

## **Chapter 7**

### **CASEWORK CONSIDERATIONS**

#### **Highlights**

Members and staff of the House often assist constituents in their dealings with administrative agencies by acting as facilitators or "ombudsmen." Members may *properly* communicate with agencies on behalf of constituents:

- to request information or status reports;
- to urge prompt consideration of a matter based on the merits of the case;
- to arrange for appointments;
- to express judgment on a matter (subject to ex parte communication rules); and/or
- to ask for reconsideration, based on law and regulation, of an administrative decision.

Congressional officials should make clear to administrators that action is only being requested to the extent consistent with governing law and regulations.

In communicating with a Federal agency on behalf of a constituent, a Member, officer, or employee of the House should *not*:

- make prohibited, off-the-record comments to an official considering a matter in a formal proceeding;
- receive money or things of value (other than congressional salary) in return for or because of official help; or
- exert undue or improper pressure on agency officials, such as by suggestions of favoritism or threats of reprisals.

stitutional scheme, it is not surprising, as the Supreme Court has recognized, that “[s]erving constituents and supporting legislation that will benefit the district and individuals and groups therein is the everyday business of a legislator.”<sup>5</sup>

### OFF-THE-RECORD (EX PARTE) COMMUNICATIONS

Even though performing casework is an important congressional duty, it is not totally unrestricted. Federal law specifically prohibits certain off-the-record comments, known as ex parte communications, directed to executive or independent agency officials, on the merits of matters under their formal consideration.<sup>6</sup> Whenever parties to a dispute come before a formal tribunal, they are entitled to a fair, impartial hearing and to equal access to the fact-finder. The ex parte rule is designed to preserve the due process rights of all parties to administrative proceedings.

An ex parte communication is an oral or written communication made without proper notice to all parties and not on the public record, from an interested person outside the agency to a member of the agency, an administrative law judge, or an employee involved in the decision-making process.<sup>7</sup> Since 1976, the “Government in the Sunshine Act,” has prohibited *anyone* from making an ex parte communication to an administrative agency decision-maker concerning the merits of an issue that is subject to formal agency proceedings.<sup>8</sup> This broad prohibition encompasses the statements of Members and employees of Congress acting on behalf of constituents.

Formal agency proceedings generally include those of a quasi-adjudicatory (or trial-type) nature and those rulemaking proceedings that must include formal hearings and a decision on the record. The legislative history of the Government in the Sunshine Act shows that “[t]he prohibition only applies to formal agency adjudication. Informal rulemaking proceedings and other agency actions that are not required to be on the record after an opportunity for a hearing will not be affected by the provision.”<sup>9</sup> Thus, a House Member or

<sup>5</sup> McCormick v. United States, 111 S. Ct. 1807, 1816 (1991).

<sup>6</sup> 5 U.S.C. § 557(d).

<sup>7</sup> 5 U.S.C. § 551(14).

<sup>8</sup> See 5 U.S.C. § 557(a), (d).

<sup>9</sup> SENATE COMM. ON GOV'T OPERATIONS, GOVERNMENT IN THE SUNSHINE ACT, REPORT TO ACCOMPANY S. 5, S. REP. NO. 94-354, 94th Cong., 1st Sess. 35 (1975); see also GOVERNMENT IN THE SUNSHINE ACT, S. CONF. REP. NO. 94-1178, 94th Cong., 2d Sess. 29 (1976).

employee may undertake communications to an agency on behalf of a constituent concerning those matters not subject to formal agency proceedings. Development of agency policy and establishment of budget priorities are examples of areas where Members of Congress are generally free to voice their own views or to forward those of their constituents. Agencies often ask for public comment on proposed regulations. Representatives, like other members of the public, may clearly contribute their opinions. It should be noted that some communications, even if related to a matter not then in a formal agency proceeding, may become part of the public record concerning that matter if the communication forms the basis of subsequent formal action, particularly one involving competing claims to a valuable privilege.<sup>10</sup>

The proscription does not extend to “general background discussions about an entire industry which do not directly relate to specific agency adjudication involving a member of that industry, or to formal rulemaking involving the industry as a whole.”<sup>11</sup> The statute specifically exempts congressional status requests.<sup>12</sup> As stated in a House Report on the Government in the Sunshine Act: “While the prohibitions on ex parte communications relative to the merits apply to communications from Members of Congress, they are not intended to prohibit routine inquiries or referrals of constituent correspondence.”<sup>13</sup>

Both the House and Senate reports recognized the possibility that a request for background information or a status report “may in effect be an indirect or subtle effort to influence the substantive outcome of the proceedings.” Thus in doubtful cases, agency personnel may treat these requests as ex parte communications “to protect the integrity of the decision-making process.”<sup>14</sup> One way to avoid violating the statutory prohibition is to put all communications with agencies in writing and to request that they be made a part of the record, available to all interested parties.

<sup>10</sup> See Home Box Office, Inc. v. FCC, 567 F.2d 9, 57 (D.C. Cir.) (“information gathered *ex parte* from the public which becomes relevant to a rulemaking will have to be disclosed at some time”), cert. denied, 434 U.S. 829 (1977); see also Action for Children’s Television v. FCC, 564 F.2d 458, 474-77 (D.C. Cir. 1977).

