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Ethical Considerations in Assisting Constituents With Grant Requests Before Federal Agencies

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Summary

There is no inherent ethical problem with a Member's office assisting constituents and constituent organizations with the procedures and applications for Federal grants, up to and including, if the office deems it appropriate, contacting a Federal agency to express interest in and support of the grant application. In conducting such assistance, three general areas of ethical considerations should be noted:

1. In prioritizing grant assistance requests, and deciding whether and at what level assistance is to be provided, Member offices should consider generally the overall "public interest" and the potential public benefits of the proposal or project. One factor that should *not* be considered is whether or not the constituent or the organization has supported the Member financially with campaign contributions, and no such "linkage" should be made either internally or overtly.

2. If it is decided that a proposal has particular merit, or would be particularly beneficial to the community, the office may contact an agency to express interest in the proposal, and may even advocate for the grant proposal. It should be remembered, however, that the administrative agency has the final decision on the matter, and that the awarding of grants is generally a competitive process in which the agency decision is to be made on the *merits* of the proposal and not on political considerations. It is considered an abuse of a Member's representational role to threaten agency officials, or to make promises to the agency, in an effort to gain administrative action.

3. After official assistance is given to a constituent or a constituent group, the Member and the staff should not receive personally anything of value from the group or person as a payment, a "thank you" or "in appreciation of" the official duties performed on their behalf.

Ethical Basis For Constituent Assistance Before Federal Agencies.
There is no statutory law, nor Rule of the House of Representatives or of the Senate,

which prohibits a Member of Congress or his or her staff from becoming officially involved in a private grant application, or other request for assistance in matters before a federal agency, even to the extent of contacting, discussing with, and representing the interests of one's constituents before a federal agency or department. Furthermore, there are certain public policy arguments which have been advanced for a Member's participation in certain matters bearing on the public interest which involve federal agencies and a Member's constituents. The House Committee on Standards of Official Conduct has noted in the past, for example, that:

An important aspect of a Congressman's representative function is to act as a 'go-between' or conduit between his constituents and administrative agencies of the Federal Government.¹

The noted ethicist, the late Senator Paul Douglas of Illinois, explained the underlying ethical and practical principles as follows:

The truth is that legislation and administration should not be kept in air-tight and separate compartments. In order that each group may perform its own job adequately, it should within limits interest itself in the work of the other. There is, then, a sound ethical basis for legislators to represent the interests of constituents and other citizens in their dealings with administrative officials and bodies.

Besides the ethical justification, there is a practical necessity for it. Out of a deep instinctive wisdom, the American people have never been willing to confide their individual or collective destinies to civil servants over whom they have little control. They distrust and dislike a self-perpetuating bureaucracy, because they believe that ultimately it will not reflect the best interests of the people. They therefore turn to their elected representatives to protect their legitimate interests in their relationship with the public administrators.²

The United States Court of Appeals for the District of Columbia, in *Sierra Club v. Costle*,³ has noted that informal contacts, in the form of inquiries and expressions of interest by Members of Congress to agencies on behalf of constituents, which are focused and based on the appropriate factors which the agency should consider in an informal agency proceeding, are expected and acceptable in our system of government, and that such "pressures" on agencies are merely among the considerations with which a public agency must contend:

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

¹ *Ethics Manual for Members, Officers, and Employees of the U.S. House of Representatives*, Committee on Standards of Official Conduct, 102nd Cong., 2d Sess. at 241 (1992). See also Senate Rule XLIII(1): "In responding to petitions for assistance, a Member of the Senate, acting directly or through employees, has the right to assist petitioners before executive and independent government officials and agencies."

² Douglas, Paul H. *Ethics in Government*, Harvard University Press (Cambridge 1952), at p. 88; see also Senate Committee Print, "Ethical Standards in Government," Report of a Subcommittee on the Committee on Labor and Public Welfare, 82d Cong., 1st Sess. 28-30 (1951).

³ 657 F.2d 298 (D.C. Cir. 1981).

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.⁴

While there are no ethical or statutory prohibitions directly on congressional communications or intervention with federal agencies concerning matters of public interest on behalf of constituents, there are ethical and other considerations that need to be recognized in carrying out such intervention.

