment Corporation, which handles uranium for the United States government. This law excepts from the application

²See §§ 14:5 to 14:20 and 18 U.S.C.A. §§ 594, 597, 600, 601 and 610, among others.

[Section 14:40]

¹18 U.S.C.A. § 207(j)(5).

²18 U.S.C.A. § 207(j)(5).

³67 Fed. Reg. 58634-5 (Sept. 17, 2002) (Immigration and Naturalization), 65 Fed. Reg. 48017 (Aug. 4, 2000) and 62 Fed. Reg. 53351 (Oct. 14, 1997) (National Aeronautics and Space Administration); 61 Fed. Reg. 66656 (Dec. 18, 1996) (Department of Energy).

of Section 207(a), (b), (c) and (d) those directors, officers and employees of the United States Enrichment Corporation should they continue with the corporation once it is made private, providing that they worked continuously for the public corporation during the 45 days prior to the privatization date.¹

§ 14:42 Presidential waivers

Under Section 207(k), the President may grant waivers under circumstances so limited that the President has never invoked this provision. Section 207(k) allows the President to grant up to 25 waivers in effect at any given time to current civilian executive branch officers and employees (outside the Executive Office of the President) for such person's future employment with a Government-owned, contractor operated entity, with which the person served as an officer or employee immediately before the person's Federal Government employment began.¹ The OGE has recommended its repeal.²

§ 14:43 Congressional revolving door limits

The conflict of interest laws and roles limiting the activities of former Senators, Representatives, and congressional officers and staff add additional complexity to the analysis above. Many of the same (and additional laws) apply with additional provisions and exceptions expressly dealing with the legislative branch. As noted, the Ethics Reform Act of 1989 extended the reach of Section 207 to Members of Congress and their staff.¹ The Honest Leadership Act increased the restrictions on lobbying by former Senators and their staff. Under the 2007 law, former Senators are prohibited for two years from "knowingly" making lobbying contacts with any Member, officer or employee of either House of Congress or other legislative officer or employee, and former senior Senate aides are banned from lobbying the Senate for a year. Previously, a former Senator could not directly lobby for

[Section 14:41]

¹42 U.S.C.A. § 2297h-3(c).

[Section 14:42]

¹18 U.S.C.A. § 207(k).

²Office of Gov't Ethics, Rep. to the President and to Congressional Committee on the Conflict of Interest Laws Relating to Executive Branch Employment, 15 n. 30, 39 (Jan. 2006).

[Section 14:43]

¹Pub. L. No. 101-194, 103 Stat. 1716.

one year and his or her aides were only barred from lobbying their previous Senate office, not the entire chamber. The one-year lobbying ban applicable to former Members of the House of Representatives remains the same. Criminal penalties for a violation of any of these lobbying bans include up to five years in prison.² The 2007 law further amends the rules of the House of Representatives and the Standing Rules of the Senate to reduce conflicts of interest consistent with the changes to Section 207(e). These provisions take effect on or after the date of adjournment of the first session of the 110th Congress sine die, or December 31, 2007, whichever is earlier, except for those that are amendments to House Rules in which case they are already in effect.³

In the same Act, Congress made it illegal for a Member of Congress to influence a private entity's employment decisions and practices for partisan reasons.⁴ The provision arose as a result of the controversy surrounding the so-called "K Street Project"—an effort by the new Republican majority in the 1990s to pressure D.C. lobbying firms and trade associates (many of which traditionally had offices in Washington, D.C.'s K Street) to hire Republicans as lobbyists.⁵ Section 227 of Title 18 applies to any "Senator or Representative in, or Delegate or Resident Commissioner to, the Congress or [congressional employee] of either House of Congress," and provides felony penalties that include "disqualif[ication] from holding any office of honor, trust, or profit under the United States" and for a sentence of imprisonment of up to 15 years. By its terms, however, Section 227 is narrowly limited to situations in which a Senator or other person covered by Section 227 "takes or withholds," "influences," or "offers or threatens" such, with respect to an "official act," with the intent to influence a private entity's employment decision or practice "solely on the basis of partisan political affiliation."⁶

Section 102(b) of the Honest Leadership Act provides that nothing in Section 227 "shall be construed to create any inference with respect to whether the activity described in section 227 . . . was a criminal or civil offense before the enactment of this Act,

²See 18 U.S.C.A. § 207(e)(1) and (2), as amended, and the penalties of 18 U.S.C.A. § 216 incorporated therein.

