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THE ASSOCIATION OF THE BAR
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Political Activities of Government Employees

By THE COMMITTEE ON FEDERAL LEGISLATION

The Hatch Act, which prohibits government employees from engaging in a wide variety of political activities, was enacted in 1939 in reaction to widespread abuses in the 1936 and 1938 elections.[1] It was an attempt to end an aspect of the spoils system which had managed to survive, despite the creation in the late 19th Century of a civil service in which appointment was generally made on the basis of examination and tenure was protected against dismissal without good cause.

Essentially, the Act seeks to preserve the impartial execution of the laws and to prevent government officials and employees from using their offices for political purposes. A second objective of the Act is to ensure that government employees spend their working hours exclusively in the furtherance of the "business of government." Lastly, the Act seeks to protect civil servants from being coerced by their superiors to support political activities in order to preserve their employment.

Although the Act has been amended and supplemented on several occasions, it has failed to keep in step with the times. In October 1966, the Congress established a Commission on Political Activity of Government Personnel (the "Study Commission") to investigate the entire range of political activities by governmental personnel and to suggest changes in the Act. As a result of its inquiry, the Study Commission recommended that the Act be substantially revised and proposed amending legislation.[2] None of the comprehensive bills introduced in response to the Study Commission's work has been enacted, and the Hatch Act remains in effect largely unchanged. However, there are pending before the 94th Congress various bills to amend the Act, and a subcommittee of the House Committee on the Post Office and Civil Service is currently conducting hearings on the subject in several cities. It appears that the Congress will finally focus on Hatch Act revision this year. Our report will deal primarily with the bill introduced by the House subcommittee's chairman, Representative William Clay of Missouri (the "Clay Bill"),[3] but we shall also refer to the more comprehensive bill sponosored in previous Congresses by Representative John E. Moss to implement the recommendations of the Study Commission (the "Moss Bill").[4]

Federal Legislation Report No. 75–4 (June 25, 1975)

I. THE BASIC PROHIBITIONS

The Act, as now codified, separately describes those political activities proscribed for employees of the Executive Branch of the federal government and those which are proscribed on the part of state and local government employees working in federally-assisted programs. The Act centers around its three principal prohibitions against:

(1) using official authority or influence for the purpose of interfering with, or affecting the result of, an election ("political interference");[5]
(2) taking an active part in political campaigns ("political campaigning");[6] and
(3) making, soliciting or receiving political contributions ("political solicitation").[7]

Violations of the Act by employees of the federal government are punishable by termination or suspension of employment. In the event of a violation by a covered state or local government employee, similar sanctions are to be imposed by the employing local government agency, while the Act provides for the termination of federal funds to that agency in the event it does not take the required action. With respect to state and local employees, the Act is administered by the U.S. Civil Service Commission. However, with respect to federal employees, the Act is administered by both the Civil Service Commission and the various agencies of the federal government, depending upon the level of the employee's appointment.

Many legislators have questioned whether there is still a need for the Hatch Act in view of existing election law provisions which impose criminal penalties for many of the same activities prohibited by the Act. In fact, the Clay Bill would completely eliminate the political campaigning prohibition of the Act. We believe, in contrast, that the Act, despite its faults, could if thoughtfully amended and properly enforced serve a valuable function in the fight against political corruption. Each of the Act's three main prohibitions could serve a distinct, important purpose, especially if they are clarified and limited as discussed below. The existence of criminal statutes prohibiting many of the activities covered by the Act does not obviate the need for civil prohibitions imposing lesser sanctions which are more likely to be widely enforced.

A. *Political Interference*

The political interference prohibitions of the Act are designed to preserve the integrity of the elective process. They are based on the premise that governmental employees are in a unique position to interfere with free elections and election campaigns. The present prohibitions against political interference are stated in broad language, and they would be preserved without change by the Clay Bill.

Although the Study Commission voiced no objection to this aspect of the

Act, it did suggest that the general prohibition against political interference be expressed in the form of specific conduct to be prohibited. This recommendation of the Study Commission was, for the most part, adopted in the Moss Bill, which would prohibit all covered employees from using official authority or influence for the purposes of (1) interfering with the result of any election for a public office; (2) threatening any person for the purpose of interfering with his right to vote; (3) coercing any other covered employee to contribute anything of value (including services) for political purposes; (4) threatening any political action; or (5) conferring any benefits or effecting any reprisal because of political contributions or political activity, or lack thereof, by a covered employee.

Any attempt to clarify the prohibitions of the Act would, of course, be helpful, although the Study Commission did not find that there was any significant confusion on the part of government employees as to which acts of political interference (as opposed to political campaigning, discussed below) were prohibited. While we prefer the more specific approach of the Moss Bill, it should be emphasized that all attempts to use governmental authority for political gains should be proscribed. If the approach of the Moss Bill is to be used, it should be modified to make clear that the various forms of political interference itemized in it are merely examples of unlawful activity and do not constitute an exclusive list of proscribed coercive political activities.

B. *Political Campaigning*

Prior to 1974 the Act contained a single and sweeping provision prohibiting all covered public employees from engaging in all forms of political campaigning. This prohibition applied to state and local employees administering federal programs, as well as to employees of the federal government. However, through a provision enacted by the 93rd Congress as a rider to its 1974 amendments to the federal election campaign laws, the coverage of the political campaigning aspect of the Hatch Act was limited with respect to state and local officials covered by the Act, so that it now prohibits them only from "being a candidate for elective office."[8]

The campaigning bar in its original coverage, which continues in effect for federal employees, was intended to prevent the use of government offices as campaign offices and to ensure that the taxpayers do not unwittingly finance election campaigns. It was further based on a belief that the civil service should be politically neutral and thus able and willing to implement the policies of an elected administration reflecting any political viewpoint. To allow political campaigning by government employees, it has been thought, might encourage the politicization of the civil service, thereby affording the party in power great leverage in successive elections and improperly affecting the politically neutral administration of the laws between elections.

The political campaigning prohibition does not specifically identify what acts are forbidden. Instead, it incorporates by reference the decisions (num-

bering over 3,000) of the Civil Service Commission prior to July 19, 1940. This lack of specificity raised questions with respect to the constitutionality of the prohibition.[9] A court challenge by the Letter Carriers Union resulted in a ruling by a three-judge District Court sitting in the District of Columbia to the effect that the prohibition against political campaigning in the Act was unconstitutionally vague and overly broad. However, the Supreme Court, in a 6-to-3 decision, reversed the District Court, stating that the findings of the Civil Service Commission incorporated by the Act are sufficiently specific and understandable.[10] Furthermore, the Supreme Court held that the Civil Service Commission's rulings are based on actual situations and, therefore, not overly broad. The majority opinion also pointed out that the right of free speech was not denied since federal employees could participate in a wide range of political activities within the limits of the Act. Thus, the Court in effect referred the questions of fairness or appropriateness of the statute back to Congress, ruling that any inadequacy of the Act does not reach constitutional dimensions.[11]

Justices Douglas, Brennan and Marshall, who dissented on the ground that the political campaigning provision is so vague as to cast a "chilling effect" upon the entire scope of permissible politically-oriented actions by federal employees, would strike down the Act "so that a new start may be made on this old problem" (413 U.S. at 600).

Notwithstanding the Court's decision on the *constitutional* issue, the vagueness of the present statute is surely poor policy, and we recommend that Congress clarify the campaigning prohibition. In so doing, Congress must also face the question whether some liberalization of the prohibition would be appropriate.

As now interpreted, the Act's prohibition against political campaigning precludes the following activities: (1) making a speech at a rally held by a political party, (2) holding a political party office, (3) running for state or national public office, (4) assisting in a voter registration drive or at the polls on election day, and (5) distributing campaign materials for a political party or candidate. Although the courts have held that these prohibitions do not violate either the First or Fifth Amendments to the Constitution, by present standards they are highly restrictive of the political rights of governmental employees. This is especially so when one considers that the bulk of civil servants today do not hold positions that are sensitive in a policy-making sense and are not in positions where unchecked abuse of power is a realistic possibility. Accordingly, the Clay Bill seeks, as have virtually all earlier bills to amend the Act in one way or another, to limit the political campaigning prohibition.

The Clay Bill would completely eliminate this prohibition and expressly exclude from the political interference provision many of the acts heretofore proscribed as political campaigning, such as (i) being a delegate or alternate to a political convention or otherwise serving at such a convention, (ii) participating at or organizing a political meeting, rally or parade, (iii)

organizing or being a member of a political club, (iv) distributing campaign literature or wearing campaign badges or buttons, (v) publishing material designed to solicit votes in favor of or against a political party or candidate, (vi) circulating nominating petitions, or (vii) being a candidate for any federal, state or local office.