Evaluating and Prioritizing Assistance Requests. Given the limited time and resources of a Member’s office and official staff, requests to a congressional office for assistance in grant applications, and what resources, time and effort to devote to such request, should be evaluated on the merits of the proposal and project, considering generally its impact and importance for the community, district or State. The House Committee on Standards of Official Conduct has issued an advisory opinion concerning congressional assistance and federal agency interventions, and has emphasized that such activities should be based primarily on the concept of the “overall public interest,” treating “constituents equally” and undertaking such actions “irrespective of political or other considerations.”⁵ In the Senate, an express Senate Rule has been adopted concerning communications to agencies on behalf of constituents,⁶ and pursuant to this Rule the Senate Ethics Committee similarly recommends that before contacting an agency an office consider the “merits of the constituent’s case,” the practice in the Senate office of providing the requested services for “any constituent similarly situated,” or whether the requested assistance “deviates from normal office practice.”⁷ The Senate Rule expressly states that a decision to provide assistance “may not be made on the basis of contributions or services, or promises of contributions or services, to the Member’s political campaigns or to other organizations in which the Member has a political, personal, or financial interest.”⁸ Members of Congress are understood to represent all of their constituents, even those who did not necessarily support the Member’s election. The converse, of course, is also true: merely because one has been a supporter and financial contributor to a Member’s campaign, does *not* exclude such person from representation, and does *not* mean that a Member or his or her staff should be precluded from assisting that individual or organization.

Conduct in Agency Contacts. If a matter is considered to have particular merit or interest to the Member and the Member’s office, it is permissible to communicate to a

⁴ 657 F.2d at 409-410. *See also Gulf Oil Corporation v. F.P.C.*, 563 F.2d 588, 610 (3rd Cir. 1977), where even in more formal agency procedures, the courts have recognized the important prerogative and function, the “legitimate and wholesome function,” of congressional oversight of administrative actions.

⁵ House Committee on Standards of Official Conduct, Advisory Opinion No. 1, “On the Role of a Member of the House of Representatives in Communicating With Executive and Independent Agencies,” January 26, 1970.

⁶ Senate Rule XLVIII.

⁷ S. Pub. 106-40, Senate Select Committee on Ethics, *Senate Ethics Manual*, 106th Cong., 2d Sess. at 178 (September 2000).

⁸ Senate Rule XLVIII(3).

federal agency the Member's interest in the matter. Generally speaking, unless the office is particularly familiar with the matter or with the individual or organization seeking the grant, the office may wish in a contact to the agency to simply express interest in the matter, and request to be kept informed of the progress or outcome of the application process. House and Senate guidelines on contacting agencies note expressly that it is permissible to request information or a "status report," urge prompt consideration, or arrange for interviews or appointments with officials of a federal agency. If it is deemed warranted, a Member through his or her office may, however, also "express judgment" on a matter, and may present arguments for a particular position or outcome based on the law or the public interest. In communicating with agencies and advocating a position and outcome, Members and staff are advised to address only the merits of a matter, and specifically may not use the "[d]irect or implied suggestion of either favoritism or reprisal ... [for] action taken by the agency contacted."⁹ Furthermore, Members are advised to assure that representations made on their behalf "are accurate and conform to the Member's instructions...."¹⁰

If any matter is in a formal, adjudicatory stage at an agency, or is being litigated, then the Member and his or her office should be cognizant of the requirements concerning *ex parte* communications, and may need to make communications in that context in a more formal manner, such as putting correspondences in writing, available to both sides of a controversy, and on the public record.¹¹

Compensation or Rewards. Members and staff should be wary of receiving "personally," for their own use, any gifts, presents or anything of value from those whom they have assisted. Although small gifts and items are generally of little concern under House and Senate Rules (which expressly allow for "gifts" of under \$50 to be accepted by Members and staff), such "things of value," if accepted by congressional staff with the knowledge that they are being rewarded, compensated, or thanked for a particular "official act" performed (or to be performed) may, under a close reading of the so-called "illegal gratuities" clause, involve a technical violation of that provision.¹² There is, it should be noted, no express or specific *de minimis* exception to the "illegal gratuities" provision of federal law. However, there appears generally to have developed an understanding that the acceptance of small tokens of appreciation for even "official" services, when accepted by federal employees in accordance and conformance with federal agency rules or conduct regulations dealing with the acceptance of "gifts," would not be conduct that would be subject to criminal law enforcement.¹³ In the House, for example, the House Committee

⁹ House Committee on Standards of Official Conduct, Advisory Opinion No. 1, *supra*.

¹⁰ *Id.*; and Senate Rule XLIII(4).