<sup>11</sup> HOUSE COMM. ON GOV'T OPERATIONS, GOVERNMENT IN THE SUNSHINE ACT, H. REP. NO. 94-880, 94th Cong., 2d Sess., pt. I, at 20 (1976).

<sup>12</sup> 5 U.S.C. § 551(14); see S. CONF. REP. NO. 94-1178, *supra* note 9, at 29.

<sup>13</sup> H. REP. NO. 94-880, *supra* note 11, pt. I, at 21-22.

<sup>14</sup> *Id.* at 21; see also S. REP. NO. 94-354, *supra* note 9, at 37.

**Example 1.** After taking testimony in a formal, contested proceeding under Federal Acquisition Regulations, an agency official is about to decide which of two competing bidders will be awarded a contract. It would be an improper, ex parte communication for Member A to call up the official and suggest that one of the two competitors receive the award.

**Example 2.** In the same circumstances as Example 1, it would be proper for Member A to put his views in writing, as part of the formal record, under established agency procedures.

**Example 3.** A constituent company in Member B's district has been awaiting a decision for some time in a formal agency proceeding. Member B may contact the agency seeking information regarding the status of the proceeding and urging prompt consideration of the company's claim.

**Example 4.** A constituent company in Member C's district has been awaiting a decision for some time in a formal agency proceeding. Member C has received information on the status of the proceeding from the agency's congressional liaison officer. A call later that day from Member C to the head of the agency, asking for the same information, could be viewed as an attempt to influence the outcome. C should refrain.

## JUDICIALLY IMPOSED LIMITS

No other statute or rule restrains Members of Congress from communicating with agency decision-makers. However, certain Federal court opinions discourage inordinate pressure on officials charged by law with responsibility for making administrative decisions. While such pressure may not violate any standard of conduct overseen by this Committee, Members should be aware that a *court's* perception that a Member has overstepped may lead it to invalidate the very determination that the Member was seeking. Judicial reaction varies, depending on the degree of formality of the administrative proceeding and the goal of the congressional intervention.

Senator Douglas pointed out with respect to proceedings conducted by administrative personnel that a legislator "should make it clear that the final decision is in their

hands."<sup>15</sup> Federal courts have nullified administrative decisions on grounds of due process and fairness towards all of the parties where congressional interference with ongoing administrative proceedings may have unduly influenced the outcome. In a seminal case, the court set aside a decision of the Federal Trade Commission because of aggressive questioning of agency officials by a Senate committee regarding their rationale for deciding an issue still pending before the officials in a formal setting. Note that the court's concern here had nothing to do with undisclosed communications; the questioning occurred during public hearings. Nonetheless, the court held that "common justice to a litigant requires that we invalidate the order entered by a quasi-judicial tribunal that was importuned by members of the United States Senate, however innocent they intended their conduct to be, to arrive at the ultimate conclusion which they did reach."<sup>16</sup>

Where congressional action is directed at less formal, non-adjudicatory administrative proceedings, courts are loathe to interject themselves between the legislative and the executive branches. As one court explained:

Americans rightly expect their elected representatives to voice their grievances and preferences concerning the administration of our laws. We believe it entirely proper for Congressional representatives vigorously to represent the interests of their constituents before administrative agencies engaged in informal, general policy rulemaking, so long as individual Congressmen do not frustrate the intent of Congress as a whole as expressed in statute, nor undermine applicable rules of procedure. Where Congressmen keep their comments focused on the substance of the proposed rule . . . administrative agencies are expected to balance Congressional pressure with the pressures emanating from all other sources. To hold otherwise would deprive the agencies of legitimate

<sup>15</sup> DOUGLAS, *supra* note 1, at 90.

<sup>16</sup> Pillsbury Co. v. FTC, 354 F.2d 952, 963 (5th Cir. 1966). See also Koniag, Inc. v. Andrus, 580 F.2d 601, 610 (D.C. Cir.) (letter from congressman to Secretary of Interior suggesting regulatory interpretation arrived at by the Secretary two days later "compromised the appearance of the Secretary's impartiality" and warranted setting aside of Secretary's determination), cert. denied, 439 U.S. 1052 (1978).

sources of information and call into question the validity of nearly every controversial rulemaking.<sup>17</sup>

The court focused here on "the intent of Congress . . . as expressed in statute." In another case, a court set aside an administrative determination that appeared to have been influenced, at least in part, by "irrelevant or extraneous" political considerations.<sup>18</sup> There, a subcommittee chairman had stated that funding for unrelated aspects of the agency's budget would be withheld until the department's Secretary approved a particular project. The court emphasized that it was not finding that the Member had acted improperly, but it nonetheless remanded the case, directing the Secretary to "make new determinations based strictly on the merits and completely without regard to any considerations not made relevant by Congress in the applicable statutes."<sup>19</sup>