³Pub. L. No. 110-81, § 105, 121 Stat. 735, 741 (2007).

⁴See Sections 102(a) and 105(b) of Pub. L. No. 110-81, codified as 18 U.S.C.A. § 227.

⁵See, e.g., Jeffrey H. Birnbaum, Lobbyist Won't Like What Pelosi Has in Mind, Wash. Post, Oct. 30, 2006, at A-1; Carl Hise, Democratic Leaders Agree on Overhaul of Lobbying, N.Y. Times, July 28, 2007, at A-12.

⁶See §§ 102(a) and 105(b) of Pub. L. No. 110-81 (emphasis added).

including under section 201(b), 201(c) any of sections 203 through 209, or section 872 of [T]itle 18 of the United States Code.”⁷ Section 102(b) will appear as a note behind Section 227 in the United States Code Annotated. By its terms, however, the post-government employment restrictions of Section 207 would not appear to cover a situation in which a current Member of Congress or congressional employee committed the Section 207 conduct giving rise to a Section 227 offense by him or her. However, Section 227 applies also to convictions for conspiracy to violate Section 207, a recent conviction under which was a spur to enact this very law.⁸

Section 401 of the Honest Leadership Act further provides for the loss of pensions accrued during service as a Member of Congress for abuses of the public trust.⁹ Section 401 applies only to certain enumerated federal crimes committed while the individual is a Member of Congress after the Act’s enactment date for which “[e]very act or omission of the individual that is needed to satisfy the elements of the offense directly relates to the performance of the individual’s official duties as a Member.” Section 401(a)(2)(ii). The crimes enumerated in Section 401 and providing for a loss of pension include Section 207 of Title 18, as amended, but whether post-employment lobbying by a former Member of Congress “directly relates to the performance of the individual’s official duties as a Member” will almost certainly be disputed. Curiously, Section 401 omits Section 227 (partisan influence in hiring decisions) from the crimes the conviction of which could result in the loss of a congressional pension, even though it became law at the same time as Section 401, and even though Congress declared that conviction for a violation of Section 227 is worthy of “disqualification from holding any office of

⁷Pub. L. No. 110-81 § 102(b).

⁸See *United States v. Ney*, No. 1:06-cr-00272 (D.D.C. Sept. 13, 2006) (former Congressman pleaded guilty to a Section 371 conspiracy to violate Section 207 in connection with former staffer’s violation of the one-year cooling off provision). In January 2007, the House amended House Rule XXIII to forbid Members, Delegates and Resident Commissioners from officially retaliating or threatening to do so against private businesses that, for example, hire employees who have a partisan political affiliation different from that of the Member. H. Res. 6, 110th Cong. (2007). The House rule is broader than Section 227 because under the rule partisan affiliation need not be the sole reason for the Members’ intent to influence the employment decision. House rules are enforced by the House Ethics Committee.

⁹Pub. L. No. 110-81 § 401, codified as 5 U.S.C.A. §§ 8332 and 8411.

honor, trust, or profit under the United States.”¹⁰ Nor do the enumerated crimes include any criminal laws specific to prohibiting partisan politicking or specific to the protection of voting rights, but conduct forbidden thereby may be captured under general criminal statutes enumerated in Section 401.¹¹

With these 2007 changes to Section 207 in mind, set forth below are the requirements of Section 207 as it concerns Members of Congress, their staffs and other employees of the legislative branch of the United States.¹²

§ 14:44 Congressional revolving door limits—Sections 207(b) and (f) limits on work involving treaties or foreign entities

The previously discussed one-year bans established by Sections 207(b) and (f) for certain persons involved in trade or treaty negotiations or seeking to represent, aid or advise a foreign entity also apply to “any person who is a former officer or employee of the legislative branch or a former Member of Congress.”¹ With respect to Section 207(f), the term “officer or employee” is used to describe the person to whom a communication is made or before

¹⁰Pub. L. No. 110-81 § 102(a).

¹¹Aspects of the Honest Leadership Act that do not address post-government employment conflicts of interest, such as lobbyist disclosure requirements, restricting contact with lobbyists married to Members of Congress, prohibitions in congressional gifts and travel by provided by registered lobbyists, and prohibitions on congressional participation in lobbyist sponsored events during political conventions, are addressed elsewhere in this Treatise.