In essence, the Clay Bill would tend to place governmental workers on a par with persons employed in private industry. While this Committee believes that the proper balance between the need for political freedom of government employees and the potential dangers of a full-scale mobilization of governmental workers for partisan political purposes should be shifted in the direction of greater employee political freedom, the Clay Bill seems to overreact in this direction. We therefore suggest that the Clay Bill be modified to permit specific types of political activity which could reasonably be undertaken in an employee's off-duty hours, and continue to proscribe those specific activities which would necessarily make heavy demands on the employee's time and energies.

Although the varieties of political activities are too numerous and changing to completely enumerate in this report, we belive that the following should be expressly permitted:

(i) expressing political views in private or in public (including attending a political meeting or rally);
(ii) registering and voting;
(iii) joining a political party or club; and
(iv) making political contributions except as proscribed by the political solicitation prohibition discussed below.

On the other hand, we believe the Act should continue to bar the following:

(i) serving as an officer of a political club or party;
(ii) managing a political campaign or serving as the treasurer or financial manager of a campaign; and
(iii) being a candidate for any political office paying a salary in excess of a stipulated nominal amount.

Between the extremes represented by the above two groupings of activities, we recognize that there are many types of activities which should be allowed in an employee's off-duty hours away from his office, but should be prohibited if conducted during working hours or with government facilities. Such activities might include the following:

(i) telephoning voters and assisting voters to the polls;
(ii) participating in voter registration drives;
(iii) circulating petitions for nominations or otherwise;
(iv) preparing campaign literature;
(v) participating in a political parade;
(vi) organizing or preparing for political functions; and
(vii) working at the polls.

The Committee also believes that there is a potential danger to the political freedom of the nation in permitting partisan political activities in one of the categories expressly approved above to be undertaken by a government employee while in uniform or in circumstances which identify him as an employee of the government. In either case, the public might give to the government employee greater access, attention or credibility than it would afford to persons not associated with the government. For example, a citizen might well grant a uniformed postal worker access to his home, whereas he might refuse entry to a campaign worker who was merely identified by his name and party organization affiliation. Because of this factor and the lack of any good reason for permitting a government worker to conduct partisan political activities under the guise of official activity we recommend that the activities permitted to be conducted while off-duty be restricted by barring their conduct while in uniform or in other circumstances which identify the individual as a government employee.

The intent of our recommendations for amending the political campaigning prohibition is to permit greater individual participation in the political process but to continue to prohibit the wholesale mobilization of portions of the governmental bureaucracy for political purposes. One area in which concerted action by government employees is expanding is in the activities of government employee unions. Political activities of unions are beyond the scope of this report. However, Congress should consider, in connection with Hatch Act reform, the special issues posed by concerted political activity carried out by government employee unions.

As a complementary feature to this legislation, we also suggest that any person wishing to engage in campaigning activities proscribed by the Act be given the right to take a leave of absence without prejudice to his or her employment status. Although such a legal framework would tend to preclude employees with limited financial resources from running for office or from undertaking other significant political activities, on balance we believe such a leave policy would be a better safety valve for individuals than loosening the rules to allow the financial burdens and potentials for abuse of permitting employees to engage in major political undertakings while on the government's payroll.

The Clay Bill would not alter the 1974 action by which Congress loosened the political campaigning prohibition with respect to covered state and local government employees, so that the Act now merely proscribes being a candidate in an election (other than an election within the pre-existing exemption for "non-partisan" elections, discussed below). For the same reasons noted above with respect to federal employees, we find this approach inadequate, and recommend that the Clay Bill address political campaigning activities on the part of previously covered state and local government employees as well as those of federal employees. However, as noted below, we do not conclude that the applicable rules, or their coverage or enforcement, should necessarily be the same.

C. *Political Solicitation*

The Act currently prohibits covered employees from soliciting from, or giving to, another government employee "a thing of value for political purposes." The aim of this provision is to prevent government employees from being inundated with hard-to-refuse requests for political contributions. The Clay Bill would basically retain this prohibition, but would create an exception for voluntary contributions—those which an employee makes "freely and voluntarily * * * on his own volition."

The existing law encompasses the person who makes the contribution, as well as the person doing the soliciting. By directing this prohibition at the contributor, as well as the solicitor, an employee who is being solicited is given a strong reason for refusing to contribute. The existing law also successfully avoids the problems of ascertaining the motive of the solicitation or contribution, or whether the contribution was in fact "voluntary." While it is questionable that imposing sanctions on the person solicited as well as the solicitor is the only effective means of preventing coerced contributions, we believe that on balance the existing blanket prohibition represents an acceptable and enforcible solution to the problems indicated.

The distinction proposed in the Clay Bill between voluntary and involuntary contributions appears to be unworkable. Government workers, by the nature of their employment, are constantly in close proximity with, and often are subordinate to, elected officials and political aspirants. Accordingly, they are natural targets of political fund-raising drives. Because of the thin line between voluntary and involuntary contributions and the difficulty of establishing "volition" as against subtle forms of coercion, the result of the Clay Bill might be to permit all but the most blatant forms of coercion in connection with political solicitations.

It is conceivable that government employees would want to contribute to the local political campaign of one of their fellow workers and that such contributions might well be the primary source of funds for such campaigns, particularly in localities with high concentrations of federal employees. To deal with such situations, we suggest that exceptions as to specific types of solicitations might be fashioned, such as those made by or on behalf of a government employee candidate of no higher rank or salary than the person being solicited.

The prohibitions against political solicitation contained in both existing legislation and the Clay Bill make no distinction with respect to activities engaged in after hours or outside of government offices, nor do they distinguish solicitations between persons in different departments or agencies of the government. We agree that neither the time and place of a solicitation nor the agency or department of the persons involved should alter the character of a proscribed solicitation. Where the alternatives are generally so readily at hand for an individual who wants to contribute, as well as for soliciting organizations, namely mailing an unsolicited contribution to the party

or candidate of the employee's choice, or the use of solicitors in the residential neighborhood who are not government employees, there is no need to break down an easily understood and easily enforced system.

II. FEDERAL, STATE AND LOCAL EMPLOYEES COVERED

The coverage of the Act, as presently in effect, is often arbitrary and is certainly not clear. Perhaps the complexity of government, and the varying types of employees in government, make it unwise to seek to apply a single set of rules to so many disparate situations. To illustrate these problems, we have prepared the chart on the facing page describing the coverage of federal, state and local employees by the Act, as we understand it, with respect to each of the three major prohibitions.

The Clay Bill would make no changes in the employee groups covered by the Act. We would suggest, however, as proposed in the Moss Bill, that the prohibition against intra-government solicitation be expanded to include Presidential appointees, including Foreign Service Officers and commissioned officers of the uniformed services. At the same time, we think consideration should be given to making the campaigning prohibition applicable to heads and assistant heads of certain sensitive departments and agencies, as well as other Presidential appointees in those departments and agencies. By recent tradition, some of these agency heads and their subordinates have not taken part in campaigns. We have in mind the agencies most directly engaged in foreign policy—the Departments of State and Defense and the Central Intelligence Agency—as well as those concerned with the administration of justice, primarily the Department of Justice. However, extension of the campaigning prohibition to the heads of these agencies should not prevent them from speaking out during a campaign on issues within the scope of the responsibilities of their offices. We therefore suggest that the Clay Bill be expanded to delineate specifically certain political restrictions to be applicable to enumerated members of the Cabinet and holders of certain other sensitive posts.

As the chart indicates, the Act is unclear as to whether it covers some kinds of federal personnel, although on occasion specific statutes relating to those personnel may incorporate by reference some or all of the provisions of the Act. These include the personnel of various types of government corporations, for example, the Tennessee Valley Authority and the new National Legal Services Corporation, as well as enrollees in volunteer programs such as the Peace Corps and VISTA. Historically, it should be remembered that abuses in the WPA during the 1936 and 1938 elections played some role in the formulation of the Hatch Act. However, the extension of the Act to such peripheral categories raises issues different—and more difficult—than those applicable to conventional government employees. To the extent the Act's prohibitions have been criticized as an unnecessary infringement on traditional rights of citizenship, they should not be extended in coverage without a showing of real need. Moreover, the employment conditions of government

COVERAGE OF THE HATCH ACT

Federal Employees	*Interference*	*Campaigning*	*Solicitation*
President and Vice President	NA	NA	NA
Employees paid from Presidential appropriations	A	NA	A
Presidential appointees (including Ambassadors, Ministers and Foreign Service Officers)	A	NA	NA
Heads and assistant heads of departments	A	NA	A
Member of Independent Commissions	?	?	?
Competitive and Excepted Services	A	A	A
Postal Service	A	A	A
Job Corps	A	A	A
VISTA Volunteers, Teachers Corps, Neighborhood Youth Corps, Youth Conservation Corps	?	?	?
Peace Corps	NA	NA	NA
D.C. Mayor and Council	A	NA	A
Foreign Service Reserve and Staff Officers	A	A	A
Commissioned officers of the Uniformed Services	?	?	?
Other Uniformed Services personnel	?	?	?
Consultants	NA*	NA*	NA*
State and Local Government Employees			
Governor, Lt. Governor, Mayor, elected state or local officers	A	NA	A
Heads and assistant heads of state departments (non-elected)	A	A	A
Local policy-making officials	?	?	?