Agency investigations occupy a middle ground between formal adjudications and informal rulemaking. An administrative decision in this context need not be completely immune from congressional pressure, provided that the agency has an independent basis for its conclusion. Thus, for example, one corporation tried to resist a Securities and Exchange Commission subpoena on the ground that it had resulted from political pressure instigated by a corporate competitor. The court ruled: "That the SEC commenced these proceedings as a result of the importunings of [a senator and his constituent, the competitor], even with malice on their part, is not a sufficient basis to deny enforcement of the subpoena. . . . [But t]he SEC order must be supported by an independent agency determination, not one dictated or pressured by external forces."<sup>20</sup>

Courts have historically refused to intervene when Members attempted to expedite an administrative process rather than urging a particular outcome. In the words of one court, "where the Congressional involvement is directed not at the agency's decision on the merits but at accelerating the disposition and enforcement of the pertinent regulations, it has

<sup>17</sup> Sierra Club v. Costle, 657 F.2d 298, 409-10 (D.C. Cir. 1981) (emphasis added). See also Environmental Defense Fund, Inc. v. Blum, 458 F. Supp. 650, 662-63 (D.D.C. 1978) (in informal rulemaking, congressmen "properly brought to the agency's attention the concerns of their respective constituencies" which were "directly relevant to the agency's proceeding").

<sup>18</sup> D.C. Federation of Civic Ass'n v. Volpe, 459 F.2d 1231, 1248 (D.C. Cir.), cert. denied, 405 U.S. 1030 (1972).

<sup>19</sup> *Id.* at 1246, 1249.

<sup>20</sup> SEC v. Wheeling-Pittsburgh Steel Corp., 648 F.2d 118, 130 (3d Cir. 1981).

been held that such legislative conduct does not affect the fairness of the agency's proceedings and does not warrant setting aside its order."<sup>21</sup>

## CONGRESSIONAL STANDARDS

Congress has adopted standards which recognize the legitimate role of Members in assisting constituents, while protecting both the due process rights of parties potentially affected by Government actions and the ability of agency officials to exercise their responsibilities. The Committee on Standards of Official Conduct has observed:

It is clear that under our constitutional form of government there is a constant tension between the legislative and executive branches regarding the desires of legislators on the one hand and the actions of agencies on the other in carrying out their respective responsibilities. The assertion that the exercise of undue influence can arise based upon a legislator's expressions of interest jeopardizes the ability of Members effectively to represent persons and organizations having concern with the activities of executive agencies.

. . . In sum, . . . a finding [of undue influence] cannot rest on pure inference or circumstance or, for that matter, on the technique and personality of the legislator, but, instead, must be based on probative evidence that a reprisal or threat to agency officials was made.<sup>22</sup>

This Committee's longstanding guidance on communicating with executive and independent agencies of the Federal Government is expressed in Advisory Opinion No. 1.<sup>23</sup> This opinion states that it is appropriate for a Member to introduce an individual to an agency, to arrange interviews and meetings for the individual, to provide a character reference, and to urge prompt and fair consideration of a matter on the merits of the case. Similarly, a Member may inquire as to the

<sup>21</sup> United States v. Armada Petroleum Corp., 562 F. Supp. 43, 51 (S.D. Tex. 1982) (citing Gulf Oil Corp. v. Fed. Power Comm'n, 563 F.2d 588, 611 (3rd Cir. 1977), cert. denied, 434 U.S. 1062 (1978), aff'd, 700 F.2d 706 (T.E.C.A. 1983).

<sup>22</sup> HOUSE COMM. ON STANDARDS OF OFFICIAL CONDUCT, STATEMENT IN THE MATTER OF REPRESENTATIVE JAMES C. WRIGHT, JR., 101st Cong., 1st Sess. 84 (1989).

<sup>23</sup> HOUSE COMM. ON STANDARDS OF OFFICIAL CONDUCT, Advisory Opinion No. 1, reprinted in 116 CONG. REC. 1077-78 (Jan. 26, 1970) and at the end of this chapter. As this MANUAL went to press, the Senate was considering adopting similar standards. See S. Res. 273, 138 CONG. REC. S3976-77 (daily ed. Mar. 19, 1992).

status of any proceeding or ruling at an agency or department. A Member may urge reconsideration of a decision on the ground that it is unsupported by Federal law, regulation, or legislative intent. If a Member has strong feelings about a particular case, judgment on the merits of the case may be expressed, subject, of course, to the prohibition on ex parte communications in formal agency proceedings. A Member should not directly or indirectly threaten reprisal or promise favoritism or benefit to any administrative official.