¹²Section 207(e)(9)(G) defines the term “employee of any other legislative office of the Congress” to mean “an officer or employee of the Architect of the Capitol, the United States Botanic Garden, the [Government Accountability Office], the Government Printing Office, the Library of Congress, the Office of Technology Assessment, the Congressional Budget Office, the Copyright Royalty Tribunal, the United States Capitol Police, and any other agency, entity, or office in the legislative branch not covered by paragraph (1), (2), (3), or (4) of this subsection.” 18 U.S.C.A. § 207(e)(9)(G).

Charts showing the statutory restrictions, and exceptions and waivers, provided under Section 207 by subsection are set forth in App. J-4 and J-5.

[Section 14:44]

¹18 U.S.C.A. § 207(b) and (f); Memorandum from Office of Legal Counsel, United States Department of Justice to Marilyn L. Glynn, Re: Application of 18 U.S.C. Section 207(f) to a Former Senior Employee (June 22, 2004), <http://www.usdoj.gov>.

whom an appearance is made, with intent to influence, and includes Members of Congress.²

§ 14:45 Congressional revolving door limits—Section 207(e) restrictions on representational contacts

Revolving door restrictions on Members of Congress and officers and employees of the legislative branch are set forth principally in 18 U.S.C.A. § 207(e). Set forth below are the restrictions applicable upon the adjournment of the current session of Congress.¹ Violations of Section 207(e) are subject to civil and criminal sanctions as provided by Section 216 of Title 18, the most serious of which is a felony term of imprisonment for up to five years.

§ 14:46 Congressional revolving door limits—Section 207(e) restrictions on representational contacts—Senators and Senate staff

The Honest Leadership Act increased the lobbying ban for Senators from one to two years, as previously noted. Section 207(e)(1)(A) now restricts a Senator for two years after he or she leaves office from “knowingly mak[ing], with the intent to influence, any communication to or appearance before any Member, officer, or employee of either House of Congress or any employee of any other legislative office of the Congress, on behalf of any other person (except the United States) in connection with any matter on which such former Senator seeks action by a *Member, officer, or employee of either House of Congress, in his or her official capacity . . .*”¹

Senate officers and employees must adhere to a one-year ban on lobbying contacts. Section 207(e)(2) restricts contacts by any officer or staff of the Senate who is an elected officer of the Senate or “for at least 60 days, in the aggregate, during the 1-year period before that former employee’s service as such employee terminated, was paid a rate of basic pay equal to or greater than an amount which is 75 percent of the basic rate of pay payable”

²18 U.S.C.A. § 207(i)(1)(B).

[Section 14:45]

¹Pub. L. No. 110-81 § 105, 121 Stat. at 741.

[Section 14:46]

¹18 U.S.C.A. § 207(e)(1)(A) (emphasis added).

for a Senator.² Seventy-five percent of a Senator's pay for calendar year 2007 is \$123,900.³

These Senate officers and employees are forbidden for one year from leaving office or employment, from “knowingly mak[ing], with intent to influence, any communication to or appearance before *any* Senator or any officer or employee of the Senate,” on behalf of another person (other than the United States) regarding any matter for which such former officer or employee “seeks action” by a Senator or an officer or employee of the Senate, in his or her official capacity.”⁴ Whether a person is a Member or employee within the meaning of this section may be determined by reference to the definitions set forth in Section 207(e)(9). While Section 207 does not define “officer” for purposes of the Congressional post-employment lobbying restrictions, the reference to “officer” with respect to the Senate means the President of the Senate, the President Pro Tempore, Party Secretaries, Secretary of the Senate and Sergeant at Arms and Senate Chaplain.

The Senate amended Senate Rule XXXVII to conform its rules to Section 207(e)(2), as amended. Senate Rule XXXVII now prohibits

- For two years, former Members from lobbying anyone in the Senate, if he or she becomes a registered lobbyist, is employed or retained by a registered lobbyist or an entity that employs or retains a registered lobbyist, for the purpose of influencing legislation (par. 8);
- For one year, former “senior” Senate staff from lobbying all Senators and Senate staff, if he or she becomes a registered lobbyist, is employed or retained by a registered lobbyist or an entity that employs or retains a registered lobbyist, for the purpose of influencing legislation (par. 9);
- For one year, former Senate staff employee, from lobbying the Member or Committee for whom he or she worked, if he or she becomes a registered lobbyist, is employed or retained by a registered lobbyist or an entity that employs or retains a registered lobbyist, for the purpose of influencing legislation (par. 9).⁵

Paragraph 9 of Senate Rule XXXVII is broader than Section 207(e)(2) in that the Senate rule applies regardless of Senate

²18 U.S.C.A. § 207(e)(2)(A) and (7)(A).