A = Applicable
NA = Not applicable
* = Applicable on days employed
? = Applicability uncertain

corporations, in at least some cases, tend to be more like those of the employees' counterparts in private enterprise than those of other forms of government employment. On the other hand, we believe that federally-appointed employees of "volunteer" agencies like VISTA, even though they serve only limited tours and have no civil service status, should nevertheless fall under the Act's strictures.

The Act's coverage of state and local officials raises thorny issues of policy as to administration and sanctions which will be discussed subsequently in this report. Insofar as the scope of such coverage itself is concerned, we would prefer a local counterpart to the exception for heads and assistant heads of federal departments set forth in the Act, but subject to our comments above as to barring political activities by holders of law enforcement positions. In general, it does not seem appropriate to sweep all state and local officials administering federal grants under the purview of the Act. With the advent of revenue sharing, it has become arguable that *all* state and local officials are covered, and this approach would strain traditional notions of federalism as well as sound administrative practice. As we shall discuss below, the Moss Bill contains provisions for development of state and local programs reflecting local circumstances which could supplant the federally-imposed rules.

The foregoing brief comments suggest that Congress should carefully review all aspects of imposing federal strictures on the political activities of state and local officials as part of its reconsideration of the Hatch Act.

III. EXEMPTIONS

The Act presently contains two exemptions: One permitting covered employees to engage in "non-partisan" political campaigning, and the other permitting federal employees in areas containing a high concentration of federal employees to engage in partisan political campaigning activities. The proposed amendments to the Act as contemplated in the Clay Bill or as proposed herein would, to a large degree, obviate the need for these exemptions. Because of the Act's current wide-ranging prohibitions, the geographical exemption is clearly justifiable in terms of permitting a normal degree of political participation in the communities in question. The amendments proposed by the Clay Bill, however, would permit many forms of political campaigning activities which are presently proscribed. Accordingly, the need for a geographical exemption is greatly reduced, and we agree that it should be eliminated as the Clay Bill provides.

The Act's current distinction between partisan and non-partisan activities was found by the Study Commission to be largely unworkable. The difficulty of making such a factual determination, when combined with the Act's decentralized administration, leads to significant inconsistencies in application. By distinguishing between those forms of political activities which require substantial personal commitment (in terms of time and effort) and those which do not, as we have suggested above, the need for a non-partisan exemption is greatly diminished. Furthermore, the exemption for "non-partisan" activities in no way furthers the purpose of the Act to diminish all forms of political activity that would interfere with the operations of government. For these reasons, the Clay Bill's elimination of the "non-partisan" activities exemption also represents an improvement to the Act.

IV. ADMINISTRATION AND SANCTIONS

With respect to federal employees, the Act is administered by both the Civil Service Commission (as to the bulk of federal employees who are in the competitive service) and the various agencies of the Executive Branch (as to other covered employees). With respect to state and local employees, the Act is administered at the federal level solely by the Civil Service Commission, which is empowered to investigate charges, make findings and determine the appropriate sanction. The actual enforcement, however, is left to the employee's local governmental employer. This decentralized administration of the Act has apparently led to some discrepancies in the degree of enforcement.

The Study Commission found that the procedures for administering the Act are inadequate in three respects: (1) the lack of adequate subpoena power in the Civil Service Commission, the primary enforcement body; (2) the absence of well defined procedures, resulting in long delays in processing cases; and (3) the lack of judicial review with respect to proceedings against federal employees.

Under the procedure proposed in the Clay Bill, the Civil Service Commission would be granted enforcement responsibilities relating to violations of the political solicitation prohibition with respect to all federal employees. The Commission would be under a duty to investigate all complaints brought to its attention; and upon finding that a violation had occurred, it would be empowered in the case of an employee in the competitive service to impose the appropriate sanction, and in the case of an employee appointed by the President to notify the President, the head of the department or agency in which the employee serves and the Congress that a violation had occurred and the penalty which the Commission deems appropriate. If the infraction also constituted a violation of the criminal law, the Commission must also refer the matter to the Attorney General.

This procedural format of the Clay Bill would only apply to violations by employees of the federal government of the political solicitation prohibition, and would not apply to violations by covered state and local government employees nor to violations of the Act's political interference prohibition. Nor does the Clay Bill establish specific procedures for the conduct of the Civil Service Commission's investigation of a complaint. For these reasons, we prefer the procedural provisions proposed in the Moss Bill.

Under the Moss Bill, the Civil Service Commission would be authorized to investigate complaints via documentary evidence and sworn testimony, and to issue subpoenas and enforce them in the District Courts. If, on the

basis of its investigation, it appeared that there had been a violation of the Act, the Civil Service Commission would be required to notify the accused employee of the specific violation, and the employee would have an opportunity to answer the allegation at a hearing, the record of which would be the basis for the Commission's decision. The Moss Bill also provides a similar procedure for state and local government employees.

Although the introduction of subpoena powers would introduce some possibility of political harassment, that potential danger would be minimized through the use of the Civil Service Commission as the administrative body and, in our opinion, is outweighed by the need found by the Study Commission for more thorough and systematic investigations of complaints.

Although the Moss Bill would place full administration of the Act in the Civil Service Commission, it would also encourage the establishment of parallel state regulatory plans, meeting certain guidelines to be developed and applied by the Civil Service Commission. State and local government employees covered by the state plans would then be exempt from the prohibitions of the Act.[12] Such a local option might tend to eliminate certain of the problems heretofore encountered wherein a state has refused to enforce an order of the Civil Service Commission. In such cases, the only alternative provided in the Act is the reduction of federal aid to the employing state or local government.

While we support the establishment of more formal procedures for processing complaints under the Act, we are reluctant to see them become excessively elaborate, particularly when the number of complaints under the Act appears to be small.[13] For the same reason, we view with skepticism suggestions for the establishment of a new commission to handle problems arising under the Act. On the other hand, centralization of the administration of the Act in the Civil Service Commission makes it particularly important that the Commission remain reasonably non-partisan. As presently constituted, it has three members, no more than two of whom may be from the same political party. Members of the Commission are appointed by the President and confirmed by the Senate. Because of its small number of members, the Civil Service Commission could easily lose its non-partisan character, although to date there is no indication that its mission has been abused.

At present the Act contains no provisions for judicial review with respect to federal employees, and neither the Clay Bill nor the Moss Bill would create such a right. Federal employees who are removed, however, may seek relief either in the Court of Claims or in the District Courts in the same manner as for other cases involving removal. There is an existing right of appeal in the Act to a United States District Court for aggrieved state and local government employees.

Violations of the Act are currently punishable by termination of employment, or by suspension of not less than 30 days if the Civil Service Commission finds (by unanimous vote) that termination is not warranted. In the event a state or local employee found to have violated the Act is not so punished by his employer, the Act provides for the termination of federal funds to the non-complying state or local government.

The Study Commission found that the sanctions of the Act were too harsh and too rigid, and suggested that the Civil Service Commission be given greater flexibility in prescribing penalties under the Act. The Clay Bill follows the Study Commission's suggestion and gives the Civil Service Commission wide latitude in selecting an appropriate penalty. The bill authorizes termination of employment only if unanimously approved by the Commission. We approve of this approach. In this connection, it should be noted that the federal criminal law (Chapter 29 of Title 18) forbids many of the activities proscribed in the Act. This duplication is beneficial because it permits a wider spectrum of sanctions. Thus, a relatively minor violation can be pursued under the Hatch Act, reserving more serious and flagrant political abuses for criminal prosecution.

The Act's reliance upon removal from office poses a constitutional problem with respect to high level appointees of both the federal and state governments. In *Myers* v. *United States*, 272 U.S. 52 (1926), the Supreme Court held that Congress did not have the power to limit the President from removing a postmaster, finding statutory restrictions upon the President's inherent power of removal of executive officials unconstitutional. In its opinion, the Court relied upon historical arguments as well as concepts of separation of powers, concluding that Congress had no role, save by impeachment, in removing executive officers after they have been appointed. The *Myers* decision was subsequently limited in *Humphrey's Executor* v. *United States*, 295 U.S. 602 (1935), wherein the Court held that Congress could limit the President's power to remove a Federal Trade Commissioner. In the *Humphrey's* case, the Court relied on the fact that such a commissioner exercises legislative and judicial, rather than executive, functions; accordingly, the Court held that Congress, and not the President, had the constitutional power to prescribe terms for removal.