The Committee set forth the following standards in Advisory Opinion No. 1:

#### *REPRESENTATIONS*

*This Committee is of the opinion that a Member of the House of Representatives, either on his own initiative or at the request of a petitioner, may properly communicate with an Executive or Independent Agency on any matter to:*

- *request information or a status report;*
- *urge prompt consideration;*
- *arrange for interviews or appointments;*
- *express judgment;*
- *call for reconsideration of an administrative response which he believes is not supported by established law, Federal regulation or legislative intent;*
- *perform any other service of a similar nature in this area compatible with the criteria hereinafter expressed in this Advisory Opinion.*

#### *PRINCIPLES TO BE OBSERVED*

*The overall public interest, naturally, is primary to any individual matter and should be so considered. There are also self-evident standards of official conduct which Members should uphold with regard to these communications. The Committee believes the following to be basic:*

1. *A Member's responsibility in this area is to all his constituents equally and should be pursued with diligence irrespective of political or other considerations.*

2. *Direct or implied suggestion of either favoritism or reprisal in advance of, or subsequent to, action taken by the agency contacted is unwarranted abuse of the representative role.*

3. *A Member should make every effort to assure that representations made in his name by any staff employee conform to his instruction.*

As a matter of common sense, when communicating with an agency, Members and staff should only assert as fact that which they know to be true. In seeking relief, a constituent will naturally state his or her case in the most favorable terms. Moreover, the constituent may not be familiar with the intricacies of the controlling administrative regulations. Thus, a Member should exercise care before adopting a constituent's factual assertions. A prudent approach in any communication would be to attribute factual assertions to the constituent.

In order to avoid any inference on the part of agency personnel that a Member is asking for action in a particular matter that is inappropriate under agency guidelines, the Member should consider expressly assuring administrators that no effort is being made to exert improper influence. For example, a letter could ask for "full and fair consideration consistent with applicable law and regulations."

The staff of the Committee's Office of Advice and Education is available to review, on an informal basis, drafts of letters to administrative agencies. Formal written advisory opinions may also be requested from the Committee regarding the propriety of particular communications.

**Example 5.** Company Z in Member A's district faces bankruptcy during the pendency of an unrelated administrative appeal. A may inform the agency of Z's financial difficulties and ask that Z's claim be expedited if agency procedures allow it.

**Example 6.** Member B sits on the Veterans' Affairs Committee. B, like any other Member, may inquire as to the status of constituents' pending appeals to the Department of Veterans' Affairs. Obviously, in making these inquiries, B should not suggest that the agency's budget will be cut if B's constituents do not receive favorable determinations.

**Example 7.** A constituent asks Member C for help with a pending administrative claim. If the Member cannot substantiate that the facts presented by the constituent are correct and complete, the Member should state in any communications to the agency that the information is “according to my constituent.”

**Example 8.** A constituent business asks Member D for help getting relief from agency regulations. Member D served on the committee that drafted the legislation under which the regulations were promulgated. Member D may tell agency officials of her view that the way in which the legislation is being implemented is inconsistent with the legislative language or intent.

### Assisting Supporters

Because a Member’s obligations are to all constituents equally, considerations such as political support, party affiliation, or campaign contributions should not affect either the decision of a Member to provide assistance or the quality of help that is given. While a Member should not discriminate in favor of political supporters, neither need he or she discriminate against them. As this Committee has stated:

The fact that a constituent is a campaign donor does not mean that a Member is precluded from providing any official assistance. As long as there is no *quid pro quo*, a Member is free to assist all persons equally.<sup>24</sup>

An individual’s status as a donor may, however, raise perception problems. The Senate Select Committee on Ethics has expressed the issue as follows:

The cardinal principle governing Senators’ conduct in this area is that a Senator and a Senator’s office should make decisions about whether to intervene with the executive branch or independent agencies on behalf of an individual without regard to whether the individual has contributed, or promised to contribute, to the Senator’s campaigns or other causes

<sup>24</sup> HOUSE COMM. ON STANDARDS OF OFFICIAL CONDUCT, STATEMENT REGARDING COMPLAINTS AGAINST REPRESENTATIVE NEWT GINGRICH, 101st Cong., 2d Sess. 66 (1990).

in which he or she has a financial, political or personal interest. . . .

Because Senators occupy a position of public trust, every Senator always must endeavor to avoid the appearance that the Senator, the Senate, or the governmental process may be influenced by campaign contributions or other benefits provided by those with significant legislative or governmental interests. Nonetheless, if an individual or organization has contributed to a Senator’s campaigns or causes, but has a case which the Senator reasonably believes he or she is obliged to press because it is in the public interest or the cause of justice or equity to do so, then the Senator’s obligation is to pursue that case. In such instances, the Senator must be mindful of the appearance that may be created and take special care to try to prevent harm to the public’s trust in the Senator and the Senate. This does not mean, however, that a Member or employee is required to determine if one is a contributor before providing assistance.<sup>25</sup>

The Senate Committee concluded that “established norms of Senate behavior do not permit linkage between . . . official actions and . . . fund raising activities.”<sup>26</sup> House Members, too, should be aware of the appearance of impropriety that could arise from championing the causes of contributors and take care not to show favoritism to them over other constituents.

### Assisting Non-Constituents

On occasion a Member’s publicized involvement in legislation or an issue of national concern will generate correspondence from individuals outside the district. A private citizen may communicate with any Member he or she desires. However, the Member’s ability to provide assistance to such individuals may face practical limitations.