³An overview of the Senate Code of Conduct and Related Laws, Select Comm. on Ethics, U.S. Senate, 100th Con., 1st Sess., Mar. 2007 at 16.

⁴18 U.S.C.A. § 207(e)(2) (emphasis added).

⁵Standing Rules of the Senate, S. Doc. 110-9 (2007).

salary. Otherwise, paragraphs 8 and 9 are narrower than Section 207(e)(2) because they do not cover Senate officers and because they restrict coverage to former Members and staff who are registered lobbyists or working in association with registered lobbyists. Registration as a lobbyist is not required for coverage under Section 207.

§ 14:47 Congressional revolving door limits—Section 207(e) restrictions on representational contacts—House of Representatives and House staff

The revolving door restrictions applicable to the House of Representatives are more nuanced and are found in Sections 207(e)(1) to (7).

Section 207(e)(1)(B) sets forth the “cooling off” period for Members and elected officers of the House of Representatives. Banned is any communication or appearance made “knowingly” with the intent to influence any matter on which the former Member or officer “seeks [official] action”.¹ For House Members, the ban applies to their *appearances or communications with any Member, officer or employee of either House of Congress and any employee of any other legislative office of the Congress*.² For House elected officers, namely the Clerk, Sergeant of Arms, Chief Administrative Officer and Chaplain, the ban applies to their appearances or communications with *any Member, officer or employee of either House of Representatives*.³ Former House elected officers thus may lobby the Senate immediately upon departure from their elected House office.

Personal, committee and leadership staff of the House of Representatives also are subject to a post-employment one-year lobbying ban. Personal staff of Members may not knowingly make communication to or appearance before any Member or employee of the House of Representatives, within the year following such Member’s service, and with intent to influence, action by a Member, officer, or employee of either House of Congress, in his or her official capacity.⁴ Committee of the House of Representatives’ staff and staff of any [joint committee] of Congress whose

[Section 14:47]

¹18 U.S.C.A. § 207(e)(1)(B).

²18 U.S.C.A. § 207(e)(1)(B)(ii).

³18 U.S.C.A. § 207(e)(1)(B)(iii).

⁴18 U.S.C.A. § 207(e)(3); see, e.g., Plea Agreement, United States v. Volz, No. 1:06-cr-00119 (D.D.C. May 8, 2006) (former congressional staffer pleaded guilty to conspiracy to violate Section 207(e), among other laws).

pay is disbursed by the Clerk of the House of Representatives are similarly limited with respect to communications to or appearances before any person “who was a Member of the committee . . . in the year immediately prior to the termination of such person’s employment by the committee or joint committee.”⁵ Leadership staff of the House of Representatives who have worked at least 60 days within the year before their employment on the leadership staff terminated and whose pay meets the requirements of Section 207(e)(7)(A), are similarly limited with respect to communication to or appearances before any Member of the leadership of the House of Representatives and any employee on the leadership staff of the House of Representatives.⁶

§ 14:48 Congressional revolving door limits—Section 207(e) restrictions on representational contacts—Other legislative offices

A former employee of any other legislative office of Congress, such as an officer or employee of the Architect of the Capitol, the Government Accountability Office, the Government Printing Office, or the Library of Congress, is barred for one year from contacting any current employee or officer of the former legislative office where he or she worked, if the communication or appearance is “knowingly” made “with intent to influence” any current officer or employee of that office to action in his or her official capacity as sought by the former employee or officer.¹

§ 14:48.50 Congressional revolving door limits—Aiding and abetting a covered former employee

Members of Congress have been prosecuted for conspiracy to violate the post-employment restrictions. These prosecutions are based upon conduct that aids and abets a former employee in lobbying in violation of a Section 207 prohibition.¹ They also may be disciplined under congressional rules. The House Ethics Committee has sanctioned a Member for engaging in a pattern and

⁵18 U.S.C.A. § 207(e)(3).

⁶18 U.S.C.A. § 207(e)(5).

[Section 14:48]

¹18 U.S.C.A. § 207(e)(6); see also 18 U.S.C.A. § 207(e)(9)(6) (defining “employee of any other legislative office of the Congress”).