In part to avoid the constitutional removal issue, the Clay Bill provides that in case of a Presidential appointee, the Civil Service Commission, upon finding that a political solicitation violation has occurred, shall notify the President, the head of the employing agency and the Congress.[14] (If the infraction also constitutes a violation of a criminal statute, the matter would be referred as well to the Attorney General for prosecution. The Senate version, S.372, further requires the Attorney General in such circumstances to notify the Congress if no action is taken by him within 60 days.) This type of procedure would avoid the constitutional issue noted above and give Congress a mechanism for overseeing the administration of the Act. It would not, of course, assure the removal or suspension of the employee should the head of the employing agency or the President fail to act.

Similar problems are raised with respect to state officials, based upon principles of federalism. For example, a District Court has held that the Congress has no power with respect to the removal of appointed officers of state gov-

ernments. *Palmer* v. *Civil Service Commission*, 191 F. Supp. 495 (S.D. Ill. 1961). In *Palmer*, the court analyzed the Illinois state legislation and constitution and concluded that no legal cause existed for the removal of a state officer who had violated the Hatch Act. The court stated that "the Congress of the United States under the separation of powers in the Federal Constitution cannot require the President of the United States to surrender any of his executive power [citation omitted], nor can it do so to the Governor of Illinois" (191 F. Supp. at 511).

Although Congress may have no power to require the removal of state officials, it may validly cut off federal aid. This was held in *Oklahoma* v. *Civil Service Commission*, 330 U.S. 127 (1947). There the Court stated:

> "While the United States is not concerned with, and has no power to regulate, local political activities as such of state officials, it does have power to fix terms upon which its money allotments to the states shall be disbursed.
>
> The Tenth Amendment does not forbid the exercise of this power in the way that Congress has proceeded in this case. As pointed out in *United States* v. *Darby*, 312 U.S. 100, 124, the Tenth Amendment has been consistently construed 'as not depriving the national government of authority to resort to all means for the exercise of a granted power which are appropriate and plainly adapted to the permitted end.'" 330 U.S. at 143.

The existence of power in the federal government to cut off aid does not mean that it is good policy to do so. Although many states have laws directed at the same political abuses as the Act, the Study Commission found such statutes generally less onerous than the federal law. Furthermore, the Study Commission concluded that the state acts are generally inadequately enforced. For these reasons the withholding of federal funds to state and local governments for failure to enforce the national policy embodied in the Act would seem appropriate in flagrant cases. However, the proposal of the Moss Bill to give the states the opportunity to set up their own plans in lieu of federal regulation also would seem a sensible resolution of the matter.

V. CONCLUSION

There is little doubt that the Hatch Act is in need of substantial reform. While we support the Clay Bill's attempt to liberalize the Act's prohibitions against political campaigning and political solicitation, we believe that the bill goes too far in this direction and should be revised to accommodate the original purposes of the Act (which we believe remain worthy) and to clarify what political activities are prohibited and what activities are permitted. We would further recommend that the Clay Bill enact comprehensive procedural provisions applying to all of the Act's prohibitions.

FOOTNOTES

[1] 53 Stat. 1148 (1939). The Act was amended from time to time, and in 1966 was codified as 5 U.S.C. §§1501–1508 and 7321–7327.

[2] *Report of the Commission on Political Activity of Government Personnel* (3 vols. 1968).

[3] H.R. 3000; H.R. 3935 is the identical bill with additional sponsors. S.372 is a similar Senate bill.

[4] S.235 of the 93rd Congress was the most recent version of the Moss Bill.

[5] 5 U.S.C. §7324(a)(1) imposes this prohibition against employees in an Executive agency and employees of the government of the District of Columbia. In addition, Section 7322 empowers the President to prescribe rules to this end applicable to employees in an Executive agency or in the competitive service. Section 1502(a)(1) imposes similar prohibitions against officers and employees of federally assisted state and local government agencies.

[6] 5 U.S.C. §7324(a)(2) imposes this prohibition with respect to employees of an Executive agency or of the government of the District of Columbia. The corresponding provision for employees of federally assisted state and local government, section 1502(a)(3), was recently amended, as discussed later in the text, to prohibit a covered employee only from being a candidate sponsored by a political party for elective office.

[7] 5 U.S.C. §7351 proscribes political gifts to all superior employees while section 7323 proscribes such gifts between employees within an Executive agency, Members of Congress and officers of a uniformed service. Section 7321 empowers the President to prescribe rules prohibiting employees in an Executive Agency or in the competitive service from being coerced into making political contributions or to render political service. Section 1502(a)(2) proscribes the coercion of political gifts from employees of federally assisted state and local governments.

[8] P.L. 93–443, §401.

[9] Two state court decisions striking down the respective states' "little Hatch Acts" had raised considerable doubt as to whether the courts would continue to uphold the Act. See *Minielly* v. *Oregon*, 242 Ore. 490, 410 P.2d 69 (1966); *Bagley* v. *Washington Township Hospital District*, 65 Cal. App. 540, 421 P.2d 409 (1966).

10 *Civil Service Commission* v. *National Ass'n of Letter Carriers*, 413 U.S. 548 (1973), reversing 346 F. Supp. 578 (1972). In *United Public Workers* v. *Mitchell*, 330 U.S. 75 (1947), the Court had previously held that the Act did not violate rights guaranteed by the First, Fifth, Ninth or Tenth Amendments to the Constitution.

11 The constitutionality of the corresponding political campaigning provision with respect to state and local government employees was not before the Court. However, the decision in the *Letter Carriers* case would seemingly have supported the constitutionality of that provision. This question has been rendered largely moot by the 1974 amendment narrowing the provision with respect to such employees.

12 The Study Commission found that every state had one or more statutes restricting the political activities of state and local government employees. Eight states had laws which were more restrictive than the Act and nine had laws which were on a par with the Act. The remainder imposed fewer restrictions. See Report, *supra* note 2, vol. 2, pp. 92–107.

13 The Report of the Study Commission indicates that during the ten years immediately preceeding the publication of the Report, there were 131 cases involving federal employees and 43 cases involving state or local government employees. *Id.* at vol. 2, pp. 173–75.

14 This procedure does not seem applicable in case of violation by a Presidential appointee of the political interference prohibition of the Clay Bill. *Compare* section 2(a) of H.R. 3000, enacting the reference procedure in a new subsection (c)(2) for 5 U.S.C. §7323 [political solicitation], *with* sections 3(a) and 4 of that bill, under which violations of 5 U.S.C. §7324 [political interference] by all covered employees are punishable directly by the Civil Service Commission. For the reasons indicated in the text, we believe the reference procedure should be utilized here as well as in solicitation cases.

PHONE: 546-8288

PHIL

GET MORTON OFF

ORCO *Petroleum Company, Inc.*

THE PUBLIC TIT

ABE DURIEL

177 EAST BROAD ST.
ROCHESTER, N. Y. 14604

Ford's Hiring of Morton Called 'Probably Illegal'

WASHINGTON (UPI) — President Ford probably violated the election reform law by putting his political adviser, Rogers C. B. Morton, on the public payroll, according to the chairman of the Federal Election Commission.

Thomas B. Curtis, a Republican named to the commission by Ford, asked that Morton "voluntarily" be moved to the President Ford Committee payroll, but he said the FEC would investigate the matter if necessary.

The White House had no immediate comment on Curtis' remarks but said it had always been the President's intention to obey the campaign finance law.

Morton, former Maryland congressman, Republican National Committee chairman and secretary of interior and commerce, was named Tuesday to a $44,600 a year White House job with the title of domestic and economics counselor. It would include duties as chief political adviser within the White House and liaison with the Ford campaign and the GOP.

Democratic presidential candidate Fred Harris, the former senator from Oklahoma, filed a formal complaint with the FEC on the matter.

§ 437d (a) (11)

§ 434 (d) reporting exemption

§ 591 defines expenditures to influence a federal election

§ 608 ceilings on contributions + expenditures

concern to carry out spirit of law

Hatch Act exemption of WH employees should not be relied upon.

Difficult but not impossible to distinguish political activities from electioneering.

Anything done to help election should be reported.

Advance work is electioneering

Harris: Use of appropriated funds not within jurisdiction

Costs of allocating expenses.

Regulation on volunteer services (revised) p. 3

5. Interface on scheduling matters
Clearance on Ford policy positions + exchange of information on development
Receive communications from PFC on

LEGAL QUESTIONS CONCERNING "POLITICAL" FUNDS

1. The Problem. (a) A number of clearly political functions of the President and his immediate staff involve the expenditure of funds for travel, meals, entertainment, mailings, souvenir gifts, etc. Traditionally, the financing of such activities has been provided by the national political parties or campaign committees supporting the incumbent President. In such cases, the expenses are either paid in the first instance or reimbursed from political funds. During the Nixon Administration, for example, the cost of the President's political travels was reimbursed to the Department of Defense from a White House account supplied for that purpose from funds of the Republican National Committee and the Committee to Re-elect the President.