Regulations of the Committee on House Administration state that the official expenses allowance “is provided to pay ordinary and necessary business expenses incurred by the Member (and/or the Member’s employees) within the United States, its territories and possessions, in support of the con-

<sup>25</sup> SENATE SELECT COMMITTEE ON ETHICS, INVESTIGATION OF SENATOR ALAN CRANSTON, S. REP. NO. 102-223, 102d Cong., 1st Sess. 11-12 (1991).

<sup>26</sup> *Id.* at 29.

duct of the Member's official and representational duties *to the district from which he/she was elected.*<sup>27</sup> This regulation does not prohibit a Member from ever responding to a non-constituent. In some instances, working on matters for non-constituents that are similar to those facing constituents may enable the Member better to serve his or her district. Other times, the Member may serve on a House Committee that has the expertise and ability to provide the requested help. Of course, if a Member has personal knowledge regarding a matter or an individual, he or she may always communicate that knowledge to agency officials. As a general matter, however, a Member should not be devoting official resources to casework for individuals who live outside the district. Where a Member is unable to assist such a person, the Member may refer the person to his or her own Representative or Senator.

### Government Procurement and Grants

Constituents frequently request congressional assistance with Government contracts or grants. These matters are subject to the same guidelines as other casework. Thus, Members may generally forward introductory information to an agency from a constituent firm or request information for a constituent on available opportunities. On the other hand, an attempt to influence the outcome of a quasi-judicial proceeding such as a formal contract dispute or a bid protest pending before a board of contract appeals could trigger complaints from third parties that the fairness and impartiality of the tribunal has been compromised.<sup>28</sup> Moreover, experience has shown that contacts like these may be resented by the decision-makers. Consequently, such efforts may do more harm than good to the constituent's cause.

In assisting a private enterprise, a Member should be mindful that congressional allowances, including those for staff, are available only for conducting official business.<sup>29</sup> Assistance should not extend so far that the congressional office is actually doing the work of the private business, rather than of the Congress. Again, Members and employees should take care not to discriminate unfairly amongst constituents, e.g., on political grounds.

<sup>27</sup> COMM. ON HOUSE ADMIN., U.S. HOUSE OF REPRESENTATIVES CONGRESSIONAL HANDBOOK § 2.I.A, at 2.1 (Sept. 1985) (hereinafter CONGRESSIONAL HANDBOOK) (emphasis added).

<sup>28</sup> See Peter Kiewit Sons' Co. v. U.S. Army Corps of Engineers, 714 F.2d 163 (D.C. Cir. 1983).

<sup>29</sup> 31 U.S.C. § 1301(a); see generally CONGRESSIONAL HANDBOOK, *supra* note 27.

**Example 9.** Member A may contact agency officials and request that they meet with a constituent seeking a grant. Staffer B on Member A's congressional staff may accompany the constituent, but B should make clear that he is not there as the constituent's agent. Care should also be taken to avoid any inference of a threat to agency officials.

**Example 10.** Constituent Z requests Member B's assistance with a grant. Z is unfamiliar with the governing regulations and asks B if her staff, being experienced in such matters, would prepare the application on Z's behalf. It would not be appropriate for congressional staff to be doing the work of a private party in this fashion.

**Example 11.** Member C is approached by a constituent business for help in getting a government agency to purchase its product. The Member may set up appointments and write letters on the constituent's behalf, however C should either (a) be personally familiar with the company, product, and government requirements, or (b) be willing to provide the same type of assistance to other, similarly situated constituent businesses.

### Communicating with Courts

Just as they are asked to intervene with agency officials responsible for making on-the-record decisions, Members may also be asked to communicate with judges in pending court cases. Most courts are subject to limits on *ex parte* communications which are at least as restrictive as those applicable to executive agencies. Judges, whether serving at the Federal, state, or municipal level, are charged with performing their duties in an impartial manner. They are guided in their actions by standards such as the following:

A judge should accord to every person who is legally interested in a proceeding, or his lawyer, full right to be heard according to law, and, except as authorized by law, neither initiate nor consider *ex parte* or other communications concerning a pending or impending proceeding. . . .<sup>30</sup>

Where a Member believes it necessary to attempt to affect the outcome in a pending case, he or she has a variety of

<sup>30</sup> Model Code of Judicial Conduct Canon 3.A(4) (1989).

options. A Member who has relevant information could provide it to a party's counsel, who could then file it with the court and notify all parties. Alternatively, the Member could seek to file an amicus curiae, or friend of the court brief. Yet another option, in an appropriate case, might be to seek to intervene as a formal party to the proceeding. A Member could also make a speech on the House floor or place a statement in the *Congressional Record* as to the legislative intent behind the law. A Member should refrain, however, from making an off-the-record communication to the presiding judge, as it could cause the judge to recuse him- or herself from further consideration of the case.