[Section 14:48.50]

¹See *United States v. Ney*, No. 1:06-cr-00272 (D.D.C. Sept. 13, 2006) (former Congressman pleaded guilty to a Section 371 conspiracy to violate Section 207).

practice of knowingly permitting his former chief of staff to lobby him in his official capacity during the former staffer's "cooling off" period. The Member admitted that this conduct violated the House rules that each Member and staffer should "conduct himself at all times in a manner that shall reflect creditably on the House."²

§ 14:49 Congressional revolving door limits—Exceptions to Section 207 restrictions on lobbying by former congressional members, officers and employees

The exceptions set forth in Section 207(j) apply to the prohibitions of Section 207(e), with the exception of Section 207(j)(5) regarding government access to certain science and technology information.¹ With respect to a testimony exception, Senators and Representatives may invoke the Speech and Debate Clause, U.S. Const. art. I, § 6, cl. 1, to avoid testifying about legislative matters.²

§ 14:50 Congressional revolving door limits—Waivers

There are no waivers applicable to the prohibitions of Section 207(e).

§ 14:51 Congressional revolving door limits—Post-employment restriction notification

Section 103 of the Honest Leadership Act requires the Secretary of the Senate or the Clerk of the House of Representatives, to notify former Members of Congress and employees and elected officers of either House of Congress of the beginning and ending date of the prohibitions that apply to them under section 207(e) of Title 18.¹ This statutory notice regards Section 207(e)'s post-employment lobbying restrictions; in some circumstances, however, the post-employment lobbying and behind-the-scenes

²Memorandum from the Committee on Standards of Official Conduct to All Members and Officers, Post-employment and Related Restrictions for Members and Officers, 8 (Sept. 29, 2006).

[Section 14:49]

¹For a discussion of these exceptions see § 14:11.

²See, e.g., *Miller v. Transamerican Press, Inc.*, 709 F.2d 524, 528–29, 13 Fed. R. Evid. Serv. 1233 (9th Cir. 1983) (congressman properly invoked privilege under Speech and Debate Clause to prohibit questioning about legislative work).

[Section 14:51]

¹Section 103, 121 Stat. 739, codified as 2 U.S.C.A § 104d.

restrictions of Sections 207(b) and (f) may also be applicable. While a defense for defective notice is not expressly provided in the statute, such claims likely will be made against Section 207 prosecution, particularly to defeat claims of criminal intent.

**§ 14:51.50 Congressional revolving door limits—
Compliance advise**

The Senate and House Ethics Committees provide upon request written advisory opinions regarding whether certain proposed conduct is consistent with Section 207. These committee interpretations of Section 207 are not binding on the Justice Department, although in other contexts they have provided a successful defense to a criminal charge.¹

**§ 14:52 Congressional revolving door limits—Senate and
House rule changes**

Titles II and V of the Honest Leadership Act add restrictions to Senate and House rules to curb abuses from the revolving door between the government and the private sector.¹ Violation of these rules may result in disciplinary action by the appropriate House of Congress.²

**§ 14:53 Congressional revolving door limits—Senate and
House rule changes—Employment negotiations**

Sections 301 and 532 of the Honest Leadership Act require Members of the Senate and the House and their staffs to disclose employment negotiations within three business days of their commencement.¹ They further prohibit the commencement of such negotiations, in the case of Members of Congress, until after their successor has been elected.² Senators are further barred from “hav[ing] any arrangement concerning prospective employment for a job involving lobbying activities as defined by the Lob-

[Section 14:51.50]

¹U.S. v. Hedge, 912 F.2d 1397, 1404-06 (11th Cir. 1990) (affirming dismissal when conduct was undertaken in good faith reliance upon erroneous legal advice from supervising ethics officer).

[Section 14:52]

¹121 Stat. 741 to 751, 757 to 774.

²See Rules of the Senate at 58–60.

[Section 14:53]

¹Section 301, 121 Stat. 251; Section 532, 121 Stat. 765.