(b) The General Accounting Office has taken the position that this reimbursement through a White House account involved that account and the career civil servant who administered it in a "political committee" under the Federal Election Campaign Act of 1971, separate from the political committees which provided the funds, on the ground that political funds were received in and expended from this account. Copies of the White House report on these funds to GAO and the GAO opinion are attached.

(c) An 1883 statute, 18 USC 603, makes it a crime for any officer or employee to solicit or receive "any contribution of money or other thing of value" in "a room or building" in which official duties are performed.

(d) If the above GAO interpretation is correct, and if the receipt of funds for purposes of the 1971 statute would also be an acceptance of funds under 18 USC 603, serious questions could be raised as to the propriety of payments or reimbursements from political funds in connection with White House activities. It might also be necessary for all persons who participate in these expenditures to register as political committees which involves the designation of a chairman and a treasurer, and the filing of a statement of organization detailing many facts appropriate to normal political groups but not to the functioning of a White House office.

(e) There may be other statutory registration or reporting requirements bearing on White House activities that might be considered "political" or on behalf of a political candidate once a President has announced that he will definitely be a candidate at the next election.

2. Illustrative Problems. Consider the following cases:

(1) Bills for the costs of Presidential travel for purely political purposes are sent by the Department of Defense to the White House which sends them to a national political committee which makes direct payment to the Department of Defense.

(2) A White House office conducts mailings to various organizations and private interest groups and the cost of such mailings is reimbursed from the funds of a national political committee. The addressees are typically not partisan political organizations but a full spectrum of private interest groups, including labor, youth, business, etc. The mailings financed in this way contain informational material, most of which is not necessarily political, but some of which endorses Administration legislative proposals and speaks well of various programs. Presidential speeches, both partisan and official, are frequently included in such mailings. After some criticism of a few mailings it was decided to do all mailings of this kind from political funds, though many -- if not most -- are not regarded as truly political. Some mailings inviting group representatives in for a series of biweekly informational meetings that are the subject of Ralph Nader's Advisory Committee Act suit are financed in this way.

(3) An entertainment is given at the White House, on the Sequoia, or at a commercial establishment and the bill is sent to the White House Staff Secretary who relays it to a national political committee for direct reimbursement.

(4) Political matters are discussed during a meal at the White House or a commercial establishment and the cost is paid as in #3 above. Such meetings may be with political leaders or just members of the press.

(5) A White House official responsible for liaison with all private interest groups (from the NAM to Ralph Nader) holds a succession of luncheon conferences and the like attended by representatives of such groups and the costs are reimbursed as in #3 above.

(6) Presidential mementos such as cuff links and tie clips are paid for by a national political committee and given out during various White House meetings and ceremonies.

(7) A national political committee pays for any political or issue polling requests by the White House.

3. The Statutory Standards. (a) The Federal Election Campaign Act of 1971, P.L. 92-225, 86 Stat 3 (1972) contains two separate definitions of a "political committee". The first is in Title II containing amendments to the criminal code, as follows:

> "(d) 'political committee' means any individual, committee, association, or organization which accepts contributions or makes expenditures during a calendar year in an aggregate amount exceeding $1,000;" (Sec 201).

The definition in Title III, which is the basis for the GAO opinion on the White House Subsidiary Account is as follows:

> "(d) 'political committee' means any committee, association, or organization which accepts contributions or makes expenditures during a calendar year in an aggregate amount exceeding $1,000;" (Sec 301). 2 USC 431 (d).

Titles II and III also contain differing definitions of "contribution." The Title III definition is:

> "(e) 'contribution' means--
>
> (1) a gift, subscription, loan, advance, or deposit of money or anything of value, made for the purpose of influencing the nomination for election, or election, of any person to Federal office or as a presidential or vice-presidential elector, or for the purpose of influencing the result of a primary held for the selection of delegates

to a national nominating convention of a political party or for the expression of a preference for the nomination of persons for election to the office of President, or for the purpose of influencing the election of delegates to a constitutional convention for proposing amendments to the Constitution of the United States;

(2) a contract, promise, or agreement, whether or not legally enforceable, to make a contribution for any such purpose;

(3) a transfer of funds between political committees;

(4) the payment, by any person other than a candidate or political committee, of compensation for the personal services of another person which are rendered to such candidate or committee without charge for any such purpose; and

(5) notwithstanding the foregoing meanings of "contribution", the word shall not be construed to include services provided without compensation by individuals volunteering a portion or all of their time on behalf of a candidate or political committee;" 2 USC 431 (c).

(b) The prohibition in 18 USC 603 is as follows:

"Whoever, in any room or building occupied in the discharge of official duties by any person mentioned in section 602 of this title [including any Senator, Representative, Delegate, Commissioner, or an officer or employee of the U.S. or of any department or agency thereof, or anyone on salary from the U.S.], or in any Navy Yard, port, or arsenal, solicits or receives any contribution of money or other thing of value for any political purpose, shall be fined not more than $5,000 or imprisoned not more than three years, or both."

4. Interpretation of 18 USC 603. (a) The legislative history which the Office of Legal Counsel has provided indicates that this statute was one of several prohibitions enacted in the same bill for the purpose of prohibiting the solicitation of political contributions from government employees. The intent appears to be clearly directed to the initial receipt of funds and not to their subsequent

transfers. The term "contribution" is defined for purposes of this statute to include--

> ". . . a gift, subscription, loan, advance, or deposit of money, or anything of value, and includes a contract, promise, or agreement to make a contribution, whether or not legally enforceable;" 18 USC 591.

The definition is very broad in describing the sort of value that can be a contribution, but again, the focus is clearly on the initial procurement of the funds.

(b) As applied to the specific problems described in paragraph 2 above, it could be argued that this statute was not intended to reach them since in every instance the contribution had already been completed before the funds came within a federal building. Clearly, no solicitation or original donation is involved. Under this interpretation, transfers of political funds within a federal building would not be covered by the statute if they were already the property of the political group at the time they are first handled, transferred, or received in a federal building.

5. Interpretation of the 1971 Act. (a) The reporting requirement arises if there is (i) a "political committee" as defined by the Act and that committee (ii) either accepts contributions or makes expenditures of more than $1,000 in a calendar year. Insofar as any of the specific examples listed in paragraph 2 above involve payment by a national political committee for a Presidential political activity, there seems to be a reportable expenditure under the Act. In that event, would the expenditure be reportable solely by the national political party's committee.

(b) A legal uncertainty would arise, however, if any intermediate decisions between personnel of the committee itself and the ultimate payee are made by White House personnel who may thereby be viewed as separate political committees. It would seem clear that the kind of expenditures described in paragraph 2 all involve a direct outlay for goods or services by the national political committee. In each case, however, the specific decision to make the expenditure is made by someone in the White House; a decision to take a Presidential political trip, to hold a reception or

entertainment for political purposes, to spend funds for a meal for political purposes, or to conduct a mailing. Under the GAO interpretation it could be argued that if the total expenditure in any one category exceeds $1,000 in a calendar year, the person or persons making those decisions should report as a separate political committee.

(c) An alternative interpretation would be that the expenditure is made by the national political committee through a decision to finance a particular category of expenditures which it should report under the Act. Under this view, the specific spending decisions made from time to time would be viewed as essentially ministerial, carrying out the basic policy decision made by the outside political committee.

6. The Questions. Both the 1883 statute and the 1971 Act as interpreted by GAO raise questions as to whether expenditures of the kind described in paragraph 2 should be made in the future and, if so, as to how they should be reported. There may be other interpretations in addition to the possibilities mentioned above. And there may be other relevant registration or reporting provision. The questions to be decided are several: (1) What is the meaning of the relevant statutes; (2) How would the paragraph 2 illustrations be treated under such statutes; (3) How should such matters be handled in order to comply fully with the letter and the spirit of the relevant laws; and (4) Are there other reporting or registration requirements not specifically noted above.

October 1, 1974

Dear Mr. Staats:

Enclosed is a completed "Registration Form and Statement of Organization for a Committee..." covering monies channeled through the former White House subsidiary account.