¹¹ Note 5 U.S.C. § 557(d). It is possible under certain circumstances that undue or improper influence or congressional interference in a more formal, quasi-judicial administrative matter could, under due process arguments, lead to a judicial invalidation of an agency's decision. Compare, *Pillsbury Company v. Federal Trade Commission*, 354 F.2d 952 (5th Cir. 1966), with *D.C. Federation of Civic Associations v. Volpe*, 459 F.2d 1231 (D.C.Cir. 1971), *cert. denied*, 405 U.S. 1030 (1972).

¹² 18 U.S.C. § 201(c)(1)(B).

¹³ See, for example, 5 C.F.R. §§ 2634.202(b), 2634.204, applying to executive agency personnel.
(continued...)

on Standards of Official Conduct has noted that it would not consider it to be a violation for an office to receive from a constituent as a “thank you” or in appreciation of official assistance, perishable gifts of *de minimis* value, such as flowers or food, which are placed out for the entire office staff and visitors, or decorative items displayed in the office.¹⁴ The making of campaign contributions by constituents or by other petitioners who have received assistance from a congressional office in the past, which are directed to a campaign committee, even those contributions which are expressly given because of a Member’s past help or “support ” (like those given because of a Member’s “positions” or votes on legislation), are permissible and anticipated in our system of privately financed campaigns, and do not in themselves implicate the bribery or illegal gratuities provisions.¹⁵ Of course, no prior agreement, arrangement or understanding to do any official act, such as providing assistance on grants, “in return for” the other party making campaign contributions (*i.e.*, a *quid pro quo* or “corrupt bargain”), should be made in light of the express prohibitions of the bribery statute.¹⁶

Finally, it should be noted that a congressional staff employee may not act in a “private,” non-official capacity for the constituent, even during “off-duty” time, and receive any compensation for “representing” the constituent or constituent group before any federal agency.¹⁷

¹³ (...continued)

These regulations were drafted in consultation with the Justice Department. Executive Order 12674, Section 201 (April 12, 1989), as modified by E.O. 12731.

¹⁴ House Committee on Standards of Official Conduct, “Rules of the U.S. House of Representatives on Gifts and Travel,” 106th Cong., 2d Sess. at 61 (April 2000). In no circumstances should cash be accepted.

¹⁵ Illegal gratuities are those things of value that are accepted “personally,” that is, for oneself, and not things of value such as campaign contributions that are made to a third-party entity like a lawful campaign committee for use in political campaigns. *United States v. Brewster*, 506 F.2d 62, 77 (D.C.Cir. 1974). Lawful campaign contributions are considered one legal and permissible way in our representational system of “rewarding” and showing support of our representatives for their positions and actions, *Brewster*, *supra* at 73, 81- 82; *United States v. Anderson*, 509 F.2d 312, 330 (D.C.Cir. 1974), *cert. denied*, 420 U.S. 991 (1975); *McCormick v. United States*, 500 U.S. 257 (1991), and are protected by the First Amendment, *Buckley v. Valeo*, 424 U.S. 1, 21 (1976). In a system of privately financed campaigns legislators must, by necessity, rely on private donations of contributions from supporters. See discussion of “donations of democracy,” in Noonan, *Bribes*, pp. 621, 696-697 (Macmillan 1984).

¹⁶ *United States v. Anderson*, *supra*; *McCormick v. United States*, *supra* (extortion).

¹⁷ 18 U.S.C. § 203, see also 18 U.S.C. § 205.

Appendix

House Committee on Standards of Official Conduct, Advisory Opinion Number 1. (Excerpt):

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.

Senate Rule XLIII

CONSTITUENT SERVICE

1. In responding to petitions for assistance, a Member of the Senate, acting directly or through employees, has the right to assist petitioners before executive and independent government officials and agencies.

2. At the request of a petitioner, a Member of the Senate, or a Senate employee, may communicate with an executive or independent government official or agency on any matter to:

- (a) request information or a status report;
- (b) urge prompt consideration;
- (c) arrange for interviews or appointments;
- (d) express judgments;
- (e) call for reconsideration of an administrative response which the Member believes is not reasonable supported by statutes, regulations or considerations of equity or public policy; or
- (f) perform any other service of a similar nature consistent with the provisions of this rule.

3. The decision to provide assistance to petitioners may not be made on the basis of contributions or services, or promises of contributions or services, to the Member's political campaigns or to other organizations in which the Member has a political, personal, or financial interest.

4. A Member shall make a reasonable effort to assure that representations made in the Member's name by any Senate employee are accurate and conform to the Member's instructions and to this rule.

5. Nothing in this rule shall be construed to limit the authority of Members, and Senate employees, to perform legislative, including committee, responsibilities.