Where a Member does have personal knowledge about a matter or a party to a proceeding, the Member may convey that information to the court through regular channels in the proceeding (e.g., by submitting answers to interrogatories, being deposed, or testifying in court). Members and employees should also be aware that special procedures are to be followed whenever they receive a subpoena seeking information relating to official congressional business.<sup>31</sup>

### Contacting Other Governments

Besides intervening with Federal agencies and personnel, Members may also be asked to assist constituents in their dealings with state, local, and foreign governments. Members may do so. Their communications should adhere to the same general principles described above that guide their contacts with Federal agencies.<sup>32</sup>

**Example 12.** Constituent Z has a claim pending before the state Workers' Compensation Board. If Member A would do the same for any similarly situated constituent, A may write to the state board inquiring as to the status of Z's claim and asking for expedited review if such would be consistent with the board's governing law and regulations. A may

<sup>31</sup> See DONNAD K. ANDERSON, CLERK OF THE HOUSE OF REPRESENTATIVES, RULES OF THE HOUSE OF REPRESENTATIVES, 102d Cong. (1991) (hereinafter House Rules), Rule 50.

<sup>32</sup> An eighteenth century law, the Logan Act (18 U.S.C. § 953), restricts private correspondence with foreign governments. This statute, which appears to have been a reaction to the attempts of one citizen to engage in private diplomacy, has never been the basis of a prosecution, and this Committee has publicly questioned its constitutionality. HOUSE COMM. ON STANDARDS OF OFFICIAL CONDUCT, MANUAL OF OFFENSES AND PROCEDURES, KOREAN INFLUENCE INVESTIGATION, 95th Cong., 1st Sess. 18-19 (Comm. Print 1977). Members should be aware, however, that the law remains on the books.

not imply that the state will receive increased Federal aid in return for a disposition favorable to Z.

**Example 13.** General Widget, Inc., an old and respected manufacturer in Member B's district, would like to take advantage of the opening of potential Eastern European markets for its products. GW asks B for a letter of introduction to a certain foreign Minister of Finance. B writes:

*Dear Minister:*

General Widget, Inc. has been doing business in my congressional district for 70 years. Now it seeks the opportunity to do business in your country as well. GW's executives would be happy to describe to you its wide range of products. I would appreciate any consideration you could show to GW and its representatives.

*Sincerely,*

*B*

*Member of Congress*

B's letter is appropriate. If B writes this letter on GW's behalf, B should be willing to write such a letter for any similarly situated constituent company.

### Intervening with Non-Governmental Parties

Most often, Members are asked to assist constituents in their dealings with Government agencies. In some circumstances, however, the Member may be asked to assist one private party in dealings with another private individual or organization. For example, a constituent company seeking subcontracts may ask a Member for a letter of introduction to another company which has been awarded Federal funds. As another example, two businesses may ask a Member to act as a mediator in a private dispute.

While a Member may take actions that he or she believes will assist the congressional district, intervening in private matters requires the exercise of particular caution. Unlike agency personnel, many private businesses are not used to dealing with Members of Congress on a regular basis. Thus, a communication from a Member's office may be viewed as an official endorsement of a private enterprise, or as pressure to take action in order to please the Member, rather than based on the merits. In this context, again, Members and

employees should bear in mind that official resources should not be devoted to doing the work of private businesses.<sup>33</sup>

### Confidentiality of Records

The "Privacy Act" protects the records maintained by Government agencies from disclosure, except for specified purposes or with the permission of the person to whom the record pertains.<sup>34</sup> Although the statute does permit disclosure "to either House of Congress,"<sup>35</sup> some agencies require Members to show written consent from their constituents before they will release the constituents' records to the Members. The Privacy Act does not apply to congressional documents. Historically, however, communications between Members and constituents have been considered confidential and should generally not be made public without the constituent's consent.

### Personal Financial Interests

Just as Representatives may vote on legislation that affects them as members of a class rather than as individuals, Members and employees may generally contact Federal agencies on issues in which they, along with their constituents, have interests.<sup>36</sup> A constituent need not be denied congressional intercession merely because a Member or the staff assistant assigned to a particular issue may stand to derive some incidental benefit along with others in the same class. Thus, Members who happen to be farmers may nonetheless represent their constituents in communicating views on farm policy to the Department of Agriculture. Only where Members' actions would serve their own narrow, financial interests as distinct from those of their constituents should the Members refrain.

As always, Members and employees must guide their actions in this regard by the Code of Official Conduct. The Code prohibits Members and staff from allowing compensation to accrue to their benefit "by virtue of influence

<sup>33</sup> See 31 U.S.C. § 1301(a); CONGRESSIONAL HANDBOOK, *supra* note 27, § 2.I.A., at 2.1.

<sup>34</sup> 5 U.S.C. § 552a(b).

<sup>35</sup> *Id.* § 552a(b)(9).

<sup>36</sup> Conflict of interest issues that arise in connection with Members' financial interests and their official activities are discussed in detail in Chapter 3 of this MANUAL.

"improperly exerted" from a position in Congress.<sup>37</sup> Moreover, an employee who files a Financial Disclosure statement may not contact a court or executive branch agency with respect to nonlegislative matters affecting any entity in which the individual has a significant financial interest, unless the employing Member grants a written waiver and files it with the Committee on Standards of Official Conduct.<sup>38</sup>

### GIFTS AND COMPENSATION FOR CASEWORK

When assisting constituents, Members and staff should be aware that the Federal Criminal Code prohibits the receipt of anything of value in return *for or because of* official actions.<sup>39</sup> Gifts offered as a thank you for casework assistance should generally be declined.