While the information concerning these accounts should be reported, a question exists in my opinion as to whether the reason is that the White House subsidiary account was a "political committee" within the meaning of the Federal Election Campaign Act of 1971. A "political committee" is defined in section 201 of that Act (18 USC 591 (d)) as "any individual, committee, association, or organization which accepts contributions or makes expenditures..."; and section 301(d) of that act defines a "political committee" as "any committee, association, or organization which accepts contributions or makes expenditures..." It does not appear to me that the White House subsidiary account could be a committee, association or organization, or an individual within the meaning of the statute, but appears to be a custodial and bookkeeping device to facilitate disbursements on behalf of the actual committees. The actual political committees involved, I am informed, were the Republican National Committee (RNC) and the Committee for the Re-Election of the President (CREEP). Accordingly, these forms show these organizations as the only committees involved, for which the White House subsidiary account was a custodial and bookkeeping device. I am informed that distributions were made from the account to serve the purpose of these two committees, and attributable to their activities, without

any discretion or decision making on the part of the White House custodian, and on termination of the account its entire balance was returned to the CREEP.

Sincerely yours,

COMPTROLLER GENERAL OF THE UNITED STATES

Dudley H. Chapman
Associate Counsel

The Honorable Elmer B. Staats
Comptroller General of the United States
Washington, D.C.

GERALD R. FORD LIBRARY

TAB B

UNITED STATES GENERAL ACCOUNTING OFFICE
WASHINGTON, D.C. 20548

OFFICE OF FEDERAL ELECTIONS

October 23, 1974

Dudley H. Chapman, Esquire
Associate Counsel
The White House

Dear Mr. Chapman:

Enclosed is a copy of our report on the White House Subsidiary Account.

We wish to take this opportunity to thank you for your courtesy and assistance in this matter.

Sincerely yours,

Acting Director

Enclosure

UNITED STATES GENERAL ACCOUNTING OFFICE
WASHINGTON, D.C. 20548

OFFICE OF FEDERAL ELECTIONS

REPORT OF THE OFFICE OF FEDERAL ELECTIONS TO THE COMPTROLLER GENERAL OF THE UNITED STATES ON THE WHITE HOUSE SUBSIDIARY ACCOUNT

I. BACKGROUND

This report covers an audit undertaken by the Office of Federal Elections of the U.S. General Accounting Office to determine whether the White House Subsidiary Account was required to register and report to the Office of Federal Elections under the Federal Election Campaign Act of 1971.

We undertook this audit, pursuant to section 308(a)(11) of the Act, because the June 10, 1974 report of the 1972 Campaign Liquidation Trust (successor to the Finance Committee to Re-elect the President) disclosed that it received $1,022.89 in "* * *unspent funds advanced for political purposes" from the White House Subsidiary Account on March 28, 1974. The White House Subsidiary Account had not registered or filed reports with this Office.

Our audit covered the period April 7, 1972, the effective date of the Act, through March 27, 1974. For this period, the Subsidiary Account reported an opening cash balance of $10,114, receipts of $6,198, and expenditures of $16,312.

II. FINDINGS AND CONCLUSIONS

A. Failure to Register and Report In a Timely Manner

Section 301 of the Act defines a "political committee" as any organization that accepts contributions or makes expenditures during a calendar year in an aggregate amount exceeding $1,000 "for the purpose of influencing the nomination * * *or election of any person to Federal office * * *." Sections 303(a) and 304(a) require that each "political committee" file a registration statement and periodic reports of receipts and expenditures with the appropriate supervisory officer.

Wilbur H. Jenkins, the Administrative Officer at the White House, was the designated treasurer of the Subsidiary Account. Mr. Jenkins informed us that the Subsidiary Account was created in October 1970 for the primary purpose of paying the expenses of political advance men. Mr. Jenkins further stated that he had made bank deposits for the Subsidiary Account and had signed the checks, but that Bruce Kehrli, the White House Staff Secretary, had approved and directed all such transactions during the period covered by our audit.

After an initial delay in gaining access to the records of the Subsidiary Account, we were allowed access in early July 1974. Our review indicated that receipts of the Subsidiary Account after April 7, 1972, consisted primarily of $10,000 in cash deposited on April 19, 1972, and a $5,000 check deposited on January 9, 1973. We found that the Finance Committee to Re-elect the President (Finance Committee) had transferred the $15,000 to the Subsidiary Account. A report disclosing pre-April 7, 1972, transactions (filed September 28, 1973, by the Finance Committee under a court order in a suit by Common Cause) shows a pre-April 6, 1972, cash payment of $10,000 to Bruce Kehrli, c/o The White House for "advance for travel and expenses of White House staff." A footnote in the report stated that Mr. Kehrli was not an employee, agent, or trustee of the Finance Committee, but was an employee of the White House. Hugh Sloan, former Finance Committee treasurer, through his attorney, stated that he remembers making the cash payment to Bruce Kehrli prior to April 7, 1972.

The report of the Finance Committee filed with this Office on March 10, 1973, disclosed a $5,000 payment to the Subsidiary Account on January 2, 1973, for the purpose of "reimbursement to White House - Campaign Expenses." This appears to be the $5,000 check deposited by the Subsidiary Account on January 9, 1973.

The majority of the Subsidiary Account's disbursements were made to pay the expenses of political advance men during the 1972 Campaign and to pay for political luncheons and parties. Its final disbursement was the $1,022.89 of unspent funds refunded to the Finance Committee's successor on March 27, 1974.

On the basis of the foregoing information, we advised Mr. Jenkins by letter dated August 19, 1974, that the White House Subsidiary Account appeared to be a political committee which would be required to register and report.

After further discussions with representatives of the Subsidiary Account, a registration statement and a report of receipts and expenditures were filed with this Office on October 1, 1974, on behalf of the "Republican National Committee/ Committee to Re-elect the President (The White House Subsidiary Account)." A transmittal letter signed by Mr. Dudley H. Chapman, White House Associate Counsel stated that:

> " * * *It does not appear to me that the White House Subsidiary Account could be a committee * * *within the meaning of the statute, but appears to be a custodial and bookkeeping device to facilitate disbursement on behalf of the actual committees. The actual committees involved, I am informed, were the Republican National Committee (RNC) and the Committee for the Re-election of the President (CREEP)."

Mr. Chapman added that decision-making and discretion were not exercised in the White House. Contrary to Mr. Chapman's statement, however, the former treasurer of the Finance Committee, Paul Barrick, told us that the Subsidiary Account was a White House account and not part of the Finance Committee or the Campaign Liquidation Trust and that the Finance Committee had reported all funds advanced to the Subsidiary Account and had no responsibility to report as to the use of funds by the Subsidiary Account. We found nothing in our review of the Subsidiary Account to show any Finance Committee involvement, except for the transfer of $15,000.

We conclude that the White House Subsidiary Account was a "political committee" within the meaning of section 301(d) of the Federal Election Campaign Act because it was an organization which accepted and spent more than $1,000 in both 1972 and 1973 for the purpose of supporting the re-election of President Nixon through the use of campaign funds.

The failure to disclose the existence of such a political fund in the White House until two years after the campaign period appears to constitute a violation of the Act.

B. Failure to Keep Complete and Accurate Records

Section 302 of the Act requires the treasurer of a political committee to keep a detailed and exact account of all contributions received and expenditures made by the Committee.

The disbursements made by the Subsidiary Account were adequately documented. All expenditures were supported by invoices and canceled checks. However, although we were able to determine independently the apparent source of the Subsidiary Account's receipts, its treasurer could not provide any documentation to verify the source or dates of the receipts.

With respect to the $10,000 cash receipt previously mentioned, a footnote to the Subsidiary Account's reported cash on hand at April 7, 1972, disclosed that it:

> "Includes $10,000 in cash which W. Jenkins was advised orally by B. Kehrli was received from CREEP prior [to] April 7. These funds were not turned over to W. Jenkins to deposit until April 19, 1972. The date of the initial receipt by B. Kehrli has not been determined."

Obviously, there is still uncertainty as to when the $10,000 cash was actually received by the Subsidiary Account and some doubt as to custody and control of the funds until they were deposited in the bank.

The failure of the Subsidiary Account to maintain complete and accurate records of its receipts appears to be a violation of section 302 of the Act.

III. RECOMMENDED FURTHER ACTION

We recommend to the Comptroller General that the following matters be brought to the attention of the Attorney General for such action as he deems appropriate:

1. The Subsidiary Account's failure to register and file reports of receipts and expenditures with this Office in a timely

manner as required by sections 303(a) and 304(a) of the Act.

2. The Subsidiary Account's failure to maintain complete and accurate records of its receipts as required by section 302 of the Act.

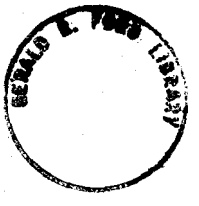
Acting Director
Office of Federal Elections

Date: October 23, 1974

Approved:

Comptroller General
of the United States

Date: October 23, 1974



THE SECRETARY OF COMMERCE

WASHINGTON, D.C. 20230

December 17, 1975

The President
The White House
Washington, D. C. 20500

Dear Mr. President:

The time has come to substantially strengthen your campaign for the nomination. The actions required to accomplish this are of paramount priority. Failure to perfect the campaign organization and strategy presents a very real risk of defeat. The voter impression is that the campaign is too far away from you, that it is not representative of your candidacy and because of it you are losing ground. Whether true or not, this is the perception.