²Section 301, 121 Stat. 251.

bying Disclosure Act of 1995 until after his or her successor has been elected.”³ Excepted from the employment negotiations requirement are officers and employees who earn 75 percent or less of the salary of a Member of the relevant House.⁴

Both Congressional chambers also require recusal of the Member and other congressional officers and employees during negotiations for post-government service employment. The House rule requires anyone to whom the rule applies to “recuse himself or herself from any matter in which there is a conflict of interest or an appearance of a conflict for” such government employee and such recusal shall be made public.⁵ The Senate rule specifies recusal for that reason and from “any contact or communication with the prospective employer on issues of legislative interest to the prospective employer.”⁶ The Senate rule requires notification to the Select Committee on Ethics but is silent with respect to public notification.⁷

§ 14:54 Congressional revolving door limits—Senate and House rule changes—Senate privileges for former members

A former Senator who is a lobbyist loses his or her Senate floor privileges during the period in which he or she is a registered lobbyist, an agent for a foreign principal, or “in the employ of or representing any party or organization for the purpose of influencing, directly or indirectly, the passage, defeat, or amendment of any Federal legislative proposal.”¹ The same restriction applies to Senator officers and Speakers of the House under the same circumstances.² Exceptions to this bar may be promulgated by regulation of the Senate Committee on Rules and Administration for ceremonial functions and special occasions designated by the Majority and Minority Leaders.³

³Section 532, 121 Stat. 765.

⁴Section 532, 121 Stat. 765.

⁵Section 301, 105 Stat. 752.

⁶Section 532, 121 Stat. 765.

⁷Section 532, 121 Stat. 765.

[Section 14:54]

¹Section 533, 121 Stat. at 765 to 766.

²Section 533, 121 Stat. at 765 to 766.

³Section 533, 121 Stat. at 766.

In addition, the Selection Committee on Ethics of the Senate is now required to issue an annual report by January 31, setting forth violations and alleged violations of Senate rules.⁴

§ 14:55 Protecting against conflicts of interest in era of government functions privatization

The growing privatization of federal functions has led to calls to apply the criminal conflicts of interest laws to government contractors. In response to increasing privatization of federal functions and operations, the OGE in 1995 issued an advisory letter entitled “Privatization Issues Affect Federal Employees,” in which the OGE opined that the privatization “trend appears irreversible—current agency programs and operations increasingly will be transferred to the private sector.”¹ The memorandum reminds federal employees that the conflict of interest prohibitions, including Section 207, continue to apply to them as the federal government downsizes through privatization. In 1999, the OGE issued a follow-on advisory letter in which it declared that “efforts to ‘reinvent’ Government have led to a surge in the privatization of Federal functions,” and reiterated that Section 207 and the other conflict of interest laws must be followed “in both the privatization process and any resulting arrangements that involve partnering . . . [with private contractors].”²

The outsourcing of federal functions and operations to the private sector has accelerated in the intervening years, making attention to Section 207 as important as ever and leading the OGE to raise with Congress the issue of whether Section 207 or the like should be applied to government contractors by restricting their use of information obtained from government while under government contract for private gain, including advantage in securing future government contracts. In its 2006 report to the President and Congress, the OGE acknowledged that “[i]ncreasingly, over the past several years, we have been receiving expressions of concern from agency officials about the potential for conflicts of interest on the part of contractor personnel. . . .

⁴Section 554, 121 Stat. 773 to 774.

[Section 14:55]

¹OGE Informal Advisory Letter 95 x 10, 1995 WL 857029, at *1 (June 1, 1995).

²OGE Informal Advisory Memorandum 99 x 10, 1999 WL 33308425, at *1, 2 (Apr. 28, 1999).

[Some] suggest that the criminal conflict of interest statutes should apply to contractors, as well as to employees.”³

In taking the position that the conflict of interest laws do not apply to government contractors, the OGE cites a 1987 opinion from the Office of Legal Counsel of the Department of Justice, which states that “[O]fficers and employees in the Executive Branch are covered by the conflict of interest laws: independent contractors are not.”⁴ The OLC therein declares that “[o]ne who in fact will serve as a government employee may not, however, be hired as an independent contractor to avoid the application of the conflict of interest laws, and concludes that a lawyer in private practice who is hired on a temporary basis for the purpose of trying select civil cases “must be appointed as an employee, rather than as an independent contractor.”⁵

³2006 Office of Gov’t Ethics, Rep. to the President and to the Congressional Committees on the Conflict of Interest Laws Relating to Executive Branch Employment 38.

⁴Memorandum Opinion for the Deputy Associate Attorney General (Mar. 23, 1979), 4B U.S. Op. Off. Legal Counsel 441.

⁵Memorandum Opinion for the Deputy Associate Attorney General (Mar. 23, 1979), 4B U.S. Op. Off. Legal Counsel 441.