Members and employees also may not ask for or receive compensation for "services rendered" in relation to matters or proceedings in which the United States is a party or has an interest.<sup>40</sup> No funds or things of value, other than one's official salary, may be accepted for dealing with an administrative agency on behalf of a constituent.

Caution should always be exercised to avoid the appearance that solicitations of campaign contributions from constituents are connected in any way with a legislator's official advocacy. A discussion of this problem was offered by Senator Douglas:

It is probably not wrong for the campaign managers of a legislator to request contributions from those for whom the legislator has done appreciable favors, but this should never be presented as a payment for the services rendered. Moreover, the possibility of such a contribution should never be suggested by the legislator or his staff at the time the favor is done. Furthermore, a decent interval of time should be allowed to lapse so that neither party will feel that there is a close connection between the two acts. Finally, not the slightest pressure should be put upon

<sup>37</sup> House Rule 43, cl. 3. *See also* Code of Ethics for Government Service ¶5, H. Con. Res. 175, 85th Cong., 2d Sess., 72 Stat., pt. 2, B12 (1958), reprinted at the front of this MANUAL.

<sup>38</sup> House Rule 43, cl. 12. *See* Chapter 3 of this MANUAL for further details on staff conflicts of interest.

<sup>39</sup> 18 U.S.C. § 201. *See* Chapter 2 for more detailed discussion of the bribery and illegal gratuities laws and Committee guidance on accepting token gifts of appreciation.

<sup>40</sup> 18 U.S.C. § 203; *see also* House Rule 43, cl. 3.

the recipients of the favors in regard to the campaign. It should be clearly understood that any gift they make is voluntary and there will be no question of reprisals or lack of future help by the legislator if the gift is withheld. In other words, any contribution should be not a quid pro quo but rather a wholly voluntary offering based upon personal friendship and a belief in the effectiveness of the legislator sharpened perhaps by individual experience.<sup>41</sup>

If a legislator were to ask for political support as a quid pro quo for official action, he or she could be subject to extortion charges. In overturning the conviction of a state legislator, the Supreme Court recently observed that soliciting campaign contributions from constituents with legislative business could be extortion, "but only if the payments are made in return for an explicit promise or undertaking by the official to perform or not to perform an official act."<sup>42</sup> The Court held in that case that, given the realities of financing campaigns, "[w]hatever ethical considerations and appearances may indicate," it is generally not a Federal crime for legislators to "act for the benefit of constituents or support legislation furthering the interests of some of their constituents, shortly before or after campaign contributions are solicited and received from those beneficiaries."<sup>43</sup>

Other limitations may affect assistance to private individuals, even when no compensation is involved. Under House rules and Federal law, employees usually may not represent individuals or organizations before the Government other than in the performance of official duties.<sup>44</sup> Although Members are not subject to the same statutory limitations, representing a private entity before the Government outside of official duties may be inconsistent with a representative's obligations to serve the public interest.<sup>45</sup>

<sup>41</sup> DOUGLAS, *supra* note 1, at 89-90.

<sup>42</sup> McCormick v. United States, *supra* note 5, 111 S. Ct. at 1816.

<sup>43</sup> *Id.*

<sup>44</sup> 18 U.S.C. § 205; House Rule 41. See Chapter 3 of this MANUAL for a detailed discussion of these provisions.

<sup>45</sup> See, e.g., Code of Ethics for Government Service ¶¶ 5 and 7, *supra* note 37.

## RECOMMENDATIONS FOR GOVERNMENT EMPLOYMENT

Constituents frequently ask their Representatives in Congress to recommend them for employment in the Federal Government. Often an individual is seeking a job in the competitive service or with the Postal Service, where merit selection requirements and Federal law limit the weight that can be given to recommendations by Members. Greater flexibility is afforded Members when recommending individuals for appointive policy positions, where political considerations are an important factor in the selection process.

Neither Federal law nor House rules prohibit Members from making recommendations or referrals on behalf of those seeking Government jobs. However, employment in the **competitive service** is intended to be based on the "merit system."<sup>46</sup> Briefly, a register of eligibles is maintained by the Office of Personnel Management, consisting of the names of applicants who have qualified for placement in the competitive service.<sup>47</sup> An appointing officer of an agency or department has discretion in choosing an "eligible" from the register to fill a vacancy,<sup>48</sup> but must make the hiring choice solely on the basis of the merit and fitness of the applicant.<sup>49</sup> Such discretion may not be exercised in an arbitrary or capricious manner.<sup>50</sup>

The regulatory and statutory framework of the merit system specifically prohibits a Federal officer with authority to appoint persons in the competitive service from considering the political affiliation of an applicant<sup>51</sup> or from considering the recommendation of a Member of Congress except as to the character or residency of the applicant.<sup>52</sup> The effect of these restrictions was summarized by the predecessor of the Office of Personnel Management as follows:

To put these findings and conclusions in proper perspective, it is necessary to understand that there is nothing wrong in the act of a member of Congress or any other partisan source referring an individual

<sup>46</sup> See 5 U.S.C. § 2301.