I believe this impression can be corrected by putting a senior political counselor in the White House who will be the prime link between you and your campaign and between the campaign and the Cabinet and senior elements of your staff.

This person must have a broad-gauge political perspective, must be able to comfortably work with you on a daily basis, must be able to work with the press, but not as a surrogate, and must have the respect of a wide spectrum of the Republican Party. Above all, this person must be your prime associate in the development of an objective campaign strategy. Separately, I have attached a list of people whom I would suggest. My ranking would put George Bush, Bill Ruckelshaus and Ody Fish at the top of the list.

I very strongly recommend that this action be taken. I think it will be welcomed by Bo Callaway. It has the endorsement of the Vice President, Bill Simon, Bill Seidman, Jim Cannon, Dick Cheney and others with whom I have discussed the matter.

Yours sincerely,

George Bush

John Byrnes

Ody Fish

Bryce Harlow

Melvin Laird

Leon Parma

George Romney

Richard Rosenbaum

William Ruckelshaus

William Scranton

THE WHITE HOUSE
WASHINGTON

January 15, 1976

1:45

Barry called and would like you to add 3 USC 105 and 106 to your list.

shirley

GUIDE FOR PREPARATION OF LEGAL RESPONSES
TO ISSUES RAISED BY MORTON APPOINTMENT

1. Statutes which have possible relevancy

   a) 18 U.S.C. § 209 (salaries of government employees payable only by U.S.)

   b) 31 U.S.C. § 628 ("sums appropriated for...expenditure in the public service shall be applied solely to the objects for which they are respectively made, and for no others.")

   c) 18 U.S.C. § 607 (payments to promote political objects from one government employee to another)

   d) 2 U.S.C. § 431(e)(4) (inclusion in "contribution" of compensation paid by any "person" for the "personal services of another person which are rendered to such candidate or political committee without charge"; see definition of "person" in §431(h) which does not include the government)

   (e) 2 U.S.C. § 431(e)(5) (exclusion from "contribution" of "the value of services provided without compensation by individuals who volunteer a portion or all of their time on behalf of a candidate or political committee")

   f) 2 U.S.C. § 431(f)(1) ("expenditure" includes any payment made for the purpose of influencing a nomination or election to Federal office)

   g) 5 U.S.C. § 7324(d)(1) (exempts "employees paid from the appropriation for the office of the President" from the general prohibition against having Executive Branch employees participate in "political management or in political campaigns")

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2. Possible issues

a) The nature and extent of services by Counsellor Morton and his aides as they are covered by the objects for which appropriations to the office of the President are made, namely all services ordinarily performed for a President whether or not he is involved in a nomination/election campaign and those which may be campaign-related but which are required because he is the incumbent President.

b) The nature and extent of services by these individuals as:

(i) they fall outside the objects of the applicable appropriations and they are not performed on the individual's own time, or

(ii) they are rendered to the President as candidate or to his election committee and they are not volunteered on the individual's own time.

3. Positions taken by Chairman Curtis

a) He has interpreted Morton's public statements to give as a justification for his role for the President the uses which incumbent Congressmen make of their staffs for campaign purposes, and in the Chairman's view this is all wrong because two wrongs do not make a right.

b) He concedes that the President and everyone on his staff have a legitimate "political" role not only in policy-making but in communicating and defending policy decisions to the American people, but that is not to say they can have a role in "electioneering" unless the costs attributable to that role are reported and accounted for as coming within the President's campaign spending limits. He thinks a workable distinction can be made and has to be made, or a serious inequity is created between incumbents and challengers.

c) The FEC has no concern with whether or not these "electioneering" costs rightly or wrongly come out of appropriated funds but, if they do represent services for which the individual is compensated by his federal salary, they must be reported as campaign receipts and expenditures. He concedes that truly "off-time" volunteer services would fall outside this requirement.

d) He wants to work, through informal means or through an advisory opinion, to achieve voluntary compliance with the Federal Election Campaign Laws, notwithstanding that a complaint has been filed which may involve the same issue.

(He has offered to meet in this regard on Monday, January 19, at 3:00 p.m.)

UPI 01-15 06:46 PES

A273
R A
POLITICS 1-15
SUB NIGHT LD POLITICS UNDATED A245 FOR 10TH PGH BGNG: WHITE HOUSE

WHITE HOUSE OFFICIALS SET UP A MEETING BETWEEN FORD'S WHITE HOUSE COUNSEL, PHILIP W. BUCHEN, AND FEC OFFICIALS "TO EXPLORE THIS CONCERN," BUT CURTIS' SCHEDULE PREVENTED A FULL DISCUSSION OF THE ISSUE.

NO DATE FOR A NEW MEETING WAS SET, BUT IT WAS EXPECTED TO TAKE PLACE NEXT WEEK WHEN CURTIS RETURNS FROM AN OUT OF TOWN TRIP.

PICKUP 11TH PGH: "THE PRESIDENI

UPI 01-15 06:48 PES

N. Y. Times
Thurs. 1/15/76

POST FOR MORTON DRAWS CRITICISM

Strauss and Election Aide View It as Political.

By WARREN WEAVER JR.
Special to The New York Times

WASHINGTON, Jan. 14—The

DS
~~Ann H.~~ McLellan · 611 South Main Street · Oxford, Ohio · 45056

Traitor's File

Jan. 15, 1976.

Dear Mr. Buchen:

I cannot understand how you could have been so insensitive as not to have appreciated the impropriety of Rogers Morton being given a high paying Federal post to work for President Ford's reelection.

Where have you been for the last 5 or 10 years? If I occasionally considered that Ford might be a better candidate for reelection than some of those Democrats running, your bland assumption that there's no incompatibility or impropriety to paying a man unauthorized tax payers money to run a political

Campaign has certainly shaken that inclination. Keep up this record of outrageous appointments — vide Braden or State Dept. Consumer Affair officer — and the unemployed, underpaid, overtaxed citizens of this country will have no choice but to defeat Jerry come November.

If you guys have no sense of decency or decorum we do. The good old line that Jerry has redeemed Nixon's iniquities is wearing thin.

David McCollam

UPI 01-15 06:46 PES

A273
R A
POLITICS 1-15
SUB NIGHT LD POLITICS UNDATED A245 FOR 10TH PGH BGNG: WHITE HOUSE
WHITE HOUSE OFFICIALS SET UP A MEETING BETWEEN FORD'S WHITE HOUSE COUNSEL, PHILIP W. BUCHEN, AND EEC OFFICIALS "TO EXPLORE THIS CONCERN," BUT CURTIS' SCHEDULE PREVENTED A FULL DISCUSSION OF THE ISSUE.
NO DATE FOR A NEW MEETING WAS SET, BUT IT WAS EXPECTED TO TAKE PLACE NEXT WEEK WHEN CURTIS RETURNS FROM AN OUT OF TOWN TRIP.
PICKUP 11TH PGH: "THE PRESIDENT
UPI 01-15 06:48 PES

Eva, FYI

6:55 p.m. Wednesday, January 14

Barry called to inform you that Fred Harris has now filed a formal complaint on the Morton position.

If we get any press calls we should advise that it is inappropriate for us to comment at this time.

Office of Legal Counsel

January 15, 1976

Honorable Philip W. Buchen
Counsel to the President
The White House
Washington, D.C. 20500

Dear Mr. Buchen:

As requested in our phone conversation today, I am enclosing a copy of the memorandum to Mr. Dean forwarding a draft response to Mr. Nader's lawyer concerning alleged Federal subsidization of reelection campaigns.

Sincerely,

Antonin Scalia
Assistant Attorney General
Office of Legal Counsel

Enclosure
Memo dated
Oct. 20, 1972

RCC:NS:frj

Files
Mr. Siegel
Mrs. Gauf

out to John Dean
10/20/72
@ 12:30pm

OCT 20 1972

MEMORANDUM FOR HONORABLE JOHN W. DEAN III
Counsel to the President

Re: Alleged Federal Subsidization
of Re-election Campaign

Pursuant to your request of October 18 I am forwarding herewith a draft response to the Nader lawyer's letter to Secretary Shultz.

Roger C. Cramton
Assistant Attorney General
Office of Legal Counsel

DRAFT REPLY

Alan B. Morrison, Esq.
Attorney-at-Law
2000 P Street, N. W., Suite 515
Washington, D. C. 20036

Dear Mr. Morrison:

This will acknowledge your letter of October 10, 1972, to the Secretary of the Treasury, which has been referred to me.