<sup>47</sup> 5 U.S.C. § 3313; see also 5 U.S.C. § 3304.

<sup>48</sup> 5 U.S.C. § 3318; 5 C.F.R. § 330.101.

<sup>49</sup> 5 C.F.R. §§ 330.101, 332.404.

<sup>50</sup> Blackmar v. United States, 354 F.2d 340 (Ct. Cl. 1965).

<sup>51</sup> See Exec. Order No. 10577, § 4.2 (1954), reprinted as amended in 5 U.S.C. § 3301; see also 5 U.S.C. §§ 2301, 2302(b)(1) and (3).

<sup>52</sup> 5 U.S.C. § 3303; see also 5 U.S.C. § 2302(b)(2).

to a Federal agency for possible employment. This is so whether the referred individual is Republican or Democrat, constituent or stranger, and regardless whether referrer and referred are or are not members of the same political party. 5 U.S.C. 3303 states "An individual concerned in examining an applicant for or appointing him in the competitive service may not receive or consider a recommendation of the applicant by a Senator or Representative, except as to the character or residence of the applicant." This provision is not a ban on referrals, and actually anticipates that referrals will be made. What this statute restricts is not communications or referrals, but the reception the appointing official is free to give to a referral. Accordingly, the simple use of a political party label to condemn the otherwise innocent activities of the referrer who bears that label cannot be substituted for a demonstration that politics influenced or was intended to influence any of those activities.<sup>53</sup>

A separate statute governs the selection of employees for the **Postal Service**. Members of Congress are prohibited by 39 U.S.C. § 1002 from "making or transmitting" any recommendation or statement regarding an individual under consideration for a position, other than statements on the person's character or residence. An authorized representative of the Government may, however, request information on employment-related qualifications of which the Member has knowledge, and the Member may respond.

The above limitations do not apply when a Member is recommending an individual for a policy-making or political position in the executive branch. Such noncareer assignments generally involve advocacy of the President's program, significant involvement in development of Administration policies, or service as a confidential assistant to a Presidential appointee or other key official. Similarly, these limitations do not affect recommendations for congressional employment.

There are other restrictions in Federal law that affect recommendations for any position. A candidate, including a

<sup>53</sup> U.S. CIVIL SERVICE COMM'N, A REPORT ON ALLEGED POLITICAL INFLUENCE IN PERSONNEL ACTIONS AT THE GENERAL SERVICES ADMINISTRATION (Sept. 1973), reprinted in 1 SUBCOMM. ON MANPOWER AND CIVIL SERVICE, HOUSE COMM. ON POST OFFICE AND CIVIL SERVICE, DOCUMENTS RELATING TO POLITICAL INFLUENCE IN PERSONNEL ACTIONS AT THE GENERAL SERVICES ADMINISTRATION, COMM. PRINT NO. 93-22, 93d Cong., 2d Sess. 13 (1974).

Member of Congress, may not promise to appoint, or to use influence in appointing someone to *any* public or private post in return for support of the candidate.<sup>54</sup> No one may promise employment, or a benefit provided for or made possible in whole or in part by an act of Congress, in return for political activity and support.<sup>55</sup> The denial or the threatening of any Federal employment, or employment made possible through Federal funds, as a means of securing political contributions is prohibited.<sup>56</sup> Finally, nothing of value may be received in return for a promise of support or use of influence in obtaining someone a Federal post.<sup>57</sup>

In making recommendations for employment, Members and employees should bear in mind the admonition of the Code of Ethics for Government Service not to discriminate by dispensing special favors.<sup>58</sup> Similarly situated constituents should be treated alike. A Member should have some knowledge of an applicant before he or she recommends the person for employment, or the Member could find it difficult to deny subsequent requests.

**Example 14.** Constituent Z from Member A's district is eligible and applying for a career position in the executive branch. A knows Z, and at Z's request, A writes to the appointing official as follows:

Dear Administrator:

Z informs me that he is applying for a position with your agency. Z lives in my district and I have known him for 10 years. He is well respected in our community, and I personally know him to be of the utmost integrity. I hope that you will give his application full and fair consideration.

Sincerely,

A

Member of Congress

A's letter is appropriate.

<sup>54</sup> 18 U.S.C. § 599.

<sup>55</sup> 18 U.S.C. § 600.

<sup>56</sup> 18 U.S.C. § 601.

<sup>57</sup> 18 U.S.C. § 211.

<sup>58</sup> H. Con. Res. 175, ¶ 5, *supra* note 37.

**Example 15.** Member B's receptionist, C, applies for a job with the Postal Service. A Postal Service employee contacts B for a job reference. B may supply a thorough evaluation of C's performance while in B's employ and any other information that is pertinent to the request.

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<sup>1</sup> Joseph L. M. Hart, "The  
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