You refer to press articles and other media reports apparently asserting that certain members of the White House staff have been devoting substantially all their time to the election campaign of the President. You express the view that these activities, even though authorized by the Hatch Act, regulating political activities of federal officers and employees, do not "permit the payment of their salaries when they are doing nothing else but working on a political campaign."

The exemptions in the Hatch Act for certain federal officials and employees plainly recognize that the official duties of those persons encompass the explanation and the defense of the President's policies in the course of a political campaign. Nor does the Act purport to or attempt to set any limits on the time those officials may devote to such activities, an obviously impractical task. The Act specifically exempts from its coverage several classes of persons, including the following: "an employee paid from the appropriation for the Office of the President"; "the head or assistant head of an Executive department or military department"; and an employee, appointed by the President

by and with the consent of the Senate, who determines policies pursued by the United States in its relations with foreign powers or "in the nationwide administration of Federal laws." 5 U.S.C. 7324(d)(1), (2), (3).

The legislative history of the Hatch Act recognized that functions performed by White House staff members and other policy-making officials in explaining and defending the President's policies were well within ~~their~~ the scope of their official duties and responsibilities, and an inseparable part of their functions of assisting the President.

When in 1939 Senator Hatch together with other sponsors introduced S. 1871, which was to become the Hatch Act, he was deeply concerned about the threat to good government arising from pernicious political activities on the part of administrative and supervisory employees in general. But Senator Hatch was not so oblivious to the practical and effective administration of public affairs as to believe that policy-making officials should also be made subject to the Act. On the contrary, he frankly disclaimed any such view stating "that a person holding a policy-making position not only should have the right and opportunity, but he ought to go out and defend his administration and its policies. Certainly it is not my intention to prohibit such action." (84 Cong. Rec. 4303, April 17, 1939)

Subsequently Senator Hatch had occasion to point out the differences between policy-making officials who are "distinctly political officers" exercising functions in that capacity, and other governmental employees.

He said:

> "Mr. President, there is a distinction between ordinary Government employees and officers who are charged with the high duty and responsibility of formulating programs and policies, because the latter

must not only sell those policies - if I may use that expression - to the country, but they must be able to defend their policies against attack. Everyone knows that to be so. Such officers are distinctly political officers, and it is not difficult to distinguish between them and other governmental employees, the great mass of whom perform merely clerical duties, which are not political in any sense . . . ." (86 Cong. Rec. 2432, March 6, 1940)

The views expressed by Senator Hatch and other Members of Congress in this connection merely reflect common experience in the conduct of political affairs and in government administration. It strikes an appropriate balance between forbidden political activity and the need to bring home to the people how the President's policies will affect them.

So far as we know, at no time has salary been denied to a policy-making official in the White House in either a Democratic or Republican administration because he has engaged in defending the administration's policies during a political campaign. And this involvement in White House affairs is recognized as proper regardless of whether it is undertaken at a time substantially before an election or shortly before it.

I should add, moreover, that there are no White House employees engaged in such purely political activities as selling buttons and the like. Their activities are devoted wholly to an explanation and advocacy of Presidential policies.

Sincerely,

John W. Dean III
Counsel to the President

Q In this frigid air he plunges into this?

MR. CARLSON: I think the President finds it very stimulating, invigorating. In fact, it was so stimulating that the President returned to the office about 8:15 and worked until 11 o'clock last night.

Q That was this morning?

MR. CARLSON: No, last night.

I think you are all up to date on our meeting with Mr. Curtis. As mentioned yesterday, the meeting was planned sometime following the completion of the regular session. That regular session didn't end until very late. Mr. Curtis had to catch a plane for an appointment this morning in St. Louis, and so the meeting has been postponed until hopefully the first part of next week. Of course, Mr. Buchen is available at the earliest convenience to meet with Mr. Curtis.

Q A question on that. In the meantime, has Mr. Morton gone on the White House staff payroll, or what is his status?

MR. CARLSON: Mr. Morton will be working as Secretary of Commerce through the end of the month, and then it is proposed that February 1 it will be Mr. Richardson coming aboard.

The President has been invited and will attend the Quadrennial Commemorative Session of the Virginia Assembly. This will take place at Colonial Williamsburg on January 31 at 4 p.m. The final details have not all been worked out, but this is just to keep you up to date.

Q Will he address that?

MR. CARLSON: Yes, he will.

On weekend plans, there has been some interest. The President will be in the White House over the weekend, and he will be devoting a substantial amount of time each day to the State of the Union Message and also reviewing the final budget document.

Q Has he set a record for working on the State of the Union Message?

MR. CARLSON: I don't know.

Q John, on the State of the Union Message, do you have any long-range idea as to when it will be available here?

Q How many subcommittees are there?

MR. CARLSON: I think six.

Q John, I was wondering, how does the White House reconcile what Ron defined as Mr. Morton's incidental duties with the Ford campaign agreement in writing with Common Cause not to use taxpayer-supported services of any public office except for security purposes?

MR. CARLSON: Les, I think I should just not comment on the whole Morton issue until after they have a chance to meet, probably Monday.

Q You think that is when Buchen and Morton's counsel -- will he meet with Morton or the counsel --

MR. CARLSON: He will meet with the FEC counsel and the chairman.

Q Can you say anything about the deteriorating situation in Angola?

MR. CARLSON: We have seen the reports that you are probably referring to, and without getting into military movements, we are concerned about the current situation in which Cuban troops are fighting in an area where they have no legitimate interest.

The President will continue to work through diplomatic channels, and to use whatever means are available to him --

Q What does that mean?

MR. CARLSON: -- to see that this conflict can be resolved without foreign intervention.

Q That is kind of a joke to say it can be resolved without foreign interference. It is being resolved quite decisively with foreign interference, both the Cubans and the Soviets.

MR. CARLSON: I think our position has been quite clear we have advocated a cease-fire and an immediate withdrawal of all foreign intervention and a solution of the African problem by Africans.

Q Isn't that policy rather dated at this point because it is clear pro-Soviet forces with Cuban soldiers in the field are making a mockery of the President's goals?

Q What time is the meeting, Ron?

MR. NESSEN: 11:30.

Q Will they have to pay their own way?

MR. NESSEN: As far as I know.

Q All of those who were invited have accepted except those two?

MR. NESSEN: The two Governors we have not heard from yet. All the mayors who were invited have accepted.

Q But these were hand-picked mayors?

MR. NESSEN: As representatives of the Conference of Mayors and the League of Cities and then kind of a broad geographical selection.

Q Are their views on the budget embargoed until 10:00 a.m. Wednesday, also?

MR. NESSEN: I don't see how we could do that. They will probably have to stay away from specific figures and so forth, whatever few figures are left unpublished.

Q Ron, if you brief us in the afternoon, tomorrow, it is not going to give any filing time between the President's briefing and yours.

MR. NESSEN: I know, and that is why I mentioned a later briefing.

Q You can't file anyway.

Q I think we need a briefing tomorrow.

MR. NESSEN: Moving right along, Phil Buchen is going to be meeting this afternoon with Tom Curtis and the Council over at the FEC. This is a meeting that you know was supposed to be held last Friday, and then Tom Curtis had a longstanding commitment, I guess, to go to St. Louis and could not attend, so that meeting will be today at 3:00.

I will talk to Phil afterward and see what sort of report we can pass on after the meeting is over. I don't have any idea of how long it is going to be.

Q Perhaps he could come out and talk to us after that.

MR. NESSEN: Let me talk to him after he gets back.

Q Will the meeting be at the White House or the FEC?

MR. NESSEN: At the FEC.

Q Ron, will he take up the question of whether or not you should be paid by the campaign as well? Curtis has now raised that point.

MR. NESSEN: I saw that. I don't know that that will specifically come up. As John told you last week, when describing the intention of the original meeting, it was to listen to the concerns of Chairman Curtis and to answer whatever questions he had about the Morton appointment.

Now, whether Chairman Curtis wants to raise questions about other White House officials, I don't have any way of knowing.

Q What time is that meeting?

MR. NESSEN: 3:00.

Q What is your reaction to Mr. Curtis' comments, Ron?

MR. NESSEN: Basically, I don't have any, Phil.

Q Could I follow Phil's question? Do you still perceive your role as nonpolitical?

MR. NESSEN: Well, again, to go back to what we talked about last week when it came to Rog Morton's appointment, it is difficult to separate -- after all, we have a political system -- so I think basically it is difficult to separate and make any clear-cut line, and clearly you ask me questions that are political and I try to answer them when I can.

Q That is all your fault.

MR. NESSEN: No, it is not. It is just an illustration of how difficult it is to draw that line.

Q Ron, how about Peter Kaye? I have known you to refer questions more than once over to him. Wouldn't that be one answer? Isn't he the political spokesman?

MR. NESSEN: He is certainly the spokesman for the campaign, yes.